Federal Court  Cour fédérale

Date: 20191101

Docket: T-1809-18

Citation: 2019 FC 1378

Ottawa, Ontario, November 1, 2019

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SAUDI ARABIAN AIRLINES CORP.

Applicant

and

TRANSPORTATION APPEAL TRIBUNAL OF CANADA AND CANADIAN TRANSPORT AGENCY

Respondents

JUDGMENT AND REASONS

[1] The present Application concerns the exercise of legislative authority by which the Transportation Appeal Tribunal of Canada (Tribunal or TATC) addresses complaints advanced to it by entities, such as the Applicant, with respect to enforcement action received from the Canadian Transportation Agency (Agency).

I. The Factual Scenario

[2] On December 21, 2016, the Applicant's plane was scheduled to fly from Toronto to Jeddah. The airport's ground handling workers began to push the plane back from the gate before the Applicant's commander had given his instructions to do so, resulting in the plane's engine cowling striking a stationary Air Canada service vehicle. A passenger filed a complaint. On September 21, 2017, the Agency found the Applicant liable to the passenger for payment of the sum of $610.

[3] Even though the Applicant paid according to the identified liability, on December 20, 2017, the Agency issued a Notice of Violation against the Applicant for an uncertain reason. On February 22, 2018, the Applicant filed a complaint to the Tribunal. In response the Tribunal scheduled a hearing to be held on September 19, 2018. As a key feature of the scenario, on September 17, 2018, the Agency withdrew the Notice of Violation.

[4] On September 18, 2018, the Applicant sent a letter to the Tribunal asking for direction as to how submissions might be made to retrieve costs as a result of the withdrawal. On September 19, 2018, the Tribunal Registrar issued a letter to the Applicant stating that because the Notice of Violation had been withdrawn, the Tribunal was no longer seized of the matter.

[5] On September 24, 2018, the Applicant sent a letter to the Tribunal contesting the Tribunal's determination that it was no longer seized of the matter as a result of the withdrawal. On September 27, 2018, the Tribunal Chairperson issued a letter to the Applicant stating that the Tribunal was no longer seized of the matter.

II. The Application for Judicial Review

[6] In the Application, Counsel for the Applicant defines the decision under review as follows:

> From the commencement of the initial application to the TATC, [Transportation Appeal Tribunal of Canada Act, SC 2001, c 29] the Applicant had maintained to the Agency that their position was unfounded in law and that the Applicant intended to seek costs at the conclusion of the matter pursuant to Section 19(1) of the [TATC]. On September 18, 2018, following the withdrawal of the Notice of Violation, the Applicant contacted the TATC to obtain instructions with regards to the form of any such cost submissions.
>
> On September 19, 2018, by way of a letter issued by the Registrar of the TATC, the TATC refused to accept any submissions with respect to costs on the basis that the TATC was no longer seized of the matter ("Impugned Letter").
>
> (Applicant's Notice of Application at para 1)

[7] Accordingly, the Applicant requests the following relief: a declaration that the TATC unlawfully or improperly refused to exercise its jurisdiction; a declaration that the TATC failed to observe a principle of natural justice and procedural fairness; and a declaration that the TATC remains seized of the matter.

[8] In support of the Application, Counsel for the Applicant's primary argument emphasized the procedural fairness and costs issues as follows:

> Subsection 180.3(3) of the CTA further obligates the member of the Tribunal, and by extension the Tribunal itself, to observe procedural fairness and natural justice in the conduct of the review.
>
> With regards to the authority of the Tribunal to award costs, Section 19 of the TATC Act provides as follows:
>
> > *Costs*
> >
> > 19(1) The Tribunal may award any costs, and may require the reimbursement of any expenses incurred

> in connection with a hearing, that it considers reasonable if
>
> > (a) it is seized of the matter for reasons that are frivolous or vexatious;
> >
> > (b) a party that files a request for a review or an appeal and does not appear at the hearing does not establish that there was sufficient reason to justify their absence; or
> >
> > (c) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal.
>
> […]
>
> If the TATC Act is interpreted in a manner which results in the Tribunal losing jurisdiction only as a result of the withdrawal, the Applicant will be left with no avenue to recover its costs from the Agency.
>
> (Applicant's Memorandum of Fact and Law, paras. 15, 16, and 23)
>
> [Emphasis added]

III. The Hearing of the Application

[9] At the hearing of the present Application, as essential context to reaching a decision, the Court requested further argument to clarify the roles and responsibilities of the individuals who participated in the Tribunal's conduct under review.

[10] In response to the Court's request, Counsel for the Tribunal, supported by Counsel for the Agency, provided a highly detailed further argument. A wealth of material was supplied by Counsel for the Tribunal in formulating and verifying the further argument. I have included all of this material as Appendix A. The Tribunal's Further Memorandum begins at page 26 of that material.

[11] Relevant documents contained in the Applicant's Record that are cited in the Tribunal's further argument, but not included in their further material, are listed and included in Appendix B.

[12] Counsel for the Applicant's reply to the Tribunal's further argument includes the following statement at paras. 14 and 15:

> In the event that this Court is persuaded that there exists a breach of procedural fairness, which is sufficient to warrant the referral of this matter back to the Tribunal for (re)consideration, we would nonetheless seek a determination as to whether subsection 19(1) of the TATC Act continues to grant the Tribunal the authority to consider costs, irrespective of the Withdrawal. Given that the Tribunal has previously ruled on this point, we would anticipate that the Agency will argue this point at any redetermination, if one were to be ordered.
>
> Without this Court's clarification of the Tribunal's jurisdiction in this matter, all of the parties may well again find themselves before this Court once again, on essentially the same fundamental question of law.

[13] I very much appreciate Counsel for the Applicant's candor in requesting clarification, even though doing so inherently risks a result that may not be positive from his perspective. I agree that clarification of the Tribunal's jurisdiction by way of the decision in the present Application is much needed.

IV. Conclusion

[14] I find that the Tribunal's further argument has critical utility in that it places and explains the Tribunal's conduct in its statutory context. Therefore, as reasons for decision, I accept each factual statement in the Tribunal's argument and accept the conclusions there expressed.

[15] In particular, with respect to Counsel for the Applicant's primary argument regarding fairness and costs, I find the following. Without providing notice, the Agency may withdraw a Notice of Violation before the Tribunal, and upon doing so, an applicant who has contested the Notice of Violation has no right of recourse to the Tribunal pursuant to the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29, the *Canada Transportation Act*, SC 1996, c 10, and the *Transportation Appeal Tribunal of Canada Rules*, SOR/86-594. The existence of a Notice of Violation before the Tribunal is a condition precedent to the Tribunal's jurisdiction to act.

[16] Accordingly, I find that, on the standard of correctness, the Tribunal acted appropriately according to law. As a result, the present Application must be dismissed.

JUDGMENT IN T-1809-18

THIS COURT'S JUDGMENT is that the present Application is dismissed. I make no order as to costs.

"Douglas R. Campbell"
Judge

Appendix "A"

Court File No. T-1809-18

FEDERAL COURT
COUR FÉDÉRALE
FILED
OCT 04 2019
AURÉLIE ADELSON
OTTAWA, ON
DÉPOSÉ

FEDERAL COURT

BETWEEN:

SAUDI ARABIAN AIRLINES CORP.

Applicant

and

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

and

CANADIAN TRANSPORTATION AGENCY

Respondents

1st ADDENDUM TO THE RESPONDENT TRANSPORTATION APPEAL TRIBUNAL OF CANADA'S MEMORANDUM OF FACT AND LAW

Transportation Appeal Tribunal of Canada
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TO:

The Federal Court of Canada

and

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COUNSEL FOR CANADIAN TRANSPORTATION AGENCY

TABLE OF CONTENTS

Court File No. T-1809-18

FEDERAL COURT

BETWEEN:

SAUDI ARABIAN AIRLINES CORP.

Applicant

and

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CANADIAN TRANSPORTATION AGENCY

Respondents

AFFIDAVIT
FORM 80

I, Sylvie Fournier, Registrar at the Transportation Appeal Tribunal of Canada, of the City of Gatineau in the Province of Québec, AFFIRM THAT:

1. I have been employed at the Transportation Appeal Tribunal of Canada (hereinafter "Tribunal") since November 2008.

2. From 2010 to 2016, I occupied the position of Deputy Registrar.

3. Since December 2016, I have occupied the position of Registrar.

4. The Registry is the first point of contact for persons and parties in relation to the Tribunal and its proceedings.

5. Communications between the Tribunal and persons and parties are sent to and from the Registry.

6. Among other tasks, the Registry is responsible for acknowledging receipt of review requests, referring review proceedings to the Chairperson for member assignment, scheduling hearings, and closing files.

7. In my capacity as Registrar, I have direct knowledge of the steps taken in relation to TATC File No. O-4392-80, *Saudi Arabian Airlines Corp. v. Canadian Transportation Agency*.

8. The following details pertain to the internal administration of TATC File No. O-4392-80 and to Tribunal practices pertaining to the cancellation of hearings, which are not yet on the record of the judicial review proceeding.

9. The Tribunal member assigned to conduct the review was Andrew Wilson.

10. On September 17, 2018, I received the message from the Canadian Transportation Agency that Notice of Violation 17-06204 had been withdrawn (see Applicant's Exhibit L).

11. On September 17, 2018, I advised member Andrew Wilson that the hearing had been cancelled. See the e-mail to Mr. Wilson attached as **Exhibit A**.

12. I prepared the Notice of Cancellation of Hearing that was issued to Saudi Arabian Airlines Corp. and the Canadian Transportation Agency on September 17, 2018 (see Applicant's Exhibit M).

13. This Notice of Cancellation of Hearing is a standard template completed and issued by the Tribunal when a party communicates its withdrawal after a hearing is scheduled but before it takes place.

14. In its Annual Reports, the Tribunal publishes statistics in relation to the total number of cases concluded without a hearing in each fiscal year.

15. The 2018-2019 Tribunal Annual Report indicates that a total of 111 cases were concluded without a hearing. The excerpt of the 2018-2019 Annual Report is attached as **Exhibit B**.

16. In relation to review requests filed in fiscal year 2018-2019, the Tribunal issued 16 Notices of Cancellation of Hearing.

17. Among them, none of the cancellations resulted from the federal enforcement body's withdrawal of its Notice.

18. In that year, 38 review hearings went ahead as scheduled.

19. The 2017-2018 Annual Report indicates that a total of 97 cases were concluded without a hearing. The excerpt of the 2017-2018 Annual Report is attached as **Exhibit C**.

20. In relation to review requests filed in fiscal year 2017-2018, the Tribunal issued 27 Notices of Cancellation of Hearing.

21. Among them, two of the cancellations resulted from the federal enforcement body's withdrawal of its Notice.

22. In that year, 40 Tribunal review hearings went ahead as scheduled.

23. For ease of reference, the 2017-2018 year is the year in which the review request by Saudi Arabian Airlines in relation to Notice of Violation 17-06402 was filed.

24. The 2016-2017 Annual Report indicates that a total of 110 cases were concluded without a hearing. The excerpt of the 2016-2017 Annual Report is attached as **Exhibit D**.

25. In relation to review requests filed in fiscal year 2016-2017, the Tribunal issued 29 Notices of Cancellation of Hearing.

26. Among them, three of the cancellations resulted from the federal enforcement body's withdrawal of its Notice.

27. In that year, 43 Tribunal review hearings went ahead as scheduled.

28. I received Saudi Arabian Airlines Corp.'s message dated September 18, 2018, anticipating that the Tribunal remained seized of the matter and requesting specific instructions from the Tribunal with respect to making written submissions as to costs (Applicant's Exhibit N).

29. I confirm that the letter that was sent in response to that message on September 19, 2018 was prepared by Tribunal staff and it was a response to the inquiry received from the Applicant to provide him with instructions (Applicant's Exhibit O).

30. I received the subsequent letter from counsel for Saudi Arabian Airlines Corp. on September 24, 2018, which requested a determination in the form of a final decision with respect to whether the Tribunal possesses jurisdiction to order costs (Applicant's Exhibit P).

31. Upon receipt of this request for a determination, Saudi Arabian Airlines Corp.'s request was provided to the Acting Chairperson of the Tribunal.

Affirmed before me at the City of Ottawa, in the Province of Ontario, on October 4, 2019.

Shirley Relizer

Commissioner for Taking Affidavits
Shirley Relizer - LSO # 76038T

Sylvie Fournier

Sylvie Fournier

This is Exhibit A referred to in the
Affidavit of Sylvie Fournier
Affirmed before me at
Ottawa, Ontario
This 4th day of October, 2019

Tamarah Nutik

Commissioner for taking affidavits for Ontario
Tamarah Nutik
LSO # 50509S

Fournier, Sylvie

From: Fournier, Sylvie
Sent: September-17-18 11:44 AM
To: Wilson, Andrew: TATC
Cc: Cannon, Mary
Subject: TATC hearing Sewptember 19, 2018 **CANCEL**

Mr. Wilson,
Please note that the **Saudi Arabian review hearing scheduled for September 19, 2018** in Toronto has been cancelled, the CTA withdrew their notice.

Marie-Line will be in touch to change your travel arrangements.
Regards,

Sylvie Fournier

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Tribunal d'appel des transports du Canada
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This is Exhibit B referred to in the
Affidavit of Sylvie Fournier
Affirmed before me at
Ottawa, Ontario
This 4th day of October, 2019

Tamarah Nutik

Commissioner for taking affidavits for Ontario
Tamarah Nutik
LSO # 50509S

Annual Report
2018-2019

Annual Report **2018-2019**

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Cat. No. TA51
ISSN: 1910-4898

May 31, 2019

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport
Transport Canada
Place de Ville, Tower "C"
330 Sparks Street, 29th Floor
Ottawa, Ontario K1A 0N5

Dear Honourable Minister:

RE: ANNUAL REPORT 2018-2019

In reference to the above and pursuant to section 22 of the *Transportation Appeal Tribunal of Canada Act*, I am pleased to submit to Parliament, through your intermediary, the Annual Report of the Transportation Appeal Tribunal of Canada for the fiscal year 2018-2019.

It is an honour and privilege to serve Canadians in Canada's national transportation sector.

Respectfully,

Charles S. Sullivan
Chairperson and Chief Executive Officer

Tel.: 613-990-6906 Fax: 613-990-9153 E-mail: info@tatc.gc.ca

Transportation Appeal Tribunal of Canada

Annual Report

2018-2019

2018-2019 in Review

Effectiveness

The Tribunal's effectiveness can be measured by its ability to provide the Canadian transportation community with the opportunity to have ministerial decisions reviewed fairly, equitably and within a reasonable period of time.

In 2018-2019, there was an increase in the number of hearings: **46** compared to **41** the previous year. In addition, members adjudicated **7** *ex parte* requests, requiring the production of written reasons in each case, and issued formal rulings in **5** cases.

The average lapsed time in 2018-2019 between the conclusion of a review hearing and the issuance of a determination is **148** days (an increase of **29** per cent from last year). This increase was due to the high number of new members presiding over their first hearing and writing their first decision. The effectiveness and efficiency of decision writing will increase substantially in the coming months as they acquire experience and expertise as presiding officers and decision-makers.

The Tribunal encourages communication and the exchange of documents by the parties to assist in identifying the issues that can be resolved between them before coming to the Tribunal. This approach reduces the length of hearings and avoids last-minute adjournments necessitated by late disclosure of information.

In the 2018-2019 reporting period, **111** cases were concluded without a hearing. It should be noted that of these cases, many were requests filed with the Tribunal and concluded shortly before the hearing was to take place, which means that all registry work that leads up to the hearing was completed.

The cases concluded without a hearing were resolved in a number of ways: the document holder paid the fine before the hearing commenced, the document holder's licence was reinstated before the hearing, the request for hearing was withdrawn by the document holder, the notice was withdrawn by the Minister, or an agreement was reached between the parties.

In 2017-2018, the Tribunal had referred **5** cases (**1** aviation, **3** marine, and **1** rail) back to the Minister for reconsideration. We are awaiting the outcome in three of these cases.

In 2018-2019, the Tribunal referred **2** cases (**1** aviation and **1** marine) back to the Minister for reconsideration. We are awaiting the outcome in both cases.

This is Exhibit C referred to in the
Affidavit of Sylvie Fournier
Affirmed before me at
Ottawa, Ontario
This 4th day of October, 2019

Tamarah Nutik

Commissioner for taking affidavits for Ontario
Tamarah Nutik
LSO # 50509S

Transportation Appeal Tribunal of Canada

Tribunal d'appel des transports du Canada

ANNUAL REPORT

2017-2018

Canada

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May 25, 2018

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport
Transport Canada
Place de Ville, Tower "C"
330 Sparks Street, 29th Floor
Ottawa, Ontario K1A 0N5

Dear Honourable Minister:

RE: ANNUAL REPORT 2017-2018

In reference to the above and pursuant to section 22 of the *Transportation Appeal Tribunal of Canada Act,* I am very pleased to submit to Parliament, through your intermediary, the Annual Report of the Transportation Appeal Tribunal of Canada for the fiscal year 2017-2018.

It is an honour and a privilege to continue to serve Canadians in the national transportation sector.

Respectfully,

Charles S. Sullivan
Vice-Chairperson and Acting Chairperson

Tel: 613 990-6906 | Fax: 613 990-9153 | E-mail: info@tatc.gc.ca

Canada

Transportation Appeal Tribunal of Canada

ANNUAL REPORT
2017-2018

Effectiveness

The Tribunal's effectiveness can be measured by its ability to provide the Canadian transportation community with the opportunity to have Ministerial decisions reviewed fairly, equitably and within a reasonable period of time.

In 2017-2018, there was a slight decrease in the number of hearings, 41 compared to 46 the previous year. This result, however, must be viewed against the decreased availability of members due to term expirations throughout the year, which resulted in an increased caseload for those members remaining. This factor also limited the Tribunal's capability to schedule hearings, and there were fewer requests for hearings this year.

The average lapsed time in 2017-2018 between the conclusion of a review hearing and the issuance of a determination is **115** days (an increase of **22** per cent from last year). This increase is also due in part to staff and member turnaround at the Tribunal, and the resulting increase in workload carried by remaining members and staff.

The Tribunal encourages communication and the exchange of documents by the parties to assist in identifying the issues that can be resolved between them before coming to the Tribunal. This approach reduces the length of hearings and avoids last-minute adjournments necessitated by late disclosure of information.

In the 2017-2018 reporting period, 97 cases were concluded without a hearing

In the 2017-2018 reporting period, **97** cases were concluded without a hearing. It should be noted that of these cases, many were requests filed with the Tribunal and concluded shortly before the hearing was to take place, which means that all registry work that leads up to the hearing was completed.

The cases concluded without a hearing were resolved in a number of ways: the document holder paid the fine before the hearing commenced, the document holder's licence was reinstated before the hearing, the request for hearing was withdrawn by the document holder, the notice was withdrawn by the Minister, or an agreement was reached between the parties.

In 2016-2017, the Tribunal had referred **6** cases back to the Minister of Transport for reconsideration (**2** aviation, **1** marine, and **3** rail). The Minister upheld the review determination on **2** cases and confirmed its original decision in **1** case. We are still awaiting the outcome in the other **3** cases.

In 2017-2018, the Tribunal referred **5** cases (**1** aviation, **3** marine, and **1** rail) back to the Minister for reconsideration. We are awaiting the outcome in all of these cases.

This is Exhibit D referred to in the
Affidavit of Sylvie Fournier
Affirmed before me at
Ottawa, Ontario
This 4th day of October, 2019

Tamarah Nutik

Commissioner for taking affidavits for Ontario
Tamarah Nutik
LSO # 50509S

Transportation Appeal Tribunal of Canada

Tribunal d'appel des transports du Canada

ANNUAL REPORT

2016-2017

Canada

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May 19, 2017

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport
Transport Canada

Place de Ville, Tower "C"
330 Sparks Street, 29th Floor
Ottawa, Ontario K1A 0N5

Dear Honourable Minister:

RE: ANNUAL REPORT 2016-2017

In reference to the above and pursuant to section 22 of the *Transportation Appeal Tribunal of Canada Act*, I am very pleased to submit to Parliament, through your intermediary, the Annual Report of the Transportation Appeal Tribunal of Canada for the fiscal year 2016-2017.

It is an honour and a privilege to continue to serve Canadians in the national transportation sector.

Respectfully,

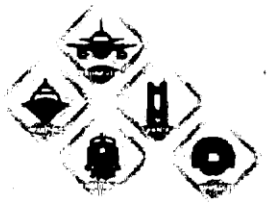
John Badowski, MSM
Chairperson

Tel: 613 990-6906 | Fax: 613 990-9153 | E-mail: info@tatc.gc.ca

Canada

Transportation Appeal Tribunal of Canada

ANNUAL REPORT
2016-2017



2016-2017 IN REVIEW

Effectiveness

The Tribunal's effectiveness can be measured by its ability to provide the Canadian transportation community with the opportunity to have Ministerial decisions reviewed fairly, equitably and within a reasonable period of time.

This year, the Tribunal increased its workload and substantially reduced a backlog of outstanding cases.

The average lapsed time in 2016-2017 between the conclusion of a Review Hearing and the issuance of a determination is **94** days (an increase of **10** per cent from last year). This result, however, must be viewed against the dramatic increase in caseload which occurred this year.

The Tribunal encourages communication and the exchange of documents by the parties to assist in identifying the issues that can be resolved between them before coming to the Tribunal. This approach reduces the length of hearings and avoids last-minute adjournments necessitated by late disclosure of information.

In the 2016-2017 reporting period, **110** cases were concluded without a hearing. It should be noted that of these cases, many were requests filed with the Tribunal and concluded shortly before the hearing was to take place, which means that all registry work that leads up to the hearing was completed.

The cases concluded without a hearing were resolved in a number of ways: the document holder paid the fine before the hearing commenced; the document holder's licence was reinstated before the hearing; the request for hearing was withdrawn by the document holder; the notice was withdrawn by the Minister; or an agreement was reached between the parties.

The number of cases, hearings and hearing days increased by up to 88 per cent this year.

In 2015-2016, the Tribunal had referred **4** cases back to the Minister of Transport for reconsideration (**3** aviation and **1** marine). We are awaiting the outcome in all of these cases.

In 2016-2017, the Tribunal referred **6** cases (**2** aviation, **1** marine and **3** rail) back to the Minister for reconsideration. We are awaiting the outcome in all of these cases as well.

Court File No. T-1809-18

FEDERAL COURT

BETWEEN:

SAUDI ARABIAN AIRLINES CORP.

Applicant

and

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

and

CANADIAN TRANSPORTATION AGENCY

Respondents

1st ADDENDUM TO THE RESPONDENT TRANSPORTATION APPEAL TRIBUNAL OF CANADA'S MEMORANDUM OF FACT AND LAW

---

[1] By Order of Justice Campbell dated September 16, 2019, the Transportation Appeal Tribunal of Canada makes these additional submissions.

[2] At the September 16 hearing, the Court drew the parties' attention to paragraph 29 of the Applicant's submissions, in which the Applicant claims that the failure to solicit commentary from the parties in relation to the withdrawal of the Notice of Violation by the Canadian Transportation Agency or the resulting impact on the Tribunal's jurisdiction undermines its obligations at common law and pursuant to subsection 180.3(3) of the *Canada Transportation Act* (CTA).

[3] The Court has asked the parties to comment on the extent of the duty of fairness, including as contained in subsection 180.3(3) of the CTA. In addition, the Court raised questions about the impugned letter written by the Tribunal's Registrar, the authority by which this letter was issued, as well as whether the (acting) Chairperson who signed the final Tribunal letter was the member assigned to conduct the review.

[4] Accompanying these submissions is an affidavit from the Tribunal's Registrar. The purpose of this affidavit is to respond to the factual questions asked by the Court. Specifically, the affidavit confirms that the member assigned to conduct the review was not involved in any communications or determinations following the withdrawal of the Notice of Violation. The letter from the Registrar dated September 19, 2018 was a staff-level response to the Applicant's queries about making cost submissions to the Tribunal. The affidavit also provides pertinent details about the Registrar's role, withdrawal rates and hearing cancellations. This information is provided so the Court may have a better understanding of the Tribunal's daily operations and processes.

[5] The questions of procedural fairness raised by the Applicant are broad. However, the procedural steps taken by the Tribunal, through its staff and Chairperson, arose within a specialized legislative scheme that sets out specific procedures for the Tribunal. The Tribunal's understanding of the requirements and limitations of this scheme informed its actions. This is demonstrated in the record of this proceeding through the following: the issuance of a Notice of Cancellation of Hearing and closing of the Tribunal's review file; the communication issued by the Registrar to the Applicant on September 19, 2018; and the subsequent determination issued by the Chairperson on September 27, 2018.

THE REVIEW PROCEEDING AND THE PERIOD AFTER THE REVIEW PROCEEDING WAS CLOSED

[6] The Tribunal considers that there were two distinct periods in this matter.

[7] The first period was the review proceeding, initiated by a request for review of Notice of Violation 17-06204 filed on March 1, 2018. In this phase, the review file was opened; a review member was assigned to hear the review; and a hearing was scheduled. This phase ended when the Notice of Violation was withdrawn; the Notice of Cancellation of Hearing was issued; and the Tribunal's file was closed.

[8] In the second period, the Registry received an inquiry from the Applicant and, subsequent to the Registrar's response, a request for a determination. This request for determination came by way of letter dated September 24, 2018. It specifically requested a determination in the form of a formal decision with respect to whether the Tribunal possesses jurisdiction to order costs pursuant to paragraph 19(1)(a) of the *Transportation Appeal Tribunal of Canada Act* (TATC Act)[1]. The response to this request came from the Chairperson of the Tribunal on September 27, 2018[2].

[9] The Tribunal's powers and the legal framework to deal with each of the review request and the request for a formal determination on the Tribunal's jurisdiction are different under the *Transportation Appeal Tribunal of Canada Act*, the *Transportation Appeal Tribunal of Canada Rules* and the *Canada Transportation Act*.

---

[1] See Exhibit P, Affidavit of Joanne Rodriguez, Applicant's Record at p. 60-61.
[2] See Exhibit Q, Affidavit of Joanne Rodriguez, Applicant's Record at p. 63.

THE REQUEST FOR REVIEW IN RELATION TO AN ADMINISTRATIVE MONETARY PENALTY UNDER THE CTA

[10] On March 1, 2018, the Applicant made an application to have the administrative monetary penalty contained in Notice of Violation 17-06204 reviewed by the Tribunal. Section 12 of the TATC Act[3] and sections 180.3 to 180.6 of the CTA[4] establish the procedure for the review of that Notice.

