Agency File No. 19-00189

CANADIAN TRANSPORTATION AGENCY

IN THE MATTER OF:

Investigation into possible freight rail service issues in the Vancouver area, pursuant to subsection 116(1.11) of the *Canada Transportation Act*, S.C. 1996, c.10, as amended

BETWEEN:

CANADIAN TRANSPORTATION AGENCY

- and –

CANADIAN NATIONAL RAILWAY COMPANY

AUTHORITIES TO THE RESPONSE

ON BEHALF OF CANADIAN NATIONAL RAILWAY COMPANY

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Le Procureur général du Québec (appelant) et La Régie des alcools, des courses et des jeux (appelante) c. 2747-3174 Québec Inc. (intimée)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: March 27, 1996
Judgment: November 21, 1996
Docket: 24309

Proceedings: Reversing 65 Q.A.C. 245, (sub nom. *Québec (Procureur général) c. 2747-3174 Québec Inc.*) [1994] R.J.Q. 2440, (sub nom. *2747-3174 Québec Inc. v. Régie des permis d'alcool du Québec*) 122 D.L.R. (4th) 553 (C.A.)

Counsel: *Jean-Yves Bernard* and *Benoît Belleau*, for appellants.
Simon Venne and *Marie Paré*, for respondent.

Subject: Public; Constitutional

Headnote

Liquor control --- Liquor licencing and control boards — Powers and procedures — Appeal or review — Grounds — General

Liquor control — Liquor licencing and control boards — Powers and procedures — Appeal or review — Grounds — Liquor control board revoking bar's liquor permits following complaints of excessive noise — Board exercising quasi-judicial function and having to comply with requirements of impartiality and independence — Board being sufficiently independent despite government's powers to dismiss directors for specific reasons and large number of contacts between board and cabinet minister — Reasonable apprehension of bias arising because board's employees investigating and prosecuting complaints as well as participating in adjudication of complaints — Board's directors not being impartial because having power to both decide to hold hearing following investigation and to participate in adjudication — Board's decision being quashed because decision not being made by independent and impartial tribunal — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 23, 56(1) — Act respecting liquor permits, R.S.Q., c. P-9.1, ss. 2, 75, 86(8).

Administrative law --- Requirements of natural justice — Bias

Administrative law — Requirements of natural justice — Bias — Liquor control board revoking bar's liquor permits following complaints of excessive noise — Board exercising quasi-judicial function and having to comply with requirements of impartiality and independence — Board being sufficiently independent despite government's powers to dismiss directors for specific reasons and large number of contacts between board and cabinet minister — Reasonable apprehension of bias arising because board's employees investigating and prosecuting complaints as well as participating in adjudication of complaints — Board's directors not being impartial because having power to both decide to hold hearing following investigation and to participate in adjudication — Board's decision being quashed because decision not being made by independent and impartial tribunal — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 23, 56(1) — Act respecting liquor permits, R.S.Q., c. P-9.1, ss. 2, 75, 86(8).

Human rights --- Miscellaneous issues

Human rights — Right to independent and impartial tribunal — Liquor control board revoking bar's liquor permits following complaints of excessive noise — Board exercising quasi-judicial function and having to comply with requirements of impartiality and independence — Board being sufficiently independent despite government's powers to

dismiss directors for specific reasons and large number of contacts between board and cabinet minister — Reasonable apprehension of bias arising because board's employees investigating and prosecuting complaints as well as participating in adjudication of complaints — Board's directors not being impartial because having power to both decide to hold hearing following investigation and to participate in adjudication — Board's decision being quashed because decision not being made by independent and impartial tribunal — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 23, 56(1) — Act respecting liquor permits, R.S.Q., c. P-9.1, ss. 2, 75, 86(8).

The provincial liquor control board, which was responsible for issuing and cancelling liquor permits, revoked the permit of the bar following a hearing into complaints of excessive noise. Section 75 of the *Act respecting liquor permits* (Que.) required that a permit holder not disturb the public tranquility, and s. 86(8) of the Act allowed the board to cancel a permit for a violation of s. 75.

The bar claimed that the board's decision violated s. 23 of the *Charter of Human Rights and Freedoms* (Que.), which states that every person has the right to a hearing by an independent and impartial tribunal for the determination of his or her rights and obligations. Section 56(1) of the *Charter* states that a tribunal, for the purposes of s. 23, included an agency exercising quasi-judicial functions. The bar claimed that the board was not impartial because its employees participated in every stage of the complaint process, including the investigation and the filing of complaints, the presentation of the case before the directors, and the making of the board's decision. The board's lawyers both made submissions to the directors, who made the decision to cancel a permit, and then advised the directors, who had no legal training, in making their decision. The directors had the power to both decide to hold a hearing and to decide the case on its merits. As well, the bar claimed that the board was not independent, because its directors held office for only five-year terms, and their appointment could be revoked by the government before the expiry of the term for specific grounds such as defalcation, mismanagement, or gross fault. The bar also claimed that the board was not independent, because the board was under the control of a cabinet minister who evaluated the board's chair, and who could require information concerning the board's activities.

The bar successfully challenged the decision before the Quebec Superior Court. The court declared that s. 2 of the Act, which established the board, was invalid because the board did not comply with s. 23. The Quebec Court of Appeal reversed the Superior Court decision in part. It found that s. 2 was valid, but that a decision by the board to cancel a permit under s. 86(8) for a violation of s. 75 would be invalid under ss. 23 and 56(1). The board appealed to the Supreme Court of Canada.

Held:

The appeal was allowed.

Per Gonthier J. (Lamer C.J.C., La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ. concurring): Section 23 applied to this case because the board was exercising a quasi-judicial function in revoking the bar's permit, since the bar's rights were clearly affected by the cancellation. As well, the board was exercising a quasi-judicial function in deciding whether to revoke a permit on the grounds of disturbance of public tranquillity, since it held a hearing and applied a pre-established standard to specific adduced facts. Section 23 applies to civil matters, and is not limited to matters of penal significance.

Section 23 required that the board be impartial, and it would fail to meet that test if a well-informed person would have a reasonable apprehension of bias concerning the board in a substantial number of cases. The fact that the board's employees performed different functions would not normally raise a problem. However, a reasonable apprehension of bias arose from the role of the board's lawyers, since they both made submissions to directors regarding prosecutions for violations of permit terms, and advised the directors, who were not legally trained, in making decisions to cancel permits. Prosecuting counsel must in no way be in a position to participate in the adjudication process. As well, a reasonable apprehension of bias arose from the fact that the board had allowed a director to make the decision to hold a hearing, and had then allowed the same director to participate in the decision-making process in the same matter. The board was therefore in violation of its s. 23 duty to be an impartial tribunal.

However, the board was sufficiently independent for the purposes of s. 23. The three main components of judicial independence are security of tenure, financial security, and institutional independence. The board's directors had security of tenure, even though they were appointed for fixed terms rather than for life. While the members could be removed before the end of their term, this did not infringe on their independence, because they could only be dismissed for specific

reasons, and not at the pleasure of the executive. While there were a large number of points of contact between the board and its governing Minister, this was not sufficient to raise a reasonable apprehension respecting the board's institutional independence.

As the board was not impartial, its structure did not meet the requirements of s. 23. However, as those shortcomings were not imposed by legislation, it was unnecessary to declare specific provisions of the Act inconsistent with the *Charter*, as the Court of Appeal had done. It was a sufficient remedy to quash the board's decision to cancel the bar's permit.

Per L'Heureux-Dubé J. (concurring): Section 23 was inapplicable in this case. Sections 23 and 56(1) had to be interpreted using the "modern" legal interpretation method, giving consideration not only to the words of the sections, but also to the section's context and legislative history, and the meaning of other provisions of the *Charter*, rather than relying on the "plain meaning" method. The definition of quasi-judicial in s. 56(1) was limited to matters of penal significance when the legislative history and purposes of ss. 23 and 56(1) was examined. Consequently, s. 23 did not give the bar the right to an independent and impartial hearing regarding the cancellation of a liquor permit.

However, while the *Charter* was inapplicable, the board was still required to act in accordance with the common law principles of administrative law which applied in Quebec. As the board performed either quasi-judicial or administrative acts, it was subject to the nemo judex in propria sua causa debet esse rule, which included the duty to act impartially. For the reasons given by the majority, the evidence established a reasonable apprehension that the board was biased. The board could have obtained a declaratory judgment that s. 2 of the Act was of no force and effect if it had sought a declaratory judgment under s. 453 of the *Code of Civil Procedure*, but it had not done so. The board's decision revoking the liquor permit was to be quashed, but solely on the basis of the rules of administrative law.

APPEAL from judgment reported at 65 Q.A.C. 245, *(*sub nom. *Québec (Procureur général) c. 2747-3174 Québec Inc.)* [1994] R.J.Q. 2440, *(*sub nom. *2747-3174 Québec Inc. v. Régie des permis d'alcool du Québec)* 122 D.L.R. (4th) 553 (C.A.), finding that power of Quebec liquor control board to cancel liquor permit, for disturbance of public tranquility, being invalid.

***Gonthier J.* (*Lamer C.J.C., La Forest, Sopinka, Cory, McLachlin, Iacobucci* and *Major JJ.* concurring):**

1 This appeal gives the Court an opportunity to clarify the scope of the requirements imposed on administrative tribunals by s. 23 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. The specific case of the Régie des permis d'alcool underscores the need to reconcile the imperatives of administrative convenience with the principles of impartiality and independence, which cannot readily be compromised.

I — Facts

2 The respondent corporation operated the Bistro-Bar La Petite Maison Enr. in St-Jérôme pursuant to two permits issued by the Régie des permis d'alcool. Following a number of complaints and the combined action of three police forces, the chairman of the Régie sent the respondent a notice of summons on May 1, 1992. In that document, which set out the various allegations against the respondent, the Régie informed the respondent that it intended to hold a hearing before making any decision concerning the cancellation or suspension of the permits. Counsel for the Régie and for the respondent accordingly adduced evidence for seven days before two directors through a number of witnesses. Then, on October 14, 1992, the chairman of the Régie sent the respondent a supplementary notice of summons on the basis of new evidence. A further seven days of hearings were necessary before the directors decided, on February 17, 1993, to revoke both of the respondent's liquor permits on the ground of disturbance of public tranquility. Among the reasons given by the directors for imposing this penalty under ss. 75 and 86(8) of the *Act respecting liquor permits*, R.S.Q., c. P-9.1, (the "Act") were that the establishment caused excessive noise and that narcotics trafficking was taking place there.

3 The respondent challenged that decision in the Superior Court by way of evocation. It asked that the decision be quashed and further asked that s. 2 of the Act, which establishes the Régie, be declared invalid on the basis that the Régie does not comply with the guarantees of independence and impartiality set out in s. 23 of the *Charter*. On June 15, 1993, the Superior Court granted the motion and, by declaring the impugned provision invalid and of no force or effect, called

exercises quasi-judicial functions, even incidentally, characterizing it as a "tribunal". Thus, within the meaning of s. 56, a tribunal is an agency exercising *quasi-judicial functions*, and not one that exercises *only* quasi-judicial functions. As a consequence, however, s. 23 is applicable only while the agency is exercising its quasi-judicial functions.

20 In *S.C.F.P. v. Québec (Conseil des services essentiels)*, [1989] R.J.Q. 2648, the Court of Appeal expressed the matter slightly differently with respect to ss. 23 and 56. Chevalier J. (*ad hoc*) stated the following at p. 2659:

> [TRANSLATION]
>
> In my view, the words used by the legislature in drafting section 56 show that it intended to make a clear distinction between an agency created *essentially* to exercise quasi-judicial functions and one that is *occasionally* required to act quasi-judicially in exercising its principal administrative function. It does not, I repeat, become a quasi-judicial agency within the meaning of section 56 just because it has such ancillary powers.
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> . . . . .
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> Since section 23 is, as a result of the definition in section 56, applicable only to an agency *exercising* quasi-judicial functions and since, as we have seen, the Conseil was not created primarily to exercise such functions, it must be concluded that the requirements of the Quebec Charter contained in section 23 are not applicable to the Conseil *in so far as its existence as an institution is in issue*.
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> . . . . .
>
> ... in my view, the wording "agency *exercising* quasi-judicial functions" in the definition in section 56 was chosen to indicate that the Conseil must, when dealing with a matter that will result in an order of a quasi-judicial nature, satisfy the requirements of section 23. [Emphasis in original.]

21 Similarly, in the case at bar, the judges of the majority held s. 23 to be applicable, although they did so after observing that the Régie was not a "tribunal" within the meaning of s. 56. While the result of their reasoning is correct, the process itself is somewhat unsound. As I explained, whether or not s. 23 is applicable depends on the characterization of the functions in question. If they are quasi-judicial, the agency is a "tribunal" and must in exercising them comply with the requirements of impartiality and independence. The distinctions made by the Court of Appeal instead pertain rather to the effect of a declaration of unconstitutionality. At that later point in the analysis it will be possible to determine whether defects deriving from the agency's constituent legislation affect its very existence or merely undermine one aspect of its operations.

22 That being the case, it is now necessary to identify the tests for distinguishing functions that are quasi-judicial from those that are not. The debate surrounding this distinction was for a long time of great importance in administrative law and resulted in numerous judicial decisions. Thus, the superior courts, owing *inter alia* to enactments requiring them to do so, relied on the distinction in order to determine what acts were subject to judicial review. The scope of the rules of natural justice then depended to a large extent on the characterization of the process by which the agency in question made its decision. However, this Court gradually abandoned that rigid classification by establishing that the content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on a characterization of its functions (see, *inter alia, Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602). As Sopinka J. noted in *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96:

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

45 This test is perfectly suited, under s. 23 of the *Charter*, to a review of the structure of administrative agencies exercising quasi-judicial functions. Whether appearing before an administrative tribunal or a court of law, a litigant has a right to expect that an impartial adjudicator will deal with his or her claims. As is the case with the courts an informed observer analysing the structure of an administrative tribunal will reach one of two conclusions: he or she either will or will not have a reasonable apprehension of bias. That having been said, the informed person's assessment will always depend on the circumstances. The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment. In a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. As Lamer C.J. noted in *Lippé*, *supra*, at p. 142, constitutional and quasi-constitutional provisions do not always guarantee an ideal system. Rather, their purpose is to ensure that, considering all of their characteristics, the structures of judicial and quasi-judicial bodies do not raise a reasonable apprehension of bias. This is analogous to the application of the principles of natural justice, which reconcile the requirements of the decision-making process of specialized tribunals with the parties' rights. I made the following comment in *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, at pp. 323-24:

> I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces.

I note, however, that this necessary flexibility, and the difficulty involved in isolating the essential elements of institutional impartiality, must not be used to justify ignoring serious deficiencies in a quasi-judicial process. The perception of impartiality remains essential to maintaining public confidence in the justice system.

(i) The Liquor Permit Cancellation Process

46 The arguments against the Régie des permis d'alcool relate primarily to its role at various stages in the liquor permit cancellation process. The Act authorizes employees of the Régie to participate in the investigation, the filing of complaints, the presentation of the case to the directors and the decision.

47 I note at the outset that a plurality of functions in a single administrative agency is not necessarily problematic. This Court has already suggested that such a multifunctional structure does not in itself always raise an apprehension of bias. In *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, at pp. 309-10, L'Heureux-Dubé J., although she did not rule on the impact of the constitutional guarantees, stated the following:

> As with most principles, there are exceptions. One exception to the "*nemo judex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.
>
> . . . . .
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> In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.

Cory J. made a similar comment in *Newfoundland Telephone*, *supra*, at p. 635:

> Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

48 Although an overlapping of functions is not always a ground for concern, it must nevertheless not result in excessively close relations among employees involved in different stages of the process. The lack of separation of roles within the Régie des permis d'alcool was the principal basis for the Court of Appeal's decision in the present case, which means that a thorough review of its institutional structure will be necessary.

49 The Régie is composed of at least six directors, including a chairman and a vice-chairman (s. 4). The directors are appointed by the government for a term of not over five years. Their remuneration, social benefits and conditions of employment are also determined by the government. Once fixed, however, their remuneration cannot be reduced (s 5). The directors are prohibited from holding offices incompatible with the functions assigned to them by the Act (s. 9). They are also prohibited, under pain of forfeiture of office, from having any direct or indirect interest in an undertaking likely to make their personal interest conflict with the duties of their office (s. 10). The directors have the powers and immunity of commissioners appointed under the *Act respecting public inquiry commissions*, R.S.Q., c. C-37 (s. 11). In addition, neither the Régie nor the directors can be prosecuted for official acts done in good faith in the exercise of their functions (s. 12).

50 The chairman, in addition to his or her role as a director, is responsible for the administration and the general direction of the affairs of the Régie (s. 8). The chairman's duties include presiding over the plenary sessions of the Régie, informing the directors on any questions of general policy, signing the documents and instruments within the Régie's jurisdiction either alone or with any other designated person, and preparing the roll (s. 15 of the *Règles de régie interne de la Régie des permis d'alcool du Québec*, R.R.Q. 1981, c. P-9.1, r. 9). Moreover, the parties admitted that the chairman conducts an annual evaluation, on the basis of a rating guide, of the performance of the Régie's members and employees. The chairman is in turn evaluated by the Minister of Public Security. These assessments appear to be used to calculate bonuses. The vice-chairman replaces the chairman in his or her absence (s. 8). The Régie's 1991-92 annual report, which was filed in evidence, describes the vice-chairman's duties as follows:

> [TRANSLATION]
>
> The incumbent of this position co-ordinates and supervises the legal advice and support functions of the Régie's directors and legal advisers. She ensures that the Régie's decisions are consistent and that files for submission to the courts are in order.

51 The other employees of the Régie work in various administrative units. Only the secretariat is of interest in this appeal, as it is responsible, *inter alia*, for the legal services unit, which includes lawyers appointed and remunerated in accordance with the *Public Service Act*, R.S.Q., c. F-3.1.1. Their role is described as follows in the annual report (at p. 22):

> [TRANSLATION]
>
> Members of legal services review any files that may result in notices to appear before the Régie to ensure that they comply with the law.
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> These advisers also meet with the solicitors of record to clarify certain aspects of the cases, see that notices of summons are drafted and sent, and present arguments to the Régie sitting in public hearings. Legal services also give legal opinions to the managers and directors, perform legal research and draft opinions, prepare draft regulations on matters within the Régie's jurisdiction and provide the public with information on statutes and regulations.

52 In practice, employees of the Régie are involved at every stage of the process leading up to the cancellation of a liquor permit, from investigation to adjudication. Thus, the Act authorizes the Régie to require permit holders to provide information (s. 110). Members of the Régie's staff designated by the chairman, or members of police forces, may also inspect establishments during business hours (s. 111). The Régie has signed memorandums of understanding with certain police forces to establish a framework for their role of inspection and seizure. The Régie can thus initiate the investigation process. However, a formal investigation is not an absolute prerequisite for cancellation of a permit. The Régie may

summon a permit holder of its own initiative or on the application of any interested person, including the Minister of Public Security (s. 85). As the annual report indicates, legal services lawyers participate in the preliminary review of files before the decision to summon a permit holder is made. Where the application for cancellation is made by a third party, s. 26 of the *Regulation respecting the procedure applicable before the Régie des permis d'alcool du Québec*, requires that the Régie summon the permit holder if the facts mentioned call *prima facie* for the enforcement of ss. 86 to 90 of the Act. The Act and regulations do not, however, specify the circumstances in which the Régie may proceed *proprio motu*.

53 If the Régie decides to hold a hearing, a notice of summons drafted by a legal services lawyer is sent to the permit holder. In the case at bar, the notice was signed by the chairman of the Régie. Where a ground related to public tranquility is involved, a hearing is then held before at least two directors designated by the chairman (ss. 15 and 16). One of the legal services lawyers acts as counsel for the Régie at that hearing. The directors must decide the matter and, in the case of a tied vote, the matter is referred to the Régie sitting in plenary session. The proceedings are completed with the publication of written reasons.

(ii) Role of the Régie's Lawyers

54 This detailed description of the Régie's structure and operations shows that the issue of the role of the lawyers employed by legal services is at the heart of this appeal. In my view, an informed person having thought the matter through would in this regard have a reasonable apprehension of bias in a substantial number of cases. The Act and regulations do not define the duties of these jurists. The Régie's annual report, however, and the description of their jobs at the Régie, show that they are called upon to review files in order to advise the Régie on the action to be taken, prepare files, draft notices of summons, present arguments to the directors and draft opinions. The annual report and the silence of the Act and regulations leave open the possibility of the same jurist performing these various functions in the same matter. The annual report mentions no measures taken to separate the lawyers involved at different stages of the process. Yet it seems to me that such measures, the precise limits of which I will deliberately refrain from outlining, are essential in the circumstances. Evidence as to the role of the lawyers and the allocation of tasks among them is incomplete, but the possibility that a jurist who has made submissions to the directors might then advise them in respect of the same matter is disturbing, especially since some of the directors have no legal training. In this regard, I agree with Brossard J.A. (at p. 581 D.L.R.):

> [TRANSLATION]
>
> The appellants invite us to presume that their opinions are general or related to the administrative functions of the directors and point out that the Régie's annual report does not establish the existence of any practice by which the prosecuting lawyers would also be called on to give legal opinions in the context of the exercise of the directors' adjudicative function. However, the report does not rule out this possibility. Yet in matters of institutional bias, it is the reasonable apprehension of the informed person that we must consider and not the proven or presumed existence of an actual conflict of interest.

55 Furthermore, the courts have not hesitated to declare on the basis of the rules of natural justice that such a lack of separation of functions in a lawyer raises a reasonable apprehension of bias. In *Sawyer v. Ontario (Racing Commission)* (1979), 24 O.R. (2d) 673 (C.A.), for example, the lawyer who presented the administrative agency's point of view subsequently took part in the review of the reasons for the decision. Brooke J.A. described the role of that lawyer as follows, at p. 676:

> But there is no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission. ... He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them

for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired.

See also *Després v. Assn des Arpenteurs-géomètres du Nouveau-Brunswick* (1992), 130 N.B.R. (2d) 210 (C.A.); *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 76 C.C.C. (3d) 10 (Ont. C.A.), at p. 41.

56 Similarly, in the case at bar, the Régie's lawyers could not advise the directors and make submissions to them without there being a reasonable apprehension of bias. This is not to say that jurists in the employ of an administrative tribunal can never play any role in the preparation of reasons. An examination of the consequences of such a practice would exceed the limits of this appeal, however, as I need only note, to dispose of it, that prosecuting counsel must in no circumstances be in a position to participate in the adjudication process. The functions of prosecutor and adjudicator cannot be exercised together in this manner.

(iii) Role of the Directors

57 The Court of Appeal's decision was also based on the fact that the directors could intervene at various stages in the permit cancellation process. The Régie, which is composed of the incumbent directors, may require permit holders to provide information (s. 110) and may assign one of its employees or a member of a police force to inspect an establishment (s. 111). The directors, including the chairman first and foremost, may thus initiate the review of a specific case. Similarly, the decision to hold a hearing presupposes a certain participation by the directors. It is the Régie that is responsible for sending notices of summons. Where a complaint is submitted to it by a third party, the Régie must hold a hearing if the allegations of fact call *prima facie* for the enforcement of the relevant provisions (s. 26 of the *Regulation respecting the procedure applicable before the Régie des permis d'alcool du Québec*). The circumstances in which the Régie may decide to summon a permit holder of its own initiative are not specified, but it may be concluded by analogy that similar criteria would be applied. Although the Act and the various regulations are silent on this subject, the Court of Appeal held in *Jacob et Bar Le Morency*, *supra*, that the decision to summon was an administrative decision within the chairman's authority that did not have to be made in plenary session. Gendreau J.A. described this power of the chairman as follows, at p. 311:

[TRANSLATION]

The chairman determines only one simple question that boils down to deciding whether it is appropriate, in light of the information obtained and placed in the record kept under s. 20(1) of the *Act*, to constitute a panel of the Régie to determine whether the permit holder's use complies with the *Act*. The purpose of the chairman's power is therefore limited to setting the quasi-judicial investigation process in motion, and this power is included among those conferred by the *Act*.

Furthermore, neither the purpose nor the effect of the chairman's decision is to affect the permit holder's rights; the operation of his or her establishment is not prevented, suspended or restricted. Nor does the notice include a decision or a statement of a presumption of unlawful exercise of trade that the appellants would have to rebut to retain their permit. In short, the chairman, in assigning the case to a panel of the Régie, in no way hinders the appellants either in putting their arguments to the directors in timely fashion or in acting as the authorized managers of their bar until the adjudication, the result of which is not prejudged.

58 Although the evidence was silent as to the Régie's practice, that judgment indicates that the decision to summon may be made by the chairman acting alone. In the case at bar, at the very least, the notice of summons bears the chairman's signature. The annual report, however, describes the duties of the directors as follows (at p. 23):

[TRANSLATION]

In addition, they must take turns in assuming internal responsibility for verifying and, where appropriate, authorizing the draft decisions submitted by the retailers' and manufacturers' permit directorates, *reviewing*

> *administrative files submitted by legal services or the above-mentioned directorates in order to decide whether a summons is necessary*, having a draft decision prepared or taking any other appropriate action. [Emphasis added.]

Furthermore, once a notice of summons has been sent, the chairman has the power to designate the directors responsible for deciding the case in question (s. 15 of the *Règles de régie interne de la Régie des permis d'alcool du Québec*).

59 A lack of evidence makes it difficult to assess the Régie's operations. It must be noted, however, that the Act and regulations authorize the chairman to initiate an investigation, decide to hold a hearing, constitute the panel that is to hear the case and include himself or herself thereon if he or she so desires. Furthermore, the annual report suggests that other directors sometimes make the decision to hold a hearing, and it does not rule out the possibility that those directors might then decide the case on its merits. In the case at bar, these factors can only reinforce the reasonable apprehension of bias an informed person would have in respect of the Régie owing to the role of counsel.

60 Having said this, I agree with the opinion expressed by Gendreau J.A. in *Jacob et Bar Le Morency* that the decision to hold a hearing does not amount to a prior determination of the validity of the allegations against the permit holder. The fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic. However, the possibility that a particular director could, following the investigation, decide to hold a hearing and could then participate in the decision-making process would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It seems to me that, as with the Régie's jurists, a form of separation among the directors involved in the various stages of the process is necessary to counter that apprehension of bias.

(2) Independence

61 The independence of administrative tribunals, which s. 23 protects in addition to impartiality, is based, *inter alia*, on the relations the decision makers maintain with others and the objective circumstances surrounding those relations. In *R. v. Beauregard*, [1986] 2 S.C.R. 56, at p. 69, Dickson C.J. defined independence as follows:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

The three main components of judicial independence, namely security of tenure, financial security and institutional independence, were identified in *Valente*, *supra*. The purpose of these objective elements is to ensure that the judge can reasonably be perceived as independent and that any apprehension of bias will thus be eliminated. Independence is in short a guarantee of impartiality.

62 The principles developed by this Court in relation to judicial independence must be applied under s. 23 of the *Charter*. That does not mean of course that the administrative tribunals to which s. 23 applies must be in all respects comparable to courts of law. As is the case with impartiality, a certain degree of flexibility is appropriate where administrative agencies are concerned. Le Dain J.'s reasons in *Valente* leave room for a flexibility that takes the nature of the tribunal and all the circumstances into account. Lamer C.J. noted this recently in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 83:

> Therefore, while administrative tribunals are subject to the *Valente* principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

See also the reasons of Sopinka J., at para. 113.

> There is no compromising when it comes to impartiality, which cannot be "adjusted" or "decreased". A decision maker, whether it is a court or a quasi-judicial tribunal, *cannot be permitted to be "almost" impartial.*
>
> . . . . .
>
> These agencies have certainly become indispensable to the efficient operation of our government, as they have in most modern democracies, but is that a sufficient reason to permit their decisions not to be impartial? I do not think so, first and foremost because *impartiality must, I repeat, be beyond reproach* and also because everyone has a fundamental right to justice of that quality.
>
> . . . . .
>
> I have also expressed my view of *impartiality* and independence in light of the cases cited above. *While the former cannot be diminished*, lesser degrees of the latter can exist, depending on the circumstances. [Emphasis added.]

111 I agree, and none of the three Court of Appeal judges really questioned the idea that there is a dichotomy between bias and impartiality — rightly so, since the argument that a tribunal can be "more or less impartial" or "just a little biased" seems rather difficult to justify. The argument that "the tribunal either is or is not impartial" seems to be much stronger.

(4) Distinctions between Bias and Reasonable Apprehension of Bias

112 In my view, the distinction between *bias* and *reasonable apprehension of bias* must be clarified at this point. While *bias* is an indivisible concept, *reasonable apprehension of bias* must be seen as varying with the tribunal in question and all the relevant circumstances.

113 I am generally in agreement with my colleague Gonthier J.'s analysis of the concept of reasonable apprehension of bias in this appeal. However, I think it appropriate to add something to that analysis.

114 As noted by my colleague, it is true that in the context of a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. However, such flexibility *must not be shown in respect of impartiality*: the requirement of impartiality cannot be relaxed. Flexibility must rather come into play in the *specific content of the test for reasonable apprehension of bias* in each individual case.

115 Thus, it is the *reasonableness of the apprehension* that will vary among administrative tribunals, not their intrinsic impartiality. In other words, a given reason for apprehending bias may be reasonable in a criminal trial but unreasonable in a quasi-judicial hearing. In every case, however, the decision-making body must be perfectly impartial; if it is biased, it will immediately violate the *nemo judex in propria sua causa debet esse* rule.

B. Classification of the Régie's Acts

116 It is well settled in our law that there are four possible categories of government acts: quasi-judicial, administrative, legislative and ministerial: see generally Dussault and Borgeat, *supra*, at pp. 240-56. In a case such as this one, the most relevant approach is to begin by asking the following question: what is the Régie alleged to have done? The respondent has not alleged either a jurisdictional error or a violation of the *audi alteram partem* rule. The allegations against the Régie all fall under the heads of impartiality and independence, that is, in the general category covered by the *nemo judex in propria sua causa debet esse* rule.

117 For the purposes of our analysis, the issue of independence is subordinate to that of impartiality. If bias is found, the issue of independence becomes totally moot. The opposite is not true: if a direct finding of bias cannot be made, then an analysis of independence will be necessary. Having made this methodological clarification, I will first consider the classification of the Régie's acts from the viewpoint of impartiality in general.

1959 CarswellBC 153
Supreme Court of Canada

A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway

1959 CarswellBC 153, [1959] S.C.R. 271, 17 D.L.R. (2d) 449, 59 C.L.L.C. 15,414, 78 C.R.T.C. 282

A.L. Patchett & Sons Ltd. (Plaintiff), Appellant and Pacific Great Eastern Railway Company (Defendant), Respondent

Rand, Locke, Cartwright, Abbott and Judson JJ.

Judgment: May 14, 1958
Judgment: May 16, 1958
Judgment: January 27, 1959

Proceedings: On appeal from the Court of Appeal for British Columbia

Counsel: *A.W. Johnson*, for the plaintiff, appellant:
J.A. Clark, Q.C., for the defendant, respondent.

Subject: Labour; Torts; Contracts; Public

Headnote

Carriers --- Statutory regulation

Duty to provide services — Access to premises interrupted by union picket line — Liability of railway — Railway Act, R.S.B.C. 1948, c. 285, s. 203(1)(c).

The duty of a railway under s. 203(1)(c) of the Act to furnish services is subject to a correlative obligation on the customer to furnish reasonable means of access to his premises. If such access is obstructed the primary responsibility lies with the customer to free its premises from trespassers who prevent the railway from providing its services. Plaintiff's mill was picketed by a union and employees of respondent railway, alleging a fear of violence by the union, refused to cross the picket line to serve the mill. An interim mandatory order was issued directing the railway to perform its statutory duty, and plaintiff brought an action for damages against the railway for failing to perform the statutory duty of providing services. The trial Judge allowed the claim, but was reversed on appeal. On further appeal, held (by a majority), the appeal should be dismissed. Although a carrier must take reasonable steps to maintain its public functions, it was not its function to clear away obstructions to operations on private premises when the owner acquiesced in them.

Labour Law --- Industrial disputes — Picketing — Remedies — Damages

Liability of picketed employer to third parties -- Train crew engaging in sympathy strike in support of woodworkers' union — Company suing railway for damages and action allowed — Appeal by railway dismissed — Responsibility of removing pickets being that of appellant — Obligations under Act not absolute but relative — Railway Act, R.S.B.C. 1948, c. 285, ss. 203, 222.

***Rand J*:**

1 The case made against the respondent is based on the sections of the provincial *Railway Act* dealing with facilities and the acceptance, carriage and delivery of goods: R.S.B.C. 1948, c. 285, ss. 203 and 222. The precise duty is declared by para. (c) of the former:

> (*c*) without delay, and with due care and diligence, receive, carry, and deliver all such traffic;

2 Mr. Johnson puts his argument in this fashion: the duty to furnish facilities, so far as conduct of employees may affect that, is absolute; and just as the employer is liable for the negligent act of his employee, positive or negative, as

for a failure by the employer in his personal duty under the statute, so is he for a deliberate refusal to work by any of them. The question is whether that absoluteness can be attributed to the language of the statute and if not, what, if any, excuse is there when the performance of a public carrier breaks down through cessation or refusal of work by employees because of a labour dispute circumstance.

3 In the case of a general strike of a group of essential employees, since that cessation, assuming appropriate conditions to be present, is a lawful act, it would be out of the question to interpret the Act as creating a liability for not doing what, in the nature of the situation, a carrier is, for the time being, unable to do, and no one has ever suggested it. Would the result be different if the cessation was illegal as in violation of law or in breach of contract?

4 Whether a strike, say of all trainmen, in sympathy with that of other employees, of the same employer or another, between whom there is no common interest beyond what is viewed as the general interest of workmen, would be within ss. 498 or 518 of the former *Criminal Code* is beyond our enquiry. Assuming it to be illegal, no civil remedy could effect directly a compulsion to work, and damages, if available, would take much time and involve many difficulties. The illegality could be declared and, in a proper case, criminal prosecution invoked; but that also would take time, during which to hold a railway bound to an absolute obligation would, for the reasons about to be stated, involve a regulation of public services by private agencies toward patrons which, in my opinion, our law does not permit. Under the present conceptions of social organization, apart from criminal law, the settlement of such a dispute must result from the pressure of the interests or necessities of the strikers or the employer or the force of public opinion. In this view I confine myself to the duty of a carrier to furnish facilities and to accept goods: where the carriage has actually begun other considerations may have to be taken into account with which we are not here concerned.

5 Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed.

6 The examples of these extreme situations furnish guidance for the solution of partial cessations of work associated with labour controversy. The duty being one of reasonableness how each situation is to be met depends upon its total circumstances. The carrier must, in all respects, take reasonable steps to maintain its public function; and its liability to any person damaged by such a cessation or refusal of services must be determined by what the railway, in the light of its knowledge of the facts, as, in other words, they reasonably appear to it, has effectively done or can effectively do to meet and resolve the situation. In weighing the relevant considerations, time may be a controlling factor.

7 Here the failure commenced on October 28 and continued until the end of November 4, a period of eight days. Within that time what effective steps could the respondent have taken which would have avoided the damages claimed? Admittedly, no measures were taken against the recalcitrant employees; its directing officers, not distinguishing the particular circumstances from those of strikes generally, acting under a vague notion that this was a "strike" which meant marking time, acquiesced in the refusal of service even though the superintendent paid lip service to the demands of the appellant by repeated orders to the train crew to "switch the siding" which they as repeatedly ignored.

8 It was urged that the railway should have applied for an injunction against its own employees; but whatever might be said for that, there was a preliminary question between the railway and the company with which I shall deal in a moment and the determination of which would have obviated any such step.

9 There was the threat of violence made to the conductor. It is easy to minimize the effect of this in the apparent light of what happened subsequently: but we know too well how vengeance can be wreaked on individuals by ruffians in a community from which a determined public attitude and adequate public protection are absent. To compel an employee so threatened to carry out orders on penalty of dismissal or suspension for refusal might, whether warrantedly or not, have aroused the brotherhood; and, in the circumstances, it would be asking the respondent unnecessarily to face a further real danger of disrupting its services throughout the district.

10 There is also the question of time. Time is frequently the arbiter of these collisions. Whatever legal action might have been taken, the ordinary course of the mill work including the siding services would have been interfered with and interrupted. As has been aptly remarked, a strike is not a tea-party and it may have consequential impacts on associated interests which cannot be met or disposed of overnight; and it is difficult if not impossible, with these doubtful issues raised, and the possibilities of further complications, to say when the situation would have been cleared up.

11 That the respondent was able to move against the pickets is doubtful; that they were not on railway property was assumed in the submission of Mr. Johnson; certainly there was no interference with operation on the main line; and if there was a picket line it was across the private siding, which, for the purposes of operation, was the property of the appellant. Even if there was a trespass on railway lands, the imaginary barrier was around the plant, and that brings me to what I consider the primary and decisive factor.

12 To the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises. There was, in fact, no labour dispute between the I.W.A. and the appellant and the picketting was illegal. That fact was the appellant's, not the respondent's, and on it only the former could, with confidence, act. The appellant thus tolerated on or about its property a disruptive presence which it was known was exerting an obstructive effect on the employees of the railway and the siding operation. The obstacle presented by the pickets was to outbound shipments with inbound deliveries by highway permitted. In these circumstances the first and obvious step was to get rid of the intruders; but the appellant, rather than involve itself with the I.W.A. in litigation, in effect called upon the respondent to take steps against its own employees or the trespassers or both.

13 If the appellant had asserted its unquestioned rights, the root of the trouble would have been removed as it was by the immediate and voluntary withdrawal of the pickets when on November 4 an interim injunction against the respondent was obtained; a direct move against the pickets by the appellant could not have had less effect than that indirect action. Would the duty on the respondent to service the siding have given it a standing in law to move for an injunction against persons illegally encircling another's property with a symbolic barrier? If the appellant was content to suffer a picket line affecting its own premises, an illegal *de facto* interference with its rights in carrying on its business, would any court have acted to remove it at the request of another having no interest in the premises, and only a qualified duty in relation to them? At the highest it is extremely doubtful that it would do so; it is not the function of a Railway to clear away obstructions to operations on private premises when the owner acquiesces in them.

14 In all these circumstances, in the light of the controlling facts as they appeared to the respondent, I am unable to say that the Court of Appeal [1] was clearly wrong in finding the respondent not liable for the damage claimed. The primary responsibility lay with the appellant to free its premises of trespassers whose presence was, falsely, a sign of a labour clash, and constituted a virtual nuisance *vis-à-vis* the employees of the railway. They prevented, in fact, reasonable access to the appellant's premises to which the railway was entitled as a condition of furnishing its services, and the obstruction they presented could have been removed by the appellant with a minimum of delay and inconvenience. Rather than take that course the appellant sought to place on the respondent the entire burden of breaking up the impasse, entailing the uncertainties and risks of any course of action attempted. Whatever an indefinite continuance of the situation might have called for, within the eight days of interruption no damage suffered by the appellant can be attributed to a breach of duty toward it by the respondent. Had the picketting under the law of the Province been legal, a different situation would have been presented but with that we are not here concerned.

2016 CAF 179, 2016 FCA 179
Federal Court of Appeal

Arsenault v. Canada (Attorney General)

2016 CarswellNat 11467, 2016 CarswellNat 2263, 2016 CAF 179, 2016 FCA 179, 11 Admin. L.R. (6th) 187, 268 A.C.W.S. (3d) 431, 486 N.R. 268

Robert Arsenault and Federal Government Dockyards Trades and Labour Council (East), Applicants and Attorney General of Canada and Treasury Board of Canada Secretariat (Department of National Defence), Respondents

Wyman W. Webb, A.F. Scott, Yves de Montigny JJ.A.

Heard: April 25, 2016
Judgment: June 14, 2016
Docket: A-436-15

Counsel: Ronald A. Pink, for Applicants
Martin Desmeules, for Respondents

Subject: Public; Labour

Headnote

Labour and employment law --- Labour law — Labour arbitrations — Judicial review — Natural justice

Applicant grievor was required by employer to travel internationally to carry out systems repairs on ship — Employer paid applicant for hours travelled at double time rate, under clause 17.03(a) of collective agreement governing compensation for days on which employees travelled but did not work, leading to total amount of pay equating to 22 hours straight time — Applicants argued that he was entitled to pay for 15 additional hours under clause 17.03(d) of collective agreement, governing travel pay where employees travelled overnight and no sleeping accommodation was required, while employer believed he was only entitled to 7 more hours — Applicants' grievance was dismissed on basis that applicant was only entitled to compensation under clause 17.03(d) and not under clause 17.03(a) of collective agreement — Applicants applied for judicial review — Application granted — Adjudicator ignored parties' common interpretation of clause 17.03(a) of collective agreement and shared view that issue to be determined was how much additional compensation he could receive under clause 17.03(d) of agreement — Adjudicator had duty to apprise parties that he was considering interpretation of clause 17.03 of collective agreement that neither party had contemplated — Applicants and employer had no indication whatsoever that their common and accepted interpretation could be questioned — Procedural fairness dictated that they should have been put on notice and afforded opportunity to address issue and adduce evidence to counter adjudicator's interpretation of clause 17.03(d) of collective agreement — Since collective agreement governed relationship between parties, it was critical that parties be afforded opportunity to be heard since they must live by terms of their contract — Both parties had vital interest in adjudicator's interpretation of their collective agreement — Adjudicator came to different interpretation of clause 17.03(d) without any input from parties on how that interpretation could possibly impact on application of clause 17.03 generally — As matter of procedural fairness, parties should have been given opportunity to present arguments and adduce evidence on such determinative issue.

Labour and employment law --- Labour law — Collective agreement — Wages — Allowances — Travel allowance

APPLICATION for judicial review of decision reported at *Arsenault v. Treasury Board (Department of National Defence)* (2015), 2015 PSLREB 57, 2015 CRTEFP 57, 2015 CarswellNat 3451, 2015 CarswellNat 3452 (Can. P.S.L.R.E.B.), dismissing applicants' grievance with respect to travel pay.

***A.F. Scott J.A.*:**

1 This is an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act) to set aside a decision rendered by an adjudicator (the Adjudicator) of the Public Service Labour Relations Board (PSLRB) dated June 22, 2015. The Adjudicator dismissed Mr. Robert Arsenault's (the grievor) grievance on the ground that he was entitled to compensation solely under clause 17.03(d) of the collective agreement dated June 16, 2008 between the Treasury Board and the Federal Government Dockyard Trades and Labour Council (East) for the Ship Repair Group (the collective agreement).

I. The facts

2 The facts were not disputed. The grievor was required by his employer to travel from Halifax to Stockholm, Sweden, in order to carry out systems repairs on a ship. He therefore left Halifax and took an overnight flight on Saturday, June 5, 2010 at 23:35 local time and arrived in London on Sunday, June 6, 2010 at 9:35 local time. He spent the day in London at a hotel and left for Stockholm the following morning. The issue before the Adjudicator was the grievor's total pay entitlement for the portion of the trip from Halifax to London as June 5 and 6 were days of rest.

3 For that portion of the trip, including the flight and the transportation to and from each airport, the grievor spent a total of 11 hours apportioned as follows: 3.5 hours on Saturday and 7.5 hours on Sunday.

4 The Employer paid the grievor, under clause 17.03(a) of the collective agreement, for the hours travelled on June 5 and 6 at the double time rate as both days were days of rest for the employee. The total amount of pay was the equivalent of 7 hours straight time on the first day and 15 hours straight time on the second day for a total of 22 hours.

