Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDING MOTION RECORD OF THE APPLICANT, AIR PASSENGER RIGHTS

Canadian Transportation Agency's motion for leave to intervene
(pursuant to Rules 109 and 369 of the *Federal Courts Rules*)

SIMON LIN
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666

simonlin@evolinklaw.com

Counsel for the Applicant,
Air Passenger Rights

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
Civil Litigation Section
50 O'Connor Street, Suite 300
Ottawa, ON K1A 0H8

Sanderson Graham
Tel: 613-296-4469
Fax: 613-954-1920
Email: *Sandy.Graham@justice.gc.ca*

Counsel for the Respondent,
Attorney General of Canada

AND TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, QC K1A 0N9

Barbara Cuber
Tel: 613-301-8322
Fax: 819-953-9269
Email: *Barbara.Cuber@otc-cta.gc.ca*
Email: *Servicesjuridiques.LegalServices@otc-cta.gc.ca*

Counsel for the Proposed Intervener,
Canadian Transportation Agency

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CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court of Appeal in **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: April 8, 2020

Issued by: _____

JEAN-FRANÇOIS DUPORT
REGISTRY OFFICER
AGENT DU GREFFE

Address of
local office: Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario, K1A 0H9

TO: **CANADIAN TRANSPORTATION AGENCY**

APPLICATION

This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency [**Agency**], entitled "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] that cites the Statement.

These public statements, individually or collectively, purport to provide an unsolicited advance ruling on how the Agency will treat and rule upon complaints of passengers about refunds from air carriers relating to the COVID-19 pandemic.

The Statement was issued without hearing the perspective of passengers whatsoever.

The Applicant makes application for:

1. a declaration that:

   (a) the Agency's Statement **is not** a decision, order, determination, or any other ruling of the Agency and has no force or effect of law;

   (b) the issuance of the Statement on or about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency's own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:

      i. the Agency as a whole, or

      ii. alternatively, the appointed members of the Agency who supported the Statement;

   (c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, S.C. 1996, c. 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

2. an interim order (*ex-parte*) that:

(a) upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

> The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It does **not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [insert URL link to PDF of order] of the Federal Court of Appeal.;

(b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

(c) the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers in relation to the COVID-19 pandemic; and

(d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

3. an interlocutory order that:

(a) the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 2(a) above), until final disposition of the Application;

(b) the interim orders in subparagraphs 1(b)-(c) above are maintained until final disposition of the Application;

(c) the Agency shall forthwith communicate with persons that the Agency has previously communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

(d) the Agency shall forthwith communicate with air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

4. a permanent order that:

(a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;

(b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;

(c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgment; and

(d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic;

5. costs and/or reasonable out-of-pocket expenses of this Application; and

6. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

The grounds for the application are as follows:

A. Overview

1. The present Application challenges the illegality of the Canadian Transportation Agency's Statement, which purports to provide an unsolicited advance ruling in favour of air carriers without having heard the perspective of passengers beforehand.

2. The Statement and the COVID-19 Agency Page preemptively suggest that the Agency is leaning heavily towards permitting the issuance of vouchers in lieu of refunds. They further suggest that the Agency will very likely dismiss passengers' complaints to the Agency for air carriers' failure to refund during the COVID-19 pandemic, irrespective of the reason for flight cancellation.

3. Despite the Agency having already determined in a number of binding legal decisions throughout the years that passengers have a fundamental right to a refund in cases where the passengers could not travel for events outside of their control, the Agency now purports to grant air carriers a blanket immunity from the law via the Statement, without even first hearing passengers' submissions or perspective as to why a refund is **mandated** by law. This is inappropriate.

4. The Agency, as a quasi-judicial tribunal, must at all times act with impartiality. That impartiality, unfortunately, has clearly been lost, as demonstrated by the Agency's issuance of the unsolicited Statement and usage thereof.

5. The fundamental precept of our justice system is that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R. v. Yumnu*, 2012 SCC 73 at para. 39). This fundamental precept leaves no room for any exception, even during difficult times like the COVID-19 pandemic.

6. Impartiality is further emphasized in the Agency's own *Code of Conduct* stipulating that the appointed members of the Agency shall not express an opinion on potential cases.

B. The COVID-19 Pandemic

7. The coronavirus [**COVID-19**] is a highly contagious virus that originated from the province of Hubei in the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around January 2020.

8. On or about March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

9. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a "declaration of war" against COVID-19, and that those in Canada should remain at home unless absolutely necessary to be outside of their homes [**Declaration**].

10. COVID-19 has disrupted air travel to, from, and within Canada. The disruption was brought about by the COVID-19 pandemic and/or the Declaration, such as:

    (a) closure of borders by a number of countries, resulting in cancellation of flights by air carriers;

    (b) passengers adhering strictly to government travel advisories (such as the Declaration) and refraining from air travel (and other forms of travel) unless absolutely necessary; and

    (c) air carriers cancelling flights on their own initiative to save costs, in anticipation of a decrease in demand for air travel.

C. The Agency's Actions in Relation to COVID-19, Including the "Statement on Vouchers"

11. Since March 13, 2020 and up to the date of filing this Application, the Agency has taken a number of steps in relation to COVID-19. Those listed in the four sub-paragraphs below are **not** the subject of review in this Application.

    (a) **On March 13, 2020**, the Agency issued Determination No. A-2020-42 providing, *inter alia*, that various obligations under the *Air Passen-*

ger Protection Regulations, SOR/2019-150 [**APPR**] are suspended until April 30, 2020:

i. Compensation for Delays and Inconvenience for those that travel: compensation to passengers for inconvenience has been reduced and/or relaxed (an air carrier's obligation imposed under paragraphs 19(1)(a) and 19(1)(b) of the *APPR*);

ii. Compensation for Inconvenience to those that do not travel: the air carrier's obligation, under subsection 19(2) of the *APPR* to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; and

iii. Obligation to Rebook Passengers on Other Carriers: the air carrier's obligation, under paragraphs 17(1)(a)(ii), 17(1)(a)(iii), and 18(1)(a)(ii) of the *APPR*.

(b) **On or about March 25, 2020**, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020. This Determination further exempted air carriers from responding to compensation requests within 30 days (s. 19(4) of *APPR*). Instead, air carriers would be permitted to respond to compensation requests 120 days *after* June 30, 2020 (e.g. October 28, 2020).

(c) **On or about March 18, 2020**, the Agency issued Order No. 2020-A-32, suspending **all** dispute proceedings until April 30, 2020.

(d) **On or about March 25, 2020**, the Agency issued Order No. 2020-A-37, extending the suspension (above) to June 30, 2020.

12. On or about March 25, 2020, almost concurrently with the Order and Determination on the same date (above), the Agency publicly posted the Statement on its website (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **En-**

glish: https://otc-cta.gc.ca/eng/statement-vouchers) providing that:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

13. On or about March 25, 2020, concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la periode de la COVID-19** [https://otc-cta.gc.ca/fra/information-

importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19]).

14. The COVID-19 Agency Page cites and purports to apply the Statement in the context of an air carrier's legal obligation in three circumstances: (1) situations outside airline control (including COVID-19 situations); (2) situations within airline control; and (3) situations within airline control, but required for safety.

15. In effect, the COVID-19 Agency Page purports to have relieved air carriers from providing passengers with refunds in practically **every** imaginable scenario for cancellation of flight(s), contrary to the Agency's own jurisprudence and the minimum passenger protections under the *APPR*.

D. Jurisprudence on Refunds for Passengers

16. Since 2004, in a number of decisions, the Agency confirmed passengers' fundamental right to a refund when, for whatever reason, an air carrier is unable to provide the air transportation, including those outside of the air carrier's control:

(a) *Re: Air Transat*, Decision No. 28-A-2004;
(b) *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88;
(c) *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15; and
(d) *Lukács v. Porter*, Decision No. 31-C-A-2014, paras. 33 and 137.

17. The Agency's jurisprudence was entirely consistent with the common law doctrine of frustration, the civil law doctrine of *force majeure*, and, most importantly, common sense.

18. The *APPR*, which has been in force since 2019, merely provides **minimum** protection to passengers. The *APPR* does not negate or overrule the passengers' fundamental right to a refund for cancellations in situations outside of a carrier's control.

19. Furthermore, the COVID-19 Agency Page also suggests that the Statement *would* apply to cancellations that are within airline control, or within airline control but required for safety purposes, squarely contradicting the provisions

of subsection 17(7) of the *APPR*. Subsection 17(7) clearly mandates that any refund be in the original form of payment, leaving no room for the novel idea of issuing a voucher or credit.

20. Finally, whether an air carrier's flight cancellation could be characterized as outside their control, or within their control, remains to be seen. For example, if a cancellation was to save costs in light of shrinking demand, it may be considered a situation within an air carrier's control. However, the Statement and the COVID-19 Agency Page presuppose that **any and all** cancellations at this time should be considered outside an air carrier's control.

21. The combined effect of the Statement and the COVID-19 Agency Page purports to ignore decade old and firmly established jurisprudence of the Agency. This all occurred without any formal hearing, adjudication, determination, or otherwise, or even a single legal submission or input from the passengers.

22. As described further below, the Agency does not even outline its legal basis or provide any support for those public statements.

23. The Agency's public statements are tantamount to endorsing air carriers in illegally withholding the passengers' monies, all without having to provide the services that were contracted for. The air carriers all seek to then issue vouchers with varying expiry dates and usage conditions to every passenger, effectively depriving all the passengers of their fundamental right to a refund, which is a right the Agency itself firmly recognized.

E. The Agency's Conduct Gives Rise to a Reasonable Apprehension of Bias

24. The Agency is a quasi-judicial tribunal that is subject to the same rules of impartiality that apply to courts and judges of the courts.

25. Tribunals, like courts, speak through their legal judgments and not media postings or "statements."

26. The Statement and/or the COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more

likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

27. The Agency has already stipulated a general rule, outside the context of a legal judgment, that refunds need not be provided. No support was provided for this radical departure from the fundamental rights of passengers. The Agency merely provided a bald assertion or conclusion that passengers are not entitled to any refund.

28. The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.
>
> [Emphasis added.]

29. Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.

30. In these circumstances, the Court must proactively step in to protect the passengers, to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," and to ensure that the administration of justice is not put to disrepute.

31. The Court ought to issue an interim, interlocutory, and/or permanent order restricting the Agency's involvement with passengers' COVID-19 related refunds against air carriers.

F. The Applicant

32. The Applicant is a non-profit corporation under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing the rights of air passengers.

33. Air Passenger Rights is led by a Canadian air passenger rights advocate, Dr. Gábor Lukács, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:

(a) *International Air Transport Assn et al. v. AGC et al.* (Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020) that:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...]

(b) *Lukács v. Canada (Transportation Agency)* 2016 FCA 174 at para. 6;

(c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269 at para. 43;

(d) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 1; and

(e) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at para. 62.

G. Statutory provisions

34. The Applicant will also rely on the following statutory provisions:

(a) *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections

25, 37, and 85.1;

(b) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and

(c) *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374; and

35. Such further and other grounds as counsel may advise and this Honourable Court permits.

This application will be supported by the following material:

1. Affidavit of Dr. Gábor Lukács, to be served.

2. Such further and additional materials as the Applicant may advise and this Honourable Court may allow.

The Applicant requests the Canadian Transportation Agency to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Canadian Transportation Agency to the Registry and to the Applicant:

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement and/or issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement;

2. The number of times the URLs for the Statements were accessed (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **English**: https://otc-cta.gc.ca/eng/statement-vouchers) from March 24, 2020 onward;

3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry (including but not limited to any travel agencies, commercial airlines, industry groups, etc.) from February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected

by COVID-19; and

4. Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.

April 6, 2020

"Simon Lin"

SIMON LIN
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6

Tel: 604-620-2666
Fax: 888-509-8168

simonlin@evolinklaw.com

Counsel for the Applicant,
Air Passenger Rights

Federal Court of Appeal | Cour d'appel fédérale

TO : APPEAL REGISTRY

FROM : WEBB J.A.

DATE : November 13, 2020

RE : **A-102-20:**
Air Passenger Rights v. Canadian Transportation Agency

DIRECTION

The parties have submitted a number of letters related to a request made under Rule 317 of the *Federal Courts Rules*, SOR/98-106 by Air Passenger Rights (APR). APR requested material relevant to its judicial review application that is in the possession of the Canadian Transportation Agency (CTA). The CTA has objected to this request.

Rules 317 and 318 state:

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
(2) An applicant may include a request under subsection (1) in its notice of application.	(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.	(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.
318 (1) Within 20 days after service of	318 (1) Dans les 20 jours suivant la

a request under rule 317, the tribunal shall transmit	signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
(a) a certified copy of the requested material to the Registry and to the party making the request; or	a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
(b) where the material cannot be reproduced, the original material to the Registry.	b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.
(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.	(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.
(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

A number of submissions have been made without first seeking the directions of the Court under Rule 318(3). It would appear (although it is not entirely clear) that the parties are seeking directions concerning how this issue between the parties should be resolved. The last correspondence (dated October 19, 2020) refers to the previous correspondence submitted by the parties collectively as the "Requests for Directions".

In this case, it would appear that APR wants to compel the CTA to produce some material and that the CTA is objecting to such production. APR should therefore bring a motion requesting an order to compel the production of the requested material.

"WWW"

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

WRITTEN REPRESENTATIONS OF THE RESPONDING PARTY / APPLICANT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Canadian Transportation Agency [**Agency**] asks this Honourable Court to permit the Agency to fully participate in the proceeding in the guise of an intervener. The Agency seeks not only to make submissions on irrelevant matters not raised in the Application, but the Agency also wishes to tender evidence.

2. On June 4, 2021, Gleason, J.A. already ruled that it was not appropriate for the Agency to be making submissions on the merits of this judicial review application, and specifically the bias issue.[1] The Agency was then removed from this Application.[2]

3. The underlying Application relates to the widely disseminated "Statement on Vouchers" that the Agency published on its website on March 25, 2020 and the "Important Information for Travellers During COVID-19" page on the Agency's website that was updated on the same date to cite the Statement on Vouchers [**Publications**]. These Publications purport to guide the travelling public on their legal right to refunds.

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1 *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 13 [Tab 8, p. 58].
2 *Ibid.*, at para. 14 [Tab 8, p. 58].

4. The two grounds of judicial review in this application are limited to:

(a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the Agency's issuing of the Publications is contrary to the Agency's own *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias with respect to the Agency's members who supported and/or endorsed the Publications; and

(b) **Misinformation Ground** — the content of the Publications contains misinformation and omissions about passengers' legal rights vis-à-vis the airlines, and creates confusion for the travelling public.

5. The Agency proposes to participate in this Application by making submissions on its jurisdiction and mandate under the *Canada Transportation Act* [***Act***]. However, the Agency's jurisdiction and mandate are not at issue on this judicial review. The Agency's position on this motion contradicts the Agency's previous concession that the Publications were not made pursuant to any particular statutory provision.

6. The Agency also seeks to introduce 211 pages of evidence,[3] some of which post-dates the Publications' dissemination.[4] This is contrary to the rule that an intervener must take the record as-is and cannot introduce evidence or further issues.

7. The Agency's position is fully defended by the Attorney General of Canada [**AGC**], who was substituted as the respondent in place of the Agency. In the unlikely event that the panel may require submissions on the Agency's jurisdiction or mandate under the *Act*, the AGC is capable of arguing those pure questions of statutory interpretation by reference to the *Act*. The Agency's self-proclamation on its website on the Agency's own interpretation of its mandate[5] is self-serving and irrelevant.

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3 Desnoyers Affidavit and its Exhibits.
4 Desnoyers Affidavit, Exhibits "D" and "E".
5 Agency's Written Representations for Leave to Intervene, para. 30.

B. Procedural History

8. On April 7, 2020, the Applicant, as a non-profit entity, brought this application for judicial review for the benefit of the travelling public, based on the two grounds outlined in paragraph 4 above. Since the filing of the application, two justices of this Court have already confirmed that the Reasonable Apprehension of Bias Ground raises a *serious issue to be tried*, and Webb, J.A. held that the application is to be heard on its merits before a panel of this Honourable Court.[6]

i. Applicant's Interlocutory Injunctions Motion

9. On April 7, 2020, the Applicant brought a motion for interlocutory injunctions seeking removal of the Publications, and enjoining the Agency's members from dealing with passengers' refund complaints arising from the COVID pandemic.

10. On May 22, 2020, Mactavish, J.A. dismissed the motion for interlocutory injunctions, but accepted that the RAB Ground raises a *serious issue to be tried*.[7] Mactavish, J.A. noted that there was no evidence before the Court at the time that the Agency's appointed members were involved with the Publications.[8] However, after the interlocutory injunctions motion was decided, evidence of the Agency's appointed members' involvement with the Publications came to light.[9] The evidence confirms that, at the minimum, the Agency's Chair (at the time) and Vice-Chair were involved with the drafting and dissemination of the Publications.

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6 *Air Passengers Rights v. Canada (TA)*, 2020 FCA 92 at para. 17 [Tab 6, p. 42]; and *Air Passengers Rights v. Canada (TA)*, 2020 FCA 155 at para. 33 [Tab 7, p. 54].

7 *Air Passengers Rights v. Canada (TA)*, 2020 FCA 92 at para. 17 [Tab 6, p. 42].

8 *Ibid.*, at para. 35 [Tab 6, p. 45].

9 Email exchange between Ms. Blake Oliver and MP Nathaniel Erskine-Smith, dated October 5, 2020 – Lukács Affidavit (Jan. 3, 2021), Exhibit "Q" [Applicant's Rule 318 and 41 Motion Record (**AR318MR**), Tab 2Q, p. 115]; TRAN Committee, Evidence (43rd Parl., 2nd Sess., No. 008), p. 11 – Lukács Affidavit (Jan. 3, 2021), Exhibit "R" [AR318MR, Tab 2R, p. 130]; and Lukács Affidavit (Jan. 3, 2021), paras. 35 and 41, and Exhibit "S" [AR318MR, Tabs 2 and 2S, pp. 16 and 19, and 133].

11. On or about May 11, 2021, about one year after the Applicant's interlocutory injunctions motion, further evidence came to light revealing further violations of the Agency's *Code of Conduct*. The Agency's Chair (now former Chair) was closely collaborating with officials from Transport Canada and an unnamed non-government individual when drafting the Publications.[10] The nature of the collaboration appears to be inconsistent with the impartiality expected of members of a quasi-judicial tribunal.

ii. Agency's Motion to Strike

12. The Agency brought a motion to strike the Application upon the lifting of the COVID-19 suspension for this proceeding, on August 3, 2020. Webb, J.A. dismissed the Agency's motion to strike on October 2, 2020 and held that the RAB Ground raises a *serious issue to be tried*, and merits a hearing before a panel of this Court.[11]

iii. Applicant's Motion for Production Under Rules 41 and 318

13. The Notice of Application contained a request that the Agency transmit four categories of relevant materials in its possession.[12] On August 20, 2020, the Agency objected to the request to transmit. The parties sought directions from the Court and Webb, J.A. directed on November 13, 2020 that the Applicant bring a motion to compel the production of documents.[13] In the interest of a swift resolution of the dispute over documents and the Application, the Applicant substantially narrowed the request to:

> Complete and unredacted copies of all records from March 9 - April 8, 2020 in respect of the Publications, including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

14. On January 3, 2021, the Applicant filed its motion for production and Gleason, J.A. is seized of that motion for production, which is currently under reserve.

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[10] Lukács Affidavit (May 12, 2021), enclosed with letter filed on May 14, 2021; see also Applicant's submissions dated July 8, 2021.
[11] *Air Passengers Rights v. Canada (TA)*, 2020 FCA 155 at para. 33 [Tab 7, p. 54].
[12] Notice of Application, request to transmit [Tab 1, p. 14].
[13] Direction of Webb, J.A., dated November 13, 2020 [Tab 2, p. 16].

15. On the motion for production, the Agency took the position that:

> "[t]he publications issued in this instance were not made pursuant to any particular statutory provision [...]"[14]
>
> "the Court will be guided by the principle that tribunals are permitted to issue instruments like statements or guidelines without requiring statutory authority to do so [...]"[15]
>
> "[...]it remains that [the Publications] are not, in fact, Agency decisions or regulatory determinations that engaged the Agency's statutory decision-making functions."[16]

iv. Gleason, J.A.'s Order on the Proper Respondent for this Matter

16. On February 19, 2021, while the Applicant's productions motion was pending, Gleason, J.A. directed the Agency (a named respondent at the time) and the Applicant to provide submissions on the appropriateness of the Agency defending this Application, with reference to Rule 303. Gleason, J.A. also invited submissions from the AGC.

17. On June 4, 2021, after all submissions were received, Gleason, J.A. released reasons for the order confirming the inappropriateness of the Agency defending this Application.[17] Gleason, J.A. ordered that the AGC, who was willing to act as the respondent,[18] be substituted in place of the Agency. The Agency was allowed to bring a motion to intervene if it still wished to do so. The Agency was specifically reminded of the scope of a tribunal's participation that could call into question its impartiality.[19]

18. The Agency filed detailed submissions on its intended position on the merits of this Application.[20] The Agency's position, excerpted in para. 15 above, undermines its justification for intervening to make submissions on its jurisdiction and mandate.

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[14] Agency's Written Representations opposing the motion for production, para. 48.
[15] Agency's Written Representations opposing the motion for production, para. 63.
[16] Agency's Written Representations opposing the motion for production, para. 45.
[17] *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 13 [Tab 8, p. 58].
[18] *Ibid.*, at paras. 8 and 11 [Tab 8, pp. 56-57].
[19] *Ibid.*, at paras. 13 and 16 [Tab 8, p. 58].
[20] *Ibid.*, at para. 2 [Tab 8, p. 55].

PART II – STATEMENT OF THE POINTS IN ISSUE

19. The issues to be decided on this motion are:

(a) whether it is appropriate for the Agency to participate in this application for judicial review;

(b) whether the Agency should be granted leave to adduce evidence; and

(c) whether the Agency should be granted leave to intervene.

PART III – STATEMENT OF SUBMISSIONS

20. Gleason, J.A. already ruled that it would be more appropriate for the AGC, not the Agency, to defend the Application.[21] Specifically for the bias issue, the Agency must refrain from taking a position that would call into question its impartiality.[22] The Agency is inviting this Court to overrule Gleason, J.A. and permit the Agency to indirectly return to defend the Application, under the guise of assisting the panel regarding the Agency's jurisdiction and mandate under the *Canada Transportation Act* [***Act***].

A. It is Not Appropriate for the Agency to Participate in the Application

21. When a tribunal wishes to intervene in a judicial review of its own conduct, the Court should first consider, as a preliminary matter, the three factors set out in *Ontario (Energy Board)*:[23]

(a) Will the application for judicial review be opposed in the proceedings?

(b) Do any of the other parties have the necessary knowledge and expertise to fully make and respond to arguments?

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[21] *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 13 [Tab 8, p. 58].
[22] *Ibid.*
[23] *Girouard v. Canada (AG)*, 2019 FC 434 at paras. 13-15 [Tab 11, p. 86], citing *Ontario (EB) v. Ontario Power Generation Inc*, 2015 SCC 44 [Tab 15, p. 151].

(c) Is the Agency's role to adjudicate individual conflicts between two adversarial parties, or is it to serve a policy-making, regulatory or investigative role, or act on behalf of the public interest?

22. After detailed submissions on these factors from the Agency, the AGC, and the Applicant, Gleason, J.A. ruled that it would not be appropriate for the Agency to defend the merits of the Application.[24] The Agency asks to re-enter this Application with their merits arguments "repackaged" as a submission on its jurisdiction and mandate.[25]

23. For the first factor, the AGC is opposing this Application as the respondent.[26]

24. For the second factor, the Agency concedes that it cannot defend the two grounds of judicial review.[27] The Agency claims that it should be permitted to make submissions on the topic of the Agency's jurisdiction and mandate under the *Act*. However, the Agency's jurisdiction and mandate are **not** even being disputed in this Application.

25. The Agency has previously claimed that the Publications were not made pursuant to its statutory jurisdiction, or even any provision in the *Act*.[28] The Agency's statutory mandate is a pure question of statutory interpretation that is ascertained by reference to the *Act*.[29] The AGC is fully equipped to argue these legal questions.

26. For the final factor, this Application deals with the Agency's quasi-judicial role in adjudicating airline-passenger disputes, despite the Agency also having a regulatory role in issuing operation licenses to airlines. The Agency cannot wear its "regulatory hat" to defend the requisite impartiality for the Agency's "quasi-judicial hat."

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[24] *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 13 [Tab 8, p. 58].
[25] Agency's Written Representations for Leave to Intervene, paras. 19-22.
[26] *Girouard v. Canada (AG)*, 2019 FC 434 at para. 12 [Tab 11, p. 85].
[27] Agency's Written Representations for Leave to Intervene, paras. 19-22.
[28] See paragraph 15, *supra*.
[29] *Green v. Law Society of Manitoba*, 2017 SCC 20 at paras 28-31 [Tab 13, p. 113].

27. All three factors strongly favour declining the Agency's participation in this Application.

B. The Agency Should Not Be Permitted to Adduce Evidence

28. The Agency failed to demonstrate any exceptional circumstances that would justify departure from the well-established principle that interveners before this Honourable Court must take the case as they find it and not add new issues or add to the evidentiary record.[30]

29. In *Tsleil-Waututh Nation v. Canada*, Stratas, J.A. held that:

> [55] In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> [56] To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.[31]

30. More recently, Stratas, J.A. confirmed that interveners are not permitted to raise issues that require new evidence, nor introduce new evidence.[32]

31. The Agency is seeking to do precisely what this Honourable Court confirmed is not permissible. The evidence the Agency seeks to adduce is not relevant, is available to the AGC, and smacks of bootstrapping.

32. ***Relevance.*** The Agency seeks to adduce evidence ostensibly to show that it regularly publishes information on its website, and uses same as a defence to the allegation that the Publications give rise to a reasonable apprehension of bias.

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[30] *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 18 [Tab 14, p. 137].
[31] *Tsleil-Waututh Nation v. Canada*, 2017 FCA 174 at paras. 55-56 [Tab 18, p. 237].
[32] *Canada (AG) v. Kattenburg*, 2020 FCA 164 at para. 9(3) [Tab 9, p. 61].

33. The fact that the Agency may have previously made other unrelated publications is not relevant to determining whether the March 2020 Publications give rise to a reasonable apprehension of bias. Two wrongs do not make a right. Subsequent documents from the executive branch offer little assistance in ascertaining Parliament's intent in a statutory interpretation exercise,[33] and would be irrelevant.

34. ***Public Availability.*** The six documents the Agency seeks to aduce are publicly available on the Agency's website. As such, if the AGC is of the view that these documents are relevant, the AGC could file them. The Agency also failed to provide any additional explanation or commentary for these documents. The Agency's intervention is not required for simply "attaching" these documents to an affidavit.

35. ***Bootstrapping.*** The Agency's conduct smacks of bootstrapping.[34] The two key documents the Agency seeks to adduce both postdate the Publications:[35]

(a) The "Sample Tariff" was published in 2021,[36] which is long after the March 2020 Publications. This document could not assist the panel in ascertaining the legal significance of the Agency's past conduct.

(b) The "Flight Delays and Cancellations: A Guide" was last modified on January 22, 2021.[37] The Agency has not mentioned this document at any time until its affidavit on July 14, 2021. There is no evidence on the record to suggest that this document existed at all in March 2020.

36. The Agency's past practice, and subsequent conduct, would not assist the panel in assessing the informed bystander's perception of the Agency's March 2020 conduct.

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[33] *PIPSC v. Canada (AG)*, 2012 SCC 71 at paras. 98-99 [Tab 16, p. 195].
[34] *Stemijon Investments Ltd. v. Canada (A.G.)*, 2011 FCA 299 at para. 41 [Tab 17, p. 224].
[35] Agency's Written Representations for Leave to Intervene, paras. 15-16.
[36] Desnoyers Affidavit, Exhibit "D", last page.
[37] Desnoyers Affidavit, Exhibit "E", last page.

C. The Agency Should Not Be Granted Leave to Intervene

37. As discussed, it is not appropriate for the Agency to participate in a judicial review where the Agency's impartiality is being questioned. The Agency could not meet any of the three factors for tribunal participation outlined in paras. 21-27 above.

38. Furthermore, the Agency does not satisfy the criteria for intervention, consisting of the threshold requirements in Rule 109(2)(b), followed by the factors in *Rothmans*:[38]

(a) the proposed intervener is directly affected by the outcome;

(b) there is a justiciable issue and a veritable public interest;

(c) there are other reasonable or efficient means to submit the question to the Court;

(d) the position of the proposed intervener is adequately defended by one of the parties to the case;

(e) the interests of justice are better served by the intervention of the proposed third party; and

(f) the Court can hear and decide the cause on its merits without the proposed intervener.

39. ***The Agency has not met the threshold requirements under Rule 109(2)(b).*** Pursuant to Rule 109(2)(b) of the *Federal Courts Rules*, a party seeking leave to intervene must:

> [...] describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.[39]

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[38] *Gordillo v. Canada (AG)*, 2020 FCA 198 at paras. 7-8 [Tab 12, p. 103].
[39] *Federal Courts Rules*, Rule 109(2)(b) [Tab 5, p. 36] (emphasis added).

40. The Agency failed to comply with this basic requirement. The Agency has not particularized how its participation would assist in the determination of the RAB Ground or Misinformation Ground, as required by Rule 109(2)(b). As discussed above, the Agency seeks to introduce a new "jurisdiction and mandate" issue that is not for determination in this proceeding.[40] The Agency provided no details on *how* its jurisdiction and mandate could relate to the allegations of bias in this specific instance.

41. ***The Agency has neither "direct" nor "genuine" interest in this Application.*** The Agency has not asserted that it has a "direct" interest in this Application, and indeed, it has none. Intervention is sometimes permitted for an independent third party with a "genuine" interest to provide its perspectives or expertise to assist the Court.[41] However, the Agency's purported interest actually goes to the Application's merits of whether it was proper for the Agency to have disseminated those Publications. The Agency was already removed from this Application because it was not appropriate for it to be addressing the merits.[42] The Reasons of Gleason, J.A. for removing the Agency from this proceeding preclude the Agency from relying directly or indirectly on any of the merits issues to assert a "genuine" interest for an intervention.

42. ***The Agency has no justiciable issue or a veritable public interest.*** The Agency's "jurisdiction and mandate" issue is not before this Honourable Court. There is also a strong public interest *against* the Agency's participation. When there is an allegation of apprehension of bias against a tribunal, the tribunal will either be denied leave to intervene altogether, or is called upon to be circumspect.[43] Indeed, it would be difficult to conceive of any submission of law by the Agency in this Application that would not be self-interested, or directed towards the merits.

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[40] *Canada (AG) v. Kattenburg*, 2020 FCA 164 at para. 6 [Tab 9, p. 60].
[41] *Gordillo v. Canada (AG)*, 2020 FCA 198 at para. 12 [Tab 12, p. 103].
[42] *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 13 [Tab 8, p. 58].
[43] *Chrétien v. Canada (AG)*, 2005 FC 591 at para. 23 [Tab 10, p. 75].

43. ***The Agency has other means to submit its question to the Court.*** To the extent that the Agency's "jurisdiction and mandate" is a question that the Agency wishes to have an answer for, the Agency could request the AGC, as the named respondent, to provide submissions on this topic. Alternatively, the Agency could avail itself of the procedures set out under s. 18.3(1) of the *Federal Courts Act*,[44] and seek a reference on its "jurisdiction and mandate." The Agency should not be permitted to hijack this Application for its own purposes.

44. ***The Agency's position, if any, is adequately defended by the AGC.*** On a judicial review, the Agency should not be taking a position that would cast doubt on its impartiality. Furthermore, the AGC, as the named respondent in place of the Agency, is already defending this Application.

45. ***The Agency's participation is contrary to the interests of justice***. Justice must not only be done, but must be seen to be done. It was already determined that the Agency's participation on the merits of this Application is not appropriate. This Court should carefully consider the perception of informed members of the public if the Agency were to return and argue its conduct from another angle. Ensuring public perception of tribunal impartiality is a strong factor to deny intervention.[45]

46. ***The Court can decide the merits without the Agency's participation.*** Judicial reviews proceed regularly with the AGC as the named respondent and without direct involvement of the tribunal.[46] As discussed above, the Agency's statutory jurisdiction was not even invoked, and submissions on its jurisdiction are not required for deciding the merits. Similarly, the Agency's mandate is a question of statutory interpretation that the AGC can address if at all necessary. This Court has also heard many matters involving the Agency and is intimately familiar with the Agency's jurisdiction and mandate.

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[44] *Federal Courts Act*, s. 18.3(1) [Tab 4, p. 34].
[45] *Chrétien v. Canada (AG)*, 2005 FC 591 at para. 36 [Tab 10, p. 78].
[46] *Air Passenger Rights v. Canada (AG)*, 2021 FCA 112 at para. 12 [Tab 8, p. 58].

47. ***Conclusion.*** The Agency's proposed intervention must be rejected. Alternatively, should this Honourable Court permit the Agency to participate, the Agency's role must be tightly circumscribed, as outlined at paragraph 48 of Part IV of these written representations.

PART IV – ORDER SOUGHT

48. The Responding Party, Air Passenger Rights, is seeking:

(a) an Order denying the Canadian Transportation Agency leave to intervene;

(b) alternatively, an Order granting the Canadian Transportation Agency [**Agency**] leave to intervene subject to the following terms:

i. the Agency shall not directly or indirectly add to the evidentiary record;

ii. the Agency shall not make submissions that directly or indirectly relate to its impartiality or independence;

iii. the Agency shall refrain from raising new issues not raised by the parties, and shall explicitly identify the paragraphs of the parties' memoranda where each point the Agency addresses is raised by the parties;

iv. the Agency shall not repeat any argument that has already been raised by the AGC;

v. the Agency may serve and file a memorandum of fact and law of no more than ten (10) pages within ten (10) days of the service of the Respondent's Record;

vi. the Applicant may, within ten (10) days of receipt of the Agency's memorandum of fact and law, serve and file a supplementary memorandum

of fact and law of a maximum length of ten (10) pages to respond to the arguments raised by the Agency;

vii. the Agency shall have the right to make oral submissions at the hearing of the application for no more than ten (10) minutes;

viii. the Agency shall not seek costs; and

(c) such further and other relief or directions as the counsel may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 30, 2021

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Federal Courts Act, R.S.C., 1985, c. F-7,
s. 18.3

Federal Courts Rules, S.O.R./98-106,
Rules 109 and 369

Case Law

Air Passengers Rights v. Canada (Transportation Agency), 2020 FCA 92

Air Passenger Rights v. Canada (Transportation Agency), 2020 FCA 155

Air Passenger Rights v. Canada (Attorney General), 2021 FCA 112

Canada (Attorney General) v. Kattenburg, 2020 FCA 164

Chrétien v. Canada (Attorney General), 2005 FC 591

Girouard v. Canada (Attorney General), 2019 FC 434

Gordillo v. Canada (Attorney General), 2020 FCA 198

Green v. Law Society of Manitoba, 2017 SCC 20

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

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44

PIPSC v. Canada (Attorney General), 2012 SCC 71

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

Tsleil-Waututh Nation v. Canada (Attorney General), 2017 FCA 174

CANADA

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Reference by federal tribunal

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

Reference by Attorney General of Canada

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

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

Renvoi d'un office fédéral

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

Renvoi du procureur général

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

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

Hearings in summary way

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

Exception

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

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

Procédure sommaire d'audition

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

Exception

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

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

Exception to sections 18 and 18.1

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

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

Dérogation aux art. 18 et 18.1

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

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

Intergovernmental disputes

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

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

Différends entre gouvernements

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

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

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Separate determination of issues

107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

Court may stipulate procedure

(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

Interpleader

Interpleader

108 (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person

(a) claims no interest in the property, and

(b) is willing to deposit the property with the Court or dispose of it as the Court directs,

that person may bring an *ex parte* motion for directions as to how the claims are to be decided.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(a) notice to be given to possible claimants and advertising for claimants;

(b) the time within which claimants shall be required to file their claims; and

(c) the procedure to be followed in determining the rights of the claimants.

Intervention

Leave to intervene

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

Contents of notice of motion

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

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

Instruction distincte des questions en litige

107 (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.

Ordonnance de la Cour

(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

Interplaidoirie

Interplaidoirie

108 (1) Lorsque deux ou plusieurs personnes font valoir des réclamations contradictoires contre une autre personne à l'égard de biens qui sont en la possession de celle-ci, cette dernière peut, par voie de requête *ex parte*, demander des directives sur la façon de trancher ces réclamations, si :

a) d'une part, elle ne revendique aucun droit sur ces biens;

b) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.

Directives

(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :

a) l'avis à donner aux réclamants éventuels et la publicité pertinente;

b) le délai de dépôt des réclamations;

c) la procédure à suivre pour décider des droits des réclamants.

Interventions

Autorisation d'intervenir

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

Avis de requête

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

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

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

Directions

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

(a) the service of documents; and

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

Questions of General Importance

Notice to Attorney General

110 Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,

(a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;

(b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and

(c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

Parties

Unincorporated associations

111 A proceeding may be brought by or against an unincorporated association in the name of the association.

Partnerships

111.1 A proceeding by or against two or more persons as partners may be brought in the name of the partnership.

SOR/2002-417, s. 11.

Sole proprietorships

111.2 A proceeding by or against a person carrying on business as a sole proprietor may be brought in the name of the sole proprietorship.

SOR/2002-417, s. 11.

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

Directives de la Cour

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

a) la signification de documents;

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

Question d'importance générale

Signification au procureur général

110 Lorsqu'une question d'importance générale, autre qu'une question visée à l'article 57 de la Loi, est soulevée dans une instance :

a) toute partie peut signifier un avis de la question au procureur général du Canada et au procureur général de toute province qui peut être intéressé;

b) la Cour peut ordonner à l'administrateur de porter l'instance à l'attention du procureur général du Canada et du procureur général de toute province qui peut être intéressé;

c) le procureur général du Canada et le procureur général de toute province peuvent demander l'autorisation d'intervenir.

Parties

Associations sans personnalité morale

111 Une instance peut être introduite par ou contre une association sans personnalité morale, en son nom.

Société de personnes

111.1 Une instance introduite par ou contre deux ou plusieurs personnes en qualité d'associées peut l'être au nom de la société de personnes.

DORS/2002-417, art. 11.

Entreprise non dotée de la personnalité morale

111.2 Une instance introduite par ou contre une personne qui exploite une entreprise à propriétaire unique non dotée de la personnalité morale peut l'être au nom de l'entreprise.

DORS/2002-417, art. 11.

(b) all affidavits and other material to be used by the respondent on the motion that is not included in the moving party's motion record;

(c) subject to rule 368, the portions of any transcripts on which the respondent intends to rely;

(d) subject to rule 366, written representations; and

(e) any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13; SOR/2015-21, s. 28.

b) les affidavits et autres documents et éléments matériels dont l'intimé entend se servir relativement à la requête et qui ne figurent pas dans le dossier de requête;

c) sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;

d) sous réserve de la règle 366, les prétentions écrites de l'intimé;

e) les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13; DORS/2015-21, art. 28.

Memorandum of fact and law required

366 On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

Mémoire requis

366 Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

Documents filed as part of motion record

367 A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

Dossier de requête

367 L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

Transcripts of cross-examinations

368 Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

Transcriptions des contre-interrogatoires

368 Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

Motions in writing

369 (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Procédure de requête écrite

369 (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Abandonment of motion

370 (1) A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

Deemed abandonment

(2) Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

Testimony regarding issue of fact

371 On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

PART 8

Preservation of Rights in Proceedings

General

Motion before proceeding commenced

372 (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

Interim and Interlocutory Injunctions

Availability

373 (1) On motion, a judge may grant an interlocutory injunction.

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

Désistement

370 (1) La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

Désistement présumé

(2) La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

Témoignage sur des questions de fait

371 Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

PARTIE 8

Sauvegarde des droits

Dispositions générales

Requête antérieure à l'instance

372 (1) Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

Injonctions interlocutoires et provisoires

Injonction interlocutoire

373 (1) Un juge peut accorder une injonction interlocutoire sur requête.

2020 CAF 92, 2020 FCA 92
Federal Court of Appeal

Air Passengers Rights v. Canada (Transportation Agency)

2020 CarswellNat 1619, 2020 CarswellNat 5171,
2020 CAF 92, 2020 FCA 92, 320 A.C.W.S. (3d) 5

AIR PASSENGERS RIGHTS (Applicant) and CANADIAN TRANSPORTATION AGENCY (Respondent)

Anne L. Mactavish J.A.

Judgment: May 22, 2020
Docket: A-102-20

Counsel: Simon Lin (written), for Applicant
Allan Matte (written), for Respondent

***Anne L. Mactavish J.A.*:**

1 As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

2 In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

3 Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

4 For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

5 In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on Vouchers" notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a "fair and sensible balance between passenger protection and airlines' operational realities" in the current circumstances.

6 The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries "should not be out-of-pocket for the cost of cancelled flights". At the same time, airlines facing enormous drops in passenger volumes and revenues "should not be expected to take steps that could threaten their economic viability".

7 The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that "an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time". The Statement then suggests that a 24-month period for the redemption of vouchers "would be considered reasonable in most cases".

8 Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled "Important Information for Travellers During COVID-19" (the Information Page), which incorporates references to the Statement on Vouchers.

9 These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

10 APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

11 According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines

from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

12 APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

13 The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

14 That is, the Court must consider three questions:

> 1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;
>
> 2) Whether irreparable harm will result if the injunction is not granted; and
>
> 3) Whether the balance of convenience favours the granting of the injunction.

15 The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. AbbVie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 (F.C.A.) at para. 14.

4. Has APR Raised a Serious Issue?

16 The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

17 With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

18 However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to "clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry". It further seeks a mandatory order requiring that the CTA bring this Court's order and the removal or clarification of the CTA's previous statements to the attention of airlines and a travel association.

19 A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 (S.C.C.) at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a *strong likelihood* that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

20 As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

21 APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought "by anyone directly affected by the matter in respect of which relief is sought" [my emphasis].