[11] The scope of reviews is circumscribed by the legislation. Subsection 2(3) of the TATC Act relates to the specific jurisdiction of the Tribunal in respect of reviews and appeals in connection with administrative monetary penalties under sections 177 to 181 of the CTA and other transportation Acts.

[12] Subsection 180.3(1) of the CTA states that a person who has been served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed can file a written request for review with the Tribunal.

[13] Pursuant to subsection 180.3(2) of the CTA, on receipt of the request to review the alleged contravention contained in the notice of violation, the Tribunal shall appoint a time and place for the review and shall notify the Minister and the person who filed the request.

[14] Pursuant to subsection 180.3(3) of the CTA, the review procedure for the alleged violation is for the Tribunal member assigned to conduct the review to provide the parties with an opportunity that is consistent with procedural fairness and natural justice to present evidence and make representations. Again, the reasons for the review hearing are the review of the facts and amount of the administrative monetary penalty as stated in subsection 180.3(1).

[15] The Tribunal interprets the procedural fairness obligations set out at subsection 180.3(3) as arising at the hearing itself. Oral hearings are the primary, and

[3] Respondent 1st Addendum, Appendix A, Tab 2.
[4] Respondent 1st Addendum, Appendix A, Tab 1.

nearly always the only, component of review proceedings under the CTA. In rare circumstances, parties raise preliminary matters in writing before the hearing takes place. However, as with all administrative monetary penalties reviewed by the Tribunal, evidence and submissions on the merits are made only on the day of the hearing.

[16] The centrality of the hearing to the review process is reflected in the words of the enabling legislation. Support for the Tribunal's reading can be found in the French version of subsection 180.3(3), which speaks to the parties' procedural fairness rights. The French provision refers explicitly to these rights arising "à "l'audience"—at the hearing:

> **180.3(3)** À l'audience, le membre du Tribunal commis à l'affaire accorde au ministre et à l'intéressé la possibilité de présenter leurs éléments de preuve et leurs observations, conformément aux principes de l'équité procédurale et de la justice naturelle.

[17] What is more, subsection 180.3(5) of the CTA states that a person who is alleged to have contravened a designated provision is not required, and shall not be compelled, to give any evidence or testimony in the matter. The French version of the provision indicates, again, that this is tied to the hearing:

> **180.3(5)** L'interéssé n'est pas tenu de témoigner à l'audience.

[18] This provision has led to the longstanding Tribunal practice of opening the evidentiary record only on the day of the hearing itself, not before. It bears mentioning that, within this statutory context, the central role of oral hearings in the Tribunal's review process also informs its understanding of its power to award costs, which again explicitly relates to hearings, as set out in section 19 of the TATC Act.

[19] Finally, the review member's decision-making power contained at section 180.5 is circumscribed. The member may either determine that there has been no contravention, or that there has been a contravention. In the latter case, the

member determines the penalty amount. This decision can only be made "at the conclusion of the review" or "après l'audition des parties."

[20] The Tribunal acknowledges that procedural fairness obligations do not only arise from statute. However, to the extent that the question before the Court is the scope of that duty under subsection 180.3(3) of the CTA, the Tribunal submits that this subsection is a hearing-specific provision that relates to the substantive review of an administrative monetary penalty and must be given a contextual reading.

[21] For this reason, the Tribunal does not interpret the statutory obligations of the member assigned to conduct the review as necessarily extending to and beyond the withdrawal of a matter. This is because the Tribunal is of the view that it loses jurisdiction in the event of withdrawals.

[22] In this case, the Tribunal understood that it lost jurisdiction to review the Applicant's request for review when the Notice of Violation was withdrawn. The Tribunal has previously said as much in its ruling in *Guardian Eagle* Co., when a similar set of facts gave rise to this same jurisdictional question, which the Tribunal examined and answered:

> The Tribunal's jurisdiction is set out in subsections 2(2) and (3) of the TATC Act. Subsection 2(3) grants jurisdiction "in respect of reviews and appeals in connection with administrative monetary penalties provided for under sections177 to 181 of the Canada Transportation Act ...". I agree with the Agency's position that this provision limits the Tribunal's jurisdiction to hearings that determine whether or not a violation alleged in a notice issued under section 180 of the CTA did, in fact, occur and whether the monetary penalty assessed was appropriate in the circumstances. The basis for the hearing is the notice and, if the notice is withdrawn, that basis disappears and the Tribunal has no further jurisdiction in the matter.[5]

[23] In that ruling, the Tribunal went on to find that its power to award costs as a consequence of withdrawal "does not stand alone and must be read as an adjunct to the authority granted to the Tribunal under the statutes listed in

[5] *Guardian Eagle Co.* v. *Minister of Transport*, TATC File No. H3814-80 at para. 14, Respondent 1st Addendum, Appendix B, Tab 2.

section 2 of the *TATC Act*."[6] In looking at the wording of section 19 of the TATC Act, the Tribunal concluded that "section 19 of the TATC Act can only apply where the Tribunal has jurisdiction over the matter. As pointed out above, the Tribunal has no jurisdiction once the notice is withdrawn and consequently cannot make an order as to costs."[7]

[24] In the case of TATC File No. O-4392, the Tribunal complied with its statutory duty under subsection 180.3(2) on May 30, 2018 by scheduling a hearing to review the alleged contravention and the amount of the penalty[8]. To that end, a member was assigned to conduct the review.[9]

[25] However, no hearing was conducted in this case as the alleged contravention and the amount of the penalty were not reviewed and no evidence and representations were made before the Tribunal. The Tribunal understood that its jurisdiction to review the alleged contravention no longer existed in the absence of the Notice of Violation.

[26] Without a review hearing and with the withdrawal of the Notice of Violation, no determination was made by the member assigned to the review, no evidence was heard by the member, there was no decision that could directly or indirectly impact the substantive merits, and no procedural steps were taken. Therefore, the Tribunal, in the case at hand, subscribes to the findings in *Newfoundland (Treasury Board)*[10] that the member assigned to the review hearing was not seized of the matter.

[27] Upon receipt of the withdrawal, the Registrar notified the assigned review member of the cancelled hearing.[11] The Registrar then issued its Notice of Cancellation of Hearing to the parties, and closed the Tribunal's file in relation

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[6] Ibid. at para. 15.
[7] Ibid.
[8] See Exhibit J, Affidavit of Joanne Rodriguez, Applicant's Record at p. 45.
[9] See Affidavit of Sylvie Fournier, Respondent's First Addendum, para. 9.
[10] *Newfoundland (Treasury Board)* v. *Newfoundland and Labrador Assn. of Public and Private Employees*, (2004) N.J. No. 325, Respondent's 1st Addendum, Appendix B, Tab 3.
[11] See Exhibit A, Affidavit of Sylvie Fournier, Respondent's First Addendum.

to the review.[12] The Notice of Cancellation is a standard template and its issuance is an established practice. This practice has developed in response to the frequent rate of withdrawals of Tribunal files, both before and after a hearing is scheduled.

[28] More specifically, the Tribunal's Annual Report shows that in 2018-2019, a total of 111 Tribunal cases were withdrawn[13]. Sixteen Notices of Cancellation were issued and 38 review hearings were held.[14]

[29] In 2017-2018, the Tribunal's Annual Report shows that a total of 97 cases were withdrawn.[15] Twenty-seven Notices of Cancellation of Hearing were issued and 40 review hearings were held.[16]

[30] In 2016-2017, the Tribunal's Annual Report shows that a total of 110 cases were withdrawn.[17] Twenty-nine Notices of Cancellation of Hearing were issued and 43 review hearings were held.[18]

[31] In the vast majority of cases, these withdrawals are initiated by applicants themselves, rather than from the federal enforcement body.[19]

[32] As a result, the cancellation of hearings and consequent closing of Tribunal files is a common practice at the Tribunal. The associated procedure is handled by the Tribunal's Registrar as an administrative matter.[20]

[33] It is the Tribunal's understanding that a review member ceases to be seized of a matter in circumstances such as the one described above. In the event that the Court reads the legislation differently, the Tribunal asks for the Court's guidance in determining the point at which the review member ceases to be seized under the legislative scheme. The Tribunal also seeks guidance on

[12] See Exhibit M, Affidavit of Joanne Rodriguez, Applicant's Record at p. 53.
[13] See Exhibit B, Affidavit of Sylvie Fournier, para. 15.
[14] See Affidavit of Sylvie Fournier at paras. 16-18.
[15] See Exhibit C, Affidavit of Sylvie Fournier at para. 19.
[16] See Affidavit of Sylvie Fournier at paras. 20-23.
[17] See Exhibit D, Affidavit of Sylvie Fournier, para. 24.
[18] See Affidavit of Sylvie Fournier at paras. 25-27.
[19] See Affidavit of Sylvie Fournier and Exhibits B, C, D.
[20] See Affidavit of Sylvie Fournier at paras. 6, 12, 13.

whether another Tribunal member may dispose of a motion for costs when no evidence has been gathered or decisions or rulings are made in respect of a hearing.

THE REQUESTS MADE BY THE APPLICANT AFTER THE REVIEW PROCEEDING HAD ENDED

[34] The Office of the Registry received Saudi Arabian Airlines' message dated September 18, 2018, anticipating that the Tribunal remained seized of the matter and requesting specific instructions from the Tribunal with respect to making written submissions as to costs (Applicant's Exhibit N).

[35] From the Tribunal's perspective, this query arose after the review proceeding had been terminated and the file was closed.

[36] The Registry is the first point of contact for parties and persons seeking to communicate with the Tribunal and it regularly responds to queries.[21]

[37] On September 19, 2018, the Registrar provided the information requested by the Applicant in regards of costs and an explanation that the matter was closed: the Registrar communicated that the Tribunal was no longer seized of the matter as opposed to the applicant's anticipation that it was. This communication from the Registrar was not a determination from the Tribunal but a response to the Applicant's request to the Registrar for "specific instructions that the Tribunal has with regards to the process of making written submissions as to costs".[22]

[38] However, in this case, the Applicant reflected its understanding that the communication was "the Registrar's view that the TATC is accordingly, unable to accept any submissions", and not a Tribunal determination, when it

[21] See Affidavit of Sylvie Fournier at paras. 4-5
[22] See Exhibit N, Affidavit of Joanne Rodriguez, Applicant's Record at p. 55.

requested a formal decision on the matter.[23] The Tribunal respectfully submits that this request and the response to it should be considered by the Court.

[39] On September 24th 2018, after receiving the Registrar's letter, the Applicant requested a determination on whether the Tribunal remained seized. Upon receipt of this request for a determination, the Applicant's request was provided to the Chairperson of the Tribunal.

[40] Pursuant to section 4 of the TATC Act, the Chairperson is a full-time member of the Tribunal:

> **4** The Governor in Council shall designate one member as Chairperson of the Tribunal and one member as Vice-Chairperson. The Chairperson and Vice-Chairperson must be full-time members.

[41] The Chairperson is therefore authorized to make procedural rulings and determinations.

[42] Under section 5 of the TATC Act, the Chairperson has supervision over, and direction of, the work of the Tribunal, including the appointment of work among members and the management of its internal affairs. Subsection 5(1) of the TATC Act provides as follows:

> **5 (1)** The Chairperson has supervision over, and direction of, the work of the Tribunal, including
>
> > **(a)** the apportionment of work among members and the assignment of members to hear matters brought before the Tribunal and, when the Tribunal sits in panels, the assignment of members to panels and to preside over panels; and
> >
> > **(b)** generally, the conduct of the work of the Tribunal and the management of its internal affairs.

[43] In this case, the Chairperson was empowered to assign himself to respond to the request for a determination made by the Applicant on September 24, 2018.

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[23] See Exhibit P, Affidavit of Joanne Rodriguez, Applicant's Record at p. 60-61.

[44] Finally, under section 11, the Chairperson determines the times and places at which the Tribunal will sit for the proper performance of its functions:

> **11** The Tribunal shall sit at those times and places in Canada that the Chairperson considers necessary for the proper performance of its functions.

[45] It is therefore submitted that, when the Applicant requested a determination with respect to a jurisdictional question, the Chairperson had the statutory authority to determine whether a sitting was necessary. The Chairperson was authorized by statute to assign himself to the matter and respond to the request made by the Applicant.

[46] When a procedural matter that is not provided for in the TATC Act or any of the Acts mentioned in subsections 2(2) and 2(3) of the TATC Act arises, sections 4 and 10 of the *Transportation Appeal Tribunal of Canada Rules* (Rules) apply. The applicant's letter dated September 24 did not, in the Tribunal's view, fall within the scope of a review proceeding, but rather fell within the scope of rules 4 and 10.[24]

[47] Both sections 4 and 10 of the Tribunal's Rules afford the Tribunal with flexibility in taking action to respond to procedural matters or requests.

[48] Section 4 provides that when a procedural matter is not provided for by any of the applicable legislation, the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, completely and fairly.

[49] Section 10 of the Tribunal's Rules applies to applications for relief brought before the Tribunal other than a request for review or appeal. Subsection 10(1.1) of the Rules states that an application shall be in writing and filed with the Tribunal unless, in the opinion of the Tribunal, circumstances exist to allow the application to be brought in some other manner. Subsections (3) and (4) provide flexibility in determining whether submissions are required.

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[24] See Respondent's 1st Addendum at Appendix A, Tab 3.

[50] Pursuant to the Chairperson's statutory powers, and considering that no hearing was held to review Notice of Violation 17-06204, that no evidence was heard that could directly or indirectly impact the merits, it was the Tribunal's understanding that the Chairperson or another tribunal member could dispose of the request dated September 24, 2018.[25]

[51] On September 27, 2018, the Chairperson disposed of the request by acknowledging the Applicant's correspondence of September 24, 2018, mentioning the Registrar's letter of September 19, and confirming that the Tribunal was no longer seized of the matter.

[52] The Tribunal acknowledges that no exchange of pleadings was requested with respect to this question. While the Tribunal defers to the Court to determine whether this constituted a breach of procedural fairness, because the Court has put the question to the parties, the Tribunal submits that the circumstances of this case were singular.

[53] It is a well-established principle of administrative law that tribunals are masters of their own procedure.[26] The Federal Court has specifically recognized that the Tribunal is authorized by section 18 of the TATC Act to govern its practice and procedure through its procedural rules and to manage the conduct of its proceedings.[27] The Tribunal notes that in some instances, such as with respect to jurisdictional questions, reviewing courts have considered the overall fairness of the result, as well as the correctness of the jurisdictional finding, in considering a decision from a Chairperson in relation to a matter of jurisdiction where the parties were not asked for submissions .[28]

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[25] *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2004] N.J. No. 325, Respondent's 1st Addendum at Appendix B, Tab 3.
[26] *Prassad v. Canada (MEI)*, [1989] 1 S.C.R. 560 at p. 568-569, Appendix B, Tab 4.
[27] *Bertram v. Canada (Attorney General)*, Federal Court File No. T-468-14, Appendix B; Tab 1.
[28] *Sayhoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2016 BCCA 312, at paras. 32-34, Appendix B, Tab 5.

[54] The question posed by the Applicant to the Tribunal was jurisdictional in nature. Based on its understanding of the legislation, its long-established practices, and its past ruling on the jurisdictional question in *Guardian Eagle*, it was determined that sufficient information was put forward to provide a response to the Applicant.

[55] Accordingly, the Tribunal's Chairperson considered and acknowledged the request and reasons provided by the Applicant, and disposed of the request in a determination pursuant to his statutory powers under the TATC Act and, the Tribunal believed, consistent with the flexibility provided to the Tribunal pursuant to its Rules.

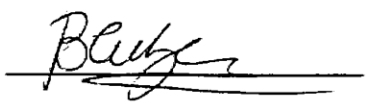
COSTS

[56] Should the Court consider the Applicant's request for costs, the Tribunal requests the opportunity to make submissions at the hearing on this issue.

[57] The Tribunal submits that it has participated in these proceedings with the prior permission of the Court's Prothonotary and that any decision that the Tribunal's actions breached the duty of procedural fairness arose from its understanding of its statutory jurisdiction and was in error, but did not constitute misconduct or bad faith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 4th day of October, 2019.



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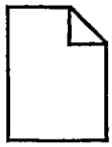
PART V: LIST OF AUTHORITIES

A. LEGISLATIVE REFERENCES

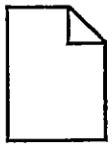
1. *Canada Transportation Act*, S.C. 1996, c. 10
2. *Transportation Appeal Tribunal of Canada Act,* S.C. 2001, c. 29
3. *Transportation Appeal Tribunal of Canada Rules*, SOR/86-594

B. JURISPRUDENCE

1. *Bertram v. Canada (Attorney General)*, Federal Court File No. T-468-14
2. *Guardian Eagle Co.* v. *Minister of Transport*, TATC File No. H3814-80
3. *Newfoundland (Treasury Board)* v. *Newfoundland and Labrador Assn. of Public and Private Employees*, (2004) N.J. No. 325
4. *Prassad v. Canada (MEI)*, [1989] 1 S.C.R. 560
5. *Sayhoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2016 BCCA 312



TAB A ONGLET



APPENDIX A: STATUTES AND REGULATIONS

TAB

1

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to June 21, 2019

Last amended on June 21, 2019

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Request for review of determination

180.3 (1) A person who is served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice or within any further time that the Tribunal on application may allow, file a written request for a review with the Tribunal at the address set out in the notice.

Time and place for review

(2) On receipt of a request filed under subsection (1), the Tribunal shall appoint a time and place for the review and shall notify the Minister and the person who filed the request of the time and place in writing.

Review procedure

(3) The member of the Tribunal assigned to conduct the review shall provide the Minister and the person who filed the request with an opportunity consistent with procedural fairness and natural justice to present evidence and make representations.

Burden of proof

(4) The burden of establishing that a person has contravened a designated provision is on the Minister.

Person not compelled to testify

(5) A person who is alleged to have contravened a designated provision is not required, and shall not be compelled, to give any evidence or testimony in the matter.

2007, c. 19, s. 52.

Certificate

180.4 If a person neither pays the amount of the penalty in accordance with the particulars set out in the notice of violation nor files a request for a review under subsection 180.3(1), the person is deemed to have committed the contravention alleged in the notice, and the Minister may obtain from the Tribunal a certificate in the form that may be established by the Governor in Council that indicates the amount of the penalty specified in the notice.

2007, c. 19, s. 52.

Determination by Tribunal member

180.5 If, at the conclusion of a review under section 180.3, the member of the Tribunal who conducts the review determines that

(a) the person has not contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall without delay inform the person and the Minister of the

Requête en révision

180.3 (1) Le destinataire du procès-verbal qui veut faire réviser la décision du ministre à l'égard des faits reprochés ou du montant de la sanction dépose une requête auprès du Tribunal à l'adresse indiquée dans le procès-verbal, au plus tard à la date limite qui y est indiquée, ou dans le délai supérieur éventuellement accordé à sa demande par le Tribunal.

Audience

(2) Le Tribunal, sur réception de la requête, fixe la date, l'heure et le lieu de l'audience et en avise par écrit le ministre et l'intéressé.

Déroulement

(3) À l'audience, le membre du Tribunal commis à l'affaire accorde au ministre et à l'intéressé la possibilité de présenter leurs éléments de preuve et leurs observations, conformément aux principes de l'équité procédurale et de la justice naturelle.

Charge de la preuve

(4) S'agissant d'une requête portant sur les faits reprochés, il incombe au ministre d'établir que l'intéressé a contrevenu au texte désigné.

Intéressé non tenu de témoigner

(5) L'intéressé n'est pas tenu de témoigner à l'audience.

2007, ch. 19, art. 52.

Omission de payer la sanction ou de présenter une requête

180.4 L'omission, par l'intéressé, de payer la pénalité dans les délais et selon les modalités prévus dans le procès-verbal et de présenter une requête en révision vaut déclaration de responsabilité à l'égard de la contravention. Sur demande, le ministre peut alors obtenir du Tribunal un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

Décision

180.5 Après audition des parties, le membre du Tribunal informe sans délai l'intéressé et le ministre de sa décision. S'il décide :

a) qu'il n'y a pas eu contravention, sous réserve de l'article 180.6, nulle autre poursuite ne peut être intentée à cet égard sous le régime de la présente partie;

determination and, subject to section 180.6, no further proceedings under this Part shall be taken against the person in respect of the alleged contravention; or

(b) the person has contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall without delay inform the person and the Minister of the determination and of the amount determined by the member of the Tribunal to be payable by the person in respect of the contravention and, if the amount is not paid to the Tribunal by or on behalf of the person within the time that the member of the Tribunal may allow, the member of the Tribunal shall issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person.

2007, c. 19, s. 52; 2018, c. 10, s. 56.

b) qu'il y a eu contravention, il les informe également de la somme qu'il fixe et qui doit être payée au Tribunal. En outre, à défaut de paiement dans le délai imparti, il expédie au ministre un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52; 2018, ch. 10, art. 56.

Right of appeal

180.6 (1) The Minister or a person affected by a determination made under section 180.5 may, within 30 days after the determination, appeal it to the Tribunal.

Loss of right of appeal

(2) A party that does not appear at a review hearing is not entitled to appeal a determination, unless they establish that there was sufficient reason to justify their absence.

Disposition of appeal

(3) The appeal panel of the Tribunal assigned to hear the appeal may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, the panel may substitute its decision for the determination appealed against.

Certificate

(4) If the appeal panel finds that a person has contravened the designated provision, the panel shall without delay inform the person of the finding and of the amount determined by the panel to be payable by the person in respect of the contravention and, if the amount is not paid to the Tribunal by or on behalf of the person within the time allowed by the Tribunal, the Tribunal shall issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person.

2007, c. 19, s. 52; 2018, c. 10, s. 57.

Registration of certificate

180.7 (1) If the time limit for the payment of an amount determined by the Minister in a notice of violation has expired, the time limit for the request for a

Appel

180.6 (1) Le ministre ou toute personne concernée peut faire appel au Tribunal de la décision rendue au titre de l'article 180.5. Le délai d'appel est de trente jours.

Perte du droit d'appel

(2) La partie qui ne se présente pas à l'audience portant sur la requête en révision perd le droit de porter la décision en appel, à moins qu'elle ne fasse valoir des motifs valables justifiant son absence.

Sort de l'appel

(3) Le comité du Tribunal peut rejeter l'appel ou y faire droit et substituer sa propre décision à celle en cause.

Avis

(4) S'il statue qu'il y a eu contravention, le comité en informe sans délai l'intéressé. Il l'informe également de la somme qu'il fixe et qui doit être payée au Tribunal. En outre, à défaut de paiement dans le délai imparti, il expédie au ministre un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52; 2018, ch. 10, art. 57.

Enregistrement du certificat

180.7 (1) Sur présentation à la juridiction supérieure, une fois le délai d'appel expiré, la décision sur l'appel rendue ou le délai pour payer la sanction ou déposer une

TAB

2

CANADA

CONSOLIDATION

CODIFICATION

Transportation Appeal Tribunal of Canada Act

Loi sur le Tribunal d'appel des transports du Canada

S.C. 2001, c. 29

L.C. 2001, ch. 29

Current to June 21, 2019

Last amended on June 21, 2019

À jour au 21 juin 2019

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence
31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts
(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve
31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois
(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to June 21, 2019. The last amendments came into force on June 21, 2019. Any amendments that were not in force as of June 21, 2019 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 21 juin 2019. Les dernières modifications sont entrées en vigueur le 21 juin 2019. Toutes modifications qui n'étaient pas en vigueur au 21 juin 2019 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to establish the Transportation Appeal Tribunal of Canada and to make consequential amendments to other Acts

TABLE ANALYTIQUE

Loi portant constitution du Tribunal d'appel des transports du Canada et modifiant certaines lois en conséquence

Consequential Amendments

Coordinating Amendments

Coming into Force

Modifications connexes

Dispositions de coordination

Entrée en vigueur

S.C. 2001, c. 29

An Act to establish the Transportation Appeal Tribunal of Canada and to make consequential amendments to other Acts

[*Assented to 18th December 2001*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the *Transportation Appeal Tribunal of Canada Act*.

Transportation Appeal Tribunal of Canada

Establishment

2 (1) There is hereby established a tribunal to be known as the Transportation Appeal Tribunal of Canada ("the Tribunal").

Jurisdiction generally

(2) The Tribunal has jurisdiction in respect of reviews and appeals as expressly provided for under the *Aeronautics Act*, the *Canada Shipping Act, 2001*, the *Marine Transportation Security Act*, the *Railway Safety Act* and any other federal Act regarding transportation.

L.C. 2001, ch. 29

Loi portant constitution du Tribunal d'appel des transports du Canada et modifiant certaines lois en conséquence

[*Sanctionnée le 18 décembre 2001*]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

Titre abrégé

Titre abrégé

1 *Loi sur le Tribunal d'appel des transports du Canada.*

Tribunal d'appel des transports du Canada

Constitution

2 (1) Est constitué le Tribunal d'appel des transports du Canada (ci-après le Tribunal).

Compétence générale

(2) Le Tribunal connaît des requêtes en révision dont il est saisi en vertu de la *Loi sur l'aéronautique*, la *Loi de 2001 sur la marine marchande du Canada*, la *Loi sur la sûreté du transport maritime*, la *Loi sur la sécurité ferroviaire* ou toute autre loi fédérale concernant les transports. Il connaît également des appels interjetés des décisions qu'il a rendues dans les dossiers de révision.

Jurisdiction in respect of other Acts

(3) The Tribunal also has jurisdiction in respect of reviews and appeals in connection with administrative monetary penalties provided for under sections 177 to 181 of the *Canada Transportation Act*, sections 43 to 55 of the *International Bridges and Tunnels Act*, sections 129.01 to 129.19 of the *Canada Marine Act*, sections 16.1 to 16.25 of the *Motor Vehicle Safety Act*, sections 39.1 to 39.26 of the *Navigation Protection Act* and sections 130.01 to 130.19 of the *Marine Liability Act*.

2001, c. 29, ss. 2, 71; 2007, c. 1, s. 59; 2008, c. 21, s. 65; 2012, c. 31, s. 345; 2018, c. 2, s. 18; 2019, c. 29, s. 290.

Compétence en vertu d'autres lois

(3) Le Tribunal connaît également des requêtes en révision et des appels portant sur les sanctions administratives pécuniaires prévues aux articles 177 à 181 de la *Loi sur les transports au Canada* et aux articles 130.01 à 130.19 de la *Loi sur la responsabilité en matière maritime* et portant sur les pénalités visées aux articles 43 à 55 de la *Loi sur les ponts et tunnels internationaux*, aux articles 129.01 à 129.19 de la *Loi maritime du Canada*, aux articles 16.1 à 16.25 de la *Loi sur la sécurité automobile* et aux articles 39.1 à 39.26 de la *Loi sur la protection de la navigation*.