5 Clause 17.03 governs travel pay under the collective agreement. It provides as follows:

> **Ship Repair - East (SRE)**
>
> 17.03 Where an employee is required by the Employer to travel to a point away from the employee's normal place of work, the employee shall be compensated as follows:
>
> a. on any day on which the employee travels but does not work, at the applicable straight-time or overtime rate for the hours travelled, but the total amount shall not exceed fifteen (15) hours' straight time;
>
> b. on a normal workday in which the employee travels and works:
>
> i. during the employee's regular scheduled hours of work at the straight-time rate not exceeding eight (8) hours' pay,
>
> ii. at the applicable overtime rate for all time worked outside the employee's regular scheduled hours of work,
>
> iii. at the applicable overtime rate for all travel outside the employee's regular scheduled hours of work to a maximum of fifteen (15) hours' pay at straight time in any twenty-four (24) hour period;
>
> c. on a rest day on which the employee travels and works, at the applicable overtime rate:
>
> i. for travel time, in an amount not exceeding fifteen (15) hours' straight-time pay, and
>
> ii. for all time worked;
>
> d. notwithstanding the limitations stated in paragraphs 17.03(a), (b) and (c), where an employee travels on duty, but does not work, for more than four (4) hours between 2200 hours and 0600 hours, and no sleeping

a potential downgrade where the grievor could not reasonably anticipate it, even though it had disclosed all the evidence necessary to make such a determination. Gleason J., as she then was, concluded that the committee had breached its duty of procedural fairness by omitting to do so:

> [25] In my view, in the circumstances of this case, the requirements of procedural fairness did require that the Committee disclose that it was considering downgrading the Professional Responsibility factor and did require that it afford the parties the opportunity to make submissions on the potential downgrade prior to rendering its decision. While it is certainly true that the content of the duty of fairness, in the context of classification grievances in the federal public service, falls "somewhere in the lower zone of the spectrum" (*Chong II* at para 12), in my view, even the minimal requirements of procedural fairness were not respected here. Mr. Fischer is not seeking the right to call *viva voce* evidence, cross-examine witnesses or other trappings of a full-blown adversarial hearing; rather, he is seeking the minimal right to be aware of and be afforded an opportunity to make arguments regarding the determinative issue in his grievance...

25 The respondent took the position before us that the onus of proof rested with the grievor and that it was incumbent on the applicants to advance all the arguments and present evidence to ensure that their interpretation of clause 17.03(d) would prevail.

26 The respondents did acknowledge that the parties were not afforded prior notice of the interpretation adopted by the Adjudicator and that it had never been discussed at the hearing, but argued nonetheless that, in light of the Adjudicator's expertise, he could not look at clause 17.03(d) in isolation. Therefore, the Adjudicator could legitimately conclude that clause 17.03(a) did not apply, even though both parties had agreed that it did.

27 In the respondents' view, the Adjudicator's interpretation was open to him and it is a reasonable and acceptable outcome in view of the fact that the Adjudicator's decision is to be reviewed on a standard of reasonableness.

VI. Analysis

28 I disagree with the respondents for the following reasons.

29 In the present case, both parties were in agreement that clause 17.03(a) was applicable. The applicants and the respondents had no indication whatsoever that their common and accepted interpretation could be questioned. I am of the view that, on the facts of this case, procedural fairness dictates that they should, at the very least, have been put on notice and afforded an opportunity to address the issue and adduce evidence to counter the Adjudicator's interpretation of clause 17.03(d) collective agreement.

30 The factual matrix before us is somewhat similar to *Garg*. In that case, this Court determined at paragraphs 7 and 8 that where an Umpire raises *sua ponte* an issue that had not been raised by any of the parties in the proceedings, and does so without giving the applicant an opportunity to be heard on the matter and to make representations, it is objectionable because it amounts to a breach of procedural fairness within the meaning of subparagraph 18.1(4)(b) of the Act.

31 Since the collective agreement is the contract that governs the relationships between the parties, it is critical, in my view, that the parties be afforded an opportunity to be heard since they must live by the terms of their contract. Both parties had a vital interest in the Adjudicator's interpretation of their collective agreement. In this case, the Adjudicator came to a different interpretation of clause 17.03(d) without any input from the parties on how that interpretation could possibly impact on the application of clause 17.03 generally.

32 In the particular circumstances of this case, it is my opinion that the Adjudicator's failure to give notice to the parties that he was contemplating an interpretation of clause 17.03(d) that negated their joint understanding of clause 17.03(a) constituted a breach of procedural fairness. Both agreed that the grievor was entitled to the payment of 22 hours for his travel between Halifax and London. In fact, the employer had already paid the grievor for the 22 hours. The dispute was clearly restricted to the interpretation of clause 17.03(d) of the collective agreement and it was well delineated. What

amount of additional payment was the grievor entitled to receive under clause 17.03(d)? The applicants argued that 15 additional hours were payable under clause 17.03(d) whereas the respondents took the position that only 7 additional hours were payable. Before propounding his interpretation, the Adjudicator should have placed the parties on notice because his failure to alert the parties deprived them of an opportunity to make representations and adduce evidence to support their common understanding that payments under clause 17.03(d) were additional to those under clause 17.03(a).

33 The standard of review for issues of procedural fairness is correctness. In this case, the Adjudicator decided to reject the accepted interpretation of a clause of a collective agreement and found that, notwithstanding the interpretation as agreed upon by the parties, the grievor was not entitled to any compensation under clause 17.03(a) of the collective agreement. The parties to that agreement should, in my view, have been given an opportunity to present arguments and to adduce evidence regarding such a determinative issue. In circumstances such as these, this Court must intervene to enforce procedural fairness.

34 For these reasons, I propose that this application for judicial review be allowed, the decision of the Adjudicator be quashed, and the matter referred back for redetermination before a different adjudicator, with costs.

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

I agree.

***Yves de Montigny J.A.*:**

I agree.

Application granted.

1999 SCC 699
Supreme Court of Canada

Baker v. Canada (Minister of Citizenship & Immigration)

1999 CarswellNat 1124, 1999 CarswellNat 1125, 1999 SCC 699, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, J.E. 99-1412

Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998
Judgment: July 9, 1999
Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

Counsel: *Roger Rowe* and *Rocco Galanti*, for Appellant.
Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for Respondent.
Sheena Scott and *Sharryn Aiken*, for Interveners The Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees.
John Terry and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.
Barbara Jackman and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights

Headnote

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Inland applications — Application of humanitarian and compassionate considerations

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified regarding whether immigration authorities are required to treat best interests of child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Junior immigration officer's notes constituted decision and demonstrated reasonable apprehension of bias — Officer appeared to have drawn conclusions based not on evidence but on fact that applicant was single mother with several children and was diagnosed with mental illness — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision — Reasons also failed to give sufficient weight or consideration to hardship that might be caused to applicant if returned to country of origin.

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Best interests of child

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power under s. 114(2) of Act requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Interests of children were minimized in manner inconsistent with Canadian humanitarian and compassionate tradition and Minister's guidelines — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Certification of questions by Federal Court Trial Division

Section 83(1) of Immigration Act does not require Federal Court of Appeal to address only certified question — Once question has been certified, then Federal Court of Appeal may consider all aspects of appeal lying within its jurisdiction.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness

Duty of fairness is flexible and variable and depends on context of particular statute and rights affected — Participatory rights within that duty ensure that administrative decisions are made using fair and open procedure appropriate to decision being made and its statutory, institutional, and social context with opportunity for those affected by decision to put forward their views and evidence fully and have them considered by decision-maker — Factors for determining requirements of duty include nature of decision being made and process followed in making it, nature of statutory scheme and terms of statute pursuant to which body operates, importance of decision to individuals affected, legitimate expectations of person challenging decision, and choices of procedure made by agency itself — Other factors may also be important when considering aspects of duty of fairness unrelated to participatory rights — Duty of fairness applies to humanitarian and compassionate applications under Immigration Act.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness applies to H & C decisions — There was no legitimate expectation that specific procedural rights would be accorded above those normally required by duty of fairness — H & C application is different from judicial decision because it involves exercise of considerable discretion, requires consideration of multiple factors, and is exception to general principles of of Canadian immigration law — Duty of fairness requires that applicant and those whose important interests are affected by decision in fundamental way have meaningful opportunity to present evidence relevant to their case and have it fully and fairly considered — Lack of oral hearing or notice of such hearing does not violate procedural fairness — Opportunity to produce full and complete written documentation was sufficient.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness requires written explanation for decision where decision has important significance for individual or

where there is statutory right of appeal — Profound importance of H & C decisions to those affected militates in favour of requiring reasons to be provided — Requirement was satisfied by provision of junior immigration officer's notes — Individuals are entitled to fair procedures and open decision-making but in administrative context, this transparency may occur in various ways.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant alleged that there was reasonable apprehension of bias — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed — Procedural fairness requires decision to be made free from reasonable apprehension of bias by impartial decision-maker — Duty applies to all immigration officers playing role in decision-making — Immigration decisions require sensitivity and understanding by decision-makers — There must be recognition of diversity, understanding of others and openness to difference — Immigration officer's notes gave impression that conclusion may have been based not on evidence but on fact that applicant was single mother with several children and had been diagnosed with psychiatric illness — Reasonable and well-informed members of community would conclude that reviewing officer did not approach case with impartiality appropriate to decision made by immigration officer.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Review of substantive aspects of discretionary decisions is to be approached within pragmatic and functional framework given difficulty in making rigid classifications between discretionary and non-discretionary decisions — Relevant factors include expertise of tribunal, nature of decision being made, language of provision and surrounding legislation, whether decision is polycentric, intention revealed by statutory language, and amount of choice left by Parliament to decision-maker — Discretion must be exercised in accordance with boundaries imposed in statute, principles of rule of law, principles of administrative law, fundamental values of Canadian society, and principles of Canadian Charter of Rights and Freedoms.

Administrative law --- Discretion of tribunal under review — General principles

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power conferred by section requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Admission — Appeals and judicial review — Judicial review — Jurisdiction

"Reasonableness simpliciter » is standard of review of discretionary decision under s. 114(2) of Immigration Act and s. 2.1 of Immigration Regulations determining whether humanitarian and compassionate considerations warrant exemption from requirements of Act — Considerable deference should be given to immigration officers exercising powers conferred by Act, given fact-specific nature of inquiry, its role in statutory scheme as exception, fact that decision-maker is Minister of Citizenship and Immigration, and considerable discretion given by wording of statute — However, lack of privative clause, existence of judicial review, and nature of decision as individual rather than polycentric suggest that standard is not as deferential as "patent unreasonableness".

Statutes --- Interpretation — Extrinsic aids — Statutes in pari materia

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration

officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether, given that Immigration Act does not expressly incorporate language of Canada's international obligations under International Convention on the Rights of the Child, federal immigration authorities must treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Values in international human rights law assist in statutory interpretation and judicial review — Convention's values recognize importance of being attentive to children's rights and best interests when making decisions relating to and affecting their future — Convention's principles place special importance on protections for children and on consideration of their interests, needs, and rights — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children and did not consider them important factor in decision — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion.

Étrangers, immigration et citoyenneté --- Admission — Demande de visa à titre de visiteur ou immigrant — Demande effectuée sur le territoire — Demande pour des motifs d'ordre humanitaire

Requérante est entrée au Canada en 1981 et a subvenu à ses besoins pendant 11 ans avant d'être diagnostiquée comme souffrant de schizophrénie avec paranoïa, et d'obtenir de l'assistance sociale — Après l'ordonnance de déportation, l'agent d'immigration a refusé d'exercer le pouvoir discrétionnaire prévu au par. 114(2) de la Loi sur l'immigration, fondé sur des motifs d'ordre humanitaire — Demande de contrôle judiciaire de la requérante a été rejetée — Requérante a formé un pourvoi — Question a été certifiée quant à savoir si les autorités de l'immigration devaient traiter le meilleur intérêt des enfants comme la principale considération au moment d'évaluer la demande de la requérante en vertu du par. 114(2) de la Loi — Pourvoi de la requérante à l'égard de la question certifiée a été rejeté — Requérante a formé un pourvoi — Pourvoi accueilli — Question a reçu une réponse affirmative — Notes de l'agent de l'immigration constituaient une décision et démontraient une crainte raisonnable de partialité — Agent semble avoir tiré des conclusions non fondées sur la preuve mais sur le fait que la requérante était monoparentale, qu'elle avait plusieurs enfants et qu'elle était atteinte d'une maladie mentale — Omission de considérer sérieusement le meilleur intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire, sans tenir compte de la déférence à laquelle la décision de l'agent devrait avoir droit — Loi sur l'immigration, L.R.C. 1985, c. I-2, par. 114(2).

The applicant entered Canada as a visitor in 1981 and continued to remain in the country. She had four Canadian-born children. She supported herself illegally for 11 years before being diagnosed as paranoid schizophrenic. She subsequently collected welfare and underwent treatment at a mental health centre. In 1992 she was ordered deported. An immigration officer refused discretionary action under s. 114(2) of the *Immigration Act* based on humanitarian and compassionate grounds.

In dismissing the applicant's application for judicial review, the motions judge found that the *Convention on the Rights of the Child* did not apply and was not part of domestic law. The motions judge also found that the evidence showed the children were a significant factor in the decision-making process. The motions judge certified a question as to whether the immigration authorities were required to treat the best interests of the child as a primary consideration in assessing an applicant under s. 114(2) of the Act, given that the Act did not expressly incorporate the language of Canada's international obligations with respect to the Convention.

On appeal of the certified question, the court held that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation. The Convention could not be interpreted to impose an obligation upon the government to give primacy to the interests of the children in deportation proceedings. Finally, because the doctrine of legitimate expectations does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) of the Act would be to create a substantive right, the doctrine did not apply.

The applicant appealed.

Held: The appeal was allowed.

Per L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring): The Convention did not give rise to a legitimate expectation that when the decision on the applicant's humanitarian and compassionate grounds

application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. The Convention is not the equivalent to a government representation about how such applications will be decided.

The lack of an oral hearing did not constitute a violation of the requirements of procedural fairness. The opportunity, which was accorded for the applicant or her children to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness.

The duty of procedural fairness required a written explanation for the decision, which was done. The junior immigration officer's notes constituted the decision and were provided to the applicant. However, the notes demonstrated a reasonable apprehension of bias. The notes appeared to link the applicant's mental illness, her training as a domestic worker and the fact that she had eight children in total to the conclusion that she would, therefore, be a strain on the social welfare system for the rest of her life. The conclusion drawn was contrary to the psychiatrist's letter, which stated that with treatment she could remain well and return to being a productive member of society. The statements gave the impression that the junior officer may have been drawing conclusions based not on the evidence before him, but on the fact that she was a single mother with several children, and had been diagnosed with a psychiatric illness.

The failure to give serious consideration to the interests of the applicant's children constituted an unreasonable exercise of discretion, notwithstanding the important deference that should be given to the immigration officer's decision. The reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause the applicant, given that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from some of her children. Attentiveness and sensitivity to the importance of the rights of the children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for a humanitarian and compassionate decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

Per Iacobucci J. (Cory J. concurring): The certified question should be answered in the negative. An international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until it has been incorporated into domestic law by way of implementing legislation. The primacy accorded to the rights of children in the Convention is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

La requérante est entrée au Canada en 1981 avec le statut de visiteur et y est restée par la suite. Elle a donné naissance à quatre enfants au Canada. Elle a illégalement subvenu à ses besoins pendant 11 ans, soit jusqu'au moment où l'on a diagnostiqué qu'elle souffrait de schizophrénie paranoïaque. Elle a par la suite touché de l'aide sociale et a suivi un traitement dans un établissement de santé. En 1992, une mesure d'expulsion a été prise contre elle. Un fonctionnaire de l'immigration a refusé d'exercer le pouvoir discrétionnaire qui lui était conféré par l'art 114(2) de la *Loi sur l'immigration* et qui était fondé sur des motifs d'ordre humanitaire.

En rejetant la requête en révision judiciaire de la requérante, la juge saisie de la requête a conclu que la *Convention relative aux droits de l'enfant* ne s'appliquait pas et que ses dispositions ne faisaient pas partie du droit interne canadien. Elle a également conclu qu'il ressortait de la preuve que les enfants avaient constitué un facteur important dans le cadre du processus décisionnel. La juge s'est également prononcée sur la question de savoir si, dans le cadre de l'examen d'une requête faite en vertu de l'art. 114(2) de la Loi, les autorités en matière d'immigration étaient tenues de considérer le meilleur intérêt des enfants comme constituant un élément primordial, même si la Loi n'incorporait pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention .

En se prononçant sur l'appel de la décision portant sur la question certifiée, la Cour d'appel a estimé que la Convention ne pouvait avoir d'effet juridique au Canada, puisqu'elle n'avait pas été intégrée dans la législation nationale. La Convention ne pouvait être interprétée comme imposant au gouvernement l'obligation d'accorder priorité à l'intérêt des enfants dans le cadre des procédures d'expulsion. Enfin, compte tenu que la doctrine de l'attente légitime ne crée pas de droits matériels et qu'imposer à un décideur l'obligation d'accorder la primauté au meilleur intérêt des enfants en vertu de l'art. 114(2) de la Loi serait de nature à créer un droit matériel, la doctrine était inapplicable.

La requérante a formé un pourvoi à l'encontre de la décision.

Held: Le pourvoi a été accueilli.

Le juge L'Heureux-Dubé (les juges Gonthier, McLachlin, Bastarache et Binnie y souscrivant) : La Convention n'a pas créé chez la requérante l'attente légitime que sa demande fondée sur des motifs d'ordre humanitaire et de compassion donnerait lieu à des droits procéduraux particuliers plus étendus que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, qu'une décision favorable serait rendue ou que des critères particuliers seraient appliqués. La Convention ne constituait pas l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes doivent être tranchées.

L'absence d'audience ne contrevenait pas aux exigences imposées en vertu de l'équité procédurale. La possibilité qui avait été donnée à la requérante ou à ses enfants de produire toute la documentation écrite se rapportant à tous les aspects de sa requête satisfaisait aux exigences relatives aux droits de participation imposées en vertu de l'obligation d'agir équitablement.

L'obligation d'équité procédurale exigeait que les motifs écrits de la décision soient fournis, ce qui a été fait. Les notes de l'agent subalterne constituaient les motifs de la décision et elles ont été fournies à la requérante. Les notes donnaient toutefois lieu à une crainte raisonnable de partialité. Elles semblaient relier les troubles mentaux de la requérante, sa formation comme domestique et le fait qu'elle avait au total huit enfants à la conclusion qu'elle constituerait, par conséquent, un fardeau pour le système d'aide sociale jusqu'à la fin de ses jours. La conclusion tirée allait à l'encontre de la lettre du psychiatre qui indiquait qu'à l'aide d'un traitement, l'état de la requérante pouvait s'améliorer et qu'elle pourrait redevenir un membre productif de la société. Ces notes donnaient l'impression que l'agent subalterne avait tiré ses conclusions, non pas en se fondant sur la preuve qu'il avait devant lui, mais plutôt sur le fait que la requérante était une mère célibataire avec plusieurs enfants et sur le fait qu'elle était atteinte de troubles psychiatriques.

Le défaut de prendre sérieusement en compte l'intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire et ce, malgré le degré élevé de retenue qu'il convient d'observer à l'égard de la décision de l'agent d'immigration. Les motifs n'accordaient pas un poids et une considération suffisants au préjudice qu'un retour en Jamaïque pouvait causer à la requérante compte tenu qu'elle avait vécu pendant 12 ans au Canada, qu'elle était malade, qu'elle ne pourrait probablement pas recevoir des soins en Jamaïque et qu'elle serait inévitablement séparée de certains de ses enfants. L'attention et la sensibilité manifestées à l'égard de l'importance des droits des enfants, à leur meilleur intérêt et au préjudice qu'ils pourraient subir en raison d'une décision rejettant la requête sont les éléments essentiels d'une décision qui doit être prise de façon raisonnable. Même si, dans le cadre des demandes de contrôle judiciaire, il convient de faire preuve de retenue à l'égard des décisions des agents d'immigration rendues en vertu de l'art. 114(2), leurs décisions ne peuvent être maintenues lorsque la façon dont la décision a été rendue et l'approche adoptée sont contraires aux valeurs humanitaires.

Le juge Iacobucci (le juge Cory y souscrivant) : Une réponse négative devrait être donnée à la question certifiée. Une convention internationale ratifiée par le pouvoir exécutif du gouvernement n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables. La primauté accordée aux droits des enfants par la Convention n'est d'aucune pertinence tant et aussi longtemps que ses dispositions n'ont pas été intégrées dans une loi adoptée par le Parlement.

APPEAL by applicant from judgment reported at *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.), dismissing applicant's appeal from judgment dismissing application for judicial review of immigration officer's refusal of application under s. 114(2) of *Immigration Act* for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada.

POURVOI de la requérante à l'encontre du jugement publié à (1996), 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (C.A. Féd.), rejetant l'appel de la requérante du jugement publié à (1995), 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (C.Féd. (1re inst.)), rejetant sa demande de contrôle judiciaire du refus, par l'agent d'immigration, d'exercer son pouvoir discrétionnaire en vertu du par. 114(2) de la *Loi sur l'immigration* pour des motifs d'ordre humanitaire.

***L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):**

"the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight* at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

2018 CAF 174, 2018 FCA 174
Federal Court of Appeal

Bell Canada v. 7262591 Canada Ltd.

2018 CarswellNat 5401, 2018 CarswellNat 8998, 2018 CAF 174, 2018 FCA 174, 298 A.C.W.S. (3d) 65, 428 D.L.R. (4th) 311

BELL CANADA and BELL MEDIA INC. (Appellants) and 7262591 CANADA LTD. (D.B.A. GUSTO TV), ACCESS COMMUNICATIONS COOPERATIVE LIMITED, ALLARCO ENTERTAINMENT INC., ANTHEM MEDIA GROUP, BLUE ANT MEDIA INC., CANADIAN CABLE SYSTEMS ALLIANCE INC., CBC/RADIO-CANADA, COGECO INC., COMPETITION BUREAU, DHX MEDIA LTD., EASTLINK, GROUPE V MÉDIA INC., INDEPENDENT BROADCAST GROUP/LE GROUPE DE DIFFUSEURS INDÉPENDANTS, L'OFFICE DES TÉLÉCOMMUNICATIONS ÉDUCATIVES DE LANGUE FRANÇAISE DE L'ONTARIO (GROUPE MÉDIA TFO), MEDIAMIND DIGITAL, MTS INC., PELMOREX COMMUNICATIONS INC., PUBLIC INTEREST ADVOCACY CENTRE, QUÉBECOR MÉDIA INC., SASKATCHEWAN TELECOMMUNICATIONS, SOGETEL INC., STINGRAY DIGITAL GROUP INC., STORNOWAY COMMUNICATIONS LIMITED PARTNERSHIP, TEKSAVVY SOLUTIONS INC. AND HASTINGS CABLE VISION LTD., TELUS, TV5 QUÉBEC CANADA, VMEDIA INC. and ZAZEEN INC. (Respondents)

M. Nadon, Rennie, Woods JJ.A.

Heard: November 14, 2017
Judgment: October 1, 2018
Docket: A-51-16

Counsel: Steven Mason, Brandon Kain, Richard J. Lizius, for Appellants
Christian Leblanc, Michael Shortt, for Respondents, Blue Ant Media Inc. et al
Judith Robinson, Eric Bellemare, for Respondent, Cogeco Communications Inc.
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Subject: Civil Practice and Procedure; Intellectual Property; Public

Headnote

Communications law --- Regulatory commissions — C.R.T.C. (Canadian Radio-television and Telecommunications Commission) — Powers and duties

Canadian Radio-television and Telecommunications Commission (CRTC) imposed policy to govern affiliation agreements between programming undertakings (PUs) and broadcasting distribution undertakings (BDUs) implemented through two decisions Wholesale Code (Code) and Broadcasting Order (Order) — Order was issued under s. 9(1)(h) of Broadcasting Act (Can.) (Act) to enable CRTC to enforce parts of Code — Appellants (Bell collectively) claimed mandate vested in CRTC to implement broadcasting policy for Canada did not authorize CRTC to interfere in economic relations between BDUs and PUs, and Code and Order ultra vires of CRTC's powers — Bell appealed — Appeal allowed — Standard of review was reasonableness — It was not reasonable to interpret s. 9(1)(h) of Act as granting CRTC general power to regulate terms and conditions of affiliation agreements — Such interpretation went beyond ordinary meaning of language of s. 9(1)(h) of Act and was not reasonably supported by textual, contextual and purposive interpretation of legislation — Interpretation of s. 9(1)(h) that was reflected in Order was unreasonable, and Order was set aside.

The Canadian Radio-television and Telecommunications Commission (CRTC) imposed a policy governing contracts between programming undertakings (PU's), which created content for television, and broadcasting distribution undertakings (BDU's), which retransmitted the programs to their customers. These contracts were known as affiliation agreements. The policy was implemented by the CRTC through the Wholesale Code (Code) which established parameters on the negotiation and content of the agreements and the Broadcasting Order (Order) issued pursuant to s. 9(1)(h) of the Broadcasting Act (Act), which bound the Code on BDU's and required them to distribute programs according to certain terms and conditions. Section 9(1)(h) of the Act authorized the CRTC to require BDU's to carry specified programming services and to mandate terms and conditions of carriage of those services as the CRTC deemed appropriate.

The appellants (collectively Bell) a PU, contended that the Code and Order were beyond the authority of the CRTC. Bell submitted that the Supreme Court of Canada had decided the issue in the case known as *Cogeco*, that adopting the Code was outside the jurisdiction conferred on the CRTC by s. 9(1)(h) of the Act; and the Code, by operation, conflicted with Bell's sole right to telecommunicate or authorize telecommunication of its copyright works and to licence the use of those works under the Copyright Act. Bell appealed.

Held: The appeal was allowed.

Woods J.A.: As per the reasons of Rennie J.A., the standard of review was reasonableness, and the Order did not conflict with the Copyright Act by operation or in purpose. It was not reasonable to interpret s. 9(1)(h) of the Act as granting the CRTC a general power to regulate the terms and conditions of affiliation agreements. Such an interpretation went far beyond the ordinary meaning of the language of s. 9(1)(h) and was not reasonably supported by a textual, contextual and purposive interpretation of the legislation. Section 9(1)(h) of the Act provides the CRTC with the power to require a licensee to carry specified programming services, and if required, it provided an additional power to mandate such terms and conditions of carriage of those services as the CRTC deemed appropriate. The ordinary meaning of s. 9(1)(h) did not include a general power to regulate the terms and conditions of carriage, but such regulation must relate to the terms and conditions of programming services that the CRTC specified and required to be provided by a licensee. The context and purpose of the legislation was important, but they did not reasonably support an interpretation that the ordinary meaning of s. 9(1)(h) could not bear. It was not reasonable to apply the doctrine of necessary implication to expand the language of s. 9(1)(h) to include powers that were necessary to fulfill the CRTC's mandate in s. 5(1) of the Act. The general objectives of s. 5(1) were subject to the specific powers granted to the CRTC in other parts of the legislation, including s. 9(1)(h). The interpretation of s. 9(1)(h) that was reflected in the Order was unreasonable, and therefore, the Order was set aside.

Nadon J.A. (concurring, separate reasons): Section 9(1)(h) of the Act did not allow the CRTC to enact the Order to give effect to the Code. However, the question of whether s. 9(1)(h) of the Act conferred authority on the CRTC to issue the Order must be decided on the standard of correctness. The standard correctness applied by the Supreme Court of Canada in Cogeco was binding and should be applied. Parliament had clearly stated in s. 31(1) of the Act that appeals from decisions made by the CRTC on questions of law or jurisdiction were to be determined by the Federal Court of Appeal (FCA), and that could only mean on a standard of correctness. The only possible interpretation of s. 31(2) of the Act was that Parliament intended that the court must provide the answers to the questions of law raised before them. To find that the FCA must defer to the CRTC's interpretation of s. 9(1)(h) required the clear legislative intent to be disregarded or s. 31(2) was pointless. It was the FCA's responsibility to determine whether or not the CRTC's view of s. 9(1)(h) was correct view. If Parliament sent a message that the FCA was to defer to an administrative body's interpretation of the law or of its jurisdiction, then effect should be given to Parliament's direction. When Parliament sent a message directing the FCA to provide answers to legal questions arising from decisions made by the CRTC, as it had done here with s. 31(2) of the Act, the FCA should determine, on a correctness standard, what the answers were to the legal questions. Deferring to an administrative body's interpretation of the law, in the circumstances, was an abandonment of the judicial role.

Per Rennie J.A. (dissenting in part): Section 9(1)(h) of the Act does not expressly grant authority to the CRTC to impose terms and conditions on the negotiation of affiliation agreements and their content. However, based on the context within which s. 9(1)(h) of the Act is situated, the Order, and the Code which it implements, are by necessary implication within the CRTC's jurisdiction. The purpose of s. 9(1)(h) of the Act is to enable the CRTC to fulfill its statutory mandate under subsection 5(1). Since the terms and conditions of affiliation agreements directly dictate the

terms on which consumers are offered programming services, by necessary implication s. 9(1)(h) must include the ability to affect affiliation agreements. The evidence demonstrated that the measures in the Code are "practical necessities" for the CRTC to achieve the objectives in ss. 3(1) and 5(1) through its ability to impose terms and conditions on programming services.

APPEAL from decisions of Canadian Radio-television and Telecommunications Commission respecting policy to govern affiliation agreements.

Rennie J.A. **(dissenting):**

I. Introduction

1 Television services are provided to Canadians through the interaction of two types of commercial entities. Programming undertakings create content, either on their own or under licence from others. They transmit their programs to broadcasting distribution undertakings, which retransmit the programs through their networks, whether cable, satellite or broadband. There is, in effect, a symbiotic relationship between programming undertakings and broadcasting distribution undertakings, the commercial terms of which are negotiated and reflected in "affiliation agreements".

2 In 2015 the Canadian Radio-television and Telecommunications Commission (CRTC) imposed a policy to govern affiliation agreements, or simply, the contracts, between programming undertakings (PUs) and broadcasting distribution undertakings (BDUs). The CRTC implemented this policy through two decisions: *Broadcasting Regulatory Policy 2015-438* (the 2015 Wholesale Code or the Code), and *Broadcasting Order 2015-439* (the Order). The 2015 Wholesale Code establishes certain parameters on the negotiation and content of affiliation agreements. The Order makes the 2015 Wholesale Code binding on broadcasting distribution undertakings and requires them to distribute programs according to prescribed terms and conditions.

3 I will turn to the 2015 Wholesale Code and its implications for affiliation agreements shortly, but pause to emphasize that while the Code, via the Order, is expressly binding only on BDUs ("distribution licensees"), it necessarily affects those that are counter-party to any negotiation and contract with a BDU, namely the programming undertakings.

4 Bell Canada and Bell Media Inc. appeal these decisions under section 31 of the *Broadcasting Act*, S.C. 1991, c. 11. Bell asserts that the mandate vested in the CRTC by section 3 of the *Broadcasting Act* to implement the Broadcasting Policy for Canada does not authorize the CRTC to interfere in the economic relationship between BDUs and PUs. Its argument is twofold: the 2015 Wholesale Code is not authorized by paragraph 9(1)(*h*) of the *Broadcasting Act* and secondly, the Code violates Bell's copyright interests guaranteed under paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*, R.S.C. 1985, c. C-42. In consequence, the 2015 Wholesale Code and Order are *ultra vires* the CRTC's powers.

5 There is no doubt that the exercise by the CRTC of its authority in respect of BDUs will have effects, both direct and consequential, on PUs. The question in their appeal, however, is whether, given the reach of the Code and its effects, it is "too great a stretch from the core purposes [of] ... and from the powers granted to the CRTC under the *Broadcasting Act*" (*Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 SCC 68 (S.C.C.) at para. 33, [2012] 3 S.C.R. 489 (S.C.C.) (*Cogeco*) per Rothstein J.).

6 In order to understand the issues in this appeal some context is necessary.

II. Background

7 The *Broadcasting Information Bulletin CRTC 2015-440* (the Bulletin), released contemporaneously with the Code, explains that the Code and the implementing Order arise from a concern on the part of the CRTC about increasing vertical integration of programming and broadcasting distribution entities and resulting concentration of market power. Beginning in 2011, the CRTC responded to this change in the commercial landscape through measures aimed at ensuring

that vertical integration did not occur at the expense of a healthy wholesale market for the sale of program content, programming diversity and consumer choice as to types and combinations of programs they wish to receive and the platform or means by which they would receive programs. Those measures included:

- issuing non-binding guidelines for the negotiation of commercial agreements between PUs and BDUs, such as the *Broadcasting Regulatory Policy CRTC 2011-601* (Ottawa: CRTC, 2011) (amended in 2011-601-1) (the 2011 Wholesale Code or the 2011 Code);

- imposing conditions of licence and group-based licence renewals on a case by case basis; and

- establishing a dispute resolution process to address impasses in negotiations between PUs and BDUs (*Broadcasting Distribution Regulations*, SOR/97-555, ss. 12-15.02).

8 In 2015 the CRTC replaced the voluntary 2011 Code with the more comprehensive Wholesale Code and, via the 9(1)(*h*) Order, required existing licensees to "abide" by the provisions in the 2015 Wholesale Code.

A. The 2015 Wholesale Code

9 The Code is divided into five parts:

- Application (sections 1-3);

- Prohibitions (section 4);

- Commercially unreasonable practices (section 5);

- Commercially reasonable practices (sections 6-12); and

- Affiliation agreements (sections 13-15).

10 The 2015 Wholesale Code applies to "licenced programming and distribution undertakings" (sections 1-3). BDUs and PUs are both defined terms under the *Broadcasting Act*:

> **Definitions**
>
> 2 (1) In this Act,
>
> . . .
>
> ***distribution undertaking*** means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking; (entreprise de distribution)
>
> . . .
>
> ***programming undertaking*** means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus; (entreprise de programmation)
>
> . . .
>
> [Emphasis added]
>
> **Définitions**

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

[...]

entreprise de distribution Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable. (distribution undertaking)

[...]

entreprise de programmation Entreprise de transmission d'émissions soit directement à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, soit par l'intermédiaire d'une entreprise de distribution, en vue de leur réception par le public à l'aide d'un récepteur. (programming undertaking)

[...]

[Soulignement ajouté]

11 In the policy statement accompanying the Code, the CRTC explains that it intends to gradually "impose the Wholesale Code on all licensed [BDUs and PUs] by means of a condition of licence with a view to ultimately repealing the 9(1)(*h*) order" (at para. 137). Indeed, many of the requirements of the Code are already included as conditions in the appellants' licences (see Blue Ant Memorandum of Fact and Law, Appendix B). The Order, which requires licensees to "abide" by the Code, bridges the gap between licence renewals and presumably seeks to ensure some degree of equivalency in licence conditions across the regulated industry.

12 Section 4 of the Code sets out seven specific terms that are not permitted in affiliation agreements between PUs and BDUs. They include:

(a) terms that prohibit the distribution of programming services on a stand-alone basis;

(b) terms that prohibit the offering of programming services on a build-your-own-package or small package basis;

(c) provisions that unilaterally grandfather distribution on the same terms and conditions as the previously negotiated agreement;

(d) veto rights by PUs of BDU packaging changes;

(e) requirements to mirror existing analog tiers in a digital offering;

(f) most favoured nation (MFN) provisions, or any similarly worded provision that has the effect of guaranteeing terms as favourable as those agreed to with other parties in other affiliation agreements; and

(g) minimum penetration, revenue or subscription levels, except where negotiated by an independent programming service.

13 Section 5 precludes commercially unreasonable practices, including:

(a) requiring an unreasonable rate (defined as other than fair market value);

(b) requiring an unreasonable volume-based rate card;

(c) requiring an unreasonable penetration-based rate card;

(d) requiring the acquisition of a program or service in order to obtain another program or service (tied-selling);

(e) imposing unreasonable terms and conditions that restrict the ability of a BDU to provide consumer choice; and

(f) imposing unreasonable terms and conditions that restrict a programming service or a BDU from providing programming on multiple distribution platforms.

14 Section 6 describes what the CRTC considers to be commercially reasonable practices. It mandates that seven factors - 6(a) to 6(g) - be considered during negotiations to establish the fair market value of the wholesale rate for programming. Sections 7 to 12 are aimed at preventing vertically-integrated entities from discriminating against independent programming services. In particular, sections 7 to 10 are aimed at the packaging and marketing of independent programming services, and sections 11 and 12 at ensuring multiplatform access to independent programming services.

15 Where an affiliation agreement has not been renewed by 120 days before its expiration date and where both parties confirm in writing their intention to renew, the Code requires that the dispute be referred to the CRTC for dispute resolution (section 13). As I will explain, this requirement is a key component of Bell's argument.

16 Finally, affiliation agreements and all other agreements regarding programming services are to be filed with the CRTC (sections 14-15).

17 With the context having been set, I turn to the substantive issues.

III. Issues

18 Bell contends that the Code, and its enabling Order, are *ultra vires* the CRTC's powers insofar as they affect its interests as a programming undertaking. Whether that argument succeeds lies in the answer to three subsidiary questions:

A. Is the decision of the Supreme Court of Canada in *Cogeco* dispositive of the issues in this appeal?

B. If *Cogeco* is not dispositive, is the Code within the power of the CRTC under paragraph 9(1)(*h*) of the *Broadcasting Act*?

C. Does the Code conflict, in operation or purpose, with the *Copyright Act*?

19 I will address the applicable standard of review in the context of issues B and C. Blue Ant Media, a respondent, raises the additional argument that the Court should, in the exercise of its discretion, bar Bell from any remedy by reason of its conduct. This will be addressed at the end of these reasons.

IV. Analysis

A. Is the decision of the Supreme Court of Canada in Cogeco dispositive of the issues in this appeal?

20 Bell submits *Cogeco* stands for the principle that the CRTC cannot regulate any aspect of the economic and commercial relationship between PUs and BDUs. Bell contends that as the Code directly interferes in the manner and content of affiliation agreements and effectively limits, dilutes or negates some of its rights under the *Copyright Act*, the Code falls squarely within the scope of the prohibition in *Cogeco*. Bell's argument requires careful consideration of what *Cogeco* decided.

21 The issue in *Cogeco* was "whether the CRTC ha[d] the jurisdiction to implement the proposed value for signal regime" (VSR) (*Cogeco* at para. 14). The VSR, what it was and what it did, is critical to understanding *Cogeco*.

22 In 2010, the CRTC was concerned about the economic viability of broadcasters (which, in effect, meant only PUs because BDUs are not included in the definition of "broadcaster" under section 2 of the *Copyright Act*). In order to ensure that the public would continue to benefit from the diversity of programming offered by broadcasters, and relying on subsection 3(1) of the *Broadcasting Act* as the source of its jurisdiction, the CRTC proposed to create the VSR (*Cogeco* at paras. 1, 6-7, 21).

23 The VSR sought to alleviate the financial challenges faced by broadcasters by granting them new and exclusive rights to control the exploitation of their communication signals or works by retransmission. The VSR allowed broadcasters to negotiate directly with BDUs for the retransmission of all of their signals. When broadcasters were unable to agree with a BDU on compensation for the distribution of their programming services, the VSR would have given broadcasters "deletion rights", thereby preventing their retransmission by BDUs (*Cogeco* at paras. 7, 19, 69).

24 In so doing, the VSR dealt directly with the subject matter of sections 21 and 31 of the *Copyright Act*. Subsection 21(1) of the *Copyright Act* grants a broadcaster an exclusive, limited copyright in the communication signals it broadcasts, with paragraph (*c*) giving it the sole right to authorize or prohibit the simultaneous retransmission by another broadcaster to the public. Since BDUs are not considered "broadcasters" under section 2 of the *Copyright Act*, a broadcaster's exclusive copyright under section 21 does not include a right to prohibit a BDU from retransmitting its communication signals (*Cogeco* at paras. 48-50). This is critical, as the salient feature of the VSR was the right of broadcasters to prohibit BDUs from retransmitting their signals (*Cogeco* at paras. 19, 69).

25 Importantly, paragraph 3(1)(*f*) of the *Copyright Act* protects the right of copyright holders to distribute their work by various means, including telecommunication. However, section 31 of the *Copyright Act* creates a "user right" (or, an exception to copyright infringement) that allows BDUs to retransmit copyright protected works carried in local and distant (over-the-air) signals without the authorization of the copyright holder. The copyright holders in those works do not have the right to block the retransmission by BDUs of local and distant signals carrying their works (*Cogeco* at paras. 56, 58). The decision in *Cogeco* pivots on the CRTC's "creation of exclusive control rights over signals or programs" and the "right" of a broadcaster to require a BDU "to delete any program owned by the broadcaster" (*Cogeco* at paras. 7, 13, 31-33), notwithstanding the rights granted under sections 21 and 31 of the *Copyright Act*.

26 The Supreme Court held that the VSR was not authorized by any provision in the *Broadcasting Act*, including paragraph 9(1)(*h*), and that it conflicted with the purposes of sections 21 and 31 of the *Copyright Act*. For the Court, Rothstein J. said:

> [13] In my respectful opinion, for two reasons, the provisions of the Broadcasting Act, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime. First, a contextual reading of the provisions of the Broadcasting Act themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control the exploitation of their signals or works by retransmission. Second, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*.
>
> (See also para. 68 of *Cogeco*)

27 With respect to the *Broadcasting Act*, the Court ruled that the broad licensing and regulatory powers in sections 9 and 10 had to be read in light of the *Broadcasting Act* as a whole. It found that not all links, however tenuous, between a licensing requirement and a broadcasting policy objective described in subsection 3(1) were sufficient to establish jurisdiction in the CRTC (*Cogeco* at paras. 25, 28-29).

28 In its reasoning, the Supreme Court observed that, in contrast to the *Telecommunications Act*, S.C. 1993, c. 38, which expressly granted the CRTC jurisdiction to ensure rates charged by Canadian carriers were just and reasonable, "none of the specific fields for regulation set out in s. 10(1) pertain to the ... control [of] the direct economic relationship between the BDUs and the broadcasters [that is, programming undertakings]" (*Cogeco* at paras. 26, 29).

29 This phrase is the foundation of Bell's argument in this appeal. It submits that none of the specific fields in subsection 9(1) pertain to the control of the direct economic relationship between BDUs and PUs.

30 Significantly, the passages from *Cogeco* reproduced in paragraphs 78 and 80 of Bell's memorandum omit a key sentence from *Cogeco* (bolded below):

> [30] However, the broadcasters submit that s. 10(1)(*g*), which enables the CRTC to make regulations "respecting the carriage of any foreign or other programming services", and s. 9(1)(*h*), which empowers the CRTC to require a licensed BDU "to carry ... programming services specified by the Commission", together with the broad wording of ss. 10(1)(*k*) and 9(1)(*b*)(i), empower the CRTC to "dictate the terms of the carriage relationship between broadcasters and BDUs" (R.F., at para. 65). **Thus, the CRTC would, in their opinion, have jurisdiction to implement the proposed regime.**
>
> [31] I cannot agree. On their face, ss. 9(1)(*h*) and 10(1)(*g*) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country's cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(*k*) and 9(1)(*b*)(i), they entitle the CRTC to create exclusive control rights for broadcasters.
>
> [emphasis added]

31 When read in its context, the Supreme Court's statement "I cannot agree", was in response to the last sentence in paragraph 30. Indeed, as is clear from the last sentence in paragraph 31 of the decision, and the point on which the case turned, was that paragraph 9(1)(*h*) did not "entitle the CRTC to create exclusive control rights".

32 A reading of *Cogeco*, keeping in mind the particular exclusive control right created by the VSR, reveals that it cannot be interpreted as widely as urged by Bell. The Supreme Court decided whether the CRTC could give PUs "an exclusive right to require deletion of the programming to which they hold exhibition rights from all signals transmitted by the BDU" (*Cogeco* at para. 19), not whether the CRTC can regulate *any* aspect of the economic relationship between PUs and BDUs. In relation to the *latter*, the Supreme Court merely stated that the fields of regulation in subsection 10(1) of the *Broadcasting Act* do not expressly authorize control of "the direct economic relationship between BDUs and the [PUs]" (*Cogeco* at para. 29). This statement has to be read and understood in light of what the VSR attempted to do and the question the Court was asked to decide.