22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69, [2020] F.C.J. No. 498 (F.C.A.) at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 (F.C.A.), leave to appeal to SCC refused 38379 [*City of Burnaby v. Attorney General of Canada, et al.*, 2019 CarswellNat 1517 (S.C.C.)] (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149 (F.C.A.).

23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131 (F.C.A.); *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (Fed. T.D.). It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport[t] to provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

24 I will return to the issue of the impact of the CTA's statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

25 Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 (Fed. T.D.), relied on by APR, where the statement in issue included a clear statement of how, in the respondent's view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

26 As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 (F.C.A.) at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

28 A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

29 APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

30 As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Metropolitan Stores (MTS) Ltd. v. Manitoba*

Food & Commercial Workers, Local 832, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 (S.C.C.) at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 (F.C.A.) at paras. 33-34; *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265, [2010] 1 C.T.C. 161 (F.C.A.) at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

31 I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

32 Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

33 Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1995), 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1 (Ont. C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (B.C. C.A.).

34 As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

35 There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 F.C. 225, 189 D.L.R. (4th) 131 (Fed. C.A.) at para. 49; *E.A. Manning Ltd.*, above at para. 24.

36 Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

37 APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

38 In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

40 APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

Motion dismissed.

2020 FCA 155
Federal Court of Appeal

Air Passenger Rights v. Canada (Transportation Agency)

2020 CarswellNat 4279, 2020 FCA 155

AIR PASSENGER RIGHTS (Applicant) and CANADIAN TRANSPORTATION AGENCY (Respondent)

Wyman W. Webb J.A.

Judgment: October 2, 2020
Docket: A-102-20

Counsel: Simon Lin (written), for Applicant
Allan Matte, for Respondent

***Wyman W. Webb J.A.*:**

1 The Canadian Transportation Agency (CTA) has brought a motion to strike the judicial review application filed by Air Passenger Rights (APR). The judicial review application relates to two statements that were published on the website of the CTA that were prompted by the COVID-19 pandemic. The "Statement on Vouchers" addresses the situation arising when flights are cancelled. It includes the following:

> [w]hile any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

2 The second statement that is the subject of the judicial review application is one which references the Statement on Vouchers.

3 Following the filing of its application for judicial review, APR brought a motion seeking an interlocutory order that would require the removal of the statements from the CTA's website. It was also seeking "to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the [CTA]'s public statements" (*Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 (F.C.A.), at para. 3).

4 In dismissing the motion, Justice Mactavish applied the test for interlocutory injunctive relief as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

5 In paragraph 16 of the reasons related to the dismissal of this motion, Justice Mactavish noted that there is a low threshold for establishing the existence of a serious issue to be tried. In paragraph 17 she stated:

> With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

6 Justice Mactavish also noted that a higher threshold is involved when a person is seeking a mandatory interlocutory injunction to compel another person to take action prior to the determination of the underlying application on its merits. In that case, she found that the party who is seeking an injunction would need to establish a strong *prima facie* case (paragraph 19).

7 In addressing whether APR had established a strong *prima facie* case, Justice Mactavish stated:

> 22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.
>
> 23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al.*, 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport [t]o provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

8 In paragraph 27 of her reasons, Justice Mactavish concluded:

> 27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient

> to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

9 As a result, APR had failed to establish, with respect to its request for mandatory relief that the statements be removed from the CTA's website, that these statements "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers".

10 Following this finding, Justice Mactavish noted:

> 39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

11 Prompted by this notation that there was no motion before the Court to dismiss the application for judicial review, the CTA brought the current motion to strike this application.

12 In *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.), (*JP Morgan*) this Court noted that the threshold for striking an application for judicial review is high:

> 47 The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> 48 There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion — one that raises matters that should be advanced at the hearing on the merits — frustrates that objective.

13 APR's main argument in its memorandum filed in relation to this motion is that the test for the availability of judicial review has changed. APR submits that the test based on whether the conduct of the administrative body affects legal rights, imposes legal obligations, or causes

prejudicial effects is no longer applicable. Therefore, APR submits that Justice Mactavish erred in basing her decision on her finding that the impugned statements did not affect legal rights, impose legal obligations, or cause prejudicial effects.

14 APR notes that this Court in *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (F.C.A.), (*AC v. TPA*) stated:

> 28 The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> 29 One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

15 However, APR, in paragraph 49 of its memorandum, submits that the Supreme Court of Canada changed the test that is to be applied to determine if judicial review is available:

> [i]n 2018, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26] the Supreme Court recast the test for availability of judicial review as simply whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**].
>
> (emphasis in original)

16 Although APR does not explicitly state that, in its view, the Supreme Court indirectly overturned the decision of this Court in *Air Canada v. Toronto Port Authority*, it appears that this is implicit in its argument which culminates in the following statement in paragraph 63 of its memorandum:

> Therefore, the panels of this Honourable Court in *Oceanex* [*Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250] and *Guérin* [*Guérin c. Canada (Procureur général)*, 2019 CAF 272] correctly concluded that availability of judicial review of acts of federal administrative bodies is to be determined based on the *Wall*-test.

17 The position of the CTA is that the principle, as set out in *Air Canada v. Toronto Port Authority*, that there is no right to judicial review "where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" is still good law and it has not been overturned by the Supreme Court. Therefore, since the statements at issue in this judicial review application do not affect legal rights, impose legal obligations or cause prejudicial effects, the application for judicial review should be struck.

18 It is important to examine exactly what each court said. The relevant paragraph in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (S.C.C.) (*Wall*), is paragraph 14:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

19 There is nothing in this paragraph that indicates that the Supreme Court is overturning the decision of this Court in *Air Canada v. Toronto Port Authority*. Rather, the Supreme Court specifically refers to this decision in the above quoted paragraph, albeit for a different principle referenced in that case. If the Supreme Court had intended that *Air Canada v. Toronto Port Authority* should no longer be followed for the principle that judicial review will not be available if the conduct does not affect legal rights, impose legal obligations or cause prejudicial effects, it presumably would have explicitly stated it was overturning this decision.

20 Furthermore, it is important to review the context in which this statement was made by the Supreme Court. The issue in *Wall*, was described by the Supreme Court in the first paragraph of that decision:

> 1. The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

21 The issue was, therefore, whether the decision that had been reached by the Judicial Committee could be the subject of a judicial review. The conclusion of the Supreme Court was that this decision was not justiciable. The Supreme Court did not decide that a particular conduct

which did not affect legal rights, impose legal obligations or cause prejudicial effects, could nevertheless be subject to judicial review. In *Wall*, Mr. Wall had been disfellowshipped by the Judicial Committee and therefore his rights were affected.

22 APR submitted that two decisions of this Court applied the test as set out in *Wall*. In *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 (F.C.A.), this Court simply noted that the Supreme Court had recently revisited the law governing the availability of judicial review and that it had emphasized:

> [...] that judicial review is available only where two conditions are met - "where there is an exercise of state authority and where that exercise is of a sufficiently public character" [...]
>
> (emphasis in original)

23 This Court did not decide that judicial review would be available where these two conditions are met regardless of whether the particular decision or conduct affects legal rights, imposes legal obligations or causes prejudicial effects.

24 In *Guérin c. Canada (Procureur général)*, 2019 CAF 272 (F.C.A.), the reference to the Supreme Court's decision in *Wall*, is in paragraph 65: « Ce principe a récemment été réitéré par la Cour suprême dans *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) c. Wall* [...] ». The principle to which this Court was referring was stated in the immediately preceding paragraph: « Dans l'arrêt *Dunsmuir*, la Cour suprême a clairement réaffirmé le principe selon lequel la relation de la Couronne avec ses employés est régie par le droit des contrats. » The principle to which this Court was referring was not the principle that related to the availability of judicial review but rather that the relationship between the Crown and its employees is governed by the law of contract.

25 As a result, none of these cases support the proposition advanced by APR. APR also refers to the decision of this Court in *Wenham v. Canada (Attorney General)*, 2018 FCA 199 (F.C.A.). In that case, this Court noted:

> 36 An application can be doomed to fail at any of the three stages:
>
> > I. Preliminary objections. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605.

26 This Court referred to both the Supreme Court's decision in *Wall* and the decision of this Court in *Air Canada v. Toronto Port Authority* as providing a basis on which a judicial review application could fail. Therefore, an application for judicial review could fail if the test as set out

in *Wall* is not satisfied, or if the particular decision or conduct did not affect legal rights, impose legal obligations or cause prejudicial effects.

27 As a result, there is no support for the proposition as advocated by APR that "where there is an exercise of state authority and where that exercise is of a sufficiently public character" that exercise of public authority can be subject to judicial review even though no legal rights are affected, no legal obligations are imposed and there are no prejudicial effects.

28 However, the finding by Justice Mactavish that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects were made in relation to the part of the judicial review application with respect to the request for an order compelling the CTA to remove these statements from its website.

29 As noted above, Justice Mactavish stated that she was assuming "that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part". APR lost its motion for an interlocutory injunction in relation to this aspect at the irreparable harm stage, not the serious issue to be tried stage. CTA did not address this distinction in its memorandum of fact and law that it included with its motion record. Instead, the CTA only focused on Justice Mactavish's conclusion that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects.

30 Following the receipt of APR's motion record, CTA addressed the reasonable apprehension of bias argument in its reply submissions, which were longer than its original submissions.

31 CTA, in its reply submissions, stated:

> 13. [APR] wants this Court to review facts which [APR] says create a reasonable apprehension of bias in future cases. There is no precedent for this. The proper course is to raise the issue in those cases where the decision of the [CTA] would affect the legal rights of the parties.
>
> 14. The decision of Mactavish J.A. on the motion for an interlocutory injunction brings home this very point. Mactavish J.A. pointed out that allegations of bias could be raised in actual proceedings affecting the rights of individuals, as was done in *E.A. Manning* [*E.A. Manning Ltd. v. Ontario Securities Commission*, 18 O.R. (3d) 97, [1994] O.J. No. 1026];
>
> > Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing.

32 However, these comments of Justice Mactavish were made in paragraph 36 of her reasons in relation to the irreparable harm component of the *RJR-MacDonald* test, not whether there was a serious issue that was raised in the judicial review application in relation to this matter. The absence of a precedent should not also necessarily lead to the conclusion that an application for judicial review should be struck. CTA was also unable to identify any precedent that clearly supported its position that this part of the judicial review application was "so clearly improper as to be bereft of any possibility of success" (*Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588 (Fed. C.A.), at page 600, (1994), 58 C.P.R. (3d) 209 (Fed. C.A.)).

33 The arguments related to the reasonable apprehension of bias should be made at the hearing of the judicial review application, not in reply submissions in relation to a motion to strike the judicial review application. APR should not be deprived of its argument simply because there is no precedent.

34 As a result, I would dismiss the motion to strike the application for judicial review. The costs of this motion shall be in the cause.

2021 FCA 112
Federal Court of Appeal

Air Passenger Rights v. Canada (Attorney General)

2021 CarswellNat 1698, 2021 FCA 112

AIR PASSENGER RIGHTS (Applicant) and THE ATTORNEY GENERAL OF CANADA (Respondent)

Mary J.L. Gleason J.A.

Judgment: June 4, 2021
Docket: A-102-20

Counsel: Simon Lin (written), for Applicant
J. Sanderson Graham, for Respondent
Allan Matte, for Canadian Transportation Agency

***Mary J.L. Gleason J.A.*:**

1 The Court has before it a motion made by the applicant under Rules 369, 318(4), and in the alternative, under Rule 41 of the Federal Courts Rules, SOR/98-106, seeking disclosure of documents in the possession, control or power of the Canadian Transportation Agency that relate to statements the Agency made on its website in March 2020. This motion for disclosure has been brought in the context of a pending application for judicial review in which the applicant seeks to challenge the Agency's statements, alleging they are non-binding, violate the Agency's Code *of Conduct* and mislead passengers as to their rights. The applicant also claims that the statements give rise to a reasonable apprehension of bias, disqualifying Agency members from ruling on any complaint in which a passenger seeks reimbursement for flights cancelled in relation to the COVID-19 pandemic.

2 In its response to the disclosure request, the Agency filed detailed submissions, resisting the requested disclosure and setting out its intended position on the various issues that arise in the application, including in respect of the applicant's bias allegations.

3 On February 19, 2021, this Court issued a Direction, requesting submissions from the parties on whether the Attorney General of Canada should be substituted as the respondent. The Direction noted that this application is not an appeal under section 41 of the Canada Transportation Act, S.C. 1996, c. 10, but, rather, an application for judicial review under section 28 of the Federal Courts Act, R.S.C. 1985, c. F-7 and that, under paragraph 303(1)(a) and subsection 303(2) of the

Federal Courts Rules, it would appear that the Attorney General ought to have been named as the respondent. A copy of the Direction was forwarded to the Attorney General, who, following receipt, filed a Notice of Appearance.

4 The Court received submissions from the parties and from the Attorney General of Canada on the issue of the appropriate respondent in this application.

5 The Attorney General takes the position that it should be substituted for the Agency as it would be inappropriate for the Agency to defend its decision or to take a position on the bias allegations and the Attorney General is the proper respondent under the *Federal Courts Rules*.

6 The Agency takes the opposite position, asserting that, as it has a statutory right to be heard in respect of appeals brought under section 41 of the Canada Transportation Act, it should be afforded standing to participate as the respondent to this application. In the alternative, the Agency requests that it be afforded the opportunity to make a motion to intervene in this application if the Attorney General is substituted as the respondent.

7 The applicant, for its part, takes the position that the Agency is the appropriate respondent, but submits that the Agency should be strictly circumscribed in the types of submissions it may make to avoid taking inappropriately adversarial positions.

8 I am of the view that the Attorney General of Canada should be substituted for the Agency as the respondent in this application given the nature of the application and the Attorney General's willingness to appear and act as respondent.

9 It is true that subsection 41(4) of the Canada Transportation Act affords the Agency the right to be heard in the context of an appeal from one of its decisions. However, as the parties acknowledge, the present application is not an appeal of an Agency decision, but, rather, is an application under section 28 of the Federal Courts Act.

10 The proper parties to such applications are governed by the *Federal Courts Rules*, which are regulations passed under the Federal Courts Act. Rule 303 provides:

> **Respondents**
>
> 303 (1) Subject to subsection (2), an applicant shall name as a respondent every person
>
> (a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or
>
> (b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.
>
> **Application for judicial review**

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.

Substitution for Attorney General

(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.

Défendeurs

303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur:

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

Défendeurs — demande de contrôle judiciaire

(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

Remplaçant du procureur général

(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

11 By virtue of paragraph 303(1)(a), it is clear that the Agency should not be named as the respondent. Moreover, as the Attorney General has indicated that he is willing to appear and act as the respondent, there is no basis to substitute any other party as the respondent.

12 Contrary to what the applicant asserts, it is not necessary to name the Agency to ensure that any order is effective. Judicial review applications proceed regularly before this Court and the Federal Court, with the named respondent being the Attorney General, and the Courts' judgments are effective against the tribunals whose decisions are being reviewed: see for example Adebogun v. Canada (Attorney General), 2017 FCA 242, 2017 CarswellNat 7140 at paras 9, 13-14, Canada (Attorney General) v. Galderma Canada Inc., 2019 FCA 196, 2019 CarswellNat 3012 at paras

1-2, 8, 24, 75, Bissessar v. Canada (Attorney General), 2019 FCA 305, 2019 CarswellNat 7639 at paras 20-24, 29-30.

13 While the foregoing is sufficient to dispose of this issue, I also note that it is likely more appropriate that submissions on the merits of the issues that arise in this application - and most notably in respect of the bias issue - be made by the Attorney General and not the Agency. In this regard, a tribunal should refrain from embarking into the merits of a decision in such a way as to call into question its impartiality (see, for example, Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147 at paras 50 and 71, Canada (Attorney General) v. Quadrini, 2010 FCA 246, [2012] 2 F.C.R. 3 at para 16, Northwestern Utilities Ltd, Canadian Pacific Railway Company v. Canada (Transportation Agency), 2021 FCA 69, 2021 CarswellNat 1402 at paras 102-103).

14 Thus, the Attorney General will be substituted as the respondent in this application.

15 If the Attorney General wishes to make additional submissions in response to those of the applicant on the disclosure issue, including in respect of the applicant's informal motion of May 12, 2021 to add additional materials in support of the disclosure motion, the Attorney General may do so within 30 days of the date of these Reasons. The applicant shall have 15 days to file responding submissions, if it wishes. The informal motion to add additional materials and the disclosure motion shall then be returned to the undersigned, for disposition.

16 If it still wishes to do so, the Agency may bring a motion, seeking leave to intervene in this application. Should such motion be made, the Agency's materials should demonstrate how its proposed intervention will meet the test for intervention under Rule 109 of the Federal Courts Rules and should be mindful of the appropriate scope of tribunal submissions.

Order accordingly.

2020 CAF 164, 2020 FCA 164
Federal Court of Appeal

Canada (Attorney General) v. Kattenburg

2020 CarswellNat 4288, 2020 CarswellNat 7028,
2020 CAF 164, 2020 FCA 164, 323 A.C.W.S. (3d) 302

ATTORNEY GENERAL OF CANADA (Appellant) and DR. DAVID KATTENBURG and PSAGOT WINERY LTD. (Respondents)

David Stratas J.A.

Judgment: October 6, 2020
Docket: A-312-19

Counsel: Gail Sinclair, Negar Hashemi (written), for Appellant
A. Dimitri Lascaris (written), for Respondent, Dr. David Kattenburg
David Matas (written), for Proposed Intervener, League, for Human Rights of B'Nai Brith Canada
Barbara Jackman (written), for Proposed Intervener, Independent Jewish Voices
Mark J. Freiman (written), for Proposed Intervener, Centre, for Israel and Jewish Affairs
David Elmaleh, Aaron Rosenberg (written), for Proposed Intervener / Respondent, Psagot Winery Ltd.
Faisal Bhabha, Madison Pearlman (written), for Proposed Intervener, Centre, for Free Expression
Paul Champ, Bijon Roy (written), for Proposed Intervener, Amnesty International Canada
Asher G. Honickman (written), for Proposed Intervener, Professor Eugene Kontorovich
Matthew R. Gourlay (written), for Proposed Intervener, Professor Michael Lynk, U.N. Special Rapporteur, for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967
Sujith Xavier (written), for Proposed Intervener, The Arab Canadian Lawyers Association and the Transnational Law and Justice Network
Ceyda Turan, James Yap (written), for Proposed Intervener, Canadian Lawyers, for International Human Rights and Al-Haq

***David Stratas J.A.*:**

1 An appeal has been brought from a judicial review in the Federal Court: 2019 FC 1003 (F.C.) (*per* Mactavish J. as she then was). The appeal is pending in this Court.

2 Before the Court are multiple motions for leave to intervene under Rule 109 and one motion by Psagot Winery Ltd. to be added as a party respondent.

A. The intervention motions

3 The underlying judicial review is a review of whether an administrative decision-maker, here the Canadian Food Inspection Agency, interpreted and applied certain legislative requirements concerning the labelling of a food product, here wine, in a defensible and acceptable way, *i.e.*, within the constraints discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (S.C.C.). There is nothing more to it. It appears to be a standard judicial review of a regulatory decision.

4 But twelve separate parties now line up to intervene: League for Human Rights of B'Nai Brith Canada, Independent Jewish Voices, Centre for Israel and Jewish Affairs, Centre for Free Expression, Amnesty International Canada, Professor Eugene Kontorovich, Professor Michael Lynk (U.N. Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967), The Arab Canadian Lawyers Association, the Transnational Law and Justice Network, Canadian Lawyers for International Human Rights, Al-Haq, and Psagot Winery Ltd. Many of them say this judicial review is something more than standard: the label described the wine as a "product of Israel" and it was made in the West Bank.

5 As a result, a number of these moving parties seek to intervene to speak to the issue of Israel's occupation of the West Bank, including the status of the West Bank, the territorial sovereignty of Israel, human rights and humanitarian concerns, issues of international law, and other related issues. Many of them appear to want this Court to rule on the merits of these issues.

6 But there is one basic problem. This appeal does not raise the merits of these issues. As I shall explain, it is narrower.

7 That is not all. Some of the moving parties seek to intervene on other issues, such as the international trade law dimensions lying behind the labelling requirements and issues arising under section 2(b) of the Charter.

8 Under Rule 109, the Federal Courts' rule governing intervention, the central part of the test for intervention is whether a moving party's submissions will be useful to the panel determining the appeal.

9 This requires four questions to be asked. In some intervention motions, such as the ones presently before the Court, it is useful to consider them separately. The four questions are as follows:

> (1) *What issues are live before the panel determining the proceeding*? The issues are set by the originating document, here the notice of appeal, as explained by any memoranda of fact and law that have been filed: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017

FCA 174, 414 D.L.R. (4th) 373 (F.C.A.) at paras. 54-56. Here, the Court must determine the "real essence" and "essential character" of the proceeding and disregard those matters that are doomed to fail: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at paras. 49-50. In doing so it must understand its role in the proceeding. For example, in the context of judicial review, often the Court is only in a reviewing role of the administrative decision-maker's decision on the merits and the administrative decision-maker is the only one entitled to decide on the merits: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.); *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.); *Robbins v. Canada (Attorney General)*, 2017 FCA 24 (F.C.A.); *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 (F.C.A.) at paras. 26-28; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (F.C.A.) at paras. 87 and 97. And to avoid disguised correctness review, the Court must not consider the merits itself: *Vavilov* at para. 83; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at para. 28.

(2) *What does the moving party intend to submit in the proceeding*? The Court must not be taken in by tricky drafting by skilful pleaders. Instead, it must determine the "real essence" and "essential character" of what the prospective intervener intends to say. It does this by reading the motion materials "holistically and practically without fastening onto matters of form". See *JP Morgan Asset Management*, above at paras. 49-50.

(3) *Are the moving party's submissions doomed to fail*? When considering an intervention motion, the Court should not venture too deeply into the merits of issues that are for the panel. That being said, the panel should not have to deal with submissions of an intervener that are doomed to fail or that are inadmissible. This includes submissions that are indisputably wrong in law or irrelevant to the live issues before the Court. Issues that require new evidence and new evidence itself are also not admissible: *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 (F.C.A.) at paras. 17 and 36; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 (F.C.A.) at para. 19; *Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at para. 14; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 (F.C.A.) at para. 11. Similarly submissions and academic articles that, in reality, contain new evidence intertwined with the legal discussion are prohibited: *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44 (S.C.C.); *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 (F.C.A.) at para. 14; *Zaric* at para. 14.

(4) *Will the moving party's arguable submissions advance the determination of the panel determining the appeal*? The Court should exclude submissions that duplicate those of others. It should also exclude those that make political points without law, pronounce freestanding

policy positions untethered to law, or offer submissions irrelevant to the legal task the Court must perform.

10 I will now consider these questions.

(1) What issues are live before the panel determining the proceeding?

11 Before us is an appeal from an application for judicial review. The appeal panel's job will be to consider whether the decision of the Agency about two particular wine labels is acceptable and defensible, *i.e.*, within the constraints discussed in *Vavilov*. Nothing more.

12 In particular, the panel will focus on the administrative decision-maker's interpretation and application of the legislation that governs it. The administrative decision-maker in this case, the Agency, had to interpret and apply a country of origin labelling requirement under the *Food and Drug Regulations*, C.R.C., c. 870, s. B.02.108 to two particular wines produced in the West Bank and decide whether their labels were false or misleading under subsection 5(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 and subsection 7(1) of the *Consumer Packaging and Labelling Act*, R.S.C., 1985, c. C-38.

13 What do country of origin and misleading mean in the legislation? To answer that question, the Agency had to examine, explicitly or implicitly, the text, context and purpose of the provisions in which those terms appear: *Vavilov* at paras. 115-124; and see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.); *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.).

14 In reviewing the legislative interpretation reached by the Agency, the panel hearing this appeal will be engaging in reasonableness review. I acknowledge that the respondent intends to argue that the standard of review for the administrative decision-maker's interpretation of the relevant legislation is correctness on the ground that the issue is of public significance. But on the authority of *Vavilov* at paras. 53-72, this is doomed to fail and so I do not consider it a live issue. The panel hearing this appeal will be conducting reasonableness review on the issue of legislative interpretation, not correctness review.

15 When conducting reasonableness review, the panel will not be allowed to reach its own interpretation of the legislation and impose it on the Agency: see *Vavilov* at para. 83; *Delios* at para. 28.

16 The panel will also determine whether the Agency's decision was reasonable in the sense that it engaged in an adequate investigation or inquiry in light of its governing legislation and whether it offered sufficient justification in support of its decision: see, generally, *Vavilov*.

17 Another issue for the panel will be whether the Federal Court was correct in law in holding that the Agency should have considered issues under section 2(b) of the Charter. This is a live issue. Note, however, that it is not for this Court to decide how section 2(b) might affect the interpretation and application of the legislative provisions. That will be for the Agency if this matter is sent back to it for redetermination.

(2) What do the moving parties intend to submit in the proceeding?

18 The true essence or essential character of the submissions of the interveners are three-fold:

- Many of the interveners intend to submit that Israel's occupation of the West Bank is illegal. They rely on plenty of international instruments. Further, some interveners wish to make submissions about human rights and humanitarian concerns of those in the West Bank.

- Some of the interveners, in particular Independent Jewish Voices, the Centre for Free Expression, B'nai Brith, the Centre for Israel and Jewish Affairs and Amnesty International, intend to argue that section 2(b) is engaged in this case. Some intend to address the substantive content of section 2(b), including how international law might inform its interpretation and application.

- Professor Kontorovich intends to submit mainly that there are international law understandings under the GATT and the WTO, including the importance of non-tariff barriers such as labelling rules. He submits that these bear upon the interpretation of the legislation in this case.

(3) Are the moving parties' submissions doomed to fail?

19 The submissions on Israel's occupation of the West Bank are doomed to fail on the legislative interpretation issue.

20 Quite properly, none of the moving parties contend that the provisions of the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act* are aimed at furthering or implementing Canada's international obligations or dealing with the Israel/West Bank issue. There is nothing to suggest that these provisions were enacted to address state occupation of territories and, in particular, Israel's occupation of the West Bank.

21 Rather, these provisions are of general application, appearing amongst similar provisions, aimed at regulating, often in exacting detail, food products and the public's interaction with those products through, among other things, labels on containers. The purpose seems to be, at a broad level of generality, consumer protection, quality assurance and safety. The exact purpose will be for the appeal panel to consider.

22 In support of their submissions, the moving parties offer many international instruments, opinions and understandings. Their submissions assume they enter the process of legislative interpretation automatically, almost as if they are some sort of super-Charter that can be used to supplement, amend or displace the provisions of domestic law. They do not.

23 Certain authorities of this Court concerning the use of international law, heavily based on authorities from the Supreme Court, will bind the panel hearing the appeal. The moving parties' proposed use of international law is contrary to these authorities. It is doomed to fail.

24 International law enters into the interpretation of domestic law such as, in this case, the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act*, only in certain limited ways: see *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100 (F.C.A.) at paras. 69-92 and the many Supreme Court authorities cited therein (including the most recent Supreme Court authority, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, 443 D.L.R. (4th) 183 (S.C.C.)); see also *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 (F.C.A.) at paras. 54-59. None of these limited ways are available here. The requirement that domestic law be interpreted in accordance with international obligations cannot be used to amend domestic legislation: *Entertainment Software Association* at paras. 89-91; *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.).

25 International law is irrelevant to the discernment of legislative purpose in a case like this: *Gitxaala Nation v. R.*, 2015 FCA 73 (F.C.A.) at paras. 11-18; *Ishaq* at para. 27. Legislative purpose is discovered from the words of the provision, related provisions, and, with some caution, legislative history and regulatory impact or official explanatory statements: *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 (F.C.A.) at paras. 25-27 and 35; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 (F.C.A.) at paras. 50-51. Sometimes it is clear from these things that the purpose of a legislative provision is to implement some or all of an international instrument: *Entertainment Software Association* at paras. 73-74 and 82. Sometimes international law can be used to resolve ambiguities: *Entertainment Software Association* at paras. 83-84.

26 But aside from those instances, as far as the discernment of legislative purpose is concerned, international law is not like a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we please. Legislative purpose is the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is "best for Canadians" or what they consider to be "just", "right" or "fair": see *Hillier*, *Williams* and *Ishaq*; and see also *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144 (S.C.C.), *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539 (S.C.C.) and *Michel v. Graydon*, 2020 SCC 24 (S.C.C.) and, in particular, the rejection of the dissents in these cases; and see also M. Mancini, "The 'Return' of 'Textualism' at the SCC[?]" (9 April 2019),

online (blog): *Double Aspect* <doubleaspect.blog/2019/04/09/the-return-of-textualism-at-the-scc/>. Thus, interveners' policy preferences and the policies they want the legislation to pursue are irrelevant to the Court's discernment of legislative purpose: *Atlas Tube Canada ULC v. Canada (Minister of National Revenue)*, 2019 FCA 120 (F.C.A.) at paras. 5-9.

27 The detailed consumer-oriented and product-oriented provisions at issue in this case were enacted without regard to issues concerning Israel's occupation of the West Bank. Specifically, they were enacted without regard to the specific international instruments the moving parties wish to insert into this appeal. These include the United Nations advisory opinions entitled *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) Notwithstanding Security Council Resolution 276* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; United Nations General Assembly resolutions entitled *The Right of the Palestinian People to Self-Determination, Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the Occupied Syrian Golan over their Natural Resources, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Peaceful Settlement of the Question of Palestine* and resolutions numbered 2435, 2649, 3236, 43/177, 48/94 and 73/158; United Nations Security Council Resolutions entitled *The Situation in the Middle East, including the Palestinian Question*, *Territories Occupied by Israel* and resolutions numbered 446, 465, 476 and 2334 and other U.N. documents such as *Territories Occupied By Israel*, *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan Over Their Natural Resources, Peaceful Settlement of the Question of Palestine*, *Settlements and Creeping Annexation*, the *Agreement on the Gaza Strip and the Jericho Area*, and various U.N. resolutions affirming the Palestinian peoples' right to self-determination. The same can be said for more general documents such as the *Charter of the United Nations*, the *Articles on Responsibility for States for Internationally Wrongful Acts*, the *Vienna Convention on the Law of Treaties*, the *Declaration of Principles on Interim Self Government Arrangements*, the *Regulations Annexed to the Hague Convention No. IV respecting the Laws and Customs of War on Land*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Rome Statute of the International Criminal Court*, the *2019 Concluding Observations of the United Nations Committee on Economic, Social, and Cultural Rights*, the *2019 Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination*, the *League of Nations, Covenant of the League of Nations*, the *Israeli-Palestinian Agreement on the West Bank and the Gaza Strip (Oslo III)* and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*.

28 Quite apart from interpreting the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act*, many of the moving parties suggest that international law is part of the process of applying this legislation to the facts of this case. They say that this

legislation must be applied in a way that implements the obligations and requirements found in international instruments.

29 This too is doomed to fail.

30 First, this misconceives this Court's task in the appeal. This Court will not be applying the legislative provisions to the facts of this case. Rather, it is only conducting reasonableness review of the Agency's decision to examine whether it is acceptable and defensible and supplies adequate justification under *Vavilov*. Under reasonableness review, it is for the administrative decision-maker, here the Agency, to apply the authentic meaning of the legislation to the facts of the case, not this Court: see *Association of Universities* and related authorities in paragraph 9(1) above.

31 As well, the moving parties are again using international law improperly in a manner that is doomed to fail. Once a court or administrative decision-maker arrives at a definitive legal interpretation of a provision — including, where proper, the content of international law — its job is to apply the provision's authentic meaning dispassionately and objectively to the facts of the case. To decide a case, a court or administrative decision-maker cannot reach out to other standards, such as those in international law, to supplement, modify or oust the authentic meaning of domestic law; international law is not a directly binding source of substantive law that supplements, modifies or ousts the authentic meaning of domestic law: see *Entertainment Software Association*at paras. 78-79 and the numerous authorities cited therein, including many from the Supreme Court. The meaning of domestic law is not to be amended by international law: see *Entertainment Software Association*, above at para. 85; see also *Németh c. Canada (Ministre de la Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 (S.C.C.) at para. 35; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.) at para. 54; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 (S.C.C.) at para. 50; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, 69 Imm. L.R. (4th) 297 (F.C.A.); *Gitxaala Nation* at para. 16.

32 Many of the moving parties' proposed submissions are doomed to fail for another reason. Many rely on evidence that is not before the Court. Some of the moving parties supply us with hyperlinks to find reports, opinions, news articles and informal articles to buttress their claims about the content of international law and the illegality of Israel's occupation of the West Bank. But as far as facts are concerned, judges can act only on evidence, matters of judicial notice or statutory deeming provisions: *Kabul Farms Inc. v. R.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11 (F.C.A.) at para. 38; *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 483 N.R. 275 (F.C.A.) at paras. 79-80. They cannot act on the basis of personal assumptions: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 (S.C.C.). As well, the normal rule in judicial reviews is that evidence is to be adduced before the administrative decision-maker, not in reviewing courts: *Association of Universities*, above. Finally, at no time do we supplement the proper evidentiary record with whatever we can scrounge from the Internet.

33 I do not doubt for a moment that international law, when properly used, can play an important role in the interpretation of legislation and the discernment of the authentic meaning of legislation: see, *e.g.*, *Entertainment Software Association* at para. 92. But this is not one of those cases.

34 Some moving parties ask this Court to award a remedy that the applicant for judicial review does not seek. This is doomed to fail. The case remains that of the applicant for judicial review; others cannot commandeer it and ask for remedies the applicant does not seek: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 (F.C.A.) at paras. 55-56; *Teksavvy Solutions* at para. 11; *Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7*, 2019 FC 261 (F.C.) at para. 50. In any event, on these facts, the relief sought by some interveners — non-remittal to the Agency and a positive pronouncement on the merits by this Court — is not available: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (F.C.A.) and *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.) at paras. 51-56 and 84, as discussed in *Vavilov* at para. 142.

35 Some of the prospective interveners appear to want to argue that the labels on the wines violate the section 2(b) rights of some of those who read them. The panel hearing this appeal will not be considering that issue. Rather, it will be considering whether the Federal Court was correct in law in holding that the Agency should have considered issues under section 2(b) of the Charter. That issue, a purely legal one, is already before the Court and the interveners have nothing to add that will help the Court determine it.

36 If this Court agrees with the Federal Court that the Agency should have considered section 2(b) of the Charter, it will be for the Agency to consider and determine it, not this Court. Thus, this Court does not need to receive submissions on the content of section 2(b) of the Charter.

(4) Will the moving parties' arguable submissions advance the determination of the panel determining the appeal?

37 I note that a number of the submissions the moving parties propose to make in this appeal are already made by the respondent, Dr. Kattenburg. Thus, their involvement is not necessary. The panel hearing the appeal will determine for itself the relevance and effect of the submissions of Dr. Kattenburg.

38 The panel hearing this appeal may have to consider whether the Agency's decision was reasonable in the sense that it engaged in an adequate investigation or inquiry in light of its governing legislation. The panel will identify what the Agency considered in making its decision. It will know that the Agency received and relied upon advice from Global Affairs Canada. Whether the Agency was mindful of and considered other advice is for the panel to decide. But the panel will know, as the Federal Court did (at para. 125), that the Israel/West Bank issue is a controversial

one, with many differing views and deeply-felt opinions on all sides. To consider these points, it is not useful for the panel to receive the submissions of the moving parties.

39 In many respects, the submissions of the moving party, Professor Kontorovich, are different from those of most of the other interveners. They are closer to the mark. He proposes to make submissions on international trade understandings of country of origin as well as Canada's international trade obligations. But the Court is not persuaded that these submissions are useful or necessary. To a large extent, the submissions of the respondent, Dr. Kattenburg, address these issues: see Dr. Kattenburg's memorandum of fact and law on the merits of the appeal at paras. 77-83. As well, this Court will have the reasons of the Agency before it. It will be able to assess whether the Agency should have considered these issues and, if not, whether its decision is unreasonable for not doing so. If it is unreasonable for that reason, it will be for the Agency to reinterpret the legislation and consider these issues on their merits.

40 This appeal turns on how the Agency applied domestic labelling requirements in legislation to specific imported food products, namely wine. Yet many of the moving parties seek to advocate for a specific foreign policy to be adopted by the Government of Canada. Rather than helping us in our task of conducting reasonableness review of the Agency's decision, they want us to make findings that further their causes.

41 We are only a court of law, not a policy forum, and still less a department of foreign affairs pronouncing on controversial international issues. We are suited to law, not free-standing policy or ideology. We are just lawyers who happen to hold a judicial commission: *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 (F.C.A.)at para. 79 and *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 (F.C.A.) at para. 30. We are not a roving commission of inquiry able to investigate whatever we wish. We are not policymakers empowered by huge budgets to decide what is best for millions. Nor are we high priests who can arbitrate values, judge what is "just", "right" and "fair" and give benediction to our personal beliefs.

(5) Concluding observations concerning the intervention motions

42 I do not want to be too hard on the moving parties. I suspect that some of them have been lured to this appeal by torqued-up press reports distorting what the Federal Court decided. And once one group applies to intervene on a controversial issue like this, others feel they also have to apply.

43 But many of these intervention motions illustrate a growing, regrettable tendency in public law cases in Canada: the tendency of those seeking political and social reform to see courts as unfettered decision-making bodies of a political or ideological sort that can give them what they want. What accounts for this? Alas, I fear that in part some courts and some judges may be to blame.

44 Some courts admit into an appeal just about anyone who wants to offer any views, even political or ideological ones oblivious to the legal doctrine that binds the Court: see observations in *Teksavvy Solutions* at para. 11; *Ishaq* at paras. 25-27; *Atlas Tube* at paras. 4-12. And sometimes upwards of twenty or more special interest or political advocacy groups are allowed to pile in, giving appeals the appearance of a sprawling Parliamentary committee hearing or an open-line radio show, and often a one-sided one at that: *Gitxaala Nation* at paras. 21-24; *Zaric* at para. 12; *Teksavvy Solutions* at para. 11; *Atlas Tube* at para. 12. So much of their loose policy talk, untethered to proven facts and settled doctrine, can seep into reasons for judgment, leading to inaccuracies with real-life consequences: see examples provided in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 (F.C.A.) at paras. 156-159, citing *Teksavvy Solutions* at para. 22, both referring to *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 (S.C.C.) and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, 433 D.L.R. (4th) 381 (S.C.C.).

45 As for judges, some give the impression that they decide cases based on their own personal preferences, politics and ideologies, whether they be liberal, conservative or whatever. Increasingly, they wander into the public square and give virtue signalling and populism a go. They write op-eds, deliver speeches and give interviews, extolling constitutional rights as absolutes that can never be outweighed by pressing public interest concerns and embracing people, groups and causes that line up with their personal view of what is "just", "right" and "fair". They do these things even though cases are under reserve and other cases are coming to them.

46 They should not act in this way. They should stay in their proper place. Their place is not in the public square amongst the partisans and the politicians, participating in the fray. Instead, their place is inside their courthouses, hearing each side, weighing and assessing the admissible evidence and discerning and applying the relevant legal doctrine, all in a rational, open-minded and neutral way, both in appearance and actual fact.

B. The motion by Psagot Winery Ltd. to be added as a party respondent

47 Psagot Winery has moved to intervene or to be added as a party respondent. It should be a party respondent. But, for the following reasons, its participation must be limited.

48 Psagot Winery produced one of the two wines at issue before the Agency but was never invited to participate in its proceedings. It says that the Agency should have brought the issue to its attention and invited it to participate. It says it first learned of the Agency's proceedings after the media attention surrounding the Federal Court's decision.

49 The proper way for Psagot Winery to attack the Agency's alleged omission was to bring its own application for judicial review. It did not and the time to do so has expired. Through this motion, it cannot bring a disguised judicial review.

50 However, there is another dimension to Psagot Winery's motion. It can be taken to be arguing that the Federal Court should have notified it and invited it to participate in Dr. Kattenburg's judicial review. This is an arguable position and supports Psagot Winery's addition to these proceedings as a party respondent. It is entitled to file evidence to support this procedural fairness position in the Federal Court and to file a short memorandum on that issue alone: *Mediatube Corp. v. Bell Canada*, 2018 FCA 127, 156 C.P.R. (4th) 289 (F.C.A.) at para. 58 and authorities cited therein. The other parties should be given an opportunity to respond and, if necessary, cross-examine on that evidence and file responding submissions.

C. Another procedural issue

51 The appellant filed its memorandum of fact and law on the merits of the appeal, including submissions concerning the standard of review, before the Supreme Court's decision in *Vavilov*. The respondent, Dr. Kattenburg, filed his memorandum after *Vavilov*. By direction, the Court asked the parties whether the appellant should be given the opportunity to make submissions on *Vavilov*. The parties agreed that the appellant should be given that opportunity and Dr. Kattenburg should be permitted to respond. These parties should also have the opportunity to respond to Psagot Winery's evidence and memorandum.

D. Disposition

52 Therefore, for the foregoing reasons, the motions for intervention will be dismissed. Psagot Winery's motion to be added as a party respondent will be granted. The style of cause will be amended to reflect this and will appear as it does on these reasons. An order will issue giving effect to all of these things and related procedural matters.

53 The Attorney General of Canada was largely successful on the motions. But it did not seek costs and so none will be awarded.

Motions for intervention dismissed, and motion to be added as party respondent granted.

2005 FC 591, 2005 CF 591
Federal Court

Chrétien v. Canada (Attorney General)

2005 CarswellNat 1036, 2005 CarswellNat 7543, 2005 FC 591, 2005 CF 591, [2005] F.C.J. No. 684, 138 A.C.W.S. (3d) 994, 273 F.T.R. 219 (Eng.), 29 Admin. L.R. (4th) 195

The Right Honourable Jean Chrétien, Applicant and Attorney General of Canada, Respondent

Aronovitch Prothonotary

Heard: April 26, 2005
Judgment: April 29, 2005
Docket: T-404-05

Counsel: Mr. Peter Doody, for Applicant
Mr. Brian Saunders, Ms. Joanna Hill, for Respondent
Mr. H. Lorne Morphy, for Proposed Intervenor

***Aronovitch Prothonotary*:**

1 The Right Honourable Jean Chrétien, the Applicant in the underlying judicial review application, is challenging the refusal of the Honourable Justice John Gomery to recuse himself as Commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the "Commission") on grounds that the parties appearing before the Commission have been denied their rights to procedural fairness and that there exists a reasonable apprehension of bias on the part of the Commissioner.