2001, ch. 29, art. 2 et 71; 2007, ch. 1, art. 59; 2008, ch. 21, art. 65; 2012, ch. 31, art. 345; 2018, ch. 2, art. 18; 2019, ch. 29, art. 290.

Members

3 (1) The Governor in Council shall appoint as members of the Tribunal persons who, in the opinion of the Governor in Council, collectively have expertise in the transportation sectors in respect of which the federal government has jurisdiction.

Conseillers

3 (1) Le gouverneur en conseil nomme au Tribunal des membres — ci-après appelés « conseillers » — possédant collectivement des compétences dans les secteurs des transports ressortissant à la compétence du gouvernement fédéral.

Full- or part-time members

(2) Members may be appointed as full-time or part-time members.

Exercice des fonctions

(2) Les conseillers exercent leurs fonctions soit à temps plein, soit à temps partiel.

Chairperson and Vice-Chairperson

4 The Governor in Council shall designate one member as Chairperson of the Tribunal and one member as Vice-Chairperson. The Chairperson and Vice-Chairperson must be full-time members.

Président et vice-président

4 Le gouverneur en conseil désigne, parmi les conseillers, le président et le vice-président. Ceux-ci doivent exercer leurs fonctions à temps plein.

Duties of Chairperson

5 (1) The Chairperson has supervision over, and direction of, the work of the Tribunal, including

(a) the apportionment of work among members and the assignment of members to hear matters brought before the Tribunal and, when the Tribunal sits in panels, the assignment of members to panels and to preside over panels; and

(b) generally, the conduct of the work of the Tribunal and the management of its internal affairs.

Fonctions du président

5 (1) Le président assure la direction du Tribunal et en contrôle les activités. Il est notamment chargé :

a) de la répartition des affaires et du travail entre les conseillers et, le cas échéant, de la constitution et de la présidence des comités;

b) de la conduite des travaux du Tribunal et de son administration.

Absence of Chairperson

(2) In the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant, the Vice-Chairperson shall act as Chairperson during the continuance of that absence or incapacity or until a new Chairperson is designated.

2001, c. 29, s. 5; 2014, c. 20, s. 464.

Intérim du président

(2) En cas d'absence ou d'empêchement du président ou de vacance de son poste, la présidence est assumée par le vice-président jusqu'au retour du président, jusqu'à la fin de cet empêchement ou jusqu'à la désignation d'un nouveau président.

2001, ch. 29, art. 5; 2014, ch. 20, art. 464.

Term of office

6 (1) A member shall be appointed to hold office during good behaviour for a term not exceeding seven years and may be removed for cause by the Governor in Council.

Reappointment

(2) A member is eligible to be reappointed.

Disposition after member ceases to hold office

(3) At the request of the Chairperson, a former member, within eight weeks after ceasing to be a member, may make or take part in a determination or decision on a matter that they heard as a member. For that purpose, the former member is deemed to be a member.

Remuneration

7 (1) Members shall receive the remuneration that is fixed by the Governor in Council.

Expenses

(2) Each member is entitled to be paid reasonable travel and living expenses incurred while absent in the course of their duties from, in the case of a full-time member, their ordinary place of work and, in the case of a part-time member, their ordinary place of residence.

Status

(3) Members are deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

2001, c. 29, s. 7; 2003, c. 22, s. 224(E).

Inconsistent interests — full-time members

8 (1) Full-time members shall not accept or hold any office, membership, employment or interest, or engage in any business activity, that is inconsistent with the proper performance of their duties and functions.

Divesting of interests

(2) If an interest that is prohibited under subsection (1) vests, by whatever means, in a full-time member, the member shall disclose the interest to the Chairperson without delay and, within three months after the interest vests, either divest himself or herself of the interest or resign as a member.

Duties of full-time members

(3) Full-time members shall devote the whole of their time to the performance of their duties and functions under this Act.

Mandat

6 (1) Les conseillers sont nommés à titre inamovible pour un mandat maximal de sept ans, sous réserve de révocation motivée par le gouverneur en conseil.

Renouvellement

(2) Le mandat des conseillers est renouvelable.

Conclusion des affaires en cours

(3) Le président peut demander à un ancien conseiller de participer, dans les huit semaines suivant la cessation de ses fonctions, aux décisions à rendre sur les affaires qu'il avait entendues; il conserve alors sa qualité.

Rémunération

7 (1) Les conseillers reçoivent la rémunération que fixe le gouverneur en conseil.

Frais

(2) Les conseillers ont droit aux frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel de travail, s'ils sont nommés à temps plein, ou de résidence, s'ils le sont à temps partiel.

Indemnisation

(3) Les conseillers sont réputés être des agents de l'État pour l'application de la *Loi sur l'indemnisation des agents de l'État* et appartenir à l'administration publique fédérale pour l'application des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*.

2001, ch. 29, art. 7; 2003, ch. 22, art. 224(A).

Incompatibilité : conseillers à temps plein

8 (1) Les conseillers à temps plein ne peuvent avoir d'intérêt ou d'affiliation, occuper des charges ou des emplois ni se livrer à des activités qui soient incompatibles avec l'exercice de leurs attributions.

Cession d'intérêts ou démission

(2) Ils doivent porter sans délai tout intérêt visé au paragraphe (1) qui leur est dévolu à la connaissance du président et, dans les trois mois suivant la dévolution, se départir de l'intérêt ainsi acquis ou démissionner de leur poste de conseiller.

Incompatibilité avec d'autres attributions

(3) Les conseillers à temps plein se consacrent exclusivement à l'exercice des attributions que leur confère la présente loi.

Inconsistent interests — part-time members

(4) If a part-time member who is assigned to hear or is hearing any matter before the Tribunal, either alone or as a member of a panel, holds any pecuniary or other interest that could be inconsistent with the proper performance of their duties and functions in relation to the matter, the member shall disclose the interest to the Chairperson without delay and is ineligible to hear, or to continue to hear, the matter.

Incompatibilité : conseillers à temps partiel

(4) Les conseillers à temps partiel appelés à entendre une affaire soit seuls, soit en comité, qui détiennent un intérêt pécuniaire ou autre susceptible d'être incompatible avec l'exercice de leurs attributions quant à l'affaire, le portent sans délai à la connaissance du président. Ils ne peuvent dès lors entendre l'affaire.

Principal office

9 The principal office of the Tribunal shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Siège

9 Le siège du Tribunal est fixé dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale*.

10 [Repealed, 2014, c. 20, s. 465]

10 [Abrogé, 2014, ch. 20, art. 465]

Sittings

11 The Tribunal shall sit at those times and places in Canada that the Chairperson considers necessary for the proper performance of its functions.

Séances

11 Le Tribunal siège, au Canada, aux dates, heures et lieux que le président estime nécessaires à l'exercice de ses attributions.

Hearings on review

12 A review shall be heard by a member, sitting alone, who has expertise in the transportation sector to which the review relates. However, a review that concerns a matter of a medical nature shall be heard by a member with medical expertise, whether or not that member has expertise in the transportation sector to which the review relates.

Requêtes en révision : audition

12 Les requêtes en révision sont entendues par un conseiller agissant seul et possédant des compétences reliées au secteur des transports en cause. Toutefois, dans le cas où la requête soulève des questions d'ordre médical, le conseiller doit posséder des compétences dans ce domaine, qu'il ait ou non des compétences reliées au secteur des transports en cause.

Hearings on appeal

13 (1) Subject to subsection (2), an appeal to the Tribunal shall be heard by an appeal panel consisting of three members.

Appels : audition

13 (1) Sous réserve du paragraphe (2), les appels interjetés devant le Tribunal sont entendus par un comité de trois conseillers.

Size of panel

(2) The Chairperson may, if he or she considers it appropriate, direct that an appeal be heard by an appeal panel consisting of more than three members or, with the consent of the parties to the appeal, of one member.

Effectif du comité

(2) Le président peut, s'il l'estime indiqué, soumettre l'appel à un comité de plus de trois conseillers ou, si les parties à l'appel y consentent, à un seul conseiller.

Composition of panel

(3) A member who conducts a review may not sit on an appeal panel that is established to hear an appeal from his or her determination.

Composition du comité

(3) Le conseiller dont la décision est contestée ne peut siéger en appel, que ce soit seul ou comme membre d'un comité.

Qualifications of members

(4) With the exception of the Chairperson and Vice-Chairperson, who may sit on any appeal panel, an appeal shall be heard by an appeal panel consisting of members who have expertise in the transportation sector to which the appeal relates.

Compétences des conseillers

(4) Les conseillers qui sont saisis d'un appel doivent, sauf s'il s'agit du président et du vice-président, qui peuvent siéger à tout comité, posséder des compétences reliées au secteur des transports en cause.

Medical matters

(5) Despite subsection (4), in an appeal that concerns a matter of a medical nature, at least one member of the appeal panel shall have medical expertise, whether or not that member has expertise in the transportation sector to which the appeal relates.

Decision of panel

(6) A decision of a majority of the members of an appeal panel is a decision of the panel.

Nature of appeal

14 An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.

Nature of hearings

15 (1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

Restriction

(2) The Tribunal shall not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

Appearance

(3) A party to a proceeding before the Tribunal may appear in person or be represented by another person, including legal counsel.

Private hearings

(4) Hearings shall be held in public. However, the Tribunal may hold all or any part of a hearing in private if it is of the opinion that

(a) a public hearing would not be in the public interest;

(b) medical information about a person may be disclosed and the desirability of ensuring that, in the interests of that person, the information is not publicly disclosed outweighs the desirability of adhering to the principle that hearings be open to the public; or

(c) confidential business information may be disclosed and the desirability of ensuring that the

Questions d'ordre médical

(5) Toutefois, dans le cas où l'appel soulève des questions d'ordre médical, au moins un des conseillers doit posséder des compétences dans ce domaine, qu'il ait ou non des compétences reliées au secteur des transports en cause.

Décision

(6) Les décisions du comité se prennent à la majorité de ses membres.

Nature de l'appel

14 L'appel porte au fond sur le dossier d'instance du conseiller dont la décision est contestée. Toutefois, le comité est tenu d'autoriser les observations orales et il peut, s'il l'estime indiqué pour l'appel, prendre en considération tout élément de preuve non disponible lors de l'instance.

Audiences

15 (1) Sous réserve du paragraphe (2), le Tribunal n'est pas lié par les règles juridiques ou techniques applicables en matière de preuve lors des audiences. Dans la mesure où les circonstances, l'équité et la justice naturelle le permettent, il lui appartient d'agir rapidement et sans formalisme.

Exception

(2) Le Tribunal ne peut recevoir ni admettre en preuve quelque élément protégé par le droit de la preuve et rendu, de ce fait, inadmissible en justice devant un tribunal judiciaire.

Comparution

(3) Toute partie à une instance devant le Tribunal peut comparaître en personne ou s'y faire représenter par toute personne, y compris un avocat.

Huis clos

(4) Les audiences devant le Tribunal sont publiques. Toutefois, elles peuvent être tenues en tout ou en partie à huis clos si, de l'avis du Tribunal :

a) il y va de l'intérêt public;

b) des renseignements d'ordre médical pouvant être dévoilés sont tels que, compte tenu de l'intérêt de la personne en cause, l'avantage qu'il y a à ne pas les dévoiler en public l'emporte sur le principe de la publicité des audiences;

c) des renseignements commerciaux confidentiels pouvant être dévoilés sont tels que l'avantage qu'il y a

information is not publicly disclosed outweighs the desirability of adhering to the principle that hearings be open to the public.

à ne pas les dévoiler en public l'emporte sur le principe de la publicité des audiences.

Standard of proof

(5) In any proceeding before the Tribunal, a party that has the burden of proof discharges it by proof on the balance of probabilities.

Charge de la preuve

(5) Dans toute affaire portée devant le Tribunal, la charge de la preuve repose sur la prépondérance des probabilités.

Powers of Tribunal

16 The Tribunal, and each of its members, has all the powers of a commissioner under Part I of the *Inquiries Act*.

Pouvoirs

16 Le Tribunal et chaque conseiller ont les pouvoirs conférés aux commissaires nommés en vertu de la partie I de la *Loi sur les enquêtes*.

Reasons

17 A member who conducts a review shall provide a determination, and an appeal panel shall provide a decision, with reasons, in writing to all parties to a proceeding.

Motifs

17 Le Tribunal communique sa décision par écrit aux parties, motifs à l'appui.

Rules of Tribunal

18 The Tribunal may, with the approval of the Governor in Council, make rules that are not inconsistent with this Act or any Act referred to in section 2 to govern the management of its affairs and the practice and procedure in connection with matters brought before it.

Règles de procédure

18 Le Tribunal peut, avec l'agrément du gouverneur en conseil, établir toute règle conforme à la présente loi ou aux lois visées à l'article 2 pour régir ses activités et la procédure des affaires portées devant lui.

Costs

19 (1) The Tribunal may award any costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if

(a) it is seized of the matter for reasons that are frivolous or vexatious;

(b) a party that files a request for a review or an appeal and does not appear at the hearing does not establish that there was sufficient reason to justify their absence; or

(c) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal.

Dépens

19 (1) Le Tribunal peut condamner l'une des parties aux dépens et exiger d'elle le remboursement de toute dépense engagée relativement à l'audience qu'il estime raisonnables dans les cas où :

a) il est saisi d'une affaire pour des raisons frivoles ou vexatoires;

b) le requérant ou l'appelant a, sans motif valable, omis de comparaître;

c) la partie qui a obtenu un ajournement de l'audience lui en avait fait la demande sans préavis suffisant.

Recovery

(2) Costs awarded to the Minister of Transport, and expenses of that Minister or the Tribunal that are subject to reimbursement, under subsection (1) are a debt due to Her Majesty in right of Canada.

Recouvrement

(2) Les dépens alloués au ministre des Transports et les dépenses de celui-ci ou du Tribunal qui font l'objet d'un remboursement constituent des créances de Sa Majesté.

Certificate

(3) Costs or expenses under subsection (1) that have not been paid may be certified by the Tribunal.

Certificat de non-paiement

(3) Le Tribunal peut établir un certificat de non-paiement pour la partie impayée des dépens ou dépenses alloués en vertu du paragraphe (1).

Registration of certificate

(4) On production to the Federal Court, a certificate shall be registered. When it is registered, a certificate has the same force and effect as if it were a judgment obtained in the Federal Court for a debt of the amount specified in it and all reasonable costs and charges attendant on its registration, recoverable in that Court or in any other court of competent jurisdiction.

Proceedings to be recorded

20 Proceedings before the Tribunal shall be recorded, and the record shall show all evidence taken and all determinations, decisions and findings made in respect of the proceedings.

Decision on appeal final

21 A decision of an appeal panel of the Tribunal is final and binding on the parties to the appeal.

Annual report

22 The Tribunal shall, not later than June 30 in each fiscal year, submit to Parliament, through the member of the Queen's Privy Council for Canada who is designated by the Governor in Council as the Minister for the purposes of this section, a report of its activities during the preceding fiscal year, and that Minister shall cause the report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the Minister receives it.

Transitional Provisions

Definitions

***23** The definitions in this section apply in sections 24 to 32.

former Tribunal means the Civil Aviation Tribunal established by subsection 29(1) of the *Aeronautics Act* as that Act read immediately before the coming into force of section 44. (*ancien Tribunal*)

new Tribunal means the Transportation Appeal Tribunal of Canada established by subsection 2(1). (*nouveau Tribunal*)

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Powers, duties and functions

24 Wherever, in any Act of Parliament, in any instrument made under an Act of Parliament or in any contract, lease, licence or other document, a power, duty or function is vested in or is exercisable by the former Tribunal, the power, duty or function is vested in or is exercisable by the new Tribunal.

Enregistrement

(4) La Cour fédérale enregistre tout certificat ainsi établi déposé auprès d'elle. L'enregistrement confère au certificat la valeur d'un jugement de cette juridiction pour la somme visée et les frais afférents dont le recouvrement peut être poursuivi devant la Cour fédérale ou tout autre tribunal compétent.

Tribunal d'archives

20 Il est tenu un registre des affaires dont le Tribunal est saisi. Y sont consignés les éléments de preuve et les décisions afférents à l'affaire.

Décision définitive

21 La décision rendue en appel par un comité du Tribunal est définitive et lie les parties.

Rapport annuel

22 Au plus tard le 30 juin de chaque exercice, le Tribunal présente son rapport d'activité pour l'exercice précédent à tel ministre, membre du Conseil privé de la Reine pour le Canada, chargé par le gouverneur en conseil de l'application du présent article. Le ministre le fait déposer devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant sa réception.

Dispositions transitoires

Définitions

***23** Les définitions qui suivent s'appliquent aux articles 24 à 32.

ancien Tribunal Le Tribunal de l'aviation civile constitué par le paragraphe 29(1) de la *Loi sur l'aéronautique*, dans sa version antérieure à l'entrée en vigueur de l'article 44. (*former Tribunal*)

nouveau Tribunal Le Tribunal d'appel des transports du Canada constitué par le paragraphe 2(1). (*new Tribunal*)

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Transfert d'attributions

24 Les attributions conférées, sous le régime d'une loi fédérale ou au titre d'un contrat, bail, permis ou autre document à l'ancien Tribunal sont exercées par le nouveau Tribunal.

Appropriations

***25** Any amount that is appropriated, for the fiscal year in which this section comes into force, by an appropriation Act based on the Estimates for that year for defraying the charges and expenses of the former Tribunal and that, on the day on which section 44 comes into force, is unexpended is deemed, on that day, to be an amount appropriated for defraying the charges and expenses of the new Tribunal.

* [Note: Sections 25 and 44 in force June 30, 2003, *see* SI/2003-128.]

Transfert de crédits

***25** Les sommes affectées — et non engagées —, pour l'exercice en cours à l'entrée en vigueur de l'article 44, par toute loi de crédits consécutive aux prévisions budgétaires de cet exercice, aux frais et dépenses d'administration publique de l'ancien Tribunal sont réputées être affectées aux frais et dépenses d'administration publique du nouveau Tribunal.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Members of Tribunal

***26** The Chairman, Vice-Chairman and other members of the former Tribunal immediately before the coming into force of section 44 shall, on the coming into force of that section, occupy the positions of Chairperson, Vice-Chairperson and members, respectively, with the new Tribunal until the expiry of the period of their appointment to the former Tribunal.

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Membres du Tribunal

***26** Le président, le vice-président et les autres membres qui occupent une charge de conseiller de l'ancien Tribunal à la date d'entrée en vigueur de l'article 44 continuent d'exercer leurs fonctions au sein du nouveau Tribunal jusqu'à l'expiration de leur mandat.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Employment continued

***27 (1)** Nothing in this Act shall be construed as affecting the status of an employee who, immediately before the coming into force of section 44, occupied a position with the former Tribunal, except that each of those persons shall, on the coming into force of that section, occupy their position with the new Tribunal.

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Postes

***27 (1)** La présente loi ne change rien à la situation des fonctionnaires qui occupent un poste à l'ancien Tribunal à la date d'entrée en vigueur de l'article 44, à la différence près que, à compter de cette date, ils l'occupent au nouveau Tribunal.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Definition of *employee*

(2) For the purposes of this section, ***employee*** has the same meaning as in subsection 2(1) of the *Public Service Employment Act*.

Définition de *fonctionnaire*

(2) Pour l'application du présent article, ***fonctionnaire*** s'entend au sens du paragraphe 2(1) de la *Loi sur l'emploi dans la fonction publique*.

References

28 Every reference to the former Tribunal in any deed, contract, agreement or other document executed by the former Tribunal in its own name shall, unless the context otherwise requires, be read as a reference to the new Tribunal.

Renvois

28 Sauf indication contraire du contexte, dans tous les contrats, actes, accords et autres documents signés par l'ancien Tribunal sous son nom, toute mention de l'ancien Tribunal vaut mention du nouveau Tribunal.

Rights and obligations

29 All rights and property of the former Tribunal and of Her Majesty in right of Canada that are under the administration and control of the former Tribunal and all obligations of the former Tribunal are transferred to the new Tribunal.

Transfert des droits et obligations

29 Les biens et les droits de Sa Majesté du chef du Canada dont la gestion était confiée à l'ancien Tribunal ainsi que les biens et les droits et obligations de celui-ci sont transférés au nouveau Tribunal.

Commencement of legal proceedings

30 Any action, suit or other legal proceeding in respect of an obligation or liability incurred by the former

Procédures judiciaires nouvelles

30 Les procédures judiciaires relatives aux obligations supportées ou aux engagements pris par l'ancien

Tribunal may be brought against the new Tribunal in any court that would have had jurisdiction if the action, suit or other legal proceeding had been brought against the former Tribunal.

Continuation of legal proceedings

***31** Any action, suit or other legal proceeding to which the former Tribunal is a party that is pending in any court immediately before the day on which section 44 comes into force may be continued by or against the new Tribunal in the same manner and to the same extent as it could have been continued by or against the former Tribunal.

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Continuation of proceedings

***32 (1)** Proceedings relating to any matter before the former Tribunal on the coming into force of section 44, including any matter that is in the course of being heard by the former Tribunal, shall be continued by the new Tribunal.

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Application of provisions

***(2)** Unless the Governor in Council, by order, directs that proceedings continued under this section are to be dealt with in accordance with the provisions of this Act, the proceedings shall be dealt with and determined in accordance with the provisions of the *Aeronautics Act* as that Act read immediately before the coming into force of section 44.

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Directions re proceedings

***(3)** The Governor in Council may, by order, direct that proceedings in respect of any class of matter referred to in subsection (1) in respect of which no decision or order is made on the coming into force of section 44 shall be discontinued or continued by the new Tribunal, as the case may be, on the terms and conditions specified in the order for the protection and preservation of the rights and interests of the parties.

* [Note: Section 44 in force June 30, 2003, *see* SI/2003-128.]

Consequential Amendments

33 to 70 [Amendments]

Coordinating Amendments

71 and 72 [Amendments]

Tribunal peuvent être intentées contre le nouveau Tribunal devant tout tribunal qui aurait eu compétence pour être saisi des procédures si elles avaient été intentées contre l'ancien Tribunal.

Procédures en cours devant les tribunaux

***31** Le nouveau Tribunal prend la suite de l'ancien Tribunal, au même titre et dans les mêmes conditions que celui-ci, comme partie aux procédures judiciaires en cours à l'entrée en vigueur de l'article 44 et auxquelles l'ancien Tribunal est partie.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Poursuite des procédures

***32 (1)** Les procédures relatives à une question pendante devant l'ancien Tribunal au moment de l'entrée en vigueur de l'article 44, notamment toute question faisant l'objet d'une audience, sont poursuivies devant le nouveau Tribunal.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Dispositions applicables

***(2)** Sauf décret prévoyant qu'elles doivent être poursuivies conformément à la présente loi, les procédures poursuivies au titre du présent article le sont conformément à la *Loi sur l'aéronautique* dans sa version antérieure à l'entrée en vigueur de l'article 44.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Exception

***(3)** Le gouverneur en conseil peut, par décret, ordonner que les procédures relatives à une catégorie de questions visées au paragraphe (1) à l'égard desquelles, au moment de l'entrée en vigueur de l'article 44, aucune décision n'a encore été rendue soient, selon les modalités spécifiées dans le décret pour assurer la protection et le maintien des droits des parties, abandonnées ou poursuivies devant le nouveau Tribunal.

* [Note : Article 44 en vigueur le 30 juin 2003, *voir* TR/2003-128.]

Modifications connexes

33 à 70 [Modifications]

Dispositions de coordination

71 et 72 [Modifications]

Coming into Force

Coming into force

'73 The provisions of this Act, other than sections 71 and 72, come into force on a day or days to be fixed by order of the Governor in Council.

' [Note: Sections 71 and 72 in force on assent December 18, 2001; sections 1 to 45, 52 to 54 and 60 to 70 in force June 30, 2003, *see* SI/2003-128; sections 55 to 59 in force June 30, 2005, *see* SI/2005-61; sections 46 to 51 repealed before coming into force, *see* 2008, c. 20, s. 3.]

Entrée en vigueur

Entrée en vigueur

'73 Exception faite des articles 71 et 72, les dispositions de la présente loi entrent en vigueur à la date ou aux dates fixées par décret.

' [Note : Articles 71 et 72 en vigueur à la sanction le 18 décembre 2001; articles 1 à 45, 52 à 54 et 60 à 70 en vigueur le 30 juin 2003, *voir* TR/2003-128; articles 55 à 59 en vigueur le 30 juin 2005, *voir* TR/2005-61; articles 46 à 51 abrogés avant d'entrer en vigueur, *voir* 2008, ch. 20, art. 3.]

AMENDMENTS NOT IN FORCE

— 2019, c. 1, s. 152

2001, c. 29, s. 71.

152 Subsection 2(2) of the *Transportation Appeal Tribunal of Canada Act* is replaced by the following:

Jurisdiction generally

(2) The Tribunal has jurisdiction in respect of reviews and appeals as expressly provided for under the *Wrecked, Abandoned or Hazardous Vessels Act*, the *Aeronautics Act*, the *Canada Shipping Act, 2001*, the *Marine Transportation Security Act*, the *Railway Safety Act* and any other federal Act regarding transportation.

— 2019, c. 28, par. 186(e)

Replacement of "*Navigation Protection Act*"

186 Every reference to the "*Navigation Protection Act*" is replaced by a reference to the "*Canadian Navigable Waters Act*" in the following provisions:

(e) subsection 2(3) of the *Transportation Appeal Tribunal of Canada Act*;

— 2019, c. 29, s. 267

2001, c. 29, s. 71.

267 Subsection 2(2) of the *Transportation Appeal Tribunal of Canada Act* is replaced by the following:

Jurisdiction generally

(2) The Tribunal has jurisdiction in respect of reviews and appeals as expressly provided for under the *Aeronautics Act*, the *Pilotage Act*, the *Railway Safety Act*, the *Marine Transportation Security Act*, the *Canada Shipping Act, 2001* and any other federal Act regarding transportation.

MODIFICATIONS NON EN VIGUEUR

— 2019, ch. 1, art. 152

2001, ch. 29, art. 71.

152 Le paragraphe 2(2) de la *Loi sur le Tribunal d'appel des transports du Canada* est remplacé par ce qui suit :

Compétence générale

(2) Le Tribunal connaît des requêtes en révision dont il est saisi en vertu de la *Loi sur l'aéronautique*, de la *Loi de 2001 sur la marine marchande du Canada*, de la *Loi sur les épaves et les bâtiments abandonnés ou dangereux*, de la *Loi sur la sûreté du transport maritime*, de la *Loi sur la sécurité ferroviaire* ou de toute autre loi fédérale concernant les transports. Il connaît également des appels interjetés des décisions qu'il a rendues dans les dossiers de révision.