33 I do not understand the Supreme Court to have concluded that any and all exercises of authority under paragraph 9(1)(*h*), which may have an effect, direct or incidental, on PUs, would be an overreach. In the result, the extent to which paragraph 9(1)(*h*) authorizes the CRTC to impose terms and conditions on the carriage of "programming services" by BDUs, which will incidentally affect PUs, remains an open question. I therefore agree with the respondents that *Cogeco* is not dispositive of whether paragraph 9(1)(*h*) authorizes the CRTC to make the Code binding.

34 For similar reasons, *Cogeco* is also not determinative of the copyright conflict issue in this appeal. The Supreme Court decided that the CRTC could not, by granting an *exclusive control* right, create a functional equivalent to a copyright for broadcasters (PUs as copyright owners) that was deliberately withheld from the *Copyright Act*. In section 21 of that Act, Parliament set out a carefully tailored regime relating to the specific kind of copyright with respect to communication signals and a specific type of user right with respect to works transmitted in over-the-air signals under section 31 of the *Copyright Act*. The VSR, however, created exclusive control rights "for broadcasters to control the exploitation of their [over-the-air] signals or works by retransmission" (*Cogeco* at paras. 13, 19, 31, 33, 69-70). The VSR, in effect, created new copyright, and conflicted with the purpose of sections 21 and 31 of the *Copyright Act* (*Cogeco* at paras. 13, 62-64, 67-70, 75-76). As I will explain, in contrast to the VSR, the Code does not create a "special right" akin to that contemplated by the VSR.

35 In considering the effect of *Cogeco*, guidance can be found in the principle expressed in *R. v. Henry*, 2005 SCC 76 (S.C.C.) at para. 53, [2005] 3 S.C.R. 609 (S.C.C.) (*Henry*), citing *Quinn v. Leathem*, [1901] A.C. 495 (U.K. H.L.), "that a case is only an authority for what it actually decides". Of particular resonance in this appeal is Binnie J.'s observation at paragraph 57 that:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.

36 Having concluded that *Cogeco* is not dispositive does not mean that it is of no consequence to this appeal. To the contrary, and consistent with *Henry*, the principles of statutory interpretation employed by the Supreme Court of Canada to read the *Broadcasting Act* are binding. I note, in particular, Rothstein J.'s observation at paragraph 23 of *Cogeco* that references to the *Broadcasting Act*'s policy objectives in subsection 3(1) are, without more, insufficient to ground jurisdiction. Of equal force and effect is the Court's recognition that the property interests created by the *Copyright Act* cannot be constrained or diminished unless authorized by Parliament. This bears on the second branch of Bell's argument which is founded on its copyright interests.

37 In conclusion, whether, to borrow the language of Rothstein J., the 2015 Wholesale Code "is too great a stretch from the core purposes intended by Parliament" and from the power granted to the CRTC under the *Broadcasting Act* (*Cogeco* at para. 33) and engages in the direct economic relationship in a manner not contemplated by Parliament remains a live question, the answers to which lie in an understanding of the intention of Parliament in enacting paragraph 9(1)(*h*). Whether the Code diminishes or conflicts with Bell's copyright interests also remains unsettled.

B. What is the standard of review?

38 The parties do not agree on the standard of review. Bell contends that the question whether the Code is authorized by paragraph 9(1)(*h*) of the *Broadcasting Act* is jurisdictional and attracts a correctness standard of review. The respondents contend that the question is simply a matter of interpretation of a home statute by a tribunal and that the standard of review is reasonableness. Insofar as the conflict with the *Copyright Act* is concerned, Bell says that this too should be examined through a correctness lens, as that act is not the home statute of the CRTC.

39 The parties pressed their positions with respect to standard of review. Given the jurisprudence it is easy to understand why that was so. From the respondents' perspective, reasonableness triggers the presumption which requires the Court to defer to the CRTC's interpretation of its home statute. This makes short work of the appeal. A favourable result is virtually assured by the near-irrefutable nature of that presumption. From the appellants' perspective, correctness opens the door, at least a crack, to a closer analysis of the legislation and potentially a different result.

40 Bell makes a compelling case that this is a jurisdictional question. Parliament made a clear and express choice to limit the CRTC's power to make orders under paragraph 9(1)(*h*) to BDUs and the "programming services" which they carry. In Bell's view, the Code derogates from Bell's rights under the *Copyright Act* and circumvents Parliament's clear language with respect to copyright.

41 Jurisdictional questions are, however, difficult to identify. We know that a jurisdictional question is one the answer to which must be correct. But this sheds little light on the defining characteristics of a jurisdictional question. As observed by Brown J. in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (S.C.C.) (*West Fraser*) "... the distinction between matters of statutory interpretation which implicate truly jurisdictional questions and those going solely to a statutory delegate's application of its enabling statute will be, at best, elusive" (at para. 124). The definitional challenges around jurisdictional questions continue to vex courts, here and abroad.

42 The distinction between jurisdictional and non-jurisdictional questions has been described by one judge of the High Court of Australia as "chimerical" (*Re Minister for Immigration and Multicultural Affairs, Ex parte Miah*, [2001] H.C.A.

22 (Australia H.C.) at para. 212, (2001), 206 C.L.R. 57 (Australia H.C.) (*Ex parte Miah*)), as a "vague and probably undefinable concept" by the New Zealand Court of Appeal (*Bulk Gas Users Group v. Attorney General*, [1983] N.Z.L.R. 129 (New Zealand C.A.) at 136) and as a "mirage" by the Supreme Court of the United States (*City of Arlington v. Federal Communications Commission*, 569 U.S. 290 (U.S. Sup. Ct. 2013) at 5. Academics have been no less restrained in their criticism. Professor Daly notes "the weak theoretical basis for the category and the historical difficulty in applying the concept ... in a clear and coherent manner" (Paul Daly, "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill L.J. 483 at 492 (Daly, "*Dunsmuir*'s Flaws Exposed").

43 The Supreme Court of Canada, echoing the suggestion of the High Court of Australia that the concept be "interred" (*Ex parte Miah* at para. 212) (Kirby J.)), has hinted that it might "euthanize" this category of review (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (S.C.C.) at para. 41 (*CHRC*), citing Binnie J. in *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at para. 88, [2011] 3 S.C.R. 654 (S.C.C.) (*Alberta Teachers*)).

44 That said, the Supreme Court has also confirmed the centrality of jurisdictional issues in ensuring that Parliamentary intention is respected. Even *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) at para. 30, [2008] 1 S.C.R. 190 (S.C.C.) (*Dunsmuir*) notes that "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority" (citing Thomas A. Cromwell, "Appellate Review: Policy and Pragmatism" in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). As Cromwell J. noted in *Alberta Teachers*:

> [94] I agree that the use of the terms "jurisdiction" and "*vires*" have often proved unhelpful to the standard of review analysis. This, however, should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is "correct". ...

45 There is also considerable thoughtful and compelling academic commentary in support of the concept (see e.g. T.R.S. Allan, "Human Rights and Judicial Review: A Critique of "Due Deference" (2006) 65:3 Cambridge L.J. 671). Professor Daly recognizes that the "category" of jurisdictional error could be removed "without undermining the availability of review for correctness ..." (Daly, "*Dunsmuir*'s Flaws Exposed" at 492, n. 36). Put otherwise, the problem lies in the category, not with the principles which it embodies.

46 Thus, as Brown J. observed in *CHRC* at paragraph 110, "[w]hile ... one might 'euthanize' *the category* of true jurisdictional questions, it would not follow that *such questions themselves* will disappear". This is because there is a symbiotic relationship between the rule of law and jurisdiction. Jurisdictional issues are a label given to a fundamental principle - that all exercises of power by public authorities must be authorized by law. Parliament is acutely cognizant of this principle. In granting rights of appeal or judicial review, Parliament recognizes the incompatibility of an unfettered discretion in tribunals to decide the scope of their jurisdiction with the fundamentals of the Westminster parliamentary democracy, and mandates the courts to demarcate the boundaries.

47 The persistency of jurisdictional questions is telling. They have coursed through our jurisprudence for over half a century, playing an integral role in ensuring the rule of law remains more than mere words. Efforts to categorize jurisdiction may have floundered, but this should not be understood either as a problem with the principle or as a rationale for its elimination.

48 As observed by Brown J. in *CHRC*, despite definitional challenges of jurisdictional questions, the underlying principle that tribunals must remain squarely within the limits of the mandate that *Parliament* (and not the tribunal itself) determined, cannot be erased: "[T]here will remain questions that tend more to the former, including matters which are still widely regarded as jurisdictional by lower courts" (*CHRC* at para. 111). The question as to the CRTC's authority under the *Broadcasting Act* in this appeal is precisely of that nature. It is one that *tends* to the jurisdictional, so much so that there is only one reasonable interpretation.

49 We do not, however, need to decide whether the question in this appeal is jurisdictional. The standard of review to be applied to orders made under paragraph 9(1)(*h*) has previously been determined by this Court as reasonableness (*Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (F.C.A.) at para. 9, (2017), 154 C.P.R. (4th) 85 (F.C.A.) (*NFL*), leave to appeal to S.C.C. granted, 37896 (10 May 2018) [2018 CarswellNat 2186 (S.C.C.)]). *Stare decisis* requires that it should be followed and applied here (*Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (Fed. C.A.)).

50 That said, reasonableness "is a deceptively simple omnibus term" (*Alberta Teachers* at para. 87 (per Binnie J.)) and, if it is to be applied, it must be given definition and content. The Court should be transparent about what it means when it conducts a reasonableness review, and identify the factors which shape the degree of scrutiny or intensity of review it intends to bring to the question. To that end, I begin with a few observations about reasonableness and deference.

51 Reasonableness, in its conception, is a highly elastic concept. Notwithstanding rule of law considerations, it tolerates the proposition that different decision makers can reach contradictory interpretations and both be reasonable (*British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at paras. 32-33, [2013] 3 S.C.R. 895 (S.C.C.) (*McLean*); *CHRC* at para. 52; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 (S.C.C.) at para. 17, [2016] 1 S.C.R. 770 (S.C.C.) (per Abella J. (*Wilson*), see also paras. 70-71 wherein McLachlin C.J.C., Karakatsanis, Wagner, Gascon, Cromwell JJ. concurred on this point)). The other end of the spectrum also contemplates circumstances where there can be only one reasonable interpretation, and "no degree of deference can justify [the] acceptance" of any other interpretation (*McLean* at para. 38).

52 Reasonableness also applies, without differentiation, across a wide range of decisions made by a broad spectrum of decision makers: *ad hoc* arbitrators, quasi-judicial tribunals, permit and licensing authorities and large specialized standing quasi-judicial tribunals supported by professional staff, such as the CRTC, the National Energy Board and the Canadian Transportation Agency, for example. It also applies to ministers of the Crown and the Governor in Council, whether acting under prerogative or statute. Reasonableness also embraces, without distinction, entirely distinct functions and responsibilities. At one end of the continuum stand administrative and adjudicative decisions affecting the interests of a single party on a discrete set of facts. At the other end are highly discretionary, policy-infused decisions, such as those of the Governor in Council as to whether a certain matter is in the public interest. There are many points in between, depending on the legal and factual matrix.

53 The existing administrative law framework, predicated as it is on categories, forces a choice between reasonableness or correctness review. It assumes that there is a bright line between jurisdictional questions and all other types of decisions. But the line between the two, if there is one, becomes blurred as the range of reasonable outcomes narrows. When it tapers to only one reasonable outcome, correctness and reasonableness review merge and become indistinguishable. This can arise in the context of near-jurisdictional issues (*Wilson* at para. 27) as well as in the context of specific exercises of discretion: *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 (S.C.C.).

54 The challenges inherent with categorization and classification as an over-arching framework were identified as early as 2003. Writing prior to *Dunsmuir*, the Supreme Court observed that the standard of review should focus on "the polar star of legislative intent" based on "principled analysis rather than categories" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (S.C.C.), para. 149, [2003] 1 S.C.R. 539 (S.C.C.)). More recently, in *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 (F.C.A.), Stratas J.A. observed:

> [58] Put another way, the issue whether an administrative tribunal is inside or outside the "jurisdictional" fences set up by Parliament is really an issue of where those fences are — in other words, an interpretation of what the legislation says about what the administrative decision-maker can or cannot do.

55 Stratas J.A. continued and concluded "There comes a point where an administrative decision-maker adopts a view of its statutory powers and the statutory scope of its authority that is neither acceptable nor defensible. When

that happens, reviewing courts acting under the reasonableness standard will quash the administrative decision, thereby keeping the administrative decision-maker within its authority."

56 In sum, the focus of the standard of review analysis should be on discerning legislative intent according to received principles of interpretation - not on choosing categories and applying *a priori* presumptions. If, after considering the statute, a court concludes that the decision was not authorized by the legislation, it cannot stand. The label applied to the exercise - whether unreasonable or jurisdictional - is of no consequence.

57 As manifested by the arguments in this appeal, the stark choice between reasonableness and correctness has repercussions for both the parties and the courts.

58 First, as Binnie J. cautioned in *Dunsmuir*, threshold debates about standard of review lead to lengthy and arcane discussions, which have little to do with the merits of the case. This truism has given rise to the contemporary view that the focus of judicial review should be on answering whether the particular power or decision was authorized by law, not on debating the category of review (see generally the contributions listed in Paul Daly, "The Dunsmuir Decade/10 ans de Dunsmuir" (11 January 2018), online: *Administrative Law Matters* <http://www.administrativelawmatters.com/blog/2018/01/11/the-dunsmuir-decade10-ans-de-dunsmuir/>, (*A Decade of Dunsmuir / Les 10 ans de Dunsmuir*, forthcoming CJALP, Fall 2018).

59 Binnie J. also urged that the courts move the parties away from arguing about tests and back to arguing about the substantive merits of their cases. In collapsing three standards of review into two, Binnie J. wrote "... the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense" (*Dunsmuir* at para. 139). This has proven prescient. As noted by Professor D.R. Knight, in *Vigilance and Restraint in the Common Law of Judicial Review* (New York: Cambridge University Press, 2018) at 195 (Knight, *Vigilance and Restraint*), "[j]udicial review doctrines which mostly concentrate on judicial methodology, without strongly elaborating norms for the administration, undermines its effectiveness. Again, the Canadian experience illustrates this criticism ...".

60 The second consequence arising from the stark choice between "categories" is that the compelling points of law and legal policy encompassed by the standard of review that is rejected are jettisoned, in their entirety (see e.g. dissenting opinions in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (S.C.C.) at para. 63,[2016] 2 S.C.R. 293 (S.C.C.) (per Côté, Brown JJ., McLachlin C.J.C., Moldaver J. concurring) (*Edmonton East*) and in *West Fraser* at paras. 52-111 (per Côté J.), at paras. 112-125 (per Brown J.); see also the reasons concurring in the result of Côté, Rowe JJ. in *CHRC* at paras. 73-81). The adverse policy consequences of the categorical approach are also detailed by L. Sossin in "Why the Standard of Review Matters (or at least why it should)!" (September 25, 2018): online Sossin's Law Blog <http://sossinblog.osgoode.yorku.ca/2018/09/why-the-standard-of-review-matters-or-at-least-why-it-should/>.

61 Reasonableness, nevertheless, grants reviewing judges "a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense" (*Alberta Teachers* at para. 87 (per Binnie J.)). In *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2013 FCA 75 (F.C.A.) at paras. 12-14, (2013), 444 N.R. 120 (F.C.A.), Stratas J.A. articulated a number of factors which, "...while situated comfortably in the context of a deferential application of reasonableness review", nevertheless point to intense scrutiny and narrowing of reasonable outcomes. The most critical of these is whether the decision turned on statutory interpretation, as in this appeal.

62 Factors both internal and external to the decision under review inform the intensity of scrutiny. The use of these contextual factors has a long provenance. From *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at paras. 29-38, (1998), 160 D.L.R. (4th) 193 (S.C.C.) to *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) to *Dunsmuir* at paragraphs 62 to 64 to *West Fraser*, contextual factors have been considered constructive in informing the answer to the question as to the role Parliament intended the court to play in relation to any particular decision. While contextualism has its critics, its

use has not lead to a proliferation of litigation. To the contrary, it cannot be avoided without turning a blind eye to Parliamentary intention and the stakes at hand for the parties.

63 There are also other advantages. As noted by Brown J. in *West Fraser* at paragraph 124, the intensity of review allows for "sufficient flexibility to reflect the varied nature of administrative bodies, the question before them, their decisions, their expertise and their mandates". Brown J. continued and noted that an intensity of review approach, which focuses on the language of Parliament and the nature of the issue is consistent "... with the dual constitutional functions performed by judicial review: upholding the rule of law, and maintaining legislative supremacy (Dunsmuir, at paras. 27 and 30)" (*West Fraser*, at para. 124).

64 This observation reflects an underlying concern, in both the jurisprudence and academic commentary, about the consistency of a binding presumption of deference to tribunal interpretations of statutes with Parliamentary intent reflected in rights of appeal or review, the rule of law and legislative supremacy. I will turn to this issue shortly in the discussion of the degree of deference to be accorded the decision under appeal.

65 Reasonableness as a standard of review has been described as points on a continuum from reasonable to the unreasonable, as a single standard which applies with increased focus or scrutiny or, as Professor Knight aptly notes, "[r]easonableness ... 'floats' along an infinite spectrum of deference" (Knight, *Vigilance and Restraint* at 206). These metaphors describe that which is a single question - what role did Parliament intend the reviewing court play in relation to the issue before it, and what are the criteria or markers which guide the court in conducting its review? These contextual factors ensure that judicial review does not become an entirely subjective enterprise, with a consequential erosion of predictability and efficacy of administrative bodies.

66 The legislation is the first and controlling point of reference in answering the question as to the role a court should play in relation to the decision in question. The degree of judicial scrutiny may be calibrated by the existence of a privative clause; whether Parliament granted a right of appeal or a more limited recourse in judicial review; the nature of the decision (the extent to which it is adjudicative as opposed to policy or legislative); the extent of the discretion granted and the degree to which it truly draws on expertise unique to a tribunal; the question before the court and its consequences for the parties; and importantly, rule of law considerations. These are all beacons that guide the answer to the question of the degree of scrutiny with which the decision is to be assessed.

67 The language of Parliament can inform the intensity of review in another fashion. The legislature may be prescriptive about the decision making process and the factors to be considered by a tribunal. That, along with a grant of judicial oversight, supports close scrutiny. As noted by Stratas J.A. in *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), the more prescriptive and directive Parliament is to the content of decision making, the lesser the discretion and the greater the scrutiny. In contrast stand cases involving a broad discretion, resulting in a range of possible outcomes and diminished scrutiny.

68 How then, should the Court consider reasonableness of the decision in this case? What indicia or markers inform the degree of scrutiny the Court should apply to the question whether the Wholesale Code is authorized by paragraph 9(1)(*h*)?

(1) What Parliament said about the role of the court

69 The legitimacy of standard of review as doctrine depends on its respect for Parliament's intention. Consequently, any consideration of the standard of review begins with an inquiry into the role Parliament intended the supervisory court to play in relation to any particular decision.

70 If the standard of review is premised on respect for legislative intention, the words of section 31 of the *Broadcasting Act* must be given meaning. Parliament said that, subject to relevant statutory provisions in the *Broadcasting Act*, decisions of the CRTC are "final and conclusive" (*Broadcasting Act*, s. 31(1)). It also said that appeals lie to this Court on "a question of law or a question of jurisdiction" (*Broadcasting Act*, s. 31(2)). Parliament was concerned about the CRTC

and its jurisdiction - so much so that the term appears no fewer than eight times in the *Broadcasting Act*, six of which are relevant for this purpose. (This is not to suggest that the weight of the argument increases with the number of words.)

71 Although a "privative clause[] deter[s] judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms" (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.) at para. 55, [2009] 1 S.C.R. 339 (S.C.C.)). In other words, a privative clause is not determinative. It is a factor which must be considered in calibrating the degree of scrutiny.

72 Section 31 of the *Broadcasting Act* is a clear indication that there are limits to the remit of Parliament's mandate to the CRTC. By these words, Parliament indicated that it wanted the Court to demarcate the borders of the CRTC's jurisdiction as the word is commonly understood. Indeed, to conclude otherwise would be to say that Parliament delegated an unfettered mandate to the agency to decide the scope of its own jurisdiction. Were that the case, section 31 would have been unnecessary.

(2) Nature of the question

73 The nature of the question will also inform the degree of scrutiny. Questions of law merit close review although the intensity may vary with the nature of the question. Discretionary decisions, which are highly fact based or infused by policy, merit a highly deferential approach. This requires a precise definition of the true question before the Court.

74 The answer to the question before us is one of statutory interpretation - text, context and purpose. This question is not a specific, narrow question focused on a discrete set of facts, nor does it turn on the understanding of technical matters which would be in the domain of the CRTC; rather the question probes whether paragraph 9(1)(*h*) allows the CRTC to directly or incidentally affect entities not expressly mentioned within paragraph 9(1)(*h*).

75 Nor does the question ask us to review an adjudicative decision. The Order, and the Code which it mandates, is quasi-legislative in nature. The distinction between the two types of power has been recognized (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (S.C.C.), at para. 5, [2004] 1 S.C.R. 485 (S.C.C.); *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 (S.C.C.) at paras. 51-52, [2014] 2 S.C.R. 135 (S.C.C.)). There cannot be two equally reasonable answers where the question asks whether Parliament intended the CRTC to have the power to regulate affiliation agreements. It either did or it did not. It is not possible to have a range of outcomes here.

76 Bell does not challenge the substantive content of the Order. Its point, and it is an important one, is that it is of no consequence whether the terms of the Code are reasonable - the CRTC has no business imposing conditions on PUs, reasonable or unreasonable. In this regard, "reasonableness" does a disservice to the substance of the argument before the Court. The struggle between the parties over the standard of review is a distraction from the question of legislative intention, and diverts attention to consideration as to whether or not the Code is reasonable - a non-issue. The question of whether the CRTC has the authority to impose the Code cannot depend on the reasonableness of the conditions. The "appropriateness" of the terms of the Code is not the same question as whether the Code can apply to PUs.

77 *West Fraser*, contrary to the respondents' submissions, does not advance their case. The decision in *West Fraser* did not collapse the question of the authority to make a regulation into the question whether the regulations are a valid exercise of a delegated power. The majority in *West Fraser* found that the Board's enactment of the regulation did not involve a question "of *vires* in the traditional sense" (*West Fraser* at para. 23).

78 Fairly characterized, Bell's argument is not a disguised attempt to challenge the merits of the regulatory scheme encompassed by the Code. The issue before this Court does not go to the reasonableness of the Code, rather it asks whether it has the authority to enact the Code *at all* (*West Fraser* at para. 56 (per Côté J. (dissenting)); *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 (F.C.A.) at para. 80). The question is "a broad question of the tribunal's authority" (*Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39 (S.C.C.) at para. 34, [2009] 2 S.C.R. 678 (S.C.C.)) and which, in essence, calls for a determination of Parliament's intent in enacting paragraph 9(1)(*h*).

79 Thus viewed, the distinction between reasonableness and correctness standards of review is of no consequence. Regardless of the choice of label or category, the answer orbits around the same question of Parliamentary intent. If, following consideration of the statute, Parliament did not authorize the CRTC to affect third party commercial interests, then any decision to the contrary is unreasonable. It is unreasonable because it was not authorized to do so by Parliament. The categorization of the standard of review is of little guidance in circumstances such as this.

(3) The extent of deference

80 The respondents place great emphasis on the deference accorded to tribunals in the interpretation of home statutes and, in particular, the statement in *Edmonton East*, at paragraph 33, that "expertise is something that inheres in a tribunal itself as an institution". If the CRTC has discretion to make orders it considers "appropriate", its expertise extends to determining both the content of the orders, and, importantly for the purposes of this appeal, to whom they should apply.

81 While deference is a principle of judicial review, its application must be nuanced.

82 In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.) at paras. 21, 27, [2006] 1 S.C.R. 140 (S.C.C.) (*ATCO*), the Supreme Court held that deference has no role to play in determining the jurisdiction of a tribunal's mandate and that the expertise of a tribunal is not engaged when deciding the scope of its own powers. This statement has been overtaken by, or subordinated to, the strength of the presumption of deference on which the respondents rely.

83 Deference informs, but does not determine, the degree of scrutiny. Whether the term or provision being interpreted is truly *sui generis* to the tribunal's unique expertise, or is equally capable of consideration by courts, is a necessary element in considering the degree or extent of deference to be accorded. The rationale which underlies or is said to justify deference also varies. In the case of highly policy-based, public interest decisions, those of a minister of the Crown or Cabinet, deference is justified on the basis of democratic accountability - Parliamentarians are elected to make these decisions, not judges. At the other end of the spectrum, deference is warranted in highly specialized areas. But under our existing framework, deference is now a presumption, applied across the board, to all decision makers, in all types of decisions. Deference may be the result, but it should arise as a consequence of a close analysis of the statute, the question before the court and its consequences.

84 Deference plays, without question, a central role in considering the substantive, technical content of the Code. Deference applies to the *how*, the means and measures employed. However, in answering the question *whether* the CRTC can affect PU's under paragraph 9(1)(*h*), there are no indicia that the CRTC has any greater expertise than that of the Court in reading the statute. Deference, according to Professor Daly, is most active where there is choice or ambiguity (Paul Daly "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta. L. Rev. 799 at 821). To the same effect, Professor Knight notes, "[t]rue deference only arises where there is a range of outcomes that all meet the test of justification" (Knight, *Vigilance and Restraint* at 215-216); see also *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 (F.C.A.)). Here, there is no palette fitted with an assortment of hues and colours from which the CRTC may choose - the CRTC either has the authority to affect third parties or it does not.

85 The argument advanced by the respondents triggers the caution of Cromwell J. writing in *Alberta Teachers*, at paragraph 94, that "the fact that a legislative provision is in a 'home statute' has become a virtually unchallengeable proxy for legislative intent" and poses concerns for both rule of law and legislative supremacy principles. This observation was echoed in *Edmonton East*, at paragraph 85, where the dissenting justices wrote that the assumption of an unlimited inherent expertise, including on matters of interpretation, "... risks transforming the presumption of deference into an irrebuttable rule". Côté and Brown JJ. further noted that "[r]espect for legislative supremacy must leave open to the legislature the possibility of creating a non-expert administrative decision maker, or creating an administrative decision maker with expertise in some areas but not others" (*Edmonton East* at para. 85).

86 The need for a tailored and nuanced consideration of deference is also demonstrated by Professor Allan, who notes in in his book, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013) at 268-269 (Allan, *The Sovereignty of Law*)):

> The appropriate degree of deference is dictated, in each case, by analysis of the substantive legal issues arising. If properly conducted, the analysis will indicate the correct division of responsibilities between court and agency, making all due allowance for the exercise of administrative discretion and recourse to specialist expertise. That division of responsibilities is itself the *outcome* of legal analysis attuned to the specific questions of legality arising: it cannot determine these questions, *a priori*, on the basis of general features of the separation of powers divorced from the specific constitutional context.

87 Deference, then, is part of the context, not an *a priori* determination of the outcome. As Professor Allan notes, if deference is viewed as part of the context, rather than as pre-determined rule, it dissolves the antagonism between the rule of law and parliamentary supremacy (Allan, *The Sovereignty of Law* at 228).

88 The degree of deference owed is gleaned from the statutory interpretation exercise. Consideration should be given to what Parliament has said about the structure of the tribunal or agency, the tenure and mandate of its decision makers, whether it is a large standing body with large professional staff, or individual *ad hoc* decision makers. Subordinating a statute to a broad and uncritical presumption of expertise in all aspects of a tribunal's mandate, with the consequential displacement of Parliament's express expectation that the courts are to perform a role in demarcating the boundaries of its legislation, lies at the heart of much of the tension in the current jurisprudence.

89 Failing to consider whether there are parameters on the presumption of expertise has consequences. If the presumption of expertise-based deference extends to the determination, by the tribunal itself, of the limits of its jurisdiction, then paragraph 9(1)(*h*) amounts to an unfettered discretion. Rothstein J. noted the point in *Cogeco* at paragraphs 27-28:

> [27] This broad, express grant of jurisdiction authorized the CRTC to create and use the deferral accounts at issue in [*Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764]. This stands in marked contrast to the provisions on which the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(*k*) and a broad licensing power under s. 9(1)(*b*)(i). Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.
>
> [28] That is the fundamental point. Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC's regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion. Rather,
>
> > discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation. (citing *ATCO* at para. 50).

90 Deference, which originated in the *application* of the law has migrated to the *interpretation* of the law. The application of the presumption of deference to the interpretation of statutes by decision makers of all types, including decisions of the executive, has implications for rules of law and legislative supremacy. In effect, the twin rationales which underlie a presumption of deference in the interpretation of the law (a high degree of specialization for technical matters or democratic accountability for public interest decisions), have been extended, effectively, to the legal advice given by public servants to tribunals or ministers.

91 Deference must be calibrated to the circumstances. Although speaking in the context of the Charter, Iacobucci J.'s observation in *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.), at para. 79 is equally apposite in this context: "The question of deference, ..., is intimately tied up with the nature of the particular claim or evidence at issue and not in the general application of the s. 1 test; it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis."

92 Academics, reflecting on the Canadian jurisprudence, have expressed a well-founded concern that "a doctrine of deference will collapse in practice into a doctrine of non-justiciability, leaving regions of governmental decision-making invulnerable to legal challenge" (Allan, *The Sovereignty of Law*, at 274). Jurists have also observed that uncritical presumptions of expertise and deference, when coupled with the broad-church doctrine of reasonableness, is inconsistent with the purported objective of sustaining legislative supremacy (see, for example, *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374 (Alta. C.A.) per Slatter J. at paras. 93-95, per Watson J. at paras. 59-74; see also e.g. Mark Mancini, "Dark Art of Deference: Dubious assumptions of expertise on home statute interpretation" (6 March 2018), Double Aspect, online: <https://doubleaspect.blog/2018/03/06/the-dark-art-of-deference/>; Peter A. Gall QC, "Dunsmuir: Reasonableness and the Rule of Law" (6 March 2018), Administrative Law Matters, online: <https://www.administrativelawmatters.com/blog/2018/03/06/dunsmuir-reasonableness-and-the-rule-of-law-peter-a-gall-qc/>). On this view, the requirement to defer should not be based on "abstracted notions of expertise", but only when and to the extent that the statute indicates that such deference is, in fact, warranted. That analysis necessarily encompasses, and gives considerable weight to, provisions granting recourse by way of appeal or judicial review to a court on questions of law, jurisdiction or otherwise.

93 These observations, however, must be set aside. The law on the question of presumed expertise and which we are required to follow, is clear (*Edmonton East* at para. 33).

94 The unilateral application of the presumption, de-contextualized from the nature of the decision maker, the nature of the question and in particular, what Parliament has said about rights of appeal or review, may erode, rather than sustain, the rule of law. The point was made by Mainville J.A. (then of this Court), in *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*, 2012 FCA 40 (F.C.A.) at para. 98, (2012), [2013] 4 F.C.R. 155 (F.C.A.), where he wrote that the presumption that the executive's interpretation of the law prevails unless the citizen can discharge an onus on him or her to prove that it is unreasonable (something which in practice is not easily done) "harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives".

95 In sum, justifications for the presumption untethered from a close examination of the statute and in particular, whether Parliament has granted a right of appeal or review, as it has here, must lie elsewhere than in sustaining the rule of law. To be faithful to the principle of respecting Parliamentary intent, any weight given to a presumption must be tailored, nuanced or situated in light of the statutory scheme in question. The point was made in *Pham v. Home Department (Secretary of State)*, [2015] UKSC 19 (U.K. S.C.) at para. 107. After noting that "the question of balance" is for the decision maker, Lord Sumption continued:

> It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject-matter.

96 Nor is the presumption of deference to tribunal interpretations an easy fit in circumstances such as this where the decision maker has provided no reasons. If there are no reasons, there is nothing to be deferred to (see *West Fraser* at para. 69 (per Côté J.)). In imposing the Code, the CRTC was exercising a non-adjudicative function. It gave no reasons as to why it had the authority to impose the Code on PUs when paragraph 9(1)(*h*) refers only to BDUs. Nor is this a case where a court can supplement an otherwise deficient set of reasons (*Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (S.C.C.)

at para. 23, (2018), 416 D.L.R. (4th) 579 (S.C.C.)). Deference here would require a court to assume that the CRTC, if asked, could write a set of reasons which this Court would find compelling. Bodies acting in a regulatory or legislative capacity seldom explain why they have the authority to act - they simply do, with the result that the tools of justification, transparency and intelligibility, which function best in an adjudicative setting, are of limited utility.

(4) Prior decisions on standard of review

97 The Supreme Court framed the issue in *Cogeco* as "whether the CRTC ha[d] the *jurisdiction* to implement the proposed value for signal regime" (*Cogeco* at paras. 1, 14 (emphasis added)). While it did not make an express determination on the applicable standard of review, it is evident that it adopted a correctness approach. The exercise in which it engaged was one of pure statutory interpretation of the text of paragraph 9(1)(*h*) when situated in the context of the *Broadcasting Act*. The language of reasonableness plays no role in the Court's analysis.

98 The issues before this Court are a mirror image of *Cogeco*. Arguably, the substantive question before this Court does not change simply because, as a matter of procedure, it arose in the former case as a reference and in the present case as an appeal. On the other hand, it could be pointed out that the Governor in Council did not ask the Court to address the standard of review. But this preferences form and procedure over the substantive question.

99 These considerations, and consistent with this Court's previous rulings, all weigh in favour of the conclusion that whether the Code is authorized by paragraph 9(1)(*h*) is a "reasonableness" exercise for which there can be only one answer. The answer to the question depends on an analysis of the statute according to received legal principles of statutory interpretation and in respect of which the regulator has no particular advantage over that of the court. It raises, at its core, a question of the scope of Parliament's remit to the CRTC. Rule of law considerations weigh in the equation.

(5) Copyright Act and Broadcasting Act conflict

100 Insofar as the conflict between the *Copyright Act* and the *Broadcasting Act* is concerned, the standard of review is, again, consistent with precedent, correctness.

101 The *Copyright Act* is not the constituent statute of the CRTC (*NFL* at para. 38). The *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, the *Broadcasting Act* and the *Telecommunications Act* are the CRTC's home statutes. Importantly, aside from ephemeral recordings, the only point of intersection between the *Copyright Act* and the *Broadcasting Act* is that considered in *Cogeco*: the carve-out for retransmission of works in local and distant signals under the *Copyright Act*. This single point of intersection, discrete and limited, and in any event irrelevant to the issues raised here, does not make the *Copyright Act* the home statute of the CRTC.

102 This appeal necessitates that a line of demarcation be drawn between the nature and extent of Bell's legal rights and interests under the *Copyright Act*, and a determination whether the Code and Order trench on those rights. While this is not a question of competing tribunals, it is a question of competing or conflicting legislative schemes. Correctness governs the question whether the exercise of paragraph 9(1)(*h*) conflicts with the *Copyright Act* as it did in *Cogeco*. This was also the conclusion of this Court in *NFL*.

C. Is the Code within the power of the CRTC under paragraph 9(1)(h) of the Broadcasting Act?

103 This appeal pivots on the intention of Parliament and whether Parliament intended, through paragraph 9(1)(*h*), to give the CRTC jurisdiction to enact measures directly affecting PUs.

104 There are two competing interpretations. Bell says that the power in paragraph 9(1)(*h*) is narrow, confined to requiring the carriage of specific programs, and that it provides no legislative basis for intruding into "the economic terms of the carriage relationship" between BDUs and PUs. The respondents say that the textual and contextual readings of the provision support the Code. Both sides rely on the same principles of interpretation and both muster legislative history in support.

105 To interpret paragraph 9(1)(*h*), we need to consider it in its "entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, (1998), 154 D.L.R. (4th) 193 (S.C.C.), citing Elmer Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87). The exercise is one of text, context and purpose.

106 I begin with the principles relevant to the interpretation of a general statutory power, such as the one contained in paragraph 9(1)(*h*), that is to be exercised in the furtherance of the objects established in the encompassing statute.

107 Rothstein J. in *Cogeco* made clear that while the policy objectives set out in subsection 3(1) of the *Broadcasting Act* function to constrain the CRTC's administrative decisions in that the CRTC must act with a view to implementing those objectives (*Cogeco* at paras. 22, 25), it was not the case that any link, however tenuous, between a proposed action under section 9 and a policy objective in subsection 3(1) would suffice (*Cogeco* at para. 25). If the only constraint on the CRTC's licensing powers was whether the CRTC's action goes towards a broadcasting policy objective identified in subsection 3(1), "[t]his would be akin to unfettered discretion" (*Cogeco* at para. 28). As Bastarache J. stated in paragraph 50 of *ATCO*, an administrative decision maker's discretion is:

> ... to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). ...

108 If a reading of "the *Broadcasting Act* in its entire context reveals that the [Wholesale Code] is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*" (*Cogeco* at para. 33), then the Wholesale Code must be found to be *ultra vires*. However, the Supreme Court has also emphasized that while "courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes" (*ATCO* at para. 50 citing *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.) at 1756, (1989), 60 D.L.R. (4th) 682 (S.C.C.) (*Bell Canada* (1989)).

109 Applying these principles, I have concluded that the Order, and the Code which it makes binding, are not "too great a stretch" from what Parliament intended, but in fact are directly within its contemplation.

110 Paragraph 9(1)(*h*) provides:

> **General Powers**
>
> ***Licences, etc.***
>
> **9 (1)** Subject to this Part, the Commission may, in furtherance of its objects,
>
> . . .
>
> **(h)** require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.
>
> **Pouvoirs généraux**
>
> ***Catégories de licences***
>
> **9 (1)** Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission:
>
> [...]
>
> **h)** obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

111 Although the power in paragraph 9(1)(*h*) must only be exercised in furtherance of its objects, this does not expand its reach. However broad the objects may be, the provision only authorizes the CRTC to order BDUs "to carry programming services" on certain terms and conditions. Those terms and conditions, contained in the Code, are circumscribed or constrained by the necessary requirement that they relate to the carriage of programming services.

112 Paragraph 9(1)(*h*) does not expressly grant authority to the CRTC to impose terms and conditions on the negotiation of affiliation agreements and their content. This much is clear. On an ordinary and literal reading of the text, paragraph 9(1)(*h*) only authorizes the CRTC to impose terms and conditions in respect of programming services upon BDUs, which are expressly mentioned, and not on PUs which are not mentioned.

113 This does not end the analysis. The context is also to be considered. A provision which confers jurisdiction cannot be read in isolation (*Cogeco* at para. 29).

114 Paragraph 9(1)(*h*) begins with "[s]ubject to this Part, the Commission may, in furtherance of its objects [perform the actions set out in subsection 9(1)]". The CRTC's objects, which are expressly set out in subsection 5(1), include "regulat[ing] and supervis[ing] all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)". Given that paragraph 9(1)(*h*) and subsection 5(1) are both located in Part II: "Objects and Powers of the Commission in Relation to Broadcasting" and that paragraph 9(1)(*h*) is located under the heading of "General Powers", it is fair to conclude one of the purposes of paragraph 9(1)(*h*) is to grant the CRTC a power that will facilitate or enable it to discharge the objects under subsection 5(1). One of those objects is to implement the broadcasting policy defined by Parliament in subsection 3(1).

115 When paragraph 9(1)(*h*) is situated in the context of the *Broadcasting Act* and the express linkages Parliament made between BDUs and PUs, the ability of the CRTC to regulate their interrelationships becomes apparent.

116 Support for this can be found in various provisions of the *Broadcasting Act*, beginning with the definitions in subsection 2(1):

> ***distribution undertaking*** means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking; (entreprise de distribution)
>
> ***programming undertaking*** means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus; (entreprise de programmation)
>
> ***entreprise de distribution*** Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable. (distribution undertaking)
>
> ***entreprise de programmation*** Entreprise de transmission d'émissions soit directement à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, soit par l'intermédiaire d'une entreprise de distribution, en vue de leur réception par le public à l'aide d'un récepteur. (programming undertaking)

117 These definitions tell us that PUs are the source of the "programming services" which the BDUs distribute. They also tell us that a BDU retransmits programming which it receives. A BDU does not produce programming services, otherwise it would be a PU.

118 The conclusion which can be drawn from these definitions is that Parliament understood the interrelationship between a BDU and a PU and that, as the "carriage" of "programming services" always depends on a PU, there will, of necessity, be consequences for PUs. The terms and conditions on which BDUs carry "programming services" directly

and indirectly shape, and in some cases dictate, the content of affiliation agreements with the consequence that any order directed at the carriage of programing services by BDUs necessarily will affect PUs. It is impossible for it to be otherwise.

119 Other provisions of the *Broadcasting Act* also demonstrate Parliament's understanding of the necessary interrelationship between the broadcasting policy, BDUs and PUs in respect of programming services. Subparagraph 3(1)(*t*)(iii) is instructive. It reflects Parliaments' appreciation of the necessary, practical interaction between the two entities:

> **3 (1)** It is hereby declared as the broadcasting policy for Canada that
>
> . . .
>
> **(t)** distribution undertakings
>
> . . .
>
> **(iii)** should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and
>
> . . .
>
> **3 (1)** Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion:
>
> [...]
>
> **t)** les entreprises de distribution:
>
> [...]
>
> **(iii)** devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion,
>
> [...]

120 In the same vein, paragraph 10(1)(*g*) authorizes the CRTC to make regulations "respecting the carriage of any foreign or other programming services by distribution undertakings". Paragraph 10(1)(*k*) provides that the CRTC may make regulations "respecting such other matters as it deems necessary for the furtherance of its objects". Subparagraph 9(1)(*b*)(i) and paragraphs 9(1)(*a*) and 9(1)(*c*) give the CRTC broad authority to issue licences subject to such conditions "as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)", to establish classes of licences and to amend conditions thereof. The broad discretion granted under both the licensing and regulation making sections of the *Broadcasting Act* reinforces the importance that paragraph 9(1)(*h*) not be given an overly technical interpretation of the kind the Supreme Court has cautioned against (*Bell Canada* (1989) at 1756).

121 The appellants and respondents both point to the legislative history of paragraph 9(1)(*h*) to support their positions. Bell says that the paragraph was enacted for a narrow purpose - to prevent cable companies from acting as gatekeepers and thwarting the objectives of the *Broadcasting Act* (House of Commons Standing Committee on Communications and Culture, *Sixth Report to the House: Recommendations for a New Broadcasting Act* (Hull, Quebec: Queen's Printer for Canada, 1987) at 77). As noted by the Department of Communications during clause by clause review before the Committee:

> ... This is one of the clauses in which the "cable-as-gatekeeper" problem is addressed. It ensures that the cable industry cannot frustrate the licensing of new satellite to cable services simply by refusing to carry them.

122 The Standing Committee also observed that the clause would "enable the CRTC to ensure equitable treatment for all licensed services in those situations where a cable company [i.e., a BDU] is allowed to invest in certain programming services and allegations are made that the cable company is giving its services preferential treatment". The Committee also recommended that:

> The CRTC should be given the power to arbitrate the terms and conditions contained in affiliation agreements between distribution undertakings and network operators.

123 This recommendation was ultimately adopted in the form of paragraph 10(1)(*h*) which demonstrates Parliament's intention to give the CRTC authority to regulate aspects of the commercial relationship between PUs and BDUs.

124 I accept that the purpose of paragraph 9(1)(*h*) is to address the role of a BDU as gatekeeper. But a "gatekeeper" some thirty years ago was markedly different and wonderfully simple compared to today. As the Code explains, in considerable detail, "programming services" can be affected by a range of issues, particularly in the context of vertical integration of BDUs and PUs and in an era where there are multiple modes or platforms by which programming services can be delivered.