2 The motion now before me is brought on behalf of the Commissioner, under Rule 109 of the *Federal Courts Rules*, (the "*Rules*") for leave to intervene in the Applicant's court challenge. While it is opposed by the Applicant, the respondent Attorney General of Canada (the "Attorney General") takes no position on the motion to intervene.

3 The sole issues on this motion are whether the Commissioner should be granted leave to intervene, and if so on what terms. For the reasons that follow I find that it would be of assistance to the Court and in the public interest that the Commissioner be granted leave to intervene, on a limited basis, such as not to call into question the Commissioner's impartiality.

4 While I have concluded that the Commissioner ought not to speak to the law on the apprehension of bias or the law on the recusal of the head of an inquiry, it is appropriate that he address his jurisdiction and process. He will also have leave to appeal the final decision of the Court should the Attorney General choose not to.

The Facts

5 I will provide an account of the evidence adduced by the parties in support of this motion, starting with the facts presented by the Commissioner. The facts provided by all the parties are uncontested.

6 The Commissioner has divided the Commission's examinations into two parts. Phase 1A explored the creation, purpose and objectives of the sponsorship program, the means by which it was administered and the extent to which it met standards of good management. Phase 1B, which is ongoing, explores where the sponsorship and advertising funds went, the extent to which there was value for money and whether there was any political influence and involvement. Closing submissions are scheduled for June 2005. The Commission's findings of fact are due on November 1, 2005, and its recommendations on December 15, 2005.

7 On May 7, 2004, the Commissioner made an opening statement affirming his independence and issued rules of practice and procedure. On June 21, 2004, he took submissions from parties seeking standing before the Commission. The Applicant and the Attorney-General both sought and were granted standing by the Commissioner at that time.

8 The Commissioner stated that the Attorney-General's role would be to "represent the interests of the Government of Canada in relation to the proceedings of the Commission" and provide "legal services" for federal public servants who were appearing or being interviewed.

9 On January 31, 2005, counsel to the Applicant brought a motion at the Commission seeking the recusal of the Commissioner on the grounds of the existence of a reasonable apprehension of bias. H. Lorne Morphy, counsel to the Commissioner on this motion, also made submissions on the Commissioner's behalf during the hearing of the recusal motion. On February 1, 2005, the Commissioner dismissed the recusal motion as failing to establish a reasonable apprehension of bias, and declined to recuse himself.

10 The Applicant filed for judicial review of this decision in the Federal Court on March 3, 2005 seeking:

> (i) an order in the nature of *certiorari* setting aside the Commissioner's decision on the Recusal Motion;

(ii) a declaration that there is a reasonable apprehension of bias in the Commissioner's performance of his duties; and

(iii) an order prohibiting the Commissioner from continuing to act as Commissioner.

11 On April 5, 2005, the Applicant was given leave to amend his judicial review application, with the consent of the Attorney General, to include additional allegations in support of the claim. These allegations relate to the Commissioner's recall of a public servant, Alex Himelfarb, Clerk of the Privy Council Office and Secretary to Cabinet, for further questioning.

12 This recall took place in February 2005. The respondent was notified of it by Commission counsel, Bernard Roy Q.C., on February 15, 2005. The respondent wrote a letter formally objecting to the recall on the ground of irrelevance, on February 25, 2005. The respondent renewed this objection on February 28, 2005, when Mr. Himelfarb re-appeared before the Commission. Both the Applicant and the respondent made the argument that Mr. Himelfarb's testimony was irrelevant. The Commissioner overruled the objection and allowed the questioning. When Mr. Himelfarb had finished his testimony, the Applicant reiterated the shared position on irrelevance.

13 There is a second judicial review application currently before the Court involving the Commissioner. It was brought by the Honourable Alfonso Gagliano, another person who was granted standing before the Commission. This application concerns the Commissioner's refusal to allow the cross-examination of Charles Guité based on statements made to the Public Accounts Committee of the House of Commons, and the issue of whether those statements are protected by Parliamentary privilege. The Commissioner was granted intervener status in this proceeding by order dated February 17, 2005.

14 Turning to the Applicant's evidence on this motion, clippings and statements from a variety of media sources are adduced that set out the position taken by the Prime Minister, the Right Honourable Paul Martin, and his Ministers. This evidence spans the period prior to the recusal motion to the April 21, 2005 televised appearance of the Prime Minister.

15 The evidence reflects the public pronouncements of the Prime Minister that it was his government that established the Commission and that he has an unequivocal commitment to support the Commissioner in completing his mandate.

16 There are added statements on behalf of the government made by the Minister of Public Works, the Honourable Scott Brison, and the Attorney General of Canada, the Honourable Irwin Cotler, in the House of Commons. The pronouncements of these Ministers are similarly supportive of the Commissioner and state the commitment of the government to cooperate with the Commissioner, and to see him remain in office to complete his work.

17 Finally, the Applicant recounts the position taken by the Attorney General at the hearing of the recusal motion. Before the Commissioner, counsel for the Auditor General made lengthy submissions opposing the motion. These submissions were wholly endorsed by the Attorney General who took the position that the Applicant had not met the necessary legal test for recusal and asked the Commissioner to reject the recusal motion.

The scope of the proposed intervention

18 As to the scope of the Commissioner's proposed intervention, he has requested standing to make argument and address the following issues:

> (a) the law of reasonable apprehension of bias as it relates to federal commissions of inquiry;
>
> (b) the scope of mandate of the Commission as set out in the Terms of Reference;
>
> (c) the jurisdiction and procedural discretion of the Commission, including in relating to the Commission Rules, the calling of witnesses and the admissibility of evidence;
>
> (d) the law as to whether the Commissioner should be prohibited from proceeding with the inquiry pursuant to his mandate; and
>
> (e) the applicable standard of review.
>
> (f) *to have a right of appeal*. [emphasis mine]

For reasons that follow, the intervention of the Commissioner will be restricted essentially to the matters addressed above at items b) c) and f).

Analasis

19 The right to intervene, unless authorized by statute requires leave to be granted under Rule 109 of the *Rules*. The principal element of the *Rules* is that a proposed intervener must indicate how their participation "will assist the determination of a factual or legal issue related to the proceeding". This has been held to mean that the party is not merely to restate what others will be arguing, but to assist the Court by bringing an additional or a different perspective to the proceeding. [1]

20 There are factors identified by the Court as generally relevant in the exercise of the Court's discretion in granting intervener status, which need not all be satisfied. [2] These include: whether the proposed intervener is directly affected by the outcome; whether a justiciable issue and a veritable public interest exists; whether there is an apparent lack of any other reasonable or efficient means to submit the question to the Court; whether the position of the proposed intervener is

adequately defended by one of the parties to the case; and whether the interests of justice are better served by the intervention of the proposed third party. [3]

21 Tribunals, however, are not placed on the same footing as other proposed interveners and have been allowed only a limited role in the judicial review of their decisions. Courts have consistently recognized that it is improper, indeed unseemly, for an impartial tribunal to be given the opportunity to defend the correctness of its decision, essentially taking sides with one of the parties to the dispute. The jurisprudence underscores that there are good public policy grounds to preclude a tribunal, which is required to be and be seen to be impartial, from becoming an advocate in its own cause. [4]

22 In *Northwestern Utilities*, *supra*, Justice Estey, speaking for an unanimous bench of the Supreme Court, wrote the following:

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

He went on to explain what he meant by jurisdiction:

> In the sense the term has been employed by me here, "**jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice."**
>
> [emphasis mine]

23 The rules of natural justice that Justice Estey refers to, the notion of procedural fairness, requires that decisions be made free from an apprehension of bias on the part of an impartial decision maker. [5] Where, as in this case, a denial of procedural fairness is alleged, a tribunal will either be denied leave to intervene altogether, or is called upon to be circumspect. [6] The Ontario Court of Appeal makes this point in *Children's Lawyer for Ontario v. Goodis*, [2005] O.J. No. 1426 (Ont. C.A.) at paragraph 40. Where the essential issue in a court review is whether a tribunal treated a particular litigant fairly, "impartiality may suggest a more limited standing $^{1}/_{4}$" [7]

24 The Commissioner says he does not wish to intervene in this judicial review to defend his decision to recuse himself, nor to respond, as an adversary would, to the specific allegations made against him. He acknowledges that it would be improper for him to address the merits of the case against him. Rather, he says, the purpose of the proposed intervention is to preserve the independence of the Commissioner from the Attorney General, and to assist the Court.

Whether the Commissioner may address the law as it relates to the apprehension of bias and the removal of heads of independent inquiries

25 The Commissioner begins his argument by emphasizing that it is crucial that the Commissioner be, and appear to be, independent.[8] The Commissioner fears that if the Attorney General is the sole advocate of the Commissioner before the Court at the same time that he is a party before the Commission to represent the interests of the Government of Canada, on an ongoing basis, the Commissioner will be perceived as not being independent of the Crown. In light of the public interest that his independence be maintained, the Commissioner suggests that he be allowed, before the Court, to add submissions from his own independent perspective to those of the Attorney General, as regards the law of bias and the law relating to the removal of the head of an inquiry. To this the Commissioner adds that his intervention would also bring a perspective on the relevant law that is independent and distinct from that of the Attorney General.

26 It is argued on behalf of the Commissioner that the circumstances presented by this case take it out of the jurisprudence normally applicable to the intervention of tribunals in the review of their own decisions. There are no adverse parties before the Commission, as there would be before a tribunal. The Applicant and the Attorney General both have standing and are in a parallel, not adversarial, position before the Commission. The Commissioner submits that there is no *lis*, or dispute, between the Applicant and the Attorney General that would make it problematic for the Commissioner to intervene.

27 Finally, the Commissioner argues that unlike the ordinary situation of a judicial review of a tribunal decision, where the parties will not appear before the tribunal again, in this case the Attorney General will continue to appear before the Commission following the hearing of the judicial review.

28 There is no question, in my view, and the Commissioner does not contest, that the Attorney General is properly named as party respondent in this proceeding. The Applicant points to Rule 303 of the *Rules*, which states that at first instance, an applicant is to name as a respondent the party directly affected by the order sought in the application, *other than the tribunal*. Rule 303(2) then provides that where there are no other persons who can be named, the Attorney General shall be named as a respondent. Whether under the former or the latter, it is clear that the Attorney General is named as a proper respondent in this application to speak to the merits of the judicial review.

29 In that connection, reference is made to my decision in *Hoechst*, *supra* note 6, where the Attorney General, named party respondent under Rule 303 of the *Rules*, made the point that he appeared as respondent in the public interest, the role and mandate of the Attorney General being to assist the Court in reaching a decision that accords with the law. The Commissioner points out

that the Attorney General, in this case, is not independent and does not represent the public interest in the same sense as in *Hoechst*, *supra* by virtue of the interest it represents before the Commission.

30 What is more, says the Commissioner, the Court recognized in *Hoechst*, *supra* that an agency or tribunal whose decision is under review is entitled to expect that there will be a party present at the judicial review to defend the reasonableness of the tribunal's decision. The Commissioner points out that, in this case, not only is the Attorney General not independent by virtue of its vested interest, but the Commissioner has no way of knowing the position that the Attorney General will take on judicial review, or whether he can expect a vigorous defense. This underscores, for the Commissioner, not only that he be allowed to supplement the Attorney General's submissions as the applicable law with his own, from the perspective of the Commissioner, but also, that he be able to appeal from any adverse decision. The Commissioner says he cannot count on the Attorney General to do so.

31 The Attorney General responds that he has put in a Notice of Appearance to the application and intends to oppose it. The position of the Attorney General is that he is not an "advocate" for the Commissioner but rather the defender of the Commissioner's decision, as the Attorney General is often called upon to do as respondent, in the public interest. That is indeed what the Attorney General is called upon to do, from time to time, in the case of boards and commissions established under federal legislation, notwithstanding that the Crown is often a party litigant before the same board or commission.

32 As well, I take the point made by the Applicant that the evidence of the public pronouncements of the Prime Minister and the Ministers of the Crown, in addition to the conduct of the Attorney General in the recusal motion before the Commission bear out that the Attorney General will be vigorous in defending the Commissioner and in pursuing an appeal.

33 Indeed, it is hard to accept the Commissioner's comment that he does not know what the Attorney General will do or if an appeal will be pursued. The evidence is to the contrary. There is nothing half-hearted in the position taken by the Attorney General to date as to whether Justice Gomery should recuse himself.

34 More importantly, as the Applicant and the Attorney General point out, there is a *lis*, or dispute, between them on the issue of bias and the recusal of Justice Gomery. The Applicant and the Attorney General hold, and have maintained, diametrically opposing and adversarial positions on the issues.

35 It is for the litigant parties to debate the law. I fail to see how, in this debate, there can be yet another independent or essentially neutral presentation by the Commissioner as to the law of bias or as to the law governing the removal of the Commissioner.

36 The Commissioner's apprehended bias and whether he will be precluded from proceeding with his inquiry are precisely the matters at issue on the merits in this judicial review. It is difficult to conceive of any submission of law, by the Commissioner, on these issues that would not be self-interested or directed to the merits. The Commissioner's impartiality in my view is best protected by precluding his participation in the very subject area in controversy between Applicant and the Attorney General.

37 Finally, I am not persuaded that the Commissioner's submissions as to the applicable law, over and above those of the parties, can bring anything new or helpful to the Court's deliberation on the merits.

Whether the Commissioner may address his jurisdiction and the standard of review

38 The Commissioner wishes to address the jurisdiction of the Commission. Counsel for the Commissioner concedes that the reasonableness of his decision to recuse himself which may broadly be viewed as a jurisdictional issue, is not jurisdictional in the sense of that term in the case law.

39 Counsel on behalf of the Applicant takes the position that there is no jurisdictional issue for the Commissioner to address. The issue of the "reasonableness" of the decision which the Supreme Court stated in *Paccar*, *supra* note 4, that a board or tribunal with special expertise may address as an intervener, is not relevant here. If I understand his position correctly, he is referring to the jurisprudence which states that the standard of review analysis has no application to a procedural fairness question, as per Binnie J. in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (S.C.C.), at paragraph 100.

40 I agree that there is no basis here to grant leave for the Commissioner to speak to the broader jurisdictional issue or to the standard of review. That said, I am satisfied that that there may be a jurisdictional issue in respect of the recall of the Clerk of the Privy Council, that I have referred to above, and that the Commissioner should have leave to address the scope of the mandate of the Commission, and his jurisdiction and the procedural discretion of the Commission under the Commission Rules, including as to the calling of witnesses, and the admissibility of evidence.

Whether the Commissioner may appeal from an unfavorable decision by the Court

41 Ordinarily an intervener is not granted the right to pursue an appeal should the decision in the proceeding in which it is intervening be contrary to its interests. [9]

42 One of the considerations in determining whether interveners ought to be granted a right of appeal is whether there is an expectation that the respondent would have any vital interest or motivation to prosecute an appeal with the same vigor as the intervening parties would do. [10] Then,

the appeal is generally limited to the issues which the intervener was given leave to address below. All the more so in the case of a tribunal or board which ought not to be an advocate in its own cause on appeal, anymore than at first instance.

43 As I have said, all the evidence is to the effect that this application will be robustly defended, in the same manner that the Attorney General defended the recusal motion before the Commissioner. That said, it is in the public interest and the interests of justice that the matter be prosecuted to an eventual appeal, if necessary. I will accordingly grant the Commissioner leave to appeal from an unfavorable decision, in the event that the Attorney General will no do so. The appropriate scope of the Commissioner's role in the appeal will be left to be determined by the Court of Appeal.

Conclusion

44 I conclude that it will be in the public interest and will assist the Court in its deliberations on the merits of this judicial review for the Commissioner to be granted leave to address the scope and mandate of the Commission as set out in the Terms of Reference, and the jurisdiction and procedural discretion of the Commission in relation to the Commission Rules, the calling of witnesses and admissibility of evidence. In addition, the Commissioner will have leave to appeal in the event the Attorney General chooses not to, subject to the redetermination of the scope of its intervention by the Court of Appeal.

Application granted on terms.

Footnotes

1 *Ferroequus Railway Co. v. Canadian National Railway*, [2003] F.C.J. No. 1621 (F.C.A.) and *Canada (Attorney General) v. Sasvari*, [2004] F.C.J. No. 2006 (F.C.).

2 *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (Fed. C.A.) ("*CUPE*"); and *Mielke v. Canada (Attorney General)*, [2003] F.C.J. No. 1170 (F.C.).

3 *CUPE*, *supra*.

4 *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.) (*"Northwestern Utilities"*); and *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.), (*"Paccar"*).

5 *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).

6 *Northwestern Utilities*, *supra*; *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3 (Fed. C.A.); *Bell Canada v. C.T.E.A.*, [1997] F.C.J. No. 1783 (Fed. T.D.); and *Hoechst Marion Roussel Canada v. Canada (Attorney General)* (2001), [2002] 1 F.C. 76 (Fed. T.D.) (Proth.).

7 *Children's Lawyer*, *supra*

8 *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.).

9 *Edmonton Friends of the North Environmental Society v. Canada (Minister of Western Economic Diversification)* (1990), [1991] 1 F.C. 416 (Fed. C.A.).

10 *Mielke*, *supra*; and *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)* (1997), 72 C.P.R. (3d) 187 (Fed. T.D.).

2019 FC 434, 2019 CF 434
Federal Court

Girouard c. Canada (Procureur général)

2019 CarswellNat 1108, 2019 CarswellNat 1239,
2019 FC 434, 2019 CF 434, 304 A.C.W.S. (3d) 282

L'HONORABLE MICHEL GIROUARD (demandeur / intimé) et LE PROCUREUR GÉNÉRAL DU CANADA (défendeur / intimé) et LA PROCUREURE GÉNÉRALE DU QUÉBEC (mise en cause) et LE CONSEIL CANADIEN DE LA MAGISTRATURE (requérant)

Simon Noël J.

Judgment: April 9, 2019
Docket: T-409-18

Counsel: Me Gérald R. Tremblay (écrite), Me Louis Masson (écrite), Me Bénédicte Dupuis (écrite), pour le dmandeur, intimé
Me Claude Joyal (écrite), Me Pascale Guay (écrite), pour le défendeur, intimé, le procureur général du Canada
Me Jean-Yves Bernard (écrite), pour mise en cause, la procureure générale du Québec
Me Ronald Caza (écrite), Me Gabriel Poliquin (écrite), Me Alyssa Tomkins (écrite), pour le réquerant, le conseil canadien de la magistrature

***Simon Noël J.*:**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

1 Pursuant to rule 109 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), the Canadian Judicial Council ("CJC") seeks leave to intervene in the amended application for judicial review filed by the Honourable Michel Girouard (Justice Girouard). In this application, Justice Girouard asks this Court to set aside a report to the Minister of Justice dated February 20, 2018, recommending his removal from office, and other decisions taken in the course of the CJC's inquiry, as well as the decision of the Ministers of Justice of Canada and Quebec to file a complaint against him. An application for constitutional invalidity also accompanies the application. The CJC furthermore requests that said motion be decided on the basis of written representations submitted by the parties under rule 369(1) of the Rules.

2 The CJC seeks leave to intervene so that it can submit [TRANSLATION] "comments" and [TRANSLATION] "explanations" on the following topics:

1. The mission and functioning of the CJC;

2. The standards of review applicable to the CJC;

3. The procedure followed for inquiries conducted under section 63 of the *Judges Act*, RSC 1985, c J-1 ("*Judges Act*");

4. The terms relevant to the exercise of the CJC's power of recommendation under section 65 of the *Judges Act*;

5. The nature and composition of items in the record on which the CJC relied in recommending the removal of Justice Girouard;

6. The process that was followed by the CJC in producing its recommendations, which it wishes to explain to the Court.

3 To this end, the CJC plans to file an affidavit by its Executive Director and Senior General Counsel ("Mr. Sabourin"), written submissions of no more than twenty (20) pages, and oral submissions for a period of sixty (60) minutes. Mr. Sabourin's affidavit (for which no page limit was provided) would contain, among other things, [TRANSLATION] "evidence" on the following topics:

1. The processing of requests for inquiries made by the attorneys general;

2. The nature and composition of the record on which the CJC bases its recommendations to the Minister of Justice;

3. The practices relating to the translation of the elements contained in that record;

4. The principle of compartmentalization in general and, in particular, the composition of the Review Panel, the Inquiry Committee and the CJC in the case concerning the applicant;

5. The division of roles between the Inquiry Committee and the CJC;

6. The review process of the CJC: (a) the report by the Inquiry Committee and (b) the written submissions of the judge under investigation;

7. The means put in place to ensure the compliance of the inquiry and recommendation process with judicial independence, in both its personal and institutional dimensions;

8. The application of its *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees*.

4 The CJC states that it does not intend to make submissions on the reasonableness or correctness of its decisions or recommendations. With regard to the constitutional issues, the CJC states that it would limit its submissions to the impact of declarations of unconstitutionality on judicial independence and the administration of justice.

5 Through his counsel, Justice Girouard unequivocally objects to the motion to intervene and has filed a substantive record with supporting authorities. He submits that the motion as presented does not meet the criteria set out in the case law on this subject and that it is a disguised attempt by the CJC to present new evidence to compensate for deficiencies in decisions it has made that are the subject of judicial review. Justice Girouard submits that the Court, with the participation of the parties, will be able to make an informed decision in the context of the judicial review. He states that the intervention sought, if granted, will seriously call into question the required impartiality, since in addition to the Attorney General of Canada as respondent, the CJC will become a *de facto* respondent. He adds that if the motion to intervene is granted, this will unduly prolong the dispute. Accordingly, he asks that the motion be denied.

6 The CJC's response refutes the arguments put forward by Justice Girouard and states that the CJC is asking to intervene and not to be a party to the dispute. It adds that it has the necessary expertise to properly inform the Court and that it does not intend to submit new evidence on the merits of the case.

7 As for the Attorney General of Canada, consent is given by letter for the CJC to intervene, provided that the submissions and affidavit are filed by April 12, 2019, so as not to delay the proper advancement of the file, as well as the hearing scheduled for late May 2019. The third party, the Attorney General of Quebec, is of the same opinion.

I. Applicable law

Rule 109 of the *Federal Courts Rules*, SOR/98-106

Intervention

Leave to intervene

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

Contents of notice of motion

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

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

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

Directions

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

(a) the service of documents; and

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

Règle 109 des *Règles des Cours fédérales*, DORS/98-106

Interventions

Autorisation d'intervenir

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

Avis de requête

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

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

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

Directives de la Cour

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

a) la signification de documents;

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

8 Rule 109, which governs the intervention procedure, requires the party who requests it to explain how it intends to participate in the proceeding and how its participation will assist the determination of a factual or legal issue. This is done through an affidavit and submissions.

9 The CJC relies on various judgments to validate its motion, but in particular *Rothmans, Benson and Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74, [1990] 1 FC 90, [1989] FCA No 707 [*Rothmans, Benson and Hedges*], which lists six (6) factors to consider:

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

10 The Federal Court of Appeal, in *Sport Maska Inc v Bauer Hockey Corp,*, 2016 FCA 44 [*Sport Maska*], validated the *Rothmans, Benson and Hedges* factors, stating that they are not exhaustive and that they are subject to the discretion of the judge, who may ascribe the weight he or she wishes to any individual factor (see paragraph 41). In addition, Justice Nadon wrote the following on behalf of the Court:

> **[42]** The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. ...
>
> (See *Sport Maska Inc.* at para 42, emphasis added)

11 As the case manager, I am well acquainted with "the particular facts and circumstances of the case".

12 First, there is an important distinction between the facts of *Rothmans, Benson and Hedges* and *Sport Maska Inc* on the one hand and those of this case on the other. In the cases cited, the organizations seeking to intervene (the Canadian Cancer Society and Reebok-CJC Hockey,

respectively) each had a particular interest in the dispute that concerned them. This is not the case for the CJC, which is the author/decision-maker of the report and other decisions, and which recommended the removal from office of Justice Girouard, those decisions being the subject of the application for judicial review. Second, the amended application for judicial review includes many of the topics in respect of which the CJC wishes to intervene (see paragraphs 2-3 above). There is a dispute on the topics, and the CJC requests to submit evidence and make written submissions and oral arguments in respect of several of them. These particular circumstances and facts are specific to the application for judicial review of this case. The Court will comment further on this in the context of the analysis.

13 The Court must also consider and apply the teachings of the Supreme Court in *Ontario (Energy Board) v Ontario Power Generation Inc,*, [2015] 3 SCR 147 [*Ontario (Energy Board)*]. In fact, the Supreme Court recognizes that the trial judge has the discretion to determine the correctness of a motion to intervene when a decision-maker is the applicant. In such a case, the judge must exercise this discretion with "principled exercise" while striving to "balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality" (see paragraph 57).

14 There is no provision in the *Judges Act* that allows the CJC to participate in an appeal from its decisions. Therefore, the CJC requests this through a motion to intervene under rule 109 of the Rules, subject to a discretionary decision of the Court. According to *Ontario (Energy Board)*, in such a situation, the Court must consider three (3) factors:

1. Will the application for judicial review be opposed in the proceedings?

2. Or, do any of the other parties have the necessary knowledge and expertise to fully make and respond to arguments?

3. Is the CJC's role to adjudicate individual conflicts between two adversarial parties, or is it to serve a policy-making, regulatory or investigative role, or act on behalf of the public interest? (See paragraph 59.)

15 These factors must be assessed by the Court while also referring to the factors laid down in *Rothman, Benson and Hedges*.

16 In order to properly assess the particular facts and circumstances of the present case in light of the factors to take into consideration according to case law, the Court must have recourse to the motion for leave to intervene, the affidavit and the submissions. The record must reveal not only the objectives of the intervention, but also the content to be filed, in whole or at least in part, so that the judge can understand and circonscribe the content of the intervention, its scope and its limits.

17 Case law has dealt with what is normally required in a motion for leave to intervene so that the judge receives a complete record containing the relevant elements for decision making. A moving party must demonstrate "what it would bring to the debate over and beyond what was already available to the Court through the parties" (*Canada (Attorney General) v Canada (Professional Institute of the Public Service)*, 2010 FCA 217 at para 4). An affidavit to be filed must not supplement, "especially after a judicial review challenging his decision had been brought, ... the bases for decision set out in the decision letter"; and the applicant must not, through his affidavit, try to make an "after-the-fact attempt to bootstrap his decision, something that is not permitted" (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41).

18 In *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 151 [*Ishaq*] at paragraph 28, Justice Stratas listed the factors to consider when preparing a motion for leave to intervene:

> **[28]** To summarize, an applicant for intervention trying to establish that it will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter ideally should:
>
> 1. identify one or more specific controlling idea(s) on which the case will turn;
>
> 2. offer, with specificity, the submission(s) it will make on the controlling idea(s), showing why it will advance the Court's appreciation of the controlling idea(s);
>
> 3. ensure that its submission(s) will not need to go beyond the evidentiary record; merely saying so is not good enough;
>
> 4. distinguish its submission(s) from those of others already before the Court, e.g., on the ground that the submission(s) have not been made, or that its perspectives, experience or expertise — specifically identified — will cast a different light on the matter.
>
> (Emphasis added.)

The Court intends to keep these statements in mind when making its decision.

19 At this point, it is helpful to provide an overview of the major issues concerning the judicial review. The seventy-three (73) paragraphs of the CJC's report submitted to the Minister, which was signed by 23 chief justices, concludes as follows:

> **[73]** Having considered the Committee's Report and the Judge's submissions, as well as all information we deemed relevant to the issues (including the soundless video recording of 17 September 2010), we find that the Judge has been guilty of misconduct. The Judge's integrity has been fatally compromised, public confidence in the judiciary has been undermined and the Judge has become incapacitated or disabled from the due execution of his office of judge. For that reason, we recommend that the Judge be removed from office.

20 However, three (3) chief justices dissented and concluded as follows in the eighth paragraph of their dissent:

> We dissent from the views of the majority and can not recommend the removal of Justice Girouard from office. This is as a result of the denial of his right to a fair hearing; a denial founded on Council's failure to ensure that all participants in the decision-making process could understand and consider the complete record. In the absence of a fair hearing the majority opinion should not stand and these proceedings should be discontinued.

21 On this subject, the majority stated the following:

> **[69]** The dissenting members express the view that the Judge "was entitled to the informed views of all the members of Council tasked with deliberating on his future."
>
> **[70]** We agree with that statement but draw a different conclusion than that of the dissenting members. We are of the view that the Judge did in fact benefit from the informed, independent and thoughtful views of all members who deliberated in this matter and recommend that he be removed from office.
>
> **[71]** The dissenting members also express the view that "all members were entitled to consider the same information." In our respectful view, all members had available in both official languages the same relevant aspects of the proceedings before the Committee: either through the detailed summaries of the evidence contained in the Report and the Judge's written representations or through the excerpts from the transcript quoted in the Judge's submissions.
>
> **[72]** As the members who recommend the removal of the Judge, we are satisfied that we had access to all materials necessary to permit us to deliberate in this matter in a fully informed, independent and thoughtful manner.

22 The amended application for judicial review raises a number of questions of law and of fact that go to the heart of the conclusions of both the majority and the dissenting judges, including the constitutional issues regarding the statutory disciplinary process, and the jurisdiction of the CJC in this regard.

23 As stated above, the CJC's report is in fact the result of an inquiry into the conduct of a judge following a request for an inquiry by the Ministers of Justice of Canada and Quebec. The CJC found that the judge's behaviour was reprehensible and justified a recommendation to remove him from office. It thus took a position against the interests of the judge. Consequently, the CJC must not, through the motion to intervene, be seen as justifying its decision or attempting to supplement it by means of new evidence or justifying submissions. To do so would not be in the public interest and would taint the entire disciplinary process established by Parliament in the *Judges Act*.

24 In addition, it should be noted that the application for judicial review in the CJC's report also involves the Attorney General of Canada as respondent, whose mission is, among other things, to ensure that the Court will be presented with all the facts and law needed to make an informed decision. In this case, the Attorney General of Quebec is also involved as third party.

II. Analysis

25 For the purposes of the analysis, I intend to address the issues as follows: first, it is important to have an overview of the amended application for judicial review. Second, since as part of the assessment of a motion for leave to intervene, a judge must have a good understanding of what is submitted to him or her in order to make the appropriate decisions, I will study and analyze the affidavit of Mr. Sabourin in support of the motion. After all, it is on the basis of this evidence that I must make a decision. Once this is done, I will address the three (3) criteria developed by the Supreme Court in *Ontario (Energy Board)* to determine whether the intervention as requested meets those criteria. I will end the analysis by doing the same, but this time using the criteria from *Rothmans, Benson and Hedges*, for the purposes of rule 109 of the Rules, the objective being to make a determination as to the merits of the CJC's motion for leave to intervene. But before all that, I would like to comment on the moving party, the CJC.

26 I acknowledge at the outset that the CJC is a special body with a special purpose, and that it is a group composed of chief justices and associate chief justices and is chaired by the Chief Justice of Canada. This in itself gives the CJC a distinctive and notable status. The CJC, both collectively and through each of its members, has unique experience. When investigating the conduct of judges in response to a complaint, it has the confidence of those who are under investigation and the public. It also has an extraordinary knowledge and understanding of such matters. It certainly has a lot to communicate, but it is important that in doing so, it does not tarnish its impartiality, so essential to its statutory mission. That said, for the judge to accept its motion for leave to intervene, the CJC must demonstrate (1) what pertinent information it would have to communicate and (2) what benefit the Court would derive from this knowledge to make an informed decision. Merely saying so is not enough.

A. Application for judicial review

27 The amended application for judicial review is in itself unusual. It calls into question the report of the CJC, the decisions of the Inquiry Committee and the decision of the Ministers of Justice of Canada and Quebec dated June 14, 2016, requesting an inquiry into the conduct of Justice Girouard. In addition, there are several constitutional issues with respect to the inquiry process concerning judges established under the *Judges Act*, procedural fairness, and the language rights of the applicant. Finally, federal jurisdiction in this area is called into question, considering the provincial jurisdiction under subsection 92(14) of the *Constitution Act, 1867*.

28 This case has history. It has been in progress since 2015 and has been the subject of several interlocutory decisions; it has also required the parties' collaboration at all times. The fall of 2018 was devoted to preparing the CJC's record, and it fully participated in that. The record was eventually perfected, subject to an appeal filed by Justice Girouard which relates to one of the decisions. With respect to the amended application for judicial review, it was agreed to by the Attorney General of Canada on January 11, 2019, and was filed in the record on January 25, 2019. It was on February 12, 2019, by order, that the schedule was finalized with the consent of all parties. Justice Girouard then filed his application on March 8, 2019.

B. CJC's motion

29 O March 18, 2019, the CJC asked to intervene, although the issues of the amended application for judicial review had been known since January 2019. Given the objectives and scope of the intervention requested by the CJC and the hearing scheduled for late May 2019, it would have been very helpful for the Court had the motion for intervention been filed earlier. In addition, taking into account what is sought by intervening, it is feared that the schedule will be upset. Allow me to explain.

30 The affidavit of Mr. Sabourin in support of the motion for leave to intervene is indicative of what the affidavit to be filed would be if leave were granted.

31 Mr. Sabourin states that the CJC must be able to [TRANSLATION] "explain" to the Court [TRANSLATION] "the process that was followed by the CJC in arriving at its recommendations" and [TRANSLATION] "submit comments and explanations" to the Court on the topics listed in paragraph 2 of these reasons.

32 All of those topics relate to the amended application for judicial review and are all part of one or another of the issues raised. As stated in point 5, the CJC intends to submit comments and explanations on the nature and composition of Justice Girouard's record, even though the preparation of this record was the concern of the parties in the fall of 2018.

33 In addition, the CJC proposes to [TRANSLATION] "file evidence" with respect to eight (8) topics such as requests for investigation from the attorneys general, Justice Girouard's record which led to the recommendation to dismiss given to the Minister of Justice, the translation practices for Justice Girouard's record, the inquiry process, the CJC review process, etc. (see paragraph 5 of these reasons for the complete list).

34 If leave is granted, Mr. Sabourin proposes that the affidavit contain explanations and comments as well as new evidence on the vast majority of topics arising from the amended application for judicial review. Furthermore, the affidavit in support of the application for leave to intervene gives no example, insight, or statement as to what the explanations, comments and new

evidence for all those topics would be. This information was however required for Court to better understand and assess this application for leave. Such examples would have been useful because the Court has no indication as to the content of the explanations and comments to be submitted in evidence and no knowledge of the content of the new evidence to be filed. In the present situation, all that the Court knows is the objectives of and grounds for the motion for intervention. Nothing has been provided as to the content. It appears that the factors laid down by Justice Stratas in *Ishaq* at paragraph 25, in particular factors 2 and 3, have not been met. However, for three (3) specific topics, the affidavit explains the reason for the intervention with respect to them. The Court considers these three (3) topics to be exceptional, and they will be treated differently at the end.

35 For a better understanding of the matter, I have inserted below a table that illustrates the multitude of topics involved in the intervention, the means of intervening, and whether the information has been disclosed or not as regards the content of the proposed intervention.

Table 1

AFFIDAVIT	**MEANS**	**INTERVENTION TOPICS**	**CONTENT: DETAILS, EXAMPLES, ETC.**
Para 17	Submit explanations on:	1. The inquiry process followed to arrive at the recommendation.{*}	None
Para 18	Submit comments and explanations on the following topics:	2. The mission and functioning of the CJC.{**}	Explanations in paragraphs 7, 8 and 9
		3. The standard of review applicable to the CJC.	None
		4. The inquiry process under section 63 of the *Judges Act*.{**}	Explanations in paragraphs 11, 12, 13 and 14
		5. The relevant means of exercising its power of recommendation under section 65 of the J*udges Act*.{**}	None
		6. The nature and composition of Justice Girouard's record.{*} (see also 7)	None
Para 19	Intends to file evidence on:	7. The nature and composition of Justice Girouard's record.{*} (see also 6)	None
		8. Practices relating to the translation of Justice Girouard's record.{*} (see also 6)	None
		9. The principle of compartmentalization	None

in general and, in particular, the composition of the Review Panel, the Inquiry Committee and the CJC in the case of Justice Girouard{*} (see also 4)	
10. The division of roles between the Inquiry Committee and the CJC.{**} (see also 4)	None
11. The process by which the Council reviewed the report of the Inquiry Committee and the written submissions of the judge.{*} (see also 4 and 6)	None
12. The means put in place to ensure the compliance of the inquiry and recommendation process with judicial independence, both in general and in the case of Justice Girouard{*} (see also 6)	None
13. The processing of inquiries requested by the attorneys general.{**}	None
14. The application of the *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees*	Explanations in paragraphs 11, 12, 13 and 14

Notes: * 7 Topics of intervention in Justice Girouard's application for judicial review that are personal in nature.** 7 Topics of intervention in Justice Girouard's application for judicial review that are general in nature.

36 At the very end, the affidavit informs us that the CJC will work with the Attorney General of Canada to ensure that there is no duplication of their respective submissions. Although this commitment appears legitimate, it concerns me. What will they share and why? Is there a danger of duplication, that is, could the CJC assume a role that would normally fall to the Attorney General of Canada? Why is the Court not involved in such an undertaking? Given the current state of

affairs, I have no idea what they want to share or what subjects could be duplicated. As Justice Stratas wrote in describing the third factor, "merely saying so is not good enough" (*Ishaq* at para 28, points 3 and 4).

37 Before closing on this subject, I must note that Mr. Sabourin, on behalf of the CJC, specifies that he does not intend to make submissions on the reasonableness or correctness of the decisions or recommendations. With regard to constitutional questions, he states that the CJC would limit its submissions to the impact of declarations of unconstitutionality on judicial independence and the administration of justice. This statement is important for the purposes of the judicial review application, but it must also be placed in the context of the entire affidavit as written. I note that this commitment is limited to submissions and that nothing is said about the evidence to be filed or the impact it may have on the dispute itself. Again, merely saying so does not help the Court. He needs to build on his record to give the Court a better idea of the content of the intervention.

38 Taking into account the motion for leave to intervene, other comments are necessary:

1. The impression that arises from reading the motion record is that the CJC intends to intervene to explain, make representations and/or present evidence with respect to the overwhelming majority of the issues in the application for judicial review. Although it is stated that the CJC will not comment on or defend its decision, the extent of its involvement as an intervener as described suggests a strong possibility that the explanations, the comments and the filing of evidence will have a direct or indirect impact on the decisions under consideration in the application for judicial review;

2. The motion record as presented is limited to giving the reasons for the intervention and the topics to be covered by it, without giving any specific and informative indication of what those explanations, comments and new evidence will be. This does not satisfy me that the motion to intervene is justified, except with regard to three (3) subjects which will be discussed later. I would add that the CJC could have at least provided examples of those explanations, comments and evidence, which it did not do. A judge placed in such circumstances can hardly grant a motion for intervention without at least knowing in broad terms what will constitute the content of the intervention. In short, the judge cannot act blindly;

3. If the Court granted the intervention as presented, it would be possible for an objective person seeing such a result to think that the CJC is necessarily defending its report and its decisions and that the impartiality required in such circumstances would therefore be undermined;

4. In the context of an application for judicial review, when making the appropriate determinations, it is customary and traditional to take into account the decision as written and the decision-maker's record. By its motion for leave to intervene, as formulated, the CJC

could find itself in a privileged position where its role would rather be that of a party than an intervener, which in our judicial system is unacceptable;

5. Moreover, all these new elements could prejudice the application for judicial review and the rights of Justice Girouard, since the CJC would disclose facts, explanations and comments previously unknown to Justice Girouard and he would not be totally in a position to challenge these new elements, except through a reply, as such, he could not fully defend himself. A reply, as we know, has its limits;

6. Finally, if the Court granted the intervention as formulated, the explanations, comments and evidence presented could jeopardize the schedule set out in the order of February 12, 2019, as well as the hearing to be held at the end of May 2019.

C. The three (3) criteria of Ontario (Energy Board)

39 At this point, I will apply the criteria set out in *Ontario (Energy Board)*, taking into account the particularities of the CJC and its motion for leave to intervene.

(1) Will the application for judicial review be opposed in the proceedings?

40 A simple answer is yes. As recognized in judicial review applications, the Attorney General of Canada intervenes as a respondent. This case is no exception, and the Attorney General of Canada has been acting as respondent since 2015. It has participated in all the stages. As for the CJC, the Court has granted it party status only when the Court had to decide the question of the jurisdiction of federal courts raised by the CJC and the content of its record. There is no legislative provision in the *Judges Act* enabling the CJC to participate in the dispute. That is why it is filing its motion for leave to intervene under rule 109 of the Rules.

(2) Do any of the parties have the necessary knowledge and expertise to fully make and respond to arguments?

41 The Attorney General of Canada has the knowledge, skills and assets to respond to the amended application for judicial review. Indeed, he consented to the amended application, and at no time did he inform the Court that he did not have the competence or knowledge to assume his responsibilities. He consented to the motion for leave to intervene by letter, as long as the schedule is respected. I have already recognized that the CJC is a special institution and has its own knowledge. However, the issues in the application for judicial review require that they be determined in accordance with the applicable legislation and with the CJC's by-laws and handbook. The parties and the Court can deal with these issues in full knowledge of the facts. As formulated, the motion for leave to intervene does not change that fact.

(3) Is the CJC's function to adjudicate individual conflicts between two adversarial parties, or is it to serve a policy-making, regulatory or investigative role, or act on behalf of the public interest?

42 The role of the CJC can be summarized as follows for the purposes of this case: through the Inquiry Committee composed of certain members of the CJC, it conducts investigations in response to a complaint about a judge's conduct. It is an investigator, and subsequently the CJC as a whole studies the inquiry report and the evidence and then collectively decides whether to recommend that the judge be removed from office. It assumes a jurisdictional task during the inquiry process. It is its report and its decisions that are the subject of judicial review. Its participation upon judicial review must be circumscribed so as not to undermine its impartiality. As formulated, the motion for leave to intervene, if granted, could even give the impression that the CJC is acting as a party to the dispute, which is not in the interests of justice.