— 2019, ch. 28, al. 186e)

Remplacement de « *Loi sur la protection de la navigation* »

186 Dans les passages ci-après, « *Loi sur la protection de la navigation* » est remplacé par « *Loi sur les eaux navigables canadiennes* » :

e) le paragraphe 2(3) de la *Loi sur le Tribunal d'appel des transports du Canada*;

— 2019, ch. 29, art. 267

2001, ch. 29, art. 71.

267 Le paragraphe 2(2) de la *Loi sur le Tribunal d'appel des transports du Canada* est remplacé par ce qui suit :

Compétence générale

(2) Le Tribunal connaît des requêtes en révision dont il est saisi en vertu de la *Loi sur l'aéronautique*, de la *Loi sur le pilotage*, de la *Loi sur la sécurité ferroviaire*, de la *Loi sur la sûreté du transport maritime*, de la *Loi de 2001 sur la marine marchande du Canada* ou de toute autre loi fédérale concernant les transports. Il connaît également des appels interjetés des décisions qu'il a rendues dans les dossiers de révision.

— 2019, c. 29, s. 268

— 2019, ch. 29, art. 268

2019, c. 1.

268 On the first day on which both section 152 of the *Wrecked, Abandoned or Hazardous Vessels Act* and section 267 of this Act are in force, subsection 2(2) of the *Transportation Appeal Tribunal of Canada Act* is replaced by the following:

Jurisdiction generally

(2) The Tribunal has jurisdiction in respect of reviews and appeals as expressly provided for under the *Aeronautics Act*, the *Pilotage Act*, the *Railway Safety Act*, the *Marine Transportation Security Act*, the *Canada Shipping Act, 2001*, the *Wrecked, Abandoned or Hazardous Vessels Act* and any other federal Act regarding transportation.

2019, ch. 1.

268 Dès le premier jour où l'article 152 de la *Loi sur les épaves et les bâtiments abandonnés ou dangereux* et l'article 267 de la présente loi sont tous deux en vigueur, le paragraphe 2(2) de la *Loi sur le Tribunal d'appel des transports du Canada* est remplacé par ce qui suit :

Compétence générale

(2) Le Tribunal connaît des requêtes en révision dont il est saisi en vertu de la *Loi sur l'aéronautique*, de la *Loi sur le pilotage*, de la *Loi sur la sécurité ferroviaire*, de la *Loi sur la sûreté du transport maritime*, de la *Loi de 2001 sur la marine marchande du Canada*, de la *Loi sur les épaves et les bâtiments abandonnés ou dangereux* ou de toute autre loi fédérale concernant les transports. Il connaît également des appels interjetés des décisions qu'il a rendues dans les dossiers de révision.

TAB

3

CANADA

CONSOLIDATION

CODIFICATION

Transportation Appeal Tribunal of Canada Rules

Règles du Tribunal d'appel des transports du Canada

SOR/86-594

DORS/86-594

Current to June 21, 2019

Last amended on September 22, 2017

À jour au 21 juin 2019

Dernière modification le 22 septembre 2017

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence
31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations
(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve
31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements
(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to June 21, 2019. The last amendments came into force on September 22, 2017. Any amendments that were not in force as of June 21, 2019 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 21 juin 2019. Les dernières modifications sont entrées en vigueur le 22 septembre 2017. Toutes modifications qui n'étaient pas en vigueur au 21 juin 2019 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

Transportation Appeal Tribunal of Canada Rules

TABLE ANALYTIQUE

Règles du Tribunal d'appel des transports du Canada

Registration
SOR/86-594 May 29, 1986

TRANSPORTATION APPEAL TRIBUNAL OF CANADA ACT

Transportation Appeal Tribunal of Canada Rules

P.C. 1986-1265 May 29, 1986

Her Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to subsection 29(3)* of the *Aeronautics Act*, is pleased hereby to approve effective June 1, 1986 the annexed *Rules governing the practice and procedure in connection with matters dealt with by the Civil Aviation Tribunal*, made by the Civil Aviation Tribunal.

* S.C. 1985, c. 28, s. 5

Enregistrement
DORS/86-594 Le 29 mai 1986

LOI SUR LE TRIBUNAL D'APPEL DES TRANSPORTS DU CANADA

Règles du Tribunal d'appel des transports du Canada

C.P. 1986-1265 Le 29 mai 1986

Sur avis conforme du ministre des Transports et en vertu du paragraphe 29(3)* de la *Loi sur l'aéronautique*, il plaît à Son Excellence le Gouverneur général en conseil d'approuver à compter du 1er juin 1986, les *Règles concernant la procédure des affaires portées devant le Tribunal de l'aviation civile*, ci-après, établies par le Tribunal de l'aviation civile.

* S.C. 1985, ch. 28, art. 5

Transportation Appeal Tribunal of Canada Rules

1 [Repealed, SOR/2017-202, s. 2]

Interpretation

2 In these Rules,

Act means the *Transportation Appeal Tribunal of Canada Act*; (*Loi*)

party means a party to a proceeding; (*partie*)

proceeding means a request for a review, an appeal or an application that is before the Tribunal; (*instance*)

registrar means a registrar of the Tribunal, and includes a deputy registrar; (*greffier*)

registry means the principal office of the Tribunal in the National Capital Region or such other offices as the Tribunal may establish from time to time. (*greffe*)

SOR/93-346, s. 1; SOR/2017-202, s. 3.

Application

3 These Rules apply to

(a) requests for a review or appeals brought before the Tribunal under a statute referred to in subsection 2(2) or (3) of the Act; and

(b) applications referred to in section 10.

SOR/2017-202, s. 4.

General

4 If a procedural matter not provided for by the Act, by statutes referred to in subsection 2(2) or (3) of the Act or by these Rules arises during the course of any proceeding, the Tribunal may take any action it considers necessary to enable it to settle the matter effectively, completely and fairly.

SOR/2017-202, s. 5.

Règles du Tribunal d'appel des transports du Canada

1 [Abrogé, DORS/2017-202, art. 2]

Définitions

2 Les définitions qui suivent s'appliquent aux présentes règles.

greffe Le siège du Tribunal situé dans la région de la Capitale nationale, ou tout autre bureau établi par le Tribunal. (*registry*)

greffier Le greffier du Tribunal, y compris un greffier adjoint. (*registrar*)

instance Les requêtes en révision, les appels et les demandes dont est saisi le Tribunal. (*proceeding*)

Loi La *Loi sur le Tribunal d'appel des transports du Canada*. (*Act*)

partie Toute partie à une instance. (*party*)

DORS/93-346, art. 1; DORS/2017-202, art. 3.

Application

3 Les présentes règles s'appliquent :

a) aux requêtes en révision et aux appels dont est saisi le Tribunal en application des lois mentionnées aux paragraphes 2(2) ou 2(3) de la Loi;

b) aux demandes visées à l'article 10.

DORS/2017-202, art. 4.

Dispositions générales

4 Le Tribunal peut prendre les mesures qu'il juge nécessaires pour trancher efficacement, complètement et équitablement, au cours d'une instance, toute question de procédure non prévue par la Loi, par les lois visées aux paragraphes 2(2) et 2(3) de la Loi ou par les présentes règles.

DORS/2017-202, art. 5.

Service

5 Service of a document, other than a summons referred to in section 14, shall be effected by personal service or by registered mail.

6 Where service of a document is effected by registered mail, the date of service is the date of receipt of the document.

Filing

7 Where a party is required or authorized to file a document with the Tribunal, the document may be filed by depositing it in the registry personally, by mailing it or sending it by courier to the registry or by transmitting it to the registry by telex, facsimile or other electronic means of communication if the registry has the necessary facilities for accepting transmission in such manner.

8 The date of filing of a document with the Tribunal is the date of receipt of the document at the registry, as evidenced on the document by means of the filing stamp of the Tribunal.

SOR/93-346, s. 2(E).

Holiday

9 If a time limit prescribed by these Rules falls on a Saturday or a holiday, the time limit is extended to the next following business day.

SOR/93-346, s. 3(E); SOR/2017-202, s. 6.

Applications

10 (1) This section applies to any application for any relief or order brought before the Tribunal under a statute referred to in subsection 2(2) or (3) of the Act, other than a request for a review or an appeal.

(1.1) An application shall be in writing and filed with the Tribunal unless, in the opinion of the Tribunal, circumstances exist to allow the application to be brought in some other manner.

(2) An application shall fully set out the grounds on which it is based and shall specify the relief or order requested.

Signification

5 La signification d'un document, autre que la citation visée à l'article 14, se fait à personne ou par courrier recommandé.

6 Lorsque la signification d'un document est faite par courrier recommandé, la date de la signification est celle de la réception du document.

Dépôt de documents

7 La partie autorisée à déposer un document auprès du Tribunal ou tenue de le faire peut, à cette fin, déposer personnellement le document au greffe, le faire parvenir au greffe par la poste ou par messager ou le transmettre au greffe par télex, fac-similé ou par tout autre moyen de communication électronique, si le greffe dispose des installations nécessaires pour recevoir de telles transmissions.

8 La date de dépôt d'un document auprès du Tribunal est la date de sa réception au greffe, attestée par le timbre officiel du Tribunal apposé sur le document.

DORS/93-346, art. 2(A).

Jours fériés

9 Tout délai prévu par les présentes règles qui expire un samedi ou un jour férié est prorogé au premier jour ouvrable suivant.

DORS/93-346, art. 3(A); DORS/2017-202, art. 6.

Demandes

10 (1) Le présent article s'applique à toute demande visant l'obtention d'un redressement ou d'une ordonnance, déposée auprès du Tribunal en vertu d'une loi visée aux paragraphes 2(2) ou 2(3) de la Loi, autre qu'une requête en révision ou un appel.

(1.1) La demande est faite par écrit et déposée auprès du Tribunal, sauf si, de l'avis de celui-ci, les circonstances justifient qu'elle soit présentée autrement.

(2) La demande énonce en détail les motifs sur lesquels elle repose et précise la nature de l'ordonnance ou du redressement demandé.

(3) Subject to subsection (4), where a party makes an application, the Tribunal shall serve notice of the application on each other party and shall afford each other party a reasonable opportunity to make representations.

(4) The Tribunal may dispose of an application on the basis of the material submitted by each party or, if in its opinion there exist exigent circumstances, on the basis of the material submitted by the applicant only.

(5) The Tribunal, upon considering the material submitted to it, shall render its determination of an application in writing and shall serve on each party a copy of the determination forthwith after the determination has been rendered.

SOR/93-346, s. 4; SOR/2017-202, s. 7.

Extending or Abridging Time

11 The Tribunal may extend or abridge a time prescribed by or pursuant to these Rules for performing any act or doing any thing on such terms, if any, as seem just.

Preliminary Procedures

12 The Tribunal may, orally or in writing, direct that the parties appear before a member of the Tribunal at a specified date, time and place for a conference, or consult each other and submit suggestions in writing to the Tribunal, for the purpose of assisting it in the consideration of

(a) the admission or proof of certain facts;

(b) any procedural matter;

(c) the exchange between the parties of documents and exhibits proposed to be submitted during a proceeding;

(d) the need to call particular witnesses; and

(e) any other matter that may aid in the simplification of the evidence and disposition of the proceeding.

SOR/93-346, s. 5(E).

Adjournments

13 At any time, the Tribunal may, on the application of any party or on its own motion, adjourn a proceeding on such terms, if any, as seem just.

(3) Sous réserve du paragraphe (4), lorsqu'une partie fait une demande au Tribunal, celui-ci signifie un avis de la demande aux autres parties et leur donne la possibilité de présenter des observations.

(4) Le Tribunal peut statuer sur une demande sur la foi des renseignements produits par toutes les parties ou, s'il est d'avis qu'une situation d'urgence l'exige, sur la foi des renseignements produits par le demandeur seulement.

(5) Après avoir examiné les renseignements produits, le Tribunal rend par écrit sa décision sur la demande et en signifie aussitôt une copie à chaque partie.

DORS/93-346, art. 4; DORS/2017-202, art. 7.

Délais

11 Le Tribunal peut, aux conditions qu'il estime justes, proroger ou abréger tout délai prévu par les présentes règles.

Procédure préalable

12 Le Tribunal peut, verbalement ou par écrit, ordonner aux parties de comparaître devant un conseiller aux heure, date et lieu indiqués, pour participer à une conférence, ou de se consulter et de soumettre par écrit au Tribunal des suggestions en vue de l'aider à statuer sur :

a) l'admission de certains faits ou la preuve de ceux-ci;

b) des questions de procédure;

c) l'échange, entre les parties, de documents et de pièces devant être produits au cours de l'instance;

d) la nécessité d'appeler certains témoins à comparaître;

e) toute autre question susceptible de simplifier la preuve et la prise d'une décision.

DORS/93-346, art. 5(A).

Ajournements

13 Le Tribunal peut, à la demande d'une partie ou de son propre chef, ajourner en tout temps une instance aux conditions qu'il estime justes.

Witnesses

14 (1) At the request of a party, the registrar shall issue a summons in blank for a person to appear as a witness before the Tribunal and the summons may be completed by the party requesting it.

(2) A summons shall be served personally on the person to whom it is directed at least 48 hours before the time fixed for the attendance of the person.

(3) At the time of service of a summons on a person, the party requesting the appearance of the person shall pay witness fees and travel expenses to the person in accordance with Rule 42 of the *Federal Courts Rules*.

SOR/2017-202, s. 8.

15 (1) Where a person has been summoned to appear as a witness before the Tribunal and does not appear, the party that requested the issuance of the summons may apply to the Tribunal for a warrant directing a peace officer to cause the person who failed to appear to be apprehended anywhere in Canada and, subsequent to the apprehension, to be

(a) detained in custody and immediately brought before the Tribunal until their presence as a witness is no longer required; or

(b) released on a recognizance, with or without sureties, conditional on the person's appearance at the date, time and place specified therein to give evidence at a proceeding.

(2) An application made pursuant to subsection (1) shall contain information indicating that

(a) the person named in the summons

(i) was served with the summons in accordance with subsection 14(2),

(ii) was paid or offered witness fees and travel expenses in accordance with subsection 14(3), and

(iii) failed to attend or remain in attendance before the Tribunal in accordance with the requirements of the summons; and

(b) the presence of the person named in the summons is material to the proceeding.

SOR/93-346, s. 6(E); SOR/2017-202, s. 9.

Témoins

14 (1) À la demande d'une partie, le greffier délivre une citation en blanc qui peut être remplie par la partie qui l'a demandée et qui enjoint à la personne désignée de comparaître à titre de témoin devant le Tribunal.

(2) La citation est signifiée à personne au moins 48 heures avant l'heure fixée pour la comparution du témoin devant le Tribunal.

(3) La partie qui cite un témoin lui verse, aux termes de la règle 42 des *Règles des Cours fédérales*, l'indemnité de témoin et les frais de déplacement au moment de la signification de la citation.

DORS/2017-202, art. 8.

15 (1) Lorsqu'une personne citée à comparaître à titre de témoin devant le Tribunal ne comparaît pas, la partie qui l'a citée peut demander au Tribunal de délivrer un mandat ordonnant à tout agent de la paix d'arrêter cette personne où qu'elle se trouve au Canada et :

a) soit de la détenir sous garde et de l'amener immédiatement devant le Tribunal jusqu'à ce que sa présence en qualité de témoin ne soit plus requise;

b) soit de la relâcher à la condition qu'elle s'engage, avec ou sans caution, à comparaître aux heure, date et lieu précisés dans l'engagement, afin de témoigner à l'instance.

(2) La demande visée au paragraphe (1) doit contenir des renseignements qui indiquent :

a) d'une part :

(i) qu'une citation a été signifiée conformément au paragraphe 14(2) à la personne qui y est désignée,

(ii) que l'indemnité de témoin et les frais de déplacement mentionnés au paragraphe 14(3) lui ont été versés ou offerts,

(iii) que la personne a fait défaut de comparaître devant le Tribunal ou de demeurer présente à l'instance, comme l'exige la citation;

b) d'autre part, que la présence de la personne désignée dans la citation est importante pour l'issue de l'instance.

DORS/93-348, art. 6(A); DORS/2017-202, art. 9.

Proceeding

16 (1) Witnesses at a proceeding shall be subject to examination and cross-examination orally on oath or solemn affirmation.

(2) The Tribunal may order a witness at a proceeding to be excluded from the proceeding until called to give evidence.

(3) The Tribunal may, with the consent of each party, order that any fact be proved by affidavit.

(4) The Tribunal may inspect any property or thing for the purpose of evaluating the evidence.

Argument

17 The Tribunal may direct a party to submit written argument in addition to oral argument.

Appeals

18 (1) An appeal to the Tribunal shall be commenced by filing a request for appeal in writing with the Tribunal.

(2) A request for appeal shall include a concise statement of the grounds on which the appeal is based.

(3) A copy of a request for appeal shall be served by the Tribunal on each other party within ten days after filing the request.

SOR/93-346, s. 7; SOR/2017-202, s. 10.

19 Where a request for appeal has been filed with the Tribunal, the Tribunal shall serve on the parties to the appeal

(a) a notice of the date, time and place of the hearing of the appeal; and

(b) a copy of the record referred to in section 20 of the Act, respecting the matters to which the appeal relates.

SOR/93-346, s. 8; SOR/2017-202, s. 11.

Determination or Decision

[SOR/2017-202, s. 12(E)]

20 (1) The Tribunal shall render its determination or decision in writing at the conclusion of a proceeding or as soon as is feasible after a proceeding.

Instance

16 (1) Au cours d'une instance, les témoins sont soumis oralement à l'interrogatoire et au contre-interrogatoire, après avoir prêté serment ou fait une affirmation solennelle.

(2) Au cours de l'instance, le Tribunal peut ordonner qu'un témoin soit exclu de l'audience jusqu'à ce qu'il soit appelé à déposer.

(3) Le Tribunal peut, si toutes les parties y consentent, ordonner qu'un fait soit prouvé par affidavit.

(4) Le Tribunal peut examiner tout bien ou toute chose aux fins de l'appréciation de la preuve.

Arguments

17 Le Tribunal peut demander qu'une partie soumette des arguments écrits en plus de ceux présentés oralement.

Appels

18 (1) Un appel devant le Tribunal est interjeté par le dépôt auprès de celui-ci d'une demande écrite à cet effet.

(2) La demande d'appel contient un bref exposé des motifs d'appel.

(3) Le Tribunal signifie une copie de la demande d'appel à toutes les autres parties, dans les 10 jours du dépôt de la demande.

DORS/93-346, art. 7; DORS/2017-202, art. 10.

19 Lorsqu'une demande d'appel a été déposée auprès du Tribunal, le Tribunal signifie aux parties à l'appel :

a) un avis des date, heure et lieu de l'audition de l'appel;

b) une copie du registre, visé à l'article 20 de la Loi, portant sur les affaires afférentes à l'appel.

DORS/93-346, art. 8; DORS/2017-202, art. 11.

Décision

[DORS/2017-202, art. 12(A)]

20 (1) Le Tribunal rend sa décision par écrit à la fin de l'instance ou le plus tôt possible après celle-ci.

(2) For the purpose of calculating the period within which a party may appeal a determination, the determination is deemed to be made on the day on which it is served on the party.

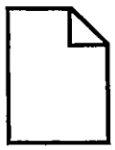
(3) The Tribunal shall serve on each party a copy of the determination or decision immediately after it has been rendered.

SOR/2017-202, s. 13(E).

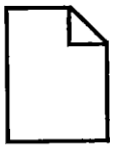
(2) Aux fins du calcul du délai d'appel, la date de la décision du Tribunal est réputée être celle de sa signification aux parties.

(3) Le Tribunal signifie à chaque partie une copie de sa décision, dès qu'il l'a rendue.

DORS/2017-202, art. 13(A).



TAB B ONGLET



APPENDIX B: JURISPRUDENCE

TAB

1

ONGLET

Federal Court Cour fédérale

Date: 20141031

Docket: T-468-14

Ottawa, Ontario, October 31, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ROSS WILLIAM BERTRAM

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF TRANSPORT CANADA

Respondents

JUDGMENT

UPON an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision by the Transportation Appeal Tribunal of Canada ("tribunal"), which for reasons of mootness, declined to hear the Applicant's request for review of a pilot licensing decision pursuant to section 7.1 of the *Aeronautics Act*, RSC 1985 c A-2 ["the Act"];

AND UPON CONSIDERING all the material submitted by the parties and their written and oral submissions;

AND UPON CONSIDERING the following facts:

1. The Applicant is a helicopter pilot and a Civil Aviation Safety Inspector with Transport Canada ("TC");

2. On September 19, 2012, an Approved Check Pilot ("ACP") carried out a Pilot Proficiency Check ("PPC") and an Instrument Rating Test on the Applicant, the PPC portion was rated as "failed" on four factors of the test;

3. On September 21, 2012, the Applicant retook the PPC and passed;

4. On November 2, 2012, the Applicant filed for a review by the tribunal of the September 19, 2012 assessment of the PPC challenging the competence of the ACP, and not with respect to the standards applied to the PPC;

5. On November 13, 2012, the Applicant received a licence validation sticker, renewing his instrument rating licence, valid from November 1, 2012 until October 1, 2014 ("the November 1, 2012 licence");

6. On or about prior to May 2013, the Applicant began the qualification process for a new aircraft, undertaken outside of the country, which led to a new licence being issued to the Applicant to operate the different aircraft (pilots only being qualified to fly one aircraft at any time);

7. On or about May 22, 2013, the Minister, in what is acknowledged was an error, issued a new licence for the same aircraft as on the November 1, 2012 licence that the Applicant

was no longer flying as he was in the qualification process for a new aircraft, but dated to have already expired on May 1, 2013;

8. On June 19, 2013, TC informed the Applicant that the September 19, 2012 PPC had been found invalid by the Minister on the basis that it was conduced in contravention to the Approved Check Pilot Manual and that the Applicant's PPC notation of failure would therefore be removed from his record;

9. On July 9, 2013, the Minister of Transport ("Minister") proposed a motion for dismissal based on the tribunal's lack of jurisdiction to hear the matter or alternatively, on the mootness of the matter;

10. On July 16, 2013, the Applicant wrote to the tribunal indicating that he wished to raise a new issue to "challenge the cancellation of the valid Instrument Flight Rules rating", in respect of the licence incorrectly issued on or about May 22, 2013 ("the May 22, 2013 issue");

11. The Applicant and the Minister submitted their written submissions in support of the motion and the case was decided on the basis of the written submissions;

12. On January 15, 2014, the tribunal found that it had jurisdiction to review the PPC, being a ministerial decision, but declined to hear the matter on the basis that the issue was moot, the PPC having already been found invalid by the Minister and the May 22, 2013 issue did not relate to the assessment of the PPC;

AND UPON CONSIDERING that this case raises to following issues:

1. Did the Board Member err in finding the matter to be moot?

AND UPON CONSIDERING that the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62, [2008] 1 SCR 190; *Canada (Attorney General) v Annon*, 2013 FC 5 at paras 13-17, 424 FTR 239);

AND UPON CONSIDERING that the tribunal's jurisdiction in this matter was limited to determining whether the decision concluding that the Applicant ceased to meet the qualifications necessary for the issuance of his licence was appropriate by confirming the Minister's decision or by referring the matter back to the Minister for reconsideration (section 7.1 of the Act);

AND UPON CONSIDERING that the tribunal is authorized by s. 18 of its enabling legislation, the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 to govern its own practice and procedure in connection with matters brought before it, and has the "inherent authority to manage the conduct of its proceedings" (*Butterfield v Canada (Attorney General)*, 2006 FC 894 at para 59, 297 FTR 34);

AND UPON CONSIDERING that the September 12, 2012 PPC was invalidated by the Minister on substantive grounds that the examiner was not entitled to conduct the impugned test and that the notation of failure was indicated as invalid on the relevant records;

AND UPON CONSIDERING that the Applicant contests the change to the record, challenging the actual amendment was not to indicate that he had not failed the test, but rather that the failed test was invalid, contrary to his expectation that the record be amended to indicate that he passed the test;

AND UPON CONSIDERING that a referral back to the decision-maker would only render the reconsideration for the purpose of a new decision of no purpose in that the decision required by the Applicant striking any reference to the failure of the test had already been invalidated and the amendment of the records requested by the Applicant not being substantially different from those made to the record and that the Applicant suffered no prejudice or loss of status and no public policy issue arises therefrom, and that it was therefore reasonable for the tribunal to exercise its discretion to decline to hear the matter as the issue is moot as serving no practical purpose;

AND UPON CONSIDERING that the issue of the re-issuance of the licence in May 2013 in apparent error with an expiry date of May 1, 2013 was a separate issue, not pertaining to the tribunal's jurisdiction which was limited to considering whether the failed portion of the PPC was the result of properly applying the standards and of no substantial prejudice to the Applicant, it was within the discretion of the tribunal to refuse to consider this issue;

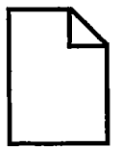
AND UPON CONSIDERING that no breach of procedural fairness occurred in the conduct of the motion;

AND UPON FINDING that the decision falls "within the range of possible acceptable outcomes which are defensible in respect of the facts and law" and is justified by reasons that are intelligible and transparent (*Dunsmuir*, at paras 47, 53);

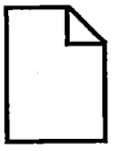
THIS COURT'S JUDGMENT is that the application for judicial review be dismissed without costs.

"Peter Annis"

Judge



TAB 2 ONGLET



Guardian Eagle Co. v. Canada (Canadian Transportation Agency), [2014] C.T.A.T.D. No. 4

Canada Transportation Appeal Tribunal Decisions

Canada Transportation Appeal Tribunal

Panel: Elizabeth MacNab, Member

Heard: By written submissions.

Decision: January 16, 2014.

Docket: H-3814-80

CTA File No.: 10-05159

[2014] C.T.A.T.D. No. 4 [2014] D.T.A.T.C. no 4 | 2014 TATCE 4 (Ruling)

IN THE MATTER OF a Request for Costs by Guardian Eagle Co., pursuant to section 19 of the Transportation Appeal Tribunal of Canada Act, S.C. 2001, c. 29 Between Guardian Eagle Co., Applicant, and Canadian Transportation Agency, Respondent

(17 paras.)