125 I do not accept, therefore, Bell's argument that the legislative history demonstrates that paragraph 9(1)(*h*) is limited to an ability to direct a BDU to carry a specific channel. Situating paragraph 9(1)(*h*) in its context, and giving it a large, liberal and purposive interpretation as consistent with the objects of the *Broadcasting Act*, I conclude that it encompasses the Order and measures in the Code. The respondents' interpretation of paragraph 9(1)(*h*) freezes the language as the industry and technology in 1985.

126 I have concluded, on the basis of the context within which paragraph 9(1)(*h*) is situated, that the Order and the Code which it implements, are within the CRTC's jurisdiction. Also, I find that the power to regulate programming undertakings is necessarily implied in the express language of the provision.

127 Paragraph 9(1)(*h*) "can be understood to include 'by necessary implication' all that is needed to enable the [CRTC] to achieve the purpose for which the power was granted", and that "[l]egislative silence with respect to a matter does not necessarily amount to a gap in the legislative scheme" (Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis Canada Inc., 2014) at 298, 386 (Sullivan)). As Bastarache J. observed in *ATCO* at paragraph 51, the "doctrine of jurisdiction by necessary implication" functions to ensure that:

> ... the powers conferred by an enabling statute are construed to 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 ...

128 Notwithstanding these broad statements of principle, it is axiomatic that the doctrine of necessary implication can only be employed where it is consistent with Parliament's intention. The doctrine cannot be applied where the power is useful, beneficial, or "nice to have"; rather, it is triggered only where the Court is satisfied that, based on the authority granting provisions of the legislation, it is a power that Parliament intended the CRTC to have. I have found that reading the *Broadcasting Act*, in accordance with the governing principle, Parliament intended paragraph 9(1)(*h*) to affect, directly and incidentally, the interests of PUs.

129 Parliament has stated that the purpose of paragraph 9(1)(*h*) is to enable the CRTC to fulfill its statutory mandate under subsection 5(1). Since the terms and conditions of affiliation agreements directly dictate the terms on which consumers are offered programming services, by necessary implication paragraph 9(1)(*h*) must include the ability to affect affiliation agreements.

130 Thus, the question is whether the power to regulate affiliation agreements is "practically necessary for the accomplishment of the object intended to be secured by the statutory regime by the legislature" (*ATCO* at para. 51). In

paragraph 77 of *ATCO*, the Supreme Court suggested an evidentiary requirement to a finding of necessary implication. The evidence should be sufficient to conclude that the measures in the Code are "practical necessities" for the CRTC to achieve the objectives in subsections 3(1) and 5(1) through its ability to impose terms and conditions on programming services.

131 Of this, there is ample. The dialogue between the CRTC, BDUs and PUs began in 2013, when a multi-year consultation (*Lets Talk TV*) was launched. At the conclusion of the process the CRTC observed:

> [V]ertically integrated entities have insisted on provisions in affiliation agreements that preclude a BDU from being able to offer programming services on an individual basis or in small packages. ... [C]ontract renewals with such entities have included restrictive packaging and pricing demands. ... As a result, changes to the [2011] Wholesale Code are required to ensure that affiliation agreements cannot be used to insulate services from choice and flexibility within the retail market. Changes to the [2011] Wholesale Code are also required to ensure that all services, including independent services, are discoverable and able to make their programming available on fair terms, thus fostering greater diversity within the system and ultimately greater choice for Canadians.

132 Limiting paragraph 9(1)(*h*) to BDUs or, hermetically sealing it such that the exercise of that power could have no consequence on PUs would trigger the well-established category of absurdity or of frustrating Parliament's purpose (Sullivan at 288, 320). It would defeat the purpose of ensuring the broadcasting industry is regulated according to the policies set out in subsection 3(1) and by a single regulator (*Genex Communications Inc. c. Canada (Procureur général)*, 2005 FCA 283 (F.C.A.) at para. 72, (2005), [2006] 2 F.C.R. 199 (F.C.A.)). The CRTC could not effectively impose broadcasting policy on the distribution of programming services without regulating affiliation agreements, either through a mechanism like the Wholesale Code or through conditions of licence. The jurisdiction therefore necessarily extends to both participants in the carriage relationship because there must always be a PU which generates the content of "programming services".

D. Does the Code conflict, in operation or purpose, with the Copyright Act?

133 Bell asserts a dual violation of the *Copyright Act*. It contends that the Code precipitates an operational conflict with paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*. Bell also says that the Code intrudes on its sole, unfettered rights under these provisions to telecommunicate or to authorize telecommunication of its works and to set the terms and conditions under which it will consent to the telecommunication of its works.

134 The second arrow in Bell's quiver is that the Code conflicts with the purpose of the *Copyright Act* and the carefully balanced regime contained within by creating a new user right for BDUs that Parliament specifically withheld from subsection 31(2).

135 To elaborate, subsection 31(2) of the *Copyright Act* limits the user right of BDUs to retransmit works without the authorization of the copyright owner only if the works are carried in local or distant (that is, over-the-air) signals. In other words, subsection 31(2) of the *Copyright Act* provides an exception to copyright infringement for a BDU to retransmit a work only if the communication is a retransmission of a local or distant signal. Thus, by creating the functional equivalent of a user right to retransmit programs carried on pay and specialty signals, the Code upsets the balance between copyright holders and users on which Parliament has settled.

136 I turn to Bell's first argument, that of an operational conflict with respect to paragraph 3(1)(*f*) and subsection 13(4).

137 An operational conflict arises where there is an impossibility of compliance between two applicable laws. Mere overlap is insufficient and, as a matter of principle, a court will seek to interpret legislation such that conflict is avoided. This flows from the imperative that legislation is to be interpreted so as to achieve consistency and coherence between laws. In consequence, operational conflicts will be rare (*Thibodeau c. Air Canada*, 2014 SCC 67 (S.C.C.) at paras. 92-96, [2014] 3 S.C.R. 340 (S.C.C.)).

138 Paragraph 3(1)(*f*) of the *Copyright Act* provides that "copyright" includes:

> **3(1)** For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
>
> . . .
>
> **(f)** in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
>
> . . .
>
> and to authorize any such acts.
>
> **3(1)** Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif:
>
> [...]
>
> **f)** de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;
>
> [...]
>
> Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

139 Subsection 13(4) of the *Copyright Act* provides further rights to the copyright holder:

> **13(4)** The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.
>
> **13(4)** Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

140 Bell contends that through paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*, Parliament gave to it, as the owner of copyright in its programs, exclusive rights which the Code fetters or negates. Bell states this gives rise to an operational conflict because the CRTC has "set itself up as the ultimate arbitrator of the price and commercial terms of carriage" which means that Bell, as a PU, is unable to exercise its "sole right" to telecommunicate or to authorize telecommunication of its works and to license the use of its works with limitations, including rates, as it sees fit - rights provided to Bell as a copyright holder under paragraph 3(1)(*f*) and subsection 13(4).

141 Bell also points to paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act* to argue that the Code, in restricting the commercial terms and prohibitions permitted in affiliation agreements and requiring that others be included, fetters,

binds or derogates from the copyright holder's "sole right" to authorize the use of its work and to set the terms and conditions of any assignment or licence for its use.

142 Bell puts considerable emphasis on the loss of control it has over the price it receives for the use of its works. It claims that the dispute resolution mechanism by which the CRTC sets the rate Bell receives for the use of its copyright conflicts with its exclusive right as the owner. This argument depends on the accuracy of Bell's characterization of the dispute resolution mechanism contained in the Code and whether it in fact trenches on the clear right of the owner to set the terms and conditions, including price, of use.

143 While Bell is correct that the 2015 Wholesale Code has a direct impact on the content and terms of affiliation agreements, Bell's understanding of the Code and of the dispute resolution mechanism is incorrect. The Code does not allow the CRTC to set the specific rates and *specific terms* of affiliation agreements contrary to the wishes of a PU. While demanding "an unreasonable rate" is a commercially unreasonable practice under subsection 5(a), the only *terms* the 2015 Wholesale Code *requires* in affiliation agreements are: (i) that BDUs provide comparable marketing support to programming services as is given to similar or related services (section 10); and (ii) that related PUs and BDUs offer independent programming services and other BDUs "reasonable terms based on fair market value" in relation to multiplatform distribution rights (sections 11 and 12).

144 Further, the only time the CRTC establishes a *specific rate* is when it chooses one of the parties' final offers in accordance with the dispute resolution procedure set out in the *Broadcasting Distribution Regulations*. This arises, however, only after *both* of the parties have agreed to renew an agreement, but cannot agree on price. Section 13 of the Code provides:

> 13. If a BDU has not renewed an affiliation agreement to which it is a party with a programming service by 120 days preceding the expiry date of the agreement and if **both parties have** confirmed in writing **their** intention to renew the agreement, the parties shall refer the matter to the Commission for dispute resolution under sections 12 to 15 of the *Broadcasting Distribution Regulations*.
>
> [emphasis added]

145 Moreover, choosing a specific rate only arises after the parties have been unsuccessful in non-binding staff-assisted mediation (*Broadcasting Distribution Regulations*, s. 12(4), 15) and after the CRTC has ensured that the parties have submitted comparable offers (*Broadcasting and Telecom Information Bulletin CRTC 2013-637* (Ottawa: CRTC, 2013) at paras. 12-26).

146 Accordingly, the 2015 Wholesale Code does not permit the CRTC to fix the price nor does it authorize a BDU to retransmit a program *without the consent of a PU*. While the terms of the affiliation agreement are circumscribed by the 2015 Wholesale Code, the PU must still consent to enter into an agreement with a BDU or consent to renew an existing agreement that authorizes the telecommunication of the content.

147 To conclude, some provisions of the Wholesale Code constrain how the copyright holder may exercise its copyright by limiting some of the terms and conditions it is allowed to include in the affiliation agreement. This does not violate paragraph 3(1)(*f*) or subsection 13(4). The Code preserves the copyright holder's right to choose *whether* to communicate its work or not. The PU is free to reject the terms offered at any time. The PU is not compelled to enter into an affiliation agreement and retains control over how and when its works will be used. Bell retains its right to exclude anyone from using its works if it chooses to do so. Thus, adherence to both the Code and the *Copyright Act* is possible, and there is, therefore, no operational conflict between the Code and paragraph 3(1)(*f*) or subsection 13(4) of the *Copyright Act*.

148 In broad terms, Bell's argument proceeds from a misconception of the nature of copyright protection. Intellectual property rights exclude or prevent others from copying artistic creation or, in the case of patents, practicing an intention. The holder of a copyright or owner of a patent is not immune or exempt from laws of general application. While they

enjoy the benefit of market exclusivity, they must nevertheless abide the rules governing the particular market in which they have chosen to participate.

149 Support for this, if more is needed, can be found in *Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42 (S.C.C.) at para. 23, [2014] 2 S.C.R. 197 (S.C.C.). There the Court considered whether the *Status of the Artist Act*, S.C. 1992, c. 33, which permitted collective bargaining by artists for a minimum fee, conflicted with the *Copyright Act*. The Court concluded that establishing a minimum fee for the use of copyright did not affect the rights conferred on copyright holders under section 3 of the *Copyright Act*, as the decision of whether or not to allow the use of an artistic work remained with the copyright holder.

150 The rights granted under the *Copyright Act*, in paragraph 3(1)(*f*) and subsection 13(4) are not unequivocal. They may be conditioned by other legislation with which the copyright intersects. Just as a patent owner has the right to exclude others from practicing the invention, patent owners are nonetheless governed by all other relevant laws (*Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 (S.C.C.) at para. 64, [2002] 4 S.C.R. 45 (S.C.C.)). The price at which patented pharmaceuticals are sold is regulated (see, for example, the Patented Medicine Prices Review Board, established under the *Patent Act* (R.S.C., 1985, c. P-4) ss. 78-103). Another example of a limitation on intellectual property rights is found in section 32 of the *Competition Act*, R.S.C. 1985, c. C-34. It is not a defence to an allegation of anti-competitive conduct to assert that one is simply exercising an intellectual property right. The "sole right" of use (*Copyright Act*, s. 3(1)) does not confer an immunity from other legislation.

151 Bell also argues that a purpose conflict arises.

152 A purpose conflict arises where, while it is possible to comply with the letter of both provisions, "applying one provision would frustrate the *purpose* intended by Parliament in another" (*Cogeco* at para. 44). As the Supreme Court in *Cogeco* stated at paragraph 45, "... the CRTC may not choose means ... which would be incompatible with the purposes of [the *Copyright Act*]".

153 It is well-established that the purpose of the *Copyright Act* is to provide a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (*Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34 (S.C.C.) at para. 30, [2002] 2 S.C.R. 336 (S.C.C.)).

154 To achieve this goal, the *Copyright Act* creates a statutory monopoly which prevents the exploitation of work in specified ways without the copyright holder's consent. As noted above, paragraph 3(1)(*f*) recognizes the sole right to authorize the use of its work, and includes the sole right to exploit the full value of the work.

155 Bell argues that the Code creates a functional equivalent of a user right for BDUs to retransmit programs in pay and specialty signals, and that this frustrates Parliament's purpose in creating a carefully balanced copyright regime. It draws a parallel to *Cogeco*. There, it will be recalled, the CRTC sought to give broadcasters (that is, programming undertakings) the right to prohibit the retransmission of work carried in any signal, a right that was deliberately withheld from section 21 of the *Copyright Act*. Analogous to *Cogeco*, Bell submits the Code creates a user right deliberately withheld from subsection 31(2) of the *Copyright Act*.

156 I disagree. A corollary to the conclusion above that PUs must consent to the use of its work and the terms and conditions of the affiliate agreement is that the Code does not confer on BDUs a user right to retransmit programs in pay and specialty signals. The consensual nature of this mechanism makes it difficult to characterize the Code as "effectively overturn[ing]" a copyright holder's "sole right" to determine the terms under which it will sell or license the use of its work. Nor can a copyright holder be dragged into arbitration without consent under the Code. Therefore, no user right deliberately withheld from the *Copyright Act* in subsection 31(2) is created by the Code.

157 I also accept the argument of the respondents that the Code does not upset the balance of rights of copyright holders and rights of users or frustrate Parliament's purpose. The Code does not purport to regulate, directly or indirectly, copyright interests of the PUs. Rather, the Code establishes minimum terms and conditions governing the affiliation

agreements, which only exist where a PU has decided that it wishes to license the use of its copyright. It preserves the right of a PU to refuse the telecommunication of their copyright protected programs without their consent.

E. Is Bell barred from a judicial review remedy by reason of its conduct?

158 Blue Ant Media contends that Bell's appeal should be dismissed on the basis that, by virtue of its conduct, it is estopped from seeking equitable relief. It relies on the principle that:

> It is settled law that estoppel cannot confer jurisdiction. However, there is a complementary principle that: "no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn around and say, 'You have no jurisdiction.' You ought not to lead a tribunal to exercise jurisdiction wrongfully." This is known as the rule in *Ex parte Pratt*.
>
> (Blue Ant Media's Memorandum of Fact and Law at para. 86 (footnotes omitted))

159 The facts that trigger the application of this principle are said to lie in two events.

160 First, in seeking the CRTC's approval of its acquisition of Astral in 2013, Bell accepted, as a condition of licence, the obligations of the predecessor 2011 Wholesale Code. In approving Bell's acquisition the Commission noted that "... but for these safeguards ... it would not have been persuaded that the present transaction is in the public interest and would not have approved it" (*Broadcasting Decision CRTC 2013-310* (Ottawa: CRTC, 2013)). Blue Ant Media also points to the fact that Bell voluntarily accepted the imposition of the 2015 Wholesale Code as a condition of licence for several BDUs without raising any jurisdictional objection.

161 In light of the disposition of the appeal, this argument need not be addressed. There is no remedy which Bell should be denied on discretionary grounds. I will, nevertheless, observe that Bell's conduct did not "lead" the CRTC to do anything. The CRTC assumed in both circumstances, that it had the authority to impose the requirements that it did. Nor, in acquiescing to that authority, did Bell waive or relinquish any right it had to advance arguments in the future to the CRTC's jurisdiction. Jurisdiction cannot arise from waiver or acquiescence. Further, given the nature of the issues raised by Bell and their consequences across a spectrum of industry and public interests, certainty and predictability of the CRTC's jurisdiction are important counter-veiling considerations. Had Bell succeeded, I would not have denied it the relief it sought on this basis.

162 For the foregoing reasons, I find that the Order was within the authority of the CRTC under paragraph 9(1)(*h*) of the *Broadcasting Act* and that it does not conflict with the *Copyright Act*, either by operation or in purpose.

V. Conclusion

163 I would dismiss the appeal, with costs.

***Woods J.A.*:**

164 I agree with the reasons of my colleague, Justice Rennie, with the exception of his finding that the CRTC reasonably concluded that paragraph 9(1)(*h*) of the *Broadcasting Act* enables the CRTC to issue the 2015 Wholesale Code and the Order.

165 By way of background, the Order was issued under paragraph 9(1)(*h*) to enable the CRTC to enforce parts of the 2015 Wholesale Code. This includes regulating the terms and conditions of carriage of programming services. The 2015 Wholesale Code was not issued pursuant to paragraph 9(1)(*h*) and is not itself an enforceable instrument.

166 Accordingly, the issue to be decided is whether the CRTC reasonably concluded that it has the power under paragraph 9(1)(*h*) to issue the Order, and by implication the power to enforce the 2015 Wholesale Code to the extent that its terms are encompassed by the Order. The CRTC did not provide reasons for this conclusion.

167 In my view, it is not reasonable to interpret paragraph 9(1)(*h*) as granting the CRTC a general power to regulate the terms and conditions of affiliation agreements. This interpretation goes far beyond the ordinary meaning of the language in paragraph 9(1)(*h*) and is not reasonably supported by a textual, contextual and purposive interpretation of the legislation.

168 By its terms, paragraph 9(1)(*h*) provides the CRTC with the power to require a licensee to carry specified programming services, and if so required, it provides an additional power to mandate such terms and conditions of carriage of those services as the Commission deems appropriate. This is reflected in the French and English versions below:

> **9 (1)** Subject to this Part, the Commission may, in furtherance of its objects,
>
> . . .
>
> (*h*) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.
>
> **9 (1)** Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission:
>
> [...]
>
> (***h***) obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

169 The ordinary meaning of this provision does not encompass a general power to regulate the terms and conditions of carriage. Such regulation must relate to terms and conditions of programming services that the CRTC specifies and requires to be provided by a licensee.

170 My colleague suggests that a broader meaning of paragraph 9(1)(*h*) is demonstrated by a contextual and purposive interpretation. The context and purpose of the legislation is important, but in my view they do not reasonably support an interpretation that the ordinary meaning of paragraph 9(1)(*h*) cannot bear.

171 My colleague has applied the doctrine of necessary implication to expand the language of paragraph 9(1)(*h*) to include powers that are necessary to fulfill the CRTC's mandate in subsection 5(1) of the *Broadcasting Act*. However, the general objectives in subsection 5(1) are subject to other provisions of the *Broadcasting Act*. This is apparent from the emphasized words below:

> **5 (1)** Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).
>
> **5 (1)** Sous réserve des autres dispositions de la présente loi, ainsi que de la *Loi sur la radiocommunication* et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en oeuvre la politique canadienne de radiodiffusion.

172 In my view, it is not reasonable to apply the doctrine of necessary implication in this case. The general objectives set out in subsection 5(1) are subject to the specific powers granted to the CRTC in other parts of the legislation, which include paragraph 9(1)(*h*).

173 As this appeal only concerns paragraph 9(1)(*h*), I express no view as to whether the CRTC's objective in issuing the Order could have been achieved by some other means.

174 For these reasons, I would conclude that the interpretation of paragraph 9(1)(*h*) that is reflected in the Order is unreasonable. I would allow the appeal, set aside the Order, and award one set of costs to the appellants.

M. Nadon J.A. **(concurring):**

175 I agree with Woods J.A. that paragraph 9(1)(*h*) of the *Broadcasting Act* does not allow the CRTC to enact the Order so as to give effect to the *2015 Wholesale Code*.

176 Both Rennie and Woods JJ.A., conclude that the question of whether paragraph 9(1)(*h*) of the *Broadcasting Act* confers authority to the CRTC to issue the Order must be decided on the standard of reasonableness. In my respectful opinion, the applicable standard is correctness.

177 At paragraph 97 of his reasons, Rennie J.A. points out that although the Supreme Court in *Reference re Broadcasting Act, S.C. 1991 (Canada)* [2012 CarswellNat 4810 (S.C.C.)] did not say in express terms what standard it was applying, it cannot be doubted that correctness was the standard applied. In the words of Rennie J.A.:

> The exercise in which it [the Supreme Court] engaged was one of pure statutory interpretation of the text of paragraph 9(1)(*h*) when situated in the context of the *Broadcasting Act*. The language of reasonableness plays no role in the Court's analysis.

178 At paragraph 98 of his reasons, Rennie J.A. makes the point, with which I agree, that the standard applicable to the question of whether paragraph 9(1)(*h*) confers authority on the CRTC to enact the order should not "change simply because, as a matter of procedure, it arose in the former case as a reference and in the present case as an appeal". How is it that the issue now before us, identical in substance to the issue in *Cogeco*, stands to be decided on a different standard of review because it comes to the Court by way of a different process? That, in my respectful opinion, cannot be. Consequently, unless I am misreading *Cogeco*, the standard applied by the Supreme Court in that case is binding upon us and is therefore the standard that should be applied in the present matter (see also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) [*Dunsmuir*], at paragraph 62).

179 Were it not for *Cogeco*, I concede that I would be bound to conclude, for the reasons given by Rennie J.A., that the reasonableness standard is applicable. However, were it open to me, I would gladly follow the dissenting judgment of Côté J. in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 6 W.W.R. 211 (S.C.C.), [*West Fraser Mills*].

180 In *West Fraser Mills*, in concluding that section 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Regulations 296/97 was beyond the authority of the Workers' Compensation Board of British-Columbia (the Workers' Compensation Board) and thus *ultra vires*, Côté J. made a distinction between acts of an administrative body pertaining to its adjudicative functions and those pertaining to its legislative functions (*West Fraser Mills* at paragraph 59). This led her to say that "[t]he scope of the body's regulation-making authority is a question of pure statutory interpretation: Did the legislature permit that body to enact the regulation at issue, or did the body exceed the scope of its powers?"

181 At paragraph 66, Côté J. concluded that the powers that the Workers' Compensation Board could exercise were those granted to it by the legislature of British Columbia. Hence, in her view, correctness ensured the Workers' Compensation Board remained "within the boundaries" of the authority given to it and that it did not "aggrandize its regulation-making power against the wishes of the province's elected representatives."

182 In paragraphs 67 and 68, Côté J. accepted that courts were to give a broad and purposive interpretation to legislation authorizing an administrative body to enact regulations, adding, however, that it was an entirely different matter to defer or give way to such a body's incorrect conclusion regarding the authority given to it by the legislature.

183 In concluding that correctness was the applicable standard, Côté J. said that the majority's rationale in support of the standard of reasonableness "escaped [her]" (paragraph 70). I agree entirely with her view of the majority's reasons

and, as I indicated earlier, were it open to me to decide otherwise, I would conclude, without having to rely on *Cogeco*, that the correctness standard was the standard upon which the present decision of the CRTC should be reviewed.

184 I should also refer to Brown J.'s dissenting judgment in *West Fraser Mills* where he says, at paragraph 114, that the issue before the Court "does not go to the *reasonableness* of the Board's decision to adopt s. 26.2(1), but rather to its *authority* to do so" (emphasis in the original). Brown J.'s remarks are entirely apposite to the question now before us in this appeal. In other words, the question before us is whether the CRTC, acting in its legislative capacity, as was the case for the Workers' Compensation Board in *West Fraser Mills*, is empowered by paragraph 9(1)(*h*) of the *Broadcasting Act* to enact the Order. Surely, in my respectful opinion, that cannot be a matter to be determined on the standard of reasonableness.

185 In further support of this view is paragraph 110 of Brown J.'s concurring reasons in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (S.C.C.) [*Canadian Human Rights Commission*] where he reminds the majority that in *Dunsmuir*, the Supreme Court, at paragraph 30 of its reasons, approved the words of Cromwell J. to the effect that "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority;[...]": "Appellate Review: Policy and Pragmatism" in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12. See also *R. v. British Broadcasting Corporation*, [2003] UKHL 23, [2004] 1 A.C. 185 (U.K. H.L.) at para. 75.

186 Before concluding, I also wish to make the following additional remarks regarding the standard of review.

187 First, there can be no doubt that there are some in the judiciary and in the academy who are dissatisfied with the present state of judicial review in this country. Judicial review, to put it mildly, is in an incoherent and confused state which undermines the predictability of outcomes and, in my respectful opinion, undermines the rule of law. How can counsel advise their clients in this area of the law when the state of judicial review always seems to be is in a continual state of construction and reconstruction? Counsel, in my respectful opinion, are placed in an impossible situation. They can only speculate as to what the possible outcome might be in any given case. (P. Daly, "The Signal and the Noise in Administrative Law" (January 2017, Cambridge University Legal Studies Research Paper Series); M. Lewans, "Administrative Law and Judicial Deference" (Bloomsbury: Hart Studies in Comparative Public Law); M. Mancini, "Not Just a Pillowfight: How the S.C.C. Has Muddied the Standard of Review" in Advocates for the Rule of Law (blog) (online: http://www.ruleoflaw.ca/not-just-a-pillowfight-how-the-scc-has-muddied-the-standard-of-review/); David Stratas, "Looking Past Dunsmuir: Beginning Afresh" in Double Aspect (blog) (online: https://doubleaspect.blog/2018/03/08/looking-past-dunsmuir-beginning-afresh/).

188 The Supreme Court's recent judgments in Canadian Human Rights Commission; West Fraser Mills; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.) [East Edmonton Mall], *Canada (Minister of Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237, [2016] 2 F.C.R. 459 (F.C.A.) serve as good examples to support the above proposition.

189 My colleague, Rennie J.A., with whom I cannot agree with respect to the standard applicable to the CRTC's interpretation of paragraph 9(1)(*h*) and hence its meaning, has nonetheless written excellent reasons. His reasons, which I have read in draft, comprise 163 paragraphs of which 64 (paragraphs 38 to 102) deal with the standard of review. His extensive discussion of the standard of review is made necessary by reason of the Supreme Court's jurisprudence. I do not exaggerate when I say that that question has almost taken precedence over the substantial issues which courts are called upon to decide and, in this case, namely whether or not the CRTC under paragraph 9(1)(*h*) has the authority to do what it purports to do. Our efforts in this case should not be focussed on determining what the applicable standard of review is but on discovering the true meaning of paragraph 9(1)(*h*) of the *Broadcasting Act*, *i.e.* whether or not the CRTC has the authority to enact the Order.

190 In my opinion, it should be self-evident that such a question should be decided on the standard of correctness, more so considering that Parliament has clearly said, by way of subsection 31(2) of the *Broadcasting Act*, that appeals

on questions of law or jurisdiction are to be taken to this Court upon leave. Thus, Parliament has sent an unequivocal signal that questions of law or of jurisdiction, arising from decisions made by the CRTC, are to be determined by this Court, which, in my view, can only mean on a standard of correctness.

191 The existence of subsection 31(1) of the *Broadcasting Act* to the effect that the CRTC's orders are final and conclusive does not, in any way, detract from the foregoing proposition. Thus, subject to an appeal under subsection 31(2), decisions of the CRTC are indeed final and conclusive. However, if an appeal is taken to this Court under subsection 31(2), then that appeal is to be determined by this Court on the standard of correctness. There is nothing in either subsection 31(1) or in subsection 31(2) which would lead a fair reader of the provisions to conclude that Parliament intended for this Court to defer on questions of law or of jurisdiction. For the sake of completeness, I hereby reproduce subsections 31(1) and 31(2) of the *Broadcasting Act*:

> **31(1)** Except as provided in this Part, every decision and order of the Commission is final and conclusive.
>
> **31(2)** An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.
>
> **31(1)** Sauf exceptions prévues par la présente partie, les décisions et ordonnances du Conseil sont définitives et sans appel.
>
> **31(2)** Les décisions et ordonnances du Conseil sont susceptibles d'appel, sur une question de droit ou de compétence, devant la Cour d'appel fédérale. L'exercice de cet appel est toutefois subordonné à l'autorisation de la cour, la demande en ce sens devant être présentée dans le mois qui suit la prise de la décision ou ordonnance attaquée ou dans le délai supplémentaire accordé par la cour dans des circonstances particulières.

192 Notwithstanding the Supreme Court's decision in *East Edmonton Mall*, with which I do not agree but which is binding upon me, I have never understood why reviewing courts must defer to administrative bodies on questions of law where Parliament itself does not so require. As I have already indicated, the only possible interpretation of subsection 31(2) of the *Broadcasting Act*, and similar clauses in other statutes, is that Parliament intended that courts provide the answers to the questions of law raised before them. To say that this Court must defer to the CRTC's interpretation of paragraph 9(1)(*h*) requires us to disregard clear legislative intent. Otherwise, subsection 31(2) is pointless. If Parliament intends for this Court to defer to the CRTC's interpretation of the law, Parliament can easily say so. It is not up to the courts to presume such an intention when Parliament has not, by any words found in the *Broadcasting Act*, required deference. In my view, the proper approach should be to defer only whenever Parliament expressly or impliedly wishes us to defer to an administrative body's interpretation of the law. Section 31 of the *Broadcasting Act* is not to that effect.

193 In *East Edmonton Mall*, in concluding her reasons for the majority concerning the applicable standard of review, Karakatsanis J. indicates, at paragraph 35 that "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review". In her view, the solution to this problem is for Parliament and the provincial legislatures to make clear in the legislation what standard of review they prefer. That, in my respectful opinion, is the legal world upside down.

194 Although trite, it is important to keep in mind that legislation enacted by Parliament or by the provincial legislatures has only one meaning. There are no multiple answers to the meaning of legal provisions, notwithstanding that there may be ambiguity. This is why, in applying the standard of reasonableness to an administrative body's interpretation of legal provisions, no judge would ever write that although a board's interpretation is incorrect, its interpretation still passes muster because it is a possible interpretation of the legal provision at issue. The Supreme Court's direction that courts must apply the standard of reasonableness to administrative bodies' interpretation of the law has led some judges to express the view that, in most cases, there is usually only one possible reasonable interpretation of the

legal provisions at issue (David Stratas: "The Canadian Law of Judicial Review: Some Doctrine and Cases", Sept. 18, 2018 at page 85, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049).

195 All of this strongly suggests that judges are ill at ease, as they should be, of sanctioning legal interpretations which, in their view, are incorrect. Some commentators have even suggested that, in the end, the Supreme Court itself, without so saying, is in fact applying a correctness standard under the guise of reasonableness (Paul Daly: "Uncovering Disguised Correctness Review? *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 (S.C.C.)", (https://www.administrativelawmatters.com/blog/2015/10/28); Hon. Joseph T. Robertson: "Dunsmuir's Demise & The Rise of Disguised Correctness Review" (https://www.administrativelawmatters.com/blog/2015/02/15); David Stratas: "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's L.J. 27, note 39.

196 Because in most cases there are no multiple possible answers with regard to the meaning of legislation, a reasonable interpretation must be correct. If it is not correct, it surely must be unreasonable because Parliament did not intend courts to sanction incorrect interpretations of its legislation. Consequently, I am satisfied that Parliament did not intend for the CRTC to interpret paragraph 9(1)(*h*) in a manner which is not in accordance with its intent. Parliament's intent with regard to paragraph 9(1)(*h*) can only be determined by this Court. By that, I mean that it is this Court's responsibility to determine whether or not the CRTC's view of paragraph 9(1)(*h*) is the correct view. If it is not, then the Order cannot stand.

197 To conclude, the rules concerning the standard of review should not be in constant flux: they should be clear. If Parliament sends a clear message that we are to defer to an administrative body's interpretation of the law or of its jurisdiction, then we should give effect to Parliament's direction, subject to constitutional requirements. However, when Parliament, as it has done here with subsection 31(2) of the *Broadcasting Act*, sends a message directing this Court to provide answers to legal questions arising from decisions made by the CRTC, we should do what courts have been doing for a very long time and that is to determine, on a correctness standard, what the answers are to the legal questions. It seems to me, with respect, that deferring to an administrative body's interpretation of the law is, in the circumstances which I have set out above, an abandonment of our judicial role, more so considering that expounding the law is the *raison d'être* of our existence.

198 I will end these remarks by quoting with approval from pages 1 and 2 of an article entitled, "10 Things I Dislike About Administrative Law", where the author, Mark Mancini writes the following:

> One's personal list of problems with administrative law will inevitably reflect one's views of what administrative law *is* and *should be*, and indeed, what law *is* and *should be*. Reasonable people will disagree on this, but perhaps we could agree on two fundamental starting points (even if we disagree on their interaction). First is the idea that absent constitutional objection, legislative delegation to administrative decision-makers should be respected, and courts should give effect to legislative language using the ordinary tools of statutory interpretation (set out in cases like *Rizzo*, *Canada Trustco*). Second is the Rule of Law; courts must survey the statutory boundaries of inferior tribunals to determine (1) the level of deference owed and (2) whether the decision is legal. On this account, administrative law can be understood as a form of control over the diffused form of decision-making the administrative state has wrought.
>
> As I hope to show (quite tentatively, I might add), the Supreme Court has moved away from these first principles, often at the expense of the Rule of Law. The main point of the Supreme Court's administrative law doctrine is an acceptance of deference of the "unrestricted" power of administrative decision-makers (see *West Fraser* at para 11). By limiting the circumstances in which courts can review the propriety of the administrative state, the Court has "read in" a doctrine of deference that may not be prescribed by the enabling statute or the role of courts to enforce constitutional precepts as "guardians of the Constitution" (*Hunter v. Southam*). The Court has constructed its own administrative law rules to operationalize its vision of deference. [Emphasis in the original]

(Mark Mancini: "10 Things I Dislike About Administrative Law" in Double Aspect (blog) (online: https://doubleaspect.blog/2018/09/10/10-things-i-dislike-about-administrative-law/).

199 Therefore, I would allow the appeal with costs and set aside the CRTC's Order for the reasons given by Woods J.A.

Appeal allowed.

1991 CarswellNat 360
Federal Court of Canada — Appeal Division

Canadian Cable Television Assn. — Assn canadienne de télévision par câble v. American College Sports Collective of Canada Inc.

1991 CarswellNat 360, 1991 CarswellNat 794, [1991] 3 F.C. 626, [1991] F.C.J. No. 502, 129 N.R. 296, 27 A.C.W.S. (3d) 936, 36 C.P.R. (3d) 455, 4 Admin. L.R. (2d) 61, 4 T.C.T. 6177, 81 D.L.R. (4th) 376

CANADIAN CABLE TELEVISION ASSOCIATION — ASSOCIATION CANADIENNE DE TÉLÉVISION PAR C]BLE v. AMERICAN COLLEGE SPORTS COLLECTIVE OF CANADA, INC., BORDER BROADCASTERS' COLLECTIVE, CANADIAN BROADCASTERS RETRANSMISSION RIGHTS AGENCY INC., CANADIAN RETRANSMISSION COLLECTIVE, CANADIAN RETRANSMISSION RIGHT ASSOCIATION, COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED, COPYRIGHT COLLECTIVE OF CANADA, FWS JOINT SPORTS CLAIMANTS, MAJOR LEAGUE BASEBALL COLLECTIVE OF CANADA, INC., and PERFORMING RIGHTS ORGANIZATION OF CANADA LIMITED

Mahoney, MacGuigan and Linden JJ.A.

Heard: May 13-17, 1991
Judgment: June 3, 1991 *
Docket: Doc. A-832-90

Counsel: *Michael K. Eisen* and *Stephen G. Rawson*, for Canadian Cable Television Association.
Gilles M. Daigle, for Border Broadcasters' Collective.
David W. Kent, for Canadian Broadcasters Retransmission Rights Agency.
Hank G. Intven, for Canadian Retransmission Collective.
Jacques R. Alleyn and *Peter E. Robinson*, for Canadian Retransmission Right Association.
Y.A. George Hynna, for Composers, Authors and Publishers Association of Canada — Performing Rights Organization of Canada.
Glenn A. Hainey and *Michael S. Koch*, for Copyright Collective of Canada.
Daniel R. Bereskin and *Grey A. Piasetski*, for FWS Joint Sports Claimants.
Richard Storrey, for Major League Baseball Collective of Canada.
J. Aidan O'Neill, for Canadian Satellite Communications Inc. — C1 Cablesystems.
Mario Bouchard, for Copyright Board.

Subject: Intellectual Property; Property; Public

Headnote

Communications Law --- Regulation of radio and television — Cable television

Procedural fairness — Audi alteram partem — Dissenting member of tribunal obtaining evidence and opinions outside of hearing — Information being trivial, obvious, publicly available, repetitive or supplementary to evidence presented at hearing — Information being favourable, not prejudicial to position of applicantfor relief and not used or influential in majority decision — Applicant failing to establish prejudice or possibility of prejudice.

Procedural fairness — Bias — Dissenting member of tribunal obtaining evidence and opinions outside of hearing — Contact not being prejudicial and not taking place due to member having stake in outcome or predisposition in favour or against party — Contact not being with another party or key witness — No reasonable apprehension of bias.

Jurisdiction — Copyright Board — Authority of tribunal to attach terms and conditions to royalties tariff including power to build in interest on royalty entitlements accruing prior to publication of tariffs — Power being implicit in legislative intention that royalties payable from certain date particularly when delay in establishing amount to be paid being result of lengthy hearings.

The Copyright Board (the "board"), established under s. 66 of the *Copyright Act* (the "Act"), conducted extensive hearings into the appropriate royalties to be paid for the retransmission of distant television systems in Canada. In its decision, the board, consisting of a chair, a vice-chair and two other members, used as a starting point for the computation of these royalties the wholesale price charged by an American satellite specialty service. The tariffs implementing the board's decision were then published in the *Canada Gazette*.

During the hearings, one of the members of the board, and ultimately the only dissenting member, telephoned his stock broker seeking information which he used in questioning two witnesses. Once the hearings were over, he also contacted, had meetings and phone conversations with, and obtained information about Canadian and American specialty cable television services and their use as a point of comparison or as a proxy from three members of the staff of the Canadian Radio-Television and Telecommunications Commission (the "CRTC"). He did not tell the chair of the board about these contacts, though he did inform the other members. Subsequently, he made some use of the information and the opinions he had obtained in his dissenting reasons. He also sought out more complete information on the cable industry (including statistics from Statistics Canada) which he referred to in his decision. In that decision, he not only rejected the point of comparison adopted by the majority but ultimately came to a position even more removed from that advocated by the Canadian Cable Television Association, a non-profit organization of licensed cable television operators across Canada and an opponent at the board's hearings of the proposed royalties which had been filed by 10 copyright collectives to initiate the hearings.

All of the information that the dissenting member obtained, with the exception of the opinions of the CRTC staff members, was public information. There was no evidence that the other members of the board shared in that information, save to the possible extent of a document and a chart that were referred to in the course of the hearings. There was also no evidence that the dissenting member had participated in the preparation of or influenced the majority decision.

The association applied under s.28 of the *Federal Court Act* to have the board's decision set aside on the basis of breaches of the rules of natural justice. In the alternative, it applied for a variation of the royalties to delete liability for interest accrued prior to the publication of the tariffs.

Held:

The application was dismissed.

While the dissenting member's conduct in seeking information outside of the hearing was a serious mistake of judgment, the obtaining and use of that information had not necessarily invalidated the proceedings on the basis of a violation of the audi alteram partem rule. In such cases, the appropriate test was whether the use of the evidence had or might have prejudiced or been adverse to the position of the association. As a result, the association did not have a claim on the basis of a denial of the opportunity to exploit to its advantage the information obtained by the dissenting member.

Further, some of the information obtained was so trivial or obvious as to be of no legal significance, such as the information that the dissenting member had obtained from his stockbroker and used in questioning witnesses and information about the proxy's programming practices.

Beyond those items, most of the other information obtained and used by the dissenting member was repetitive of or supplementary to the evidence that had emerged at the hearings and so was not prejudicial to the association. Most significantly, however, there was not a shred of evidence that the information received by the dissenting member had had any influence on the board's decision as represented by the majority's reasons. The separate activities of a minority member did not taint the conclusions of the majority unless the majority placed at least some reliance on the material generated by that minority member. Alternatively, inconsequential errors of law did not require a setting aside of a decision for error of law under s.28(1)(*b*) of the *Federal Court Act* so that, even if the dissenting member's activities could have been attributed to the board, there would, at the most, have been a mere technical breach not affecting the outcome. In sum, the board had acted fairly towards the association.

While extra-tribunal contacts between adjudicators and persons with information and/or a particular point of view as to the appropriate outcome of a hearing can give rise to a reasonable apprehension of bias, that comes into play only where

the contact creates the reasonable impression that it took place because of the member's having a stake in the outcome of the proceedings or a predisposition towards a particular outcome or, alternatively, results in the possibility of prejudice to the party alleging bias. Neither of these alternatives was present here: the information obtained had not prejudiced the association and the contacts in question were the result of a pure motivation and not a stake in the outcome and had not been with persons themselves having a stake in the outcome (as in the case of an actual party to the proceedings or a key witness).

Under s.70.63(1)(*a*)(ii) of the Act, the board had authority to establish such terms and conditions as to the royalties established as it considered appropriate. This provision was sufficient to create the power to build into the royalties interest payments with respect to royalties predating the publication of the tariffs in the *Canada Gazette*. The requirement of clear and explicit statutory language to justify the imposition of a pecuniary burden on a subject only applied as between the sovereign and a subject, not as between subject and subject. In such cases, liability for interest did not have to be provided for explicitly but could arise by implication from the statute in issue. Given that the object of the legislation was the payment of royalties for retransmissions after January 1, 1990, and that the board was attempting to address the delay in implementation caused by the length of the hearings, it was clear on a fair, large and liberal interpretation of the board's powers in the light of the statutory objectives, that it indeed had the authority to require the payment of interest on royalties that were found to be payable for transmissions after January 1, 1990.

Application under *Federal Court Act* to review and set aside decision of the Copyright Board or to vary decision of the board.

The judgment of the court was delivered by *MacGuigan J.A.*:

1 This s. 28 application [*Federal Court Act*, R.S.C. 1985, c. F-7] is brought by the applicant, a non-profit organization whose members include over 545 licensed operators of cable television systems across Canada, against a decision of October 2, 1990, by the Copyright Board (the "board"). The tariffs implementing the board's decision were published in the Supplement to the *Canada Gazette*, Part I, October 6, 1990, as the *Television Retransmission Tariff* and the *Radio Retransmission Tariff*.

2 The board was established pursuant to s. 66 of the *Copyright Act* (the "Act"), R.S.C. 1985, c. C-42, a section which was proclaimed in force as of February 1, 1989. By s. 66(3) the chairman of the board is required to be a judge, either sitting or retired, of a superior, county or district court. The chairman, Justice Donald Medhurst of the Alberta Court of Queen's Bench, was a member of the board panel in this case, as were Vice-Chairman Michel Hétu ("Hétu"), Dr. Judith Alexander ("Alexander"), and Michel Latraverse ("Latraverse"). Board member Latraverse was the only dissenting member of the panel.

3 Following the Canada-United States Free Trade Agreement, the Act was amended by the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, s. 65 to provide for the payment of copyright royalties for the retransmission of distant radio and television broadcast signals. In June of 1989, pursuant to s. 70.61 of the Act, 11 copyright collectives, acting as collecting bodies, filed with the board statements of proposed royalties for the retransmission of such signals. The applicant was one of the three parties to file objections to those statements with the board. The board hearing, which began on November 27, 1989, occupied 57 days. In its decision of October 2, 1980, the board imposed annual royalties for the retransmission of distant television signals in Canada of approximately $51 million in each of 1990 and 1991. The "proxy" (prototype or analogue) which the board adopted as a useful starting point for its computation of royalties was the wholesale price charged by the American satellite specialty service Arts & Entertainment ("A & E"), with the proviso that the differences between A & E and distant broadcast signals had to be kept in mind (*Decision*, at pp. 25-36):

> **B. The Large Systems: 1 — The Value of Distant Signals**
>
> Four comparisons were advanced during the hearing for valuing copyright works. Three of them are based on the economic value of services similar to those provided on distant signals or of benefits which have been lost through

the use of distant signals; the last establishes a direct comparison with conditions in the United States. They are listed and reviewed as follows:

(i) the value of comparable services

(ii) the value of displaced programming

(iii) the value of lost licence fees

(iv) comparison with the U.S. regime

(i) The Value of Comparable Services

The Board is charged with setting a price for distant signals; the price of a similar good in another market could provide useful information. If that analogous market were a competitive market, the price could be taken as a proxy for the value of distant signals.