43 In *Ontario (Energy Board)*, the Supreme Court wanted the judge to be satisfied with two (2) aspects. It must first ensure that the Court tasked with deciding the dispute is fully able to make an informed decision and, secondly, that the administrative tribunal/decision-maker is completely impartial. I have no information or indication that the Attorney General of Canada does not have the knowledge and jurisdiction to deal with all the issues raised by the application for judicial review. On the contrary, so far, the Attorney General of Canada has fully assumed his role of respondent. As for the impartiality of the CJC, its role as investigator and decision-maker with regard to the report and the decisions taken requires that its impartiality be preserved. The intervention sought raises a serious probability that the role to be assumed would taint this valiant impartiality.

D. The six (6) factors of Rothman, Benson and Hedges

44 I will now review the assessment factors developed in *Rothman, Benson and Hedges* to determine the motion for leave to intervene as formulated and filed under rule 109 of the Rules, taking into account the circumstances and facts of this case. Some of these answers will repeat in part the ones given to the criteria above and even when providing answers to the factors given below.

(1) Is the proposed intervener directly affected by the outcome?

45 Given that the application for judicial review concerns the CJC's report and its decisions, it goes without saying that the CJC may be directly affected by the outcome of the dispute, as the applicant raises several issues which, if they are validated, will have consequences for the CJC.

(2) Does there exist a justiciable issue and a veritable public interest?

46 The issues are all within the jurisdiction of the Court. It has full jurisdiction to determine the constitutionality and fairness of the inquiry process and the procedures and practices established under the *Judges Act* and its regulations. The Court also has the necessary tools to deal with these matters, and it will also have the benefit of the submissions of the respondent Attorney General of Canada and the third party. I would add that the specific role of the CJC in investigating the

conduct of judges does not make it an exceptional body to the point that on this aspect alone the motion for intervention should be granted according to the desired parameters. There are several bodies that have a specialized vocation and are subject to the Court's supervision, and their interventions are not granted as of right. The question of the translation of the evidence (the subject of dissent) is not a new one for the Court. The principles and laws in this area are a matter of judicial notice. Moreover, both the majority and dissent address this issue in the CJC report. As for the constitutional questions, the Court is familiar with such questions and is called upon to make appropriate determinations in many cases. There is a public interest to preserve: that of ensuring that the dispute will be judicially determined, with full objectivity. Consequently, it would be inappropriate for a decision-maker to play such an important role as the one sought by the motion for leave to intervene.

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

47 The CJC, as a decision-maker subject to an application for judicial review, wrote a report concluding by a majority that Justice Girouard should be removed from office. It explained in its decision the reasons for its conclusion. Reasons are also given for the decisions of the Inquiry Committee, and those decisions are subject to an application for judicial review. In its motion to be allowed to intervene as formulated, the CJC submits that it intends to explain and submit comments and evidence, in addition to the report and the decisions already rendered, as well as its position with respect to the dissent. In principle, in the context of an application for judicial review, it is not permitted to add to the decision under review, except with leave of the Court in certain circumstances. In addition, the Attorney General of Canada will act as respondent and will make appropriate representations. The dispute can therefore be validly submitted.

(4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

48 As already mentioned, the Attorney General of Canada has consented to the motion to be authorized to intervene, by means of a letter in which he consents, as long as the CJC files its intervention file by April 12, 2019, and the schedule provided for by the order of February 12, 2019 is not called into question. I have no indication from the Attorney General of Canada that he is not in a position to assume his role as respondent in this case. I would add that, as a case manager, I am familiar with the Court record, the issues raised, the CJC's record and the applicable laws and regulations in this area, and it seems to me that the tools are there to ensure that each party can fully assume its role, so that the Court can make an informed decision.

(5) Are the interests of justice better served by the intervention of the proposed third party?

49 The Court could not grant the intervention as formulated, except for the three (3) topics discussed below, because without having any indication as to the content sought, it could be that such an intervention would prejudice the rights of the Justice Girouard by adding new unknowns,

which would likely create a litigation within a litigation and jeopardize the schedule. Given the current state of the case, it is not in the interests of justice that leave to intervene be granted, except for the three (3) topics discussed further on.

(6) Can the Court hear and decide the cause on its merits without the proposed intervener?

50 I have already stated that I believe that the Court, with the parties, could make an informed decision. They have the tools to contribute to the judicial process, in the interests of justice. Given how the amended application for judicial review is proceeding, and following the order of February 12, 2019 (subject to the reasons hereinafter), setting the schedule with the agreement of the parties, I have no reason to believe that the case cannot be heard and decided. The parties have not expressed any fears in this regard.

51 Had the record for this motion for leave to intervene not been limited to only giving the reasons, means and topics of intervention, and had it contained information for each intervention topic as to the content of the intervention for each of them, the Court would have been in a much better position to assess the reason for the intervention, its relevance and the impact it would have on the judicial review case. All that the Court currently has is a statement from the CJC that it does not intend to make submissions about the reasonableness or correctness of the decisions and the recommendation decision. In addition, the affidavit states that the CJC intends to present comments and explanations on five (5) subjects of the application for judicial review, in addition to seeking to file new evidence on eight (8) other topics, many of which deal with Justice Girouard's record. No content is offered to the Court to enable it to assume its judicial role and exercise its discretion. The Court obviously cannot delegate its role to the CJC. Under such circumstances, the undersigned cannot grant the application for intervention as formulated.

52 Could the motion as formulated be granted in part? For eleven (11) topics of intervention, I have absolutely no indication as to the content that is intended to be submitted. For three (3) of these topics of intervention, they will be discussed below.

53 As an exception to the above statements and conclusions, there are three (3) topics that will be treated differently: the mission and functioning of the CJC, the procedure followed for inquiries carried out under section 63 of the *Judges Act*, and the application of the *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees*. Allow me to explain: Mr. Sabourin's affidavit states in paragraphs 11, 12, 13 and 14 that the CJC [TRANSLATION] "independently governs the procedure for the inquiries referred to in section 63 of the *Judges Act*, and said By-laws were not approved by the Governor-in-Council" and explains its intended role and the subjects covered by the By-laws (see paragraphs 11 and 13). He added in paragraph 12 that [TRANSLATION] "the Council independently establishes its rules and procedures". The same is true for the first topic: the mission and functioning of the CJC (see paragraphs 7, 8 and 9).

54 In *Sport Maska* (see paragraph 42), Justice Nadon invites the judge in charge of the motion for leave to intervene to be "flexible" when assessing the interests of justice at stake. Moreover, Justice Stratas in *Ishaq*, while asking us to properly analyze the motion to see and understand the reason for granting the motion, also suggests doing so with an overall view of the record. In this respect, the explanations given in paragraphs 7, 8, 9, 11, 12, 13 and 14 allow me to understand the relevance of dealing with the topics through an intervention so as to reassure me that this will be useful for making a decision on the case. I may use my discretion and be flexible about it, knowing full well that for all the other topics, the evidence disclosed did not allow it. I am aware that for these three (3) topics there is no disclosure of what will be filed, but there is at least one factual explanation given that allows me to better understand what will be discussed. In addition, the following conditions will help to ascertain the content.

55 I would also add that in taking into account the conditions that I will associate with the three (3) topics, the rights of Justice Girouard and the attorneys general should not be affected.

56 Therefore, I will allow the intervention on these three (3) topics: the mission and functioning of the CJC, the procedure followed in the inquiry under section 63 of the *Judges Act*, and the application of the *By-laws* and *Handbook of Practice and Procedure of CJC Inquiry Committees*, with the following conditions:

1. The affidavit to be submitted will be limited to a maximum of ten (10) pages and will deal with general topics and at no time with the case of Justice Girouard;

2. Written submissions will have only a maximum of fifteen (15) pages and will deal with general topics and at no time with the case of Justice Girouard;

3. The intervention is permitted to allow the CJC to share its legal knowledge on the three (3) topics, solely for the purpose of explaining to the parties and the Court the legislative and regulatory framework as implemented by the CJC. If it intends to deal with the practices of the CJC on these topics, it can do so with circumspection, reserve and wisdom, knowing full well that it must not touch on the case of Justice Girouard;

4. The oral submissions of the CJC will not exceed 40 minutes;

5. For the purposes of this intervention, it is not necessary for the CJC to consult the Attorney General of Canada;

6. The attorneys general will be able to take note of this intervention and comment as needed. The schedule will be amended for this purpose;

7. As for Justice Girouard, he will be able to address the content of the intervention in his reply and, as mentioned above, the schedule will be amended accordingly.

57 I believe that the conditions for the intervention respect the rights of all the parties. The intervention is authorized, taking into account the evidence submitted, although limited, because in my opinion, it is in the interests of justice.

58 In closing, taking into account the record as submitted and exercising my discretion, as well as the flexibility that the case law suggests in such situations, I dismiss in large part the motion for leave to intervene from the CJC and only allow it for the three (3) topics mentioned and with the conditions specified above. I am confident that in doing so, the Court and the parties will have all the information required to fully assume their roles and that there will be an informed decision at a later date. In addition, taking into account the intervention permitted with conditions, the impartiality of the CJC is ensured, in the interests of justice.

ORDER

FOR ALL THESE REASONS, THIS COURT ORDERS AS FOLLOWS:

1. The motion of the Canadian Judicial Council for leave to intervene in the application for judicial review by the Honourable Justice Michel Girouard is granted in part.

2. The CJC will be permitted to intervene only on the following topics:

   a) The mission and functioning of the CJC and the inquiry procedure under section 63 of the *Judges Act* including the application of the *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees*;

   b) The affidavit will be no more than ten (10) pages long and will deal with general topics and at no time with the case of Justice Girouard;

   c) Written submissions will only have a maximum of fifteen (15) pages and will deal with general topics and at no time with the case of Justice Girouard;

   d) Oral submissions will not exceed forty (40) minutes.

3. The schedule is amended as follows:

   a) The CJC's intervention record will be served and filed no later than April 16, 2019;

   b) The Attorney General of Canada's record will be served and filed no later than April 30, 2019;

   c) The Attorney General of Quebec's record will be served and filed no later than May 8, 2019;

d) The applicant's reply record, if any, will be served and filed no later than May 15, 2019;

e) The hearing will take place on May 22, 23 and 24, 2019, at 9:30 am, at the Federal Court, at 30 McGill Street, in the city of Montréal, in the province of Quebec.

4. Without costs.

2020 FCA 198
Federal Court of Appeal

Gordillo v. Canada (Attorney General)

2020 CarswellNat 6048, 2020 FCA 198, 329 A.C.W.S. (3d) 233

MIRNA MONTEJO GORDILLO, JOSÉ LUIS ABARCA MONTEJO, JOSÉ MARIANO ABARCA MONTEJO, DORA MABELY ABARCA MONTEJO, BERTHA JOHANA ABARCA MONTEJO, FUNDACIÓN AMBIENTAL MARIANO ABARCA (MARIANO ABARCA ENVIRONMENTAL FOUNDATION OR FAMA), OTROS MUNDOS, A.C., CHIAPAS, EL CENTRO DE DERECHO HUMANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE CHIAPAS (THE HUMAN RIGHTS CENTRE OF THE FACULTY OF LAW AT THE AUTONOMOUS UNIVERSITY OF CHIAPAS), LA RED MEXICANA DE AFECTADOS POR LA MINERÍA (MEXICAN NETWORK OF MINING AFFECTED PEOPLE OR REMA) and MININGWATCH CANADA (Appellants) and ATTORNEY GENERAL OF CANADA (Respondent) and AMNESTY INTERNATIONAL CANADA and CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND THE INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC and the CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY (Interveners)

Donald J. Rennie J.A.

Judgment: November 16, 2020
Docket: A-290-19

Counsel: Yavar Hameed, Nicholas Pope, for Appellants
Korinda McLaine, Sarah Jiwan, for Respondent
Daniel Sheppard, Louis Century, for Intervener, Amnesty International Canada
Jennifer Klinck, Joshua Sealy-Harrington, Penelope Simons, for Interveners, Canadian Lawyers, for International Human Rights and the International Justice and Human Rights Clinic
David Yazbeck, Michael Fisher, for Intervener, Centre, for Free Expression at Ryerson University

***Donald J. Rennie J.A.*:**

1 The Canadian Lawyers for International Human Rights and The International Justice and Human Rights Clinic (CLIHR/IJHRC), Amnesty International Canada, and the Centre for Free Expression at Ryerson University (CFE) seek leave to intervene in an appeal to this Court from a decision of the Federal Court (2019 FC 950, *per* Boswell J.). In that decision, the Federal Court dismissed a judicial review application of the refusal of the Public Sector Integrity Commissioner to investigate allegations that officials in the Canadian Embassy in Mexico City failed to follow Government of Canada policies applicable to the protection of human rights advocates and failed to report an act of corruption in a timely manner. The Commissioner found that these were not "wrongdoings" under subsection 33(1) and paragraphs 8(*d*) and (*e*) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (Disclosure Act.)

2 By way of context, in 2007, a Canadian mining company, Blackfire Exploration Ltd. (Blackfire), opened a barite mine in Chiapas, Mexico. The mine met with local opposition, manifesting in demonstrations in front of the Canadian Embassy in Mexico City and a blockade of one of the transportation routes to the mine. In 2009, the leader of the opposition movement, Mr. Abarca, was arrested and held without charges for eight days. The appellants assert that in 2009, shortly following a complaint to the police by Mr. Abarca that two employees of Blackfire had made death threats to him, Mr. Abarca was murdered.

3 At issue before the Commissioner was whether the Embassy's actions or inactions in assisting Blackfire navigate the political and social opposition to the mine and in liaising between Blackfire and the local, state and national governments in respect of regulatory requirements, conformed to Government of Canada policies in relation to adherence to customary international law and Canada's stated policy to advance and protect human rights. It was the position of the appellants these actions or inactions contributed to the danger faced by Mr. Abarca. The second allegation concerned whether the Embassy reported an act of corruption in a timely manner.

4 The respondent Attorney General "consents" to the leave to intervene motions of the CLIHR/IJHRC and Amnesty International and opposes the motion by the CFE, arguing that it has not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The position of the Attorney General requires comment.

5 A party cannot "consent" to a motion for leave to intervene: it can support, oppose or it can take no position. Parties can only "consent" to procedural matters such as a delay in completing a procedural step that would work to its advantage. A delay in filing a defence to which it would otherwise be entitled under the Rules is an example.

6 The question whether an intervention should be allowed is substantive and the consent of a party is irrelevant. At best, it is an acknowledgement on the part of the party that there is no issue of prejudice from its perspective. But that is only one consideration among many. The Court must be satisfied that the intervention is in the overall best interests of justice. If the Attorney

General is of the view that the motions ought to be granted, he should say so, and explain, albeit in a summary way, why that is so.

7 In a motion under Rule 109(2)(b), a party is to explain how it wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. The court then assesses and weighs these submissions against the factors as articulated in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, 103 N.R. 391 (Fed. C.A.) at para. 3 (*Rothmans, Benson & Hedges Inc.*). As noted by this Court in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 (F.C.A.) at para. 37 (*Sport Maska Inc.*), these factors are flexible and "well tailored for the task at hand" (*Sport Maska Inc.* at para. 42).

8 The relevant factors can include whether:

1) the proposed intervener is directly affected by the outcome;

2) there is a justiciable issue and a veritable public interest;

3) there are other reasonable or efficient means to submit the question to the Court;

4) the position of the proposed intervener is adequately defended by one of the parties to the case;

5) the interests of justice are better served by the intervention of the proposed third party; and

6) the Court can hear and decide the cause on its merits without the proposed intervener (*Rothmans, Benson & Hedges Inc.* at para. 12).

9 Not all factors need be present and some may weigh more heavily than others. There may also be new considerations, unique to a particular case, which are pertinent (see, *e.g.*, *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 (F.C.A.) at paras. 5-6 (*Prophet River First Nation*)). For this reason, the criteria are not prescriptive. Criteria identified as pertinent in one case should not be viewed as pre-requisites in another. As noted by Nadon J. in *Sport Maska Inc.*, "flexibility is the operative word" (at para. 42). The over-arching test is whether the Court will be better served in its consideration of the issues with which it has to grapple by the presence of the intervener.

10 A comment is required on the sixth criteria in *Rothmans*. It asks whether the court can determine the matter without the presence of the interveners. This factor is of doubtful utility and is, if scrutinized, unsound. If the answer is negative, that the matter cannot be heard without the presence of the interveners, there may well be an underlying problem in the proceeding itself. It may be moot, for example. An affirmative answer, on the other hand, that the matter can be heard without the interveners, does nothing to advance the analysis. It simply tells you that there

is a properly constituted *lis* between the parties. The question is not whether the presence of the intervener is necessary to the proceeding, rather, the question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter (*Sport Maska Inc*. at para. 40).

11 Turning to the *Rothmans* factors, none of the parties here are "directly affected" in that they have the same level of "direct interest" an entity or person with full party status would typically have (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2013 FCA 236 (F.C.A.) at paras. 19-20; *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, [2015] 2 F.C.R. 253 (F.C.A.) at para. 9). That is not a barrier, however; indeed if they did have that degree of interest they would likely be a party. Courts have long granted parties in public interest litigation intervener status in the absence of a direct interest. Instead, the court looks for a genuine interest on the part of the intervener in the proceeding.

12 In asserting a genuine interest, there must be a link between the issue to be decided and the mandate and objectives of the party seeking to intervene. The source of the genuine interest must be identified and it should be clear from the submissions what animates the intervention. Sometimes, a genuine interest is established through the expertise or experience the intervener brings to the issue. Sometimes it is established through the unique perspective it has on the issues. However, in asserting a genuine interest, an intervener must demonstrate more than a "jurisprudential" motivation (*Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 257 (F.C.A.) at paras. 6-7; *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233 (Fed. C.A.) at paras. 11-12). An interest in the legal question alone is insufficient.

13 Here, the proposed interveners have, through their supporting affidavits, established a historical record of engagement in different facets of the legal issues before the Court. The CLIHR/IJHRC and Amnesty outline their mandates as non-governmental institutions working on international human rights issues, and explain how the issues in this case bear on their work. The CFE also describes, in its materials, its extensive engagement with the issue of public disclosure by government institutions, and its participation in other court cases in the interpretation of the Disclosure Act.

14 As noted in *Sport Maska Inc.*, the critical question is whether the intervener will bring further, different and valuable perspectives to the Court that will assist it in determining the matter.

15 This assistance can take many forms (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 (F.C.A.) at para. 49 (*Tsleil-Waututh Nation*)). It may address the broader social or economic context within which a particular case is situated. It may address the policy implications of a decision — the ramifications of a decision which are not apparent on the face of the record, or which have not been identified by the parties. These factors may bear on the purpose of the legislation, and inform the exercise of statutory interpretation.

16 In this case, the interveners' submissions draw on their understanding of international law, both customary and treaty, and its role in the interpretation of domestic legislation. The focus of the CFE is different — its interest is in the substance of the Disclosure Act and its scope. In its supporting affidavit, the CFE describes initiatives it has undertaken in Canada with respect to the protection of public servants who make disclosures, including the publication of a ten year review of how the Disclosure Act has been implemented and interpreted. More specifically, it proposes to make submissions on the interpretation of sections 8 and 33 of the Disclosure Act.

17 A proposed intervener's motion will be dismissed if their submissions substantially duplicate those already made by the parties or is not sufficiently distinct (*Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at paras. 16-17). This is not the case here. The interveners have all filed, as part of their motion records, draft outlines of the arguments that they propose to make. Both Amnesty International and the CLIHR/IJHRC propose to present arguments on the impact of international law on both the statutory interpretations and administrative law principles at the heart of this proceeding. These arguments are not addressed in the memorandum of the parties or in the decision of the Federal Court but may assist this Court in deciding the matter. I am also satisfied, on reviewing the submissions of the CFE and the reasons of the Federal Court, that the legal analysis it proposes is unique and is not replicated in the submissions filed by the principal parties.

18 As noted, the controlling consideration is whether the interests of justice are better served by allowing the intervention. It is under this factor that the Court can address "the particular facts and circumstances of the case in respect of which intervention is sought" (*Sport Maska Inc*. at paras. 39 and 42). The relevant considerations can be both substantive and procedural. They are not exhaustive and will vary from case to case. They can include whether the moving party intends to work within the current proceedings, whether they intend to add anything to the evidentiary record (*Tsleil-Waututh Nation* at para. 49), whether they were involved in earlier proceedings, whether the issues before the Court have a public dimension which can be illuminated by the perspectives offered by the interveners, whether any terms should be attached to the intervention (*Prophet River First Nation* at para. 6), whether the intervention was timely or whether it will delay the hearing and prejudice the parties.

19 In this instance, there are no specific facts that would weigh against either Amnesty International, the CLIHR/IJHRC or the CFE. They have not delayed in bringing their motions, they have outlined the nature of their representations and have restricted themselves to the evidentiary record already before the court.

20 The Attorney General advances three main objections to the intervention of the CFE. I do not find these compelling.

21 The first is that the appeal does not raise any new legal issues and can be disposed of based on settled precedent. This assumes, of course, there is nothing unique in the facts of this case that would distinguish its consideration from prior cases. Without prejudging what this Court may decide with respect to the merits after hearing the appeal, it is sufficient to note that assumption is not made out in the argument on this motion.

22 The second objection is that the CFE's argument is simply a challenge to the reasonableness of the Commissioner's decision. On reading the CFE's proposed submissions, I do not agree that this is a proper characterization, particularly in light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.). The thrust of the CFE submissions is on the correct legal test, and the scope of legal or policy obligations that inform the interpretation of sections 8 and 33 of the Disclosure Act.

23 The third objection is that the CFE's interest is purely jurisprudential. While I agree with counsel that the focus of the CFE's submission is on the nature of the legal tests, it is nonetheless a genuine interest because of the link between the CFE's mandate and expertise and the issue. The requirement that a party demonstrate more than a purely jurisprudential interest serves as a gatekeeper — it excludes busybodies. It is not meant to exclude those with a genuine interest in the legal framework within which it may operate, whether a non-governmental organization or corporation.

24 On balance I am satisfied that the proposed interveners have demonstrated through their submissions that they have a genuine interest in the matter before this Court, that their proposed submissions are not duplicated by either party and that it would be in the interests of justice to grant them intervener status. That said, I am also satisfied, having regard to the slight overlap in some of the arguments, and complexity and novelty of others, that some adjustment in the amount of time for oral argument allotted to the interveners is warranted. This is reflected in the allocation of time in the order.

25 I make one final observation. There is a distinction to be made between public interest issues determined on the basis of the application of settled jurisprudence, established doctrine and cases where, as described by Stratas JA in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 (F.C.A.), "interveners advance too much policy talk, untethered to the facts and legal doctrine," and cautions that this may seep into the Court's consideration of legal issues.

26 This is not the case before me. Here, while the interventions arise in the context of a broader policy question of Canada's role in relation to the advancement of human rights abroad, the interventions do not seek to engage the court in the merits of that discussion. All focus on the proper interpretation of a statute. All draw on authoritative legal sources of international law. All the arguments pivot on questions of legal doctrine. Unlike *Kattenburg*, they do not directly bring geo-political considerations to the table.

27 The motions for leave to intervene by the Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic (a single intervention), Amnesty International Canada and the Centre for Free Expression are granted without costs. The title of the proceeding shall be modified to include these parties as interveners. The leave to intervene is granted on the following terms:

1) The interveners are required to accept the record as adduced by the parties and shall not be entitled to file any additional evidence.

2) The interveners Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic are entitled to file a memorandum of fact and law not exceeding 20 pages.

3) The interveners Amnesty International and the Centre for Free Expression are each entitled to file a memorandum of fact and law not exceeding 15 pages.

4) The interveners' memoranda of fact and law are to be filed on or before December 4, 2020.

5) The reply of the Attorney General is limited to 10 pages per intervention, to be filed on or before December 15, 2020.

6) The interveners Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic are allowed to make oral submissions to the Court, not exceeding 20 minutes.

7) The interveners Amnesty International and the Centre for Free Expression are allowed to make oral submissions to the Court, not exceeding 10 minutes each.

Motions granted.

2017 SCC 20, 2017 CSC 20
Supreme Court of Canada

Green v. Law Society of Manitoba

2017 CarswellMan 136, 2017 CarswellMan 137, 2017 SCC 20, 2017 CSC 20, [2017] 1 S.C.R. 360, [2017] 5 W.W.R. 1, 18 Admin. L.R. (6th) 107, 276 A.C.W.S. (3d) 728, 407 D.L.R. (4th) 573, 6 C.P.C. (8th) 225

Sidney Green (Appellant) and The Law Society of Manitoba (Respondent) and Federation of Law Societies of Canada (Intervener)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: November 9, 2016
Judgment: March 30, 2017
Docket: 36583

Proceedings: affirming *Green v. Law Society of Manitoba* (2015), [2015] 10 W.W.R. 239, 386 D.L.R. (4th) 511, 75 C.P.C. (7th) 73, 638 W.A.C. 189, 319 Man. R. (2d) 189, 2015 CarswellMan 332, 2015 MBCA 67, Christopher J. Mainella J.A., Diana M. Cameron J.A., Marc M. Monnin J.A. (Man. C.A.); affirming *Green v. Law Society of Manitoba* (2014), 66 C.P.C. (7th) 430, 313 Man. R. (2d) 19, [2015] 5 W.W.R. 769, 2014 CarswellMan 760, 2014 MBQB 249, Rempel J. (Man. Q.B.)

Counsel: Charles R. Huband, Kevin T. Williams, for Appellant
Rocky Kravetsky, Jeffrey W. Beedell, for Respondent
Neil Finkelstein, Brandon Kain, for Intervener

Wagner J. **(McLachlin C.J.C. and Moldaver, Karakatsanis and Gascon JJ. concurring):**

I. Introduction

1 A lawyer's professional education is a lifelong process. Legislation is amended, the common law evolves, and practice standards change as a result of technological advances and other developments. Lawyers must be vigilant in order to update their knowledge, strengthen their skills, and ensure that they adhere to accepted ethical and professional standards in their practices.

2 This appeal concerns a basic component of a lawyer's education: continuing professional development ("CPD"). At issue is whether The Law Society of Manitoba ("Law Society") can

impose rules that couple a mandatory CPD program with a possible suspension for failing to meet the program's requirements.

3 I agree with the courts below that the Law Society has the authority to do so. The Law Society is required by statute to protect members of the public who seek to obtain legal services by establishing and enforcing educational standards for practising lawyers. CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism. CPD programs have in fact become an essential aspect of professional education in Canada. Most law societies across the country have implemented compulsory CPD programs.

4 But educational standards can ensure consistency of legal service only if lawyers adhere to them. If a lawyer fails to complete the required hours of training ("CPD hours") even after having been warned, temporarily suspending him or her until those hours are completed is a reasonable way to ensure compliance. This suspension is administrative, not punitive, in nature.

5 The appeal should be dismissed. The impugned rules with respect to CPD are reasonable in light of the importance of CPD programs and the Law Society's broad rule-making authority over the maintenance of educational standards.

II. Facts

6 The appellant, Mr. Sidney Green, was called to the Bar of Manitoba in 1955. He has been a practising lawyer and member of the Law Society for over 60 years. Mr. Green has served as a bencher of the Law Society [1] and has also participated and lectured in many CPD activities. He has no discipline record and does not face any disciplinary charges.

7 In this case, Mr. Green is challenging the provisions of the Rules of the Law Society of Manitoba (“Rules”) that make its CPD program mandatory. Manitoba's program has not always been mandatory. In 2007, as a first step, the benchers approved rules requiring that all lawyers report their CPD hours. The Law Society collected and studied the CPD hours reported by its members over a two-year period. Many members had reported completing no CPD activities or less than one hour of such activities per month. Subsequently, the Law Society's Admissions and Education Committee ("Committee") recommended that the benchers move to a mandatory CPD program. At about the same time, the Chief Executive Officer ("CEO") of the Law Society wrote a memorandum to the benchers in which he indicated that voluntary CPD was not working.

8 From late March 2010 to May 2011, the benchers considered making the CPD program mandatory, consulting the members on that subject. Over that period, the benchers and the Committee each met several times and received a variety of comments and other input. Mr. Green made no submissions to the benchers on the proposed CPD requirements even though the Law Society had invited its members to do so.

9 The benchers subsequently approved mandatory CPD and amended the Rules to require all practising lawyers to complete CPD hours (one hour per month of practice for a total of 12 hours a year). Failing to comply with this requirement may lead to the suspension of a lawyer's licence to practise. The Rules specifically provide:

> **2-81.1(8)** Commencing January 1, 2012, and subject to subsection (10), a practising lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practising status ....
>
> . . . . .
>
> **2-81.1(12)** Where a practising lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid.
>
> **2-81.1(13)** Where a member is suspended more than once for failing to comply with subsection (8), the chief executive officer may also refer the matter to the complaints investigation committee for its consideration.

10 Despite these mandatory rules, Mr. Green did not report any CPD activities for 2012 or 2013. On May 30, 2014, over a year after Mr. Green had first failed to report the completion of any CPD hours, the CEO of the Law Society sent Mr. Green a letter notifying him that if he did not comply with the Rules within 60 days, he would be suspended from practising law. The CEO also invited Mr. Green to correct any errors in his self-reported CPD record and informed him that it was possible for the 60 days he had to complete his hours to be extended.

11 Mr. Green did not reply to the letter, nor did he apply for judicial review of the decision to suspend him. Rather, he applied for declaratory relief on June 25, 2014, challenging the validity of certain provisions of the Rules with respect to CPD ("impugned rules"). Although the Law Society subsequently suspended Mr. Green's practising certificate effective July 30, 2014, it has agreed not to enforce the suspension until after the litigation has been resolved.

III. Decisions Below

A. Manitoba Court of Queen's Bench, 2014 MBQB 249313 Man. R. (2d) 19 (Man. Q.B.)

12 The application judge dismissed Mr. Green's application, concluding that the impugned rules fall squarely within the Law Society's legislative mandate under *The* Legal Profession Act, C.C.S.M., c. L107 (“Act”). The Law Society is required to "establish standards for the education, professional responsibility and competence" of lawyers (s. 3(2)). As a result, the impugned rules

are consistent with the Law Society's broad power under s. 4(5) of the Act to make rules it deems advisable in order to pursue its statutory purpose and uphold the public interest.

13 The application judge also dismissed arguments raised by Mr. Green with respect to natural justice and procedural fairness.

B. Manitoba Court of Appeal, 2015 MBCA 67319 Man. R. (2d) 189 (Man. C.A.)

14 The Court of Appeal dismissed the appeal for reasons similar to those of the application judge. It noted that the Law Society's constituent Act is a public interest statute designed to protect members of the public who seek to obtain legal services and concluded that the Law Society's rule-making power must be given a broad and liberal interpretation in order to achieve that objective.

15 Mr. Green conceded in the Court of Appeal that the Law Society has the power to make rules to set up a CPD program. The court held that the Law Society also has the power to make such a program mandatory and to establish consequences under s. 65 of the Act for failing to comply with the program.

16 Further, the Court of Appeal found that the suspension of a lawyer for failing to complete his or her CPD hours is an administrative decision that does not require implementation of the more extensive procedures that apply where a lawyer has been charged with professional misconduct or incompetence (as set out in s. 72 of the Act).

IV. Issues

17 This case raises two questions: (1) What standard of review applies to a question regarding the validity of rules made by a law society? (2) Having regard to the appropriate standard of review, are the impugned rules valid in light of the Law Society's mandate under the Act?

V. Analysis

18 Mr. Green has challenged the impugned rules because he has no interest in complying with them. Since these rules came into force in 2012, Mr. Green has not reported completing any CPD hours. He argues that the impugned rules are unfair because they impose a suspension without a right to a hearing or a right of appeal. Yet Mr. Green has not applied for judicial review of the Law Society's decision to suspend him. He has not complained that the Law Society treated him unfairly. Mr. Green is challenging these rules on these procedural grounds, not for fear of injustice. He is simply not interested in attending a mandated number of CPD activities.

19 Despite these motivations for Mr. Green's challenge to the impugned rules, this Court must now determine whether those rules fall outside the Law Society's statutory mandate. The Court has never addressed the appropriate standard of review to be applied when considering the validity of rules made by a law society. The standard of review framework from *New Brunswick (Board of*

Management) v. Dunsmuir, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), applies in this case because it is applicable to "all exercises of public authority" and to "those who exercise statutory powers": para. 28; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.), at para. 53.

A. Standard of Review Is Reasonableness

20 In my view, the standard applicable to the review of a law society rule is reasonableness. A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at para. 24. This means "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature": *Catalyst Paper*, at para. 25; see also *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (S.C.C.), at para. 25.

21 Rules made by law societies are akin to bylaws passed by municipal councils. McLachlin C.J. explained the rationale for this standard of review in *Catalyst Paper*:

> ... review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. [para. 19]

22 Similar considerations are relevant in the context of rules made by a law society. In the case at bar, the legislature specifically gave the Law Society a broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest. The Act empowers the benchers of the Law Society to make rules of general application to the profession, and in doing so, the benchers act in a legislative capacity.

23 Further, reasonableness is the appropriate standard because many of the benchers of the Law Society are elected by and accountable to members of the legal profession. While it is true that the public does not directly vote for the benchers, the rules the benchers make apply only to members of the profession. Thus, McLachlin C.J.'s comments in *Catalyst Paper* in the context of municipal bylaws are apt here as well: "... reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19).

24 Beyond the specific guidance provided in Catalyst Paper, which I find applicable in the instant case, the general principles developed by the Court in respect of the standard of review also support the argument that reasonableness is the appropriate standard. The Law Society acted pursuant to

its home statute in making the impugned rules, and in such a case there is a presumption that the appropriate standard is reasonableness: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at paras. 34 and 39. The Law Society must therefore be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at paras. 50 and 87.

25 Additionally, the Law Society has expertise in regulating the legal profession "at an institutional level": *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.), at para. 33. This Court has previously recognized that self-governing professional bodies have particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions: *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 887.

B. Are the Impugned Rules Reasonable in Light of the Law Society's Mandate Under the Act?

26 To determine whether the impugned rules are reasonable, I am adopting a two-step approach. First, I will construe the scope of the Law Society's statutory mandate in accordance with this Court's modern principle of statutory interpretation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27(S.C.C.), at para. 21. Second, I will address whether, in light of this mandate, the impugned rules are unreasonable because they expose a lawyer to a suspension in the event of non-compliance and unreasonable having regard to their procedural protections.

(1) Statutory Mandate

27 The purpose, words, and scheme of the Act support an expansive construction of the Law Society's rule-making authority.

(a) Object of the Act

28 I will begin with the object of the Act. The legislature has given the Law Society a broad public interest mandate and broad regulatory powers to accomplish its mandate. This mandate must be interpreted using a broad and purposive approach: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485 (S.C.C.), at paras. 6-8; *The Interpretation Act*, C.C.S.M., c. I80, s. 6.

29 First of all, the Act contains an expansive purpose clause that obligates the Law Society to act in the public interest: "The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence" (s. 3(1)). The meaning of "public interest" in the context of the Act is for the Law Society to determine. In pursuing this purpose, the Law Society *must* "(a) establish standards for the education ... of persons practising or

seeking the right to practise law in Manitoba; and (b) regulate the practice of law in Manitoba" (s. 3(2)).

30 Moreover, the independence the legislature has given the Law Society under the Act is evidence of an intention to give the Law Society all necessary powers to regulate its members. As this Court once wrote, Manitoba's legal profession "is self-governing in virtually every aspect": Pearlman, at p. 886.

31 Finally, construing the Law Society's rule-making authority broadly is consistent with the approach taken by the Court in previous cases. For example, Iacobucci J. wrote in *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.), that "[t]he Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members" (para. 40). Further, McLachlin C.J. wrote in *Wallace v. Canadian Pacific Railway*, 2013 SCC 39, [2013] 2 S.C.R. 649 (S.C.C.), that "[t]he purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules — in short, the good governance of the profession" (para. 15). These expansive assertions are indicative of the breadth of the Law Society's regulatory authority.

(b) The Words in Their Ordinary and Grammatical Sense

32 The wording of the Act is also indicative of the breadth of the Law Society's authority and its rule-making power. The Act imposes on the benchers a duty to "establish standards for the education ... of persons practising ... law" in Manitoba (s. 3(2)(a)). Sections 4(5) and 4(6) of the Act vest the Law Society with an open-ended rule-making authority to ensure that it can achieve this and its other public interest objectives. Section 4(5) provides that, "[*i*]*n addition* to any specific power or requirement to make rules", the benchers may make rules to "pursue [the Law Society's] purpose and carry out its duties". Therefore, in addition to the powers already identified in the Act, the benchers can make rules furthering the Law Society's purpose and duties. Section 4(6) provides that the rules made by the benchers are binding on all Law Society members.

33 More explicitly, the Act provides that the benchers may "establish and maintain, or otherwise support, a system of legal education, including ... a continuing legal education program" (s. 43(c)(ii)).

34 Regarding a possible suspension, s. 65 specifically empowers the Law Society "to establish consequences for contravening this Act or the rules". This language could hardly be clearer — the Law Society can establish consequences, such as a suspension, for failing to meet the educational standards it is statutorily required to put in place.

35 Mr. Green relies on the "implied exclusion rule" of statutory interpretation to argue that a suspension cannot be imposed under the Act. In his opinion, because the Act specifically empowers

the Law Society to impose a "suspension" in four specific situations but not in the CPD context, the legislature intended to exclude a suspension as a consequence in any situation other than those in which it is mentioned.

36 This argument is flawed for two reasons. First, it disregards the proper approach to assessing the legality of the impugned rules. What the Court must do is to determine not whether the Act specifically refers to this power, but whether the impugned rules are reasonable in light of the Law Society's statutory mandate.

37 Second, Mr. Green's argument is inconsistent with this Court's purposive approach to statutory interpretation. An argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 256-57. The words of the statute must be considered in conjunction with its purpose and its scheme. In my view, the purpose of the Act supplements the open-ended wording of the relevant provisions to indicate that the implied exclusion rule should not be applied in this case.

(c) Scheme of the Act

38 The scheme of the Act further undermines Mr. Green's position. It must be borne in mind that the Act does not require the Law Society to set up a CPD program. Rather, it provides that the benchers "*may*" establish and maintain such a program (s. 43(c)(ii)). It would be pointless for the legislature to establish consequences for failing to comply with a program that the Law Society is not even required to set up.

39 While it is true that there are only four provisions of the Act that mention "suspension" as a potential consequence, each of them is responsive to a mandatory rule or procedure that is in fact provided for in the Act. A suspension for failing to pay fees is responsive to the obligation that members pay fees (s. 19(5)). A suspension imposed by the Complaints Investigation Committee is responsive to that committee's obligation to investigate complaints (s. 68(c)). A suspension imposed by the Discipline Committee is responsive to that committee's obligation to conduct disciplinary proceedings (s. 72(1) and (2)). The Act requires the payment of fees and the establishment of the committees in question and then establishes powers and consequences that are incidental to them.

40 In contrast, the Law Society is not required to set up a CPD program (s. 43(c)(ii)). If the legislature had explicitly set out the possible consequences for failing to comply with CPD requirements, but the Law Society never imposed any such requirements, the provisions setting out these consequences would be superfluous. The legislature does not enact unnecessary provisions.

41 In my view, the Act's express references to "suspension" are not indicative of an intention to restrict suspensions to specific circumstances. Rather, these references show that where the legislature intended to confer disciplinary powers on a committee or specify the consequences for

a breach of a legislated requirement, it did so expressly. Otherwise, the legislature gave the Law Society the discretion, in exercising its general rule-making authority, to establish consequences for contravening the Rules. This is clear from the broad scope of the authority to make rules and establish consequences that is provided for in ss. 4(5) and 65.

42 In any event, since the Law Society has the power to create a CPD scheme, it necessarily has the power to enforce the scheme's standards. Given the breadth of the statutory authority, the Act must be construed such that the powers it confers "include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature": *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51. This is consistent with s. 32(1) of The Interpretation Act, which provides that "[t]he power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers".

(2) Is It Reasonable for the Rules to Expose a Lawyer to a Suspension as a Consequence for Non-compliance With the CPD Program?

43 Having construed the Act, I will now turn to the reasonableness of the impugned rules. Mr. Green conceded in the Court of Appeal that the Law Society has authority to make rules to establish a CPD program. And he further conceded in this Court, contrary to his position in the courts below, that the Law Society can make that program mandatory. The question that remains is whether the impugned rules are unreasonable because they permit the imposition of a suspension on a lawyer for failing to comply with the mandatory program.

44 In my view, the Act provides clear authority for the Law Society to create a CPD program that can be enforced by means of a suspension. Specifically, ss. 3, 4(5), 4(6), 43(c)(ii) and 65, as interpreted in relation to the Act's public interest purpose, provide statutory authority for the impugned rules. The overall purpose of the Act, the words used in it and the scheme of the Act show that the impugned rules are reasonable in light of the Law Society's statutory mandate.

45 The establishment of mandatory standards such as those provided for in the impugned rules is compatible with the Law Society's purpose and duties as set out in s. 3 of the Act. I agree with the Court of Appeal that "[t]o set such a [mandatory] standard in order to maintain a practicing certificate which, in the benchers' view, serves to protect the public, is in keeping with the duties given to the Law Society under the Act" (para. 17 (emphasis deleted)).

46 To ensure that those standards have an effect, the Law Society must establish consequences for those who fail to adhere to them. As a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational.

47 A suspension is a reasonable way to ensure that lawyers comply with the CPD program's educational requirements. Its purpose relates to compliance, not to punishment or professional

competence. Other consequences, such as fines, may not ensure that the Law Society's members comply with those requirements. An educational program that one can opt out of by paying a fine is not genuinely universal. I am mindful of the fact that in making these mandatory rules, the Law Society was responding to the reality that many lawyers in Manitoba had not complied with the CPD program when it was voluntary.

48 To ensure consistency of legal service across the province, the possibility of a suspension effectively guarantees that even lawyers who are not interested in meeting the educational standards will comply. Mr. Green submits that, in his opinion, the CPD activities that were made available to him would not have been helpful to him in his practice. But it is not up to Mr. Green to decide whether CPD activities are valuable or adequate. The legislature has decided that the Law Society must impose educational standards on practising lawyers (s. 3(2)) and that it is for the Law Society to determine the nature of those standards.