Case Summary

Tribunal Summary:

Held: I find that the Tribunal has no jurisdiction to consider the award of costs after a Notice of Violation, issued under section 180 of the *Canada Transportation Act*, has been withdrawn.

Appearances

For the Applicant: William F. Clark.

For the Respondent: Andray Renaud.

RULING ON APPLICANT'S

REQUEST FOR COSTS

I. BACKGROUND

1 On July 5, 2011, the Canadian Transportation Agency (Agency) issued a Notice of Violation (Notice) to the Applicant, Guardian Eagle Co., alleging that it operated an air service without a licence as required by paragraph 57 *(a)* of the *Canada Transportation Act*, S.C. 1996, c. 10(*CTA*).The Notice assessed a monetary penalty of $30000,

which was later reduced to $10000, as counts B, D, E and F were withdrawn. The Applicant requested a review of the matter by the Transportation Appeal Tribunal of Canada (Tribunal), and after numerous delays, a hearing was set for October 2 and 3, 2013. On September 16, 2013, the Agency withdrew the Notice. On September 24, 2013, the Applicant wrote to the Tribunal stating that it did not consent to the withdrawal of the Notice and was seeking costs in the matter, on the basis that the original Notice was frivolous and vexatious.

2 The Tribunal asked both parties for written submissions on the matter, including representations concerning the Tribunal's jurisdiction to hear an application for costs once the Notice had been withdrawn.

II. STATUTE

3 Subsection 19(1) of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29(*TATC Act*) provides:

> **19.** (1) The Tribunal may award any costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if
>
> (*a*) it is seized of the matter for reasons that are frivolous or vexatious;
>
> (*b*) a party that files a request for a review or an appeal and does not appear at the hearing does not establish that there was sufficient reason to justify their absence; or
>
> (*c*) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal.

III. ARGUMENTS

A. Applicant

4 The Applicant set out its position in the letter of September 24, 2013. Its representative argued that a bureaucracy should be held to a higher standard than an applicant, since the relaxed standards of the Tribunal process is intended to allow document holders to participate without the necessity of representation. He pointed out that the Applicant had consistently taken the position that any violations which occurred had been committed by others and that, at a meeting in April 2013, the Applicant indicated it would be asking for costs at the conclusion of the hearing.

5 The Applicant's representative argued that all the criteria for awarding costs set out in section 19 of the *TATC Act* had been met. The issue of the Notice was frivolous and vexatious since the evidence showed that the Applicant did not actually operate the aircraft involved. The withdrawal, two weeks before the date of the hearing, was without adequate notice to the Tribunal and the justification for the withdrawal, that being the lack of availability of witnesses, had existed for a considerable time.

6 On October 25, 2013, the Applicant's representative wrote to the Tribunal stating that he no longer had any authority to make representations on behalf of his client but that he was not withdrawing his earlier representations.

B. Respondent

7 On October 2, 2013, the Agency wrote to the Tribunal, challenging the allegations of bad faith and abuse of authority set out in the Applicant's request dated September 24, 2013. It took the position that, on the basis of the facts as it set them out, including the contractual arrangements with the air services, it was clear that the Applicant was operating an air service within the meaning of the *CTA*, even if it did not operate the aircraft. Further, the delays in scheduling a hearing were not caused by the Agency. Finally, one factor in deciding to withdraw the Notice was the inability to subpoena one witness, although diligent attempts to do so were carried out over the summer with the result that, to continue, the Agency would need to ask for an adjournment. Balancing the time and

costs associated with such a request against the passage of time since the alleged violation, and the current compliance of the Applicant, it was decided to withdraw the Notice.

8 Further, the Agency submitted that none of the criteria for awarding costs set out in subsection 19(1) of the *TATC Act* had been met. The Notice was not frivolous or vexatious within the meaning of paragraph 19(1)(*a*) since there was documentary evidence supporting the allegation that the Applicant was the operator of an air service. Paragraph 19(1)(*b*) applies only to the party who requested the review. Paragraph 19(1)(*c*) refers to a request for an adjournment made without adequate notice to the Tribunal, and no request for an adjournment was made. Further, the Tribunal set out its expectations of adequate notice in relation to a settlement in its Notice to Parties, requesting notice of five days, or at least two days, when possible–time enough to cancel accommodation and avoid service fees. The notice of withdrawal was given two weeks before the date of the hearing.

9 On October 29, 2013, the Agency provided further material, in response to the Tribunal's request for submissions, concerning its jurisdiction to hear an application for costs after the Notice had been withdrawn. It argued that the powers of the Tribunal are limited to those found in sections 177 to 181 of the *CTA* that set out the authority to assess an administrative monetary penalty by means of a Notice of Violation, the ability to request a review and the powers of the Tribunal in respect of that review. Consequently, it argues that once the Notice is withdrawn, the Tribunal has no jurisdiction over the matter. The submission refers to two cases where it was held that an adjudicative tribunal's power was that given to it by statute and if the foundation for that power, a complaint, was withdrawn, the tribunal had no further jurisdiction in the matter. This was determined by the Federal Court of Canada in *McKeown v. Royal Bank of Canada*, [2001] 3 FC 139, with respect to the withdrawal of complaints under Part III of the *Canada Labour Code*, and by the Federal Court of Appeal in *Canada (Attorney General) v. Lebreux*, 178 NR 1, with respect to the withdrawal of grievances under the *Public Service Staff Relations Act*.

10 The Agency also argued that the request in the Applicant's letter of September 24, 2013 was limited to a request for costs. There was no request for a determination of whether the contravention occurred or the penalty was justified. Even if the Tribunal had jurisdiction to order costs after a notice was withdrawn, it could only do so if, after a review, it could find that one of the criteria set out in subsection 19(1) of the *TATC Act* had been met.

11 The Agency also pointed out that the Applicant, by suggesting that the Tribunal should require justification before consenting to the withdrawal of the Notice in a manner analogous to the courts, is in fact suggesting that the Tribunal should read into its governing statutes the authority to require justification and award costs when a notice is withdrawn. It is submitted that this view cannot be maintained in the absence of express statutory authority. While courts and some administrative tribunals may award costs when a matter before them is withdrawn, such costs are awarded on the basis of authority to do so set out in the governing statute or rules made under the authority of that statute.

12 Finally, the Agency repeated the points made in its letter of October 2, 2013, which argued that even if the Tribunal had the ability to assess costs, none of the criteria set out in subsection 19(1) of the *TATC Act* had been met.

IV. DISCUSSION AND ANALYSIS

13 The Applicant has invited the Tribunal to hold the Agency to a higher standard than the Applicant and to find that the Agency should not be allowed to unilaterally withdraw its Notice. Its actual request, however, was to institute a process that would allow the Applicant to recover its costs on the basis that all three of the situations described in subsection 19(1) of the *TATC Act* had been met. The Agency responded that since the Notice has been withdrawn, the Tribunal no longer has any jurisdiction in the matter, but even if it did, its authority is limited to the circumstances set out in subsection 19(1) of the *TATC Act*, none of which apply in this matter.

14 Administrative tribunals are creatures of the statutes that govern them. Apart from the authority given by those statutes, they have no ability to adjudicate. The Tribunal's jurisdiction is set out in subsections 2(2) and (3) of the

TATC Act. Subsection 2(3) grants jurisdiction "in respect of reviews and appeals in connection with administrative monetary penalties provided for under sections 177 to 181 of the *Canada Transportation Act...*". I agree with the Agency's position that this provision limits the Tribunal's jurisdiction to hearings that determine whether or not a violation alleged in a notice issued under section 180 of the *CTA* did, in fact, occur and whether the monetary penalty assessed was appropriate in the circumstances. The basis for the hearing is the notice and, if the notice is withdrawn, that basis disappears and the Tribunal has no further jurisdiction in the matter.

15 Subsection 19(1) of the *TATC Act* establishes a further jurisdiction of the Tribunal; a limited jurisdiction to assess costs in specified circumstances. The Tribunal has consistently held, most recently in *Kipke v. Canada (Minister of Transport)*, 2013 TATCE 13 (Appeal), TATC file no. C-3449-33, that the jurisdiction to award costs is limited to those situations set out in the subsection. This jurisdiction, however, does not stand alone and must be read as an adjunct to the authority granted to the Tribunal under the statutes listed in section 2 of the *TATC Act*. Paragraphs 19(1)(*b*) and (*c*) refer to situations where there is a hearing or an adjourned hearing, and paragraph (*a*) refers to a situation where the Tribunal is "seized of the matter for reasons that are frivolous or vexatious". On the basis of this wording, section 19 of the *TATC Act* can only apply where the Tribunal has jurisdiction over the matter. As pointed out above, the Tribunal has no jurisdiction once the notice is withdrawn and consequently cannot make an order as to costs.

16 While I have found that there is no jurisdiction to order costs in this matter, for the sake of clarity, I would point out that in any event, were the Tribunal to have jurisdiction on this issue, there would be no basis for ordering costs in the circumstances set out in the material before me. While there is no proven evidence available, from the documentation before me there seems to be a genuine issue as to whether the Applicant was the operator of the air service and so it cannot be said that the Agency was acting for frivolous or vexatious reasons in issuing the Notice. The Notice was withdrawn two weeks before the hearing and, to the extent that the withdrawal is analogous to an adjournment, that period has been considered adequate by the Tribunal in other circumstances. I note in this connection that the requirement in paragraph 19(1)(*c*) is "adequate notice to the Tribunal" and it is for the Tribunal to determine whether that requirement is met. Similarly, even if the withdrawal were analogous to a failure to appear at a scheduled hearing as provided for in paragraph 19(1)(*b*), that paragraph only applies to the party that requested the review.

V. RULING

17 I find that the Tribunal has no jurisdiction to consider the award of costs after a Notice of Violation, issued under section 180 of the *Canada Transportation Act*, has been withdrawn.

January 16, 2014

Elizabeth MacNab
Member

End of Document

TAB 3 ONGLET

Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees, [2004] N.J. No. 325

Newfoundland and Labrador Judgments

Newfoundland and Labrador Supreme Court - Court of Appeal

Wells C.J.N.L., Roberts and Mercer JJ.A.

Heard: May 19, 2004.

Judgment: September 29, 2004.

Docket: 03/24

[2004] N.J. No. 325 2004 NLCA 58 245 D.L.R. (4th) 234 241 Nfld. & P.E.I.R. 13 20 Admin. L.R. (4th) 17 | 134 A.C.W.S. (3d) 89

Between Her Majesty the Queen in Right of Newfoundland and Labrador, represented by Treasury Board, and Newfoundland and Labrador Health and Community Services Association, on behalf of St. John's Regional Health and Community Services, appellant, and Newfoundland and Labrador Association of Public and Private Employees (Paul Walsh), respondent

(61 paras.)

Case Summary

Courts — Judges — Powers or jurisdiction — Respecting judgments or orders — Jurisdiction — Effect of want of.

Preliminary determination as to whether an applications judge had jurisdiction to exclude four affidavits filed by the appellant employer and two affidavits filed by the respondent union. The respondent Walsh grieved his dismissal by his employer for becoming sexually involved with a patient at a detoxification centre where Walsh worked as an attendant. An arbitrator found the employer had just cause to impose discipline and reduced the penalty to a one-year suspension without loss of seniority. The arbitration was not transcribed, although the arbitrator took notes. The employer commenced a judicial review application. The parties filed conflicting affidavits, deposed by the individuals who represented the parties at the arbitration, concerning the testimony of witnesses before the arbitrator. The first applications judge determined the arbitrator's notes formed part of the record. The second applications judge found the error complained of in the case was sufficiently placed in focus on the record alone.

HELD: The second applications judge did not have jurisdiction to exclude the affidavits.

The decision was a nullity. Resolving the problem arising from the conflicting affidavits was fundamental to the requested judicial review of the arbitrator's award. Deciding the material that fairness and justice required the judicial review judge to consider would impact both the making of the decision and the substantive decision to be made. The first judge became seized of the matter by reason of his hearing and disposing of the interlocutory application regarding the arbitrator's notes. The discretion of the judicial review judge would be interfered with and the integrity of the hearing would be compromised if the decision of the second judge were to stand when the first judge was seized of the matter.

Statutes, Regulations and Rules Cited:

Arbitration Act, R.S.N.L. 1990, c. A-14.

Judicature Act, R.S.N.L. 1990, c. J-4, ss. 2(c)(iii), 27, 29, 29(1), 29(2).

Newfoundland Rules of Court, Rules 1, 14.24(1), 29.09, 29.09(1), 29.18, 46, 46.03, 46.03(1), 46.09, 46.10.

Counsel

Counsel for the Appellant: Augustus Lilly, Q.C.

Counsel for the Respondent: Stephanie Newell

[Editor's note: A corrigendum was released by the Court October 8, 2004; the corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment by Wells C.J.N.L. Concurred in by Roberts and Mercer JJ.A.

WELLS C.J.N.L.

1 This appeal is from a decision in one of three interlocutory proceedings taken in respect of matters arising out of an originating application for judicial review of an arbitration award. In the first of the interlocutory applications, Barry J. made a determination respecting the arbitrator's notes forming part of the record before the court. While the second interlocutory application arises, it does so only in an inconsequential manner. In the third interlocutory application, the one that is the subject of this appeal, Thompson J. made a decision that would result in four affidavits filed by the appellant and two filed by the respondent being excluded. Counsel for the parties have expressed agreement that, at the time of hearing the respective interlocutory applications, neither Barry J. nor Thompson J. was considered to be seized of the issues in the originating application for judicial review, and the matter of jurisdiction was not addressed at either hearing.

2 Prior to the presentation of oral argument, this Court raised with counsel the question of whether Thompson J. had jurisdiction to determine, on an interlocutory application, the evidence that would or would not be admissible before the judge hearing the originating application if he were not to be that judge. That gave rise to the further question of whether the decision under appeal may be a nullity. Counsel agreed that those questions ought to be addressed first. After adjournment for some weeks, counsel filed briefs and presented argument. They requested that the Court dispose of those issues prior to hearing argument on the merits of the appeal.

Background Facts

3 The background facts are conveniently set out in paragraphs 2 to 9 of the interlocutory decision of Barry J.[1] They are as follows:

[2] Paul Walsh grieved his dismissal by the St. John's Regional Health and Community Services Board for becoming sexually involved with a patient at a detoxification centre where Walsh worked as an attendant.

[3] A single arbitrator found the employer had just cause to impose discipline. But the arbitrator reduced the penalty to a one year suspension without loss of seniority.

[4] The [appellant] seeks judicial review of this decision, one ground being that the award was patently unreasonable because there was no evidence which, viewed reasonably, could justify a reduction in penalty.

[5] At the arbitration the parties agreed as follows:

> "That the Arbitrator would take written notes and in the event of conflict, these notes would prevail."

[6] The arbitrator taped the proceedings. Upon receipt of the award the [appellant's] solicitors requested the arbitrator to retain the tapes of the proceeding and allow the [appellant] to have the tapes copies [sic] for preparation of a transcript. The arbitrator replied the tapes were for his personal use and had not been retained. He also stated that the parties should have requested transcribing services, if a transcript was to be required.

[7] The [appellant] then requested a copy of the arbitrator's notes. The arbitrator replied that his notes were in his own handwriting, using abbreviations and his own form of shorthand, so they might not be of any assistance to anyone other than himself. The arbitrator also raised the issue of whether his notes formed part of the record and, unless both sides were in agreement, he suggested the matter be brought to Court for direction.

[8] The grievor's solicitor then advised the [appellant] that [the respondent] did not agree that the arbitrator's notes form part of the record.

[9] The parties have filed conflicting affidavits, deposed by the individuals who represented the parties at the arbitration, concerning the testimony of witnesses before the arbitrator.

Prior Proceedings

4 On March 14, 2000, the appellant caused to be issued the originating application by which it sought judicial review of the arbitrator's award. That application indicated that the basis for seeking a review was that the arbitrator had exceeded his jurisdiction by making a decision alleged to be patently unreasonable for, amongst others, the following reasons:

> (a) There was no evidence to support the decision to reinstate or, alternatively, the evidence, viewed reasonably, was incapable of supporting the decision to reinstate.
>
> ...
>
> (e) There was no evidence or, alternatively, no evidence which, viewed reasonably, that established [there follows a list setting out five challenged findings of fact].

The originating application was grounded by the usual affidavit attesting the facts set out in the application and attaching, as exhibits, the arbitrator's award and documentary evidence put before the arbitrator. That affidavit was sworn by Geoff C. Williams who had presented the case for the appellant at the arbitration hearing.

5 On the same date the appellant also caused to be issued an interlocutory application seeking an order that the arbitrator's notes form part of the record and that the arbitrator deliver, to the court and the parties, a copy of his notes and a typewritten transcript of those notes. That application was grounded by a second affidavit by Geoff C. Williams to which was attached certain correspondence exchanged between solicitors for the appellant and respondent.

6 The "conflicting" affidavits referred to in paragraph 9 of the decision of Barry J. were filed later. One was a third affidavit of Geoff C. Williams, and the other was the first affidavit of Thomas Hanlon, who had presented the case for the respondent at the arbitration hearing. The third Williams affidavit challenged conclusions of the arbitrator as to whether or not evidence was given at the hearing in respect of certain matters and, in particular, as to the content of the evidence given by a psychiatrist, Dr. John Angel. The first Hanlon affidavit deposed as to the findings of the arbitrator in relation to the evidence and responded to the challenged assertions in the third Williams affidavit, respecting the presence or absence of evidence to support certain conclusions of the arbitrator.

7 The interlocutory application was heard before Barry J. on May 29, 2000. On July 21, 2000 he filed a written decision in which, amongst other things, he wrote:

> [1] This application raises the question of whether an arbitrator's notes should be considered by a court when determining the sufficiency of evidence for an award.
>
> [10] As a preliminary matter, the employer asks this Court to determine whether the arbitrator's notes form part of the record which this Court may consider in determining the sufficiency of the evidence.
>
> [23] Whether or not this should be the approach in every case, I believe the fact that the parties agreed the arbitrator would take written notes to prevail in the event of conflict provides sufficient reason to conclude the notes form part of the record.
>
> [24] Also, even if the notes do not form part of the record, they may still be of sufficient assistance in determining the testimony of witnesses to justify their admission into evidence on judicial review. ... In the present case the employer has provided a basis for questioning the testimony recorded in the affidavit of NAPE's presenter at the arbitration, namely, the conflicting affidavit of the employer's presenter.
>
> [27] In the present case, in order to assist in resolving the problem arising from the conflicting affidavits of the presenters before the tribunal, I believe fairness and justice requires that this court consider the notes of the arbitrator.
>
> [28] The arbitrator's notes form part of the record. Even if they do not, they are relevant material which may assist in determining the testimony before the arbitrator and should, therefore, be considered by the court.

8 On July 31, 2001, the appellant filed two further affidavits: a fourth affidavit[2] of Geoff C. Williams, and an affidavit of Paula M. Schumph who had taken notes on behalf of the appellant for at least part of the arbitration proceedings. Both affidavits provided information said to be notes, taken by the deponents, of the evidence given by the witness Dr. Angel before the arbitrator.

9 Somewhat more than a year later, the appellant filed a further interlocutory application outlining the history of the proceedings and seeking a date for the hearing of the merits of the originating application. That interlocutory application also: (i) indicated that counsel for the respondent had advised that most likely an application, seeking to set aside the fourth Williams affidavit and the Schumph affidavit, would be brought; and (ii) sought an order that, if an application to set aside the affidavits were made, it be heard on the same day as, but prior to, the hearing of the merits of the originating application. That interlocutory application was ground by a pro forma affidavit of counsel.

10 On January 9, 2003, the respondent caused an interlocutory application to be issued seeking an order that the third and fourth Williams affidavits and the Schumph affidavit be "excluded from any consideration by this Honourable Court, on the merits of the Application for Judicial Review or otherwise" and that the affidavits "be stricken from and not form any part of the record of the judicial proceedings". That application was grounded by the second affidavit of Thomas Hanlon verifying the information contained in the application, which was largely a recitation of events between the parties from the date of, and arising out of, the originating application.

11 That interlocutory application was heard by Thompson J. who ordered that all affidavits filed except the first Williams affidavit, grounding the originating application, be struck out. In the first paragraph of his reasons for

decision[3], Thompson J. described what he was being asked to do, in the manner following:

> [1] Preliminary to consideration of an application by the Plaintiff for judicial review of an Award of a consensual arbitrator, pursuant to the court's jurisdiction under the Arbitration Act and otherwise under its inherent jurisdiction, the Defendant has applied for an order that two affidavits of Geoff Williams, one sworn July 26, 2001, the other July 30, 2001, and one affidavit of Paula Schumph sworn July 30, 2001, be stricken from and not form any part of the record subject of the judicial review.
>
> [Emphasis added]

Amongst other things, he then wrote:

> [19] The [appellant] asks that the record on judicial review be augmented by evidence of persons who represent one of the parties to the arbitration as to what their notes state and, based, upon their notes and their recollection, what they believe that evidence to have been.
>
> [20] If the record should be augmented by the evidence of persons representing a party, the [respondent] then is of the view that evidence of other note takers be received as well as leave granted for cross-examination as well as a rehearing of the evidence of the psychiatrist whose evidence the [appellant] is [sic] claimed as lacking in content to permit the arbitrator's finding.
>
> [63] ... The extent of the inquiry and the admissibility of evidence to support the allegation should be limited to that which is necessary in the circumstances to allow the court to understand the dimensions of the problem and to bring the problem into focus. Once the court becomes satisfied that the dimension of the problem is understandable without the need for further inquiry, the inquiry should end.
>
> [64] I am of the view then that the inherent jurisdiction of this court on judicial review of a consensual arbitration can authorize by necessary implication receipt of information external to the record but in limited circumstances and for limited purposes as discussed and should be based upon a review of each case and the particular circumstances presented. The court may have to discontinue such inquiry where the deference afforded the arbitrator overrides the obligation for continued judicial inquiry.
>
> [65] Based upon the foregoing review I conclude that:
>
> ...
>
> 3. Where the parties have expressly submitted contractually to other matters being contained in the record, as was concluded by Justice Barry in this judicial review as including the notes of the arbitrator for the express purpose of resolving conflict in the event conflict arose, such may be added to the record.
>
> [66] In a case such as this one, where finding of fact was related to and in respect of testimony provided in the hearing and that testimony was addressed in some manner by the arbitrator in the exercise of that consensual authority no inquiry is justified. The error complained of in this case is sufficiently placed in focus on this judicial review on the record alone with its findings of fact, its limited notes of the arbitrator, the application of principles and the conclusions reached by the Arbitrator. ... The affidavits take issue with what that evidence may have been. It cannot be said that the evidence is incapable of supporting the findings. There was no absence of the subject matter of the evidence.

[Emphasis added]

Appeal and Preliminary Issues on Appeal

12 The appellant sought and was granted leave to appeal the decision of Thompson J. On the date set for the hearing of that appeal, the Court raised with counsel for the parties the question of whether Thompson J. was without jurisdiction to make the decision that he did and, if he were without jurisdiction, whether his decision is a nullity. Disposing of that preliminary issue is the sole subject matter of this decision. I make no comment on the merits of the appeal from the decision of Thompson J.

13 The underlined portions of the excerpt from the decision of Thompson J., set out in paragraph 11 above, indicate Thompson J. was under no misapprehension as to the significance of what he was being asked to decide: that the impugned affidavits "... be striken from and not form any part of the record subject of the judicial review"; "... that the record on judicial review be augmented by evidence of persons ..."; and, if that occurred, "... that evidence of other note takers be received as well as leave granted for cross examination as well as a rehearing of the evidence of the psychiatrist ...". Thompson J. also acknowledged that the affidavits sought to be struck "... take issue with what that evidence may have been". Clearly, the decisions being sought from Thompson J. would be fundamental, perhaps even critical, to the decision to be made by the judicial review judge, as to whether the arbitration award should be set aside on the ground that the arbitrator had exceeded his jurisdiction and made a patently unreasonable decision by reason of:

> - there being no evidence to support the decision to reinstate or, alternatively, the evidence, viewed reasonably, was incapable of supporting the decision to reinstate, and
>
> - there being no evidence or, alternatively, no evidence which, viewed reasonably, established the challenged findings of fact.

14 Nevertheless, Thompson J. decided, amongst other things, that:

> Where the parties have expressly submitted contractually to other matters being contained in the record as was concluded by Justice Barry in this judicial review as including the notes of the arbitrator ... [and] ... such may be added to the record[;]
>
> In a case such as this one, where finding of fact was related to and in respect of testimony ... and that testimony was addressed in some manner by the arbitrator ... no inquiry is justified[;]
>
> The error complained of in this case is sufficiently placed in focus on this judicial review on the record alone with its findings of fact ...[; and,]
>
> It cannot be said that the evidence is incapable of supporting the findings.

[Emphasis added]

15 Thompson J. then ordered:

> The affidavits subject of this application and all other affidavits filed in this matter, excepting the two page affidavit grounding the Originating Application sworn by Geoff C. Williams on March 13, 2000, shall be excluded from the record. ...

It should be noted that the effect of that order is to exclude not only the third and fourth Williams affidavit and the Schumph affidavit, as was requested in the interlocutory application, but also the second Williams affidavit and the first Hanlon affidavit, which provided the evidentiary material and other information on which Barry J. relied in making his order. As well, it excluded the second Hanlon affidavit which grounded the interlocutory application which Thompson J. heard.

16 Disposing of the preliminary issue on this appeal potentially requires the Court to address the following questions:

1. Did Barry J. become seized of the originating application by reason of the issues he considered and the decision he made?
2. If Barry J. did become seized, what is the effect of the decision subsequently made by Thompson J.?
3. If Barry J. is not seized of the originating application, did Thompson J. become seized of the matter?
4. If Thompson J. is seized of the matter did he err in law by essentially determining the outcome of the originating application prior to the parties being heard, as a result of his concluding that "It cannot be said that the evidence is incapable of supporting the findings"?
5. If neither Barry J. nor Thompson J. is seized of the originating application what is the effect of their decisions on the determinations to be made by the judicial review judge on the hearing of the originating application?

17 Depending on the answer to the first two questions some or all of the remaining questions may not need to be answered. Answering the first two questions will require that the Court first determine the law as to the point at which a judge becomes seized of a matter of this nature and the circumstances in which, and the extent to which, a different judge can exercise jurisdiction in a proceeding in respect of which another judge is seized.

The Law

(a) Common law

18 It would not be inappropriate for me to make, here, the same comment as was made by Martin J.A. of the Ontario Court of Appeal, in R. v. Hatton (1978), 39 C.C.C. (2d) 281 when he wrote, at page 289:

> Neither the industry of counsel, nor the research of the Court has led to the discovery of any Canadian or Commonwealth decision on the precise question presented by this branch of the appeal.
>
> [Emphasis added]

Essentially, that observation appears to be as applicable today as it was when Martin J.A. wrote it in 1978. However, there have been some further decisions where similar issues have been considered and principles have been identified.