CCC [Copyright Collective of Canada] claimed that the rates charged by CANCOM [Canadian Satellite Communications Inc.], the resale carrier, were a measure of the benefit of distant signals to cable systems. The price for the first distant signal delivered by CANCOM is as high as $1.70 ....

MLB [Major League Baseball Collective of Canada, Inc.] proposed the U.S. sports service, ESPN, as a proxy for the sports programming on distant signals, and specifically, for baseball programming.

. . . . .

CRC [Canadian Retransmission Collective] collected data in 1989 on the monthly wholesale rates charged to Canadian cable systems for specialty services. Prices ranged from highs of $1.05 and 88¢ for the Réseau des sports (RDS) and The Sports Network (TSN) to lows of 8¢ for MuchMusic and nothing for Vision TV. The unweighted average of these fees was 34¢. Both CCC and CRC claimed that among the services listed, YTV and Arts and Entertainment Network (A & E) are those whose content most resembles that of distant signals. It was argued that their wholesale rates of 31¢ and 25¢ respectively should be treated as a measure of the minimum value of distant signals. The rate for A & E is a market price, and that for YTV is regulated; hence, the price of A & E might be a better proxy for the value of distant signals.

A functioning market is only one requirement for a service to be a good proxy for a comparable service. A & E has a price that is determined in a functioning market, but it suffers from other deficiencies as a proxy.

. . . . .

(ii) The Value of Displaced Programming

CRC proposed the value of programming services displaced by programs on distant signals as a measure of the harm to the collecting bodies. CRC estimated that the presence of distant signals prevents the creation of at least one more national broadcast service.

. . . . .

(iii) The Value of Lost Licence Fees

CRC also suggested that the value of a program is reduced with each opportunity to watch it. As already discussed, no harm results to copyright owners where programs are simultaneously substituted, but other duplication may reduce licence fees and even prevent an additional sale. CRC used a figure of $4,000 per broadcast hour as a conservative estimate of that harm.

. . . . .

(iv) Comparison with the U.S. Regime

The projected retransmission royalties in the United States for 1990 are in the order of U.S. $200 million. CCTA [Canadian Cable Television Association, the applicant herein] proposed the 'rule of ten': given that the U.S.

population is approximatelyten times that of Canada, the royalties in Canada should be ten per cent of those generated in the United States. This is about Can. $24 million.

The royalties set by the Board apply only to retransmitters in Canada, although they are paid to copyright owners in other countries. Inter-country comparisons of any kind are fraught with difficulties: industry structure, relative prices, income levels and cultures are different. At least four quantifiable differences exist between the markets in the two countries.

. . . . .

(v) The Board's Conclusions

The Board concludes that the comparable services approach is sound and that the wholesale price charged for A & E is useful starting point, so long as the differences between A & E and distant signals are recognized.

Programs on distant signals are simultaneously substituted while those on A & E are not; accordingly, the Board considers that the value of a distant signal should be discounted by 20 per cent.

The market in which a signal is distant calls for different cost recovery considerations than the subscription market of specialty services. It follows that the distant signal seller would be prepared to accept a lower price for the product in that market.

The level of penetration of distant signals is higher than that of A & E. To achieve the same level of penetration, A & E's price would have to be lower.

Distant signals are packaged in many combinations and this may have an impact on their value. Even if the price of A & E is an appropriate proxy for the price of a first distant signal, it may be too high for one of many signals in the same package.

Considering all the differences, the Board finds that an average price of 15¢ per distant signal is reasonable.

4 The statutory authority on which the board proceeded in making its decisions is contained in s. 70.63 of the Act, which reads as follows:

70.63. Certification

(1) On the conclusion of its consideration of the statements of royalties, the Board shall

(*a*) establish, having regard amongst others to the criteria established under subsection (4),

(i) a manner of determining the amount of the royalties to be paid by each class of retransmitter, and

(ii) such terms and conditions related to those royalties as the Board considers appropriate;

(*b*) determine what portion of the royalties referred to in paragraph (*a*) is to be paid to each collecting body;

(*c*) vary the statements accordingly; and

(*d*) certify the statements as the approved statements, whereupon those statements become for the purposes of this Act the approved statements.

(2) [*No discrimination.*] — For greater certainty, neither the Board, in establishing a manner of determining royalties under paragraph (1)(*a*) or in apportioning them under paragraph (1)(*b*), nor the Governor in Council, in varying any such manner under section 70.67, may discriminate between copyright owners on the ground of their nationality or residence.

(3) [*Publication*.] — The Board shall cause the approved statements to be published in the *Canada Gazette* as soon as practicable and send a copy of each approved statement, together with reasons for the Board's decision, to each collecting body and to any person who filed an objection under section 70.62.

(4) [*Criteria*.] — The Governor in Council may make regulations establishing criteria to which the Board must have regard in establishingunder paragraph (1)(*a*) a manner of determining royalties that are fair and equitable.

1

5 The applicant, which, as the board's reasons for decision indicate, had proposed the fourth comparison for valuing copyright works, viz., comparison with the U.S. regime, sought to set aside the board's decision for failure to observe principles of natural justice. In the alternative, the applicant sought an order varying the statement of royalties to be paid for the retransmission of distant television and radio signals in Canada during 1990 and 1991 by eliminating s. 19 of the *Television Retransmission Tariff*, s. 14 of the *Radio Retransmission Tariff*, and any related liability, thereby deleting the royalties referable to interest accrued prior to publication of the tariff.

I

6 It was common ground that the board is required to act in a quasi-judicial manner and is therefore subject to the full requirements of natural justice.

7 It was also common ground that, subsequent to the close of the board hearings, board member Latraverse had attempted to obtain informationconcerning Canadian and U.S. specialty services from staff members of the Canadian Radio-Television and Telecommunications Commission ("C.R.T.C."), and had made use of some of the material so obtained. On August 15, 1990, Latraverse met, at his request, with C.R.T.C. staff members Wayne Charman ("Charman"), Janet Yale ("Yale"), and Randolph Hutson ("Hutson") to obtain information and documents about specialty services. Each of the four parties to that meeting swore an affidavit, those by the three C.R.T.C. staff members being submitted by the applicant; all of the affidavits were in agreement on all essential points. In addition, Ms. Yale was cross-examined on her affidavit.

8 At the meeting of August 15, 1990, Charman handed Latraverse a copy of the C.R.T.C. publication of November 30, 1987, *More Canadian Programming Choices* ("*Programming Choices*"). There were also three telephone conversations after the meeting between Charman and Latraverse by way of follow-up to matters raised at the meeting, and Latraverse subsequently received a chart indicating the rates paid in the United States for specialty services.

9 All of the evidence was to the effect that only three issues were canvassed in these C.R.T.C. conversations: (1) specialty services in Canada; (2) specialty services in the United States; and (3) the use of specialty services as a proxy. Latraverse advised board members Hétu and Alexander of the fact that he had obtained these documents. He did not so advise Chairman Medhurst, who might have been expected to take a dim view of this way of proceeding.

10 In addition to these conversations and documents, Latraverse also independently gathered more complete statistics on the cable industry than were available from the exhibits. He also referred in his dissenting reasons to the fact that he had "been able to determine that a very substantial percentage of [A & E's] programming is repeated several times during the same month" and that "this information was not established in evidence" (*Decision*, at p. 112). Since this is a fact obvious to any casual reader of the A & E monthly programming guide, and certainly to every subscriber to the service, I cannot attach any legal significance to Latraverse's use of it. Latraverse also stated that "[a]nother percentage of its programming, also not established in evidence, is 'blacked-out' because the Canadian broadcast rights could not be cleared by A & E" (ibid.). I also cannot attach legal significance to the fact it was not established in evidence how much of its programming was blacked out, since the absence of evidence establishes no more one way than the other.

11 Finally, while C.C.T.A.'s panel of cable television operators was testifying, Mr. Latraverse placed a telephone call to his broker to ask the broker about certain evidence that had been given by panel members. He then used the financial information that he apparently obtained from his broker to question two of the panelists. During the questioning, Mr. Latraverse directed the following comments to Mr. Linton of Rogers Cable TV:

> a) You kept mentioning that bank loans total $37 million on the Consolidated Balance Sheet which is peanuts [for Rogers Communications].
>
> b) What I want to emphasize is: Looking at your numbers and at how sharp and remarkable an operator and how well you take care of your own affairs, it is very difficult for me to start crying for Rogers Communications because of its bank debt load.
>
> c) You just mentioned that you lost $25 million on the Home Shopping Channel. This is no big deal to [Rogers Communications].
>
> d) Maybe you [either Rogers Communications or Mr. Linton] are a super businessman, but there is something mysterious in your approach.

[Transcript, v. 45, February 22, 1990, at pp. 7815-7838.]

12 In my view, the use of privately obtained information to make such obvious comments is too trivial for serious consideration,[2] and I do not propose to deal with it further. However, the natural justice issues must be faced with respect to the other incidents.

13 The common law embraces two principles in its concept of natural justice, both usually expressed in Latin phraseology: audi alteram partem (hear the other side), which means that parties must be made aware of the case being made against them and given an opportunity to answer it; and nemo judex in sua causa debet esse (no one may be a judge in his/her own cause), a rule as to the impartiality required of deciders of issues which forbids both actual bias and a reasonable apprehension of bias. The applicant in this case invoked both principles, which I shall accordingly consider in turn.

II

14 It was alleged by the applicant that Latraverse and the board violated the principle of audi alteram partem by receiving evidence outside the hearing process, evidence of which it learned only accidentally after the board's decision through a conversation between one of its officers and Charman, and to which it had therefore no opportunity to respond. In my opinion, despite his excellent motive of attempting better to equip himself to decide the case, Latraverse's seeking information outside the hearing process was a serious mistake of judgment which *could* certainly have had the effect of invalidating the board's decision for lack of fairness. If it did not in this instance entail that consequence, it could only be as a result of adventitious circumstances, as urged by the respondents.

15 The respondents argued: (1) that the information Latraverse obtained was either already in the record, known to the parties or in the public domain; (2) that it was in fact in the applicant's favour, not to its detriment; (3) that Latraverse's efforts did not influence and were not known to the majority; and (4) that the principle does not apply to information which affects only a dissenting member of a tribunal. The first three allegations are primarily factual, the latter a matter of law.

16 As I have indicated, the evidence from the various sources was congruent as to the matters discussed. First, with respect to specialty services in Canada, Latraverse brought with him to the meeting a copy of a chart (introduced into evidence at the board hearing by Peter Grant ("Grant"), an expert witness), as to the prices paid in Canada for specialty services. The data contained in the chart were drawn from C.R.T.C. policies and decisions, and Latraverse had questions

as to the background and rationale, the carriage rules and the prices (Charman affidavit, para. 4(b), Yale affidavit, para. 6(a), Latraverse affidavit, paras. 8 and 11). Much of this information was provided by the handing-over of a copy of *Programming Choices*, a seminal C.R.T.C. policy statement available to, and universally known by, participants in the cable industry such as the 500-odd members of the applicant. Although it was not formally introduced into evidence before the board, the document was used as a basis of questioning during the hearings and was referred to directly by Grant (*Transcript*, at pp. 2626 and 2637).

17 With respect to specialty services in the United States, the evidence showed that Latraverse was especially interested in how the prices for these services were established (Charman affidavit, paras. 4(c) and 6, Hutson affidavit, paras. 2, 3(a) and 3(b), Yale affidavit, para. 6(b), Latraverse affidavit, paras. 8, 12, 17, 18 and 19). The account which was given by Latraverse in his affidavit was fully supported by the others:

> 12. During the meeting, Mr. Charman, commenting the second object of my approach, i.e. whether there were any CRTC decisions or policies relating to the price paid by Canadian cable operators for U.S. specialty signals, stated that the CRTC is not involved in the determination of those rates. He offered to verify for me whether any other available documentation existed in this regard.
>
> . . . . .
>
> 19. The last conversation took place on 21 or 22 August, 1990. Mr. Charman confirmed that he had not found any published documentation on the price paid by Canadian cable operators for U.S. specialty signals, the information being provided by cable companies on a 'lump sum' basis rather than for individual services. He also stated that such information was provided to Statistics Canada on a confidential basis. Mr. Charman offered to fax me a chart, excerpted from the 30 April, 1990 issue of *Cable TV Programming*, an American newsletter which is available to the public at the CRTC library. The chart indicates the rates paid in the United States for specialty services. I received this chart on the morning of 23 August, 1990; it is attached as Exhibit 'C' to this affidavit.

18 The upshot was that the only new information obtained by Latraverse on this subject was the chart referred to as Exhibit C. The chart was largely irrelevant to the issues before the board. The little that was relevant was duplicative of information already presented in the board hearings, particularly the 11-cent-a-customer-a-month basic cable network fee for 1989 for A & E in the United States, a figure which was cited by the applicant itself to the board, and was also referred to by a witness (Kain examination, March 19, 1990, at pp. 9256-9257).

19 With respect to the use of specialty services as a proxy, Charman refused to express an opinion (affidavit, para. 4(d)), whereas both Hutson (affidavit, paras. 4(c) and 4(d)) and Yale (affidavit, para. 6(c)) expressed negative opinions. Ms. Yale told him that "the prices for specialty services would not be a good proxy in that regard since they were established for a different purpose than copyright considerations." Hutson's expressed view was that making use of the prices charged for U.S. specialty services in either the United States or Canada "would be like comparing apples and oranges."

20 Latraverse possibly was influenced by these opinions, for he wrote in his dissent (*Decision*, at p. 132):

> My colleagues rely solely on the rate of an optional American service, A & E, as the unit of measure. It is a marginal service whose content is not typical; therefore it is not an appropriate benchmark for establishing the value of distant signals generally retransmitted in Canada.

Nevertheless, his rejection of the majority's approach did not lead him to the standard proposed by the applicant, but rather to an approach based on the equivalent costs of Canadian programming which caused him to propose a global annual royalty for each of 1990 and 1991 which was some $36 million higher than that adopted by the majority.

21 Latraverse also plainly acknowledged the use of the additional statistics he obtained from Statistics Canada. In his dissenting reasons for decision he stated (*Decision*, at p. 102):

> One of the collectives, PROCAN-CAPAC, provided to us during the course of the hearing CRTC documentation on the costs of programming of the private television, pay television and cable industries. [PROCAN-CAPAC-

> TV-8]. To obtain more complete statistics on the cable industry, I obtained from Statistics Canada the required information for the years missing from the documentation provided. It should be noted that I ignored the figures for CBC/SRC in the figures for television: otherwise, costs as a percentage of revenues would have been considerably higher but would have skewed the statistics.

22 The applicant argued that Latraverse may well have obtained more extra-hearing information than he — or the others — explicitly acknowledged,but with respect to the meeting of August 15, 1990, that not only runs counter to the tenor of all of the affidavits, but also to the direct evidence of Ms. Yale on her cross-examination (cross-examination, April 29, 1991, at pp. 7-8):

> Q. Okay. Now in addition let me ask you, having gone through the three areas that you discussed [i.e., speciality services in Canada, speciality services in U.S., the use of speciality services as proxies], you say in paragraph five that you cannot remember, there are things you can't remember regarding the details of the discussion, and what I would like to ask you is, is it possible there was anything significant, any significant or substantial topic that was discussed in addition to the three you have enumerated there?
>
> A. To the best of my knowledge those were the three identified things, were the things that we spent most of our time discussing.
>
> Q. And —
>
> A. And just to be complete, if there was anything else significant, I think I would have remembered it.

To suppose that there was more would be an entirely gratuitous assumption.

23 The applicant also attempted to establish that Latraverse (and hence his extra-hearing knowledge) influenced the deliberations of his colleagues, and in fact went so far at one point in oral argument as to argue actual bias. The first ground of this contention was his reference in para. 3 of his affidavit to participation in the decision:

> 3. J'ai participé à la décision de la Commission qui fait l'objet de la présente affaire.

The English translation provided with the affidavit reads, quite correctly, as follows:

> 3. I participated in the decision which is the object of these proceedings.

This assertion immediately follows (English translation) these first two statements:

> 1. I am a member of the Copyright Board ('the Board').
>
> 2. I have knowledge of the matters hereinafter deposed to.

In the context, therefore, I believe "participated" must be taken as meaning only an acknowledgment of having "sat on" the matter, not as having, in some unstated way, worked with the majority to produce a partially collective result. In my opinion the sense of the original French text would be to the same effect.

24 It is true, as urged by the applicant, that Latraverse indicated a small measure of agreement with his colleagues. As he put it (*Decision*, at p.98):

> **Dissent of Member Latraverse**
>
> **Preamble**
>
> I do not agree with the guiding principles adopted by my colleagues for establishing the global amount of royalties, nor do I agree with their analysis of or conclusions on the evidence, as expressed in part 3B of the majority decision,

> 'The Royalties to be Paid for Television Retransmission; The Large Systems I; The Value of Distant Signals'. In addition, I am of the opinion that the compilation claim should be recognized, in principle, with a nominal allocation.
>
> The tariff formula and other parts of the decision were prepared jointly by all members of the Board and I am completely satisfied with them, *except as to the amounts themselves*, and certain remarks that I make regarding compilation.

[Emphasis added.] Latraverse's agreement on the tariff formula, etc., amounted really to an agreement on the arithmetical correctness of the majority's conclusion *in the light of its hypotheses*, with which he disagreed. On my reading there is no suggestion of any combining of effort in the production of the majority decision, certainly not on the aspect which is in issue before this court. Finally, the applicant asserted (*Memorandum of Fact and Law*, para. 31):

> 31. In his affidavit, Mr. Latraverse does not deny that he was influenced by or relied on the information and documents that he obtained from the CRTC. Neither does Mr. Latraverse deny that the other members of the Copyright Board were influenced by or relied on that information and those documents.

Latraverse himself probably was influenced by and relied on the information he had received outside the hearing process, but, while it was hardly his place to give evidence as to the majority's state of mind, his failure to advert to a matter on which he was not questioned (but might have been, on his affidavit) cannot be taken as the foundation for a conclusion even as to his view of the majority's knowledge, let alone as to theirs. In my opinion there is simply no basis for speculating that the members of the board majority had any knowledge whatsoever of the content of his information (and in the case of the chairman, no knowledge that he had even made such extra-hearing inquiries). If there was anything of which they were aware, it could only have been the two documents, *Programming Choices* and the chart.

25 What we have, then, amounts to this, viz., that the dissenting member of the board received a report of which both he and the applicantmight already have been made aware in the hearings, a chart the relevant part of which was referred to in the hearings, statistical information which appears to be of no particular significance, and two opinions which influenced him in rejecting the majority's approach and in that sense in the applicant's favour, although he, ultimately, came to an even more negative opinion from the applicant's point of view. All of the information (except for the opinions) was public information.None of it, not even the opinions, was adverse to the applicant's position.

26 The applicant did not, in fact, argue that it was adversely affected by the extra-hearing evidence, but rather that, in dealing with a complaint based on evidence received outside the hearing process, a court will not inquire into whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. A court was said to be concerned, not with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

27 The applicant further argued that it was in fact actually prejudiced in all of the circumstances, not by reason of any adverse effect, but rather by being denied the opportunity to exploit in its favour the evidence received. Thus it had no chance to rely on and further explore the opinion of two senior C.R.T.C. officials as to the inappropriateness of using the wholesale price paid for specialty services as a proxy for valuing the copyright component of distant broadcast signals.

28 These arguments necessitate a review of the case law.

29 A number of cases deal with aspects of the issue raised in the case at bar. In *R. v. Schiff*, [1970] 3 O.R. 476, *(*sub nom. *Ottawa Civic Hospital, Ex parte)* 13 D.L.R. (3d) 304 (C.A.), where a board, for purposes of an arbitration award, without notice to the parties, relied upon material researched by itself and not derived directly from the parties to the arbitration, Aylesworth J.A. said for the court at pp. 479-480 [O.R.]:

> Finally, and as an additional ground for refusal of the remedy sought, it is abundantly apparent that the material complained of and to which the board of its own motion, as it were, resorted, was material from publicly known

> government sources, and entirely supplemental in its nature and kind to the very material the parties themselves supplied to the board. The board complained of the fragmentary nature of the material supplied by the parties which was in the nature of statistics, collective bargaining agreements with other hospitals and the like, and it was natural that the board should look to such further material, and should be expected to look to it in view of that expressed dissatisfaction made known to the parties and in view of the board's intention expressed to them that it was going to seek further data of its own volition. Having regard to the highly informal method of procedure adopted by the parties in the hearing before the board of arbitration and, as I have said, to the nature of the material and the kind of presentation made with respect to that material as well as to the nature of the public material resorted to by the board, we fail to perceive any failure to afford natural justice to the trustees in what the board did in that respect. ...
>
> . . . . .
>
> Perhaps also it is desirable, although unnecessary, to add to what has been said that, upon the peculiar facts of this case, what the board did with respect to getting the kind of material it did get after the hearing, and with respect to the use to which the board put it, really was very much akin to what frequently is resorted to in the regular Courts of law wherein those Courts take judicial notice of well-known public facts, knowledge and information. We think what has already been said illustrates that similarity and demonstrates that in fact there was no denial of natural justice.

30 It therefore appears that a board's referring to material from publicly known government sources, and entirely supplemental in its nature and kind to the very material the parties themselves applied to the board, will not of itself violate the principles of natural justice.

31 In *Canadian Pacific Ltd. v. British Columbia Forest Products Ltd.* (1980), [1981] 2 F.C. 745, 34 N.R. 209 (C.A.), where the Canadian Transport Commission had failed to give an opportunity to respond to evidence obtained by it after the close of the hearing, this court said (at p. 221 [N.R.]):

> Under subsection 23(4) of the *National Transportation Act*, it is essential that there be a hearing before the Commission may find that a 'rate' is prejudicial to the public interest. Such a hearing, in our view, would require that at least the minimum elements of natural justice in respect of the right to be heard must be observed. Because of the failure to give the appellants an opportunity to respond to the results of the Commission's post-hearing investigation into the Duncan Bay diversion, these minimum requirements were not observed. Accordingly, not only was natural justice denied, but the statutory mandate to proceed by way of a hearing was not complied with. The consequence is that the decision of the Commission is invalid.

From this last-noted material fact it would appear that a tribunal must have relied on the evidence it received subsequent to the hearing.

32 The authorities most favourable to the applicant are *Pfizer Co. v. Deputy Minister of National Revenue*, [1977] 1 S.C.R. 456, 6 N.R. 440, 24 C.P.R. (2d) 195, 68 D.L.R. (3d) 9, and *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 31 N.R. 214, 110 D.L.R. (3d) 311. In *Pfizer*, PigeonJ. said shortly for the court (at p. 463 [S.C.R.]): "It is clearly contrary to [the rules of natural justice] to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it." In *Kane*, a case involving a disciplinary suspension of a university professor, the issue was much more fully canvassed. The university president, who had initially imposed the suspension, attended the appeal hearing as a member of the board of governors, and provided additional information to the board in response to questions after the close of the hearing, although he did not participate in deliberations or vote on the decision. The board affirmed the suspension.

33 Dickson J. (as he then was), after enunciating the principle that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake" (at p. 1113 S.C.R., p. 221 N.R.), went on to state (at pp. 1113-1116 S.C.R., pp. 221-223 N.R.):

> 5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses ... or, *a fortiori*, hear evidence in the absence

> of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in *Kanda v. Government of the Federation of Malaya* [[1962] A.C. 322], at p. 337, '... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other.' ...
>
> . . . . .
>
> 6. The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. *Kanda v. Government of the Federation of Malaya, supra*, at p. 337. In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. ... We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

34 It seems clear that the first assertion in point 6 in the above quotation cannot be given its full extension, and that the two parts of the first sentence are intended to be read together. A court will not inquire whether the evidence did work to the prejudice of one of the parties when it *might* have done so. Or, put another way, it will inquire whether the evidence *might* have worked to the prejudice of one of the parties. A showing either of actual prejudice or of the possibility of prejudice is sufficient to constitute a violation of audi alteram partem. That seems indeed to be the basis on which the court acted in *Kane*: "in the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny." As Ritchie J., in dissent, emphasized in analyzing the facts, the appellant considered that the facts as given in the president's statement "*could be construed adversely to him* and he had no opportunity to answer" (at p. 1121 S.C.R., p. 228 N.R. [emphasis added]).

35 The notion of adverse effect is in fact central to audi alteram partem. In the words of Gonthier J. for the majority in *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, 105 N.R. 161, 88 D.L.R. (4th) 524, 90 C.L.L.C. 14,007, 38 O.A.C. 321, 73 O.R. (2d) 276 (note), [1990] O.L.R.B. Rep. 369, at p. 339 [S.C.R.]:

> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a 'fair opportunity of answering the case *against [them]*': Evans, *de Smith's Judicial Review of Administrative Action*, [4th ed. 1980], at p. 158. It is true that on factual matters the parties must be given a 'fair opportunity ... for correcting or contradicting *any relevant statement prejudicial to their view*': *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp. 133 and 141, and *Kane v. Board of Governors of the University of British Columbia, supra*, at p. 1113.

[Emphasis added.] Certainly, this court in *Re Cardinal Insurance Co.*, [1982] I.L.R. 1-1541, 44 N.R. 428, (sub nom. *Cardinal Insurance Co. v. Minister of State (Finance)*) 138 D.L.R. (3d) 693 (Fed. C.A.) saw prejudicial effect on a party as essential. In that case the Minister had held a meeting, in the absence of an insurance company, with a reinsuring company in an effort to obtain a settlement. Immediately after quoting Dickson J.'s fifth point from *Kane*, supra, Urie J.A. wrote for the court at pp. 706-707 [D.L.R.]:

> Certainly there can be no quarrel with that proposition but, in my opinion, there was no breach thereof by the Minister in this case. No evidence was taken nor was anything done at the meeting which prejudicially affected Cardinal. As has been stated, what was done was an endeavour to persuade Union to honour its treaties or to make a settlement with Cardinal which would preclude the necessity for action by the Minister. He had already heard the evidence and representations of all concerned. What Union said at the meeting was, as far as the record shows, merely a repetition of what it had said before. I do not think that his failure to include Cardinal in the settlement discussions with Union ought, in the circumstances, to vitiate the whole proceeding.
>
> Unlike the Tariff Board in *Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs & Excise* (1975), 68 D.L.R. (3d) 9, [1977] S.C.R. 456, 24 C.P.R. (2d) 195, where the board referred to two texts in its decision which

> were not put in evidence or referred to at the hearing before the board, no evidence not known to Cardinal was elicited in this case.
>
> The same comment applies in respect of *R. v. Deputy Industrial Inquiries Com'r, Ex p. Jones*, [1962] 2 Q.B. 677, and *Kanda v. Government of Federation of Malaya*, [1962] 2 A.C. 322, in both of which evidence was received by the tribunal which was prejudicial to the person concerned, without their being made aware of it and being given an opportunity to respond. If any new evidence was heard by the Minister at the February 16th meeting, and it does not appear that there was, it was not prejudicial to Cardinal. In fact the opposite is true. The efforts of the Minister and his officials were directed to attempting to negotiate a settlement. An offer of settlement was in fact obtained and was conveyed to Cardinal and rejected by it. Such efforts cannot be characterized as prejudicial.

Hence the court found no violation of audi alteram partem. A Saskatchewan court seems to have come to a similar interpretation of Kane: *C.U.P.E. (Civic Employees' Union, Local 21) v. Regina (City)* (1989), 81 Sask. R. 16 (Q.B.). In that case Armstrong J. held (at p. 21):

> In my view the improperly received evidence might well have prejudiced Murray in this case. In fact if the opinion of Dr. Abdulla means what the applicants think it means (and I do not know that it does) the Tribunal must have been influenced by the material improperly before it, to decide as it did.

That was also the line taken by this court in *Hecla Mining Co. of Canada v. Cominco Ltd.*, No. A-1137-87, decided June 16, 1989 [now reported 116 N.R. 44], where Hugessen J.A. wrote (at p. 2 [p. 45 N.R.]):

> We did require submissions from the respondents on the applicant's allegation that the Minister had failed to follow the rules of natural justice. We find that allegation to be substantiated. The record shows that, after the parties had completed their submissions, the Minister received a letter from the Mining Recorder which contained a number of assertions of fact and opinions which were incorporated by the Minister into his decision almost verbatim. That letter was never communicated to the parties prior to the decision. It was largely unfavourable to the applicant's pretentions.

In the circumstances, following *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, 16 Admin. L.R. 233, [1986] 1 W.W.R. 577, 69 B.C.L.R. 255, 49 C.R. (3d) 35, 63 N.R. 353, 23 C.C.C. (3d) 118, 24 D.L.R. (4th) 44, the court refused to try to conclude that the ministerial decision might in any event have been to the same effect, and accordingly struck it down.

36 In my opinion, this review of the case law indicates the fallacy of the applicant's argument. Contrary to its contention that a court will not inquire into the question of prejudice, all of the authorities which focus on the matter show that the question of the possibility of prejudice is the fundamental issue: *Kane, Consolidated Bathurst, Cardinal Insurance, Civic Employees Union*, and *Hecla Mining*.

37 If the possibility of prejudice must be looked to, what, then, do the facts show in the case at bar? Much of the information Latraverse received was repetitive of, or supplementary to, the hearings, and so, as in *Schiff*, not a matter of denial of natural justice. Even the applicant alleged only the lack of a positive opportunity to exploit favourable information, not the absence of an occasion to respond to unfavourable information. The authorities, moreover, have taken "prejudicial" in the sense of "adverse effect."

38 The largest factor, however, militating against the applicant's argument is that there is not a shred of evidence that any of the information received by Latraverse had any influence whatsoever on the board's decision, that is to say, on the decision of the board majority. Two of the board majority appear to have been aware that he had obtained some additional information, but not of its content. There is not a single reference in the board's decision, direct or indirect, to any extra-hearing evidence. Latraverse simply was off on a frolic of his own, which seems not to have impinged at all on the minds of the majority.

39 Not only is there no case law which holds that the separate activities of a dissenting board member can, without more, taint the deliberations of the majority, but I believe the *Canadian Pacific* case in this court stands for the proposition that an applicant must show that the board "placed at least some reliance on the information" in question (at p. 221 [34 N.R.]). Here there is no evidence at all of such reliance. Indeed, quite the contrary.

40 If a final word needs to be said, let it be that an inconsequential error of law, or even a number of them, which could have no effect on the outcome do not require this court to set aside a decision under para. 28(1)(*b*) of the *Federal Court Act*. In *Schaaf v. Canada (Minister of Employment & Immigration)*, [1984] 2 F.C. 334, [1984] 3 W.W.R. 1, 52 N.R. 54 (C.A.), at p. 342 [F.C.], Hugessen J.A., after setting out the text of s. 28(1), commented as follows:

> In my view, nothing in the words used makes them other than attributive of jurisdiction. They create the power in the Court to set aside decisions which offend in one of the stated ways but do not impose a duty to do so in every case.
>
> This appears also, I would suggest, from the wording of section 52, which describes the dispositions which are open to the Court on a section 28 application. The opening words are: 'The Court of Appeal may ....' They are clearly permissive and nowhere is there a suggestion that the Court must act whenever it finds an error of law.
>
> This is not to say that the Court is entitled to decline to exercise the jurisdiction which is given to it by sections 28 and 52, but simply that there is nothing in the language of the statute obliging the Court to grant the remedy sought where it is inappropriateto do so. While it can no doubt be argued that the statute creates certain rights for the litigant, it does so by granting powers to the Court and the latter must remain the master of whether or not they are to be exercised in any particular case.

41 In my view, the board made no error of law by infringing the principle of audi alteram partem in this case, but if, hypothetically, the actions of Latraverse could somehow be attached to the whole of the board, I think any error attributable to the board would be inconsequential, a mere technical breach, and should not be a basis for judicial reversal. The authorities have all required a real possibility that the result was affected.

42 As it was put by Dickson J. (as he then was) in *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602, 13 C.R. (3d) 11, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, (sub nom. *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*) 106 D.L.R. (3d) 385, 30 N.R. 119, at p. 631 [S.C.R.]:

> 8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

I have no doubt that in the case at bar the board acted fairly towards the applicant.

III

43 The applicant also alleged that the board had violated the rule of natural justice against a reasonable apprehension of bias by reason of Latraverse's receiving of extra-hearing information. The authority principally relied upon is *Spence v. Prince Albert Board of Police Commissioners* (1987), 25 Admin. L.R. 90, 53 Sask. R. 35 (C.A.) [hereinafter *Spence v. Spencer*].

44 On the facts of that case a police constable had been dismissed after having been found guilty at two separate hearings of, first, falsifying a claim for overtime and, second, various disciplinary infractions with respect to alcohol. Both meetings were chaired by the mayor. After the charges had been laid, one of the principal witnesses on the second set of charges had come to the mayor's office to talk about her motives for lodging the complaints, and had responded affirmativelyto the mayor's question as to whether the constable had done the things alleged against him. Another member of the Board of Police Commissioners had withdrawn from the second hearing because his daughter was to be a witness against the constable on the second infraction, but continued on the first hearing.

45 Vancise J.A. stated for the court (at pp. 101-105 [Admin. L.R.]):

> The law is well settled that a quasi-judicial tribunal like the Police Commissioners is subject to the rules of natural justice which are, after all, only 'fair play in action': see *Ridge v. Baldwin*, [1963] 1 Q.B. 539, [1962] 1 All E.R. 834 at 850 (C.A.) [Reversed [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.)]. The rule against bias is one of the most fundamental elements of natural justice. A person accused is entitled to have his cause determined by an impartial tribunal which is untainted with the knowledge of facts or with a predisposition to a particular point of view which might affect the result. The policy underlying this principle is that justice must not only be done but must manifestly and undoubtedly be seen to be done: see *R. v. Sussex JJ; Ex parte McCarthy*, [1924] 1 K.B. 256, [1923] All E.R. Rep. 233. A breach of the rule against bias will generally result in the statutory delegated authority losing jurisdiction and will render the administrative action void and subject to judicial review. The respondent submits that there is no real or apprehended bias by reason that the chairman did not discuss 'specific' allegations against the appellant.
>
> The Chambers Judge in considering this matter found that no actual bias was established and concluded that there was 'no real likelihood of bias'. In arriving at that conclusion he considered a number of factors, including the following:
>
> (1) Mr. Spencer was not sitting alone. He was a member of a panel;
>
> (2) He did not seek out Miss Ahenakew;
>
> (3) She did not go into all the facts;
>
> (4) The meeting with the chairman was initiated by Miss Ahenakew and was a 'chance encounter';
>
> (5) The chairman was not actually engaged in the investigation of the allegations made against the appellant;
>
> (6) There was nothing in the evidence to indicate a predisposition or partiality or prejudice.
>
> With respect, that approach begs the question.
>
> It is not necessary to demonstrate that the chairman was actually biased. The test is whether there was a reasonable apprehension of bias .... The test is whether a reasonable person would believe there is a real danger of bias or whether there would be a reasonable suspicion of bias even though unintended. As the Chief Justice [Laskin C.J.C. in *Committee for Justice & Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 at p. 733 D.L.R.] stated, 'This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies. ...' The public policy consideration which requires the appearance of justice focuses on perceptions. A perception of a reasonable apprehension of bias, even though there is no real likelihood of bias, is all that is required to cause the Police Commissioners to lose jurisdiction. Here, the person who provided the information to the police department which started the inquiry, the principal witness before the commission, met privately with the chairman in advance of the hearing. In that meeting she discussed the allegation contained in the charge in a general way, but what is significant is that when asked by the chairman whether the allegations were true, she answered in the affirmative. In my opinion, the facts in this case constitute in law a reasonable apprehension of bias. A reasonably well-informed person would have a reasonable apprehension of bias where the chairman has spoken privately with a principal witness in a cause. Dickson J., speaking for the authority [majority?] in *Kane v. Univ. of B.C. Bd. of Govs.* ... considered this very question. ...
>
> He concluded that there was a breach of the rules of natural justice and that the Court did not have to inquire into whether the evidence obtained in the private interview did work to the prejudice of one of the parties. It was sufficient if it might have worked to the prejudice of one of the parties. In the present case, we have no knowledge of what was specifically said by Miss Ahenakew to the chairman because her evidence was vague and she could not remember what she said. It is clear, however, that she did talk about the complaint and equally clear that she

> stated the allegations in the charge were true. In my opinion, the Chambers Judge erred in deciding that there was no reasonable apprehension of bias and no breach of the rules of natural justice.
>
> The appellant alleges that the participation by the chairman and Norman McCallum in the first hearing in view of the fact that Mr. McCallum's daughter was a witness at the second hearing and that the mayor had spoken privately to the principal witness of the second hearing, and that both decisions were rendered on the same date, raises a reasonable apprehension of bias in the first as well as the second decision.
>
> As previously noted, it is not necessary to show that participation by those two members or the participation by one or either of them affected the results. It is enough if there is an apprehensionthat the 'judge' might not act in an impartial manner. Mr. McCallum disqualified himself on the second of the hearings presumably on the ground that his daughter was to be a witness. Even though she was not to be a witness at the first hearing and the issue was different, it was still related to the professional conduct of the appellant. There is a reasonable apprehensionthat the participation by his daughter in the misconduct alleged to have been committed by the appellant could have affected his impartiality in deciding the charge. The same comments apply to the chairman. The appellant alleges that there is a reasonable apprehension the two commissioners did not judge him in a fair and impartial manner by reason of the prior knowledge. He alleges a 'probability or reasoned suspicion of bias and judgment, unintended though it be'. (Rand J. in *Szilard v. Szasz*, p. 373.) I agree. In both cases, the possibility of these members of the Police Commission obtaining information concerning the appellant prior to the hearing from these witnesses which could affect their impartial appraisal of the issues is sufficient to raise a reasonable apprehension of bias and a denial of natural justice.

Although I have no doubt that *Spence v. Spencer* was correctly decided, I find it necessary to enter two caveats. First, Dickson J. in *Kane* seems to have addressed his remarks to the audi alteram partem rule rather than to the nemo judex principle.[3] Second, as I have already established, Dickson's words must be understood to require judicial scrutiny as to the possibility of prejudice. In *Spence v. Spencer*, in the case of the mayor (which is the closer to the facts in the case at bar), the witness's affirmation that the constable had committed the act alleged was a statement highly prejudicial to him, going to the very heart of the case. In those circumstances, since the principle of reasonable apprehension of bias requires essentially a judg ment on appearances from the viewpoint of a reasonable person, the court correctly found a reasonable apprehension of bias to exist even in the absence of any evidence as to the effect on the mayor. In my view, however, this conclusion rests on the foundation of prejudicial evidence.

46 It was common ground to the parties that bias need not be pecuniary. As was said by Hughes J. in *Bateman v. McKay*, [1976] 4 W.W.R. 129 (Sask. Q.B.), at pp. 143-144, quoting Freedman J.A. (as he then was) in *Gooliah v. R.* (1967), 59 W.W.R. 705, 63 D.L.R. (2d) 224 (Man. C.A.) at pp. 227-228 [D.L.R.]:

> Bias may be of two kinds. It may arise from an interest in the proceedings. That indeed is the kind of bias which is most frequently encountered in cases coming before the Courts. Sometimes it is a direct pecuniary or proprietary interest in the subject-matter of the proceedings. A person possessing such an interest is disqualified from sitting as a judge thereon. Sometimes the interest is not financial but arises from a connection with the case or with the parties of such a character as to indicate a real likelihood of bias. ...
>
> This brings us to the second kind of bias — namely, actual bias in fact.

A reasonable apprehension of non-pecuniary bias[4] must arise from "a connection with the case or with the parties." It has to amount to an "interest in the subject matter of the proceedings." In other words, it can come into play only when the tribunal member appears to have some stake in, or predisposition toward, a particular outcome of the adjudication. In *Bateman* the tribunal member was exonerated because "the party who did the talking with the ultimate chairman was not someone directly concerned in the matter" (at p. 142). The information there was at most enough "to allow him to form a tentative point of view as he stood on the threshold of the hearing" (at p. 145).

47 That requirement identified in *Bateman* is wholly absent from the facts in the case at bar. However unfortunate his mistake in seeking extra-hearing information, Latraverse's motivation was pure and he had no stake in the outcome beyond the best possible decision. The most that could be said for the applicant's case is that the opinions of the two C.R.T.C. staff members may have given Latraverse, not a predisposition, but what I might call a post-disposition, to reject specialty services as proxies. But this is a post-disposition favourable to the applicant's argument, and in my opinion it cannot be heard to object to it.

48 I would agree with the applicant that, if one member of a tribunal is disqualified for bias, the decision of the tribunal must be set aside even if the other members are without bias. That principle was established by *Frome United Breweries Co. v. Bath JJ.*, [1926] A.C. 586, [1926] All E.R. 576. *International Union of Mine, Mill & Smelter Workers v. U.S.W.A.* (1964), 48 W.W.R. 15, 45 D.L.R. (2d) 27 (B.C. C.A.), and *Re Canada (Anti-dumping Tribunal)*, [1972] F.C. 1078, 30 D.L.R. (3d) 678 (T.D.) are to the same effect. In the *U.S.W.A.* case the court fastened on the fact that the impugned member "retired with the other members and remained with them while they discussed and made their decision" (at p. 29 [D.L.R.]).

49 But that means nothing if no member of a tribunal is disqualifiable for bias. In *Yukon Conservation Society v. Yukon Territory Water Board* (1982), 11 C.E.L.R. 99, 45 N.R. 591 (Fed. T.D.), five members of a tribunal held private meetings with a corporation seeking a change in its licensing arrangements, thus involving themselves in the preparation of the very application they would later have to judge on its merits. Addy J. found (at p. 599 [N.R.]):

> The Five Members have become so involved in the application as to put themselves in the position of being considered gratuitous consultants of Cyprus Anvil and the application, to some limited extent at least, becomes their own. The principle *nemo judex in causa sua debet esse* might well be considered applicable.

This is one kind of case in which courts have found a reasonable apprehensionof bias to exist, viz., one where a member of a tribunal met with a party affected and discussed the matter to be determined in the hearing. The result is the same if the meeting is with a key witness, as in *Spence v. Spencer*. The other type of case is one in which a member of a tribunal has had a past relationship, or has a present one, with a party appearing before it: *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. Neither of these categories fits the case at bar, for the reasons I have given. I can therefore find no reasonable apprehension of bias on the facts of this case.

IV

50 The issue as to the award of interest on royalty payments relating to the transitional period between January 1 and August 31, 1990, is one of statutory interpretation, relating to subpara.70.63(1)(*a*)(ii), which reads as follows:

> (1) On the conclusion of its consideration of the statements of royalties, the Board shall
>
> (*a*) establish...
>
> (ii) such terms and conditions related to those royalties as the Board considers appropriate...