49 Mr. Green also argues that the impugned rules exposing a lawyer to a suspension are unreasonable because his "common law right" to practise law cannot be taken away absent clear legislative language. This argument is unpersuasive. The right to practise law is not a common law right or a property right, but a statutory right that depends on the principles set out in the Act and the rules made by the Law Society. As this Court has stated, "the Law Society has total control over who can practise law in the province, over the conditions or requirements placed upon those who practise and, perhaps most importantly, over the means of enforcing respect for those conditions or requirements": Pearlman, at p. 886. The Law Society has not interfered with Mr. Green's rights. It is merely doing what the statute requires it to do: regulate the education of lawyers in the public interest.

50 In light of the relevant provisions of the Act and practical concerns related to enforcing educational standards, the provisions of the rules establishing a mandatory CPD program that permit the suspension of a lawyer as a consequence for contravening those rules are not unreasonable.

(3) Is It Reasonable for the Rules to Expose a Lawyer to a Suspension Without a Right to a Hearing or a Right of Appeal?

51 Mr. Green also challenges the impugned rules from the standpoint of procedural fairness. He argues that the rules in question are invalid because they provide for the suspension of a member without a right to a hearing or a right of appeal. In my view, this challenge to the rules is inappropriate in the context of an application for declaratory relief. The common law duty of procedural fairness applies only to a specific decision made by the Law Society that affects a lawyer's interests. Given that Mr. Green has not applied for judicial review of the decision to suspend him, all he can do is allege that the impugned rules are not reasonable given the Law Society's authority under the Act.

52 In light of the administrative nature of the suspension and the discretion the CEO has under the Rules when imposing a suspension, I conclude that the fact that the impugned rules do not provide for a right to a hearing or a right of appeal does not make them unreasonable.

(a) Rules Are Not Exhaustive of Common Law Procedural Rights

53 The common law duty of procedural fairness does not reside in a set of enacted rules. As Brown and Evans explain, "delegated legislation that apparently permits a fundamental breach of the duty of fairness will not normally be found to be exhaustive of procedural rights": *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 7:1512. A statutory decision-maker can always provide for procedures in addition to those set out in a rule in order to ensure that the dictates of procedural fairness are met: see *Culligan v. New Brunswick (Commissioner, Inquiries Act)* (1996), 178 N.B.R. (2d) 321 (N.B. Q.B.), at paras. 23-24; Shewchuk-Dann v. Assn. of Social Workers (Alberta)199638 Admin. L.R. (2d) 19(Alta. C.A.); *Laferrière c. Canada (Procureur général)*, 2015 FC 612 (F.C.), at paras. 13-14; *Irwin v. Alberta Veterinary Medical Assn.*, 2015 ABCA 396, 609 A.R. 299 (Alta. C.A.), at paras. 58 and 63. However, the common law duty of fairness "supplements existing statutory duties and fills the gap" where procedures are not provided for explicitly: G. Huscroft, "From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review" in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013) 147, at p. 152.

54 Had Mr. Green challenged the Law Society's decision to suspend him instead of simply challenging the impugned rules, this Court could have examined the specific procedure that the Law Society followed in making its decision. If the Law Society's decision was made in a manner that was not procedurally fair, the decision would then have been quashed. But the duty of fairness is engaged only if the Law Society makes a decision that affects the "rights, privileges or interests of an individual" by, for example, imposing a suspension, not when it acts in a legislative capacity to make rules of general application in the public interest: *Dunsmuir*, at para. 79; see also *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653(S.C.C.), at p. 669.

55 In framing his challenge to the Rules in this way, Mr. Green wrongly assumes that the Law Society will not take its duty of procedural fairness seriously and provide for an appropriate procedure that is responsive to the particular facts and the reasonable expectations of the parties. The benchers can delegate authority to the CEO to provide for additional procedures if the circumstances of a particular case justify protections broader than those set out in the Rules. The Act authorizes the benchers to "take *any action* consistent with [the] Act that they consider necessary for the promotion, protection, interest or welfare of the society" and to delegate that authority to the CEO (ss. 4(2) and 12(2)).

56 Moreover, whether a decision is procedurally fair must be determined on a case-by-case basis. This Court has long recognized that the requirements of the duty of fairness are "eminently

variable and [that] its content is to be decided in the specific context of each case": *Dunsmuir*, at para. 79, quoting Knight, at p. 682, *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817(S.C.C.), at para. 21, and *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.), at paras. 74 and 75; see also *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.), at para. 42. Absent an application for judicial review, it would be unwise for this Court to express an opinion on what procedure the Law Society might follow in making such a decision.

57 Although the Law Society's decision to suspend Mr. Green was not challenged, it shows why procedural fairness cannot be assessed in a factual vacuum. In his letter to Mr. Green, the CEO invited Mr. Green to correct any errors in his CPD report and wrote that the Law Society would "be happy to grant reasonable extensions" to enable him to complete the missing hours. However, the CEO has no such powers under the Rules. Rather, his power is limited to extending the time for members to report their CPD activities or file their annual reports (rr. 2-81.1(6) and 2-81.2(3)). The CEO was thus willing to adopt a more generous procedure in Mr. Green's case than the one provided for in the Rules by inviting Mr. Green to respond and by offering to consider a request for an extension.

(b) The Rules Imposing an Administrative Suspension Without a Right to a Hearing or a Right of Appeal Are Reasonable

58 Given that Mr. Green did not contest the Law Society's decision, his procedural arguments are merely another way to challenge the validity of the impugned rules. In my view, imposing an administrative suspension on members for failing to comply with the impugned rules without giving such members a right to a hearing or a right of appeal is not unreasonable in light of the Law Society's statutory powers — in fact, it is entirely consistent with the Law Society's duty to establish and enforce educational standards.

59 It must be borne in mind that the suspension at issue in this case is not a disciplinary action. The educational standards in respect of CPD, as defined by the Rules, do not relate solely to the competence of lawyers. While they may improve the currency of a lawyer's knowledge, these standards also protect the public interest by enhancing the integrity and professional responsibility of lawyers, and by promoting public confidence in the profession (r. 2-81.1(1)). A reasonable member of the public would understand that a temporary suspension for failing to complete CPD hours is not akin to a more serious disciplinary suspension. A lawyer's competence in handling a case, to give one example, is not affected by a failure to comply with the CPD requirements.

60 That is why a failure to comply with the impugned rules is not on its own a ground for a finding of misconduct or incompetence. This is evidenced by the Rules themselves — the CEO can refer a failure to comply with r. 2-81.1(8) (which requires members to complete one hour of

CPD activities per month) to the Law Society's complaints investigation committee, but only if the member in question has been suspended under that rule more than once (r. 2-81.1(13)).

61 Moreover, a suspension under the impugned rules is reported and recorded differently than other Law Society suspensions. The Law Society is not required in such a case to give the same notice of a suspension to the public and the profession as it must give where a suspension is imposed by the complaints investigation committee (r. 5-81(2)). Nor is a suspension under the impugned rules recorded in a lawyer's discipline record.

62 The suspension of a lawyer for failing to complete the CPD requirements is administrative in nature. The impugned rules reasonably include no right to a hearing or right of appeal because lawyers are solely in control of complying with the rules in question at their leisure. Members report on their own compliance with the impugned rules — no adjudication is needed in order to determine whether a member has failed to meet the requirements. A suspension under the impugned rules ends immediately when the member comes into compliance with them. There is no residual punishment or fine other than a reinstatement fee. Thus, this suspension is similar to the one that may be imposed on a member for failing to pay fees (s. 19(5), rr. 2-88 and 2-91) or failing to file an annual trust account report (r. 5-47(10)). In both cases, the Act and the Rules reasonably grant no right to a hearing or right of appeal because only the member can end the suspension by complying with the requirements.

63 It must be remembered that Mr. Green has admitted his disinterest in complying with a mandatory CPD program. Thus, even if the Rules did provide for more extensive procedures before a suspension could be imposed, such additional procedures would not exempt a person in Mr. Green's position from the CPD program.

64 Further, the rules permitting a suspension are not self-applying. In addition to a lawyer's common law procedural rights, the impugned rules expressly vest the CEO of the Law Society with discretion to ensure that the effect of the Rules in any given situation is not overly harsh. A suspension is not automatically imposed when a lawyer fails to complete the necessary hours. Rather, the CEO "may" send a letter to a member advising that he or she must comply with the CPD requirements. If a letter is sent, the lawyer has 60 days to comply with the Rules. The Rules also do not prevent the CEO from withdrawing a letter during this 60-day period if circumstances justify such a withdrawal.

65 In this case, the CEO exercised his discretion: rather than sending a letter immediately upon learning of Mr. Green's non-compliance, he waited a full year after Mr. Green had first failed to comply with the requirements before sending the letter. In doing so, the CEO effectively waived the application of the impugned rules to Mr. Green for the first year they were in force.

66 Although the impugned rules could have included more extensive procedures, there is no magic formula for making rules with respect to CPD. The different provincial law societies have

implemented CPD programs in different ways. This Court's role is not to rewrite the Rules so as to include every procedural protection imaginable, but to determine whether the impugned rules are reasonable in light of the Act. The approach set out by Lord Russell C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.), which McLachlin C.J. endorsed in Catalyst Paper, at para. 21, is applicable in the instant case:

> ... I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [Emphasis added; pp. 99-100.]

67 While it remains true that a rule is unreasonable if it involves "such oppressive or gratuitous interference with the rights of those subject to them as could find *no justification* in the minds of reasonable men," the rules at issue do not come close to this. A lawyer's failure to comply with the impugned educational rules, even after having been warned and given an opportunity to seek an extension, provides clear justification for the Law Society to impose a temporary suspension. These rules are not "'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose" of the Law Society in any way: *Katz*, at para. 28.

68 Therefore, I cannot accept Mr. Green's procedural arguments. Given the Law Society's statutory mandate, it was entirely reasonable for it to make the impugned rules that vest its CEO with the discretion to impose an administrative suspension without a right to a hearing or a right of appeal.

VI. Disposition

69 I would dismiss the appeal with costs throughout to The Law Society of Manitoba.

***Abella J.* (dissenting) (Côté J. concurring):**

70 The possible sanctions for a lawyer in Manitoba who is found guilty of professional misconduct or incompetence range from a reprimand or fine to a suspension or disbarment. On the other hand, if a lawyer fails to complete 12 mandatory hours of Continuing Professional Development activities in a calendar year, he or she is automatically suspended.

71 I accept that The Law Society of Manitoba has the authority to require that its members take 12 hours of mandatory Continuing Professional Development courses. I also accept that The Law Society has, theoretically, the authority to suspend members who fail to comply with these requirements. But neither of these issues is at the heart of this case.

72 The real issue is the reasonableness of the Law Society's rule that members who do not comply with those requirements are *automatically* suspended. This, in my respectful view, is inconsistent with the Law Society's mandate to protect the public's confidence in the legal profession because it gratuitously — and therefore unreasonably — impairs public confidence in the lawyer.

Analysis

73 A suspension is, in the panoply of a Law Society's disciplinary sanctions, one of the two most serious. The ultimate sanction is disbarment. When a lawyer is suspended, so is public confidence in him or her. That is why the Law Society of Manitoba takes such care in its investigation of complaints regarding professional misconduct or incompetence — it helps ensure that a suspension is imposed only after at least some minimal procedural protections have been provided, and then only after a range of lesser penalties has been considered.

74 When a suspension is the result of such a process, the loss of public confidence is warranted. Where, however, a suspension is imposed automatically for the least serious disciplinary breach possible — failing to attend classes — the Law Society is in breach of its duty to protect the public from the needless erosion of trust in the professionalism of lawyers.

75 Automatically imposing one of the most serious possible sanctions, brings automatic public opprobrium for the least serious professional misconduct possible. This squanders public trust for no justifiable reason. A sanction for failing to attend? Perhaps. But not a suspension in every case regardless of the reasons for non- compliance.

76 Law Societies have rules and sanctions to maintain and enforce the professionalism of their members, but a Law Society cannot enact *any* rule. It can only enact rules that are consistent with the purposes, scope, and objectives of its enabling statute (Donald J. M. Brown and John M. Evans, with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 15:3261).

77 In *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 (S.C.C.), McLachlin C.J. explained that any such authority must be exercised "in a reasonable manner" (para. 15). This was echoed in *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, [2013] 3 S.C.R. 810 (S.C.C.), where this Court, at para. 24, citing Waddell v. British Columbia (Governor in Council)19838 Admin. L.R. 266(B.C. S.C.), at p. 292, confirmed that delegated

legislation must be consistent with the purposes and objectives of its enabling legislation "read as a whole".

78 I accept that *Katz* suggests a deferential approach when reviewing impugned delegated legislation, but the list of adjectives set out in para. 28 does not represent an exhaustive template. As stated in Catalyst at para. 21, there are other grounds for finding delegated legislation to be unreasonable, such as those set out in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Eng. Div. Ct.), at p. 99, where Lord Russell said:

> ... I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable... If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were *manifestly unjust*...
>
> [Emphasis added.]

The Court confirmed this in *Catalyst* when it said, "[t]he fact that wide deference is owed ... does not mean that [the delegate has] *carte blanche*" (para. 24). It is the mandate "as a whole" that governs the inquiry.

79 That general mandate, as this Court said in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), is to protect "the interests of the public" (para. 36). (See also *Law Society (British Columbia) v. Mangat*, [2001] 3 S.C.R. 113 (S.C.C.), at para. 41.) In Manitoba, the Law Society's purpose is to "uphold and protect the public interest in the delivery of legal services with competence, integrity and independence".[2] Those are the core values of a lawyer's professionalism. Protecting the public interest necessarily involves not only ensuring that a lawyer delivers legal services in accordance with those core values, but also protecting the public's *perception* in the professionalism of the delivery. The professional delivery must not only be done, it must be seen to be done.

80 Law Societies therefore represent — and are dedicated to protecting — the core values of the profession. They also represent — and are dedicated to protecting — the public's confidence that those values will guide the lawyers who serve them. While the primary goal of the Law Society is the protection of the public interest, it cannot do so without also protecting the ability of its members to practise law professionally. As Estey J. stated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.):

> The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the bar and through those members, legal advice and services generally. [p. 336]

(See also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 27-2.)

81 A Law Society must, as a result, exercise its mandate in a way that not only protects the ability of lawyers to act professionally, but that also reinforces the public's perception that lawyers are *behaving* professionally. The flip side is that a Law Society cannot enact rules which unreasonably undermine public confidence in lawyers.

82 Yet that is exactly what happens when a lawyer in Manitoba does not comply with the 12 hour educational requirements.

83 The Continuing Professional Development requirements, defined as "learning activities that protect the public interest by enhancing the *competence*, integrity and professional responsibility of lawyers", [3] were designed to enhance the competence of lawyers under s. 3(2)(a) of Manitoba's Legal Profession Act, C.C.S.M., c. L107 (“Act”), which states:

> **3(2)** In pursuing its purpose, the society must
>
> > (a) establish standards for the education, professional responsibility and *competence* of persons practising or seeking the right to practise law in Manitoba;

84 When the chief executive officer learns that a lawyer has not completed the required 12 hours, he sends a letter informing him or her that there are 60 days to complete them. The letter is sent automatically [4] and without requesting or receiving representations from the defaulting lawyer. The failure to complete the requirements results in that lawyer being suspended from practising law. [5]

85 The chief executive officer has only such powers as are given to him or her by or under the Act or the Rules of the Law Society of Manitoba (“Rules”). [6] Other than granting more time to fulfill the Continuing Professional Development requirements, the chief executive officer has no discretion under rule 2-81.1 (12) to do anything except automatically suspend the lawyer:

> *A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid*.

86 There are no exceptions or exemptions available to any lawyer who, for health or personal reasons for example, is unable to comply with the requirements. At most, the chief executive officer has discretion to permit a "carry over" of hours in "exceptional circumstances", [7] He cannot waive or change them. That means, in reality, an automatic suspension regardless of whether there was a compelling reason for failing to comply. Not even the barest of procedural fairness is

authorized, such as the ability to explain. And everyone, regardless of circumstances, is subjected to an identical sanction.

87 The absence of discretion, procedural fairness, or remedial options is in stark contrast to other provisions in the Act or the Rules furthering the Law Society's mandate under s. 3(2) of the Act to establish standards for the competence of lawyers. Unlike the automatic suspension which attaches to breaches of the 12 annual hours of "learning activities", the following procedural protections apply to all other "competency" breaches: a lawyer who is being investigated is entitled to be notified of a complaint made against him or her; [8] there is an opportunity for a written response; [9] and the chief executive officer can informally resolve the complaint. [10] The chief executive officer can also decide to take no further action, or can refer the matter to the Complaints Investigation Committee for further investigation. [11]

88 If the matter is before the Complaints Investigation Committee, a member can be invited to respond in writing to the substance of the complaint [12] or appear before the committee. [13] The committee may decide to take no further action, or send a letter reminding the member of his or her obligations, or make recommendations to improve a member's practice, or issue a formal caution. [14] The committee may also direct that a charge be laid against the member and refer the matter to the Discipline Committee, [15] with a suspension imposed pending completion of the investigation and any disciplinary proceedings that may follow. [16] If a decision is made to suspend a member at this stage, the member has the right to appeal the decision to a judge of the Court of Queen's Bench under s. 75(1) of the Act.

89 If the competence-related matter is referred to the Discipline Committee, the member is entitled to be represented by counsel. [17] The range of consequences for a lawyer found to be incompetent by the Discipline Committee, is found in s. 72(2) of the Act:

> (a) if the member is a lawyer, disbar the member and order his or her name to be struck off the rolls;
>
> . . . . .
>
> (c) confirm, vary or impose restrictions on the member's practice *or suspend the member from practising law*, until the member satisfies the panel that he or she is competent to practise law;
>
> (d) order the member to pay a fine;
>
> (e) order the member to pay all or any part of the costs incurred by the society in connection with any investigation or proceedings relating to the matter in respect of which the member was found incompetent;
>
> (f) reprimand the member;

(g) permit the member to resign his or her membership and order his or her name to be struck off the rolls;

(h) if the member is a director, officer or shareholder of a law corporation, revoke or suspend the corporation's permit, or impose conditions on the permit;

(i) order the member to take instruction or submit to examinations, or both, as the panel considers appropriate;

(j) rescind or vary any order made or action taken under this subsection;

(k) make any other order or take any other action the panel thinks is appropriate in the circumstances.

If a decision is made to punish a member for incompetence as set out in s. 72(2), including a suspension, the member is entitled to appeal to the Court of Appeal. [18]

90 There is only one "competence" issue regulated by the Law Society that has *no* procedural protections, no range of remedies, and no discretionary leeway on the part of the chief executive officer: failure to comply with Continuing Professional Development requirements. It is as close to a victimless breach as it is possible to imagine, yet it is the only breach that attracts the automatic loss of the ability to practise law. It alone attracts automatic suspension, regardless of justificatory circumstances. This makes it arbitrary.

91 It is worth contrasting this with the regulations, policies and by-laws of most other Canadian provinces and territories that have Continuing Professional Development related rules. All of these expressly offer discretion to their respective regulatory bodies to deal with breaches of Continuing Professional Development requirements where there is a reasonable and justifiable explanation of why an exemption or a waiver would be required. These law societies explicitly grant their members the possibility of either exemptions or waivers from mandatory Continuing Professional Development requirements.

92 In New Brunswick, an exemption can be requested and, if denied, a hearing can be sought. [19] In Ontario, the Law Society can exempt a lawyer from mandatory Continuing Professional Development, or reduce the number of hours. [20] The Executive Director of Nova Scotia's Barristers' Society can waive the requirements if the waiver is "in the public interest". [21] In British Columbia, if there are "special circumstances", a lawyer can apply to the Practice Standards Committee which can, in its discretion, order that the lawyer not be suspended. [22] In Saskatchewan, an exemption can be granted by the Director of Education "in exceptional circumstances". [23] Quebec's regulations and policy with respect to exemptions specify which exceptional circumstances will allow a member to be "exempted", and which will not. [24] The list

of permissible exemptions include parental leave; medical reasons, such as accidents; having to act as a caregiver; being in a disaster zone or a war zone and not being able to attend training activities. Non- permitted exemptions include a gradual return to work following a work stoppage for medical reasons; part-time work; a precarious financial situation; an intensive work period; being outside of Quebec for professional or personal reasons; not actively practicing the legal profession; not being obligated to contribute to the professional insurance; being unemployed; taking a year off; and holidays. In the Yukon, the Chair of the Continuing Legal Education Committee "may order that ... the member not be suspended" [25] .

93 No such discretion is available in Manitoba. This lack of discretion is, in my respectful view, fatal. It is also why judicial review of the chief executive officer's decision is not available. The only remedy is to challenge the reasonableness of the Rule itself. The benchers may, at some point in the future, decide to change the Rule by giving the chief executive officer discretion, but at the moment, no such discretion has been delegated to him.

94 The Law Society argued that the Continuing Professional Development- related suspension is administrative, not punitive, and therefore does not reflect incompetence. It does not provide comforting attenuation of the severity of the penalty to say it was not for "serious" incompetence or misconduct. A suspension is a suspension is a suspension. As Lord Denning noted in *Pett v. Greyhound Racing Assn. Ltd.*, [1968] 2 All E.R. 545(Eng. C.A.), a decision to suspend someone, or not renew a licence to practice a profession, "concerns his [or her] reputation and his [or her] livelihood" (p. 549). (See also *Joplin v. Vancouver (City) Commissioners of Police* (1982), 144 D.L.R. (3d) 285 (B.C. S.C.), at pp. 298-99.) That is why Dickson J. in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), held that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake" (p. 1113).

95 Public confidence in a lawyer's professionalism is inevitably undermined when it learns that a lawyer has been suspended. The reason for the suspension does not magically transform a punitive consequence into an administrative one. The economic costs of the suspension are manifest. So are the reputational ones, especially since the Rules require the chief executive officer to notify every member of the Law Society and each of the chief justices of the courts in Manitoba of the name of a member who is suspended. [26]

96 While enhancing lawyers' competence is essential, so is upholding the Law Society's responsibility to protect the ability of lawyers to practise their profession with the public's confidence, or, at least, not to attract its unwarranted loss. But a Rule that leads to an *automatic* suspension for failing to attend 12 annual hours of classes, is so far removed from ensuring the public's confidence in lawyers, that it is "manifestly unjust." It is, as a result, unreasonable (Kruse, at pp. 99-100).

97 Because rule 2-81(12) unjustifiably undermines public confidence in a lawyer, it is inconsistent with the Law Society's duty to protect the public interest. It is undeniably in the public interest to sanction lawyers for breaches of professionalism; it is in no one's interest to sanction them arbitrarily.

98 I would allow the appeal and set aside the Rule.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 The benchers are a body of elected members and appointed persons who govern the Law Society: The Legal Profession Act, C.C.S.M., c. L107, ss. 4(1) and 5.

2 Section 3(1) of The Legal Profession Act, C.C.S.M., c. L107.

3 Rule 2-81.1(1) of the Rules of the Law Society of Manitoba.

4 Affidavit of Joan Holmstrom, the Law Society's Director of Education, sworn November 7, 2014, A.R., vol. II, at pp. 59-60.

5 Rule 2-81.1(12).

6 Section 12(2) of the Act: "The chief executive officer has the powers and duties given to him or her by or under this Act and the rules, and those assigned or delegated to him or her by the benchers, the president or the vice-president".

7 Rules 2-81.1(9) and Rule 2-81.1(6).

8 Rule 5-64(2).

9 Rule 5-64(3).

10 Rule 5-65(1).

11 Rule 5-66.

12 Rule 5-72(1).

13 Rule 5-72(4).

14 Rule 5-74(1).

15 Section 68(b) of the Act.

16 Section 68(b)(i) of the Act.

17 Rule 5-96(2).

18 Section 76(1)(a)(i) of the Act.

19 See The Law Society of New Brunswick's Rules *on Mandatory Continuing Professional Development*, ss. 7(1) to (3) and 8(1) and (2).

20 See The Law Society of Upper Canada's *By-Law 6.1 — Continuing Professional Development*, s. 2(4).

21 See Nova Scotia Barristers' Society's Regulations, r. 8.3.9.

22 See British Columbia's Law Society Rules 2015, rr. 3-29(1) and (5) and 3-32.

23 See the Law Society of Saskatchewan's *Continuing Professional Development Policy* (online), dealing with "exemptions" and sections 16, 18 and 19.

24 See Barreau du Québec's *Règlement sur la formation continue obligatoire des avocats*, CQLR, c. B- 1, r. 12, ss. 15 to 17, and *Guide sur les dispenses de l'obligation de formation continue* (online), at p. 10.

25 See the Rules of the Law Society of Yukon, r. 95.3(5)

26 Rule 2-97.

2019 FCA 149
Federal Court of Appeal

'Namgis First Nation v. Canada (Fisheries and Oceans)

2019 CarswellNat 2011, 2019 FCA 149, 305 A.C.W.S. (3d) 463

'NAMGIS FIRST NATION (Appellant) and MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, and MOWI CANADA WEST LTD.(FORMERLY KNOWN AS MARINE HARVEST INC.) (Respondents)

David Stratas J.A.

Judgment: May 16, 2019
Docket: A-110-19

Counsel: Sean Jones (written), for Appellant
Tim Timberg (written), Gwen MacIsaac (written), for Respondent, Minister of Fisheries, Oceans and the Canadian Coast Guard
Chris Watson (written), Ian Knapp (written), for Respondent, Mowi Canada West Ltd.

Subject: Civil Practice and Procedure; Natural Resources; Public

MOTION by appellant First Nation for order settling contents of appeal book.

***David Stratas J.A.*:**

1 The Federal Court dismissed the appellant's application for judicial review of a decision by the Department of Fisheries and Oceans to grant a transfer licence. The appellant appeals to this Court. The appeal is pending.

2 Within this appeal, the appellant moves for an order settling the contents of the appeal book. The appellant submits that the appeal book should contain materials that were not before the Federal Court.

3 The written representations before the Court are very good. But, to some extent, they do not clearly identify and articulate all of the operative legal principles that bear upon this issue. Thus, the Court will set out the operative legal principles. This exposition also may be useful to litigants elsewhere: the law in this area is stable and is largely shared by all Canadian jurisdictions.

The administrative decision-maker as fact-finder and merits-decider

4 It is well-known that, absent a legislative provision to the contrary, evidence relevant to the issues to be decided by the administrative decision-maker is to be adduced before that decision-maker, not before someone else later.

5 Most legislative regimes, like the one in issue in this case, set up and empower the administrative decision-maker to find the facts, apply the law and make a decision. In short, the administrative decision-maker is the merits-decider. Normally, the first-instance reviewing court is not the merits-decider: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.) at paras. 17-18; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301 (F.C.A.) at para. 41.

6 In this context, the only time the reviewing court acts in a practical sense as the merits-decider is where *mandamus* lies or where the reviewing court decides as a matter of remedial discretion not to send the matter back to the administrative decision-maker because no use would be served by it: on *mandamus*, see *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55, 444 N.R. 93 (F.C.A.) and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (F.C.A.) (a power far broader, more powerful and more useful in this Court than the Supreme Court just suggested in *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 (S.C.C.) at para. 65); on remedial discretion, see *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.) at paras. 51-52 and cases cited therein.

The first-instance reviewing court

7 Thus, the normal rule, subject to limited exceptions, is that only material that was before the administrative decision-maker, the merits-decider, is admissible on judicial review: see, *e.g.*, *Association of Universities* at para. 17; *Delios* at para. 42; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.). Attempts in the first-instance reviewing court to file evidence that goes to the merits of the administrative decision and that was not before the administrative decision-maker must be rebuffed.

8 The normal rule must be applied flexibly, in accordance with its purpose. Material that was not formally filed before the administrative decision-maker but which it nevertheless considered may properly be in the record placed before the first-instance reviewing court. See *Bell Canada v. 7262591 Canada Ltd.*, 2016 FCA 123 (F.C.A.) at paras. 11-16.

9 The normal rule admits of exceptions. The exceptions apply where the receipt of evidence by the reviewing court respects the differing roles of the reviewing court and the administrative decision-maker: *Association of Universities* at para. 20.

10 Specific recognized categories of exception currently include the following:

(a) *General background affidavits*. Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Association of Universities* at para. 20 and authorities cited therein; and see the important limits to this exception discussed in *Delios* at paras. 44-46. For example, care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.

(b) *Affidavits concerning grounds of review where evidence cannot be found in the record of the administrative decision-maker*. Sometimes affidavits are necessary to bring to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can discharge its role of review: *e.g*, *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.). For example, if a party discovers that the opposing party has been bribing the administrative decision-maker and evidence of that is not in the evidentiary record of the administrative decision-maker, the evidence can be placed before the reviewing court to support a ground of bias. Another example of this exception is where the applicant alleges in the reviewing court that the administrative decision cannot stand for a reason that the administrative decision-maker could not legally consider: see, *e.g.*, *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 (F.C.A.) and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.) (the administrative decision-maker could not consider whether the Crown had complied with its obligation to consult Indigenous peoples and failure to consult would invalidate the administrative decision). Still another is a proper allegation of improper purpose where evidence exists outside of the record: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (F.C.A.) at para. 99.

(c) *Affidavits to highlight gaps in the record*. Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, above.

(d) *Affidavits relevant to the reviewing court's remedial discretion*. Sometimes events following the administrative decision may affect the reviewing court's remedial discretion. For example, post-decision events may be such that no practical purpose would be served by quashing and sending the matter back: see, *e.g.*, *Dennis v. Adams Lake Band*, 2011 FCA 37, 419 N.R. 385 (F.C.A.). In this instance, the evidence is not being used to supplement the record of the administrative decision-maker; rather, it is assisting the reviewing court in formulating an appropriate remedy.

11 In certain circumstances, the doctrines of *res judicata*, issue estoppel, abuse of process and judicial notice and legislative provisions that deem facts to exist can have the practical effect of placing certain facts before the first-instance reviewing court: on *res judicata*, issue estoppel and

abuse of process, see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.); and on judicial notice, see *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 (S.C.C.).

12 Sometimes parties in the first-instance reviewing court try to add issues that should have been raised first before the administrative decision-maker and then try to adduce evidence in support of the new issues. For good reason, reviewing courts are very reluctant to entertain new issues: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.); and for new constitutional issues, see *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257 (S.C.C.) and *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, [2015] 4 F.C.R. 75 (F.C.A.) at paras. 43-47. In part, this is due to the normal rule, explained above, that the reviewing court normally cannot receive evidence other than what was before the administrative decision-maker. This also respects the law the legislature has set out: it has assigned the responsibility of deciding the issues to the administrative decision-maker, not us.

The appellate court

13 The evidentiary record in the appellate court is the record that was before the first-instance court. That is the normal rule — one that admits of few exceptions. As for new issues, they cannot be introduced into an appeal if they need a factual record: *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.); *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.).

14 Evidence excluded or not admitted by the first-instance reviewing court does not form part of the record before the appellate court and should not appear in the appeal book. But if on appeal the appellant is challenging the first-instance court's decision to exclude or not admit the evidence, the evidence can be placed in the appeal book. Such evidence is admissible only to show the appellate court the nature of the evidence over which there is a challenge. If the appellate court rules on the admissibility issues and decides that the first-instance court should have admitted the evidence, it may consider the evidence for all purposes before it.

15 Suppose evidence arises after the first-instance reviewing court has made its decision. And suppose the evidence would have been admissible in the reviewing court (under the principles discussed above) had it existed at the time and had it been presented to the reviewing court? What should the appellate court do with this late evidence?

16 As usual, first principles must be kept front of mind. The first-instance reviewing court was the forum for building the record for the application for judicial review. The appellate court is not such a forum. Thus, any new evidence presented to the appellate court that is meant to supplement the record for judicial review purposes is fresh evidence that can be admitted only under the relevant test in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 (S.C.C.).

17 It must be remembered, though, that evidence can be offered to the appellate court for purposes other than building the record for judicial review. Take, for example, evidence that goes to a procedural flaw in the first-instance reviewing court's hearing or decision, such as procedural unfairness or bias in that court. This sort of evidence is relevant not to whether the administrative decision should be set aside, nor is it being used to supplement the judicial review record. Rather, it goes to whether the first-instance reviewing court did its job in a procedurally fair or unbiased way. For this sort of evidence, the difficult *Palmer* test for the admission of fresh evidence does not apply: see *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 (F.C.A.); *R. v. McKellar* (1994), 19 O.R. (3d) 796 (Ont. C.A.) at p. 799, *R. v. McKellar* (1994), 34 C.R. (4th) 28 (Ont. C.A.) at p. 31; *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69, 50 C.R. (4th) 357 (C.A. Que.).

18 Except in the most exceptional circumstances permitted by an appellate court, interveners in the appellate court must take the case as they find it and not add new issues or add to the evidentiary record: *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 206 N.R. 122 (Fed. C.A.); *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2018 FCA 81 (F.C.A.); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174 (F.C.A.) at para. 55.

19 A motion to settle the contents of the appeal book, including difficult questions on the admissibility of evidence, need not be determined on an interlocutory basis: *Collins v. R.*, 2014 FCA 240, 466 N.R. 127 (F.C.A.); *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.) at paras. 9-11, *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 (F.C.A.) at paras. 9-14, *McKesson Canada Corp. v. R.*, 2014 FCA 290, 466 N.R. 185 (F.C.A.) at paras. 9-10, and cases cited therein. The admissibility of materials can be left for the appeal panel to decide.

20 Whether the issues should be left for the appeal panel is a discretionary call governed by several factors: see the above authorities, *Association of Universities* at para. 11 and *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108 (F.C.A.) at paras. 16-17. These factors include whether determining the motion on an interlocutory basis will allow the hearing to proceed in a more timely and orderly fashion and whether the result of the motion is clear-cut or obvious. Overall, Rule 3 governs the exercise of this discretion: we are to adopt the course of action that "will secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Agreements made by the parties concerning the admissibility of evidence

21 In any level of court, the parties can agree that certain evidence can be admitted and considered. Or they can stipulate to certain facts.

22 As long as there are no legislative provisions or other legal reasons against admissibility that cannot be shunted aside by agreement, courts at any level can receive such facts and evidence. See *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at

paras. 79-80. In the end, though, it is always for the court to determine the weight, if any, to be accorded to the facts and evidence. And in the area of judicial review, despite agreements and stipulations by the parties on a certain issue, the first-instance reviewing court and the appellate court may still have to decline to determine the issue because the administrative decision-maker is the merits-decider.

Recourse back to the administrative decision-maker for revised fact-finding

23 At any time, if new facts relevant to the administrative decision have arisen while the matter is before the first-instance reviewing court or the appellate court, one potential recourse is to go back to the administrative decision-maker and seek a variation or a reconsideration of the decision, assuming the decision-maker has that power.

24 Whether the administrative decision-maker has that power and in what circumstances depends on the legislation governing the administrative area: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577 (S.C.C.). Administrative decision-makers only have the powers granted to them explicitly or implicitly by legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.) at para. 16; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609 (S.C.C.); and for a recent discussion and application of this, see *Hillier v. Canada (Attorney General)*, 2019 FCA 44 (F.C.A.) at para. 10.

Rule 351 of the Federal Courts Act

25 The parties have cited Rule 351. This Rule empowers the Court, on motion, in "special circumstances" to grant leave to a party to present evidence on a question of fact. Rule 351 does not broaden the bases for admissibility discussed above.

Application of these principles to this case

26 The appellant moves to add certain new documents to the evidentiary record of this Court: the Svanvik Affidavit, the Further Further Amended Certified Tribunal Record from another judicial review, a Policy JR Notice, an Amended Policy JR Notice, and a group of documents known as the "G2G Recommendations".

27 This list is found in the appellant's written representations. It does not appear to be exactly the same as the relief sought in the notice of motion.

28 Legally speaking, the Court can only give the relief sought in the notice of motion. To the extent that the relief sought in the written representations is different from that sought in the notice of motion, the appellant should have amended his notice of motion. This being said, in this instance I am prepared to consider the list found in the appellant's written representations.

29 The new documents shall not be added to the appeal book in this Court: they cannot form any part of the evidentiary record in this Court.

30 In the Federal Court, there was another judicial review among the parties (T-430-18) but it was not joined or consolidated with this judicial review (T-744-18). The documents from the other judicial review (T-744-18) were never before the Federal Court in the judicial review in this case (T-430-18). Therefore, the documents from the other judicial review (T-430-18) are not admissible in the record before this Court. And the appellant has not satisfied the test for fresh evidence: all of these documents were either available through the exercise of due diligence at the time of the first-instance judicial review proceedings or are not significant enough to have a determinative effect upon the outcome of the appeal.

31 The Federal Court's decision in the other judicial review (T-744-18) has not been appealed and, thus, is final. It might contain factual findings among these parties on the issue before this Court that are admissible in this court as a result of the operation of *res judicata* and issue estoppel. But this does not affect the content of the appeal book in this appeal, which is the issue currently under consideration.

32 The respondent, the Minister of Fisheries, Oceans and the Canadian Coast Guard, is prepared to allow into the appeal book the notice of application and the amended notice of application in the other judicial review (file T-430-18). But there is no agreement here: the respondent, Mowi Canada West Ltd., opposes their inclusion into the appeal book. It submits that the documents are from a different case, a case that is not under appeal. It terms them "distracting" and "unnecessary to dispose of any issue under appeal." I agree.

33 The appellant seeks to include a Further Further Amended Certified Tribunal Record from another judicial review (T-1710-16). This stands in the same position as the documents sought to be included from T-430-18, above. For the same reasons, they too cannot be admitted into the appeal book.

34 The appellant also wishes to add into the appeal book a group of documents called the "G2G Recommendations". The appellant submits that these provide evidence that the federal Crown can achieve practical consultation and accommodations for introductions of farmed Atlantic salmon. The documents postdate the judgment of the Federal Court.

35 I have not been persuaded that they are admissible as fresh evidence. Under the *Palmer* test, they are not of such significance that they could have a determinative effect on the appeal, *i.e.*, whether the Federal Court was wrong not to set aside the administrative decision in issue. For example, one of the documents in the group called the "G2G Recommendations" provides that it and any acts performed in connection with it are not "to be used, construed or relied on by anyone

as evidence or admission of the nature, scope or content of any Aboriginal Rights or Title and Crown Rights or Title".

36 The appellant also wishes to add an affidavit, known as the Svanik Affidavit, into the appeal book. The Federal Court struck this affidavit from the record on the ground that it was not before the administrative decision-maker whose decision it was reviewing. The appellant is not appealing the Federal Court's ruling. Therefore, there is no basis for including this document into the appeal book.

Disposition

37 I will make an order settling the contents of the appeal book in accordance with these reasons. The appeal book will not include the new evidence the appellant wishes to include.

Motion granted in part.

2015 SCC 44, 2015 CSC 44
Supreme Court of Canada

Ontario (Energy Board) v. Ontario Power Generation Inc.

2015 CarswellOnt 14395, 2015 CarswellOnt 14396, 2015 SCC 44, 2015 CSC 44, [2015] 3 S.C.R. 147, [2015] S.C.J. No. 44, 135 O.R. (3d) 160 (note), 257 A.C.W.S. (3d) 252, 338 O.A.C. 1, 388 D.L.R. (4th) 540, 475 N.R. 1, 95 Admin. L.R. (5th) 1, J.E. 2015-1505

Ontario Energy Board, Appellant and Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals, Respondents and Ontario Education Services Corporation, Intervener

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon JJ.

Heard: December 3, 2014
Judgment: September 25, 2015
Docket: 35506

Proceedings: reversing *Hydro One Networks Inc., Re* (2013), *(*sub nom. *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario Energy Board)* 116 O.R. (3d) 793, 2013 CarswellOnt 9792, *(*sub nom. *Power Workers' Union v. Ontario Energy Board)* 307 O.A.C. 109, 365 D.L.R. (4th) 247, 2013 ONCA 359, M. Rosenberg J.A., R.A. Blair J.A., S.T. Goudge J.A. (Ont. C.A.); reversing *Hydro One Networks Inc., Re* (2012), 2012 CarswellOnt 2709, 2012 ONSC 1080, Aitken J., Hoy J., Swinton J. (Ont. Div. Ct.); affirming *Hydro One Networks Inc., Re* (2010), 2010 CarswellOnt 10806, Ken Quesnelle Member, Paul Sommerville Presiding Member, Paula Conboy Member (Ont. Energy Bd.)

Counsel: Glenn Zacher, Patrick Duffy, James Wilson, for Appellant
John B. Laskin, Crawford Smith, Myriam Seers, Carlton Mathias, for Respondent, Ontario Power Generation Inc.
Richard P. Stephenson, Emily Lawrence, for Respondent, Power Workers' Union, Canadian Union of Public Employees, Local 1000
Paul J.J. Cavalluzzo, Amanda Darrach, for Respondent, Society of Energy Professionals
Mark Rubenstein, for Intervener

Rothstein J. **(McLachlin C.J.C., Cromwell, Moldaver, Karakatsanis and Gascon JJ. concurring):**

1 In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

2 OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

3 OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence methodology, OPG argues that its decision was unreasonable.

4 The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

5 OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

6 The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

7 In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG

and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

8 In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

9 Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

10 Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

11 The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

> **1.**(1) . . .
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576 (Ont. Div. Ct.), at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793 (Ont. C.A.), at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481 (Ont. C.A.), at para. 48.

12 One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

> (5) The Board may fix such other payment amounts as it finds to be just and reasonable,
>
> > (a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; ...

13 Section 78.1(6) provides: "... the burden of proof is on the applicant in an application made under this section".

14 As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

15 This Court has had the occasion to consider the meaning of similar statutory language in *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.). In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

16 This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*, 2004 FCA 149, 319 N.R. 171 (F.C.A.).

17 This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators,

but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

18 As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

19 Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

20 In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

21 OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

22 It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

23 Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.
>
> (A.R., vol. III, at p. 215)

24 As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 (the "Board 2008-2009 Decision") (online), at pp. 5-6).

25 The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. (the "Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

26 In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

27 On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

28 On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

29 OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

30 A substantial portion of OPG's wage and compensation expenses were fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

III. Judicial History

A. Ontario Energy Board: EB-2010-0008, Decision With Reasons, March 10, 2011 (the "Board Decision") (Online)

31 In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (p. 18). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

32 The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (p. 86). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

33 Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576 (Ont. Div. Ct.)