19 In the Hatton decision, the Court was dealing with a circumstance where, in the trial of an accused charged with rape, the jury had been empanelled and the accused given in charge of the jury. At that point the presiding judge disqualified himself because he knew one of the Crown witnesses. Another judge continued the trial with both the Crown and defence indicating they had no objection. On appeal, after conviction, it was argued that there was no jurisdiction to substitute judges after the trial had commenced. That ground of appeal was rejected because no evidence had been called and no rulings had been made that could possibly affect the integrity of the trial. In the

course of his decision, Martin J.A. wrote, at page 292:

> The principal practical objection to the substitution of Judges in the course of a trial is that where the substitution takes place after witnesses have testified, the Judge before whom the trial is continued is deprived of the opportunity of observing the demeanour of the witnesses, and since the jury is entitled to the assistance of the trial Judge, the integrity of the trial is affected. Also, where rulings have been made by the Judge before whom the proceedings commenced, those rulings may interfere with the discretion of the Judge before whom the proceedings are continued.
>
> [Emphasis added]

At page 293, he explained his decision in his comment that:

> ... While the trial, in a formal sense, had, no doubt, commenced when the appellant was given in charge to the jury, the actual determination of his guilt or innocence did not commence until evidence was called.

20 In W.(R). v. British Columbia (Superintendent of Family and Child Services) [1991] B.C.J. No. 562 (B.C.S.C.) (QL), the court was dealing with a circumstance where three exhibits, in the nature of notices of the hearing were filed and the matter was adjourned to a later date. On that date a different provincial court judge made a ruling respecting custody of a child. On an application for judicial review, Drossos J. considered whether the first judge was:

> ... seized of the hearing, and as a consequence, the Court lost jurisdiction when the hearing pursuant to adjournment came before another judge of the Court for continuation.

After reviewing Hatton, and a number of other decisions, Drossos J., at page 10, concluded:

> ... the mere calling of substantive evidence did not in itself result in a judge being seized of the case. Something more is required. A threshold test of "sufficient" substantive evidence must first be met before a judge is "seized".
>
> Accordingly, there is a distinction between commencement and being 'seized' such that more than commencement per se is required before a judge becomes seized of a case. The guiding consideration, if not principle, for when a judge is seized of a case in R. v. Hatton was that after the trial began a point would be reached where the validity and integrity of a fair and just trial would be compromised, if the same judge did not continue with it to conclusion.
>
> In my opinion, the resolution and synthesis of the foregoing is that when sufficient substantive evidence is heard by a judge, or sufficient submissions or rulings of substance are made, in brief, when enough has been heard, such that a continuation of the hearing or trial before another judge in substitution would result in the validity and integrity of a fair and just hearing or trial being jeopardized or compromised, the judge is effectively seized of the case. At that point, any substitution of another judge in the absence of covering statutory authority, such as s. 19(3) of the Act, would result in a loss of jurisdiction.
>
> What constitutes sufficient substantive evidence or submissions or rulings would depend in each case upon the nature and extent of the evidence or submissions heard by the Court and rulings made.
>
> Without attempting to close the limit of categories as to when the threshold has been reached, as different situations will no doubt present themselves, it is apparent that it has when witnesses are called, as a judge at the outset enters upon a viewing and consideration of the credibility, correctness and weight to attach to

> their testimony. (see the dictum of Scrutton, L.J., p. 13)[4] The situation would not be as critical where affidavit, commission or exhibit evidence is presented, but depending on its nature and extent and whether submissions were made concerning the same, a point could be reached where a judge is effectively seized of the matter. Also, technical rulings on non-contentious points, especially where consented to, may not be sufficient to result in a judge being seized of the case, but otherwise, where issues of substance or in contention are ruled upon. As already mentioned, the categories are not closed and whether the threshold has been met will depend in each case on what is then actually before the judge.
>
> [Emphasis added]

21 While there is no indication that the court considered W.(R.), the Prince Edward Island Court of Appeal took a similar approach in Doyle v. Doyle (2002), 216 Nfld. & P.E.I.R. 301. There, the record indicated that the first judge was of the view that "he only dealt with the matter on an interim basis and did not consider himself seized of the variation proceeding as a whole". Webber J.A., writing for the court, at paragraphs 17 to 21 wrote:

> As well, just as the first judge had no authority to issue an interim order varying the existing order, that judge could not on an interim basis decide the issue of material change and then leave a further hearing on the matter to another judge. As there is no interim process contemplated by the legislation, once a hearing has begun the judge before whom it has begun is seized with it unless that judge hears no evidence and/or makes no rulings. The first judge apparently heard only affidavit evidence (although we were not provided with a full transcript of the proceedings before the first judge). However, he clearly made a finding of material change in circumstances. That finding is absolutely essential to the variation hearing as a whole....
>
> ... A judge's reasoning for making the finding is an essential component of the analytical process required on a variation application. Thus, the integrity of the process would have to be affected if one judge made the finding of material change and a second judge completed the variation hearing. Such an impact is one of the major criteria for determining if a judge is seized of a matter. In the instant case the integrity of the process was threatened in this way and so the first judge was seized of this matter.
>
> ...
>
> The decision regarding a material change in circumstances was not appealed to this court and so is not before us. However, the second judge could not obtain jurisdiction by either adopting the finding of the first judge or purporting to come to the same conclusion. The first judge was seized of this matter and as a result the second hearing is a nullity.
>
> [Emphasis added]

22 Those views are also consistent with views expressed in authorities cited by counsel for the appellant. Although in those authorities the courts were dealing with issues somewhat different than the issues before us, they were made in the context of dealing with preliminary applications to exclude certain affidavit evidence. In R. v. Corbett, [1988] 1 S.C.R. 670 LaForest J. wrote, at page 714, that "questions of relevancy and exclusion are, of course, matters for the trial judge". While he was writing in dissent, the majority did not disagree with that proposition.

23 In M. (C. L.) v. W. (D.G.), [2004] A.J. No. 329, 2004 ABCA 112, Paperny J.A., at paragraph 11, wrote:

> Further, it is not appropriate at this stage of these proceedings to exclude the challenged affidavit evidence. The court deciding the substantive issue will have an opportunity to consider that evidence in its proper context and determine whether there is any proper foundation on which to exclude it.

Counsel for the appellant also cited Ontario authorities to the same effect (see 876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd. (1997), 37 O.R. (3d) 70 (Ont. Ct. Gen. Div.); Stanley v. Davies, [1999] O.J. No. 634 (Ont. Div. Ct.) (QL); Masters' Association of Ontario v. Ontario (Attorney General), [2001] O.J. No. 1444 (Ont. Div. Ct.) (QL) and Zeitler v. Inmet Mining Corp., [2001] O.J. No. 5022 (Ont. Sup. Ct. J.) (QL)).

24 As well, I am of the view that an approach such as that taken in Hatton, in W. (R.) and in Doyle is the only one that would be consistent with the rule against collateral attack. That rule is: A court order made by a court having jurisdiction to make it, may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or the judgment. If a different judge or judges could decide certain issues in interlocutory proceedings, then in any appeal of the decision in the primary proceeding, decisions by one or more other judges in interlocutory proceedings, arising out of that primary proceeding, would not be subject to review because it would be a collateral attack on decisions made by those other judges.

25 The basis for that rule was explained by McIntyre J. in Wilson v. The Queen, [1983] 2 S.C.R. 594. At page 599 he wrote:

> In the Manitoba Court of Appeal, Monnin J.A. said:
>
> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.
>
> I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. ...

At page 604 he further wrote:

> The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

26 The issue was again before the Supreme Court in R. v. Litchfield, [1993] 4 S.C.R. 333. Iacobucci J., writing for six of the seven judge court, at pages 347 to 349 wrote:

> It is not disputed that the Crown could not have appealed the division and severance order prior to the trial. However, the question in this appeal is whether the Crown can appeal the division and severance order as part of its appeal of the respondent's acquittal.
>
> The answer to this question is not straightforward. The division and severance order in this case was not made by the trial judge. It was made by a superior court judge on a motion brought prior to the trial. At first blush, the order cannot be appealed as part of the respondent's acquittal without violating the rule against collateral attack. This rule holds that "a court order, made by a court having jurisdiction to make it," may not be attacked "in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment" (Wilson v. The Queen, [1983] 2 S.C.R. 594, per McIntyre J., at p. 599). The lack of jurisdiction which would oust the rule against collateral attack would be a lack of capacity in the court to make the type of order in question, such as a provincial court without the power to issue injunctions. However, where a judge, sitting as a member of a court having the capacity to make the relevant type of

> order, erroneously exercises that jurisdiction, the rule against collateral attack applies. See, e.g. B.C. (A.G.) v. Mount Currie Indian Band (1991), 54 B.C.L.R. (2d) 129 (S.C.), at p. 141, and R. v. Pastro (1988), 42 C.C.C. (3d) 485 (Sask. C.A.), at pp. 498-99, per Bayda C.J.S. Such an order is binding and conclusive until set aside on appeal.
>
> The rule against collateral attack has been reaffirmed by this Court on numerous occasions, such as in R. v. Meltzer, [1989] 1 S.C.R. 1764, R. v. Garofoli, [1990] 2 S.C.R. 1421, and Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892, per McLachlin J. at p. 973, citing R.J. Sharpe, Injunctions and Specific Performance (1983).
>
> The respondent's trial would not have been a proceeding in which the specific object was the reversal, variation or nullification of the division and severance order. Therefore, under a strict application of the rule against collateral attack, the trial judge would have had no power to review the division and severance order. Consequently, there would have been no error of law committed with respect to proceeding on the division and severance order at the trial upon which an appeal of the verdict reached during the trial could be founded. The result would be that neither the Court of Appeal nor this Court would have jurisdiction to review, much less to set aside, the division and severance order.
>
> [Emphasis added]

(b) Statutory provisions bearing on the question

27 In the originating application, the applicant seeks an order "... further to the powers vested in this Honourable Court by the Arbitration Act and otherwise through its inherent jurisdiction ..." Nothing in the Arbitration Act, RSNL 1990, c. A-14 bears directly on the issue presently before the Court. It is not, therefore, necessary to give specific consideration to any of its provisions in the course of this decision.

28 The provisions of the Judicature Act, RSNL 1990, c. J-4, were not specifically argued by counsel, either in their facta or oral arguments. At least one provision appears to bear directly on the issue. The Court must, therefore, consider whether that provision would permit different aspects of a proceeding to be decided by different judges as occurred in this case. Section 29 provides:

> 29. (1) Where a judge is absent, ill, or the office has become vacant, or where there is some other cause, and it is urgent to do so, another judge may sit for that judge to hear or dispose of a proceeding heard in part by that judge.
>
> (2) Evidence that has been heard by a judge before the substitution of that judge under subsection (1) may be used by the judge who sits pursuant to subsection (1).

29 The section specifically allows for another judge to sit "where a judge is absent, ill, or the office has become vacant, or where there is some other cause, and it is urgent to do so ...". In my view, that does not confer power to substitute a judge at will. It permits a judge to sit in place of another where one of the specified circumstances exists. I interpret that to mean one of the limited circumstances in which substitution may occur must be shown to exist before a judge can be substituted to sit on a matter of which another is seized.

30 A similar statutory provision was considered in W. (R.). There, the court was interpreting and applying a legislative provision that specifically provided for continuation of a proceeding by another judge having jurisdiction where the original judge was "unable to hear further proceedings in the same matter". It was argued, however, that the section did not apply "where on the day and place set for the continuation, a judge, who is seized of the hearing,

is unable to do so merely because of the turn of his rota he is elsewhere". The court agreed that something more was required to bring the case within that statutory provision. Drossos J. at page 3, observed:

> Without attempting to limit the factors, something more in the way of a debilitating disability, such as a serious illness of the judge, or a legal impediment arising, such as a conflict of interest and factors of that nature are required.

I agree with that conclusion and am of the view that it applies to section 29.

31 Section 29 cannot, therefore, be construed as granting general jurisdiction to a Trial Division judge to make determinations, in a separate preliminary interlocutory application, as to what may or may not constitute the record to be considered, or as to what affidavits may or may not be filed, in a proceeding of which another judge of the Trial Division is, or may become, seized. It can only be employed where it is shown that a circumstance provided for in subsection 29(1) exists.

(c) Regulatory provisions bearing on the question

32 Certain of the Rules of the Supreme Court 1986, made pursuant to the provisions of the Judicature Act, bear, at least indirectly, on the issue of admissibility of affidavit evidence at the hearing on the judicial review. Rules 29.09 and 29.18 are part of the general rules relating to the hearing of applications, set out under the heading "Rule 29" "Applications", and they provide as follows:

> 29.09 (1) Evidence on a hearing may be given
>
> (a) by an affidavit or statutory declaration made pursuant to Rule 48;
>
> (b) by a statement of facts agreed upon in writing by all the parties;
>
> (c) with leave of the Court, by any witness in person; or
>
> (d) by any evidence obtained on discovery and admissible under the applicable rule.
>
> (2) Where there is or may be a dispute on a hearing as to the facts, the Court may, before or on the hearing, order that the application shall be heard on oral evidence, either alone or with any other form of evidence, and may give such other directions relating to any pre-hearing procedure and the conduct of the application as it considers just.
>
> 29.18. The provisions of these rules shall, with any necessary modification, apply to any application.
>
> [Emphasis added]

33 Given the usage of, and meaning assigned to, the words "these rules" in Rule 1, rule 29.18 requires consideration of the possibility that provisions of other rules may have application here. Other rules that could have a bearing on admissibility of affidavit evidence on the hearing of the originating application and the interlocutory application arising from it, with which we are here concerned, are the following:

> 46.03. (1) The Court may by order permit
>
> (a) any fact to be proved by affidavit; or
>
> (b) the affidavit of any witness to be read at a trial, and

> unless the Court otherwise orders, the deponent shall not be subject to cross-examination and need not attend the trial.
>
> 46.09. The Court may, at a trial, make an order directing the method of proving any fact or document or of adducing any evidence if it appears that the order can be safely made having due regard to the interests of justice.
>
> 46.10. An order made under the foregoing rules, including an order made on appeal, may be revoked or varied by a subsequent order of the Court made before or at the trial, and on such terms as are just.
>
> [Emphasis added]

34 Rule 29.09(1) clearly gives the court, which under the Judicature Act[5] and the Rules includes any judge exercising the power of the court in court or in chambers, power to give leave for the presentation of evidence by an affidavit. Rule 46.03(1), although expressed in somewhat different language, is to the same effect.

35 Rule 46.09, which by virtue of rule 29.18 applies to the hearing of an application, empowers the court at trial to make an order "directing the method of proving any fact". Rule 46.10 provides that such an order "may be revoked or varied by a subsequent order of the Court." Unless the approach adopted in Hatton, in W. (R.) and in Doyle is followed, application of these rules could result in evidentiary chaos in any proceeding. Either, a judge hearing a matter would not be able to exercise the discretion, granted by rules 29.09, 46.03 and 46.09, as to evidence to be admitted, because another judge, in an earlier interlocutory proceeding, may have made an order precluding the use of the specific affidavit or affidavits, or, if the judge did exercise such discretion, that judge would be exercising appellate jurisdiction over another judge of the Trial Division by exercising the power, conferred by rule 46.10, to revoke or vary an order earlier made by the court. Rule 46.10 can only be rationally applied in a circumstance where the Hatton, W.(R.) and Doyle approach is adopted to determine when a judge becomes seized of a matter.

36 A somewhat different approach was taken by the Manitoba Court of Appeal in CAE Aircraft Ltd. v. Canadian Commercial Corp. (1994), 95 Man. R. (2d) 101. There, a question arose as to whether a judge who had dealt with an estoppel issue, that had been further dealt with by the Court of Appeal, was seized of the remaining issues in the matter. A judge of the Court of Queen's Bench concluded that the first judge had not become seized of the remaining issues by reason of deciding the estoppel issue. He considered the approach taken in W. (R.) but concluded that the first judge had not "crossed the threshold". On appeal, Scott C.J.M. agreed but for different reasons. He decided, at paragraph 19:

> In my opinion the legalistic and formal procedure followed in this case to determine if Wright, J., was obliged to hear the trial was simply unnecessary. Prima facie, assignment of judges is a matter for the Chief Justice by virtue of statute and tradition. Indeed, assignment of cases is one of the most important functions of a Chief Justice.

Scott C.J.M. was satisfied that the estoppel issue was separate and apart from the main issue in the trial and that the first judge, in his reasons for judgment, "makes it obvious that he restricted his comments to the evidence before him". It may well be that Manitoba statutory provisions or rules of court permit, or even require, that approach. However, absent specific authority in the statute or the rules, in my view, the approach adopted by Scott C.J.M. would, in the ordinary course, conflict with the rule against collateral attack discussed above. That rule did not arise in CAE, presumably because the Court of Appeal had already dealt separately with the estoppel issue. Had that not been the case, the rule against collateral attack would necessitate separate appeals from the decision of each judge with an inability to dispose of the whole case in either appeal unless they were taken in the same time frame and consolidated, assuming the rules permitted that to be done.

37 Counsel for the respondent cites several decisions of the Federal Court. Those, however, deal primarily with the timing of hearing of an application to exclude affidavit evidence. In the main they indicate that such applications should not, in the ordinary course, be raised prior to the hearing. The decisions also acknowledge that in some circumstances it may be appropriate to do so. Counsel for the respondent, quite fairly, in the respondent's factum, acknowledges:

> In terms of a Judicial Review, and in particular, the filing of supplementary Affidavits, case law supports that this determination should be conducted by the Judge "seized with" or hearing the Judicial Review.

She cites Walker v. Randall (1999), 173 F.T.R. 161 as authority for that proposition. In that case, the court concluded that the appropriate time to make a motion to strike out affidavits was at the outset of the judicial review hearing. However, in the course of dealing with the matter, Teitelbaum J., at paragraph 28, wrote:

> I am in agreement with the comments expressed by both Mr. Justice Muldoon and Prothonotary Hargrave. I am satisfied that the issue of the propriety of an affidavit(s) to support a judicial review application should be determined by the judge hearing the judicial review of the application as the affidavit(s) form part of the judicial review application.

I agree with that conclusion.

(d) Conclusions as to the law respecting:

(i) when a judge becomes seized of a matter.

38 Based on the foregoing assessment, I would conclude that there are no provisions in the Judicature Act which specifically identify the point at which, or the circumstances in which, a judge becomes seized of a proceeding. Nevertheless, it is clear from the authorities that simple commencement of a proceeding by a judge is not enough. Where procedural steps only are taken, to facilitate orderly management of the court's processes, and anything decided does not impair the integrity of the trial, a judge is not seized, even though, as in both W.(R.) and Hatton, in the formal sense, the trial may have commenced.

39 There are exceptions to the common law approach requiring a proceeding, and proceedings arising out of that proceeding, to be heard, determined and disposed of by the same judge. Section 29 of the Judicature Act identifies judicial absence, illness, or vacancy of office, or where there is some other cause, and it is urgent to do so, as circumstances in which another judge is permitted to sit. It is not necessary for me to decide, for purposes of this appeal, whether employment of that provision would require establishing urgency in each of the specifically identified circumstances, or only where "some other cause" is the circumstance relied on, and I decline to do so. It is sufficient, to enable disposition of this appeal, to decide that the record would have to indicate that there was consideration of, and a determination made as to, the existence of one of the specified circumstances, if the section is to be relied upon to support assumption of jurisdiction by a different judge.

40 Following the approach in Hatton, in W. (R.) and in Doyle, I would conclude that a judge becomes seized when the actions of the judge in hearing evidence or making rulings has the potential to affect, if that judge is not to be the trial or hearing judge, the integrity of the full and fair trial or hearing to which the parties are entitled. As Martin J.A. decided in Hatton, that would include any ruling that "may interfere with the discretion of the Judge before whom the proceedings are continued". I would express the standard, in simple terms, to be when a judge hears evidence or makes a decision that could, directly or indirectly, impact the substantive decision, or the making of the substantive decision, that is to be made by the judge who is seized, or will become seized, of the matter.

(ii) the circumstances in which, and the extent to which, a different judge may exercise jurisdiction in a proceeding in respect of which another judge is seized.

41 As noted above, section 29 of the Judicature Act makes specific provision for some circumstances in which a judge, not seized of a proceeding, may acquire jurisdiction even where another judge is seized. Subsection (2) of that section explicitly confers, on the substitute judge, the discretion to use or not to use evidence heard by the first judge. It does not explicitly confer jurisdiction to vary or revoke rulings made by the first judge. It is not necessary, for purposes of this decision, to consider whether rule 46.10 would permit a substitute judge to revoke or vary an order previously made under one of the rules of Rule 46, in circumstances where section 29 applies. That issue must remain for another day. For purposes of this decision, it is sufficient to determine the extent to which a different judge may exercise any jurisdiction in a proceeding in respect of which another judge is seized, in circumstances where no specific statutory authorization is relied upon, as is the case here.

42 Drossos J., in W.(R.) observed, at page 3 that "... if the judge, who is seized of the hearing, does not pursuant to adjournment appear on the adjourned date for continuation of the hearing, it would be open to another judge of the Court to adjourn, but not to continue, the hearing ...." I agree with that observation. The approach was also followed in Blitz v. Blitz, [2002] B.C.J. No. 874, 2002 BCSC 633. There, after quoting the excerpts from W.(R.) set out in paragraph 20 above, Kirkpatrick J. at paragraph 41, observed:

> ... Most significantly, if another judge is seized of the matter, a second judge, absent an order or direction under R. 64(10), lacks jurisdiction to make substantive orders that ought to be made by the judge who heard the evidence and who made findings of fact and credibility.
>
> [Emphasis added]

Clearly, that leaves room for a non-seized judge to make an order or give a direction that does not involve a matter of substance.

43 Adjournments, routine procedural matters, and perhaps other such matters not involving substance, are decisions or rulings that are of such a nature that they could not, directly or indirectly, impact the ultimate outcome of the matter. In my view, decisions by a judge not seized of a matter must be limited to such minor, although necessary, non substance aspects that could not possibly impact, directly or indirectly, either the substantive decision, or the making of the substantive decision, to be made in the matter. (See also Doyle (supra) and Reid v. Durning (1987), 78 N.S.R. (2d) 12 (N.S.C.A.))

Analysis

Of the first issue: Did Barry J. become seized of the originating application by reason of the decision he made?

44 In this case, the purpose of the originating application was to seek the setting aside of the arbitrator's decision on the basis that the evidence before the arbitrator was incapable of supporting his decision to reinstate Mr. Walsh, and on the basis that there was no evidence to support a number of the specific factual findings that the arbitrator made. Those questions could not possibly be answered without the judge, exercising the judicial review jurisdiction, first deciding what materials should, at law, in the circumstances of the case, be considered by the Court in the course of making the decision. That would require a decision as to whether, in the circumstances of this case, as identified in portions of two of the later excluded affidavits, the arbitrator's notes may or should be considered by the court. The excerpts from paragraphs 1 and 10 of the decision of Barry J., as quoted in paragraph 7 above, indicate those are precisely the questions he was determining on the interlocutory application.

45 An examination of paragraphs 24 and 27 of the decision of Barry J., also quoted in paragraph 7 above,

indicates that, after concluding that the appellant had provided a basis for questioning the testimony, he decided that "in order to assist in resolving the problem arising from the conflicting affidavits ... fairness and justice requires that this court consider the notes of the arbitrator". Resolving the problem arising from the conflicting affidavits is fundamental to the requested judicial review of the arbitrator's award. Deciding the material which fairness and justice requires the judicial review judge to consider would, undoubtedly, impact both the making of the decision and the substantive decision to be made. Thus, Barry J. made a decision that could directly or indirectly impact the outcome of the originating application for judicial review. At the very least it was a decision that, in the words of Martin J.A., "may interfere with the discretion of the Judge before whom the proceedings are continued". On the principles adopted above, I conclude that Barry J. became seized of the matter by reason of his hearing and disposing of, in the manner that he did, the interlocutory application which arose out of that originating application.

46 Clearly, it would have been otherwise if Barry J. had been asked only to order the arbitrator to make his notes, and a typewritten transcript of them, available to the court and the parties, or had so confined his order. Such a decision would impact only process management. The decisions as to what should constitute the record in the judicial review and what material fairness and justice would require be considered, would have remained to be made by the judicial review judge. By making the determination he did Barry J. decided issues that can only be properly made by the judge seized of the judicial review, if the integrity of that review, as a fair and just hearing, is to be preserved. In doing so, Barry J. became seized of the matter.

> Of the second issue: If Barry J. were seized of the originating application, what is the effect of the decision subsequently made by Thompson J.?

47 Counsel for the parties advised the Court that neither the parties nor the court considered that Thompson J. was, at the time, seized of the originating application for judicial review. With respect to that, it is sufficient for the Court to simply observe that, in such a circumstance, neither the making of the application, nor the arguing of it by the parties without addressing the question of jurisdiction, nor the decision of the judge to hear and dispose of it, was an appropriate course of action to be taken, whether or not Barry J. was seized of the matter. With the possible exception of an application to strike out a pleading or document for one of the reasons specified in rule 14.24(1)[6], the law identified above indicates clearly that one superior court judge cannot exercise jurisdiction to rule upon the evidence that will be admissible, or should be considered, in a matter of which another superior court judge, is or is to become, seized. That would amount to one superior court judge exercising supervisory jurisdiction over another. The unacceptability of such a situation is so clear that it requires no further comment.

48 Nothing in the record indicates whether the request, in the second interlocutory application of the appellant, that if the respondent raised a question of excluding affidavits, it "be heard on the same day, prior to commencement of the hearing on the merits of the Originating Application", was considered and, if it were, how it was disposed of. The record does not indicate that, when the matter came on before Thompson J., there was argument by counsel, or consideration by the judge, of any question as to jurisdiction. There was no consideration of whether section 29 of the Judicature Act was to be relied upon to allow Thompson J. to assume jurisdiction. That being so, that section cannot be engaged ex post facto to support the assumption of jurisdiction by Thompson J.