Acting under this power to establish such terms and conditions related to the royalties it had set, the board considered transitional provisions appropriate (*Decision*, at pp. 87-88):

> (xv) *Transitional provisions* [Television tariff, s. 19; radio tariff, s. 14]
>
> The transitional provisions are necessary because the Act provides that the tariffs will take effect on January 1, 1990 while they were, in fact, approved much later. Two main principles inform these provisions.
>
> First, the provisions are meant to account for the opportunity cost associated with the late payment of royalties. An interest factor has been added, starting on the date an amount would have become due had a retransmitter known

> the provisions of the tariffs. This interest is equal to the Bank of Canada rate; retransmitters are not responsible for the delay in certifying the tariffs. This provides collecting bodies with fair compensation and does not penalize retransmitters.
>
> Second, the Board wanted to avoid each retransmitter having to calculate the interest factors for the retroactive period. This would have imposed an unnecessary burden on the retransmitters, and would have entailed errors. For these reasons, the board has calculated in advance an interest factor by which the amount owed must be increased. This factor is suitable for most retransmitters; only those that are not small systems and did not retransmit a distant television signal for the whole period will have to calculate the interest. Even these retransmitters will find that the television tariff states the interest rates to be applied for the relevant months.
>
> The provisions containing precalculated interest ignore any fluctuations in the number of premises served by a retransmitter during the period. In the Board's opinion, the imprecision that might result from this is small.

The interest factors that the board went on to establish for both radio and television were not established separately by the tariffs as interest payments, but rather were merged into the royalties paid.

51 The applicant conceded that the board's decision that interest be paid on retransmission royalties not received by the due date may be a proper exercise of the jurisdiction under this provision, but argued that its award of interest on royalties accrued prior to publication of any tariff represents the exercise of a substantive authority beyond the board's powers.

52 This contention is based in part upon the old principle that no pecuniary burden is to be imposed upon a subject except upon clear and distinct legal authority: *Liverpool Corp. v. Arthur Maiden Ltd.*, [1938] 4 All E.R. 200. But that, I believe, is a principle of law that applies between sovereign and subject, rather than between subject and subject. It is also based in part on the fact that there is no explicit statutory provision in the Act specifically empowering the board to compel the payment of interest by retransmitters. The power would have to be implied, and, since a requirement respecting interest is a substantive right, it was said that it should be expressly provided for in the governing legislation.

53 However, the authorities do not go so far as to say that any right to interest must be provided for explicitly. *WMI Waste Management of Canada Inc. v. Metropolitan Toronto (Municipality)* (1981), 23 R.P.R. 257, 34 O.R. (2d) 708, 24 L.C.R. 204 (H.C.), which might be thought to do so, is explained by *Kidd Creek Mines Ltd. v. Northern & Central Gas Corp.* (1988), 29 C.P.C. (2d) 257, 66 O.R. (2d) 11, 30 O.A.C. 146, 53 D.L.R. (4th) 123, as taking the position that, where a statute provides a complete code as to interest payments, then the explicit provision of interest on compensation awards, and failure to provide for interest on costs, must be taken as excluding the latter.

54 Indeed, ss. 70.62 through 70.67 are remedial legislation, the objects of which include the establishment of a regime for royalty payments for retransmissions after January 1, 1990. The transitional provisions were deemed necessary by the board only because the length of the hearings prevented it from approving the tariffs until much later, and it therefore attempted to live up to its statutory mandate by including an interest factor to make up for the late payment of royalties caused by the delays in the approval process. The *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, requires that legislation be given such a fair, large and liberal construction as best ensures the attainment of its objectives.

55 In *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at p. 1756, 38 Admin. L.R. 1, 60 D.L.R. (4th) 682 at pp. 706-707, 97 N.R. 15, Gonthier J. said:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

Accordingly, in that case, the Supreme Court held that a power to make interim orders necessarily implied the power to revise the period during which interim rates were in force. A similarly broad interpretation was given by this court in

Performing Rights Organization of Canada Ltd. v. Canadian Broadcasting Corp. (1986), 64 N.R. 330, 7 C.P.R. (3d) 433 (Fed. C.A.), where the majority of the court adopted the conception that whatever is reasonably necessary for the proper discharge of a duty is impliedly authorized by it. In *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok* (1988), 22 C.C.E.L. 59, 88 C.L.L.C. 14,033, 87 N.R. 178, 89 C.L.L.C. 14,026 (Fed. C.A.), a power to award interest was held by this court to be impliedly authorized by a power to do anything equitable to remedy or coun teract a dismissal.

56 The board set the interest rate for the transitional period at one per cent less than the rate generally determined in the tariff for defaulting payments, to allow for the fact that retransmitters were not responsible for the delay in making the payments.

57 Parliament's intention was clearly that the royalty scheme should take effect as of January 1, 1990, regardless of how much later that scheme might actually be established. In that respect s. 149 of the *Canada-United States Free Trade Agreement Implementation Act* provides as follows:

> **Transitional**
>
> 149. For greater certainty, the royalties in the first statements certified under paragraph 70.63(1)(*d*) of the *Copyright Act* become effective on January 1, 1990 regardless of when the statements are so certified.

Section 149 is described in the heading as the transitional provision of the Act. In the light of Parliament's manifest determination to make the royalty scheme effective on January 1, 1990, it can be supposed only that it would have wanted to make the royalty recipients whole as of that day, or at least to give the board the right to do so if it considered it appropriate, especially since subpara.70.63(1)(*a*)(ii) was also enacted by the *Canada-United States Free Trade Agreement Implementation Act*.

58 It was argued by the applicant that an interest penalty for late payment imposed by the board is unnecessary in the light of the Act's provisions that all copyright users face either liability for copyright infringement or an action to recover outstanding royalties, and indeed that it is counter-productive, by making it difficult to determine at what point a retransmitter is in breach of its obligations. If the payment of interest is not a proper part of the retransmission royalty tariff, it was contended that interest should not be construed as being within the "terms and conditions related to those royalties." However, it seems to me that any such argument is vitiated by the fact that the board was taking account of the unique situation where the retransmitters were not themselves responsible for the delay in certifying the tariffs.

59 I must therefore conclude that the applicant has failed to establish that the board committed an error of law or jurisdiction.

V

60 In the result the s. 28 application must be dismissed.

Application dismissed.

Footnotes

* On March 12, 1992, the court issued a corrigendum to these reasons, which has been incorporated herein.

1 No such regulations have been made by the Governor in Council.

2 It was also apparently disclosed at the hearing and no objection was taken at the time.

3 Dickson J. pointed out (at p. 1110 S.C.R., p. 218 N.R.) that at trial "[t]he main thrust of the case advanced on behalf of Dr. Kane was that no man could be a judge in his own cause ...." The Court of Appeal upheld the Chambers judge in rejecting an argument based upon that principle. Dickson J. went on to say (at pp. 1110-1111 S.C.R., p. 219 N.R.):

4 In *Energy Probe v. Atomic Energy Control Board* (1984), [1985] 1 F.C. 563 at p. 580, 11 Admin. L.R. 287, 13 C.E.L.R. 162, 56 N.R. 135, 15 D.L.R. (4th) 48 (C.A), at p. 61, Marceau J.A. (concurring) includes in non-pecuniary bias "emotional type interests ... such as kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc."

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2017 CAF 6, 2017 FCA 6
Federal Court of Appeal

Canadian National Railway v. Viterra Inc.

2017 CarswellNat 10258, 2017 CarswellNat 107, 2017 CAF 6, 2017 FCA 6, 275 A.C.W.S. (3d) 196, 410 D.L.R. (4th) 128

CANADIAN NATIONAL RAILWAY COMPANY (Appellant) and VITERRA INC. and CANADIAN TRANSPORTATION AGENCY (Respondents)

CANADIAN NATIONAL RAILWAY COMPANY (Appellant) and RICHARDSON INTERNATIONAL LIMITED and CANADIAN TRANSPORTATION AGENCY (Respondents)

M. Nadon, Donald J. Rennie, Mary J.L. Gleason JJ.A.

Heard: April 21, 2016
Judgment: January 12, 2017
Docket: A-396-15, A-398-15

Counsel: Douglas C. Hodson, Q.C., C. Ryan Lepage, for Appellant
Lucia M. Stuhldreier, Carolyn J. Frost, for Respondents, Viterra Inc. and Richardson International Limited
Barbara Cuber, for Respondent, Canadian Transportation Agency

Subject: Civil Practice and Procedure; Public

Headnote

Transportation --- Railways — Federal regulatory boards — Orders and decisions — Review and appeal — Grounds — Improper exercise of discretion

With record grain crop, there was surge in demand by Canadian grain shippers for freight service that railway company was unable to fully satisfy — Railway implemented car rationing methodology, assigning percentage of available rail car supply to shippers — Respondent shippers, who were provided with number of rail cars falling short of percentage shares calculated by railway's methodology, complained to Canada Transportation Agency — Agency held that railway failed to meet its level of service of obligation to respondents and ordered remedial measures — Railway appealed — Appeal allowed — Agency erred in treating rationing methodology as if it constituted confidential contract, which led to failure to investigate whether railway had provided respondents with adequate and suitable accommodation for their traffic — Agency's investigation amounted to determining railway's commitment to respondents pursuant to its rationing methodology and then giving effect to terms of that commitment — Rationing methodology did not constitute confidential contract or other written agreement pursuant to which parties had agreed on manner in which obligations were to be fulfilled by railway as set out in s. 113(4) of Canada Transportation Act — Agency was required under s. 116(1)(a) of Act to determine whether number of rail cars provided to respondents during weeks in issue constituted adequate and suitable accommodation in regard to traffic — Instead of conducting required investigation, agency erred in assuming that rationing methodology and percentage shares allocated to respondents constituted level of service obligation that railway owed to respondents — Railway was under no duty to deliver fixed percentage of cars or fixed number of cars per week to respondents, but was obligated to provide them with adequate and suitable accommodation in regard to their traffic — Matter would be remitted back for reconsideration.

APPEAL by railway company from decision upholding respondent grain shippers' complaints and ordering remedial measures.

***M. Nadon J.A.*:**

by the company". Consequently, rather than conducting the inquiry set out at paragraph 116(1)(*a*) of the *CTA*, i.e. an inquiry into whether CN had fulfilled its obligations under sections 113 to 115, the Agency's investigation amounted to ascertaining CN's commitment to the respondents pursuant to its rationing methodology and then giving effect to the terms of that commitment.

61 There are other paragraphs in the Agency's preliminary decisions which leave no doubt that it viewed CN's rationing methodology as a binding commitment on CN's part to provide specific Percentage Shares to the respondents from which no deviation would be tolerated. In that regard, I have in mind paragraph 163 of the Viterra preliminary decision and paragraph 158 of the Richardson preliminary decision where the Agency dismissed CN's argument that it had taken all commercially reasonable steps to move as much grain as it could during the 2013-2014 crop year. In dismissing CN's argument, the Agency made it clear that because CN had decided to put in place a rationing methodology, it would not make any allowance in favour of CN. Specifically, the Agency said that "any issues with capacity acquisition have no bearing on a rationing program based on percentage allocations and do not justify its faulty implementation".

62 I also have in mind paragraph 173 of the Viterra preliminary decision and paragraph 168 of the Richardson preliminary decision where the Agency dismissed CN's argument that it had transported record levels of Canadian grain during the 2013-2014 crop year and that it had delivered more cars to the respondents (Richardson and Viterra, in that order, are the shippers which received the most cars during the 2013-2014 crop year) than to any other shipper during the relevant period. The Agency dismissed CN's argument because it determined that CN's difficulties in regard to the supply chain could not justify its failure to provide to the respondents their Percentage Shares. In other words, the Agency found that CN had bound itself to provide specific Percentage Shares and the Agency would hold it to that promise.

63 I should also mention paragraph 154 of the Viterra preliminary decision and paragraph 149 of the Richardson preliminary decision where the Agency dismissed CN's argument that it required flexibility, in particular during crop years such as the 2013-2014 crop year, to make adjustments to its car supply so as to meet shifting priorities and changing circumstances. The Agency's answer to CN's submission was a simple one, i.e. that CN's rationing methodology "already integrates a sufficient degree of flexibility". In other words, because CN had committed itself to provide to the respondents their Percentage Shares, the Agency determined that it should not be allowed any flexibility in regard to that commitment.

64 There can be no doubt, in my view, that CN's rationing methodology does not constitute a confidential contract or other written agreement pursuant to which the parties have agreed, in the words of subsection 113(4), "on the manner on which the obligations under this section are to be fulfilled by the [railway] company". It is worth pointing out that neither the respondents nor the Agency advanced the proposition that CN's rationing methodology constituted a confidential contract or that it should be treated as such.

65 Where, however, the parties have entered into such an agreement, the test of reasonableness enunciated in *Patchett* will not apply and the investigation which paragraph 116(1)(*a*) of the *CTA* requires the Agency to perform will be restricted by the terms of the written agreement which shall be binding on the Agency. In such circumstances, a railway company will be unable to rely on an argument that it could not reasonably be expected to fulfill the obligations found in the confidential contract. The parties to such a contract will be held to their bargain by the Agency. Consequently, if the railway company fails to fulfil its obligations under the confidential contract, it will be found by the Agency to have breached its obligations under sections 113 to 115. It is on that basis that our Court upheld the Agency's decision in *Louis Dreyfus Commodities* where, at paragraph 26 of its reasons, the Court said:

> The *CTA* contemplates that a shipper and a railway company may enter into an agreement that would set out the manner in which the service obligations of the railway company may be fulfilled. If the parties have entered into such an agreement, the service obligations of the railway company will be determined based on what the railway company agreed to provide, not on whether any particular order is considered to be reasonable.
>
> [emphasis added]

2004 NSCA 143
Nova Scotia Court of Appeal

Harris v. Barristers' Society (Nova Scotia)

2004 CarswellNS 496, 2004 NSCA 143, [2004] N.S.J. No. 463, 135 A.C.W.S. (3d) 509, 228 N.S.R. (2d) 153

Corina T. Harris (Appellant) v. The Nova Scotia Barristers' Society (Respondent) and Attorney General of Nova Scotia (Respondent)

Chipman J.A., Hamilton J.A., and Roscoe J.A.

Heard: September 29, 2004
Judgment: December 2, 2004
Docket: C.A. 212411

Counsel: Corina T. Harris for herself
Alan J. Stern, Q.C. for Respondent, NSBS
Edward A. Gores for Attorney General

Subject: Civil Practice and Procedure; Constitutional; Public

Headnote

Barristers and solicitors --- Organization and regulation of profession — Disciplinary proceedings — Appeals

Appellant, who was barrister, was charged by Nova Scotia Barrister's Society with professional misconduct for failing to comply with regulations concerning trust accounts — Appellant was found guilty and reprimanded — Discipline panel noted that there was no sense things were improving with time, that failure to keep records was serious, and that there was long delay between request for information by Society and its delivery — Discipline panel found that appellant's actions, when taken together, showed reckless disregard for trust account regulations — Appellant appealed — Appeal dismissed — Appellant's request for disclosure from Society was dismissed as material either did not exist or was not relevant to charges against appellant and her reasonably possible defences — Appellant was permitted to adduce one of three proferred affidavits; facts in other affidavits were known to appellant and could have been led at discipline hearing had she not left in middle of cross-examining Society's first witness — Appellant was not permitted to raise constitutional issues — Appellant's failure notify Attorney General of constitutional issues to be raised before discipline panel, manner in which issues were raised, and minimal record rendered consideration of constitutional issues dangerous and inappropriate — Appellant was not denied procedural fairness or natural justice before discipline panel — Discipline panel was not clearly wrong in finding that appellant demonstrated reckless disregard for trust account regulations or unreasonable in her finding that her actions constituted professional misconduct.

APPEAL by barrister from decision of Nova Scotia Barrister's Society that she had engaged in professional misconduct in not complying with trust account regulations.

***Hamilton J.A.*:**

1 An adjudicative hearing panel ("Panel") of the Discipline Committee of the respondent, the Nova Scotia Barristers' Society ("Society"), found a barrister, Corina Harris, the appellant, guilty of professional misconduct for (1) failing to prepare monthly trust reconciliations, maintain adequate books of original entry, maintain a chronological file of copies of billings and file a required Form 20 on time contrary to the Society's trust account regulations and for (2) demonstrating "a continued reckless disregard" of the Society's trust account regulations. There was no suggestion that Ms. Harris misappropriated money from her trust account. The Panel reprimanded Ms. Harris for this professional misconduct.

2 Ms. Harris asks this Court to overturn the Panel's decision.

3 Numerous issues were raised by Ms. Harris in her factum but as I see it there are six main issues:

1. Did the Society breach its duty of disclosure to Ms. Harris, and if so, should the material Ms. Harris sought be disclosed now and admitted as fresh evidence on this appeal?

2. Should Ms. Harris' three affidavits, filed after the appeal dates were set, be admitted as fresh evidence?

3. Should this Court decide the constitutional issues raised by Ms. Harris in her Notice of Appeal in light of the objection of the Attorney General of Nova Scotia on the basis that Ms. Harris did not give him the required notice that she was going to raise constitutional issues before the Panel and that these issues were not adequately raised before the Panel?

4. Did the Society's investigation of Ms. Harris or the Panel's conduct of the hearing into the formal complaint against Ms. Harris breach natural justice or deny Ms. Harris procedural fairness?

5. Was the Panel clearly wrong in its conclusion that Ms. Harris' actions demonstrated "reckless disregard" for the Society's trust account regulations?

6. Was the Panel's decision that Ms. Harris' actions constituted professional misconduct unreasonable?

4 This Court's jurisdiction arises from s. 32(13) of the *Barristers and Solicitors Act*, formerly R.S.N.S. 1989 c. 30, as amended, since repealed:

> Where ... a resolution or order is made, ... pursuant to this Section, the Appeal Division of the Supreme Court ... may, upon such grounds and in accordance with such procedures as it shall determine, ... intervene upon the request of ... the barrister ... in respect of whom a resolution or order is made; ... and make such order or give such direction as it shall deem fit and necessary under the circumstances. (underlining mine)

5 This Court has consistently taken a somewhat limited view of the power to intervene conferred on it by s. 32(13), *Pavey v. Barristers' Society (Nova Scotia)* (2001), 198 N.S.R. (2d) 381 (N.S. C.A.) , ¶ 7. This Court's statutory power to intervene has been held to be comparable to a statutory provision that allows for an appeal of a tribunal's decision to a court, *Pavey* , ¶ 30. For purposes of convenience I will herein refer to this case as an appeal.

6 Ms. Harris has not satisfied me that the Society breached its duty to disclose the material she sought to have disclosed. Accordingly I am not prepared to order that it be disclosed or admitted as fresh evidence. I am satisfied this material either does not exist or is plainly irrelevant to the charges against Ms. Harris in the formal complaint and her reasonably possible defences.

7 I would admit the last affidavit filed by Ms. Harris as fresh evidence, but not the other two affidavits. All of the facts set out in these two affidavits were known to Ms. Harris at the time of the hearing before the Panel and could have been offered as evidence if admissible at that hearing if Ms. Harris had not abruptly left the hearing in the middle of cross-examining the Society's first witness. She was given the opportunity to cross examine all of the Society's witnesses and to present evidence supporting her position at the hearing. She did not take advantage of that opportunity. It would be wrong to allow her to present this evidence at this late date having chosen not to present it at the appropriate time in the appropriate forum.

8 Ms. Harris has not satisfied me that this Court should decide the constitutional issues she raised in her Notice of Appeal. The failure to notify the Attorney General that she was going to raise constitutional issues before the Panel, the manner in which she did raise these issues with the Panel and the minimal record before the Panel, largely due to Ms.

Harris' early departure, satisfy me it would be dangerous and inappropriate for this Court to consider these constitutional issues.

9 Ms. Harris has also not satisfied me that she was denied natural justice or procedural fairness during the investigation or adjudication stages, that the Panel was clearly wrong in finding she demonstrated "reckless disregard" for the Society's trust account regulations or that its decision that her actions constituted professional misconduct was unreasonable. I would dismiss the appeal.

Facts

10 The following review of the facts is based solely on the record and Ms. Harris' last filed affidavit of August 10, 2004. It does not include facts alleged in Ms. Harris' factum or any of her other affidavits or applications. I have relied only on the record and Ms. Harris' August 10, 2004 affidavit in reaching my conclusions.

11 Ms. Harris was admitted to the bar in 1993. Her difficulty finding work led to several job changes and financial difficulties. She was suspended from the practice of law several times for failure to pay her fees and file Form 20, which is a statement of trust account activity signed by a lawyer and her accountant, required by the regulations of the *Act* to be filed annually.

12 On April 1, 1998 Ms. Harris was again suspended for failure to file her Form 20 for her trust account for her fiscal period ended December 31, 1997 and for failure to pay her fees. The Society's Trust Accounts Committee ("TAC") ordered a random audit of her books, records and accounts in April, 1998. The auditor found that Ms. Harris was not in compliance with the Society's trust account regulations in several respects. He recommended that she be required to file monthly trust reconciliations with the TAC for at least six months. This original auditor's report was not before the Panel. As a result of the auditor's report the TAC ordered Ms. Harris to file monthly, rather than annual, trust reconciliations.

13 Ms. Harris was reinstated May 27, 1998 when she filed her Form 20 for December 31, 1997 and paid her fees. This Form 20 included the following exceptions noted by her accountant:

> 1. There is no evidence that formal bank reconciliations were completed for the 1997 trust year.
>
> 2. There is no evidence that a book of original entry was maintained for either receipts or disbursements.
>
> 3. There is no evidence of a fees books (sic) or chronological files of copies of billings.
>
> 4. There is no evidence of a comparison by month of total balances held in trust and the total of all unexpended balances of trust money.

14 This Form 20 also included Ms. Harris' explanation for the exceptions:

> My practice shut down in April/97 due to an inability to get the financing required. Therefore, I did not have an adequate amount of time between December and April to either learn proper procedures or set them up.

15 By letter dated May 27, 1998 the Society's Acting Director of Administration wrote to Ms. Harris noting that the Society had received her Form 20 and that the exceptions noted were considered to be serious violations of the Society's trust account regulations. He indicated that her trust accounts had to be maintained in accordance with the Society's trust account regulations and asked her to respond by June 17, 1998 to advise that her trust accounts were being so maintained. The letter stated that because of the nature and number of the reported exceptions on her Form 20 that it would be reviewed by the TAC.

16 The TAC monitored Ms. Harris' situation.

17 By letter dated August 10, 1998, copied to Ms. Harris, the chair of the TAC filed a written complaint with the Society's Director of Discipline regarding Ms. Harris. The letter indicated the TAC was monitoring Ms. Harris with respect to her ongoing trust account problems and the serious exceptions noted on her Form 20. It stated that Ms. Harris had been suspended from the practice of law several times for failure to pay her practising fees and file Forms 20. It noted her cheques to pay fees had been returned NSF in the past and that she had declared bankruptcy previously. It noted the results of the random audit. It suggested clients had been unable to reach Ms. Harris and that the Society had received "calls of concern" from the public regarding Ms. Harris although none had filed written complaints with the Society.

18 This letter also indicated the TAC's view that Ms. Harris' actions demonstrated a continued reckless disregard of the Society's trust account regulations and the Society's regulations respecting payment of fees and the filing of Forms 20. It requested that the Society's discipline committee investigate the matter to determine what action should be taken.

19 The chair of the TAC testified at the hearing before the Panel. She confirmed that it was the opinion of the TAC that Ms. Harris' actions demonstrated a continued reckless disregard for the trust account regulations. There was also evidence before the Panel that it was rare but not unique for the TAC to forward a trust account problem to the Discipline Committee. The evidence indicated that usually trust account problems are resolved at the TAC level because lawyers cooperate with the Society and take the required action to correct the problem once it is brought to their attention. The evidence before the Panel also indicated that a review by the Society shortly before this time showed a positive correlation between lawyers who file Forms 20 similar to that filed by Ms. Harris and lawyers who misappropriated client trust funds. The testimony indicated that the filing of this type of Form 20 set alarm bells ringing at the Society.

20 Ms. Harris responded to the complaint letter, outlining generally her employment, financial and health difficulties since admission to the bar. She noted her difficulties with one employer in particular who was also a member of the Society and a member of Bar Council, the governing body of the Society. This employer later filed a separate complaint against Ms. Harris and was instrumental in having Ms. Harris charged criminally with the unauthorized taking of money from their general account. Ms. Harris indicated her difficulties overwhelmed her at times and interfered with her ability to deal with accounting matters. Her response states:

> I do not agree with Ms Macdonald's (sic) claim that my Form 20 revealed "serious" exceptions. I was not familiar with trust accounts prior to setting one up in 1997 and the exceptions noted were that of an administrative nature.

21 She indicated she had since obtained advice from her accountant on how to keep her accounting records properly.

22 The chair of the TAC responded to Ms. Harris' letter by sending another letter dated September 16, 1998 to the Director of Discipline, again copied to Ms. Harris. This letter indicated a recent judgment search done on Ms. Harris revealed three judgments registered against her. One of these judgments was executed during the time Ms. Harris was a practising member. The letter suggested it was not reported to the Society as required by regulation 48B(3). The letter suggested this was further evidence of Ms. Harris' disregard for the Society's regulations.

23 This letter also took exception to Ms. Harris' characterization of the exceptions noted on her Form 20 as being administrative and not serious. It stated that failure to prepare monthly trust reconciliations and maintain adequate trust records were not considered by the TAC to be exceptions of an administrative nature. It stated that ignorance of the regulations and difficult personal circumstances were not an excuse for failure to adhere to the trust account regulations. It stated that the Society had a "zero-tolerance" threshold in respect of exceptions to or contraventions of the trust account regulations, pointing out the need for this "zero-tolerance" threshold in light of the Society's then recent past experience with the misappropriation of large amounts of money by lawyers. The letter stated:

> I wish to reiterate the view of the Trust Accounts Committee that Ms. [Harris'] history of failure to file her Form 20 on time, to pay her membership fees on a timely basis and without cheques being repeatedly returned NSF, and to provide the trust documentation required by the Committee on a timely basis, together with the new information

> that she failed to report the judgment of December 1996 to the Society pursuant to Regulation 48B(3), all point to an ongoing disregard for the rules and regulations by which all lawyers are governed in Nova Scotia.

24 Ms. Harris responded on October 8, 1998 indicating she did not know the judgment had been registered and reminding the Society's Director of Discipline that she had now received advice from her accountant on trust account record keeping.

25 When Ms. Harris' monthly trust reconciliation for September 1998 was not filed on time, the TAC on November 5, 1998 instructed its auditor to conduct a random audit of her accounts.

26 The auditor partially completed the audit and prepared a report dated December 2, 1998 which was before the Panel. In it he indicated he had difficulty getting access to Ms. Harris' trust and general account records. His difficulty with the trust account was because Ms. Harris was out of her office the first three times he attended. His problem with access to the general account was that Ms. Harris told him these records were at her home and it would take a few days for her to gather them. At the time of writing his report he had not yet been given access to Ms. Harris' general account records despite several efforts to obtain them. As it turned out he saw some of her general account records in January, 1999 but did not have access to all of her records until the late spring of 1999.

27 The auditor's report also indicated that one of Ms. Harris' banks told him it had closed her accounts because she was overdrawn and was bouncing cheques on her general account and the bank got tired of her stories and chasing her to cover the overdrafts. It indicated Ms. Harris opened a new trust account at another financial institution that the Society may not be aware of.

28 By letter dated December 4, 1998 the chair of the TAC sent a copy of the auditor's report to the Director of Discipline, again copied to Ms. Harris. The letter indicated that Ms. Harris' reluctant and evasive actions to date continued to give the TAC serious concerns, including her actions in closing one trust account and opening another without informing the Society at a time when Ms. Harris knew her trust account was under review.

29 By letter dated December 17, 1998 Ms. Harris responded stating :

> First of all, I want to clarify that I am not being "evasive" regarding a review of my general accounts. What I <u>am</u> being is paranoid and more than frustrated that there appears to be no end to the "investigation" of me. . . .

30 She indicated she had cooperated fully with the Society to date, except that she was late filing her monthly trust reconciliation a couple of times, was up to her neck in debt, was a terrible record keeper but that she was not misusing clients' money, suggesting that her assurance that she was not misappropriating her clients money should cause the Society to leave her alone.

31 Ms. Harris also indicated in this letter that her doctor had advised her to stay away from work until January 4, 1999 so that she would not be able to meet with the auditor and provide him with her general account information until January 5, 1999. She stated she found the attention to "bureaucracy," referring presumably to the Society's insistence on her keeping her accounts in accordance with the Society's trust account regulations, distasteful, suggesting it may force her from the practise of law.

32 By memo dated January 4, 1999, Ms. Harris informed the auditor that having read his December report in which she felt he misconstrued or made unwarranted conjecture from his contact with her, she was not prepared to answer any questions he had about her accounts orally. He was now to request information from her in writing. She instructed him not to speak to her secretary about any financial matters indicating her secretary would not know anything about these matters. It appears that some time later she insisted that all contact between her and the Society's counsel be on a written basis only.

33 With the auditor's report still incomplete because Ms. Harris had not provided the balance of her general account records to him, on March 26, 1999 the discipline subcommittee that was investigating Ms. Harris ("Investigative Subcommittee") informed her that she would need a co-signer for her trust account in accordance with s.33(1) of the *Act*. It asked to be advised by April 12, 1999 of the arrangements Ms. Harris had made to give effect to this.

34 On March 31, 1999 Ms. Harris filed her Form 20 for her year ended December 31, 1998 with no exceptions. The portion of this Form 20 that was signed by her accountant indicated he had reviewed her general account records.

35 By letter dated April 16, 1999 the Society sought written clarification from Ms. Harris as to what records her accountant had reviewed before signing her recently filed Form 20, since Ms. Harris had still not provided sufficient records of her general account to the Society's auditor.

36 By fax dated April 21, 1999 Ms. Harris notified the Director of Discipline that she had closed her trust account so that she would not need a co-signer.

37 By letter dated April 26, 1999 the Investigative Subcommittee wrote to Ms. Harris indicating it was "deferring" the TAC complaint in light of Ms. Harris' advice that she had closed her trust account.

38 By letter dated April 30, 1999 Ms. Harris indicated that she had not provided the balance of her general account material to the auditor because she no longer had an office and did not want him in her home. Responding to the April 16 letter, she indicated that in filing her Form 20 her accountant had reviewed the same materials the auditor had reviewed. She indicated she had now closed her general account.

39 With a letter dated June 15, 1999 the Society received from Ms. Harris the balance of the general account records for 1998 and 1999 for the auditor's review. This was over six months after the auditor had originally sought this information from Ms. Harris. In the same letter Ms. Harris sought an extension of time until September 15, 1999 to file anything else she was required to file with the Society because she was getting married in July, her son would be out of school for the summer and she was preparing for her August trial on the criminal charges allegedly laid against her as a result of her former employer's allegation that she had stolen money from the firm's general account.

40 By letter dated June 24, 1999 the Director of Discipline advised Ms. Harris that her Form 20 was required before July 16, 1999. However, by letter dated July 14, 1999 the Society's Director of Administration and Credentials extended to September 30, 1999 the time for Ms. Harris to file her Form 20 for the period from January 1, 1999 to the time her trust account was closed in April 1999.

41 After reviewing the information relating to her general account that Ms. Harris provided to the Society in June, 1999, the auditor filed his final report in July 1999. This final report was not before the Panel.

42 On August 16, 1999 the chair of the TAC again wrote to the Director of Discipline with respect to Ms. Harris enclosing a copy of the auditor's final report. This letter indicates the TAC was concerned with two noted violations of the trust account regulations and with the manner in which Ms. Harris used her general account, all as referred to in the auditor's final report. The letter also indicated the TAC found Ms. Harris' request that she not have to deal with any more requests from the Society until the end of September "unsatisfactory". This letter was written approximately one year after the first complaint letter and violations of Ms. Harris's trust account were still being noted.

43 On October 1, 1999 Ms. Harris was suspended from the practice of law for failure to file her Form 20 and pay her practising fees.

44 By letter dated October 3, 1999 Ms. Harris indicated she had not filed her Form 20 or paid her fees by the end of September as required because of the cost and because "(her) legal career depend(ed) upon whether the judge believ(ed) (her) or (her former employer) on the 6th [of October] (at her criminal trial)." She characterized her treatment by the Society as harassment.

45 On November 2, 1999 Ms. Harris was acquitted of the criminal charges against her. The Crown appealed.

46 By letter dated November 9, 1999 the Director of Discipline informed Ms. Harris that the TAC complaint against her continued to be "deferred" by the Investigative Subcommittee pending the completion of her criminal trial and the filing of her Form 20.

47 On March 13, 2000 the Crown abandoned its appeal of Ms. Harris' acquittal.

48 On March 29, 2001, the Society filed a formal complaint against Ms. Harris alleging:

> 1. [Ms. Harris], a Barrister, while practising at Greenwood, in the County of Kings, and other locations in Nova Scotia, failed in 1997 and 1998 to comply with the Nova Scotia Barristers' Society Regulations passed pursuant to the ***Barristers and Solicitors Act***, R.S.N.S. 1989, c. 30, as amended, as they relate to trust accounts and in particular she:
>
> (a) failed in 1997 to prepare monthly trust reconciliations;
>
> (b) failed in 1997 to maintain adequate Books of Original Entry;
>
> (c) failed in 1997 to maintain a chronological file of copies of billings;
>
> (d) failed in 1998 to file the required Form 20 in a timely manner;
>
> (e) failed in 1998 to file the required trust reconciliation for May, 1998;
>
> contrary to Regulations 47A and 47B of the Nova Scotia Barristers' Society.
>
> 2. She, a Barrister, while practising at various locations in Nova Scotia demonstrated a continued reckless disregard of the trust account regulations of the Nova Scotia Barristers' Society from 1993 up to and including 1998, contrary to Chapters 1 and 18 of ***Legal Ethics and Professional Conduct*** (A Handbook for Lawyers in Nova Scotia) adopted by the Nova Scotia Barristers' Society as at August 1, 1990.

49 The formal complaint was served on Ms. Harris on September 24, 2002. Testimony at the hearing before the Panel indicated that the reason for the delay in filing the formal complaint and serving a copy on Ms. Harris was that the Society did not know how to get in touch with her for approximately two years. Counsel for the Society indicated that during this time Ms. Harris was administratively suspended from practice by virtue of her own conduct; the formal complaint was made at the time when Ms. Harris' status was about to change so that she would no longer be considered a "barrister" under the *Act*; and the Society was unclear as to whether the discipline process would continue to apply to her.

50 The required notice of hearing was served on the parties indicating that the hearing of the formal complaint would be held on September 23, 2003.

51 On September 10, 2003 Ms. Harris applied under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, to the Federal Court of Canada. Notice of this application was given to the Attorney General of Nova Scotia under s.10 of the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89. She sought a writ of prohibition, certiorari and an order for disclosure of the same material she sought to have this Court order disclosed, all with respect to the Society's investigation. She sought declarations that the Society had wrongly refused disclosure, had acted ultra vires the *Act* and had violated her rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. She sought consideration of constitutional questions as to the validity, application and effect of s. 32(13) of the *Act* and s. 44(27) of the regulations to it. On application of the Society, Ms. Harris' application was dismissed by the Federal Court for want of jurisdiction before the September 23, 2003 hearing.

52 The hearing into the formal complaint against Ms. Harris before the Panel proceeded on September 23, 2003. The Attorney General was not a party and had not received notice that Ms. Harris was going to ask the Panel to address any constitutional issues.

53 Ms. Harris sent the chair of the Panel a number of documents prior to the hearing including her application to the Federal Court. At the commencement of the hearing the chair sought to clarify with Ms. Harris what use she intended to make of these materials. He also sought to have Ms. Harris indicate any preliminary matters she wished to raise.

54 After a confusing exchange, it appeared that Ms. Harris questioned the jurisdiction of the Panel to continue with the hearing. She indicated the only submission she wished to make on this jurisdiction issue was contained in her application to the Federal Court. She indicated that because of her difficulty of speaking on her feet she wished her written application to the Federal Court to be received as her sole argument on this jurisdictional point. It should be noted that Ms. Harris' application to the Federal Court was therefore before the Panel only as a submission, not for the truth of the facts set out in the 17 page single spaced application.

55 Before recessing to read her Federal Court application, the chair asked counsel for the Society if he wished to respond to Ms. Harris' jurisdictional argument. His comments in response make it clear he did not know Ms. Harris was raising constitutional questions for the Panel to decide. He made no argument in response stating:

> I'm not sure what the particular (jurisdictional) question is, . . .

56 The other material Ms. Harris sent to the chair prior to the hearing was returned to her. The Panel then recessed to read the Federal Court application. When the hearing resumed the chair indicated the Panel would proceed with the hearing but reserve its decision on the process argument made by Ms. Harris since it was interconnected with the substantive matters set out in the formal complaint.

57 In its written decision the Panel indicated that it determined during the recess that there was no constitutional issue affecting its ability to proceed with the hearing. There is no other reference to any constitutional issue in the record or in the decision.

58 Ms. Harris admitted before the Panel that she was guilty of the charges set out in 1 (a) to (d) of the formal complaint leaving the Panel to determine only the charges set out in 1(e) and 2 of the formal complaint.

59 The hearing continued with the Society calling its first witness, the chair of the TAC in 1998. She was examined on direct and cross-examined by Ms. Harris until Ms. Harris left the hearing and did not participate in it further:

> You know what? You can all go fuck yourselves, I'm sick of this. Fred, get me out of here.
>
> . . . . .
>
> Well, what's the point in my being heard? What's the point in my asking questions when they're going to tell me it's not relevant. What's the point in my asking questions because they should have read documents and read stuff they had in their possession. . . . And certainly, now, five years later when I haven't even worked in three years — this is ridiculous, it's ridiculous. Totally ridiculous. And my participation in it is over because I'm only legitimizing it. You have my Federal Court thing, take it from there. And if it's the last thing I do is I'll get you out of that job, because you shouldn't be in it.

60 The Panel continued with the hearing in Ms. Harris' absence. Ms. Harris does not take issue with this.

61 In addition to the chair of the TAC testifying on behalf of the Society, the auditor who did the two audits of Ms. Harris' accounts and wrote the three reports testified as did the Society's Director of Administration and Credentials

who Ms. Harris alleges was out to get her along with the Executive Director. Each witness confirmed his or her belief that Ms. Harris' actions demonstrated a reckless disregard for the Society's trust account regulations.

62 The chair of the TAC testified that the TAC was of the opinion that Ms. Harris showed reckless disregard for the Society's trust account regulations:

> Q. Was the view of the Committee that Ms. [Harris'] actions, as you outlined, demonstrated continued reckless disregard of the Trust Account Regulations — is that right?
>
> A. That's correct.
>
> . . . . .
>
> Yes, it raised very significant concerns, continuing on with our previous concern that Ms. [Harris] was not prepared to cooperate with the Committee, was not respectful of the Regulations at all, and was actually engaging in activity to avoid cooperating with the Committee.
>
> . . . . .
>
> It was the progression of what was happening over the period of time that didn't seem to be improving in any way. And the lack of improvement seemed, at least to the Committee, to be as a result of her unwillingness to cooperate and outright just completely thinking that the Regulations weren't significant and were just administrative and mere paperwork

63 The auditor testified:

> My conclusions were that the recording of the trust records was not a priority for Ms. [Harris]. From time to time, I'd come across, you know, I guess I should say more the odd time I've come across lawyers who have a particular issue with having to record in accordance with these regulation, and Ms. [Harris] was an individual who felt that these regulations weren't meant for her.
>
> She felt because of the size of her business and the number of transactions that she shouldn't be required to keep these records up to date in accordance with the regulations. I explained to her that it didn't matter how big or small you were that the regulations were there for everybody.

64 The Director of Administration and Credentials testified:

> I think you have to look at the context of the matter as a whole. This is a very unusual situation so I can't compare it to many other circumstances. We haven't had a member with so many suspensions in such a short period of time — so six suspensions in fewer than three years. A member who we knew from the accountant's report was bouncing cheques — was bouncing fees cheques to the Society on a — at least two or three, stated in one of her responses that she didn't have time in her first four months of practice to basically learn the rules of operating a trust account.
>
> Given the Trust Account Committee's view of zero tolerance in that regard, that's not acceptable. Ignorance of the rules and regulations is not acceptable.
>
> . . . . .
>
> So when you put it all together over a period of almost three years, that demonstrated continued reckless disregard — "reckless" being a lack of caution; "disregard" being a sense that these rules are not important.
>
> . . . . .
>
> She was unhappy with the fees, unhappy with the fee structure, unhappy with being regulated and being governed; and expressed that in very clear terms on more than one occasion and wanted just what she wanted to do, which was practice in some way without having to report to anybody. And the fact that we were having her try to comply

> with the same rules that every other lawyer had to comply with, didn't go over very well. And the more we had to intervene, the more antagonistic she got.

65 Ms. Harris' comments during her cross examination of the TAC chair indicates she continued to view her actions with respect to her accounts as simply a problem of filling out forms improperly:

> I just filled out forms incompletely or improperly, whatever way it might be.
>
> . . . . .
>
> You will never find no matter how much you dig anything I ever did to clients and that's what this should be about. Not because I couldn't fill out a form properly.

Panel Decision

66 In its decision the Panel noted Ms. Harris' admission of the charges set out in 1(a) to (d) of the formal complaint. It agreed with Ms. Harris' argument that the charge set out in 1(e) should be dismissed upon reviewing the evidence of the auditor that indicated her trust account was not opened until June 1998, so that no trust reconciliation was required for the preceding May. It noted this had been pointed out by the auditor in one of his reports to the TAC and had been missed by the TAC along with Ms. Harris' request for help from the Society.

67 The decision reviewed the evidence of the witnesses at the hearing, noting that there was no sense things were improving with time, that the failure to keep the records the Society was requesting was serious, and the long delay between the request for the information relating to the general account and its delivery over six months later. It noted the 28 documents that were admitted by consent while Ms. Harris was in attendance at the hearing.

68 It found as a fact that the Society had proved, for the time period beginning in December 1996, the charges set out in 2 of the formal complaint, namely: that Ms. Harris demonstrated a continued reckless disregard of the Society's trust account regulations, stating that any one aspect of Ms. Harris' actions may not show reckless disregard but that when taken together they did.

69 It also found that Ms. Harris' actions constituted professional misconduct.

Fresh Evidence and Disclosure Application

70 Ms. Harris applied for the admission of fresh evidence at the hearing before the Court and we reserved our decision. For the following reasons I would dismiss her application except with respect to her August 10, 2004 affidavit which I would admit.

71 In Ms. Harris' application to admit fresh evidence on appeal she sought to have two types of material admitted as evidence for the consideration of this Court in addition to the record. First, she sought to have the Court order the disclosure of additional material from the Society, which material she had unsuccessfully sought previously, and to have the Court admit this material as fresh evidence. Secondly, she sought to have the facts set out in her three affidavits filed after the appeal dates were set admitted as fresh evidence. These affidavits were sworn June 14, 2004, July 13, 2004 and August 10, 2004 respectively.

72 I will deal with the disclosure aspect of her application first.

73 The material Ms. Harris sought to have disclosed and admitted as fresh evidence included copies of minutes of all TAC meetings and meetings of the Investigative Subcommittee where issues relating to her were raised. She sought the names of all persons present at such meetings. She sought copies of all correspondence, memoranda and notes relating to her investigation, internal and external to the Society.

74 She sought this material to support her argument that some senior Society staff were biased against her and abused their power by doing everything they could to influence the TAC and the Investigative Subcommittee to find something against her. Ms. Harris argued the investigation had nothing to do with her Form 20 or her trust account. She believes the investigation was all related to her former employer.

75 She also sought disclosure of this material to support her argument that these committees made decisions based on mistaken information. One example of such mistaken information she pointed to was the fact these committees acted on the belief she failed to file a trust reconciliation with respect to May 1998 when in fact she had no trust account open for that month. She indicated this to the Panel. The Panel agreed that the evidence before it supported her argument that she did not open her trust account until June, 1998 and found her not guilty of the charge set out in 1(e) of the formal complaint.

76 Ms. Harris also sought the names of her clients that could not find her and the names of the persons who made "calls of concern" to the Society about her that are referred to in the August 10, 1998 letter of complaint. Ms. Harris sought these names during her cross examination of the chair of the TAC at the hearing before the Panel. The chair testified that she did not remember these names. Ms. Harris is not satisfied with that answer. The Society's counsel indicated the Society no longer has a record of these names, if it ever did.