34 OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test — that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

35 The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on

> terms inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

36 Justice Aitken dissented, finding that,

> to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793 (Ont. C.A.)

37 The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2006), 210 O.A.C. 4 (Ont. C.A.) (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

IV. Issues

38 The Board raises two issues on appeal:

> 1. What is the appropriate standard of review?
>
> 2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

39 Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

> 3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

40 It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. The Appropriate Role of the Board in This Appeal

(1) Tribunal Standing

41 In *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684 (S.C.C.) ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: "... it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

42 The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

43 This Court further considered the issue of agency standing in *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) [hereinafter Paccar], which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

44 This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. British Columbia (Industrial Relations Council)* (1988), 26 B.C.L.R. (2d) 145 (B.C. C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

> those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.
>
> (*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

45 Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.); *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.); *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.); see also *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (Ont. C.A.) ("*Goodis*"), at para. 24.

46 A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in Kaiser and Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

47 In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America,*

Local 1386 v. Bransen Construction Ltd., [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.); at para. 32.

(*Goodis*, at para. 34)

48 The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and to what extent the tribunal should be permitted to make submissions: paras. 36-38.

49 In *Quadrini v. Canada (Revenue Agency)*, 2010 FCA 246, [2012] 2 F.C.R. 3 (F.C.A.), Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

50 The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

51 A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Alberta (Information & Privacy Commissioner)*, 2011 ABCA 94, 502 A.R. 110 (Alta. C.A.). In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern Utilities* but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

52 The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in*Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected

without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

53 Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

54 Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

55 Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

56 The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292 (B.C. C.A.), at para. 42.

57 I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

58 In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

59 In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

60 Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute with acting to safeguard the public interest — with few alternatives but to participate as a party.

61 Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

62 The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do

not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

63 The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

64 As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27, 249 N.B.R. (2d) 93 (N.B. C.A.). Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

65 The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini* , at para. 16, citing *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.). Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

66 By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

67 There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's

original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

68 I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

69 I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

70 In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

71 I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> ... if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal

> that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

72 In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. Standard of Review

73 The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act*, *1998*, the Board's home statute, a standard of reasonableness presumptively applies: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 54; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 30; *Commissioner of Competition v. CCS Corp.*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.), at para. 35. Nothing in this case suggests the presumption should be rebutted.

74 This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. Choice of Methodology Under the Ontario Energy Board Act, 1998

75 The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

76 The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust

utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

77 The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, *methodology*, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

78 As a contrasting example, s. 6(2) 4.1 of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were *prudently incurred*" and that "the financial commitments were *prudently made*": s. 6(2)4.1. The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

79 Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

80 Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998* "... the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

81 In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is

consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, [2009] 2 S.C.R. 764 (S.C.C.), at para. 40 (concerning telecommunication rate-setting), quoting *General Increase in Freight Rates, Re* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. Characterization of Costs at Issue

82 Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

83 There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

84 In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility

regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

85 However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

86 Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. The Prudent Investment Test

87 In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

88 American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 54.

89 The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel.*

Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 276 (U.S. Mo. S.C. 1923), at p. 289, fn.1.

90 In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

91 By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test — a test that allows for payments related to investments that may not be used or useful — it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

92 The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (U.S. Sup. Ct. 1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

93 American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> ... we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.
>
> (*US West Communications Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (U.S. Utah S.C. 1995), p. 274)

94 Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

95 Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

96 In *British Columbia Electric Railway v. British Columbia (Public Utilities Commission)*, [1960] S.C.R. 837 (S.C.C.), Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

> (a) ... shall consider all matters which it deems proper as affecting the rate: [and]
>
> (b) ... shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": at p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for

the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

97 In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

> ... prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. ... Hindsight is not applied in assessing prudence. ... A utility's decision is prudent if it was within the range of decisions reasonable persons might have made. ... The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.
>
> (*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 (N.S. Utility & Review Bd.) ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

98 The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Nova Scotia Power Inc., Re*, 2012 NSUARB 227 (N.S. Utility & Review Bd.) ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

99 In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

> • Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
>
> • To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
>
> • Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

> • Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

100 Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

> the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

101 However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

102 The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exists different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *Nova Scotia Power 2005* and *Nova Scotia Power 2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

103 However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it

when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

104 To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

105 This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

(4) Application to the Board's Decision

106 In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

107 First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach

(with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

108 Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

109 Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

110 By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

111 Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at p. 86) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

112 The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at p. 87. The

Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

113 Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

114 There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

115 Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at p. 19. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

116 With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

117 It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at pp. 18-19, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

118 Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

119 Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has ... imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

120 I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at p. 86). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

121 I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I

would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

***Abella J.* (dissenting):**

122 The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

123 A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

124 As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B., s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, ss. 1(1)1 and 1(1)2.

125 Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

126 Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor

company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

127 The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

128 On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs — wages, benefits, pension servicing, and annual incentives — to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

129 In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for a future period and which can still be reduced or avoided — the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review ... conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

130 The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

131 On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

> First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate

> between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

132 The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

133 I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": p. 19.

134 In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

135 Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (U.S. Sup. Ct. 2002), at p. 481; see also *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at pp. 192-93.

136 The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.
>
> [Emphasis added.]
>
> (*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri* (1923), 262 U.S. 276 (U.S. Mo. S.C. 1923), at p. 289, fn. 1, per Brandeis J., dissenting).

137 The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

> • Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
>
> • To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

> • Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
>
> • Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.
>
> (*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2).

138 This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2006), 210 O.A.C. 4 (Ont. C.A.), at paras. 8 and 10-12.

139 In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

> When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence — and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.
>
> The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [p. 19]

140 A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board

explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

> Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [p. 19]

141 In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

> This issue concerns expenditures which have largely already been incurred by the company. ... Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

142 As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

143 The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce". The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts ... will take time" (pp. 85 and 87), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

144 The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

145 Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

146 Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (Ont. Arb.).

147 The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

148 Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of three per cent on January 1, 2011, two per cent on January 1, 2012, and a further one per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

149 The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

150 Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: p. 85. Had the Board used the approach it said it would use for costs the company had "no opportunity ... to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

151 Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

152 The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation]'s unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

153 The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

154 It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under

its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

155 Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": p. 19.

156 Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

157 The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

158 In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

159 I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the ... methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. Canada (National Energy Board)* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

160 In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

161 I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed.

Pourvoi accueilli.

2012 SCC 71
Supreme Court of Canada

PIPSC v. Canada (Attorney General)

2012 CarswellOnt 15718, 2012 CarswellOnt 15719, 2012 SCC 71, 2012 C.E.B. & P.G.R. 8017 (headnote only), [2012] 3 S.C.R. 660, [2012] A.C.S. No. 71, [2012] S.C.J. No. 71, 119 O.R. (3d) 80 (note), 1 C.C.P.B. (2nd) 1, 221 A.C.W.S. (3d) 470, 274 C.R.R. (2d) 30, 300 O.A.C. 202, 352 D.L.R. (4th) 491, 438 N.R. 1, J.E. 2012-2355, D.T.E. 2012T-892, EYB 2012-215501

Professional Institute of the Public Service of Canada, Canadian Merchant Service Guild, Federal Government Dockyard Trades and Labour Council (East), International Brotherhood of Electrical Workers, Federal Government Dockyard Chargehands Association, Research Council Employees' Association, Association of Public Service Financial Administrators, Professional Association of Foreign Service Officers, Federal Government Dockyard Trades and Labour Council (West), Canadian Association of Professional Radio Operators, Canadian Air Traffic Control Association, Canadian Military Colleges Faculty Association and Federal Superannuates National Association (Appellants) and Attorney General of Canada (Respondent)

Public Service Alliance of Canada (Appellant)
and Attorney General of Canada (Respondent)

Armed Forces Pensioners'/Annuitants' Association of Canada, Association des Membres de la Police Montée du Québec, British Columbia Mounted Police Professional Association, Mounted Police Association of Ontario and Canadian Association of Professional Employees (Appellants) and Attorney General of Canada (Respondent) and Attorney General of British Columbia (Intervener)

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: February 9, 2012
Judgment: December 19, 2012
Docket: 33968

Proceedings: affirming *PIPSC v. Canada (Attorney General)* (2010), (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 275 O.A.C. 40, 2010 ONCA 657, 2010 CarswellOnt 7532, 84 C.C.P.B. 161, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 2010 C.E.B. & P.G.R. 8409, 102 O.R. (3d) 241 (Ont. C.A.); affirming *PIPSC v. Canada (Attorney General)* (2007), 66 C.C.P.B. 54, 2007 CarswellOnt 7541 (Ont. S.C.J.)

Counsel: Paul J.J. Cavalluzzo, Hugh O'Reilly, Amanda Darrach, for Appellants, Professional Institute of the Public Service of Canada et al.
James Cameron, Andrew Raven, Andrew Astritis, for Appellants, Public Service Alliance of Canada, Armed Forces Pensioners'/Annuitants' Association of Canada et al.
Peter Southey, Dale Yurka, Christine Mohr, for Respondent
J. Gareth Morley (written), for Intervener

***Rothstein J.*:**

I. Introduction

1 This appeal concerns three statutory, public sector pension plans, the members of which are federal public service employees, members of the Canadian Forces, and members of the RCMP. Each plan is administered by the Government of Canada, and each is a contributory, defined benefit plan.

2 The statutes governing the plans establish for each one a "Superannuation Account", which records payments into and out of the plan. In the 1990s, the credits to the Superannuation Accounts began to reflect actuarial surpluses (meaning that the credits exceeded the estimated cost of providing pension benefits). By March 1999, the total surpluses of the three plans had reached approximately $30.9 billion.

3 Beginning with the 1990-91 Public Accounts (Canada's annual financial reports), the government began to "amortize" the actuarial surpluses in the Superannuation Accounts. On April 1, 2000, the *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34 ("Bill C-78") came into force. Bill C-78 changed the way in which contributions to the plans were collected, managed and distributed. It also required the Minister to debit from the Superannuation Account certain amounts in excess of specified actuarial surplus ceilings. Unlike the effect of the prior amortization practice, on the basis of Bill C-78, the government debited over $28 billion directly from the Superannuation Accounts, thereby reducing the actuarial surplus in those accounts.

4 The appellants (being various unions and employee/pensioner associations) filed suit, seeking relief that would require the government to return $28 billion to the plans. The trial judge dismissed

the claims, and the Ontario Court of Appeal upheld the decision ((2007), 66 C.C.P.B. 54 (Ont. S.C.J.), aff'd 2010 ONCA 657, 102 O.R. (3d) 241 (Ont. C.A.)).

5 In order to succeed, the plan members must establish that they have an equitable entitlement to the actuarial surpluses. Otherwise, their entitlement will be limited to the defined pension benefits set out in the governing statutes. In this connection, the nature of the Superannuation Accounts is an issue of central importance. The appellants have argued that the Superannuation Accounts were funds that contained assets in which an equitable interest could be claimed. They say their equitable interest is protected by a fiduciary duty on the part of the government, and, in the alternative, by a constructive trust based on unjust enrichment. The government counters that the Superannuation Accounts were merely accounting records and contain no assets to which an equitable interest could attach. A further issue raised on appeal is whether, if the plan members did have an interest in the actuarial surplus, that interest was extinguished by Bill C-78.

6 I have determined that the courts below were correct to conclude that the Superannuation Accounts were not separate funds containing assets, but were rather accounting ledgers used to track pension-related payments, and to estimate Canada's future pension liabilities in the Public Accounts. Therefore, the plan members' entitlements are limited to the statutorily defined benefits set out in the *Superannuation Acts*.

7 I have also concluded that the government was not subject to a fiduciary obligation in favour of the plan members with respect to the actuarial surplus. Nothing in the *Superannuation Acts*, or any other legislation, supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the plan members with respect to the actuarial surplus. Further, there was no unjust enrichment and therefore no basis for a constructive trust. As the Superannuation Accounts did not contain assets in which the appellants had an interest, they did not suffer any detriment as a result of the government's accounting treatment of the Superannuation Accounts. For the same reason, Bill C-78 did not expropriate any property of the plan members. Accordingly, I would dismiss the appeal.

II. Facts

A. The Pension Plans

8 The summary of facts that follows parallels the findings of the Court of Appeal closely. There are three pension plans involved in this appeal (the "Plans"). They were established by statute for each of three groups: substantially all those who are employed in the federal public service; the members of the RCMP; and the regular force of the Canadian Forces (the "Plan members"). The relevant statutes are the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 ("*PSSA*"); the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17 ("*CFSA*"); and the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 ("*RCMPSA*") (collectively, the "*Superannuation Acts*").

9 Each of the *Superannuation Acts* has legislative antecedents dating back to the late 19th or early 20th centuries. As currently enacted, they date from the coming into force of the present *Superannuation Acts* — January 1, 1954, for the *PSSA*, S.C. 1952-53, c. 47 ("*PSSA* 1954"); March 1, 1960, for the *CFSA*, S.C. 1959, c. 21; and April 1, 1960, for the *RCMPSA*, S.C. 1959, c. 34.

10 The Plans are the same in all aspects relevant to these proceedings. For ease of reference, I will generally refer only to the *PSSA*, but the analysis and conclusions apply equally to the *CFSA* and the *RCMPSA*.

11 The *Superannuation Acts* set out the terms of the Plans. They establish contributory, defined benefit pension plans. Membership in the Plans is compulsory for all eligible public service employees, members of the regular force of the Canadian Forces, and members of the RCMP.

12 There are two relevant time periods in this appeal. The first period is up to and including March 31, 2000. It precedes the coming into force of Bill C-78, legislation that amended the *Superannuation Acts* and, thus, the Plans. The second period begins on April 1, 2000, when Bill C-78 came into effect.

13 Employees are required to make a contribution to the relevant Plan, by way of reservation of salary. While the contribution rates for these Plans varied, employees generally contribute in the range of 5 to 7.5 percent of their salaries.

14 The defined benefit to which an employee is entitled, upon retirement, is determined in accordance with a formula. The basic pension is two percent per year of pensionable service (to a maximum of 35 years) multiplied by the average of the best five consecutive years of salary.

15 The terms of the Plans are not subject to collective bargaining. The *PSSA* Plan is excluded by virtue of s. 113(*b*) of the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*") (formerly s. 57(2)(*b*) of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("*PSSRA*") [rep. S.C. 2003, c. 22, s. 285]). The *RCMPSA* Plan is not subject to collective bargaining because RCMP members are expressly excepted from para. (*d*) of the definition of "employee" in s. 2(l) of the *PSLRA* (formerly para. (*e*) of the definition of "employee" in s. 2(1) of the *PSSRA*) and thus have no collective bargaining rights. The *CFSA* Plan is not subject to collective bargaining because members of the Canadian Forces are neither Crown employees nor part of the public service as defined in the *PSLRA* and therefore do not have collective bargaining rights. Nor are the Plans subject to the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) (see s. 4).

16 Employee contributions to the Plans were required to be deposited into the Consolidated Revenue Fund ("CRF"). "Consolidated Revenue Fund" is defined to mean "the aggregate of all public moneys that are on deposit at the credit of the Receiver General", in the *Financial*

Administration Act, R.S.C. 1985, c. F-11 ("*FAA*"), s. 2. Prior to April 1, 2000, contributions to the Plans were reflected as credits to the "Superannuation Accounts" (or "Accounts"), which were statutorily established for each of the Plans. Amounts payable pursuant to the *Superannuation Acts* (pension benefits) were paid from the CRF and debited to the appropriate Superannuation Account.

17 In addition to credits reflecting Plan members' contributions, the legislatively prescribed credits to the Superannuation Accounts prior to April 1, 2000, consisted of the following: (1) credits in respect of contributions by Public Service corporations; (2) government contribution credits; (3) additional actuarial liability credits (to cover actuarial liabilities); (4) transfers from other pension plans and Supplementary Retirement Benefits Accounts; and (5) interest credits on the balance in the Superannuation Accounts at the rate prescribed by regulation.

18 The required government contribution credits varied over time. For example, the government was required to credit the Superannuation Account created for the *PSSA* Plan with amounts matching employee contributions in respect of current service: a year in arrears, from 1954 to 1991, and on a monthly basis, from 1991 to 2000. Additionally, further credits were required in relation to past or "buyback" service, and to provide for the cost of benefits accrued in the month in relation to current service.

19 The reporting of the government's pension liabilities is subject to the *FAA*, the applicable *Superannuation Act*, and the *Public Pensions Reporting Act*, R.S.C. 1985, c. 13 (2nd Supp.) ("*PPRA*"). Pursuant to s. 64 of the *FAA*, for each fiscal year the Receiver General must prepare, and the President of the Treasury Board must lay before the House of Commons, an annual report known as the "Public Accounts". The Public Accounts reflect the value of the assets and liabilities of Her Majesty in Right of Canada. They are the Government of Canada's main financial reporting document.

20 The two principal statements in the Public Accounts are the Statement of Financial Position, which sets out the assets and liabilities of the government, and the Statement of Operations and Accumulated Deficit, which sets out the government's revenues and expenditures.

21 The transactions and balances in the Superannuation Accounts are reported annually in the Public Accounts. The government's annual credits made pursuant to the *Superannuation Acts* are shown as a government expense in the Statement of Operations and Accumulated Deficit. The amounts set out in the Superannuation Accounts are shown as an ongoing liability of the government in its Statement of Financial Position. The Superannuation Accounts have been classified as "Specified Purpose Accounts" under the liabilities section of the Statement of Financial Position since the 1980-81 fiscal year.

22 As required by the *Superannuation Acts* and the *PPRA*, actuarial reports were received from time to time with respect to each of the Plans. The *PPRA* requires the Chief Actuary of the Office of the Superintendent of Financial Institutions to periodically estimate the cost of the government's

future pension obligations, and to cause a "certification of the assets" of the Plans (ss. 5, 8(1) and 9(1)). To the extent that the estimated cost of the pension liabilities is greater than the certified value of the "assets" reflected in the Superannuation Accounts, there is an "actuarial deficit". On the other hand, where the certified value of the "assets" reflected in the Superannuation Accounts exceeds estimated pension liabilities, there is an "actuarial surplus".

23 In the 1990s, the actuarial valuations showed that the estimated cost of the present and future obligations for each of the three Plans was less than the total of the amounts showing in the Superannuation Accounts. The surplus arose as a result of a combination of factors, including low inflation rates, high interest rates, government-imposed restraints on salaries, the capping of indexing benefits in the 1980s, and changing assumptions in calculating the actuarial liability of the Plans. The surplus in the three Superannuation Accounts reached $16.6 billion by December 1992, climbing to $23.4 billion in March 1996 and $30.9 billion in March 1999.

B. Amortization of the Surplus

24 In the 1990-91 fiscal year, the government began to "amortize" the actuarial surplus in the Superannuation Accounts. The word "amortize" is used to describe the actions undertaken by the government, over a number of years, to gradually reduce the impact of the actuarial surplus on the Public Accounts. The amortization consisted of the following actions: the government continued to credit its contributions to the Superannuation Accounts in accordance with the *Superannuation Acts*. However, the Public Accounts recorded lower net annual pension expenses. To accomplish this objective, the government booked into the Public Accounts negative expenses to reflect the amount of the surplus amortized during the year, thereby reducing the government's total pension expenses. For the books to balance, the negative adjustments to pension expenses were equally reflected in reductions in the government's total stated pension liabilities on its Statement of Financial Position. To make this happen, the amounts amortized each year were debited to contra-liability accounts (i.e., liability accounts having a debit balance) created in the Public Accounts. These accounts went by different names over the years — such as the "Allowance for Pension Adjustments" — but their function was the same: they allowed the government to reduce its stated net pension liabilities in the Public Accounts by the amount of the amortization without debiting the Superannuation Accounts themselves. The Superannuation Accounts maintained their credit balances, unaffected by the amortization, but the debit balances in the separate allowance accounts partially offset them in the Public Accounts. The government's stated net pension liabilities were in this way gradually brought toward the actuarial valuation of Plan liabilities (i.e., the surplus was gradually reduced), but the balances in the Superannuation Accounts were not affected.

25 The effect of this "amortization" was therefore twofold: it reduced the government's annual budget deficit (or increased the annual budget surplus) by reducing annual pension expenditures, and it brought the government's net debt down by reducing the net pension liabilities to an amount closer to the actuarial estimates of the government's future pension obligations.

26 During the 1990s, the government amortized a total of $18.6 billion, with further amounts being amortized after the year 2000.

C. Bill C-78

27 In 1999, the government introduced Bill C-78, which came into force on April 1, 2000. It made significant changes to the *Superannuation Acts*. It established a Pension Fund in each of the *Superannuation Acts* that replaced the Superannuation Accounts for post-March 31, 2000 service ("Pension Funds"). Since April 1, 2000, employee and government contributions in respect of current service have been made to the Pension Funds.

28 Under Bill C-78, the amounts in the Pension Funds were to be invested externally. Bill C-78 established an investment board to manage the assets in the Pension Funds. One of the objects of the investment board is to manage the amounts that are transferred to it, pursuant to the amended Superannuation Act, "in the best interests of the contributors and beneficiaries under those Acts" (s. 4(1)(*a*)).

29 Bill C-78 added s. 44(9) to (13) to the *PSSA*. In general terms, these subsections both grant discretion to and create an obligation on the Minister to debit the Superannuation Accounts to reduce the actuarial surplus. While the Minister has the discretion to debit the Superannuation Accounts with any amount of the surplus between 100 percent and 110 percent of the amount estimated to be required to meet the cost of benefits payable, as determined from the actuarial reports, the Minister is required to debit the Accounts for any actuarial surplus that exceeds 110 percent of the amount required to pay future benefits.

30 Bill C-78 provided that after January 1, 2004, employee contribution rates would no longer be set by legislation but would be set at the discretion of the Treasury Board, subject to certain restrictions. Employees faced a legislated increase of 15 to 33 percent in contribution rates in the years from 2000 to 2003. In 2005, the Treasury Board announced further increases.

31 Bill C-78 also changed the basis for the government's annual contributions. Instead of being required to make contributions matching those made by employees, the government's contributions are now determined by the President of the Treasury Board, based on the actuarial valuations for each Plan.

32 All benefits for pensionable service prior to April 1, 2000, when paid, are charged to the appropriate Superannuation Account. However, benefits paid for service thereafter are paid from the appropriate Pension Fund.

33 Between 2001 and 2004, the government relied on Bill C-78 to debit over $28 billion from the Superannuation Accounts. Since the effect of the prior amortization was to reduce the annual

deficit or increase the annual surplus, and to reduce the government's net debt, the debiting of any amounts already amortized had no effect on Canada's financial position.

D. The Appellants' Action

34 The appellants brought an action for the return of the actuarial surplus reflected in the Superannuation Accounts, arguing that the government had breached its trust and fiduciary duties by amortizing and debiting the surplus. The appellants also maintained that Bill C-78 did not extinguish Plan members' interest in the surplus as it did not evidence an unambiguous intent to expropriate without compensation. The trial judge dismissed the appellants' action. The Ontario Court of Appeal dismissed their appeal.

35 In their appeal in this Court, the appellants seek a declaration that the Plan members have an equitable interest in the outstanding balance in the Superannuation Accounts as of March 31, 2000. They say that the equitable interest includes the right to have the entire amount in the Superannuation Accounts used solely for the purpose of providing pension benefits to Plan members. In the alternative, the appellants seek a declaration that the equitable interest of the Plan members constitutes a right to have a share of the actuarial surplus in the Superannuation Accounts used for the purpose of providing benefits to the Plan members. Under this alternative, the appellants have prorated their share in accordance with the ratio of employee and employer contributions as of March 31, 2000. The Plan members' contributions were the equivalent of 42.2 percent of the actuarial surplus on that date. They also seek a declaration that ss. 44(9) and 44(10) of Bill C-78 do not authorize the reduction from the Superannuation Accounts of any amount in which Plan members have an equitable interest without compensation. And they seek an order that the Superannuation Accounts be credited with all amounts that were removed following Bill C-78 in which the Plan members have an equitable interest, together with interest.

E. Relevant Statutory Provisions

36 The relevant statutory provisions are set forth in the Appendix at the conclusion of these reasons.

III. Judgments Below

A. Ontario Superior Court of Justice (Panet J.)

37 The appellants brought a claim for breach of trust, and a claim for breach of fiduciary duty with respect to the outstanding balance in the Superannuation Accounts, as of March 31, 2000.

38 In considering the statutes and other documents, Panet J. found that the trust requirement that there be certainty of intention was not present. Panet J. also concluded that there was no certainty of subject matter. He found that there was no separate or segregated fund. Panet J.

rejected the appellants' claim for breach of fiduciary duty, as there was no scope for the exercise of any discretion or power, a necessary element of a fiduciary relationship. Panet J. held that the government had no discretion because the *PSSA* was a complete statutory code.

39 The appellants also objected to the amortization of the surplus. Panet J. rejected this claim on the basis that the Public Service Superannuation Plan was not a funded plan, and that the amortized amounts in the Superannuation Account were not assets that had been removed.

40 In Panet J.'s view, the Superannuation Accounts did not contain assets. Rather, the Accounts were maintained by the government, pursuant to the *FAA*, to record and disclose an estimate of its pension liability (the cost of the pension obligation).

41 Panet J. considered whether the government had borrowed from the Superannuation Accounts the difference between the contributions to the Plans plus interest, and the pension payments from the Plans. He found there was no amount owing by the government to the Superannuation Accounts.

42 In his view, the government's pension liability comes from the *Superannuation Acts*, not the Accounts. The Superannuation Accounts are effectively an estimate of the cost of the government's pension liability. Panet J. considered the actuarial reports periodically submitted to Parliament, which make reference to assets and liabilities in the Plans. However, he found that the use of the word "assets" in these reports does not correspond to the ordinary meaning of that word. "Asset" was used to mean the recorded contributions of employees and the government, less benefits paid — i.e., the balances in the Superannuation Accounts.

43 Even though he concluded that the Superannuation Accounts did not contain assets, Panet J. went on to consider whether Bill C-78 expropriated any interest that the Plan members had in the surplus. He concluded that, in clear and unambiguous terms, Bill C-78 required the Minister to debit from the Superannuation Accounts any amount that exceeds 110 percent of the amount estimated to be required to meet pension obligations, and that it gave him the discretion to debit additional amounts of the surplus.

44 Finally, Panet J. rejected the appellants' argument that Bill C-78 breached the *Charter* rights of Plan members.

45 Panet J. concluded that the declarations sought by the appellants should not be granted.

B. Court of Appeal for Ontario (Gillese J.A., Concurred in by Laskin and Juriansz JJ.A.)

46 Gillese J.A. found that the trial judge had correctly concluded that the Superannuation Accounts did not contain assets, notwithstanding the appearance of the word "assets" in the *PSSA*. In her view, Superannuation Accounts were "legislated ledgers", designed to record the

amounts credited to the Plans, and to estimate the government's liability to provide benefits to Plan members. The "real money" deducted from employees' pay cheques was deposited (retained) in the CRF, becoming a part of the aggregate of all public moneys, with a corresponding credit in the appropriate Superannuation Account (paras. 49 to 52).

47 Although government documents referred to the Plans as being "fully funded", Gillese J.A. held that, understood in context, that phrase simply meant that the value of credited contributions in the Superannuation Accounts was sufficient to discharge the government's liability for promised pension benefits (para. 55).

48 However, Gillese J.A. held that the trial judge erred by determining that the *PSSA* was a complete code. While the *PSSA* listed many of the parties' rights and obligations, prior to April 1, 2000, the *PSSA* did not address the actuarial surpluses in the Superannuation Account. Accordingly, the Act did not constitute a complete code prior to Bill C-78 coming into force.

49 It did not follow from this conclusion that Plan members had equitable rights to the actuarial surplus. They did not have an interest in the surplus flowing from the *PSSA*, the employment relationship, trust principles, or from the government's fiduciary obligations as plan administrator.

50 Gillese J.A. found that the government was not a fiduciary in its capacity as administrator of the Plans prior to April 1, 2000. However, she held that the trial judge had erred by determining that the government did not have any discretion that could give rise to a fiduciary duty. In her view, the government had discretion in managing the amounts credited to the Superannuation Accounts. The government made the decision to deal with the actuarial surplus by amortizing it, and this amounted to the exercise of discretion.

51 Gillese J.A. held that there was no property belonging to the Plan members that was affected by the government's exercise of discretion, but that the way the government exercised its discretion had an effect on the practical interests of the Plan members. It appeared to her that the exercise of discretion led to the employees having to contribute more towards the cost of their pensions. However, the core question was whether "given all the surrounding circumstances, one party could reasonably have expected that another would act in the former's best interests" (para. 94). In this case, she concluded it would *not* be reasonable for Plan members to expect the government to act in their best interests when exercising its discretion. A fiduciary duty is unlikely to apply to the Crown, as it would create a conflict between the Crown's responsibility to act in the public interest, on one hand, and its obligation to act in the best interests of beneficiaries, on the other.

52 Gillese J.A. also held that a constructive trust should not be imposed. She found that it need not be imposed to satisfy the requirements of good conscience, in view of the lack of an equitable obligation on the part of the government. Second, the government was not enriched by the amortization and removal (pursuant to Bill C-78) of the actuarial surplus. In her view, whatever

benefit there was to the amortization, it enured to all Canadian taxpayers. In any event, Bill C-78 was a juristic reason justifying any removal.

53 Accordingly, Gillese J.A. dismissed the appeal. Laskin and Juriansz JJ.A. concurred.

IV. Issues

54 The issues in this appeal are:

a. Did the Superannuation Accounts contain assets?

b. Did the government owe a fiduciary duty to the Plan members?

c. Should a constructive trust be imposed over the balances in the Superannuation Accounts as of March 31, 2000?

d. Did Bill C-78 authorize the government to debit the actuarial surpluses in the Superannuation Accounts?

V. Analysis

55 This Court has considered the law related to pension plan surpluses on several occasions, but it has always done so in the context of private sector pension plans. In this appeal, the Court must consider pension plan surpluses in the context of statutory, public sector pension plans.

56 *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.), is the leading statement of the law on pension plan surpluses. That case establishes the principle that, in the absence of overriding legislation, the first step to assessing competing claims to the surplus is to determine, in accordance with ordinary principles of trust law, whether the pension fund is impressed with a trust. If it is, all applicable trust principles apply. If, on the other hand, the pension fund is not subject to a trust, entitlement to the surplus will be assessed in accordance with the principles of contract interpretation.

57 In *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), this Court affirmed *Schmidt*, along with *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), and *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), to the effect that entitlement to a pension plan surplus is "determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions" (para. 26).

58 At trial, the appellants advanced the argument that the *Superannuation Acts* created express trusts for the benefit of Plan members. However, the trial judge rejected the express trust argument, and it has not resurfaced on appeal.

59 In this appeal, the appellants have based their arguments not on express trust, but on constructive trust. Their contention is that the Superannuation Accounts contain assets, and that the government is under an equitable (fiduciary) obligation in respect of its management of them. The appellants argue that the government breached its fiduciary duty by amortizing the surplus, and that this gives rise to a constructive trust over the assets in the Superannuation Accounts, in favour of the Plan members. The appellants have also argued that a constructive trust should be imposed on the basis of unjust enrichment. As mentioned above, central to both of these arguments is the issue of whether the Superannuation Accounts in fact contained assets. If they did not, then there could be no equitable interest subject to a fiduciary duty, nor any unjust enrichment justifying a constructive trust. Accordingly, the first issue to address is whether the Superannuation Accounts contained assets.

A. Did the Superannuation Accounts Contain Assets?

60 Both courts below found that the Superannuation Accounts did not contain assets. At first instance, Panet J. rejected appellants' expert evidence that the primary asset of each Account is a receivable from the government. He found that, in fact, the government had not borrowed from the Superannuation Accounts and that there were no amounts owing by the government to the Accounts. Rather, the Superannuation Accounts were no more than accounts maintained by the government to record and disclose its estimated pension liability. At the Court of Appeal, Gillese J.A. found no error with this conclusion. In her view, "[i]n essence, the Superannuation Accounts are legislated ledgers" (para. 50).

61 While there is no question that the Superannuation Accounts are not pools of marketable securities, the appellants maintain that the courts below erred in not finding that the Accounts contain assets, namely, receivables owing from the government to the Accounts. They submit that real money was contributed to the Accounts in each year, but, because the amounts were not invested externally, the government effectively borrowed this money from the Accounts for its own use — leaving promises to pay in the Accounts. These promises to pay, they say, are assets, much like Government of Canada bonds.

62 As I will presently explain, I agree with the respondent and the courts below that the Superannuation Accounts do not contain assets. The Superannuation Accounts are no more than accounting records designed to track the operation of the Plans and to estimate the government's future pension liabilities.

(1) The Superannuation Acts

63 The Superannuation Accounts are all established by statute and therefore, an analysis of their nature must begin with the legislation. The current Superannuation Account for the Public Service Superannuation Plan is a continuation of the account established by the 1952 revision of

the *Civil Service Superannuation Act*, R.S.C. 1952, c. 50 (*PSSA*, definition of "*Superannuation Act*" in s. 3(1) and s. 4(2)). The 1952 Revised Statutes of Canada re-enacted, in turn, a provision that was originally found in *An Act to amend the Civil Service Superannuation Act*, S.C. 1944-45, c. 34, s. 6, enacted by Parliament in 1944.

64 The *Civil Service Superannuation Act*, s. 21, provided that all funds collected and distributed pursuant to that Act flowed into, and out of, the CRF:

> **21.** (1) The moneys received under the provisions of this Act shall form part of the Consolidated Revenue Fund, and the moneys payable under the said provisions shall be payable out of the said Consolidated Revenue Fund.

The CRF was defined to mean, at the relevant time, in *The Financial Administration Act*, S.C. 1951 (2nd Sess.), c. 12, s. 2(*e*), assented to December 21, 1951, "the aggregate of all public moneys that are on deposit at the credit of the Receiver General". Section 21 of the *Civil Service Superannuation Act* further provided for a special account in the CRF, to be known as the Superannuation Account, for purposes of funds received and payable in respect of the Act:

> (2) There shall be kept in a Special Account in the Consolidated Revenue Fund, to be known as the Superannuation Account, of all moneys so received or so payable, and there shall be added to the said Account annually an amount representing interest, at such rate and calculated in such manner as the Governor in Council may by regulation prescribe, on the amount to the credit of such account.

65 The description of the Superannuation Account as a "Special Account in the Consolidated Revenue Fund ... of all moneys so *received* or so *payable*" describes accounting entries — a record of transactions relating to government pension plans reflected in credits and debits. It is apparent from the statutory language that Parliament contemplated that the Account would reflect Plan-related transactions into and out of the CRF. Considered together with the direction to receive all Plan-related moneys into the CRF, and to pay them out of the CRF, the language is consistent with accounting entries rather than with a direction to keep a separate, identifiable accumulation of assets.

66 As the current Superannuation Account is a continuation of the account established by the 1952 Revised Statutes of Canada (originally established legislatively in 1944), the current Superannuation Account continues to represent accounting entries reflecting, through credits and debits, superannuation Plan-related transactions into and out of the CRF.

67 In this regard, I pause to remind that the Superannuation Account continues to exist notwithstanding the establishment in 2000 of the Pension Funds pursuant to Bill C-78. Benefits for pensionable service prior to April 1, 2000, are, generally, charged to the Superannuation Account and paid out of the CRF (*PSSA*, s. 43).

68 The current *FAA* supports the view that all pension-related transactions are into and out of the CRF, and no money is deposited in or withdrawn from the Superannuation Accounts themselves. The *FAA* provides that "all public money shall be deposited to the credit of the Receiver General", and it defines "public money" as including "all money that is paid to or received or collected by a public officer under or pursuant to any Act ... and is to be disbursed for a purpose specified in or pursuant to that Act" (ss. 17 and 2). Thus, while the *PSSA* no longer refers specifically to the Superannuation Account as being an account in the CRF, the scheme of the *FAA* provides that the moneys collected under the *PSSA* form part of the CRF. Thus, the continuation of the 1944 Superannuation Account, an account in the CRF, is consistent with the financial administration legislation currently in force.

69 When Parliament first established the Superannuation Account, the intention was to create an accounting ledger to track the operation of the superannuation Plan. Not only does the Account record transactions into and out of the CRF, as I have explained, but the credit balance reflects an estimate of Canada's future pension liability under the *PSSA*. This is demonstrated by the fact that, when the Account is in deficit (i.e., is an understatement of the actuarial estimate of pension liabilities), the *PSSA* requires the government to record actuarial liability credits to bring the credit balance in the Account — through annual instalments, to spread out the impact on the Public Accounts — toward the actuarial estimate of the future pension obligation (*PSSA*, s. 44(6) to (8)). In this way, the Superannuation Account is useful from a financial reporting perspective. And it explains why it is disclosed in the Public Accounts as a government liability.

70 While the above discussion focuses on the Superannuation Account applicable to the Public Service Superannuation Plan, the conclusions apply equally to the other two pension plans at issue on this appeal. The Canadian Forces Superannuation Account is a continuation of the Permanent Services Pension Account established in the accounts of Canada pursuant to the *Defence Services Pension Act*, R.S.C. 1952, c. 63, as it read before March 1, 1960. The Permanent Services Pension Account was earlier enacted pursuant to *An Act to amend the Militia Pension Act*, S.C. 1946, c. 59, s. 6, and was described as "a Special Account in the Consolidated Revenue Fund". Likewise, the RCMP Superannuation Account is a continuation of the Royal Canadian Mounted Police Pension Account established in the accounts of Canada pursuant to the *Royal Canadian Mounted Police Act*, R.S.C. 1952, c. 241, as it read before April 1, 1960. The Royal Canadian Mounted Police Pension Account was earlier enacted pursuant to *An Act to amend the Royal Canadian Mounted Police Act*, S.C. 1947-48, c. 28, s. 10, and was also said to be "a Special Account in the Consolidated Revenue Fund".

71 The legislation supports the finding that the Superannuation Accounts are accounting entries, rather than funded pools of assets.

(2) The "Borrowing Theory"

72 The appellants' argument that the Superannuation Account contained assets did not rely on the contention that there was identifiable property in the Accounts that could be liquidated or sold. (This much was admitted by the appellants' expert, John Christie, at trial, upon cross-examination: A.R., vol. III, at 142.) His theory (the "Borrowing Theory") was instead, that "[t]he assets of the plan are a promise to pay from the government of Canada, a debt of the government of Canada" (A.R., vol. III, at pp. 142-43). In his opinion, the assets consisted of the "promise to pay to the account the amount that was owed to it by the government of Canada" (p. 147).

73 Scott Milne (the appellants' accountant) presented a similar opinion. He stated at trial that the government has

> effectively paid the money into the account, and then they have borrowed the money back from the account. So the end result is ... that the pension account has a receivable from the government and the government has a payable to the pension account. [A.R., vol. IV, at p. 48]

74 The trial judge rejected the expert evidence supporting the Borrowing Theory, and the Court of Appeal agreed. I see no reason to interfere with this finding.

75 The appellants argue, incorrectly in my view, that "if the Government did not borrow the amounts in the Superannuation Accounts, the only conclusion available is that it violated the *PSSA* by failing to contribute to the Accounts in the first place" (A.F., at para. 57). They assert that the experts testified at trial that the only way for the government to have met its statutory obligations without actually transferring money into the Accounts was through the Borrowing Theory. The problem, however, is that this argument is premised on a legally incorrect interpretation of the governing legislation. As already discussed, the Superannuation Accounts were — and are — legislated ledgers to track Plan-related CRF transactions and to estimate the government's pension liabilities to Plan members. In short, they are accounting records — that is to say, *information* — not repositories of assets capable of holding property.

76 For the appellants' Borrowing Theory to hold together, it must be possible to say that the government was required to contribute property to the Superannuation Accounts, and that it was, in fact, borrowing this property back and depositing it into the CRF for public purposes. However, if the Superannuation Accounts are informational accounting records, as I have already concluded they are, this is manifestly impossible. There can be no transfer of actual property to — or borrowing from — an informational record. The property is, and always was, elsewhere: viz., prior to April 1, 2000, the legislation contemplated that all property associated with the operation of the Plans was to be held in, and ultimately be paid out of, the CRF. Throughout the operation of the Superannuation Accounts, there was no intermediate step in which any property should have gone into the Accounts, only to be immediately borrowed back by the government. Not only were such "offsetting cheques" (A.R., vol. IV, at p. 51) not contemplated by the legislation, but the trial judge also found as a fact that this is not how the government was operating the Accounts.

Legislatively, the Accounts were informational records incapable of holding assets; in practice, they were treated as such. There was no borrowing from them; there was no debt owing to them; there was no property in them.

77 As I have said, the *Superannuation Acts* required the government to record accounting credits and debits to track the operation of the Plans, and to pay the statutorily defined benefits to members out of the CRF. But they did *not* require the government to transfer assets into the Accounts, nor did they require the government to "borrow" from the Accounts or to place paperless government receivables in them to reflect this "borrowing". The suggestion that any of this was statutorily required is not reflected in the relevant legislation. The Superannuation Accounts were intended to be, and were, part of the government's accounting system. Contrary to the appellants' contention, the Accounts were not capable of holding assets.

78 The appellants also put before the Court various government documents and reports that refer to "borrowing" from the Superannuation Accounts. In the Auditor General's 1991 report to the House of Commons, for example, it is stated that a

> substantial portion of the government's budgetary deficit is financed through internal non-cash borrowing from specified purpose accounts (SPAs).... These borrowings do not involve cash but rather result from a deferral of payments of contributions and interest owed by the government to the third parties on whose behalf the SPAs are administered. [A.R., vol. IV, at p. 233]

79 Similarly, it is written in the 1994 report of the Economic Analysis and Forecasting Division, entitled "Public Service Pension Review: The Macroeconomic Impacts of Investing in A Diversified Portfolio of Market Assets":

> At present, the pension funds are, in effect, segmented off from the capital market. They constitute a pool of funds to which only the government has access. The Government 'borrows' from the fund and credits the fund with interest as if the borrowing was done exclusively through 20-year Government of Canada bonds. [A.R., vol. V, at p. 167]

80 It is important, however, to understand these references to "borrowing" in context. As the Treasury Board Secretariat explained in its response to the Auditor General's 1991 report:

> The government does not borrow funds directly from the public service pension accounts to finance other spending activities. The government has borrowed from the pension accounts only in the sense that by not raising money to invest required employee and government contributions in marketable securities it has not had to borrow money in the capital markets. [A.R., vol. IV, at p. 237]

81 There is a difference between saying that the effect of the superannuation scheme operates *as if* the government were borrowing from the capital markets, without actually doing so — as the Treasury Board Secretariat explains — and saying the government is *actually* borrowing *from* the Superannuation Accounts, in the sense that a debt is owing *to* the Accounts (such that the Accounts hold government receivables). The legislation does not support the appellants' contention that there was borrowing from the Accounts. The superannuation scheme reflects "internal borrowing" only in the sense that it avoids, by design, the need for the external borrowing that would otherwise be required to finance the government's pension obligations.