49 In its factum the respondent asks the Court to treat the assumption of jurisdiction by Thompson J. as an irregularity not a nullity, and allow the decision to stand because there is no prejudice to the parties and because of the cost of having the issues reheard before the judicial review judge. This Court has no discretion to make such an order. The findings of Thompson J. set out in paragraph 11 above, and the conclusions of Thompson J. set out in paragraph 14 above, are specific findings and conclusions that are fundamental to decisions to be made by the judicial review judge in the process of dealing fully with the application for judicial review of the arbitrator's award. Clearly, the discretion of the judicial review judge would be interfered with and the integrity of the hearing, as a fair and just hearing, would be compromised if the decision of Thompson J. were to stand when another judge is, or is to become, seized of the matter. Allowing it to stand would not only prejudice the appellant but it would bring the administration of justice into disrepute, because it would be quite inconsistent with the foregoing assessment of the law.

50 At the appeal hearing, counsel for the respondent ultimately acknowledged that Thompson J. ought not to have been asked to proceed, and ought not to have proceeded the way he did, if he were neither seized nor to become seized of the judicial review. Nevertheless, counsel for both parties argue that the decision should not be held to be a nullity. Rather, they argue, the decision of Thompson J. should simply be set aside on the basis that it was error of law for him to proceed as he did. Neither counsel offered authority for the proposition. Research by the Court did not produce clear authority. However, it may be more a question of semantics than substance.

51 Although a superior court judge has inherent jurisdiction as well as jurisdiction conferred by a variety of statutes, there are bounds. This was recognized in respect of a judge of the Supreme Court of Canada at a very early stage. In Re Sproule (1886), 12 S.C.R. 140, a writ of habeas corpus had been issued by a judge of the Court. On appeal to the full court, it was concluded that the statute did not constitute the individual judges of the Supreme Court of Canada as a court. The writ was held to be a nullity. Taschereau J. at page 242 wrote:

> ... Where, as here, a judge having a limited jurisdiction exercises a jurisdiction which does not belong to him, his decision, or his acts, amount to nothing and do not create any necessity for an appeal. Attorney General v. Hotham.[7] A proceeding so taken is a complete nullity, a nullity of non esse.

52 This Court came to a similar conclusion in R. v. O'Leary (1991), 97 Nfld. & P.E.I.R. 314. Admittedly, the court was there dealing with an appeal from a decision of a Provincial Court judge and not a superior court judge. Nevertheless it was dealing with the matter as an appeal from a court of record and not by way of judicial review. The circumstance and principle are both clearly identified in the comments of Gushue J.A., at paragraphs 11 and 12, where he wrote:

> (11) In other words, a particular Provincial Court judge acquires no jurisdiction to act as a trial court in respect of an indictable offence, and thus to deal with the offence charged, until the accused's election is made in favour of a trial in Provincial Court. It follows that if he has no jurisdiction to act as a trial court, he has no jurisdiction or authority to dismiss the charge.
>
> (12) That is the position in the present case. Judge LeBlanc had certain jurisdiction over the person of the respondent, but none over the offence charged. He therefore could not dismiss it and it is clear that his decision to do so was a nullity.

53 A similar conclusion was reached, of course, in Doyle. There, at paragraph 21, Webber J.A. wrote:

> The decision regarding a material change in circumstances was not appealed to this court and so is not before us. However, the second judge could not obtain jurisdiction by either adopting the finding of the first judge or purporting to come to the same conclusion. The first judge was seized of this matter and as a result the second hearing is a nullity.

Presumably, if the hearing was a nullity, any order resulting from it would also be a nullity.

54 On the other hand, there are comments in Canadian Transport (U.K.) Ltd. v. Alsbury, [1953] 1 D.L.R. 385 (B.C.C.A.) to the effect that an order of the superior court is never a nullity. There, Sidney Smith J.A., at page 406, wrote:

> The appellants attacked the Chief Justice's order on many grounds of which I shall examine the foremost:
>
> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity and could form no basis for contempt proceedings. ...
>
> ...

> To this the general answer is made that the order of a Superior Court is never a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General [authorities cited]. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside ...
>
> [Emphasis added]

55 Although the Supreme Court of Canada dismissed[8] the appeal, it did so without any direct discussion of the statement that "... the order of a superior court is never a nullity ...". An examination of the remainder of the comments of Sidney Smith J.A. leads me to the conclusion that what was really meant by the statement is that an order of a superior court is never to be treated as a nullity, unless and until determined to be so by the court having appellate jurisdiction in the matter. In addition to the context, in which the statement was contained, set out above, further comments of Sidney Smith J.A. that lead me to that conclusion are to be found at page 408. They include:

> But to return to the objection that the injunction order was a nullity (which means made without jurisdiction) because founded on inadequate and inadmissible evidence: The idea that the sufficiency of evidence has any relation to jurisdiction is entirely novel and against principle. That would be so even if it were dealing with an inferior Court.
>
> Next the appellant said that the injunction was a nullity because it went further than the Trade-Unions Act permitted, and because it did not comply with the Laws Declaratory Act, R.S.B.C. 1948, c. 179, regulating ex parte injunctions. This argument that a Court, particularly a superior Court, acts without jurisdiction when it errs in matters of statute law, seems to be clearly against both authority and principle. ...
>
> ... On principle it seems clear that a Court's mistakes as to statute law are error just like their mistakes at common law. Otherwise impossible situations would arise. There is always room for doubt as to what statutes mean, and as to whether the facts of a particular case bring it within a statute. Parties resort to Courts to find out what their legal rights are. But if a judgment was void whenever the Judge made a mistake in statute law, resort to the Courts would be useless.
>
> ... These were all authorities to show that Clyne J. erred, and that he could perhaps have been reversed if appeal had been taken from his injunction; but they are not authorities for his order's being treated as a nullity, and ignored.

56 In Wilson, McIntyre J. quoted the excerpt from the decision of Sidney Smith J.A., from page 406 of Canadian Transport, that I have set out in the preceding paragraph. At page 601 of Wilson, McIntyre J. also quoted from the decision Bird J.A., at page 418 of Canadian Transport, the following:

> The order under review is that of a Superior Court of Record, and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.
>
> [Emphasis added]

57 When one considers that the court, in Wilson, was dealing primarily with the rule against collateral attack, it is reasonable to conclude that the court was not espousing the view that, even on appeal, a decision of a superior court cannot be held to be a nullity. The comments of McIntyre J.A. quoted in paragraph 25 above, unquestionably, indicate otherwise. In particular I would refer to his expression of approval of the comment of Monnin C.J.M. that:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed

and to his own comment that:

> ... a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation or nullification of the order or judgment. ...
>
> [Emphasis added]

That last comment is a recognition that a decision under appeal not only can be reversed (which I would take to include setting aside) or varied, it can be nullified. An appealed decision can only be reversed or varied if it contains, within it, error in law that would warrant reversal or variation. If, instead of error in law, want of jurisdiction is found, there is no consideration of its legal merits. The decision may or may not be correct in law but it cannot stand, not because its content was erroneous in law, but because the maker had no jurisdiction to make it. In those circumstances, it can only be set aside because, having been made without jurisdiction, it is a nullity. That conclusion is clearly reflected in decisions of courts of appeal in Doyle, O'Leary, Reid v. Durning and others.

58 As was decided in W.(R.) when one judge is seized of a proceeding any substitution of another judge, to deal with substantive issues, in the absence of covering statutory authority, results in a loss of jurisdiction. Barry J. being seized of the matter, the substitution of Thompson J., in circumstances other than expressly authorized by statute, resulted in loss of jurisdiction. Even though the legal merit of the conclusions of Thompson J. has not been considered and, therefore, those conclusions have not been found to be erroneous in law, his decision cannot be allowed to stand. An examination of the impact of the decision of Thompson J., on the ruling of Barry J., demonstrates the logic of that position in this case. As noted above, the underpinning for the decision of Barry J., determining that "the arbitrator's notes form part of the record ..." and "should, therefore, be considered by the Court", was the third Williams affidavit and the first Hanlon affidavit which the decision of Thompson J. ordered "... excluded from the record". As well, Barry J., or any other judge who may become seized of the judicial review, could well conclude that such affidavits not only should be admitted but may be essential to proper conduct of the judicial review. If the decision of Thompson J. cannot be reversed or varied because it has not been found to be erroneous in law, it can only be set aside because it is a nullity. That must be the result in this case.

Of the remaining issues

59 In light of my decision that Barry J. was seized of the originating application by reason of the decision he made, and that, as a result, the decision of Thompson J. must be set aside by reason of it being a nullity, it is not necessary to decide the remaining issues identified above.

Conclusion

60 For the reasons set out above the appeal is allowed. It is ordered: (1) that the decision of Thompson J. is set aside by reason of it being a nullity, and it is declared to be of no force or effect; and (2) that Barry J. is seized of the originating application and all proceedings arising out of it unless another judge becomes seized in accordance with the law.

61 As responsibility for the circumstances necessitating this decision appears to lie, at least to some degree, with both parties, each party will bear its own cost of the interlocutory application before Thompson J. and of this appeal.

WELLS C.J.N.L.
ROBERTS J.A.:— I concur.

MERCER J.A.:— I concur.

* * * * *

CORRIGENDUM

Released: October 8, 2004.

On page 6, in paragraph [11], the quoted paragraph numbered [65] was inadvertently placed out of sequence. It should appear between the quoted paragraphs [64] and [66].

WELLS C.J.N.L.
ROBERTS J.A.:— I concur.
MERCER J.A.:— I concur.

1 (2000), 195 Nfld. & P.E.I.R. 330 (N.L.T.D.)

2 Incorrectly titled "Affidavit No. 2 of Geoff C. Williams"

3 (2003), 222 Nfld. & P.E.I.R. 336

4 Coleshill v. Manchester, [1928] 1 K.B. 776.

5 See section 2, paragraph (c)(ii) and section 27.

6 (a) it discloses no reasonable cause of action or defence; (b) it is false, scandalous, frivolous or vexatious: (c) it may prejudice, embarrass or delay the fair trial of the proceeding; or (d) it is otherwise an abuse of the process of the Court, ...

7 (1827), 3 Russ. 413.

8 [1953] 2 D.L.R. 785.

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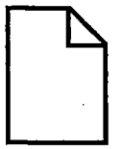

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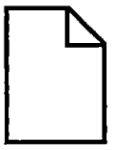

Madhur Lata Prassad *Appellant*

v.

Minister of Employment and Immigration *Respondent*

INDEXED AS: PRASSAD v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

File No.: 19608.

1988: November 28; 1989: March 23.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Adjournment of inquiry — Powers of adjudicator — Application for a Minister's permit authorizing a person to remain in Canada — Whether adjudicator must adjourn immigration inquiry to enable appellant to pursue her application made under s. 37(1) of the Immigration Act, 1976 — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 27(3), 37(1), 113(e) — Immigration Regulations, 1978, SOR/78-172, s. 35(1).

Appellant was deported from Canada on June 6, 1984 and re-entered the country without the written consent of the Minister of Employment and Immigration contrary to s. 57(1) of the *Immigration Act, 1976*. On November 2, 1984, the immigration inquiry held by an adjudicator pursuant to s. 27(3) of the Act was adjourned to give appellant's counsel time to prepare. Two weeks after the adjournment, appellant sent a letter to the Minister seeking a permit authorizing her to remain in Canada pursuant to s. 37(1)(*b*) of the Act. When the inquiry reconvened on November 21, 1984, appellant requested an adjournment to permit her application to the Minister to be considered. The adjudicator refused the request and proceeded with the inquiry. At the conclusion of the inquiry, a deportation order was made against the appellant. The Federal Court of Appeal dismissed appellant's application, made under s. 28 of the *Federal Court Act*, to review and set aside the adjudicator's decision. The Court held that the adjudicator did not err in refusing an adjournment of the inquiry to permit the appellant to pursue an application under s. 37(1) of the Act.

Held (Wilson and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Madhur Lata Prassad *Appelante*

c.

Ministre de l'Emploi et de l'Immigration *Intimé*

RÉPERTORIÉ: PRASSAD c. CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

N° du greffe: 19608.

1988: 28 novembre; 1989: 23 mars.

Présents: Le juge en chef Dickson et les juges McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Ajournement d'enquête — Pouvoirs de l'arbitre — Demande de permis du ministre en vue d'être autorisé à demeurer au Canada — L'arbitre doit-il ajourner l'enquête d'immigration pour permettre à l'appelante de poursuivre ses démarches en vertu de l'art. 37(1) de la Loi sur l'immigration de 1976? — Loi sur l'immigration de 1976, S.C. 1976-77, chap. 52, art. 27(3), 37(1), 113e) — Règlement sur l'immigration de 1978, DORS/78-172, art. 35(1).

L'appelante, expulsée du Canada le 6 juin 1984, est entrée de nouveau au pays sans l'autorisation écrite du ministre de l'Emploi et de l'Immigration, contrairement au par. 57(1) de la *Loi sur l'immigration de 1976*. Le 2 novembre 1984, l'enquête d'immigration tenue par un arbitre en application du par. 27(3) de la Loi a été ajournée pour permettre à l'avocat de l'appelante de se préparer. Deux semaines après l'ajournement, l'appelante a envoyé une lettre au ministre lui demandant un permis l'autorisant à demeurer au Canada, conformément à l'al. 37(1)*b*) de la Loi. À la reprise de l'enquête le 21 novembre 1984, l'appelante a demandé un ajournement pour permettre au ministre d'examiner sa demande. L'arbitre a refusé d'accéder à la demande et a poursuivi l'enquête. À la fin de l'enquête, une ordonnance d'expulsion a été rendue contre l'appelante. La Cour d'appel fédérale a rejeté la demande d'examen et d'annulation de la décision de l'arbitre présentée par l'appelante en application de l'art. 28 de la *Loi sur la Cour fédérale*. La Cour a conclu que l'arbitre n'avait pas commis d'erreur en refusant d'ajourner l'enquête pour que l'appelante poursuive ses démarches en application du par. 37(1) de la Loi.

Arrêt (Les juges Wilson et L'Heureux-Dubé sont dissidentes): Le pourvoi est rejeté.

1989 CanLII 131 (SCC)

Per Dickson C.J. and McIntyre, Lamer, La Forest and Sopinka JJ.: An adjudicator, acting pursuant to s. 27(3) of the *Immigration Act, 1976*, is not required to adjourn an inquiry to enable the subject of that inquiry to pursue an application under s. 37(1) of the Act. The adjudicator is given discretion under s. 35(1) of the *Immigration Regulations, 1978*, and s. 113(*e*) of the Act to determine whether an adjournment shall be granted or refused, and such discretion is guided by the general principle that a "full and proper inquiry" be held. In exercising this discretion to adjourn, the adjudicator may consider such factors as the number of adjournments already granted and the length of time for which an adjournment is sought. Where an adjournment is requested in order that an application under s. 37 might be pursued, the adjudicator may also consider the opportunity available to the subject of the inquiry to apply to the Minister prior to the request for an adjournment. Here, the adjudicator properly refused to adjourn the inquiry. Appellant could have applied at any time between the date of her removal from Canada on June 6, 1984, and the recommencement of the inquiry on November 21, 1984. She did not send a letter to the Minister's office until November 16, 1984.

The decision of the Court in *Ramawad* is distinguishable from the present case. *Ramawad* involved provisions of the former *Immigration Act* and Regulations specific to an application for an employment visa. The final determination of the visa application required the decision of the Minister. In the present case, the s. 37(1) application was not an integral part of the proceedings before the adjudicator under s. 27(3) but a remedy that was clearly separate from that proceeding. The mere fact that there was an alternative remedy open to the appellant did not convert it into an automatic concomitant right to have other proceedings adjourned to accommodate the application. Nothing in s. 37 suggests that an application under that section is to be treated any differently than an application for other remedies.

Per Wilson and L'Heureux-Dubé JJ. (dissenting): The adjudicator erred in refusing to adjourn the immigration inquiry. This Court's reasoning in *Ramawad* applies to an application for a Minister's permit pursuant to s. 37(1) of the *Immigration Act, 1976*. While a person has no legal right to obtain a permit under s. 37(1), such a person has a right in the sense of a legal entitlement to obtain a decision from the Minister as to whether his case is deserving of special relief. Since the

Le juge en chef Dickson et les juges McIntyre, Lamer, La Forest et Sopinka: L'arbitre qui agit en application du par. 27(3) de la *Loi sur l'immigration de 1976* n'est pas obligé d'ajourner une enquête pour permettre à la personne qui en fait l'objet de poursuivre ses démarches en application du par. 37(1) de la Loi. Le paragraphe 35(1) du *Règlement sur l'immigration de 1978* et l'al. 113*e*) de la Loi confèrent à l'arbitre le pouvoir discrétionnaire de décider si l'ajournement sera accordé ou refusé et l'exercice de ce pouvoir est régi par le principe général de la «tenue régulière d'une enquête approfondie». Dans l'exercice de ce pouvoir discrétionnaire, l'arbitre peut considérer des facteurs comme le nombre d'ajournements déjà accordés et la durée de l'ajournement demandé. Lorsqu'on sollicite un ajournement en raison d'une demande fondée sur l'art. 37, l'arbitre peut également tenir compte de la possibilité qu'avait la personne qui fait l'objet de l'enquête de s'adresser au ministre avant la présentation d'une demande d'ajournement. En l'espèce, c'est à bon droit que l'arbitre a refusé d'ajourner l'enquête. L'appelante aurait pu s'adresser au ministre à n'importe quel moment entre la date de son renvoi du Canada, le 6 juin 1984, et la date de reprise de l'enquête, le 21 novembre 1984. Elle n'a pas envoyé de lettre au bureau du ministre avant le 16 novembre 1984.

On peut faire un distinction entre l'arrêt *Ramawad* de cette Cour et le présent pourvoi. L'arrêt *Ramawad* portait sur des dispositions de l'ancienne *Loi sur l'immigration* et de son Règlement qui visaient spécifiquement les demandes de visa d'emploi. On ne pouvait résoudre de façon définitive la question de la demande de visa sans obtenir la décision du ministre. En l'espèce, la demande présentée au ministre en vertu du par. 37(1) ne fait pas partie intégrante de la procédure devant l'arbitre selon le par. 27(3) mais constitue une voie de recours tout à fait distincte de cette procédure. Le simple fait que l'appelante dispose d'un autre recours ne transforme pas ce dernier en un droit automatique concomitant à l'ajournement des autres procédures afin de faciliter la demande. Rien dans l'art. 37 ne suggère qu'une demande présentée en vertu de cet article devrait être traitée différemment d'une demande présentée dans le cadre d'autres recours.

Les juges Wilson et L'Heureux-Dubé (dissidentes): L'arbitre a commis une erreur en refusant d'ajourner l'enquête d'immigration. Le raisonnement de cette Cour dans l'arrêt *Ramawad* s'applique à une demande de permis du ministre présentée en vertu du par. 37(1) de la *Loi sur l'immigration de 1976*. Bien qu'une personne n'ait pas de droit à l'obtention d'un permis en vertu du par. 37(1), cette personne possède néanmoins un droit en ce sens qu'elle est légitimement fondée à obtenir une

1989 CanLII 131 (SCC)

Minister has no power to issue a permit to a person against whom a removal order has been made (s. 37(2)), although such a person might otherwise be deserving of special consideration, the denial of a request to adjourn the immigration inquiry pending disposition of the application for a Minister's permit will generally constitute the denial of the right to obtain a decision from the Minister as well. This result could not have been intended by Parliament. Moreover, the expanding doctrine of administrative fairness strongly militates in favour of ensuring that the inquiry is not held in a way which denies the applicant his entitlement to a decision from the Minister. Therefore, where an application for a permit is made pursuant to s. 37(1), the adjudicator must adjourn the immigration inquiry pending the disposition of the applicant's request by the Minister or someone authorized to exercise the Minister's authority. This will be the case where there has not been a previous refusal to grant such a permit, based on the circumstances existing at the time the application is made. Although the adjudicator has a general discretion to adjourn by virtue of s. 35(1) of the *Immigration Regulations, 1978*, where an application under s. 37(1) of the Act is made before a determination is reached on the merits of the immigration inquiry, the adjudicator may exercise this discretion and refuse the adjournment only in those cases where doing so will not compromise the applicant's entitlement to a consideration of his case and a decision from the Minister.

Cases Cited

By Sopinka J.

Distinguished: *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375; **applied**: *Minister of Employment and Immigration v. Widmont*, [1984] 2 F.C. 274; *Louhisdon v. Employment and Immigration Canada*, [1978] 2 F.C. 589; *Oloko v. Canada Employment and Immigration*, [1978] 2 F.C. 593; *Murray v. Minister of Employment and Immigration*, [1979] 1 F.C. 518; *Stalony v. Minister of Employment and Immigration* (1980), 36 N.R. 609; **considered**: *Laneau v. Rivard*, [1978] 2 F.C. 319; *Nesha v. Minister of Employment and Immigration*, [1982] 1 F.C. 42; **referred to**: *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40; *Pierre v. Minister of Manpower and Immigration*, [1978] 2 F.C. 849; *Tam v. Minister of Employment and Immigration*, [1983] 2 F.C. 31; *Minister of Manpower and Immigration v. Tsakiris*, [1977] 2 F.C. 236; *Lodge v. Minister of Employment and Immigration*, [1979] 1 F.C. 775; *Minister of Employment and Immigration v. Hae Soo Han*, [1984] 1 F.C. 976.

décision du ministre pour déterminer si son cas mérite un redressement spécial. Puisque le ministre n'a pas le pouvoir de délivrer un permis à une personne qui a fait l'objet d'une ordonnance d'expulsion (par. 37(2)), même si cette personne peut par ailleurs mériter une considération spéciale, le refus d'ajourner l'enquête d'immigration pour attendre la décision du ministre sur une demande de permis constituera généralement une négation du droit d'obtenir une décision du ministre. Le Parlement n'a pas pu vouloir ce résultat. De plus, la doctrine de l'équité administrative milite clairement en faveur du besoin d'assurer que l'enquête n'est pas tenue d'une manière qui nie au requérant son droit à une décision du ministre. Par conséquent, lorsqu'une demande de permis est faite en vertu du par. 37(1), l'arbitre doit ajourner l'enquête d'immigration jusqu'à ce que le ministre, ou une personne autorisée à exercer le pouvoir du ministre, rende une décision sur la demande du requérant. Ce sera le cas lorsque ce permis n'aura pas été refusé auparavant d'après les circonstances qui existaient au moment où la demande a été faite. Bien qu'en vertu du par. 35(1) du *Règlement sur l'immigration de 1978* l'arbitre ait un pouvoir discrétionnaire général d'ajourner, lorsqu'une demande fondée sur le par. 37(1) de la Loi est présentée avant qu'une décision soit rendue sur le fond de l'enquête d'immigration, l'arbitre ne peut exercer ce pouvoir discrétionnaire et refuser l'ajournement que lorsque cela ne compromettra pas le droit du requérant à un examen de son cas et à une décision du ministre.

Jurisprudence

Citée par le juge Sopinka

Distinction d'avec l'arrêt: *Ramawad c. Ministre de la Main-d'œuvre et de l'Immigration*, [1978] 2 R.C.S. 375; **arrêts appliqués**: *Ministre de l'Emploi et de l'Immigration c. Widmont*, [1984] 2 C.F. 274; *Louhisdon c. Emploi et Immigration Canada*, [1978] 2 C.F. 589; *Oloko c. Emploi et Immigration Canada*, [1978] 2 C.F. 593; *Murray c. Ministre de l'Emploi et de l'Immigration*, [1979] 1 C.F. 518; *Stalony v. Ministre de l'Emploi et de l'Immigration* (1980), 36 N.R. 609; **arrêts examinés**: *Laneau c. Rivard*, [1978] 2 C.F. 319; *Nesha c. Ministre de l'Emploi et de l'Immigration*, [1982] 1 C.F. 42; **arrêts mentionnés**: *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40; *Pierre c. Ministre de la Main-d'œuvre et de l'Immigration*, [1978] 2 C.F. 849; *Tam c. Ministre de l'Emploi et de l'Immigration*, [1983] 2 C.F. 31; *Ministre de la Main-d'œuvre et de l'Immigration c. Tsakiris*, [1977] 2 C.F. 236; *Lodge c. Ministre de l'Emploi et de l'Immigration*, [1979] 1 C.F. 775; *Ministre de l'Emploi et de l'Immigration c. Hae Soo Han*, [1984] 1 C.F. 976.

1989 CanLII 131 (SCC)

By L'Heureux-Dubé J. (dissenting)

Ramawad v. Minister of Manpower and Immigration, [1978] 2 S.C.R. 375; *Minister of Employment and Immigration v. Widmont*, [1984] 2 F.C. 274; *Louhisdon v. Employment and Immigration Canada*, [1978] 2 F.C. 589; *Oloko v. Canada Employment and Immigration*, [1978] 2 F.C. 593; *Murray v. Minister of Employment and Immigration*, [1979] 1 F.C. 518; *Laneau v. Rivard*, [1978] 2 F.C. 319; *Nesha v. Minister of Employment and Immigration*, [1982] 1 F.C. 42; *Jiminez-Perez v. Minister of Employment and Immigration*, [1983] 1 F.C. 163 (C.A.), aff'd in part on another issue [1984] 2 S.C.R. 565; *Beeston v. Minister of Employment and Immigration* (1982), 41 N.R. 260.

Statutes and Regulations Cited

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10 [now R.S.C. 1985, c. F-7], s. 28.
Immigration Act, 1976, S.C. 1976-77, c. 52 [now R.S.C. 1985, c. I-2], ss. 27(2)(*h*), (3), 29(1), (5), 30(1), 31(1), 32(6), 37(1), (2), (4), (6), 43(1), 45(1), 57(1) [rep. & subs. 1984, c. 40, s. 36(4)], 113, 115(2).
Immigration Regulations, 1978, SOR/78-172, s. 35(1).

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APPEAL from a judgment of the Federal Court of Appeal, [1985] 1 F.C. D-4, dismissing appellant's application under s. 28 of the *Federal Court Act* to review and set aside a deportation order. Appeal dismissed, Wilson and L'Heureux-Dubé JJ. dissenting.

Andrew J. A. McKinley, for the appellant.

H. J. Wruck, for the respondent.

The judgment of Dickson C.J. and McIntyre, Lamer, La Forest and Sopinka JJ. was delivered by

SOPINKA J.—The issue in this case is whether the adjudicator of an immigration inquiry must adjourn the inquiry to enable the appellant to pursue an application to the Minister under s. 37(1) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52 (now R.S.C. 1985, c. I-2), as amended. Here the adjudicator refused to grant the appellant's

Citée par le juge L'Heureux-Dubé (dissidente)

Ramawad c. Ministre de la Main-d'œuvre et de l'Immigration, [1978] 2 R.C.S. 375; *Ministre de l'Emploi et de l'Immigration c. Widmont*, [1984] 2 C.F. 274; *Louhisdon c. Emploi et Immigration Canada*, [1978] 2 C.F. 589; *Oloko c. Emploi et Immigration Canada*, [1978] 2 C.F. 593; *Murray c. Ministre de l'Emploi et de l'Immigration*, [1979] 1 C.F. 518; *Laneau c. Rivard*, [1978] 2 C.F. 319; *Nesha c. Ministre de l'Emploi et de l'Immigration*, [1982] 1 C.F. 42; *Jiminez-Perez c. Ministre de l'Emploi et de l'Immigration*, [1983] 1 C.F. 163 (C.A.), conf. en partie sur un autre point [1984] 2 R.C.S. 565; *Beeston c. Ministre de l'Emploi et de l'Immigration* (1982), 41 N.R. 260.