77 Ms. Harris sought the notes of Society staff with respect to their efforts to locate her prior to September 2002 when she was served with the formal complaint. She argued that the testimony before the Panel indicating that the Society did not know how to contact her until that time was not true; that the Society could have obtained her address in a number of ways, including through its counsel if he had responded to her correspondence.

78 Ms. Harris sought material relating to the Society's auditor. It is not clear if she continues to want disclosure from the Society on this because her August 10, 2004 affidavit indicates she requested information directly from the auditor and received it.

79 She also sought the names of lawyers who have been reprimanded for Form 20 exceptions in the past, the job description for the Society's Director of Discipline and the amount of the fees paid to the Society's counsel in connection with the Society's prosecution of her.

80 The Supreme Court of Canada in *R. v. McQuaid*, [1998] 1 S.C.R. 244 (S.C.C.), confirmed in *R. c. Taillefer*, [2003] 3 S.C.R. 307 (S.C.C.), set out the two step test to be followed in criminal appeals where following trial it is found that the Crown breached its duty to disclose under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). Accepting without deciding that the onerous tests set out in those cases involving criminal appeals applies in this appeal which involves Ms. Harris' professional reputation, I would apply them. However, the situation on this appeal differs from those cases because in this appeal there has not been a determination that the Society breached its duty to disclose to Ms. Harris, whereas in those cases it had previously been determined that the Crown had breached its duty to disclose. Therefore before we can apply the *McQuaid* two step test to Ms. Harris' application we must determine whether the Society breached its duty of disclosure by not disclosing to Ms. Harris in advance of the hearing before the Panel, the material she is seeking.

81 Counsel for the Society argued that the Society followed its usual disclosure policy with Ms. Harris, of disclosing in accordance with the disclosure principles set out in *Stinchcombe* , supra.

82 Assuming without deciding that the disclosure principles set out in *Stinchcombe* , supra apply to the Society, those principles as set out in *Taillefer* , supra are:

> 59 After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to

> disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
>
> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed — *Stinchcombe*, supra, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence. (underlining mine)

83 Ms. Harris has not satisfied me the Society breached its duty of disclosure to her. I am satisfied the material sought by Ms. Harris is plainly irrelevant both to the charges contained in the formal complaint and to any reasonably possible defence available to her.

84 In considering whether this material is plainly irrelevant, the charges against Ms. Harris and her possible defences have to be kept in mind. The charges are set out in full in ¶ 48 ante. The first five related to failure to prepare monthly trust reconciliations, maintain adequate books of original entry, maintain chronological files of copies of billings, file the required Form 20 in a timely manner and file the required trust reconciliation for May, 1998. These charges were of a documentary nature and Ms. Harris admitted the first four of these charges. The sixth charge related to whether Ms. Harris demonstrated a continued reckless disregard for the Society's trust account regulations.

85 It must also be remembered that the Society's discipline process is a bifurcated one where one subcommittee investigates whether a barrister may be guilty of professional misconduct and if it determines that to be the case, lays a formal complaint. The formal complaint is then heard by an independent adjudicative subcommittee that holds a hearing at which the barrister and the Society are given the opportunity to present evidence and argument. The adjudicative subcommittee then makes its decision considering only the evidence before it.

86 Ms. Harris sought the committee minutes and Society notes and memoranda to support her arguments that senior Society staff were biased against her and abused their power by doing everything they could to encourage the TAC and the Investigative Subcommittee to find something against her and that these committees made decisions on mistaken information.

87 Ms. Harris' belief that senior Society staff were biased against her and abused their power is based on the Executive Director's attendance at the October 6, 1998 meeting of the Investigative Subcommittee where he is recorded as having stated that Ms. Harris' actions were "consistent with a person in denial," that " Ms. [Harris] has some difficulty with authority" and that "the Committee is going to have to be careful as it completes its investigation." At this meeting the reporting member of the Investigative Subcommittee indicated there was not enough information at that time to warrant a formal complaint being laid.

88 Her bias argument is also based on her belief that the Executive Director was out to get her because she is alleged to have made a derogatory comment about him that was reported to him by her former employer and because of an answer she gave in an Ethics class he taught while she was in law school.

89 Ms. Harris' bias argument is also based on the fact that another senior Society staff member was the staff liaison person for the TAC at the beginning of the investigation, later became involved as a staff member dealing with discipline matters during the investigation and later still testified at the hearing before the Panel on behalf of the Society.

90 There is nothing in the record to support Ms. Harris' argument that the Executive Director or the other senior Society staff member was out to get her as a personal vendetta. There is nothing wrong with the Executive Director

participating in the October 6, 1998 meeting of the Investigative Subcommittee as he did. By the time of this meeting Ms. Harris' criminal charges were still outstanding and her lack of attention to her trust account records was known as was her failure to file her trust reconciliation for September 1998, almost six months after being informed that her trust accounts were not being properly kept. Ms. Harris' history of failing to pay her fees on time and bouncing cheques for fees was also known. The positive correlation between the filing of Forms 20 with exceptions such as those on Ms. Harris' Form 20 and defalcation by other lawyers was something the Executive Director was also aware of from the then recent Society survey that resulted from the Society's then recent experience with lawyers who misappropriated substantial amounts of money. While it is natural for Ms. Harris to profess her own honesty, it is unreasonable for her to expect that the Society would rely on her word that she was not stealing money, perhaps especially given the dire financial situation she described herself as being in. The input provided by the Executive Director to the volunteer committee members in these circumstances was not inappropriate.

91 The arguments Ms. Harris made with respect to the actions of the Executive Director and the other senior Society staff member indicate an apprehension of bias which has no reasonable foundation. The actions complained of are not wrong; do not give rise to a reasonable apprehension of bias. Hunches without more to support them do not warrant ordering the disclosure requested by Ms. Harris. Since the material sought relates to an argument without merit, the material sought is plainly irrelevant and need not be disclosed.

92 Ms. Harris' argument that these minutes and notes would support her argument that the TAC and the Investigating Subcommittee made decisions on mistaken information again does not satisfy me they should have been disclosed. Given that the Society's discipline process is a bifurcated one, the basis on which the TAC and the Investigating Subcommittee reached their decisions was plainly irrelevant to the Panel's decision, whether made on mistaken information or not. The Panel made its decision only on information put before it by Ms. Harris and the Society. Ms. Harris had the opportunity at the Panel hearing to correct any information she believed was wrong by cross examining the Society's witnesses and presenting her own evidence if she wished to do so. The effectiveness of this opportunity is apparent when considering the Panel's decision to dismiss the charge set out in 1(e) of the formal complaint after Ms. Harris submitted to the Panel that she did not have a trust account in May 1998 and therefore could not file a reconciliation for that month.

93 The job description of the Director of Discipline and the amounts paid to the Society's counsel are also plainly irrelevant as are the names of people on the TAC and the Investigative Subcommittee.

94 With respect to the remainder of the material Ms. Harris sought to have disclosed and admitted as fresh evidence, Ms. Harris has not satisfied me that it exists or that it is relevant to this appeal. This includes the names of her clients and others that she seeks, additional information relating to the auditor if she is still seeking that, and other documents with respect to the Society's efforts to locate Ms. Harris for the purpose of serving her with a copy of the formal complaint. The Society cannot produce information it does not have.

95 In case I am wrong in my conclusion that the existing material that Ms. Harris sought was plainly irrelevant to the charges against her and to her reasonably possible defences, which would mean the Society was in breach of its duty to disclose, I considered the material Ms. Harris sought to have disclosed in light of the two step test set out in *McQuaid* , supra, to determine whether the failure to disclose denied Ms. Harris natural justice or procedural fairness with respect to the Panel's decision itself or the overall fairness of the hearing before the Panel.

96 In *Taillefer* , supra, the court set out with approval the *McQuaid* two part test:

> 80 In *Dixon*, at para. 36, this Court defined as follows the principles that apply to determining whether the right to make full answer and defence has been infringed, first with respect to the verdict, and then as regards the actual fairness of the trial:
>
> > First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused

> was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence. [First and third emphasis added; second and fourth emphasis in original.]

97 Applying this two step test I am not satisfied the material sought by Ms. Harris should be ordered disclosed at this stage and admitted as evidence. The material sought all relates to the investigation stage of the Society's bifurcated discipline process. This material is immaterial at the adjudicative stage before the Panel. What those involved at the investigation stage thought about Ms. Harris' actions was ultimately of no interest. Their decisions had no affect on Ms. Harris except to the extent a formal complaint was laid and her actions would be considered by an independent adjudicative body. The Panel did not make its decision on the facts as determined by the TAC or the Investigative Subcommittee. It did not make its decision based on conclusions drawn by those committees. The Panel made its decision on the facts it found from the evidence before it and the conclusions it drew from those facts. The opinions of those who investigated Ms. Harris, whether staff or volunteers on the committees, were not taken into account by the Panel except to the extent they gave evidence at the hearing. Ms. Harris was given the opportunity to cross examine and present her own evidence. The responsibility for not taking advantage of that opportunity rests with her. Any mistaken facts that the TAC and the Investigative Subcommittee considered in reaching their decisions could have been corrected at the hearing before the Panel by cross-examination and by Ms. Harris presenting her own evidence as she did with respect to the charge in 1(e)of the formal complaint.

98 On the basis of the record before us on this appeal, I am satisfied the existing material Ms. Harris sought to have disclosed would have had no effect on the Panel's decision or on the overall fairness of the hearing before the Panel.

99 Having dealt with the disclosure aspect of Ms. Harris' application for fresh evidence, I will now deal with that part of Ms. Harris' fresh evidence application requesting the admission of her three affidavits. The first two of these affidavits outline a significant amount of the evidence and argument Ms. Harris would likely have presented at the hearing before the Panel if she had stayed and participated in it.

100 Her first affidavit was sworn June 15, 2004, and was filed with the Court with her application for fresh evidence. This was a 14 page single spaced affidavit with 19 exhibits attached. Three of these exhibits were earlier affidavits sworn by her.

101 Her affidavit sets out many of the facts with respect to the investigation that are again set out in her factum. Among other matters her affidavit outlines her efforts to obtain additional documents from the Society and alleges improper activity, bias and abuse of power by senior Society staff in trying to influence the TAC and the Investigative Subcommittee that was investigating Ms. Harris to ensure they found something against her. It alleges that the TAC and the Investigative Subcommittee acted on mistaken information, alleges that the testimony given at the hearing before the Panel was wrong and that the Society's counsel both prior to and at the hearing was biased and usurped the duty of the Panel. This last argument was based on the statement in the November 27, 2002 letter to Ms. Harris from the Society's counsel in which he discussed the possibility of settling the formal complaint by agreement rather than hearing, which is a procedure authorized by the regulations to the *Act*. He stated that the suggested agreement mirrored "the very likely outcome of a hearing." Rather than the usurping of the Panel's duty as argued by Ms. Harris, this was merely an expression of his opinion of the outcome of a hearing on the basis of the facts before him.

102 Ms. Harris' second affidavit was sworn July 13, 2004 in connection with the Society's application to strike parts of the appeal book. Included in this 12 page single spaced affidavit is Ms. Harris' further allegation that the Society's counsel acted improperly. Also included is Ms. Harris' argument that the Society's evidence before the Panel, that it did not know her whereabouts at the time the formal complaint was made, was wrong. Her affidavit alleges again that the Society staff had an "aggressive campaign to shut [her] down" and that the investigation into her accounts proceeded on wrong information.

103 The third affidavit Ms. Harris sought to have admitted as new evidence was sworn August 10, 2004. It was 2 pages long. It had attached to it the transcript of the penalty hearing before the Panel that a Chambers judge of this Court previously ordered be included in the record. It also had attached to it a copy of a draft letter to her from the auditor dated June 5, 1998 which she obtained directly from the auditor when she requested a copy of her file from him. This draft letter was attached to an intra-office memorandum from the author seeking instructions about whether it should be sent to the Society. There is no indication whether it was ever sent to the Society. The Society consented to the admission of this draft letter which it indicates was not in its file and was not before the Panel. The third affidavit explains what the attachments are and where Ms. Harris obtained them.

104 Ms. Harris argues that the draft letter is evidence that she did not demonstrate a reckless disregard for the Society's trust account regulations because it thanked her for her cooperation with the audit after outlining the defects found in her trust account. She suggests this supports her argument that the Panel's decision that she recklessly disregarded the Society's trust account regulations was clearly wrong. With the Society's consent the auditor's draft letter is admitted as fresh evidence and for completeness I would also admit this affidavit. The transcript of the penalty hearing is already part of the record.

105 With respect to the first two affidavits, the test for the admission of fresh evidence on appeal was set out by the Supreme Court of Canada in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) at page 775:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them — see for example *Regina v. Stewart* (1972), 8 C.C.C. (2d) 137 (B.C.C.A.); *Regina v. Foster* (1977), 8 A.R. 1 (Alta. C.A.); *Regina v. McDonald*, [1970] 3 C.C.C. 426 (Ont. C.A.); *Regina v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.). From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result

106 In *Thies v. Thies* (1992), 110 N.S.R. (2d) 177 (N.S. C.A.) , this Court approved the use of the *Palmer* test for admission of fresh evidence on appeals in civil cases. I am satisfied the *Palmer* test is the appropriate test to apply in this appeal.

107 The events and documents referred to in and attached to the first two affidavits all occurred or came into existence prior to the hearing before the Panel. With due diligence and if Ms. Harris had stayed at the hearing and participated in it all of this evidence insofar as admissible could have been adduced before the Panel. Thus on the first factor set out in *Palmer* , supra, the affidavits should not be admitted.

108 It would not serve the interests of justice to permit Ms. Harris to leave the hearing before the Panel without cross examining the Society's witnesses and without presenting her own evidence and then allow her to present it on appeal. That would be the effect of admitting these affidavits. This is not the time nor forum for the presentation of evidence that was available at the time of the Panel's hearing. Ms. Harris was given the opportunity to adduce this evidence before the Panel and chose not to take advantage of it. There would be no end to litigation if parties were allowed to pick and choose the time at which and the forum in which to present their evidence.

109 In considering whether justice requires that this evidence be admitted, I considered Ms. Harris' alleged medical condition although she did not raise it in connection with her application to admit fresh evidence. Since she did not seek an adjournment of the hearing before the Panel and made no attempt to engage a lawyer to represent her at the hearing knowing her medical condition well in advance, I am satisfied her alleged medical condition does not justify admission of her affidavits at this stage.

110 For the foregoing reasons, I would dismiss the appellant's application for the introduction of her affidavits as fresh evidence, except with respect to the August 10, 2004 affidavit which is admitted.

Constitutional Issue

111 On the direction of a Chambers judge of this Court Ms. Harris gave notice to the Attorney General pursuant to s.10 of the *Constitutional Questions Act*, supra, that she was raising constitutional questions on this appeal. The Attorney General filed a factum and attended the hearing of the appeal. He objected to the constitutional arguments raised by Ms. Harris being considered on their merits for the first time at this stage. We heard Ms. Harris and the Attorney General only on whether we should consider the merits of her constitutional arguments, and indicated that if we determined that we should consider them that we would give Ms. Harris and the Attorney General an opportunity to present these arguments. There is no reason to request such additional argument because for the following reasons I would decline to consider the merits of Ms. Harris' constitutional arguments.

112 Five of the seven arguments set out in Ms. Harris' factum raise constitutional issues. She challenged the constitutionality of section 32(13) of the *Act* and sections 44(25) and 44(27) of the regulations to the *Act*. She argued that these sections offend her rights under the *Charter*, specifically her right to make full answer and defence and to have a fair hearing. Many of the constitutional arguments she made were similar to her arguments on natural justice and procedural fairness.

113 The Attorney General argued that we should not consider Ms. Harris' constitutional arguments since they are not properly before us. He argued that because the Attorney General was not a party before the Panel, was not given the required notice by Ms. Harris that she was going to raise constitutional issues before the Panel, had no actual knowledge that constitutional issues were going to be raised before the Panel and that she did not raise such issues before the Panel, that this Court should not deal with these issues for the first time. He argued that the lack of notice and the fact that these issues were not raised by Ms. Harris before the Panel deprived the Crown of the opportunity to cross examine the witnesses heard by the Panel and to lead direct evidence if necessary to address the scope and nature of the relevant constitutional rights alleged to have been violated and to address s.1 of the *Charter* if necessary.

114 Ms. Harris admitted that she did not give the required notice to the Attorney General that she intended to raise constitutional arguments before the Panel but she argued that she did raise her constitutional arguments before the Panel and that we should deal with them on their merits.

115 The manner in which Ms. Harris placed her constitutional issues before the Panel was confusing. She gave the Panel a copy of her Federal Court application as her argument that the Panel had no jurisdiction to hear the formal complaint against her. In that application Ms. Harris raised the constitutionality of two of the three sections of the *Act* and regulations she now challenges, sections 32(13) and 44(27). Ms. Harris said nothing to the Panel about what she wished it to do with respect to these constitutional issues.

116 In her factum Ms. Harris stated with respect to the Panel and the alleged inadequacy of its reasons: "Frankly, it appears to the Appellant that they missed the entire point." I think she is probably right. The manner by which Ms. Harris tried to make her constitutional arguments to the Panel, by providing a copy of a dismissed application to the Federal Court for a different purpose, without specifying that she wanted the Panel to consider the constitutional arguments she made in that application, was completely inadequate to alert the Panel to the fact she wanted it to determine if these sections of the *Act* and regulations were unconstitutional, even if she was permitted by it to do so in light of her failure to give the required notice to the Attorney General.

117 Assuming without deciding that the Panel had authority to decide constitutional issues, without the required notice to the Attorney General and without these issues having been adequately raised by Ms. Harris before the Panel, I am satisfied we should not consider the merits of Ms. Harris' constitutional arguments at this stage. Only two of the three issues she now wishes to raise were referred to in the Federal Court application. In addition there was little, if any, evidence before the Panel relevant to the constitutional arguments Ms. Harris wishes us to deal with because of Ms. Harris' early exit from the hearing. It would be very dangerous and inappropriate to decide the constitutional issues now raised on such a record. We do not have the advantage of any evidence or argument that the Attorney General may have wished to present and make. We do not have the advantage of the Panel's decision on these issues if they had been raised adequately and argued.

118 As said by Chief Justice Dickson in *Northern Telecom Ltd. v. Communications Workers of Canada* (1979), [1980] 1 S.C.R. 115 (S.C.C.) at page 139 when deciding not to consider constitutional issues on review if they were not raised before the tribunal:

> . . . One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. . . . As no constitutional question was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned.
>
> . . . . .
>
> There is always the overriding concern that the constitution be applied with some degree of certainty and continuity and regularity and not be wholly subject to the vagaries of the adversarial process.

Grounds of Appeal

119 I will now deal with the remaining three issues that I see need to be decided on this appeal:

> 4. Did the Society's investigation of Ms. Harris or the Panel's conduct of the hearing into the formal complaint against Ms. Harris breach natural justice or deny Ms. Harris procedural fairness?
>
> 5. Was the Panel clearly wrong in its conclusion that Ms. Harris' actions demonstrated "reckless disregard" for the Society's trust account regulations?
>
> 6. Was the Panel's decision that Ms. Harris' actions constituted professional misconduct unreasonable?

Natural Justice and Procedural Fairness

120 The standard of review with respect to Ms. Harris' argument that she was denied natural justice and procedural fairness is correctness as stated by the court in *Pierce v. Law Society (British Columbia)*, 2002 BCCA 251 (B.C. C.A.) :

> [8] As far as natural justice or procedural fairness are concerned, on the other hand, I am of the view that the tribunal, which has the power to affect the profession and livelihood of a lawyer, must under existing law be held to a correctness standard. In this regard, I note the statement in Brown and Evans, supra, to the effect that courts rarely apply a deferential standard of review to questions of procedural propriety on the part of administrative tribunals (sec. 7.4410 and 14.2300) and that the "general posture" in reviewing procedural issues has been to regard them as "jurisdictional" (sec. 7.4421). The authors note that while there may be room for the development of a 'continuum' type of approach like that developed by the Supreme Court of Canada for other decisions of administrative decision-makers, the Supreme Court has not yet articulated how such an approach could be applied to questions of "administrative procedural propriety." (sec. 7.4410) Even if such an approach were adopted, I would suggest that the nature of the tribunal in this case, the importance of its findings for lawyers who are subject to disciplinary hearings, and the nature of the rules which together make up procedural fairness would militate in favour of a standard of correctness, or something close to it, on a continuum. Thus I regard the grounds stated in Mr. Pierce's petition as requiring from the court below the application of a "correctness" standard to issues of procedural fairness or natural justice...
>
> (underlining mine)

121 Ms. Harris argued that the Society breached the rules of natural justice and procedural fairness in the manner in which it pursued its case against her. She did not differentiate the investigation stage from the adjudication stage. She relied on cases dealing with the adjudication stage, such as *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), when discussing the procedure that should have been followed during investigation.

122 Ms. Harris argued she was denied natural justice and procedural fairness in several different ways. Most of her arguments relate to the investigation stage, but she also makes some arguments concerning the adjudicative stage. For the purpose of this appeal I have assumed without deciding that the Investigative Subcommittee owed a "limited" duty of procedural fairness to Ms. Harris.

123 Ms. Harris alleged a reasonable apprehension of bias with respect to several aspects of the investigation: the Executive Director pursuing her as a personal vendetta and improperly encouraging those investigating her to find something against her; the changing roles within the Society of one of its senior staff members resulting in that staff member having contact with both the TAC and the Investigative Subcommittee; the fact that the Society's Director of Discipline at the time the investigation began was married to a partner of the Society's counsel; and the fact that her former employer, who she alleged instituted the criminal charges against her, was a member of Bar Council, the Society's governing body, as was the chair of the TAC.

124 My review of the record satisfies me there is nothing to support these allegations amounting to a reasonable apprehension of bias. I am satisfied a reasonable and right minded person, reviewing the record in light of these arguments would conclude there was no reasonable basis for any apprehension of bias, *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at ¶ 46 quoting *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.).

125 With respect to Ms. Harris' allegation that the Panel's creation and conduct gave rise to a reasonable apprehension of bias she pointed to several aspects: the Panel's indication at the hearing with respect to penalty that her leaving the first hearing was an indication of her "attitude"; the fact the witnesses were not excluded at the hearing; the fact that prior to the hearing, the chair of the Panel was changed without a reason being given to her; the fact the Panel proceeded with the hearing after reading her Federal Court application as her submission with respect to jurisdiction; the fact the

Society staff person who changed jobs and had contact with the TAC and the discipline investigation also gave evidence at the hearing before the Panel and the fact the Society's counsel painted her in a bad light at the hearing.

126 One is to assume a basic level of impartiality and common sense by Panel members, *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)* (1996), 18 B.C.L.R. (3d) 361 (B.C. C.A.) :

> In my view, those who have been appointed to serve on the discipline committee should be credited with enough intelligence to assume that they do not adopt everything they read (even in the profession's magazine), that they can distinguish between fact and commentary, that they will appreciate the gravity of the task they are asked to perform, and that they will approach that task with an open mind.

127 None of Ms. Harris' arguments about the Panel being improperly constituted, appearing to be biased or conducting the hearing improperly have merit. Ms. Harris' manner of leaving the hearing is telling. The Panel's comment to this effect does not suggest anything improper. The fact witnesses were not excluded is not improper particularly given that Ms. Harris did not request an exclusion of witnesses. Presumably the reason the chair of the Panel was changed was because Ms. Harris brought to the attention of the first chair that he may have a conflict of interest because one of his partners was acting for the long term disability insurance company she was in a law suit with. There is nothing unusual about his being replaced in light of Ms. Harris' concern with his involvement. The Panel's decision to proceed with the hearing after reading her Federal Court application does not create a reasonable apprehension of bias. Following this logic would result in adjudicative bodies regularly having to disqualify themselves as soon as they made a preliminary decision favouring one side or the other. There is nothing improper with the staff member involved in the investigation giving evidence at the hearing. How else can the Society present its case to the Panel? Ms. Harris was given the opportunity to cross examine her and present her side of the story.

128 There is also nothing wrong with the actions of the Society's counsel during the hearing. Ms. Harris complains that he painted "[Ms. Harris] in an unfavourable light". This is part of the somewhat adversarial system engaged by the hearing of a formal complaint. Ms. Harris could have tried to rebut this characterization had she continued to participate in the hearing before the Panel. It is not appropriate for Ms. Harris to voluntarily leave the hearing and then complain that the picture painted of her before the Panel was one sided. She had the opportunity to present her side of the case to the Panel and chose not to.

129 There is no evidence of any impropriety in the appointment of the Panel as alleged by Ms. Harris. I am satisfied the Panel was properly constituted in accordance with the *Act* and that it was composed of persons who had no previous involvement in the investigation into Ms. Harris' accounts. Subsection 31(5) of the *Act* provides:

> **Adjudication of formal complaint**
>
> (5) A subcommittee may hear and adjudicate any formal complaint referred to in subsection (4), but no subcommittee may hear or adjudicate a formal complaint which arises out of an investigation in which the subcommittee has participated.

130 Reading the transcript of the hearing satisfies me the Panel conducted the hearing in a fair manner. The following statement of the chair is typical of the evenhanded approach taken by the Panel. These comments were made after Ms. Harris continually attempted to give evidence while cross examining the TAC chair:

> And this is evidence that we will certainly hear and consider. You will have to at this point have faith that the Panel will deal with the matter in a fair and impartial manner. We are not coming in with any preconceived ideas of what's right and what's wrong; we're just here to hear — we're here to listen to the evidence and then make a decision based on that.

131 There is nothing in the record indicating the Panel did not live up to this.

132 Ms. Harris also argued that she was denied procedural fairness because the formal complaint was vague; it did not define "professional misconduct" or "reckless disregard." She argued that she was caught unaware by the Society's argument, made at the hearing before the Panel after she left, that her actions in not complying with the trust account regulations were intentional.

133 I am satisfied there was enough detail in the formal complaint to alert Ms. Harris to the charges she had to meet. The charges were relatively straightforward. I accept the Society's argument that Ms. Harris' intention was not raised for the first time at the Panel hearing because the allegation of "reckless disregard" in s. 2 of the formal complaint imports a state of mind. Reckless is defined as:

> marked by lack of proper caution: careless of consequences
>
> (Merriam Webster Dictionary)

134 Ms. Harris also argued that she was denied natural justice and procedural fairness because the Investigative Subcommittee did not give reasons why it recommended a formal complaint be laid against her and because the Panel's decision was inadequate.

135 I am satisfied the Investigative Subcommittee had no obligation to give reasons why it recommended that a formal complaint be made. The *Act* and regulations do not require that a report be given by the Investigative Subcommittee, distinguishing this case from *Broda v. Law Society (Alberta)* (1993), 7 Alta. L.R. (3d) 305 (Alta. Q.B.) .

136 The *Act* and regulations do not anticipate written reasons being given. Section 31(4) of the *Act* provides:

> **Powers at investigative level**
>
> (4) A subcommittee may at the investigative level
>
> (a) counsel the barrister or articled clerk involved;
>
> (b) caution the barrister or articled clerk involved;
>
> (c) counsel and caution the barrister or articled clerk involved;
>
> (ca) with the consent of the barrister or articled clerk involved and notwithstanding that a formal complaint has not been made, heard or adjudicated, order by resolution that the barrister or articled clerk receive a reprimand; or
>
> (d) lay one or more formal complaints on behalf of the Society against the barrister or articled clerk involved. (underlining mine)

137 The Investigative Subcommittee had an investigative function only. It laid the formal complaint in accordance with s. 31(4)(d). It did not make any final determination of whether Ms. Harris' actions constituted professional misconduct. That decision was left to the Panel to make after holding a hearing. Since the Investigative Subcommittee did not make any decision that finally determined Ms. Harris' rights and interests, it was not necessary that it give a reasoned decision.

138 I am also satisfied the reasons given by the Panel were adequate and did not give rise to a breach of natural justice. The Panel's decision was a reasoned one, a long way from the summary conclusion reached by the trial judge in *R. v. Sheppard*, [2002] 1 S.C.R. 869 (S.C.C.).

Error of fact

139 The standard of review with respect to the question of whether the Panel erred in finding as a fact that Ms. Harris' actions demonstrated continued reckless disregard for the Society's trust account regulations is whether it was clearly wrong, *Solicitor "Y" v. Barristers' Society (Nova Scotia)* (N.S. C.A.), N.S.R. (2d) 239, para 39, following *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) and *Pavey* , supra, paras. 12 and 13.

140 It was within the Panel's competence to accept the facts admitted by Ms. Harris with respect to the charges set out in 1(a) to (d) of the formal complaint, to find additional facts based on the evidence before it with respect to the charges set out in 1(e) and 2 of the formal complaint and to draw inferences therefrom.

141 I have reviewed the documentary evidence that was before the Panel in some detail earlier in this decision. A review of that evidence and the transcript of the proceedings before the Panel satisfies me the Panel was not clearly wrong in concluding that Ms. Harris demonstrated a continued reckless disregard for the Society's trust account regulations as set out in section 2 of the formal complaint.

142 The Panel had before it the exceptions to Ms. Harris' first Form 20 and her explanation for them. She indicated she did not have time to learn or follow these regulations. This can be interpreted as disregard. In its decision the Panel commented on this:

> . . . It is clear that she should not have commenced her practice without a clear understanding of the Regulations affecting the operation and record-keeping required for both general accounts and trust accounts.

143 The Panel also had before it evidence that Ms. Harris failed to file some of her monthly trust reconciliations on time and failed to provide her complete records for her general account for over six months, at a time when the TAC had made it abundantly clear to her that it was concerned with her accounting records. It had evidence that there were still problems with her accounts a year after these problems were brought to her attention. There were comments in her correspondence about her accounting problems being "of an administrative nature", "the attention to bureaucracy", "assuming I don't get disbarred for my lousy record keeping." She suggested in one letter she may give up the practice of law rather than comply. Her correspondence suggested the accounting was unimportant unless it was related to defalcation and that it was a nuisance for her to have to comply with it as long as she was not misappropriating trust money. Ms. Harris made her annoyance with the Society and its investigation clear in her correspondence.

144 The position of minimizing rather than complying, taken by Ms. Harris was also evident at the hearing before the Panel as referred to in ¶ 68 ante.

145 The Panel also had the evidence of the three Society witnesses who indicated that from their contact with Ms. Harris during the investigation they felt she showed a reckless disregard for the trust account regulations. This evidence was referred to in paras. 61 to 64 ante.

146 The Panel noted that Ms. Harris' aggressive manner in responding to the Society's requests exacerbated the problem as did her leaving the hearing without presenting her side of the case:

> It appears to the Panel that the approach taken by Ms. Harris to the investigation of the complaint may have created more problems and may have resulted in something which began as a less serious matter becoming much larger in the view of the Trust Accounts Committee; the Discipline Committee; and the Society Staff. The responses provided by Ms. Harris to communications from the Society may have been misinterpreted by the staff or the Committees.
>
> In the view of the Panel, it is unfortunate that the matter could not have been resolved at an earlier stage of the proceedings. The Panel is also concerned that it did not hear evidence from Ms. Harris in response to the case presented by the Society as this may have been an opportunity to clarify some issues.

147 It was not improper for the Panel to take into consideration when determining whether there was reckless disregard and professional misconduct Ms. Harris' manner of responding to the Society; her "attitude" as it has been called.

148 With this evidence before it and particularly with no evidence from Ms. Harris that may have clarified the issues, I am satisfied the Panel's decision that Ms. Harris demonstrated a reckless disregard for the Society's trust account regulations is not clearly wrong and hence should not be interfered with by this Court.

Error Re Professional Misconduct

149 The last issue is whether the Panel's decision that Ms. Harris' actions constitute professional misconduct is unreasonable. Ms. Harris argues that the Society has not been able to point to another case where breach of the trust account regulations alone, without more such as defalcation, has been found to be professional misconduct. She argues without such precedent the Panel erred in finding her conduct was professional misconduct.

150 Ms. Harris' argument that the Panel cannot find professional misconduct without a precedent that is on all fours with her situation is without merit.

151 As stated by Sara Blake in *Administrative Law in Canada*, 2 nd ed. (1997 Butterworths Canada Ltd.) at page 113:

> A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances in the field it governs. The principle of stare decisis does not apply to tribunals. A tribunal may consider previous decisions on point to assist it in deciding the appropriate order to make in the case at hand. If circumstances are similar, it may find an earlier decision persuasive. However, it should not treat the earlier decision as binding upon it.

152 In any event, while we were not provided with a case where professional misconduct was found on actions similar to those of Ms. Harris without more, Ms. Harris provided us with cases where professional misconduct was agreed to or found where the lawyer failed to keep her or his accounts in accordance with the trust account regulations where there was no defalcation or dishonesty, *Nova Scotia Barristers' Society v. Tippett-Leary* (26 May 1989)(unreported) (Discipline Subcommittee) and *Nova Scotia Barristers' Society v. Elman*, [1993] L.S.D.D. No. 175. Failure to comply with the regulations can lead to problems in a busy practice such as those encountered in *Elman* where an audit of the trust account was needed to prove that no client's funds were taken and those encountered in *Nova Scotia Barristers' Society v. Rideout*, (1994) The Discipline Digest, Issue No. 7, p. 2. of unintentionally overdrawing specific trust accounts.

153 Counsel for the Society argued in his factum that professional misconduct is whatever the Panel says it is. I disagree. This Court will defer to the finding of the Panel only so long as its decision is reasonable. The standard of review with respect to Ms. Harris' argument that the Panel erred in law in finding that her actions constituted professional misconduct is reasonableness simpliciter. If the Panel's decision is unreasonable, this Court may intervene. *Southam Inc.* , supra para 54, *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), paras. 27-42, *Solicitor "Y"* , supra, paras. 11 and 14

154 Also as stated in *Pavey* , supra:

> [17] The **Act** provides a mechanism to protect the public, the profession and lawyers when complaints of professional misconduct are made (**Markus**, supra).. This is an integral part of self governance. Therefore, a degree of deference to a decision of a discipline subcommittee is in order as the Legislature intended that such matters be resolved by the Barristers' Society in accordance with the **Act** and the **Regulations**, subject to this Court's power to intervene.

155 It was within the Panel's competence to determine whether Ms. Harris' actions constituted professional misconduct. Subject to ensuring its decision is reasonable, this Court is to defer to the decision of the Panel as to whether Ms. Harris' actions constitute professional misconduct.

156 In *Pearlman v. Law Society (Manitoba)* (1988), 51 Man. R. (2d) 151 (Man. Q.B.) , appeal dismissed [1991] 2 S.C.R. 869 (S.C.C.), the court states:

> As for the jurisdiction of the Benchers to hear the disciplinary proceedings, I note that courts have recognized that Benchers are in the best position to determine issues of misconduct and incompetence. For example, in Re Law Society of Manitoba and Savino (1983), 1 D.L.R. (4th) 285 (Man. C.A.) the Court of Appeal said (at pp. 292-93):
>
> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.
>
> As noted above, Jewers J. turned his mind to the jurisdictional question, identified the threshold test to be applied (viz. whether the allegations, if proved, could reasonably be regarded as professional misconduct), and held that the Benchers were properly seized with the disciplinary hearings. In doing so, Jewers J. acted correctly in my view...

157 There is no single definition of professional misconduct. In *Words & Phrases*, Vol. 5, J-N (Scarborough, Ont: Thomson, Carswell) at page 5-755 "misconduct" is defined in an old English case:

> What is called misconduct has been defined in a number of cases referred to in Cordery's Law of Solicitors, 3rd ed., pp. 176 et seq., but to which it is unnecessary to refer in detail, the result of them is that, speaking generally, to constitute misconduct the misconduct must be either criminal or fraudulent. Mere delay in paying over a client's money is not sufficient. Misappropriation of it is. Conduct amounting to negligence, even gross, is not misconduct. It must be shewn that the conduct is dishonourable to the solicitor as a man and dishonourable in his profession. See per Lord Esher, M.R., in the case of a solicitor, In re Cook (1889) 24 L.J. Notes of cases 237.

158 Since 1889 the range of what can constitute "professional misconduct" has broadened beyond fraudulent, criminal and dishonourable. This broadening is referred to in *Dunne v. Law Society (Newfoundland)* (2000), 191 Nfld. & P.E.I.R. 129 (Nfld. T.D.) :

> 39 As authority [for its argument that a solicitor's actions need not be disgraceful or dishonourable to constitute professional misconduct], counsel for the Law Society relies on the following passages from McKenzie, Lawyers & Ethics:
>
> > Traditionally, professional misconduct has been defined as "conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency". Moral turpitude was an essential component. Mere negligence was not sufficient.
> >
> > Today in jurisdictions in which the Law Society's governing statute either defines professional misconduct or authorizes the profession to pass specific rules of professional conduct and the profession does so, this definition must be qualified in two respects. First, it is now clear that practitioners can be found guilty of professional misconduct for violating regulatory requirements and rules of professional conduct that impose specific duties, whether or not such violations could be said to be disgraceful or dishonourable. Lawyers are frequently reprimanded, for example, for failing to respond promptly to communications from the law society and for failing to file required forms and annual reports of public accountants. (p. 26 - 22)
> >
> > . . . . .
> >
> > Not every breach of the rules of professional conduct is professional misconduct. Conversely, not every act of professional misconduct is specifically prohibited by the rules. *Fan v. Law Society* (British Columbia (1977), 77 D.L.R. (3d) 97 [at 102] (p. 26 — 30). (underlining mine)

159 I am satisfied the Panels' decision is reasonable. There is an evidentiary foundation for it as can be seen from a review of the facts. There is logic to the process by which it came to its decision as disclosed by its written reasons. The Panel's decision can be found at *Nova Scotia Barristers' Society v. Harris* (2003), [2004] L.S.D.D. No. 1 (N.S. B.S. Disc. S. Comm.).

160 The Society has been given the authority by the Legislature to govern the legal profession. This encompasses the ability to create and implement procedures to try to ensure lawyers deal appropriately with money the public gives them to hold in trust. The Society has done this by passing the trust account and discipline regulations, among other things. These regulations apply to all Nova Scotia lawyers. There was evidence before the Panel that there is a positive correlation between the manner in which lawyers adhere to these trust account regulations and defalcations. Preventing defalcations is in the interest of the public who could lose their money, and in the interest of lawyers who are required to contribute to the Reimbursement Fund established by s. 40 of the *Act* to partially reimburse members of the public whose money is taken by defalcating lawyers. If lawyers respond to inquiries and requests by the Society with respect to their accounts as Ms. Harris did, the Society's ability to detect possible problems would be severely hampered.

161 I want to be clear however that on different facts a similarly constituted panel may decide that certain breaches of the Society's trust account regulations do not constitute professional misconduct. That decision would not necessarily be unreasonable since each case depends on the facts and the reasoning of the decision. As noted by the Panel in its decision, if Ms. Harris had remained at the hearing and presented her side of the story, she may have been able to "clarify some issues". It is trite to say that the nature of the evidence before a panel is often determinative.

162 One other argument Ms. Harris made was that the Panel erred by not finding it had lost jurisdiction to hear the formal complaint because of delay. She has not satisfied me that the Panel erred in this regard.

163 There was evidence before the Panel that the Society did not pursue Ms. Harris' investigation to completion initially because of the outstanding criminal charges against her, and later because it did not know where to contact her. While Ms. Harris strongly believes the delay was intentional and not caused by the Society's inability to get in touch with her, there is nothing in the record to support this.

164 Accordingly I would dismiss the appeal with costs in the amount of $2,500 plus disbursements, payable by Ms. Harris to the Society.

Appeal dismissed.

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2003 CAF 133, 2003 FCA 133
Federal Court of Canada — Appeal Division

Hutchinson v. Canada (Minister of Environment)

2003 CarswellNat 2987, 2003 CarswellNat 679, 2003 CAF 133, 2003 FCA 133, [2003] 4 F.C. 580, [2003] F.C.J. No. 439, 121 A.C.W.S. (3d) 914, 2004 C.L.L.C. 230-008, 239 F.T.R. 316 (note), 25 C.C.E.L. (3d) 206, 302 N.R. 66, 47 C.H.R.R. D/12, 50 Admin. L.R. (3d) 255

Honourable Christine Stewart in her capacity as Minister of Environment Canada, Appellant and Charlotte Hutchinson, Respondent

Stone, Rothstein, Pelletier JJ.A.

Heard: November 4, 2002
Judgment: March 14, 2003
Docket: A-737-00

Proceedings: reversing *Hutchinson v. Canada (Minister of Environment)* (2000), 2000 CarswellNat 2618, (sub nom. *Hutchinson v. Honourable Christine Stewart)* 2000 C.L.L.C. 230-044, 5 C.C.E.L. (3d) 110, 195 F.T.R. 269, 39 C.H.R.R. D/124 (Federal Court of Canada — Appeal Division)

Counsel: *Martin C. Ward* and *Kathleen McManus*, for appellant
Anne S. Derrick, for respondent

Subject: Employment; Public; Constitutional; Civil Practice and Procedure; Human Rights

Headnote

Employment law --- Public servants — Judicial review of administrative actions — Procedural fairness of board or commission — Failure to comply with procedural requirements

Procedural fairness is not violated when letter submitted by employer to investigator is not forwarded to public service employee who initiated human rights complaint — To extent that information in letter was not included in investigation report and was not otherwise before human rights commission, right to respond did not arise — There was no reason to conclude that simple possession of Public Service Staff Relations Board decision by investigator gave rise to duty of disclosure and right to respond — Investigator properly concluded that decision was irrelevant to issue to be decided and did not include it in material forwarded to commission — No error was identified that would have justified interference by Court of Appeal based on adequacy of investigation, and it was reasonable to find that transaction between employer and employee did not disclose adverse treatment.

Human rights --- Practice and procedure — Judicial review — Grounds — General

Procedural fairness is not violated when letter submitted by employer to investigator is not forwarded to public service employee who initiated human rights complaint — To extent that information in letter was not included in investigation report and was not otherwise before human rights commission, right to respond did not arise — There was no reason to conclude that simple possession of Public Service Staff Relations Board decision by investigator gave rise to duty of disclosure and right to respond — Investigator properly concluded that decision was irrelevant to issue to be decided and did not include it in material forwarded to commission — No error that would have justified interference based on adequacy of investigation was identified, and it was reasonable to find that transaction between employer and employee did not disclose adverse treatment.

Human rights --- Statutory exemptions — Duty to accommodate — Undue hardship

Procedural fairness is not violated when letter submitted by employer to investigator is not forwarded to public service employee who initiated human rights complaint — To extent that information in letter was not included in investigation report and was not otherwise before human rights commission, right to respond did not arise — Based on investigation

report, it was reasonable to find that transaction between employer and employee, taken as whole, did not disclose adverse treatment — It was open to commission, given evidence, to find that some of employer's suggested alternative work locations were reasonable — Commission could reasonably have concluded that employer's response to employee's circumstances was such that inquiry into complaint was not warranted.

A public service employee was diagnosed with "multiple chemical sensitivity" or "environmental illness." In spite of the employer's attempts to accommodate her illness, including suggestions for alternative work locations, the employee continued to experience health problems associated with her employment. The employer rejected a renovation of the existing government space because it was not a guaranteed solution and refused to allow the employee to rent non-governmental space for safety and liability reasons. After declining to work from home and to perform duties because her workplace was unsafe, the employee was dismissed for being unable to perform the duties of her job. The employee filed a complaint with the provincial Human Rights Commission, claiming workplace harassment, on the basis of disability. Based on an investigator's report, the commission declined to appoint a tribunal, saying that the employee's allegations were unfounded and that the employer had provided "reasonable accommodation" for her disability.

The employee successfully applied for judicial review. When her complaint was dismissed, the employee learned that, without her knowledge, the employer had sent a letter to the investigator. The reviewing court found that the information in the letter would have affected the outcome of the complaint. The investigator's failure to act fairly toward the employee constituted a breach of procedural fairness. The employer had likewise submitted to the investigator the decision of the Public Service Staff Relations Board, which was critical of the employee, after the applicable deadline, but did not forward a copy to the employee. The employee's inability to comment on the adverse decision amounted to a breach of procedural fairness. The investigator's report was not neutral, because previous complaints of the employee, referenced in the report, were not relevant to whether she had a valid human rights complaint. The Minister of Environment Canada appealed.