82 It remains only to dispose of the appellants' reliance on *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.). In that case, this Court was concerned with the Crown's obligations in respect of oil and gas royalties collected on behalf of Aboriginal bands. The Crown deposited the royalties into the CRF and credited interest based on the market yield of long-term government bonds. Superficially relevant to this appeal is the discussion in that case of the Crown's "borrowing" of royalty moneys. The bands argued that the Crown was in breach of its fiduciary duty because (1) a trustee is not permitted to borrow from a trust fund, and (2) by holding the royalties in the CRF for use by the Crown, the Crown was engaged in "forced borrowing" of the assets in the trust (para. 126). This Court agreed that the "Crown is borrowing the bands' money held in the CRF" (para. 127). However, it concluded that this practice was not a breach of the Crown's fiduciary duty because the "borrowing" was required by legislation (para. 127).

83 It might be said that similar type of "borrowing" is reflected in the present appeal. While the government owed future obligations to the Plan members (their statutorily defined benefits), it had the use of current funds in the CRF, including the amounts of employee contributions withheld from their pay cheques. Likewise, by not having to withdraw funds from the CRF to satisfy its own contribution obligations, the government continued to have the use of funds that it would have otherwise had to set aside to invest in marketable securities. As already discussed, however, it does not follow from this "internal borrowing" that the Superannuation Accounts contain government receivables: the Superannuation Accounts are no more than legislated accounting records. *Ermineskin* does not suggest otherwise.

84 Further, in *Ermineskin*, the Crown received royalty moneys "in trust" for the bands, and the Court concluded that the relationship between the Crown and the bands was "trust-like in nature" (para. 74). Upon collecting the royalty moneys, "in trust", the Crown was statutorily required to retain them in the CRF (para. 127). In other words, the legislation required the Crown to take property that was subject to a "trust-like" fiduciary duty, collected on behalf of beneficiaries, and to deposit it into the CRF for public use. It is accurate to describe this statutory scheme as involving the public "borrowing" of property from the "trust". This is in contrast to the present case: the government did not undertake, expressly or impliedly, to act in the best interests of Plan members with respect to the actuarial surplus (discussed below). The Superannuation Accounts

are just accounting records and they are not funds, nor are they "trust-like", such that it is possible to borrow from them.

85 Accordingly, the courts below were right to reject the Borrowing Theory. Panet J. correctly found that, "[i]n fact, there is no such borrowing and there is no amount owing by the government to the Superannuation Account of each plan" (para. 222).

(3) The Word "Assets"

86 The appellants point out that the *Superannuation Acts* and the *PPRA* use the word "assets" in connection with the Superannuation Accounts.

87 The 1954 version of the *PSSA* required the reporting of "an estimate of the extent to which the assets of the said [Superannuation] Account are sufficient to meet the cost of the benefits payable under this Act" (s. 33). The *PPRA* provides that the "Minister shall cause a certification of the assets of a pension plan established under the *Canadian Forces Superannuation Act*, ... the *Public Service Superannuation Act*, [and] the *Royal Canadian Mounted Police Superannuation Act* ... to be made and a report thereof to be filed" (s. 8). The *PPRA* also refers to the "going concern assets" of the Plans (s. 7).

88 These provisions pre-date Bill C-78, which amended the *Superannuation Acts* to make specific reference to the *PPRA*. From September 14, 1999, onward, the *PSSA*, for example, provided:

> **45.** In accordance with the *Public Pensions Reporting Act*, a cost certificate, an actuarial valuation report and an assets report on the state of each of the Superannuation Account, the Public Service Superannuation Investment Fund and the Public Service Pension Fund shall be prepared, filed with the Minister designated under that Act and laid before Parliament.

89 The appellants say that these legislative references mean that the Superannuation Accounts contain assets, in the sense that there is something of value in the Accounts to which the Plan members could have an equitable interest.

90 In my view, the word "assets" in the *Superannuation Acts* and the *PPRA*, when it is used in connection with the Superannuation Accounts, refers to the credit balances reflected in the Accounts. As discussed above, the actual moneys related to pension contributions remained in the CRF until paid out to members, and the Accounts did not contain government debt. The Superannuation Accounts themselves reflect accounting credits and debits. Prior to Bill C-78, there was no mechanism in the *Superannuation Acts*, or elsewhere, to direct payments into a separate pension fund.

91 Accordingly, the word "assets" in the legislation cannot indicate that the Superannuation Accounts contain any property to which the Plan members could have an interest. I would not, however, agree with the Court of Appeal's suggestion that the Parliamentary use of the word "assets" reflects "sloppy use of language" (para. 49). Rather, the word "asset" is being used in the *Superannuation Acts* and the *PPRA* in a different sense: as Panet J. said in respect of the actuarial reports periodically submitted to Parliament, the term "assets" refers to the credit balances in the Superannuation Accounts (para. 228). The same, in my view, applies to the legislation. It is simply a matter of definition.

(4) Extrinsic Aids

92 The appellants rely on several representations by government to the effect that the Superannuation Accounts contain assets. The authority to rely on such representations is found in *Schmidt*, where Cory J. stated:

> Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees. [p. 669]

93 In *Burke*, however, this Court determined that, where the relevant articles in the plan documents were unambiguous, it was not necessary to consider surrounding documents (in that case, employer pension booklets) as interpretative aids.

94 *Schmidt* and *Burke* were decided in the private law context. As this case involves statutory plans, the considerations are different. Specifically, it is necessary to consider the law on extrinsic evidence in statutory interpretation.

95 As this Court reiterated in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), "[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (para. 29 (emphasis deleted), quoting *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 14).

96 I have found that the *Superannuation Acts* require the Superannuation Accounts to operate like accounting records, tracking pension-related payments that are made into and out of the CRF. The Accounts are not required by the *Superannuation Acts* to be segregated, funded accounts, that receive or make any actual payments themselves; thus, the legislation does not require them to contain assets. The language in the legislation is quite consistent: "assets" simply has a statutorily

specific meaning, namely, the credit balances in the Accounts. However, even were it appropriate to look at extrinsic materials, they do not assist the appellants for the reasons that follow.

97 The appellants present documents that were produced years after the Superannuation Accounts were established. They have not pointed to documents coinciding with (or preceding) the creation of the Superannuation Accounts, which, as noted above, are *continued* by the current *Superannuation Acts*.

98 The appellants' documents therefore reflect subsequent governments' interpretations of previous Parliamentary work (*United States v. Dynar*, [1997] 2 S.C.R. 462 (S.C.C.), at para. 45). However, as Cory and Iacobucci JJ. wrote in the context of subsequent legislative history, "in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was" (*Dynar*, at para. 45). Accordingly, it is necessary to be cautious when relying on the many subsequent government documents to which the appellants have referred the Court.

99 Further, Parliament, which created the Superannuation Accounts, is to be distinguished from the executive branch of government, which administers them. Although it is not impossible that governmental documents could assist in the interpretation of legislation, the words of subsequent government Ministers and bureaucrats offer minimal guidance in identifying Parliament's intention concerning the Superannuation Accounts.

100 The appellants present one Parliamentary debate that took place prior to the enactment of Bill C-78. In February 1992, the President of the Treasury Board said, when introducing Bill C-55, that the "bill also proposes that all [superannuation] plans should henceforth be operated on a fully funded basis" (*House of Commons Debates*, vol. VI, 3rd Sess., 34th Parl., February 24, 1992, p. 7486). He went on to say that the *Superannuation Acts* would be amended to "consolidat[e] the assets and obligations in respect of each [sector]" (p. 7486).

101 However, Bill C-55, which was enacted as S.C. 1992, c. 46, did nothing to change the nature of any of the Superannuation Accounts. The Accounts did not hold actual assets before 1992, and the amendments did not change this fact.

102 The notion that Bill C-55 made the Superannuation Accounts "fully funded" is also found in the 1993 document "Treasury Board Secretariat and Department of Finance Study of the Implications of the Current and Alternative Methods of Financing Federal Public Service Pensions". With respect to the words "fully funded", the document states: "Among other provisions of Bill C-55, the Superannuation Acts were amended to require, effective April 1991, that the plans be fully funded; that is, that contributions be made each month by the Government which, together with employee contributions and interest credits, are sufficient to provide for the cost of the benefits that have accrued in respect of that month" (A.R., vol. V, at p. 221). In other words, "fully funded" in this context refers to government contribution credits that must be made to record

the cost of benefits accruing each month. It does not refer to an identifiable fund of assets set aside to cover the government's pension liabilities.

103 The appellants also present a Treasury Board document entitled "Basic Facts about Pensions in the Public Service of Canada", dated October 18, 1976. The Treasury Board expressly denied that the Plans (other than indexation benefits) were "pay-as-you go". Rather, the Treasury Board said that the "basic pensions are fully funded in a government account" (A.R., vol. V, at p. 11). The "Basic Facts" document explained the meaning of "fully funded" as follows: "This means that pensions are provided for in such a way that, if the Plan were suddenly terminated, the Account would, without further contributions but with future interest earnings, have sufficient credits to meet the pension payments ..." (A.R., vol. V, at pp. 10-11).

104 The description of the Accounts as "fully funded" is also found in an undated pension booklet which was at one time given to federal employees (A.R., vol. V, at p. 83). And, as in the *Superannuation Acts*, the language of "assets" can be found in various internal and external governmental documents (see e.g. "Public Service Pensions", January 1970 (A.R., vol. V, at p. 5).

105 While the government documents presented by the appellants use language stating that the Accounts contain assets, other government documents, presented by the government, support the argument that they do not. The Auditor General has several times expressed — in his official observations on the Public Accounts — that the Superannuation Accounts are "unfunded pensions, in the sense that assets have not been set aside to pay for ultimate pension benefits" ("Supplementary Information: Observations by the Auditor General on the Financial Statements of the Government of Canada and the Statement of Transactions of the Debt Servicing and Reduction Account", in *Public Accounts of Canada 1997* (1997), vol. I, 1.25, at p. 1.28; see also "Supplementary Information: Observations by the Auditor General on the Financial Statements of the Government of Canada, the Statement Required Under the *Spending Control Act* and the Statement of Transactions of the Debt Servicing and Reduction Account", in *Public Accounts of Canada 1996* (1996), vol. I, 1.24, at p. 1.27).

106 Similarly, the Towers Perrin consulting report, "Return Expectations for the Public Service Superannuation Fund", prepared for the Department of Finance and Treasury Board in 1993, states that, "[i]n the case of the PSSF [the "Public Service Superannuation Fund"], *the plan is not 'funded'* in the sense of an externally invested trust fund, but it is accounted for and actuarially treated as if it were" (A.R., vol. V, at p. 145 (emphasis added)). In this document, the Plans are referred to as "notionally- funded".

107 In my view, even if reference to extrinsic aids was appropriate, the extrinsic evidence available is inconclusive. Nor does it afford insight into the intention of Parliament when creating the Superannuation Accounts. Thus, I cannot give much weight to the documents presented by the

appellants in their submissions. It would appear that, from time to time, government officials have inaccurately described the Superannuation Accounts in publications and internal communications.

(5) Conclusion on Whether the Superannuation Accounts Contain Assets

108 For the reasons given, I agree with the courts below that the Superannuation Accounts do not hold assets — not even the government receivables that the appellants suggest they contain. The *Superannuation Acts* created the Accounts to track Plan-related CRF transactions and to estimate the government's pension liabilities to Plan members. In this way, they are accounting records, not funded and segregated pools of assets. When the word "assets" is used in the legislation in reference to the Superannuation Accounts, it merely signifies their credit balances, not anything of value to which the appellants could have an interest.

109 The courts below were correct to reject the theory that the government borrowed from the Accounts, placing in them promises to pay by the government (the purported assets in the Accounts). This theory is inconsistent with the legislation in that it assumes that the government was required to contribute property into the Accounts in the first place. As the Accounts are no more than accounting records, this would have been impossible. Prior to April 1, 2000, all of the real money associated with Canada's pension scheme remained unsegregated in the CRF, until benefits were actually paid — out of the CRF — to Plan members.

110 I have concluded that the Superannuation Accounts do not contain assets. Therefore, there was no property in respect of which Plan members can have a legal or equitable interest. However, even if the Accounts did contain assets, the appellants have not established that Plan members have a proprietary interest in either their contributions made or in the government credits under the *Superannuation Acts*.

111 On a plain reading of the *Superannuation Acts*, there is no suggestion that the Plan members have a proprietary interest in their contributions. Contributing employees can claim no continuing property interest in these amounts. In exchange for their contributions, and with each year of pensionable service, employees gain a legal entitlement to a future benefit. That is the nature of this defined benefit plan.

112 The appellants asserted that employees have an interest in both the employee and employer contributions, plus interest, on the basis that they form part of employees' total compensation. Even if it were to be assumed that employees have an interest in the contributions at the point in time at which their salaries are to be paid to them, no interest in these amounts could survive the requirement in the *Superannuation Acts* that they be paid into the CRF and credited to the Accounts. Rather, this is the "cost" paid by employees for the future legal entitlement to their statutorily defined benefits. The *Superannuation Acts* also do not establish that employees have an equitable interest in the amounts credited to the Accounts. They provide only a legal entitlement to statutorily defined pension benefits.

B. Did the Government Owe a Fiduciary Duty to the Plan Members?

(1) Was There a Fiduciary Relationship Between the Government and the Plan Members?

113 Fiduciary relationships may be either *per se* or *ad hoc*. The former refers to those relationships that the law presumes to be — and characterizes as — fiduciary (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37). The recognized categories give rise to fiduciary duties "because of their inherent purpose or their presumed factual or legal incidents" (para. 36). The existence of an *ad hoc* fiduciary relationship, on the other hand, is determined on a case-by-case basis. Whereas the *per se* categories describe relationships in which the fiduciary character is "innate", *ad hoc* fiduciary relationships arise from the specific circumstances of a particular relationship (*Galambos*, at para. 48).

114 The appellants argue that the Court of Appeal erred in failing to find that the government was a *per se* fiduciary in its role as plan administrator. Alternatively, they say that the Court of Appeal erred in failing to find an *ad hoc* fiduciary relationship in the circumstances: "the Government had undertaken to act in the Plan Members' best interests with respect to their pension contributions; the Plan Members were in a vulnerable relationship in which the Government had significant discretion; and the Government could exercise this discretion to affect the Plan Members' interests" (A.F., at para. 67). According to the appellants, that interest includes both receiving pension benefits and ensuring that their contributions were maintained to be used for pension purposes.

115 Chief Justice McLachlin recently listed the *per se* fiduciary relationships in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), identifying the following: trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, guardian-ward, and parent-child.

116 In this case, the government does not fall into any of these categories. The closest category (trustee-*cestui que trust*) does not apply because the government is not a true trustee in equity in respect of any trust property held for the benefit of the Plan members. The appellants contend, however, that the government is in a recognized fiduciary role in its capacity as a pension plan administrator.

117 The administrator/pension Plan member relationship was dealt with in *Burke*. This Court found that the indicia of an *ad hoc* fiduciary relationship were met.

118 However, the authority of *Burke* on this point is limited to the private pension plan context. Participants in public pension plans are not subject to the same vulnerabilities or risks as participants in private pension plans. The government stands behind the pension plans that it provides for its employees, and is not subject to the same sort of credit risks as are private entities.

Furthermore, this Court recognized in *Elder Advocates* that while the Crown is subject to the normal requirements for establishing an *ad hoc* fiduciary relationship, "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (para. 37). McLachlin C.J. in that case quoted Dickson J., as he then was, writing for the majority in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at p. 385:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.
>
> [Emphasis added by McLachlin C.J.; para. 37.]

119 Binnie J. made the same point writing for the Court in *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.), at para. 96: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting ...." The same principle also dictates that the Crown will not be presumed to be a fiduciary based solely on its role bearing a similarity to a traditional category of fiduciary.

120 It is not necessary to decide the precise ambit of any potential fiduciary duty that might arise between the government, as pension plan administrator, and the beneficiaries of the Plan, or whether the relationship inherently carries with it some set of fiduciary obligations. This is because it is clear that the government had no fiduciary duty to the Plan members with respect to the actuarial surplus. This is demonstrated under the template provided for identifying *ad hoc* fiduciary duties in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), and *Elder Advocates*.

121 Beginning with Wilson J.'s dissenting opinion in *Frame*, and subsequently adopted by the majority of this Court (see e.g. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.)), the following characteristics were said to identify those relationships where fiduciary obligations had been imposed.

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]

122 Most recently, in *Elder Advocates*, McLachlin C.J. stated that the aforementioned characteristics were useful but did not provide a complete code. This Court adopted the

Hodgkinson factors, but added the requirement of an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.

123 Each lower court in this case applied the earlier version of the test, as *Elder Advocates* had not yet been decided.

(2) Undertaking to Act in the Best Interest of the Alleged Beneficiary

124 It is now definitely a requirement of an *ad hoc* fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.

125 I have been able to identify nothing in the *Superannuation Acts*, the *FAA*, or the *PPRA* that supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the Plan members, with respect to the actuarial surplus — the specific interest at issue here.

126 By contrast, Bill C-78 establishes a legislated undertaking on the part of the Board (the administrator of the new Pension Funds) to act in the best interest of contributors, but only in respect of post-April 1, 2000 contributions. Section 4(1)(*a*) of Bill C-78 provides that the Board is "to manage amounts that are transferred to it ... in the best interests of the contributors and beneficiaries under those Acts". These words are not found in the *Superannuation Acts* in respect of the Superannuation Accounts.

127 I am reinforced in the view that there was no undertaking here by the Chief Justice's comment in *Elder Advocates* that, where the issue relates to the exercise of a government power or discretion, the required undertaking will generally be lacking. As the Chief Justice said, at para. 44, an undertaking of a duty of loyalty by the government

> is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

And further, "[i]f the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it" (para. 45). The *Superannuation Acts* do not. Accordingly, I would conclude that there has been no undertaking to act in accordance with a duty of loyalty with respect to the actuarial surplus at issue here. There is not, therefore, a fiduciary relationship between the

government and the Plan members. However, for the sake of completeness, I will consider the other elements of the test.

(3) Were the Plan Members Vulnerable to the Exercise of Discretion by the Government?

128 The second element of an *ad hoc* fiduciary relationship, following *Elder Advocates*, at para. 33, requires (1) a defined *person or class of persons* (i.e., the beneficiary or beneficiaries), who is or are (2) *vulnerable* to the fiduciary, (3) in that the fiduciary has a *discretionary power* over them.

129 In this case, there is no doubt that there is a defined class of persons capable of being the beneficiaries in the alleged fiduciary relationship. The class consists of the current and former employee-contributors and their beneficiaries. The issue is whether the government had a discretionary power over this class of persons in relation to the Superannuation Accounts. Following Bill C-78, the Pension Investment Board and the Treasury Board had clear discretionary powers in relation to the management of the new Pension Funds, including the setting of employee contribution rates (the latter only following January 1, 2004). As the appellants seek an equitable interest in the Superannuation Accounts as they stood on March 31, 2000, the question is whether the government had a discretionary power in relation to the administration of the Superannuation Accounts prior to Bill C-78 coming into force (April 1, 2000).

130 If, as the trial judge found, the *Superannuation Acts* constituted a complete code with respect to the actuarial surplus, the government would have no discretionary power to exercise with respect to the surplus so as to affect any interest the Plan members may have in the surplus. The concept of a "complete code" was discussed in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 (S.C.C.). In that case, the Department of Fisheries and Oceans seized and sold spawn that Donald and William Gladstone were accused of attempting to sell in violation of the *Fisheries Act*, R.S.C. 1985, c. F-14. Pursuant to that Act, the Department deposited the net proceeds of the sale in the CRF. The proceedings against the Gladstones were eventually stayed, and the net proceeds from the sale were paid to them. However, the Attorney General refused to pay interest.

131 This Court concluded that the *Fisheries Act* is a "complete code" dealing with the return of seized property (*Gladstone*, at para. 9). Major J. reasoned that the Act "creates a comprehensive framework for dealing with issues arising from seizure" (para. 10). Thus, the Act did not create an obligation on the Crown to pay interest on the proceeds of seized property.

132 I agree with Gillese J.A. that the *Superannuation Acts* were not "complete codes" as these are described in *Gladstone*, before the amendments made by Bill C-78 on April 1, 2000. Prior to that bill coming into force, the *Superannuation Acts* did not address the surpluses in the Superannuation Accounts. While the *Superannuation Acts* dealt with the accounting of deficits, there was no mention of surpluses. Thus, the *FAA* — which gave the President of the Treasury Board and the Minister of Finance discretion to include adjustment accounts in the Public Accounts

— was employed to supplement the accounting rules in the *Superannuation Acts* (*FAA*, s. 64(2)(*d*)). The government was entitled to exercise its discretion to amortize the surplus because of the absence of provisions in the *Superannuation Acts* governing the actuarial surpluses. Gillese J.A. correctly concluded that the *Superannuation Acts* were not a complete code prior to April 1, 2000.

133 However, as I have explained, the accounting treatment of the surpluses (the amortization) in respect of which the government exercised a discretion did not alter the accounting balances in the Superannuation Accounts; it only altered the representation of the financial position of the Government of Canada in the Public Accounts.

134 As earlier determined, prior to Bill C-78 coming into force, the government exercised discretion in respect of the surplus in the Public Accounts. Section 63(2) of the *FAA* provides that the Receiver General "shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada and shall establish such reserves with respect to the assets and liabilities as, in the opinion of the President of the Treasury Board and the Minister, are required to present fairly the financial position of Canada". Further, s. 64(2)(*d*) of the *FAA* provides that the Public Accounts shall include "such other accounts and information relating to the fiscal year as are deemed necessary by the President of the Treasury Board and the Minister to present fairly the financial transactions and the financial position of Canada".

135 While the *FAA* requires the Receiver General to present fairly the financial position of Canada, the President of the Treasury Board and the Minister of Finance have flexibility when it comes to establishing the necessary accounts and adjustments. The amortization, which included the creation of the "Estimate of Pension Adjustments" accounts to set off the overstated liabilities (the actuarial surplus) in the Superannuation Accounts, may be seen as an example of a discretionary decision directed at the accurate presentation of the Public Accounts.

136 Prior to Bill C-78, the surpluses reflected in the Superannuation Accounts were left intact. The surpluses were not debited until Bill C-78 required such debiting after April 1, 2000. The amortization in the 1990s was reflected only in the Public Accounts, for the purpose of accurately presenting the true net state of Canada's deficit or surplus and net debt. This was an accounting decision, not a decision going to the substance of the Plan members' entitlements or interests. As the appellants' expert accountant asserted on cross-examination, accounting does not determine the substance of a transaction.

137 I agree that there was a discretionary power exercised in connection with the amortization of the Superannuation Accounts in the 1990s. However, this particular discretion existed for, and was exercised in connection with, the presentation of the Public Accounts, rather than the administration of the Plan members' pensions. The Plan members' entitlement to their statutorily defined benefits, remained unchanged and remained subject to Parliament's legislative prerogative, not the government's discretion. Therefore, the discretion exercised by the government in respect

of the Public Accounts was irrelevant to the existence of a fiduciary duty in favour of the Plan members. I conclude that the appellants are unable to establish vulnerability to the government's exercise of discretion.

(4) Did the Plan Members Have a Substantial Legal or Practical Interest in the Actuarial Surplus?

138 In order to establish an *ad hoc* fiduciary relationship, the purported beneficiary must have an "identifiable legal or vital practical interest that is at stake" (*Elder Advocates*, at para. 35). In *Elder Advocates*, the Chief Justice gave the following examples of sufficient interests: "... property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person" (para. 51). A statutory interest may also qualify in some circumstances: "... a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest" (para. 51).

139 As I have concluded that the Superannuation Accounts do not contain assets, the amortization of the surpluses cannot have put any of the Plan members' legal or equitable interests at risk. However, the Court of Appeal suggested that the members had a vital practical interest at stake. According to that court, "the exercise of Discretion led to the situation where the employees were obliged to contribute more towards the cost of their pensions" (para. 90).

140 Though the Court of Appeal did not finally decide the matter, in my respectful opinion, its perception of the effect of the exercise of discretion on contribution rates is not supported by the evidence. I cannot agree that the amortization or debiting of the Superannuation Accounts caused increases in contribution rates. The government says that in 2006 the Minister started exercising the discretion conferred upon him by Bill C-78 to raise the employee contribution rates up to a maximum of 40 percent of the total required from both employees and the government. In oral argument, the government indicated that during Parliamentary debates on Bill C-78, the government explained that the Minister would be given discretion to increase rates because the contribution ratios between government and Plan members had gone from 60/40, historically, to 70/30, and were projected to go to 80/20. The government indicated that it desired a return to the historical 60/40 contribution rate.

141 In any event, as the Chief Justice explained in *Elder Advocates*, the interest at issue must be a specific private law interest, and the entitlement at stake "must not be contingent on future government action" (para. 51). Federal employees are not entitled to any specific contribution rate, whether the contribution is determined by Parliament (as it was prior to January 1, 2004), or by the Treasury Board (starting January 1, 2004). The Plan members did not have a specific private law interest in any prescribed contribution rates such as to ground a fiduciary duty.

(5) Conclusion on Fiduciary Relationship

142 For these reasons, I conclude that there was no *ad hoc* fiduciary relationship between the government and the Plan members with respect to the actuarial surplus reflected in the Superannuation Accounts. Most importantly, the government did not undertake, either expressly or impliedly, to act in the best interests of the Plan members with respect to the actuarial surplus. Without such an undertaking of loyalty in favour of these particular stakeholders, the government's duty was to act in the best interests of society as a whole. This is inconsistent with the existence of a fiduciary duty. Moreover, while the government exercised discretion in its accounting treatment of the surpluses in the Superannuation Accounts, the Plan members were not vulnerable to that discretion, nor did they have any legal or practical interest at stake. The effect of the amortization was to disclose more accurately Canada's actual pension obligations, not to affect Plan members' statutory entitlements under the Plans.

C. Should a Constructive Trust Be Imposed Over the Balances in the Superannuation Accounts as of March 31, 2000?

(1) Equitable Obligation

143 In order to succeed, the appellants must establish that they have an equitable interest in the actuarial surplus reflected in the Superannuation Accounts, as their legal interest is limited to their entitlement to statutorily defined benefits. They have not pursued their express trust argument on appeal; they have not argued that a resulting trust has arisen in their favour; therefore, a constructive trust is the only basis upon which an "equitable interest" might be recognized in the actuarial surplus (A. F., at para. 142).

144 Since this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), there have been two grounds on which a court can impose a constructive trust: (1) breach of an equitable obligation, and (2) unjust enrichment. The appellants have argued both in this appeal.

145 In *Soulos*, McLachlin J. (as she then was) held that a constructive trust "may be imposed where good conscience so requires" (para. 34). In her view, good conscience might require the imposition of such a trust in two situations: (1) where property is obtained wrongfully by the defendant (such as by breach of fiduciary duty or breach of loyalty), or (2) where the defendant has been unjustly enriched.

146 Regarding the first category, McLachlin J. identified four conditions which are generally required before a constructive trust for wrongful conduct may be imposed:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [*Soulos*, at para. 45]

147 I have found that the government was not subject to a fiduciary obligation in relation to its management of the Plans, and the appellants have not argued that the government has breached any other equitable obligation that it had to the Plan members. The appellants' argument fails on the first requirement of the *Soulos* test. I therefore turn to the other basis on which a constructive trust may be imposed: unjust enrichment.

(2) Unjust Enrichment

148 As this Court found in *Elder Advocates*, it is possible to claim unjust enrichment against the government (provided the issue is not restitution for taxes paid under an *ultra vires* statute).

149 In order to prove a claim in unjust enrichment, the plaintiff must establish: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) ("*Pacific National*"), at para. 14). Where these elements are satisfied, the remedy of constructive trust may be available, if (1) "monetary damages are inadequate", and (2) "there is a link between the contribution that founds the action and the property in which the constructive trust is claimed" (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 988).

150 As Binnie J. explained in *Pacific National*, at para. 15, "[a]n enrichment may 'connot[e] a tangible benefit' ..., or it can be relief from a 'negative', such as saving the defendant from an expense he or she would otherwise have been *required* to make" (emphasis in original).

151 Following this Court's decision in *Peter v. Beblow*, the enrichment must correspond with a deprivation from the plaintiff. While the test for unjust enrichment is typically articulated as having three elements, it is important to recognize that the enrichment and detriment elements are the same thing from different perspectives. As Dickson C.J. suggested in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), cited by Cory J. in his concurring reasons in *Peter v. Beblow*, at p. 1012, the enrichment and the detriment are "essentially two sides of the same coin".

152 The "straightforward economic approach", as described in *Pacific National*, to enrichment and detriment, is properly understood to connote a transfer of wealth from the plaintiff to the defendant (para. 20). As the purpose of the doctrine is to reverse unjust transfers, it must first be determined whether wealth has moved from the plaintiff to the defendant.

153 Accordingly, the first inquiry is not whether the government was somehow enriched or benefitted by amortizing or removing the surpluses in the Superannuation Accounts. Rather, the question is whether the government was enriched at the appellants' expense. Even if it could be shown that the government benefited in some way by reducing the stated financial obligations of Canada, it would not assist the appellants unless the gain corresponded to the appellants' loss.

154 As the Superannuation Accounts are mere accounting records, and do not contain assets in which the appellants have an interest, no enrichment and corresponding deprivation can be found in either (1) the government's decision prior to April 1, 2000, to amortize the surpluses for accounting purposes under the *FAA*, or (2) Parliament's decision to enact Bill C-78 to require the debiting of a portion of the surplus directly from the Accounts.

155 The Court of Appeal found that there was no enrichment because "whatever benefit there was to such actions enured to all Canadian taxpayers" (para. 106). I do not understand the nature of the inquiry in the same way. The enrichment and corresponding deprivation elements ask whether there was a transfer of wealth from the plaintiff to the defendant. The fact that the defendant is a public body is irrelevant to whether such a transfer of wealth took place. Indeed, this reasoning would have the effect of insulating the government from any claim for unjust enrichment.

156 The Court of Appeal indicated that there might have been a deprivation because the government's actions "were detrimental to plan members if for no other reason than the fact that those actions apparently led to increases in plan member contribution rates" (para. 107). As I observed in connection with the issue of whether the Superannuation Accounts contained assets, the evidence does not support such an alleged deprivation.

157 Further, if the increase in contribution rates did constitute a deprivation, the corresponding enrichment could only be the additional deductions taken from employee pay cheques following the rate hikes, and not the amount of the surpluses amortized and removed. But the appellants have sought a declaration that they have an equitable interest in the balances in the Superannuation Accounts as at March 31, 2000, and not the return of the increased contributions after Bill C-78 came into force. Accordingly, on the argument that increased contribution rates constituted a deprivation, there is no link between the alleged deprivation and the property right they seek, the return of the amortized surplus and subsequently debited surplus.

158 I conclude that there was no enrichment and corresponding deprivation, and that the appellants have not established a *prima facie* case of unjust enrichment. The third branch of the test for unjust enrichment, the absence of a juristic reason for the enrichment, need not be analyzed.

D. Did Bill C-78 Authorize the Government to Debit the Actuarial Surpluses in the Superannuation Accounts?

159 The courts below ruled that any interest Plan members had in the balances and surpluses in the Superannuation Accounts was extinguished by Bill C-78. The appellants have argued that Bill C-78 did not disclose an explicit intention to expropriate their interest, on the basis of the presumption against expropriation without compensation in statutory interpretation (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 478-82).

160 In *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 (S.C.C.), this Court affirmed the principle that "potentially confiscatory legislation ought to be construed cautiously so as not to strip individuals of their rights without the legislation being clear as to this intent" (para. 26). In order to confiscate an interest, Parliament must "express [it]self extremely clearly where there is an intention to expropriate or confiscate without compensation" (para. 26).

161 I have concluded that the courts below did not err in determining that the Plan members have no equitable interest in the surpluses in the Superannuation Accounts. Bill C-78 thus could not have expropriated the Plan members' property. Further, I would agree with the courts below that s. 44(9) to (13) of the *PSSA* are unambiguous in establishing that the Minister *may* debit any actuarial surplus and *must* debit all amounts exceeding 110 percent of the estimated liability under the Plans.

162 Moreover, it is "extremely clea[r]" that Parliament did not intend any compensation to be given to the Plan members for these debits, whether or not this constituted expropriation. It would be absurd to read Bill C-78 as requiring the government to debit excess amounts and then compensate the Plan members for the amounts debited. Such an interpretation would be to convert the relevant provisions of Bill C-78 into a distribution mechanism — where the surpluses would be reduced and the Plan members would receive some form of compensation in lieu of having surpluses in the Accounts — which was quite clearly not Parliament's intent. If s. 44(9) to (13) amount to confiscatory legislation, the intention was to confiscate without compensation.

163 The corresponding amendments to the *CFSA* (s. 55(9) to (13)) and the *RCMPSA* (s. 29(9) to (13)) are to the same effect, and are equally clear.

VI. Conclusion

164 The Superannuation Accounts are legislated records and do not contain assets in which the appellants have a legal or equitable interest. The Plan members' interests are limited to their interest in the defined benefits to which they are entitled under the Plans. The government was not under a fiduciary obligation to the Plan members, nor was it unjustly enriched by the amortization and removal of the pension surpluses. Finally, the Plan members had no legal or equitable interest in the actuarial surplus reflected in the Superannuation Accounts to be expropriated by Bill C-78.

165 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

Appendix

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2

2. (1) The following definitions apply in this Act.

. . . . .

"employee", except in Part 2, means a person employed in the public service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(b) a person locally engaged outside Canada;

(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;

(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;

(e) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;

(f) a person employed on a casual basis;

(g) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(h) a person employed by the Board;

(i) a person who occupies a managerial or confidential position; or

(j) a person who is employed under a program designated by the employer as a student employment program.

. . . . .

"public service", except in Part 3, means the several positions in or under

(a) the departments named in Schedule I to the *Financial Administration Act*;

(b) the other portions of the federal public administration named in Schedule IV to that Act; and

(c) the separate agencies named in Schedule V to that Act.

. . . . .

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if

(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or

(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

Public Service Superannuation Act, R.S.C. 1985, c. P-36

4. (1) Subject to this Part, an annuity or other benefit specified in this Part shall be paid to or in respect of every person who, being required to contribute to the Superannuation Account or the Public Service Pension Fund in accordance with this Part, dies or ceases to be employed in the public service, which annuity or other benefit shall, subject to this Part, be based on the number of years of pensionable service to the credit of that person.

(2) The Superannuation Account, established in the accounts of Canada pursuant to the *Superannuation Act*, is hereby continued.

. . . . .

43. (1) All amounts required for the payment of benefits for which this Part and Part III make provision shall be paid out of the Superannuation Account if the benefits are payable in respect of pensionable service to the credit of a contributor before April 1, 2000.

(2) The amounts deposited in the Public Service Superannuation Investment Fund under subsection 44.1(2) shall be transferred to the Public Sector Pension Investment Board within the meaning of the *Public Sector Pension Investment Board Act* to be dealt with in accordance with that Act.

(3) If there are insufficient amounts in the Superannuation Account to pay all the benefits referred to in subsection (1), the amounts required for the payment of those benefits shall be charged to the Public Service Superannuation Investment Fund and paid out of the assets of the Public Sector Pension Investment Board.

. . . . .

44. (1) There shall be credited to the Superannuation Account in each fiscal year

(a) [Repealed, 1999, c. 34, s. 95]

(b) in respect of every month, such amount in relation to the total amount paid into the Account during the preceding month by way of contributions in respect of past service as is determined by the Minister; and

(c) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal to the rate that would be determined for that quarter using the method set out in section 46 of the *Public Service Superannuation Regulations*, as that section read on March 31, 1991.

(2) to (5) [Repealed, 1999, c. 34, s. 95]

(6) Following the laying before Parliament of any actuarial valuation report pursuant to section 45 that relates to the state of the Superannuation Account and the Public Service Superannuation Investment Fund, there shall be credited to the Account, at the time and in the manner set out in subsection (7), the amount that in the opinion of the Minister will, at the end of the fifteenth fiscal year following the tabling of that report or at the end of the shorter period that the Minister may determine, together with the amount that the Minister estimates will be to the credit of the Account and the Public Service Superannuation Investment Fund at that time, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(7) Subject to subsection (8), the amount required to be credited to the Superannuation Account under subsection (6) shall be divided into equal annual instalments and the instalments shall be credited to the Account over a period of fifteen years, or such shorter period as the Minister may determine, with the first such instalment to be credited in the fiscal year in which the actuarial valuation report is laid before Parliament.

(8) When a subsequent actuarial valuation report is laid before Parliament before the end of the period applicable under subsection (7), the instalments remaining to be credited in that period may be adjusted to reflect the amount that is estimated by the Minister, at the time that subsequent report is laid before Parliament, to be the amount that will, together with the amount that the Minister estimates will be to the credit of the Superannuation Account and

the Public Service Superannuation Investment Fund at the end of that period, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(9) Following the laying before Parliament of any actuarial valuation report pursuant to section 45 that relates to the state of the Superannuation Account and the Public Service Superannuation Investment Fund, there may be debited from the Account, at the time and in the manner set out in subsection (11), an amount that in the opinion of the Minister exceeds the amount that the Minister estimates, based on the report, will be required to be to the credit of the Account and the Public Service Superannuation Investment Fund at the end of the fifteenth fiscal year following the tabling of that report or at the end of a shorter period that the Minister may determine, in order to meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(10) If the total of the amounts in the Account and in the Fund referred to in subsection (9) exceeds, following the laying of the report referred to in that subsection, the maximum amount referred to in subsection (13), there shall be debited from the Account, at the time and in the manner set out in subsection (11), the amount of the excess.

(11) Subject to subsection (12), the amount that may be debited under subsection (9) and the amount that must be debited under subsection (10) shall be debited in annual instalments over a period of fifteen years, or a shorter period that the Minister may determine, with the first such instalment to be debited in the fiscal year in which the actuarial valuation report is laid before Parliament.

(12) When a subsequent actuarial valuation report is laid before Parliament before the end of the period applicable under subsection (11), the instalments remaining to be debited in that period may be adjusted to reflect the amount that is estimated by the Minister, at the time that subsequent report is laid before Parliament, to be the amount that will, together with the amount that the Minister estimates will be to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund at the end of that period, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(13) At the end of the period, the total of the amounts that are to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund must not exceed one hundred and ten percent of the amount that the Minister estimates is required to meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(14) The costs of the administration of this Act, as determined by the Treasury Board, with respect to benefits payable under this Act in respect of pensionable service that is to the credit of contributors before April 1, 2000, shall be paid out of the Superannuation Account.

Public Sector Pension Investment Board Act, S.C. 1999, c. 34

4. (1) The objects of the Board are

(a) to manage amounts that are transferred to it under subsections 54(2) and 55.2(5) and section 59.4 of the *Canadian Forces Superannuation Act*, subsections 43(2) and 44.2(5) of the *Public Service Superannuation Act* and subsections 28(2) and 29.2(5) of the *Royal Canadian Mounted Police Superannuation Act* in the best interests of the contributors and beneficiaries under those Acts; and

(b) to invest its assets with a view to achieving a maximum rate of return, without undue risk of loss, having regard to the funding, policies and requirements of the pension plans established under the Acts referred to in paragraph (*a*) and the ability of those plans to meet their financial obligations.

(2) The costs associated with the operation of the Board shall be paid out of the funds.

(3) The Minister shall determine from which funds the costs shall be paid, but no amount shall be taken out of the Canadian Forces Pension Fund or the Canadian Forces Superannuation Investment Fund — or, if regulations are made under section 59.1 of the *Canadian Forces Superannuation Act*, from the fund referred to in section 59.3 of that Act — without consulting the Minister of National Defence, or from the Royal Canadian Mounted Police Pension Fund or the Royal Canadian Mounted Police Superannuation Investment Fund without consulting the Minister of Public Safety and Emergency Preparedness.

Public Pensions Reporting Act, R.S.C. 1985, c. 13 (2nd Supp.)

7. Where, in the review of a pension plan, actuarial assumptions or methods are used that differ from those used for the immediately preceding review in respect of which a cost certificate was filed pursuant to section 5 and such different assumptions or methods result

(a) in a decrease in the going concern unfunded actuarial liability but do not result in an excess of going concern assets over the going concern actuarial liabilities, the outstanding special payments shall be recalculated by multiplying each of the amounts thereof by a factor having, as numerator, the going concern unfunded actuarial liability and, as denominator, the sum of the present values of the previously determined special payments where the present values are calculated on the basis of the actuarial assumptions used at the current review; or

(b) in an excess of the going concern assets over the going concern actuarial liabilities, the valuation report referred to in section 6 shall include a statement as to the method, if any, proposed for the disposition of such excess.

8. (1) The Minister shall cause a certification of the assets of a pension plan established under the *Canadian Forces Superannuation Act*, ... the *Public Service Superannuation Act*, [and] the *Royal Canadian Mounted Police Superannuation Act* ... to be made and a report thereof to be filed with the Minister at the same time as a cost certificate is filed pursuant to subsection 5(1).

(2) The certification and the assets report referred to in subsection (1) shall be made by the Comptroller General of Canada.

9. (1) The Minister shall lay before Parliament any cost certificate, valuation report or assets report filed with the Minister pursuant to this Act, within thirty sitting days of their being filed if Parliament is then sitting, or if Parliament is not then sitting, on any of the first thirty days thereafter that Parliament is sitting.

Financial Administration Act, R.S.C. 1985, c. F-11

2. In this Act,

. . . . .

"Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;

. . . . .

"money" includes negotiable instruments;

"negotiable instrument" includes any cheque, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and any other similar instrument;

. . . . .