Held: The appeal was allowed.

The reviewing court erred in finding that the letter in question should have been passed on to the employee, allowing her to respond. To the extent that the investigation report disclosed information contained in the letter, the employee had exercised her right to respond. To the extent that information in the letter was not contained in the investigation report and was not otherwise before the commission, the right to respond did not arise. The investigator properly concluded that the board's decision was irrelevant to the issue to be decided and did not include it in the material forwarded to the commission. There was no reason to conclude that simple possession of the decision by the investigator, and nothing more, gave rise to a duty to disclose and a right to respond.

With respect to the evenhandedness of the investigation report, the investigator's refusal to forward the board's decision to the commission was the best evidence of the investigator's attitude. The disclosure of the numerous complaints made by the employee to the Public Service Commission would have been prejudicial only if the commission had inferred that the complaints were either excessive or unjustified. Nothing in the investigation report suggested that the investigator had communicated that view. There was no reason to believe that the commission did not understand that the employee had a right to make those complaints and that they had nothing to do with her human rights complaint.

The number of complaints was significant in light of the employee's allegation that it was unfair for the commission to have dealt with the Minister through a person who was the subject of an unresolved harassment complaint. No duty to the employee was breached, however, in the Minister's choice of contact person for dealing with the commission.

No error that would have justified interference on the basis of the adequacy of the investigation was identified. The question of the proper training of the investigator was for the commission. The court in the present appeal could address only the fruits of that training in the form of the process followed and the report produced. It was clear that the investigator had understood the nature of the condition of the employee and had given her the opportunity to respond to the Minister's comments and to the investigation report.

Based on the investigation report, the transaction between the Minister and the employee, taken as a whole, did not disclose adverse treatment. Some of the Minister's suggested alternative work locations, given the evidence, were reasonable. The commission could reasonably have concluded that the Minister's response to the employee's circumstances was such that an inquiry into the complaint was not warranted.

APPEAL by Minister of Environment Canada from judgment reported at 2000 CarswellNat 2618, *(sub nom. Hutchinson v. Honourable Christine Stewart)* 2000 C.L.L.C. 230-044, 5 C.C.E.L. (3d) 110, 195 F.T.R. 269, 39 C.H.R.R. D/124 (Fed. T.D.), granting application by employee for judicial review of decision by Canadian Human Rights Commission dismissing her complaints of discriminatory practices filed against former employer.

The judgment of the court was delivered by *Pelletier J.A.*:

1 In reasons reported at [2000] F.C.J. No. 1764, 195 F.T.R. 269 (Fed. T.D.), the applications judge allowed the respondent's application for judicial review of the Canadian Human Rights Commission's dismissal of her complaint, when he found that she had been denied procedural fairness in the course of the Commission's investigation. This appeal of that decision raises questions of procedural fairness and the content of the duty to accommodate.

The Respondent's Employment

2 Charlotte Hutchinson (the "respondent") began working for the Federal Public Service in 1971. In March 1985 she was transferred to the Department of the Environment (the "appellant"), where she became the Personnel Manager for the Conservation and Protection Branch, Atlantic Regional Office. Her work location was on the 4th floor of the Queen Square Building in Dartmouth, Nova Scotia.

3 Prior to April 1987, the respondent experienced symptoms which included constant headaches, fatigue, gastrointestinal distress, mental confusion and extreme sensitivity to odours. Exposure to odours precipitated symptoms such as nasal stuffiness, soreness of the throat and nose, swelling of the mucous membranes, mental and physical fatigue and difficulty breathing.

4 This led to a period of sick leave commencing in April 1987, followed by a period of leave without pay commencing in December 1987. On July 12, 1988, she applied for and received long-term disability benefits. On her application for long-term disability benefits, the respondent identified "burnout, stress and job incompatibility" as the reasons for the leave. The respondent was away from work from April 1987 until October 1990, with the exception of a short period in which she participated in a French language training course followed by an attempt to return to work, which ended unsuccessfully after one day.

5 In June 1988, the respondent was diagnosed by her physician, Dr. Beresford, as suffering from environmental illness and burnout, though it appears that this was not communicated to the appellant at that time.

6 In August 1990, Health Canada conducted a "fitness for work" assessment of the respondent. This assessment indicated that the respondent qualified as a "class A" fit for work, i.e., she was fit for work without limitations. However, the assessment did state that it would be advisable that she avoid air conditioning, tobacco smoke, and chemical odour.

7 The respondent indicated to the appellant that she could not return to her previous responsibilities. She was then offered a position as an Environmental Engineering Technician, which she accepted. This position carried fewer responsibilities and was less stressful but she continued to be paid at her former salary level. It required her to perform field work, including work at the Department's warehouse and its laboratory, and to visit industrial sites, such as oil refineries and pulp and paper mills. The respondent began work in this capacity in October 1990, once again working out of the Queen Square Building. She worked happily and productively in this position until 1995.

8 In January 1993, the respondent's position was made seasonal, at her request. She was therefore laid off for approximately four months at the start of 1993, 1994 and 1995.

9 In May 1995, the respondent returned from her seasonal layoff only to discover that she was experiencing an even greater sensitivity to environmental factors. Perfume worn by the other employees, and other scents, seemed to aggravate her environmental illness. In an attempt to accommodate the respondent, the appellant undertook various efforts to ameliorate the working conditions in the Queen Square Building. Management discussed potential solutions

49 It is clear from *Madsen* and *Mercier*, that the obligation to disclose submissions arose in the context where those submissions were to be placed before the Commission. The underlying principle was established ten years earlier in *Radulesco*. There is nothing in any of these cases which would support the proposition that every exchange between an investigator and an interested party must be disclosed to the other party. The right to know the case to be met and to respond to it arises in connection with material which will be put before the decision maker, not with respect to material which passes through an investigator's hands in the course of the investigation.

50 Consequently, the learned applications judge erred when he held that the October 22, 1997, letter ought to have been passed on to the respondent so as to allow her to respond. To the extent that the Investigation Report disclosed information contained in the letter, the respondent amply exercised her right of response. To the extent that information in the letter was not contained in the Investigation Report and was not otherwise before the Commission, the right to respond did not arise.

51 The same is true of the PSSRB decision, which did not come into the investigator's hands until after the Investigation Report was completed. The investigator concluded, and rightly so, that the decision was irrelevant to the issue to be decided and did not include it in the material which was forwarded to the Commission. The PSSRB decision is critical of the respondent, to the point where it would have been unfairly prejudicial to the respondent to place it before the Commission. The investigator displayed mature judgment in simply putting the decision aside.

52 The respondent argues that it is precisely because the decision is so critical of her that she ought to have been given the chance to respond. In my view, this argument leads nowhere since the decision was not placed before the Commission. The decision is the result of an adjudicative process, which the respondent herself initiated. She is understandably disappointed in the result. But that disappointment does not give rise to a right to reargue the entire issue with the investigator under the guise of responding to the appellant.

53 The learned applications judge held, on the authority of *S.E.P.Q.A.*, that possession of the decision by the investigator was possession by the Commission, thereby giving rise to a duty to give the respondent a chance to respond before her complaint was disposed of by the Commission. But, as was pointed out by MacGuigan J.A. in *Pathak*, the fact that the Commission may be found to be in possession of a document so as to be liable to produce it when required to does not mean that the document was before the Commission in its deliberations:

> [para. 21] But that is not in my view to say that for all purposes the persons of the investigator and the Commission are to be merged. All the documents were in the Commission's custody and of easy access, but it could not be said that they were actually before the Commission when it made its decision. To hold otherwise would be to create a limitless legal fiction merging the mostly separate identities of the investigator and the Commission.

54 Consequently, I can see no basis for the notion that the investigator's possession of the decision, without anything further having been done with it, gives rise to a duty of disclosure and a corresponding right to respond.

55 Insofar as the evenhandedness of the Investigation Report is concerned, the best evidence of the investigator's attitude is her refusal to forward the PSSRB decision to the Commission. The reference to 14 complaints to the Public Service Commission, which the applications judge found objectionable, is a purely factual reference made in the context of a summary of the respondent's employment history. The applications judge's conclusion as to lack of neutrality suggests that it was not the fact that the complaints were irrelevant which troubled the applications judge, but rather his view that disclosure of the complaints was prejudicial to the respondent. But it is only prejudicial if one infers from the number of complaints that they were either excessive or unjustified. There is nothing in the body of the Investigation Report which suggests that the investigator communicated such views. As for the members of the Commission, I have no reason to believe that they did not understand that the respondent had a right to make those complaints and that they had nothing to do with her human rights complaint.

2014 ONSC 3141
Ontario Superior Court of Justice

Robotham v. WestJet Airlines

2014 CarswellOnt 7043, 2014 ONSC 3141, 241 A.C.W.S. (3d) 4

Alton A. Robotham, Plaintiff and Westjet Airlines, Defendant

Spence J.

Heard: April 7, 2014; April 8, 2014; April 9, 2014; April 10, 2014
Judgment: May 26, 2014
Docket: CV-12-448628

Counsel: Alton A. Robotham, Plaintiff, for himself
Michael Dery, Kathryn McGoldrick, for Defendant

Subject: Civil Practice and Procedure; Contracts; Public; Torts

Headnote

Transportation --- Aviation and aeronautics — Negligence — Miscellaneous

Passenger, who was Canadian citizen, boarded plane in Toronto for Jamaica, using Canadian Citizenship Card but not passport — Upon attempting to leave, passenger was not permitted to board plane without passport, although he provided other identification — Passenger obtained Jamaician passport after two weeks and ultimately returned to Canada — Passenger brought action against airline in negligence — Action dismissed — Passenger did not have passport and was not able to meet requirements — to prove he was Canadian citizen — Passenger was therefore not entitled to travel to Canada and airline was entitled to refuse to allow him to board — Airline acted reasonably — Airline fulfilled requirements under contract and there was no other basis for negligence — Airline had concern regarding travel using false documents — Airline was following direction of Canadian Border Services Agency, and attempting to ensure compliance with its obligations under Immigration and Refugee Protection Act — Refusal by airline to allow passenger to board his return flight related to rights and obligations relating to air travel to destination in Canada and was not determination by officer under immigration and Refugee Protection Act of right to enter Canada on arrival — Airline did not violate Identity Screening Regulations under Aeronautics Act.

ACTION by airline passenger in negligence for refusal to allow passenger to board return flight.

***Spence J.*:**

1 Mr. Alton A. Robotham (the "Plaintiff") claims for damages arising from the breach by WestJet Airlines (the "Defendant" or "WestJet") of its contract with the Plaintiff for his return trip to Toronto on September 25, 2011 when WestJet refused to allow the Plaintiff to board the flight.

2 The Plaintiff also claims for damages in negligence on the ground that by refusing to transport him, WestJet failed to discharge the standard of care that applied in respect of its duty to the Plaintiff.

3 The Plaintiff pleads that by refusing to transport him, WestJet violated s. 1 of the Identity Screening Regulations, SOR/2007-82 under the *Aeronautics Act*, R.S.C., 1985, c. A-2. The Plaintiff does not plead that WestJet owed a duty of care to him to comply with the Regulations.

Background Facts

4 The Plaintiff is a Canadian citizen who carries on business in the Toronto area.

5 On September 18, 2011 the Plaintiff attended at Toronto Pearson International Airport, Terminal 3 to board WestJet Flight 2702. At the ticket counter, the Plaintiff was requested to provide his ticket and identification. The Plaintiff presented his e-ticket and Canadian Citizenship Card which was accepted and he was given his boarding pass. The Plaintiff arrived in Montego Bay, Jamaica, without incident.

6 The Plaintiff's flight was the first part of a trip to Jamaica with a return ticket to Toronto one week later. The Plaintiff had not tried to find out what travel documents he would need to complete his trip.

7 On September 25, 2011, the Plaintiff went to the WestJet counter in the airport in Jamaica to access his return flight to Toronto. The WestJet counter representative requested the Plaintiff's ticket and identification. The Plaintiff presented his e-ticket and Canadian Citizenship Card. The WestJet counter representative called the WestJet Duty Manager to verify that the Plaintiff's identification was acceptable. The Duty Manager asked the Plaintiff for his passport and the Plaintiff said that he did not have one. The Plaintiff presented his Ontario Driver's License, his Ontario Health Insurance Plan card and his Social Insurance Number card.

8 The WestJet Duty Manager told the Plaintiff that he would have to obtain a passport before he would be permitted to board the plane. The Plaintiff told the WestJet Duty Manager and counter representative that he had a contract that he might lose if he did not return to Toronto by a specific date and that he would sue WestJet if he lost the contract. The Duty Manager was adamant that the Plaintiff would not be allowed on WestJet Flight 2703 to Toronto and that he had to obtain a passport before he would be allowed to board. The Duty Manager subsequently phoned Toronto to keep the Plaintiff's flight status valid so that it could be activated when the Plaintiff re-booked his flight. The Plaintiff received a bus card from the Duty Manager with two phone numbers to call when the Plaintiff was ready to re-book his flight.

9 Following WestJet's refusal to transport him on September 25, 2011, the Plaintiff did not attempt to determine whether another airline would transport him to Toronto without a passport. He did not take any steps to obtain an emergency Canadian passport.

10 After spending almost two weeks more in Jamaica, the Plaintiff obtained a Jamaican passport and re-booked his flight via the Internet to return to Toronto on October 9, 2011 via WestJet Flight 2703. On returning to the WestJet counter on October 9, 2011 the Plaintiff was requested to present his ticket and identification. The Plaintiff told the counter representative that he had booked his ticket via the Internet and presented his Jamaican passport and Canadian Citizenship Card. The Duty Manager who had been on duty September 25, 2011 was present that day. The Duty Manager approved the Plaintiff's documents and the Plaintiff was permitted to return to Toronto on his scheduled flight.

11 The Plaintiff claims that WestJet breached the contract between the Plaintiff and WestJet by allowing the Plaintiff to board WestJet Flight 2702 on September 18, 2011 with his Canadian Citizenship Card and subsequently not allowing the Plaintiff to board WestJet Flight 2703 on September 25, 2011 with the same identification.

Damages

12 The Plaintiff says that at the time he arranged to fly to Jamaica he was engaged in making what he calls a "career change" from the business he had previously carried on of pest control and extermination to a new business of home design and construction on which he had recently embarked with his first project — the design and construction of a house at 61 Denvale Road in Toronto. The construction work on the house was underway when he left Toronto for a contemplated 7-day trip to Jamaica. He says that the refusal of WestJet to carry him on the return flight resulted in his not being able to return to Canada until October 9, 2011; *i.e.* two weeks later than expected.

13 In the Statement of Claim the Plaintiff claims for damages consisting of (1) the earnings he would have earned to complete the project at 61 Denvale Road; (ii) the amounts that are payable by him to subcontractors for their work on the project; and (iii) his foreseeable losses as a direct result of the loss of the Denvale project in respect of his experience and competence and also to his website interactive tutoring and promotion of his business.

CANADIAN TRANSPORTATION AGENCY

Decision No. 360-R-2014

October 1, 2014

COMPLAINT filed by Canadian Canola Growers Association against Canadian National Railway Company and the Canadian Pacific Railway Company pursuant to sections 26, 37 and 116 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

File No.: T7375-3/14-02841

INTRODUCTION

[1] On May 26, 2014, the Canadian Canola Growers Association (CCGA) filed a complaint with the Canadian Transportation Agency (Agency). CCGA submits that the Canadian National Railway Company (CN) and the Canadian Pacific Railway Company (CP) have failed to meet their level of service obligations in relation to the receiving, carrying and delivering of cereal, pulse and oilseed crops from elevators in western Canada to port terminals and other North American destinations.

[2] CCGA is a not-for-profit corporation comprised of five provincial associations representing canola growers. In a submission dated June 23, 2014, CCGA confirmed that it is the sole applicant in these proceedings and that the five member associations are not parties to the application.

[3] On July 4, 2014 both respondents filed motions to dismiss the complaint on, among other things, the grounds that the applicant does not present a justiciable case. The Agency determined that it was in the interests of natural justice that a decision be rendered first on those motions.

[4] The respondents seek to have the application struck in its entirety. Their motions to dismiss have been filed pursuant to sections 22 and 32 of the *Canadian Transportation Agency General Rules*, SOR/2005-35.

[5] CN raised the following:

1. CCGA does not have standing to file the complaint under section 116 of the CTA;
2. The complaint does not disclose a justiciable complaint;

entered the winter months with a substantial backlog of demand for rail service from the grain industry;

- As of February 18, 2014, the railway companies, including CN, were approximately 51,000 cars behind on outstanding orders. As of April 1, 2014, that number was 65,000 cars. CCGA estimates that this backlog represents approximately 5.9 million tonnes of grain that could have been shipped and for which railcars have not been supplied by CN and CP;
- Dwell times for loaded railcars at elevators also increased, sometimes reaching as high as 20 days. Such delay creates logistical issues for the elevator in that it has to work around loaded cars when additional empty cars arrive on site.

[38] However, CCGA makes no distinction between CN and CP.

[39] When asked by CN to identify how specifically CN has failed to fulfill its service obligations CCGA responded that CN has failed to fulfill its statutory obligations by:

a. Failing to provide suitable and adequate accommodation for the carriage of grain in the current crop year;
b. Failing to receive, carry and deliver grain without delay and with due care and diligence;
c. Failing to furnish and use all proper appliances, accommodations and means necessary for receiving, loading and carrying Grand; and
d. Failing to move grain in an expeditious, timely and efficient manner.

[40] The jurisprudence dictates that the applicant bears the burden of enunciating in the pleadings the facts upon which they rely for each cause of action alleged. In other words, the applicant's legal conclusion that the respondents failed to meet their statutory obligations must be supported by the necessary factual basis. The allegation must be more than bare allegations of wrongdoing.

[41] There is a distinction between pleadings of fact and pleadings of legal conclusion. This distinction is explained by Justice Conrad, speaking for the majority of the Alberta Court of Appeal in *Tottrup v. Alberta* (*Minister of Environmental Protection*), 2000 ABCA 121, at paragraph 11:

> […] it is not the allegation of a duty at law that is critical, but the facts alleged supporting such a duty. For example, a statement of claim alleging only that "A" breached a duty owed to "B" thereby causing damage does not, in my view, disclose a cause of action. Pleadings are allegations of fact and, in my view, where negligence is alleged, that allegation must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted. On a motion to strike it is the allegations of fact that must be examined to determine whether a cause of action exists.

[42] The Agency is of the opinion that CCGA's application presents no material facts or evidence as to which car orders were not filled, or when or why the car orders were not filled or how CN's or CP's level of service obligations have been breached with respect to these car orders.

[43] Furthermore, CCGA did not submit any material facts or evidence setting out whether all of the car orders were requested from CN or CP or some other railway company providing service. CCGA does not submit material facts or evidence relating to dwell times or its actual cause. CCGA lacks material facts to support its claim that the performance of CN and CP has been sub−optimal, creating problems for terminal, producers and grain companies.

[44] Mere statements to the effect that: (1) upwards of 65,000 open car orders have not been filled; (2) dwell times for loaded railcars at elevators increased to sometimes as high as 20 days; and (3) CN's and CP's performance has been sub-optimal, thus creating problems for terminals, producers and grain companies are not sufficient to establish a *prima facie* case. There has to be some link between the allegations and the material facts. CCGA provides no details about any of the events that comprise the allegations listed. The language it uses is vague and general.

[45] Furthermore, the Agency notes and agrees with CP's statement that CCGA's complaint provides no specific information connecting the matters raised to any failure by CP to meet its common carrier obligations. The Agency finds that the allegations are no more specific with respect to CN. As a result, the Agency finds that the complaint can neither be responded to by CP or CN nor determined by the Agency.

[46] CCGA states that the Agency cannot dismiss a complaint because the complainant is unable to particularize the degree of failure as stated in Decision No. LET-R-171-2006. In this regard, the Agency notes that, unlike the present case, the Normerica case concerned particular movements under one bill of lading for CN/BNSF and included distinct incidents of a perceived breach.

[47] As such, the Agency is of the opinion that CN and CP cannot adequately respond to the allegations in CCGA's complaint because they are too vague.

[48] Furthermore, the Agency is of the opinion that CCGA fails to link the allegations in its complaint to specific railway company breaches in their level of service obligations, which constitute necessary material facts. It is not sufficient for a party to simply state its conviction that there has been a violation of sections 113 to 116 of the CTA. Allegations must be set out with supporting facts.

[49] The Agency finds that CCGA's complaint discloses no reasonable cause of action. The Agency therefore dismisses CCGA's complaint on the basis that CCGA has not presented a case that can be adjudicated.

[50] In light of the foregoing, the Agency finds that it is not necessary to address the other grounds raised in the respondents' motions to dismiss.

CONCLUSION

[51] The Agency allows the motions, in part, and dismisses CCGA's complaint.

CANADIAN TRANSPORTATION AGENCY

Letter Decision No. 2014-10-03

Redacted version

October 3, 2014

Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to section 116 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

Case number: 14-02100

Introduction

Application

[1] On April 14, 2014, Louis Dreyfus Commodities Canada Ltd. (LDC) filed a level of service application with the Canadian Transportation Agency (Agency). LDC submits that the Canadian National Railway Company (CN) failed to fulfill its level of service obligations with respect to LDC's elevator facilities at Glenavon, Saskatchewan (Glenavon); Aberdeen, Saskatchewan (Aberdeen); Joffre, Alberta (Joffre); and Lyalta, Alberta (Lyalta) (LDC's Facilities).

[2] LDC requests that the Agency order CN to provide service to each of LDC's Facilities in accordance with the terms specified in the confidential contract between LDC and CN dated redacted (Confidential Contract). LDC also requests that the Agency order CN to fulfill its level of service obligations in such a manner and within such time or during such period as the Agency deems expedient having regard to all proper interest, and that the particulars of the obligations to be fulfilled be specified by the Agency.

Issue

[19] The level of service provisions must be read in light of the national transportation policy, which addresses the need for a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment at the lowest total cost. In order to advance the national transportation policy's objective of enabling competitiveness and economic growth in both urban and rural areas throughout Canada, the provisions must be read in a manner that ensures that the Canadian economy is not negatively affected by the practices or preferences of railway companies where they unduly restrict the ability of shippers to move their goods.

[20] While paragraph 5(*a*) of the CTA emphasizes these objectives, it is tempered by paragraph 5 (*b*), which allows for regulation and strategic public intervention to be used to achieve economic outcomes that cannot be achieved satisfactorily by competition and market forces alone. Sections 113 to 115 of the CTA provide a clear example of such a public intervention imposing common carrier obligations on federal railway companies.

[21] With respect to grain transportation, historically, federal and provincial governments provided a fleet of hopper cars for the railway companies and the management of the grain hopper car supply was often shared by a number of other players, including the industry-led Car Allocation Policy Group and the Canadian Wheat Board. However, the Class 1 railway companies now have sole discretion over the operation of their railways, including the size of the motive power and hopper car fleets, the allocation of cars and assignment of motive power and crews. The means for providing suitable and adequate service lies entirely in the hands of the railway companies.

[22] Regardless of changes in the grain handling and transportation system, the CTA does not authorize a railway company to refuse to provide service. As set out in subsection 113(2) of the CTA, a railway company must move traffic to destination upon payment of the lawful rate and it must, for that purpose, furnish adequate and suitable accommodation. In that sense, a railway company's service obligations with respect to shippers are unconditional, subject to a shipper meeting its correlative obligations.

[23] The CTA is specific about the railway company's duty, which is to provide adequate and suitable accommodation for "all traffic offered for carriage…" That is to say the obligation of a railway company is owed to each individual shipper in respect of whatever traffic is tendered to the railway company by each shipper. It does not imply that a breach to one shipper is acceptable if there are breaches to others. It also does not imply that a superior level of service to one shipper excuses or justifies an inferior level of service to another shipper. This is clear because allegations of discriminatory treatment have been raised in level of service applications throughout the history of the provisions. Examples include 344-R-2007">Decision No. 344-R-2007">344-R-2007, in which the applicant alleged that the railway company's Advance Product programs discriminated against it and other small grain handling companies in the distribution of

rail cars, and Decision No. 323-R-2002, in which the applicant alleged that the railway company discriminated between competing shippers in allocating its cars. In each case, the Agency found the railway company to be in breach of its level of service obligations.

[24] In other words, the compliance of a railway company with its level of service obligations to a shipper must be assessed having regard to that specific shipper's individual requests for rail services, not simply according to the railway company's assessment of the combined requests of all shippers or of groups of shippers, or its car allocation or rationing policies or programs.

[25] Further, pursuant to paragraph 113(1)(*c*) of the CTA, the duty must be undertaken "without delay." This means that traffic cannot be routinely allowed to build up until the railway company considers it convenient to move it.

[26] As mentioned above with respect to the context of the level of service provisions, these sections have a long legislative history. Prior to Confederation, Part XXI of the *Railway Clauses Consolidation Act*, 1851, 14 – 15 Vict., c. 5, stated:

> The trains shall…furnish sufficient accommodation for the transportation of all such passengers and goods as shall within a reasonable time previous thereto be offered for transportation ….and the part aggrieved by any neglect of refusal in the premises, shall have an action therefor against the Company.

[27] As early as 1906, language almost identical to what is presently found in the CTA was included in the *Railway Act*, 1906, R.S.C, 1906, c.37. Specifically, section 284 stated:

> The company shall according to its powers, -
>
> a. Furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;
> b. Furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic;
> c. Without delay, and with due care and diligence, receive, carry and deliver all such traffic;
> d. Furnish and use all proper appliances, accommodation and means necessary to receiving, loading, carrying, unloading, and delivering such traffic.
>
> […]
>
> (3) If in any case such accommodation is not, in the opinion of the Board, furnished by the company, the Board may order the company to furnish the same within such time or during such period as the Board deems expedient having regard to all proper interests; or may prohibit or limit the use, either generally or upon any specific railway or part thereof, of any engines, locomotives, cars, rolling stock, apparatus, machinery, or devices, or any class of kind thereof, not equipped as required by this Act, or by any orders or regulations of the Board made within the jurisdiction under the provisions of this Act.

> [35] *Patchett* stands for the general proposition that the duty of a railway company to fulfil its service obligations is "permeated with reasonableness in all aspects of what is undertaken" (except in relation to its special responsibility as an insurer of goods, which is not in issue in this case). As I read *Patchett*, the three propositions to which CN refers in its argument are not free-standing principles of law. They are guidelines that must inform any determination by the Agency of a service complaint, but they do not necessarily compel a particular outcome. That is because the determination of a service complaint requires the Agency to balance the interests of the railway company with those of the complainant in the context of the particular facts of the case.
>
> [36] A fair reading of the decision of the Agency discloses that it was well aware of its obligation to strike a reasonable balance between the interests of CN and the interests of Northgate in the factual context of the Northgate complaint. Contrary to the submissions of CN, the Agency did not require CN to furnish cars at all times sufficient to meet all of Northgate's demands. The Agency did not deprive CN of the right to make a reasonable charge for its services or to require an extra payment for services requested in excess of the minimum level prescribed by the Agency. Nor did the Agency require CN to provide Northgate with service in circumstances where CN had no reasonable means of access. In my view, the Agency's decision strikes a reasonable balance that is consistent with *Patchett*.

[34] It is clear that *Patchett* and the reasonableness test do not stand for the proposition that the level of service obligations only impose a soft obligation on railway companies. Railway companies must furnish adequate and suitable accommodation for the carriage, unloading and delivering of traffic that meets the requirements of the shipper, as long as the shipper has properly triggered the level of service obligations. In this regard, the railway company must comply with those obligations unless it demonstrates that it cannot reasonably do so.

[35] Having set out the context, the legislative history and purpose, the Agency's role in the application, the interpretation by the courts of the level of service provisions of the CTA, as well as the reasonableness test established by the courts, the Agency will now apply these to develop an Evaluation Approach for determining whether a railway company has breached its level of service obligations under the CTA.

Evaluation Approach

[36] Unless the Agency determines that an applicant is not eligible to apply under the level service provisions of the CTA, the Agency will consider three questions in evaluating a level of service application, namely:

1. Is the shipper's request for service reasonable?
2. Did the railway company fulfill this request?
3. If not, are there reasons that could justify the service failure?

(a) If there is a reasonable justification, then the Agency will find that the railway company has not breached its level of service obligations;

(b) If there is no reasonable justification, then the Agency will find that there has been a breach of the railway company's level of service obligations and will look to the question of remedy.

[37] The Agency will apply the Evaluation Approach in cases where the level of service application is with respect to the statutory obligations set out in sections 113 to 115 of the CTA. In cases where a confidential contract or other written agreement exists pursuant to subsection 113 (4) of the CTA, the Agency's determination is bound by the terms of the confidential contract. However, whether a level of service application involves a confidential contract or not, the Agency is of the opinion that the Evaluation Approach is sufficiently robust to allow it to fully assess the merits of any level of service application filed by a shipper.

Step 1: Is the shipper's request for service reasonable?

[38] In 344-R-2007">Decision No. 344-R-2007 (at paragraph 71), the Agency established that a railway company's obligation is to provide cars in acceptable quantities at acceptable times. When assessing what constitutes providing cars in "acceptable quantities at acceptable times," the Agency cannot disregard the specific needs of individual shippers. In 42-R-2010">Decision No. 42-R-2010 (at paragraph 39), the Agency stated that "[t]he statutory requirement to serve all shippers is not sufficient, in itself, to absolve the railway company of its duty to provide suitable service to any individual shipper."

[39] The Agency finds that the needs of the shipper must be assessed having regard to the principles stated in Decision No. 323-R-2002, where the Agency found that railway companies have the obligation to provide cars and carry traffic to the extent that the service requested is reasonable in the circumstances prevailing. To the extent that the number of cars requested by a shipper is reasonable, the Agency finds that this will constitute an acceptable quantity of cars, subject only to the railway company justifying why it cannot provide this number. Consistent with this finding, the first step of the Evaluation Approach to level of service applications should begin with an evaluation of the reasonableness of the shipper's request for service.

[40] A shipper initiates the application of the level of service provisions of the CTA by making a request for rail service. Accordingly, at this first step of the Evaluation Approach, the Agency will examine the shipper's request to ensure that it has properly triggered the railway company's level of service obligations. In so doing, the Agency will consider the shipper's submissions as well as the railway company's response with respect to the reasonableness of the request, and may consider several factors. For example, a customer's entitlement to receive cars should be considered in terms of its own obligation to properly communicate its demands in a manner that

CANADIAN TRANSPORTATION AGENCY

Home ➜ Decisions and determinations

Decision No. 273-R-2012

July 5, 2012

Complaint by Russel Metals Inc. pursuant to section 120.1 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

File No.: T7375-3/11-1-2

Introduction

[1] Russel Metals Inc. (Russel) filed a complaint with the Canadian Transportation Agency (Agency) pursuant to section 120.1 of the *Canada Transportation Act* (CTA) regarding interline shipments into its Winnipeg Facility. The complaint relates to the Canadian Pacific Railway Company's (CP) assessment of rail car demurrage and other ancillary related charges on Russel's interline shipments and to CP's alleged unwillingness to fully investigate the root cause of interline rail car bunching by obtaining detailed operational data from its competitor, the Canadian National Railway Company (CN). Russel also asks the Agency to issue an interim order that CP temporarily suspend all its demurrage assessments and ancillary switching charges involving interline activity to Russel until the Agency has made a determination in this case.

[2] Russel also filed two other complaints against CP pursuant to section 120.1 of the CTA. In Decision No. LET-R-21-2012, the Agency determined that the three complaints would be dealt with individually and directed the parties to address each case separately. This Decision deals solely with the complaint set out above.

Issues

[3] 1) Are CP's ancillary charges and associated terms and conditions of its Tariff 2 Railcar Supplemental Services for the movement of traffic and provision of incidental services related to inbound interline shipments to the Russel facility in Winnipeg unreasonable to the extent that CP should be responsible for:

- investigating the cause of any delays and providing Russel with detailed information related to CN's part of the movement, and;

[9] Section 120.1 of the CTA has been designed to allow one or more shippers to challenge a charge and associated term or condition imposed by a railway company, which they believe is unreasonable. The CTA does not stipulate who bears the burden of proof. As the CTA is silent, the common law principle prevails and the ultimate burden of proof rests, on a balance of probabilities, with the applicant. In this case, the legal burden of proof rests with Russel.

[10] Once the party who bears the legal burden of proof (burden of persuasion) has presented sufficient evidence to make its arguments persuasive, an evidentiary burden will shift to the opposing party. This basically requires the opposing party to respond to the issues raised by adducing evidence supporting its position. Where an opposing party fails to adduce evidence, an unfavorable inference may be drawn against it. This is especially true where all the relevant evidence is within the control of that party. Jurisprudence teaches that a responding party must put its “best foot forward” or risk losing the case. This principle has been followed in numerous decisions.

[11] The distinction between an evidentiary burden (duty of going forward with evidence) and a burden of proof (burden of persuasion) is important. An evidentiary burden will be discharged by adducing or pointing to evidence which, if accepted, is sufficient to support one’s position. The burden of proof is the duty that lies with a party – in this case on Russel – to establish the facts asserted in the complaint. It determines the ultimate outcome and, in civil cases, needs to be discharged on a balance of probabilities. The evidentiary burden refers to the sequence of proof as between parties. Justice Fish in *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702 distinguished the two concepts as follows (at paragraph 11): “An ‘evidential burden’ is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the ‘persuasive burden’ determines how the issue should be decided.”

[12] As noted, the burden of proof lies with Russel at the outset to prove its case. This means that Russel also bears the evidentiary burden to present enough evidence to justify consideration of the issues, in other words, to show that it has made out a case for CP to answer. This evidentiary burden on Russel will not shift to CP until it is established that there is *prima facie* substance to the complaint. The jurisprudence establishes that this threshold for the complainant is fairly low and that decision makers should be cautious before striking out a case at the initial stage. In *Hunt v. Carey Canada*, 1990 Can LII 90 (SCC), [1990] 2 S.C.R. 959 (*Hunt*), the Supreme Court of Canada makes it clear that a claim must be read generously with allowance for inadequacies due to drafting deficiencies. In *Hunt*, the Supreme Court of Canada emphasizes that a decision maker should only exercise its discretion to strike a claim when it is plain and obvious that, on the basis of the facts put forward in the application, the claim does not disclose a reasonable cause of action.

[13] This leads to the second question to be addressed.

Did Russel submit sufficient evidence to demonstrate that it has

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

SOR/2014-104

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Intervention

Filing of intervention

21 (1) An intervener may file an intervention. The intervention must be filed within five business days after the day on which their request to intervene is granted by the Agency and must include the information referred to in Schedule 8.

Participation rights

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Response to intervention

22 An applicant or a respondent that is adverse in interest to an intervener may file a response to the intervention. The response must be filed within five business days after the day on which they receive a copy of the intervention and must include the information referred to in Schedule 9.

Position Statement

Filing of position statement

23 (1) An interested person may file a position statement. The position statement must be filed before the close of pleadings and must include the information referred to in Schedule 10.

No participation rights

(2) A person that files a position statement has no participation rights and is not entitled to receive any notice in the dispute proceeding.

Written Questions and Production of Documents

Notice

24 (1) A party may, by notice, request that any party that is adverse in interest respond to written questions that relate to the matter in dispute or produce documents that are in their possession or control and that relate to the matter in dispute. The notice must include the information referred to in Schedule 11 and must be filed

(a) in the case of written questions, before the close of pleadings; and

(b) in the case of the production of documents, within five business days after the day on which the party becomes aware of the documents or before the close of pleadings, whichever is earlier.

Intervention

Dépôt de l'intervention

21 (1) L'intervenant qui souhaite déposer une intervention le fait dans les cinq jours ouvrables suivant la date à laquelle sa requête d'intervention a été accordée. L'intervention comporte les éléments visés à l'annexe 8.

Droits de participation

(2) La participation de l'intervenant se limite aux droits de participation que lui accorde l'Office.

Réponse à l'intervention

22 Le demandeur ou le défendeur qui a des intérêts opposés à ceux d'un intervenant et qui souhaite déposer une réponse à l'intervention le fait dans les cinq jours ouvrables suivant la date de réception de la copie de l'intervention. La réponse à l'intervention comporte les éléments visés à l'annexe 9.

Énoncé de position

Dépôt de l'énoncé de position

23 (1) Toute personne intéressée peut déposer un énoncé de position. Celui-ci est déposé avant la clôture des actes de procédure et comporte les éléments visés à l'annexe 10.

Énoncé de position

(2) La personne qui dépose un énoncé de position n'a aucun droit de participation ni droit aux avis relatifs à l'instance de règlement des différends.

Questions écrites et production de documents

Avis

24 (1) Toute partie peut, par avis, demander à une partie qui a des intérêts opposés aux siens de répondre à des questions écrites ou de produire des documents qui se trouvent en sa possession ou sous sa garde et qui sont pertinents à l'affaire. L'avis comporte les éléments visés à l'annexe 11 et est déposé dans les délais suivants :

a) s'agissant de questions écrites, avant la clôture des actes de procédure;

b) s'agissant de la production de documents, soit, dans les cinq jours ouvrables suivant la date à laquelle la partie a pris connaissance de leur existence, soit, si elle est antérieure, avant la clôture des actes de procédure.

Response to notice

(2) The party to which a notice has been given must, within five business days after the day on which they receive a copy of the notice, file a complete response to each question or the requested documents, as the case may be, accompanied by the information referred to in Schedule 12.

Objection

(3) If a party wishes to object to a question or to producing a document, that party must, within the time limit set out in subsection (2), file an objection that includes

(a) a clear and concise explanation of the reasons for the objection including, as applicable, the relevance of the information or document requested and their availability for production;

(b) any document that is relevant in explaining or supporting the objection; and

(c) any other information or document that is in the party's possession or control and that would be of assistance to the party making the request.

Expedited Process

Decision to apply expedited process

25 (1) The Agency may, at the request of a party under section 28, decide that an expedited process applies to an answer under section 19 and a reply under section 20 or to any request filed under these Rules.

Time limits for filing — answer and reply

(2) If an expedited process applies to an answer under section 19 and a reply under section 20, the following time limits apply:

(a) the answer must be filed within five business days after the date of the notice indicating that the application has been accepted; and

(b) the reply must be filed within three business days after the day on which the applicant receives a copy of the answer.

Time limits for filing — request

(3) If an expedited process applies to a request filed under these Rules, the following time limits apply:

(a) any response to a request must be filed within two business days after the day on which the person who is

Réponse à l'avis

(2) Dans les cinq jours ouvrables suivant la date de réception de la copie de l'avis, la partie à qui l'avis est envoyé dépose une réponse complète à chacune des questions ou les documents demandés, selon le cas, ainsi que les éléments visés à l'annexe 12.

Opposition

(3) La partie qui souhaite s'opposer à une question ou à la demande de production d'un document dépose une opposition dans les délais prévus au paragraphe (2). L'opposition comporte les éléments suivants :

a) un exposé clair et concis des motifs de l'opposition, notamment la pertinence des renseignements ou du document demandé ou leur disponibilité, selon le cas;

b) tout document pertinent à l'appui de l'opposition;

c) tout autre renseignement ou document en la possession ou sous la garde de la partie et susceptible d'aider la partie qui a fait la demande.

Processus accéléré

Décision d'appliquer le processus accéléré

25 (1) L'Office peut, sur requête déposée en vertu de l'article 28, décider que le processus accéléré s'applique à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, ou à toute autre requête déposée au titre des présentes règles.

Délais de dépôt — réponse et réplique

(2) Lorsque le processus accéléré est appliqué relativement à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, les délais suivants s'appliquent :

a) le dépôt de la réponse se fait dans les cinq jours ouvrables suivant la date de l'avis d'acceptation de la demande;

b) le dépôt de la réplique se fait dans les trois jours ouvrables suivant la date de réception de la copie de la réponse.

Délai de dépôt — Requête

(3) Lorsque le processus accéléré est appliqué relativement à une requête déposée au titre des présentes règles, les délais suivants s'appliquent :

SENATE SÉNAT

CANADA

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(HANSARD)

Thursday, November 9, 2017

The Honourable GEORGE J. FUREY,
Speaker

• (1540)

The information provided by these devices would be available, in particular, to railway companies for proactive action to enhance safety, to the Transportation Safety Board to investigate accidents and incidents and to Transport Canada for policy development and accident and incident investigation.

Clearly, this kind of video and voice recording raises privacy concerns for workers. In order to mitigate these concerns, the bill contains numerous safeguards, the most important ones being that, first, access to the data for proactive safety issues can only be done through a legislatively imposed, random process. It can't be targeted; it has to be random.

And second, the data cannot be used to pursue enforcement action against an employee, with a single proviso, which is in cases where someone has specifically tampered with the LVVR equipment or where a threat to safety has been identified.

Transport Canada will conduct audits to ensure compliance with these requirements and has the authority to take enforcement action if infractions occur.

Almost as important as safety in the railway industry are competitive pricing and high-quality responsive transportation services for shippers. Among them: farmers, forestry companies, mining companies and many other enterprises like them critical to our economy. Many shippers are captive, meaning they have limited access to competing transport, in particular to competing railways. They can therefore be held hostage to a single rail provider's service level and pricing.

To address this problem, the bill introduces a new competitive access measure called long-haul interswitching, which I will refer to as LHI. It's easier that way. This requires one immediately available railway to transport a shipper's goods to a place where there is access to a competing railway. The further the long haul, the greater the benefit to captive shippers. Previously, the reach was 160 kilometres under the temporary extended interswitching provisions of the Fair Rail for Grain Farmers Act. It will now be extended to the greater of 1,200 kilometres or 50 per cent of the total movement in Canada. This will accommodate all captive grain elevators.

Moreover, contrary to extended interswitching that was limited to only the Prairie region in the previous temporary circumstance, the new LHI remedy will apply broadly across the country.

LHI rates will also be established by the Canadian Transportation Agency at a reasonable and fair level based on comparable traffic moving elsewhere in the system. This means LHI rates will reflect rates established in competitive markets.

The LHI remedy is supplemented by a suite of initiatives that will further contribute to keeping price and service competitive for the benefit of shippers; once again, for farmers. The level of service that railways are required to provide, known as adequate and suitable service, has now been clearly and robustly defined for the first time in over 100 years. It will ensure that railways provide the highest level of service that they can reasonably provide, and it will give shippers guarantees that is the case. Railways will have to provide weekly information on their service and performance.

Reciprocal financial penalties will be instituted. Currently, as hard as this is to believe, railways can apply for penalties against a shipper if they believe the shipper has not complied with the terms of their shipping agreement or tariff. But that is not the case for shippers. This bill will make it so that shippers will be able to apply for penalties against railways. In addition, the agency will be given enhanced powers to resolve commercial disputes between shippers and railways.

Bill C-49 will also encourage investment in the freight rail system by reforming the Maximum Revenue Entitlement regime — I will refer to that as the MRE — which establishes the maximum revenue that CN and CP can earn in a crop year for the movement of grain.

While the CTA review report recommended that MRE be eliminated, this bill proposes to keep it in place, as it is very helpful for farmers. However, the MRE has also inhibited the two major railways from investing in hopper cars and making other capital investments. Currently, if one of the major railways invests in capital equipment, the other railway benefits from the resulting adjustment of the cost component of the formula that is used to determine each railway's maximum revenue. In other words, the cost component is shared between CN and CP. It becomes a case of "you first; no, you first."

By splitting the cost component of this MRE and applying it separately to each railroad, it will remove this impasse and facilitate capital investment.

The railways will also be given more credit for investing in new, modern-capacity hopper cars. The bill will also relax CN's majority ownership restrictions from 15 per cent to 25 per cent to further encourage investment in that railway line.

Overall, the freight rail measures in Bill C-49 strike a delicate balance between railway and shipper interests and should stimulate the continually required capital investment of these enterprises.