"public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(a) duties and revenues of Canada,

(b) money borrowed by Canada or received through the issue or sale of securities,

(c) money received or collected for or on behalf of Canada, and

(d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

. . . . .

17. (1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

(2) The Receiver General may establish, in the name of the Receiver General, accounts for the deposit of public money with

(a) any member of the Canadian Payments Association;

(b) any local cooperative credit society that is a member of a central cooperative credit society having membership in the Canadian Payments Association;

(c) any fiscal agent that the Minister may designate; and

(d) any financial institution outside Canada that the Minister may designate.

. . . . .

(4) Subject to any regulations made under subsection (5), every person employed in the collection or management of, or charged with the receipt of, public money and every other person who collects or receives public money shall pay that money to the credit of the Receiver General.

. . . . .

63. (1) Subject to regulations of the Treasury Board, the Receiver General shall cause accounts to be kept in such manner as to show

(a) the expenditures made under each appropriation;

(b) the revenues of Canada; and

(c) the other payments into and out of the Consolidated Revenue Fund.

(2) The Receiver General shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada and shall establish such reserves with respect to the assets and liabilities as, in the opinion of the President of the Treasury Board and the Minister, are required to present fairly the financial position of Canada.

(3) The accounts of Canada shall be kept in the currency of Canada.

64. (1) A report, called the Public Accounts, shall be prepared by the Receiver General for each fiscal year and shall be laid before the House of Commons by the President of the Treasury Board on or before December 31 next following the end of that fiscal year or, if the House of Commons is not then sitting, on any of the first fifteen days next thereafter that the House of Commons is sitting.

(2) The Public Accounts shall be in such form as the President of the Treasury Board and the Minister may direct, and shall include

(a) a statement of

(i) the financial transactions of the fiscal year,

(ii) the expenditures and revenues of Canada for the fiscal year, and

(iii) such of the assets and liabilities of Canada as, in the opinion of the President of the Treasury Board and the Minister, are required to show the financial position of Canada as at the termination of the fiscal year;

(b) the contingent liabilities of Canada;

(c) the opinion of the Auditor General of Canada as required under section 6 of the *Auditor General Act*; and

(d) such other accounts and information relating to the fiscal year as are deemed necessary by the President of the Treasury Board and the Minister to present fairly the financial transactions and the financial position of Canada or as are required by this Act or any other Act of Parliament to be shown in the Public Accounts.

2011 CAF 299, 2011 FCA 299
Federal Court of Appeal

Stemijon Investments Ltd. v. Canada (Attorney General)

2011 CarswellNat 4372, 2011 CarswellNat 5330, 2011 CAF 299, 2011 FCA 299, [2011] F.C.J. No. 1503, [2012] 1 C.T.C. 207, 2011 D.T.C. 5169 (Eng.), 209 A.C.W.S. (3d) 721, 341 D.L.R. (4th) 710, 425 N.R. 341

Stemijon Investments Ltd., Appellant and The Attorney General of Canada, Respondent

Canwest Communications Corporation, Appellant
and The Attorney General of Canada, Respondent

Canwest Direction Ltd., Appellant and The Attorney General of Canada, Respondent

Leonard Asper Holdings Inc., Appellant and
The Attorney General of Canada, Respondent

Lenvest Enterprises Inc., Appellant and The Attorney General of Canada, Respondent

Sensible Shoes Ltd., Appellant and The Attorney General of Canada, Respondent

Marc Noël, Johanne Trudel, David Stratas JJ.A.

Heard: October 11, 2011
Judgment: October 26, 2011
Docket: A-376-10, A-374-10, A-375-10, A-377-10, A-378-10, A-382-10

Proceedings: affirming *Stemijon Investments Ltd. v. Canada (Attorney General)* (2010), 2010 CarswellNat 3943, 2010 CF 893, 2010 D.T.C. 5156 (Eng.), 2010 CarswellNat 3315, 2010 FC 893 (F.C.)

Counsel: Ian S. MacGregor, Peter Macdonald, for Appellants
Josée Tremblay, Julian Malone, for Respondent

Subject: Income Tax (Federal)

APPEAL by taxpayers from judgment reported at *Stemijon Investments Ltd. v. Canada (Attorney General)* (2010), 2010 CarswellNat 3943, 2010 CF 893, 2010 D.T.C. 5156 (Eng.), 2010 CarswellNat 3315, 2010 FC 893 (F.C.), upholding Minister of National Revenue's decision not to waive penalties and interest assessed against taxpayers for their late filings.

***David Stratas J.A.*:**

A. Introduction

1 Before this Court are six appeals from six judgments of the Federal Court (*per* Justice Mandamin): 2010 FC 892 (F.C.), 2010 FC 893 (F.C.), 2010 FC 894 (F.C.), 2010 FC 895 (F.C.), 2010 FC 897 (F.C.), 2010 FC 898 (F.C.). In each, the Federal Court dismissed an application for judicial review brought by the taxpayer concerning a decision by the Minister of National Revenue. In each, for identical reasons, the Minister refused the taxpayer relief from penalties and interest under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

2 Since the facts and the law are substantially the same in each matter, this Court consolidated the appeals, the appeal in file A-376-10 being designated as the lead appeal. A copy of these reasons for judgment will be filed in each of files A-374-10, A-375-10, A-376-10, A-377-10, A-378-10 and A-382-10, and shall serve as this Court's reasons for judgment in each appeal. Given the identical nature of the appellant's submissions, the Minister's decision for each appellant, and the Federal Court's decision, these reasons will speak of one decision, one decision letter and one Federal Court decision.

3 In my view, for the reasons set out below, the Minister's decision falls outside the range of defensibility and acceptability and, thus, is unreasonable. However, the relief is discretionary. In these particular circumstances, no practical end would be accomplished by setting aside the Minister's decision and returning the matter back to him for redetermination: the Minister could not reasonably grant relief on these facts. Therefore, I would dismiss the appeals.

B. The basic facts

(1) Background information

4 The Act requires persons to file certain forms in certain circumstances. These forms convey information to the Canada Revenue Agency. The Canada Revenue Agency uses this information to discharge its responsibilities under the Act.

5 Form T1135 is one such form. This form must be filed by taxpayers who own specified foreign property, the total cost amount of which is over $100,000: subsection 233.3(3) of the Act.

6 The appellants were obligated to file this form for each of the 2000 to 2003 taxation years. They did so, but were late. Due to their lateness, the Minister assessed penalties and interest against the appellants.

7 The appellants sought relief from the penalties and interest from the Minister. The Minister can grant such relief under subsection 220(3.1) of the Act. Broadly speaking, the appellants alleged

that they had made an innocent mistake and that it would be unfair to levy penalties and interest in the amounts assessed.

(2) How the late filings happened

8 The appellants employed a common financial representative to make all tax filings on their behalf.

9 For the 1998 and 1999 taxation years, the appellants' representative filed the appellants' Forms T1135 on time. However, for the 2000 to 2003 taxation years, the appellants' representative formed the view, contrary to the wording of subsection 233.3(3) of the Act, that it was unnecessary to file the forms. The appellants' representative felt that the Canada Revenue Agency was getting all the information it needed from other filings made by the appellants' Canadian investment managers.

10 Specifically, the appellants' representative believed that Form T1135 did not need to be filed where a foreign investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements. In his view, that was the case with each of the appellants. However, as the appellants' representative conceded in a letter dated June 2, 2005, that logic did not apply to the appellant Canwest Communications Corporation, which had U.S. investments administered by U.S. fund managers.

11 Somewhat later, the Canada Revenue Agency alerted the appellants to the fact that they had not filed their forms for some time. The appellants complied, filing their forms late and explaining their misunderstanding.

(3) The appellants' request for relief from interest and penalties and the first level administrative decision

12 The appellants' financial representative wrote on behalf of the appellants to the Fairness Committee of the Canada Revenue Agency, requesting relief under subsection 220(3.1) of the Act against the penalties and interest assessed against the appellants for their late filings of the forms. The representative conceded that the delay in filing was "a conscious decision" but was done in the mistaken belief, described above, that the forms did not need to be filed. The representative explained that it was guilty of "administrative oversight."

13 In its first level administrative decision, the Canada Revenue Agency denied the appellants' request for relief. It found that the appellants did not fall within one of the three specific scenarios set out in Information Circular (IC) 07-01 ("Taxpayer Relief Provisions"), a policy statement issued by the Minister. These three specific scenarios are extraordinary circumstances beyond the taxpayer's control, actions of the Canada Revenue Agency, and inability to pay. The Canada Revenue Agency also denied the appellants' request for relief under a "one chance policy" that

existed at the time. The appellants failed to qualify under that policy because they filed the forms only as a result of an inquiry made by the Canada Revenue Agency.

(4) The appellants' further request for relief from interest and penalties and the Minister's decision

14 Dissatisfied, the appellants made a second level request for relief to a delegate of the Minister (hereafter, the "Minister"). They explained that their representative had engaged in an "administrative oversight." They enclosed their previous correspondence that explained that the representative believed that the forms did not need to be filed because the Canada Revenue Agency was getting information about the appellants' foreign holdings from other filings. They suggested that the delay of the Canada Revenue Agency should result in some relaxation in the interest charges. Finally, they also argued that there was an "error of omission common to all entities" and so the penalty, levied for each of the six appellants, should be substantially reduced.

15 The Minister set out his reasons in a decision letter. In his decision letter, the Minister partly granted the appellants' request for relief. He was prepared to reduce the interest charged during six months due to the Canada Revenue Agency's delay in replying to the appellants. The Minister denied the remainder of the appellants' request for relief.

(5) The applications to the Federal Court for judicial review

16 The appellants applied to the Federal Court for judicial review of the Minister's denial of relief.

17 In the Federal Court, and also in this Court, the appellants focused on the reasons set out in the Minister's decision letter. They submitted that the Minister improperly narrowed the scope of discretion permitted to him under subsection 220(3.1) of the Act. In their view, the Minister had regard only to the three scenarios of relief specifically set out in the Information Circular rather than the general concept of fairness under subsection 220(3.1) of the Act. In other words, the Minister improperly fettered his discretion.

18 The appellants also submitted that the Minister's refusals of relief on the facts of this case could not be sustained under the standard of review of reasonableness.

(6) The Federal Court's decision

19 The Federal Court rejected the appellants' submissions. It found that the Minister had not fettered his discretion. Instead, he was aware of the full extent of his discretion and decided against granting relief. The Federal Court based this conclusion on the fact that the Minister had before him an array of material that went beyond the three scenarios set out in the Information Circular, such as the submissions of the appellant and a wide-ranging Taxpayer Relief Report. The Federal

Court also found that the Minister fully addressed the appellants' requests for relief and reached a conclusion that passed muster under the standard of review of reasonableness.

C. Analysis

(1) The standard of review to be applied

20 The Federal Court held that the standard of review of the Minister's decision is reasonableness. In this Court, the parties accept this. This Court can interfere only if the Minister reached an outcome that is indefensible and unacceptable on the facts and the law: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 (F.C.A.) at paragraphs 24-28; *Slau Ltd. v. Canada (Revenue Agency)*, 2009 FCA 270 (F.C.A.) at paragraph 27; *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at paragraph 47, [2008] 1 S.C.R. 190 (S.C.C.).

21 The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

22 On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decisionmaking: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

23 This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19 (F.C.A.). But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

24 *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law — for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and,

thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

25 In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

(2) Subsection 220(3.1) of the Act

26 Subsection 220(3.1) of the Act provides that if an application for relief is made in time, the Minister has discretion to grant relief against penalties and interest. Subsection 220(3.1) reads as follows:

> **220.** (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.
>
> **220.** (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

27 The scope of the Minister's discretion under this subsection is determined, like any other matters of statutory interpretation, by examining the statutory words setting out the discretion (here unqualified), the other sections of the Act which may provide context, and the purposes underlying the section and the Act itself. When that examination is conducted, it is fair to say that the scope of the Minister's discretion is broader than the three specific scenarios set out in the Information Circular.

(3) Does the Minister's decision pass muster under the standard of review of reasonableness?

28 In my view, the Minister fettered his discretion, and thereby made an unreasonable decision. He did not draw upon subsection 220(3.1) of the Act to guide his discretion. He looked exclusively to the Information Circular. This is seen from the Minister's reasons for decision.

(a) The Minister's reasons for decision, as evidenced by his decision letter

29 In his decision letter, the Minister sets out reasons for his decision. At the beginning of the decision letter, the Minister mentions that his decision falls under "Taxpayer Relief Legislation." He explains that this legislation "gives the Minister the discretion to waive or cancel all or part of any penalty or interest payable." At this point, he says nothing about the scope of his discretion under this legislation. He never does.

30 In the next sentence in his decision letter, the Minister defines the scope of his discretion, limiting it somewhat. He does this by reference to the Information Circular, not subsection 220(3.1). Specifically, he states that his discretion is to be guided by "whether the penalty or interest resulted from extraordinary circumstances, is due mainly to actions of the Canada Revenue Agency (CRA), or...[is due to an] inability to pay." As we have seen in paragraph 13 above, these are the three specific scenarios set out in the Information Circular for the granting of relief. These words show that the Minister was limiting his consideration to the three circumstances set out in the Information Circular, and was not considering the broad terms of subsection 220(3.1) of the Act.

31 Alone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern. Often administrative decision-makers use policy statements to guide their decision-making. As I mention at the end of these reasons, such use is acceptable and helpful, within limits. But many administrative decision-makers are careful to note those limits — policy statements can only be a guide, and, in the end, it is the governing law that must be interpreted and applied. In his decision letter, however, the Minister did not note any limits on his use of the Information Circular.

32 In the next portion of his decision letter, the Minister stated that the appellants sought relief on the basis of "administrative oversight." This was incomplete: as mentioned in paragraph 14, above, the appellants offered other explanations and justifications. The Minister never addressed these in his decision letter. The Minister responded to the appellants' explanation of "administrative oversight" by reminding them about their responsibility to determine and follow the deadlines set out in the Act.

33 Next, the Minister turned to the appellants' request for interest relief due to the Canada Revenue Agency's delay. Here, as mentioned in paragraph 15 above, he granted limited relief. In granting that relief, the Minister did not refer to the Information Circular. However, delay by the Canada Revenue Agency does fit within the second scenario set out in the Information Circular for the granting of relief, namely conduct by the Agency.

34 At the end of his decision letter, the Minister refused the rest of the relief sought by the appellants. In support of this, he offered the following explanation:

> While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines. I trust this explains the Agency's position in this matter.

35 This passage offers further evidence that the Minister was restricting his consideration to the three scenarios set out in the Information Circular and was not drawing upon subsection 220(3.1) of the Act as the source of his decision-making power. This is seen from the Minister's reference to the "Taxpayer Relief Provisions" — the title of the Information Circular — as the source of his decisionmaking power, not subsection 220(3.1) of the Act. On a fair reading of this passage, the Minister denied the appellants relief because their claims for relief did not fit within the scenarios set out in the Information Circular.

(b) Does the record before the Minister shed any further light on the Minister's decision?

36 The respondent urges us to go beyond the stated reasons in the Minister's decision letter. It points to the record that was placed before the Minister, and an affidavit filed with the Federal Court. The respondent submits that these materials demonstrate that the Minister drew upon more than the Information Circular as the source of his authority.

37 I agree that the reasons in a decision letter should not be examined in isolation. Reasons can sometimes be understood by appreciating the record that was placed before the administrative decision-maker: *Vancouver International Airport Authority v. P.S.A.C.*, 2010 FCA 158 (F.C.A.) at paragraph 17.

38 But sometimes the record is of no assistance. That is the case here. While the Minister had a broad record before him, his decision letter shows no awareness that he could go beyond the Information Circular. To the contrary, his decision letter shows an understanding — faulty — that he was governed exclusively by the Information Circular. Further, as explained in paragraph 32, above, the Minister did not seem to have full and accurate regard to key portions of the record before him, namely the explanations and justifications in letters sent by the appellants. In such circumstances, resort to the record to explain why the Minister decided in the way that he did is not possible.

39 The Federal Court was willing to assume that the Minister considered the record before him. In my view, that assumption was not open to it given the reasons in the preceding paragraph.

(c) Does an affidavit filed in the Federal Court shed any further light on the Minister's decision?

40 During argument of this appeal, the respondent referred us to an affidavit that was filed with the Federal Court. The affidavit is from the delegate of the Minister who made the decision that is the subject of judicial review in these proceedings. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision, including "the relevant sections of the *Income Tax Act*." The respondent points to this affidavit as evidence that the Minister had regard to the full extent of his discretion under subsection 220(3.1) of the Act and drew upon that section as the source of his authority.

41 The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.). After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27 (N.B. C.A.) at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267 (S.C.C.).

42 In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.

(d) Conclusion: the Minister's decision was unreasonable

43 I conclude that in making his decision the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act. Instead, he drew upon the Information Circular, and nothing else. His decision thereby became unreasonable.

(4) Should the decision be set aside and the matter returned to the Minister for redetermination?

44 Just because a decision is unreasonable does not mean that it must automatically be set aside and returned to the decision-maker for redetermination. Relief on an application for judicial review is discretionary.

45 In particular, this Court may decline to grant relief for an unreasonable decision where, for example, there is no substantial miscarriage of justice or the granting of relief would serve no

practical end: *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.); *Dennis v. Adams Lake Band*, 2011 FCA 37 (F.C.A.).

46 In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

47 The appellants say that their financial representative had a reasonable but mistaken belief that filing the form was not obligatory. This is belied by the fact that it did file the forms for the 1998 and 1999 taxation years. It knew that the Act required that the forms be filed and filed them.

48 After the 1999 taxation year, the appellants' representative consciously chose not to comply with the Act. It did so on the basis that the Canada Revenue Agency was getting information from other sources, such as the appellants' Canadian money managers. As it turned out, this basis did not apply to the appellant Canwest Communications Corporation.

49 Even if the Canada Revenue Agency was getting the information from other sources, this cannot be an acceptable excuse or mitigating factor for non-compliance in the circumstances of this case, especially where we are dealing with the appellants' representative, a professional firm that deals with tax matters. It is notorious that in various provisions of the Act, the Canada Revenue Agency is allowed to obtain the same type of information from different sources. This allows it to verify compliance with the Act. For example, an employer is obligated to file T-4 slips reporting the income it has paid to its employees. At the same time, the employees disclose their income from employment. The employers' and employees' figures should match. What if the employer, after filing T-4 forms for a period of years, consciously declined to file the T-4 slips and then argued that it should avoid penalties because the Canada Revenue Agency would get information about the employees' income from the employees? In those circumstances, would there be any case for relief? Of course not.

50 In this case, compliance was fully within the appellants' control. Compliance happened in the 1998 and 1999 taxation years and there were no new extenuating circumstances that might explain the later non-compliance. These facts fall outside of what this Court has identified as being a focus of subsection 220(3.1), namely the granting of relief where there are extenuating circumstances beyond the control of the person seeking relief: *Bozzer v. Minister of National Revenue*, 2011 FCA 186 (F.C.A.) at paragraph 22.

51 The appellants also argued that it is unfair for the Minister to levy six separate, sizeable penalties against the six appellants when there was really only one mistake made by their one common representative. The appellants contended that the penalties should be substantially reduced for that reason. This argument, smacking of a plea for a "volume discount," has no

merit. Each of the appellants is a separate legal entity and a separate taxpayer, potentially subject to penalties and interest for its own non-compliance. Each is capable of independent decision-making concerning the forms that are to be filed. Each, accepting the risk, chose instead to have a representative look after the filings. That risk materialized: their representative made a conscious decision not to file the forms, a decision made without reasonable excuse or justification, as explained above. Granting relief under subsection 220(3.1) on the basis of this argument would be an unreasonable exercise of discretion.

52 I accept that the normal remedy for an unreasonable decision is to set it aside and return the matter back to the decision-maker for redetermination. I also accept that this Court should be reluctant to wade into the merits of administrative decision-making. But there are cases, perhaps rare, where no practical end would be served by returning the matter back to the decision-maker. This is just such a case.

53 In these circumstances, the appellants' explanations and justifications are entirely without merit. The appellants could not succeed on them if we returned the matter to the Minister for redetermination. Similar to what happened in *MiningWatch Canada*, *supra*, the Minister made an unreasonable decision but no practical end would be served in returning the matter back to him for redetermination. Therefore, in this case, I would decline to do so.

D. Postscript

54 So that these reasons provide proper guidance and are not misunderstood and misapplied in future cases, I wish to make three brief observations.

-I -

55 Portions of the language used in the decision letter in this case are identical to that used in other decision letters: see, for example, *Spence v. Canada (Revenue Agency)*, 2010 FC 52 (F.C.). In itself, there is nothing wrong with using form letters or stock language taken from other decision letters. The reasons offered in one case can be appropriate for other cases, and the repeat use of those reasons is efficient. However, as this case shows, a blind use of form letters or stock language can sometimes lead to trouble.

56 Whether the reasons are cut and pasted from a previous letter, are slightly modified from a previous letter or have to be drafted from scratch, the final product issued to the applicant for relief under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters — something that can happen through careless or unthinking use of a form letter or stock language — the decision may not pass muster under the standard of review of reasonableness.

-II -

57 The foregoing comment and these reasons should not be taken to impose onerous new reasons-giving requirements upon the Minister. In this case, all that was required was perhaps a few additional lines in a letter that was just 33 lines long: *Vancouver International Airport Authority*, *supra* at paragraphs 16 and 17.

-III -

58 Finally, these reasons should not be taken to cast any doubt on the ability of administrative decision-makers, such as the Minister, to use policy statements, such as the Information Circular in this case, as an aid or guide to their decision-making.

59 Policy statements play a useful and important role in administration: *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 (F.C.A.). For example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

60 However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

61 In this case, the Minister ran afoul of these principles. Fortunately for him, however, he reached the only reasonable outcome on these facts.

E. Proposed disposition

62 For the foregoing reasons, I would dismiss the appeals. However, in light of the unreasonableness of the Minister's decisions, I would not award the respondent in each appeal its costs of the appeal.

***Marc Noël J.A.* :**

I agree.

***Johanne Trudel J.A.* :**

I agree.

Appeal dismissed.

2017 CAF 174, 2017 FCA 174
Federal Court of Appeal

Tsleil-Waututh Nation v. Canada (Attorney General)

2017 CarswellNat 10645, 2017 CarswellNat 4093, 2017 CAF 174, 2017 FCA 174, 11 C.E.L.R. (4th) 188, 282 A.C.W.S. (3d) 495, 414 D.L.R. (4th) 373

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY (Applicants) and ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC (Respondents) and ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA (Interveners)

David Stratas J.A.

Judgment: August 29, 2017
Docket: A-78-17, A-217-16, A-218-16, A-223-16, A-224-16, A-225-16, A-232-16, A-68-17, A-73-17, A-74-17, A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

Counsel: Thomas R. Berger, O.C., Q.C. for Moving Party, Attorney General of British Columbia
Scott A. Smith for Applicant, Tsleil-Waututh Nation
F. Matthew Kirchner, Emma K. Hume for Applicants, The Squamish Nation (Also known as the Squamish Indian Band), Xàlek/Sekyú Siý Am, Chief Ian Campbell on his own behalf and on behalf

of all members of the Squamish Nation, and the Coldwater Indian Band and Chief Lee Spahan in his capacity as chief of the Coldwater Band on behalf of all members of the Coldwater Band
Crystal Reeves for Applicant, Upper Nicola Band
Cheryl Sharvit for Applicant, Musqueam Indian Band
Jana McLean for Applicants, Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie Squiala First Nation, Tzeachten, Yakweakwioose, Skwah, Kwaw-Kwaw-Apilt and Chief David Jimmie on his own behalf and on behalf of all members of the Ts'elxwéyeqw Tribe
Sarah D. Hansen for APPLICANT, Chief Fred Seymour on their own behalf and on behalf of all other members of the Stk'emlubsemc Te Secwepemc of the Secwepemc Nation
Dyna Tuytel for Applicant, Raincoast Conservation Foundation and Living Oceans Society
K. Michael Stephens for Applicant, City of Vancouver
Gregory J. McDade, Q.C. for Applicant, City of Burnaby
Maureen Killoran, Q.C. for Respondent, Trans Mountain Pipeline ulc
Jan Brongers for Respondent, Attorney General of Canada
Marta Burns for Intervener, Attorney General of Alberta

***David Stratas J.A.*:**

1 The Attorney General of British Columbia moves under Rule 110 of the *Federal Courts Rules*, SOR/98-106 to intervene in these consolidated proceedings.

A. Background

2 In these consolidated proceedings, the applicants seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 and Order in Council PC 2016-1069 dated November 29, 2016 and published in a supplement to the *Canada Gazette*, Part I, vol. 150, no. 50 on December 10, 2016.

3 In brief, the Project — the capital cost of which is $7.4 billion — adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the construction of new works such as pump stations and tanks and the expansion of an existing marine terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day.

4 The applicants challenge the administrative approvals on a number of grounds. In support of their challenges, the applicants invoke administrative law, relevant statutory law, and section 35 of the *Constitution Act, 1982* and associated case law concerning the obligations owed to First Nations and Indigenous peoples and their rights. They also raise many issues concerning the Project's

"environmental effects," as defined by section 5 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

5 By Order dated March 9, 2017, after submissions were received, this Court consolidated 16 separate applications involving 31 parties and received one of the largest evidentiary records this Court has ever seen. The March 9, 2017 Order streamlined the process for getting the applications ready for hearing and set an expedited schedule.

6 During these proceedings, tens of motions have been brought. All were prosecuted under attenuated timelines.

7 The public interest in expediting this matter is strong. A couple of preambles in the March 9, 2017 Order put it this way:

> [W]ithout expressing any prejudgment on the matter, a report, an Order in Council and a Certificate have been made under the purported authority of legislation advancing the public interest and themselves have been made in the public interest, and all have effect until set aside; further, owing to the substantial interests of all parties in these proceedings, the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized;
>
> [T]herefore, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

8 The parties are to be commended for their conduct in these proceedings. They have worked hard to ensure the fastest possible hearing of this matter. They have complied fully with the letter and the spirit of the March 9, 2017 Order and the forest of orders and directions the Court has issued since that time.

B. Earlier motions to intervene

9 The March 9, 2017 Order allowed for motions to intervene to be brought within thirty-five days of the Order, namely by April 13, 2017. Two parties moved to intervene. One was successful: the Attorney General of Alberta (hereafter "Alberta"). See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 (F.C.A.).

10 The Attorney General of British Columbia did not move to intervene.

C. Later circumstances in British Columbia

11 On April 11, 2017, just two days before the expiry of the time to intervene in these proceedings, writs of election were issued in British Columbia.

12 The election was held on May 9, 2017. No one party achieved a majority of seats. The incumbent party won a plurality of seats and formed the government. At the end of June, it lost a vote of confidence in the Legislature. Soon afterward, the Lieutenant Governor invited the leading opposition party to form the government. It did so and assumed office on July 18, 2017.

D. British Columbia's motion to intervene

13 Five weeks later, on August 22, 2017, the Attorney General of British Columbia (hereafter "British Columbia") brought this motion. By direction, this Court required representations on the motion to be filed on an expedited basis. The last representations were filed two business days immediately preceding today.

14 A number of aspects of British Columbia's motion are unsatisfactory.

15 For one thing, it took five weeks for British Columbia to bring this motion, a very long time in a closely-managed, expedited proceeding such as this. The seven-paragraph affidavit offered in support of the motion does not offer a single word of explanation for the five-week delay.

16 The respondents, Trans Mountain and Canada, and the intervener, Alberta, found it difficult to respond to British Columbia's motion because it said little on the scope of its intervention. British Columbia's written representations contain only four very general paragraphs regarding why it meets the test for intervention under Rule 110. None of them address the issue of the scope of the intervention.

17 In this Court, an intervener — even an Attorney General intervening under Rule 110 — is not given an open microphone to say anything it wishes. Instead, in order to ensure that new issues and matters requiring evidence are not raised, this Court defines the scope of the intervention. It is true that Attorneys General intervening under Rule 110 make submissions based on the public interest in their respective jurisdictions. In appropriate cases, this can be broad. But this Court must still take care to ensure that procedural and substantive unfairness is not caused to the parties directly affected by the proceedings: the existing applicants and respondents.

18 In its representations in chief, British Columbia submits that the Project has a "disproportionate impact...on British Columbians" including "impact[s] on British Columbia's land and coast" and effects upon the "health and welfare of British Columbians," the environment and "provincial infrastructure." It adds that there are "constitutional limitations on British Columbia's ability to regulate the Project," British Columbia has a "strong interest in the regulatory regime that governs interprovincial pipelines," and these proceedings "raise profound questions about cooperative federalism in Canada." British Columbia also notes that it raised certain concerns in this matter before the National Energy Board.

19 In its representations in reply, British Columbia adds that marine spill risks were unreasonably assessed, resulting in risk to British Columbians and a breach of the duty to accommodate Indigenous peoples and First Nations.

20 Missing overall is any mention of the precise submissions British Columbia intends to make as an intervener in these proceedings. In these circumstances, all that this Court can do is assume that British Columbia intends to speak to the concerns described above and no other concerns.

E. The criteria for intervention

21 The criteria for intervention under Rule 110 are set out in this Court's earlier decision in *Tsleil-Waututh Nation*, above.

22 Motions to intervene under Rule 110 are different from motions to intervene under Rule 109. As explained in *Tsleil-Waututh Nation*, Rule 110 is a special rule allowing the Attorneys General of Canada and the provinces to move to intervene. Rule 110 recognizes that Attorneys General who represent broader interests — in many cases the interests of millions of members of the public — are responsible on behalf of the Crown for advancing and protecting the public interest.

23 In contrast, Rule 109 requires others moving to intervene, such as special interest groups, to show how their participation in the proceeding as an intervener "will assist in the determination of a factual or legal issue related to the proceeding." As *Tsleil-Waututh Nation*, above explains, Attorneys General are under no such requirement.

24 Under the terms of Rule 110, Attorneys General are not automatically allowed to intervene.

25 First, the opening words of Rule 110 require that there be "a question of general importance raised in the proceeding." The question must be one that affects the interests of the government or the population in the relevant jurisdiction in a general way: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2002 FCA 306, 293 N.R. 182 (Fed. C.A.) at para. 8; *Vancouver Wharves Ltd. v. Canada (Regional Safety Officer)* (1996), 107 F.T.R. 306, 41 Admin. L.R. (2d) 137 (Fed. T.D.) at paras. 36, 37, 41 and 42. The "question of general importance" requirement can also be met where "serious questions are raised in proceedings that themselves are of general importance": *Tsleil-Waututh Nation* at para. 18.

26 Second, Rule 110 does not stand alone in the *Federal Courts Rules*. In making an intervention order under Rule 110, this Court can impose conditions: Rule 53. More broadly, Rule 110 must be interpreted and applied in accordance with the objectives set out in Rule 3, namely the securing of "the just, most expeditious and least expensive determination of every proceeding on its merits." In some special circumstances, those considerations can empower the Court to dismiss an Attorney General's motion to intervene, even where the "question of general importance" requirement is met.

F. Should British Columbia be allowed to intervene?

27 In my view, British Columbia has met the "question of general importance" requirement. This Court so found in the context of Alberta's motion to intervene in these proceedings (*Tsleil-Waututh Nation*, above at paras. 19 and 21-22):

> There is no doubting the importance of these consolidated proceedings. They consist of 16 separate proceedings brought by many applicants, including First Nations, Indigenous peoples and environmental groups. The Project concerns a pipeline that crosses much of Alberta. The Project is intended to facilitate the access of Alberta's natural resources to new markets for the benefit of the economy.
>
> . . . . .
>
> Further, the legal issues the applicants raise are of general importance. These include issues concerning the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the *Species at Risk Act*, S.C. 2002, c. 29, and issues relating to the rights and interests of Indigenous peoples.
>
> Taken together, all these considerations suggest a strong nexus between the issues raised in the proceeding on the one hand and the interests of the Government of Alberta and the population it serves on the other.

28 Equally, there is a strong nexus between the issues raised in this proceeding on the one hand and the interests of the Government of British Columbia and the population it serves on the other.

29 Both the respondent, Trans Mountain, and the intervener, Alberta, submit that this Court should exercise its discretion against allowing British Columbia to intervene. Both invoke British Columbia's delay in moving to intervene.

30 Trans Mountain goes further and opposes on the basis of the unsatisfactory features of British Columbia's motion, some of which I have described above. It raises the specter of British Columbia advancing new, complex issues on the eve of the hearing, resulting in substantive and procedural unfairness.

31 I share many of these concerns. The public interest in this hearing going ahead as scheduled on October 2-13, 2017 outweighs any public interest served by British Columbia's intervention. British Columbia could have moved to intervene far sooner. The five-week delay in bringing this motion — in the end a motion offering just a handful of meaningful paragraphs supported by general documents already known to the Court — is unexplained. Finally, British Columbia says that it considers its participation in the proceedings important, yet after five weeks it cannot yet say with much specificity how it intends to participate.

32 British Columbia does not appear to understand the basic ground rules of the complex proceeding it is seeking to enter. Its representations in chief show no understanding of the March 9, 2017 Order and the strong public interest in the hearing going ahead as scheduled; rather than seeking a variation of the March 9 Order to allow its intervention motion to be considered, it sought an extension of time under the Rules to intervene but the Rules do not set a time period for interventions. It was unaware of other important orders made in the proceedings relating to the manner of service and the style of cause. To enter complex proceedings — especially at a very late date — a party must intimately understand the proceedings and to the extent possible work within existing strictures, doing its best to minimize any prejudice. Here, this did not happen.

33 Although this motion is a close call, this Court has decided to allow British Columbia to intervene on terms. The style of cause is hereby amended to reflect this. The style of cause is now as set out at the beginning of this document.

34 There are certain circumstances that prompt this Court to grant British Columbia's motion to intervene.

35 Two provinces are most directly affected by these proceedings, Alberta and British Columbia. The public interest of Alberta has been given a voice in these proceedings. The public interest of British Columbia deserves a voice too.

36 Alberta appears to be mainly on the side of the respondents. British Columbia appears to be mainly on the side of the applicants. The former is in the proceedings; the latter should also be in the proceedings. One factor in intervention proceedings is the concept of "equality of arms" and fair treatment to both sides: *Gitxaala Nation v. R.*, 2015 FCA 73 (F.C.A.) at para. 23; *Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at para. 12.

37 British Columbia did participate in the administrative proceedings before the National Energy Board. It advanced a position there. It should be free to advance a position in the judicial review of those administrative proceedings.

38 Trans Mountain characterizes British Columbia as reversing its position on the issue of intervention. Even accepting that characterization, the intervening election, the confidence vote and the resulting change of government are justifying circumstances.

39 Trans Mountain submits that British Columbia is estopped or foreclosed from advancing certain arguments. I do not accept this, except to the extent discussed below.

40 The concerns that Trans Mountain and Alberta raise are serious. But they can be regulated by conditions imposed on the granting of intervention status.

41 While British Columbia may have been blasé in approaching this motion to intervene, it must be vigilant in complying with these conditions: if any are breached, the panel hearing the appeal may revoke British Columbia's status as an intervener.

G. The intervention order and conditions attached to it

42 British Columbia may file a memorandum of fact and law of no more than fifteen pages, the same page length given to Alberta. It may also make oral submissions at the hearing for a duration to be set by the hearing panel.

43 British Columbia will have to file its memorandum of fact and law on a highly expedited basis. This timing is dictated by present circumstances.

44 Under the March 9, 2017 Order as amended, the respondents and Alberta file their memoranda of fact and law this Friday, September 1, 2017. Mindful of the public importance of the hearing in this matter proceeding as scheduled, almost all of the existing parties — both applicants and respondents — insist that this filing date be maintained. I agree. The deadline of September 1, 2017 for the respondents and Alberta to file their memoranda is confirmed.

45 As already noted, British Columbia appears to be adverse in interest to the respondents and Alberta and supportive of some of the applicants' positions. Under our Rules concerning the filing of memoranda, absent special circumstances, applicants and those supporting them do not have a right of reply.

46 Accordingly, the latest that British Columbia can file its memorandum of fact and law is Friday, September 1, 2017. In its reply representations on this motion, British Columbia accepts this as the deadline. Therefore, September 1, 2017 shall be the deadline for British Columbia's memorandum.

47 Two respondents, Trans Mountain and Canada, have asked for an opportunity to respond to British Columbia by way of a reply memorandum. Fairness requires this. Therefore, these respondents shall be permitted to file memoranda of fact and law replying to British Columbia, restricted to the matters raised by British Columbia in its memorandum. The reply memoranda shall be limited to ten pages.

48 Given the closeness of the hearing date, the deadline for the filing of the respondents' reply memoranda will be September 8, 2017.

49 Alberta also asked to file a reply memorandum. But it only has the status as an intervener. Thus, I exercise my discretion against allowing it to file a reply memorandum. If necessary, it can reply to British Columbia as part of its oral submissions at the hearing. This places Alberta and British Columbia in the same situation: neither will be able to respond in writing to the other.

50 Many of the applicants ask for an opportunity to file a second memorandum replying to British Columbia's memorandum. I am not persuaded at this time that this will be necessary. British Columbia's memorandum, expected to be supportive of some of the applicants' positions, will be brief and any necessary reply can be made orally at the hearing.

51 The applicants also request a further half day of hearing time on the basis that British Columbia's time for oral submissions will come out of the applicants' overall time.

52 I deny the request. Here I note that there is equal treatment of both sides: Alberta's time for oral submissions will come out of the respondents' overall time and British Columbia's time for oral submissions will come out of the applicants' overall time. While the interveners are cutting into the parties' time for oral submissions, still much time remains. As is the case for Alberta, the duration of British Columbia's oral submissions shall be set by the chair of the panel hearing this matter. I expect that the duration of argument devoted to each intervener will be relatively small, probably in the ten-to-thirty minute range. Further, the overall time set for argument — seven days — is longer than any other modern proceeding in this Court. Therefore, I am not persuaded that the overall time for argument should be extended.

53 I now turn to the permissible scope of British Columbia's intervention.

54 In this Court, an intervener is not an applicant: *Tsleil-Waututh Nation*, above. An intervener cannot introduce new issues or claim relief that an applicant has not sought. Instead, an intervener is limited to addressing the issues already raised in the proceedings, *i.e.*, within the scope of the notices of application. As well, an intervener cannot introduce new evidence. See generally *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 (F.C.A.).

55 In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.

56 To allow them to do more is to alter the proceedings that those directly affected — the applicants and the respondents — have cast and litigated under for months, with every potential for procedural and substantive unfairness.

57 Against this, British Columbia cites certain decisions of the Supreme Court of Canada that take a looser approach to intervention. These decisions are distinguishable. They concern the intervention practice of that Court as a final general court of appeal acting under its own intervention rule. They do not concern the intervention practice of this Court acting as a first-instance reviewing court operating under its own intervention rule.

58 These principles affect the permissible scope of British Columbia's intervention. Some of the concerns British Columbia raises, described at para. 18 above, are new issues in these proceedings. For example, the "constitutional limitations on British Columbia's ability to regulate the Project" are not in issue, nor is the "regulatory regime that governs interprovincial pipelines" except to the extent that the meaning of certain regulatory provisions has been put in issue by the parties. Further, "profound questions about cooperative federalism in Canada" have not been raised. These issues are off the table.

59 They are also irrelevant to the issues this Court must decide. Before this Court are judicial reviews of decisions of the National Energy Board and the Governor in Council. The question is whether the decisions should stand in light of the administrative law principles raised by the parties and the principles associated with the duty to consult and accommodate Indigenous peoples and First Nations — nothing more. I am not persuaded that cooperative federalism or constitutional limitations on British Columbia's ability to regulate the Project have anything to do with these principles or how they are applied.

60 This Court is a court of law that grapples with legal arguments; larger political issues that do not bear on the legal issues are irrelevant and distracting, and, thus, inadmissible. See *Ishaq*, above at paras. 26-27; see also D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 17 at 59-61 and authorities cited therein.

61 British Columbia shall not advance new issues.

62 British Columbia shall also take care not to advance new arguments that in effect are new issues. For example, submissions that extend the scope of the duty to consult and accommodate beyond those advanced by the applicants are not permissible.

63 British Columbia shall be limited to submissions commenting on the submissions advanced by other parties from its perspective as guardian of the public interest of British Columbia and as a government with responsibilities to discharge under provincial legislation. This is to be done with one goal front of mind: to assist the Court in deciding whether the administrative decisions before it should be quashed on account of administrative law and duty to consult principles.

64 For example, British Columbia may make submissions on the issue it raised in its reply representations on this motion: namely, whether marine spill risks were unreasonably assessed, resulting in risk to British Columbians and a breach of the duty to accommodate Indigenous peoples and First Nations. The applicants have placed this issue on the table.

65 British Columbia's submissions shall not unnecessarily duplicate the submissions of other parties.

66 British Columbia may also make submissions concerning its involvement in the administrative proceedings below and whether the concerns it advanced, similar to those raised by the applicants, have been addressed.

67 British Columbia shall be limited to the evidentiary record. For example, in commenting on what it calls "disproportionate impact[s]...on British Columbians," including "impact[s] on British Columbia's land and coast" and effects upon the "health and welfare of British Columbians," the environment, and "provincial infrastructure," British Columbia shall be restricted to the evidence in the Electronic Record in these proceedings.

68 Trans Mountain submits that as a condition of intervening, British Columbia should be liable for its solicitor and client costs occasioned by the need to file a memorandum in reply to British Columbia. Trans Mountain is the only party asking for costs.

69 Trans Mountain is entitled to costs owing to British Columbia's lateness in moving to intervene. Had British Columbia moved sooner, it would have been required to file its memorandum at the same time as the applicants. In that case, Trans Mountain would have been able to respond to British Columbia in its responding memorandum. Trans Mountain must now prepare a second memorandum. In my discretion, I award it $7,500 in costs from British Columbia in any event of the cause.

70 Except as provided in these reasons, the schedule set by this Court remains in place. In particular, the hearing is set for a duration of seven days during the period of October 2-13, 2017.

71 Nothing in these reasons should be taken to affect the hearing panel's discretion over the conduct of the hearing.

72 I thank all parties for their prompt and helpful submissions. An order shall issue in accordance with these reasons.

Motion granted on terms.