Lois et règlements cités

Loi sur la Cour fédérale, S.R.C. 1970 (2e supp.), chap. 10 [maintenant L.R.C. (1985), chap. F-7], art. 28.
Loi sur l'immigration de 1976, S.C. 1976-77, chap. 52 [maintenant L.R.C. (1985), chap. I-2], art. 27(2)*h*), (3), 29(1), (5), 30(1), 31(1), 32(6), 37(1), (2), (4), (6), 43(1), 45(1), 57(1) [abr. & rempl. 1984, chap. 40, art. 36(4)], 113, 115(2).
Règlement sur l'immigration de 1978, DORS/78-172, art. 35(1).

Doctrine citée

Wydrzynski, Christopher James. *Canadian Immigration Law and Procedure*. Aurora, Ont.: Canada Law Book, 1983.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1985] 1 C.F. F-11, qui a rejeté la demande d'examen et d'annulation de l'ordonnance d'expulsion présentée en application de l'art. 28 de la *Loi sur la Cour fédérale*. Pourvoi rejeté, le juges Wilson et L'Heureux-Dubé sont dissidentes.

Andrew J. A. McKinley, pour l'appelante.

H. J. Wruck, pour l'intimé.

Version française du jugement du juge en chef Dickson et des juges McIntyre, Lamer, La Forest et Sopinka rendu par

LE JUGE SOPINKA—La question en l'espèce est de savoir si l'arbitre dans une enquête d'immigration était tenu de l'ajourner pour permettre à l'appelante de poursuivre ses démarches auprès du ministre en vertu du par. 37(1) de la *Loi sur l'immigration de 1976*, S.C. 1976-77, chap. 52 (maintenant L.R.C. (1985), chap. I-2), et modifi-

1989 CanLII 131 (SCC)

request for an adjournment. The Federal Court of Appeal dismissed an application under s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10 (now R.S.C. 1985, c. F-7), as amended, to review and set aside the decision of the adjudicator. The appellant appeals to this Court from that dismissal.

The immigration inquiry before the adjudicator arose out of the following circumstances. The appellant, also known as Sandhya Kishun, is a citizen of Fiji. She is neither a permanent resident nor a citizen of Canada. She originally entered Canada as a visitor in 1975 and continued in that status until a deportation order was made against her on September 15, 1982. She was removed from Canada on June 6, 1984, pursuant to that order.

The appellant's stay in Canada between 1975 and 1982 was authorized by a Minister's permit issued under s. 37(1) of the *Immigration Act, 1976*. This permit was extended a number of times. Following an immigration inquiry, the deportation order of September 15, 1982, was made pursuant to s. 37(6) of the Act. The appellant had been convicted of a number of criminal offences during her stay in Canada.

On August 17, 1984, the appellant re-entered Canada without having first obtained the written consent of the Minister contrary to s. 57(1) of the Act. She then became subject to a report under s. 27(2)(*h*) of the Act and was arrested.

On November 2, 1984, an inquiry was commenced under s. 27(3) of the Act. At the hearing, the appellant was ordered released upon the posting of a cash bond, and the inquiry was adjourned to November 21, 1984, to permit counsel for the appellant time to prepare.

When the inquiry reconvened, counsel for the appellant delivered to the adjudicator a copy of a letter, dated November 16, 1984, which had been sent to the respondent. In the letter, the appellant applied to the Minister of Employment and Immigrations. En l'espèce, l'arbitre a refusé d'accéder à la demande d'ajournement de l'appelante. La Cour d'appel fédérale a rejeté la demande d'examen et d'annulation de la décision de l'arbitre, présentée en application de l'art. 28 de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e supp.), chap. 10 (maintenant L.R.C. (1985), chap. F-7), et modifications. L'appelante fait appel de ce rejet devant cette Cour.

Les circonstances à l'origine de l'enquête tenue par l'arbitre sont les suivantes. L'appelante, également connue sous le nom de Sandhya Kishun, est citoyenne des îles Fidji. Elle n'est ni résidente permanente ni citoyenne du Canada. Elle est entrée au Canada à titre de visiteur en 1975 et elle a conservé ce statut jusqu'à ce qu'une ordonnance d'expulsion soit rendue contre elle le 15 septembre 1982. Conformément à cette ordonnance, elle a été renvoyée du Canada le 6 juin 1984.

Le ministre avait autorisé le séjour de l'appelante au Canada entre 1975 et 1982 en lui délivrant un permis en application du par. 37(1) de la *Loi sur l'immigration de 1976*. La durée de validité du permis a été prorogée plusieurs fois. Après une enquête d'immigration, une ordonnance d'expulsion a été rendue le 15 septembre 1982 en vertu du par. 37(6) de la Loi. Au cours de son séjour au Canada, l'appelante a été déclarée coupable d'un certain nombre d'infractions criminelles.

Le 17 août 1984, l'appelante est entrée de nouveau au Canada sans autorisation écrite du ministre, contrairement au par. 57(1) de la Loi. Elle était donc susceptible de faire l'objet d'un rapport en application de l'al. 27(2)*h*) de la Loi et a été arrêtée.

Le 2 novembre 1984, une enquête fut ouverte en vertu du par. 27(3) de la Loi. À l'audience, on a ordonné la mise en liberté de l'appelante sur inscription d'un cautionnement en espèces et l'enquête a été ajournée au 21 novembre 1984 pour permettre à son avocat de se préparer.

À la reprise de l'enquête, l'avocat de l'appelante a remis à l'arbitre la copie d'une lettre en date du 16 novembre 1984 qui avait été envoyée à l'intimé. Dans la lettre, l'appelante demandait au ministre de l'Emploi et de l'Immigration de lui délivrer,

1989 CanLII 131 (SCC)

gration for a Minister's permit authorizing her to remain in Canada pursuant to s. 37(1)(*b*) of the Act. She also applied to the Governor in Council for exemption from the Regulations pursuant to s. 115(2) and permission to establish permanent residence in Canada. Officials in the Minister's office indicated that they had not received the letter as of the date upon which the inquiry reconvened.

Counsel for the appellant then requested an adjournment of the inquiry to permit her applications to the Minister and to the Governor in Council to be considered. The adjudicator refused the request and proceeded with the inquiry. At the conclusion of the inquiry a deportation order was made against the appellant pursuant to s. 32(6) of the Act.

On March 5, 1985, the Federal Court of Appeal dismissed the appellant's application under s. 28 of the *Federal Court Act* to review and set aside the decision of the adjudicator. Thurlow C.J., speaking for the Court, considered the court bound by its consistent previous judgments, including the decision in *Minister of Employment and Immigration v. Widmont*, [1984] 2 F.C. 274 (C.A.) The Court held that the adjudicator did not err in refusing an adjournment of the inquiry to permit the appellant to pursue applications under ss. 37(1) and 115(2) of the *Immigration Act, 1976*. On July 9, 1985, the Federal Court of Appeal granted the appellant leave to appeal its decision to this Court, [1985] 2 F.C. 81.

The resolution of this appeal requires a careful examination of the applicable provisions of the *Immigration Act, 1976*, and the relevant procedures.

Legislation and Procedures

The following are the relevant provisions of the *Immigration Act, 1976*:

27. ...

(2) Where an immigration officer or peace officer has in his possession information indicating that a person in Canada, other than a Canadian citizen or a permanent resident, is a person who

. . .

(*h*) came into Canada contrary to section 57,

. . .

conformément à l'al. 37(1)*b*) de la Loi, un permis l'autorisant à demeurer au Canada. Elle a également demandé au gouverneur en conseil une dispense d'application des règlements en vertu du par. 115(2) et la permission d'établir sa résidence permanente au Canada. Les fonctionnaires du bureau du ministre ont indiqué qu'ils n'avaient pas reçu la lettre le jour de la reprise de l'enquête.

L'avocat de l'appelante a alors demandé que l'enquête soit ajournée pour permettre l'examen de ses demandes au ministre et au gouverneur en conseil. L'arbitre a refusé d'accéder à la demande et a poursuivi l'enquête. À la fin de l'enquête, une ordonnance d'expulsion a été rendue contre l'appelante en application du par. 32(6) de la Loi.

Le 5 mars 1985, la Cour d'appel fédérale a rejeté la demande d'examen et d'annulation de la décision de l'arbitre présentée par l'appelante en application de l'art. 28 de la *Loi sur la Cour fédérale*. Le juge en chef Thurlow, s'exprimant au nom de la Cour, a décidé que la Cour était liée par ses décisions antérieures constantes, y compris l'arrêt *Ministre de l'Emploi et de l'Immigration c. Widmont*, [1984] 2 C.F. 274 (C.A.) La Cour a conclu que l'arbitre n'avait pas commis d'erreur en refusant d'ajourner l'enquête pour que l'appelante poursuive ses démarches en application des par. 37(1) et 115(2) de la *Loi sur l'immigration de 1976*. Le 9 juillet 1985, la Cour d'appel fédérale autorisait l'appelante à faire appel de cette décision devant cette Cour, [1985] 2 C.F. 81.

Ce pourvoi exige un examen soigneux des dispositions applicables de la *Loi sur l'immigration de 1976* et des procédures pertinentes.

La loi et la procédure

Voici les dispositions pertinentes de la *Loi sur l'immigration de 1976*:

27. ...

(2) Tout agent d'immigration ou agent de la paix, en possession de renseignements indiquant qu'une personne se trouvant au Canada, autre qu'un citoyen canadien ou un résident permanent,

. . .

h) est entrée au Canada en violation de l'article 57,

. . .

1989 CanLII 131 (SCC)

he shall forward a written report to the Deputy Minister setting out the details of such information unless that person has been arrested without warrant and held in detention pursuant to section 104.

(3) Subject to any order or direction of the Minister, the Deputy Minister shall, on receiving a report pursuant to subsection (1) or (2), and where he considers that an inquiry is warranted, forward a copy of that report and a direction that an inquiry be held to a senior immigration officer.

31. (1) An adjudicator shall give his decision as soon as possible after an inquiry has been completed and his decision shall be given in the presence of the person concerned wherever practicable.

32. ...

(6) Where an adjudicator decides that a person who is the subject of an inquiry is a person described in subsection 27(2), he shall, subject to subsections 45(1) and 47(3), make a deportation order against the person unless, in the case of a person other than a person described in paragraph 19(1)(*c*), (*d*), (*e*), (*f*), or (*g*) or 27(2)(*c*), (*h*) or (*i*), he is satisfied that

(*a*) having regard to all the circumstances of the case, a deportation order ought not to be made against the person, and

(*b*) the person will leave Canada on or before a date specified by the adjudicator,

in which case he shall issue a departure notice to the person specifying therein the date on or before which the person is required to leave Canada.

37. (1) The Minister may issue a written permit authorizing any person to come into or remain in Canada if that person is

(*a*) in the case of a person seeking to come into Canada, a member of an inadmissible class, or

(*b*) in the case of a person in Canada, a person with respect to whom a report has been or may be made under subsection 27(2).

(2) Notwithstanding subsection (1), a permit may not be issued to

(*a*) a person against whom a removal order has been made who has not been removed from Canada pursuant to such an order or has not otherwise left Canada, unless an appeal from that order has been allowed;

(*b*) a person to whom a departure notice has been issued who has not left Canada; or

doit adresser à ce sujet un rapport écrit et circonstancié au sous-ministre, à moins que la personne concernée n'ait été arrêtée sans mandat et détenue en vertu de l'article 104.

(3) Sous réserve des instructions ou directives du Ministre, le sous-ministre saisi d'un rapport visé aux paragraphes (1) ou (2), doit, au cas où il estime que la tenue d'une enquête s'impose, adresser à un agent d'immigration supérieur une copie de ce rapport et une directive prévoyant la tenue d'une enquête.

31. (1) Après l'enquête, l'arbitre doit rendre sa décision le plus tôt possible, en présence de la personne concernée, si les circonstances le permettent.

32. ...

(6) L'arbitre, après avoir conclu que la personne faisant l'objet d'une enquête est visée par le paragraphe 27(2), doit, sous réserve des paragraphes 45(1) et 47(3), en prononcer l'expulsion; cependant, dans le cas d'une personne non visée aux alinéas 19(1)*c*), *d*), *e*), *f*) ou *g*) ou 27(2)*c*), *h*) ou *i*), l'arbitre doit émettre un avis d'interdiction de séjour fixant à ladite personne un délai pour quitter le Canada, s'il est convaincu

a) qu'une ordonnance d'expulsion ne devrait pas être rendue eu égard aux circonstances de l'espèce; et

b) que ladite personne quittera le Canada dans le délai imparti.

37. (1) Le Ministre peut délivrer un permis écrit autorisant une personne à entrer au Canada ou à y demeurer. Peuvent se voir octroyer un tel permis

a) les personnes faisant partie d'une catégorie non admissible, désireuses d'entrer au Canada, ou

b) les personnes se trouvant au Canada, qui font l'objet ou sont susceptibles de faire l'objet du rapport prévu au paragraphe 27(2).

(2) Par dérogation au paragraphe (1), ne peuvent obtenir le permis

a) les personnes ayant fait l'objet d'une ordonnance de renvoi, qui se trouvent encore au Canada sauf si l'appel interjeté de cette ordonnance a été accueilli;

b) les interdits de séjour qui n'ont pas encore quitté le Canada; ou

1989 CanLII 131 (SCC)

(*c*) a person in Canada with respect to whom an appeal made pursuant to section 79 has been dismissed.

. . .

(4) The Minister may at any time, in writing, extend or cancel a permit.

57. (1) Subject to section 58, where a deportation order is made against a person, the person shall not, after he is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister unless an appeal from the order has been allowed.

Section 113 of the Act specifies certain of an adjudicator's powers:

113. An adjudicator has all the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and, without restricting the generality of the foregoing, may, for the purposes of an inquiry,

(*a*) issue a summons to any person requiring him to appear at the time and place mentioned therein to testify with respect to all matters within his knowledge relative to the subject-matter of the inquiry and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to the subject-matter of the inquiry;

(*b*) administer oaths and examine any person on oath;

(*c*) issue commissions or requests to take evidence in Canada;

(*d*) engage the services of such counsel, interpreters, technicians, clerks, stenographers and other persons as he deems necessary for a full and proper inquiry; and

(*e*) do all other things necessary to provide a full and proper inquiry.

Section 35(1) of the *Immigration Regulations, 1978*, SOR/78-172, as amended, provides:

35. (1) The adjudicator presiding at an inquiry may adjourn the inquiry at any time for the purpose of ensuring a full and proper inquiry.

The applicable inquiry procedures created by these provisions are as follows. An immigration officer may have information that a person in Canada, other than a Canadian citizen or permanent resident, is a person who falls into any of the categories listed in s. 27(2), including being a person who, having been subject to a deportation order, re-entered Canada without the written con-

c) les personnes se trouvant encore au Canada dont l'appel interjeté en vertu de l'article 79 a été rejeté.

. . .

(4) Le Ministre peut, par écrit et à tout moment, proroger la durée de validité d'un permis ou l'annuler.

57. (1) Sous réserve de l'article 58, la personne qui fait l'objet d'une ordonnance d'expulsion ne peut plus revenir au Canada sans l'autorisation écrite du Ministre, à moins qu'un appel de ladite ordonnance n'ait été accueilli.

L'article 113 de la Loi précise certains pouvoirs de l'arbitre:

113. Tout arbitre a les pouvoirs et attributions des commissaires nommés en vertu de la Partie I de la *Loi sur les enquêtes* et, aux fins d'enquête, peut notamment

a) adresser une citation à toute personne l'enjoignant à comparaître aux date et lieu indiqués pour témoigner sur toute question dont elle a connaissance, relative à l'objet de l'enquête, et à produire tout document, livre ou écrit en sa possession ou sous sa responsabilité, qui se rapporte à l'objet de l'enquête;

b) faire prêter serment et interroger sous serment;

c) délivrer des commissions ou requêtes en vue de recueillir des preuves au Canada;

d) retenir les services de conseil, d'interprètes, de techniciens, de commis, de sténographes et du personnel qu'il estime nécessaires à la tenue d'une enquête approfondie;

e) faire tout ce qui est nécessaire à la tenue régulière d'enquêtes approfondies.

Le paragraphe 35(1) du *Règlement sur l'immigration de 1978*, DORS/78-172, et modifications, prévoit:

35. (1) L'arbitre qui préside l'enquête peut l'ajourner à tout moment afin de veiller à ce qu'elle soit complète et régulière.

Selon ces dispositions, la procédure d'enquête est la suivante: si un agent d'immigration possède des renseignements indiquant qu'une personne, autre qu'un citoyen canadien ou résident permanent, relève de l'une des catégories énumérées au par. 27(2), ce qui serait le cas d'une personne qui a fait l'objet d'une ordonnance d'expulsion et qui est entrée de nouveau au Canada sans l'autorisation

1989 CanLII 131 (SCC)

sent of the Minister. The immigration officer must forward that information in a report to the Deputy Minister. If the Deputy Minister considers it is warranted, an immigration inquiry shall be held.

The inquiry is held before an adjudicator. The subject of the inquiry is present (s. 29(1)) and is entitled to be represented by legal counsel (s. 30(1)). Upon hearing evidence from both sides, the adjudicator will render a decision. If the adjudicator decides that the subject of the inquiry is a person described in s. 27(2), the adjudicator shall make a deportation order against that person.

Submissions of Counsel

Counsel for the appellant submitted that once an application for adjournment is made to the adjudicator, the adjudicator is obliged to adjourn to enable the applicant to pursue an application to the Minister under s. 37 of the Act. The appellant relies on the decision of this Court in *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375, and on the fact that an order for deportation forecloses any opportunity to obtain the Minister's permit. Although the same argument was made in relation to an application to the Governor in Council under s. 115(2) of the Act in the Federal Court of Appeal, this argument was expressly abandoned by the appellant in this Court.

Counsel for the respondent submitted that by virtue of s. 35(1) of the Regulations, the adjudicator was obliged to refuse a request for an adjournment. He submitted that an application to the Minister under s. 37 is extraneous to the conduct of a full and proper inquiry under s. 27(3) of the Act. In the alternative, counsel for the respondent submitted that the adjudicator has a discretion to refuse the adjournment.

Powers of the Adjudicator

In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own

écrite du ministre, cet agent d'immigration doit transmettre ces renseignements dans un rapport au sous-ministre. Une enquête est tenue si le sous-ministre estime qu'elle s'impose.

L'enquête est tenue devant un arbitre. La personne qui fait l'objet de l'enquête est présente (par. 29(1)) et peut être représentée par un conseiller juridique (par. 30(1)). Après avoir entendu les deux parties, l'arbitre rend une décision. Si l'arbitre décide que la personne qui fait l'objet de l'enquête est visée au par. 27(2), il prononce contre elle une ordonnance d'expulsion.

Les prétentions des avocats

L'avocat de l'appelante prétend que lorsqu'une demande d'ajournement est présentée à l'arbitre, celui-ci est tenu d'ajourner l'enquête pour permettre au requérant de poursuivre ses démarches auprès du ministre en application de l'art. 37 de la Loi. L'appelante s'appuie sur l'arrêt de cette Cour *Ramawad c. Ministre de la Main-d'œuvre et de l'Immigration*, [1978] 2 R.C.S. 375, et sur le fait qu'une ordonnance d'expulsion la prive de toute possibilité d'obtenir un permis du ministre. Bien que le même argument ait été invoqué au sujet d'une demande présentée au gouverneur en conseil en vertu du par. 115(2) de la Loi en Cour d'appel fédérale, l'appelante l'a expressément abandonné devant cette Cour.

L'avocat de l'intimé soutient qu'en vertu du par. 35(1) du Règlement, l'arbitre était obligé de refuser la demande d'ajournement. Il prétend qu'une demande adressée au ministre en application de l'art. 37 est étrangère à la tenue de l'enquête approfondie prévue au par. 27(3) de la Loi. Subsidiairement, l'avocat de l'intimé soutient que l'arbitre a le pouvoir discrétionnaire de refuser l'ajournement.

Les pouvoirs de l'arbitre

Afin d'interpréter correctement des dispositions législatives susceptibles de sens différents, il faut les examiner en contexte. Nous traitons ici des pouvoirs d'un tribunal administratif à l'égard de sa procédure. En règle générale, ces tribunaux sont considérés maîtres chez eux. En l'absence de règles précises établies par loi ou règlement, ils fixent

1989 CanLII 131 (SCC)

house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.

In *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40, the Ontario Court of Appeal was asked to hold that the Labour Relations Board was obliged to adjourn when its jurisdiction was attacked by a motion for *certiorari* in the High Court. Arnup J.A., speaking for the Court, stressed that the Board was "master of its own house" (p. 49) and was not required to adjourn when served with a notice of motion for *certiorari*. The Board was free to adopt such procedures as appeared to it to be just and convenient in the particular circumstances. Arnup J.A. concluded, at p. 50:

> ... it is for the Board itself to decide how it shall proceed. If procedural guide lines of a mandatory nature are to be laid down, they should come from the Legislature and not from the Court.

Jackett C.J., in *Pierre v. Minister of Manpower and Immigration*, [1978] 2 F.C. 849, put it this way, at p. 851:

> In considering a complaint that a tribunal has refused to grant an adjournment, it must be remembered that, in the absence of some specific rule governing the manner in which the particular tribunal should exercise its discretion to grant an adjournment, the question as to whether an adjournment should be granted is a discretionary matter for the tribunal itself and that a supervisory tribunal has no jurisdiction to review the tribunal's decision to refuse an adjournment unless the refusal results in the decision made by the tribunal at the termination of the hearing being voidable as having been made without complying with the requirements of natural justice.

The power of an adjudicator to adjourn the proceedings is specifically addressed in s. 35(1) of the Regulations and more generally in s. 113(*e*) of the Act. The effect of these provisions is to confirm a discretion in the adjudicator, the exercise of

leur propre procédure à la condition de respecter les règles de l'équité et, dans l'exercice de fonctions judiciaires ou quasi judiciaires, de respecter les règles de justice naturelle. Il est donc clair que l'ajournement de leurs procédures relève de leur pouvoir discrétionnaire.

Dans l'arrêt *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40, on a demandé à la Cour d'appel de l'Ontario de conclure que la Commission des relations de travail était obligée d'ajourner sa procédure lorsque sa compétence était contestée par requête en *certiorari* devant la Haute Cour. Le juge Arnup, s'exprimant au nom de la Cour d'appel, a insisté sur le fait que la Commission était [TRADUCTION] «maîtresse chez elle» (p. 49) et n'était pas tenue d'ajourner sa procédure lorsqu'un avis de requête en *certiorari* lui était signifié. Elle était libre d'adopter la procédure qui lui semblait juste et appropriée dans les circonstances particulières. Le juge Arnup a conclu, à la p. 50:

> [TRADUCTION] ... il appartient à la Commission elle-même de décider comment procéder. S'il est nécessaire d'établir des directives obligatoires en matière de procédure, c'est à la législature de le faire et non à la Cour.

Le juge en chef Jackett, dans la décision *Pierre c. Ministre de la Main-d'œuvre et de l'Immigration*, [1978] 2 C.F. 849, s'exprime ainsi, à la p. 851:

> Dans l'examen d'une plainte relative à un refus d'ajournement par un tribunal, il ne faut pas oublier qu'en l'absence de toute règle spécifique régissant le mode d'exercice par le tribunal de son pouvoir discrétionnaire dans l'octroi d'un ajournement, la question d'accorder ou de refuser l'ajournement demandé est de nature discrétionnaire pour le tribunal même, et qu'une cour supérieure ayant droit de surveillance n'a pas compétence pour réviser un refus d'ajournement, à moins qu'à cause de ce refus, la décision rendue par le tribunal à la fin de l'audience ne soit annulable pour violation des règles de justice naturelle.

Le pouvoir d'un arbitre d'ajourner l'enquête est expressément prévu au par. 35(1) du Règlement et, de façon plus générale, à l'al. 113*e*) de la Loi. L'effet de ces dispositions est de reconnaître à l'arbitre un pouvoir discrétionnaire dont l'exercice

1989 CanLII 131 (SCC)

which is guided by the general principle that a full and proper inquiry be held. I agree with the statement made by Wydrzynski, in *Canadian Immigration Law and Procedure* (1983), at p. 265:

> The adjudicator is given discretion to determine whether an adjournment shall be granted, but, of course, this discretion is guided by the notion of a "full and proper" inquiry. In other words, the discretion must be exercised in accordance with principles of fairness and natural justice.

The appellant does not argue that the inquiry proceedings violated the principles of natural justice. She argues instead that she has a right to apply to the Minister under s. 37 and therefore the adjudicator is required to grant an adjournment to permit her to do so. Such a result can only obtain if s. 37 or some other provision deprives the adjudicator of the discretionary power to adjourn enjoyed by administrative tribunals and confirmed by s. 113(*e*) of the Act and s. 35 of the Regulations. In light of the usual practice relating to the power to adjourn which I have outlined above, I would expect to find rather explicit language in the statute or regulation if this result were intended.

There is no doubt that the adjudicator has a discretion to adjourn to permit an application under s. 37(1). (See *Tam v. Minister of Employment and Immigration*, [1983] 2 F.C. 31 (C.A.), and *Widmont*, *supra*.) In this regard, I respectfully disagree with the respondent's submission that s. 35(1) of the Regulations obliges the adjudicator to reject an application for an adjournment to permit an application under s. 37(1). The contrary proposition then remains to be addressed: is the adjudicator obliged to grant the application for adjournment in these circumstances?

The corner-stone of the appellant's argument is that once a removal order is made the Minister cannot grant an application under s. 37 and therefore the adjudicator must give the appellant this opportunity. This overstates the consequences of the refusal of an adjournment. The application to

est régi par le principe général de la tenue régulière d'une enquête approfondie. Je suis d'accord avec l'affirmation de Wydrzynski dans *Canadian Immigration Law and Procedure* (1983), à la p. 265:

> [TRADUCTION] L'arbitre a le pouvoir discrétionnaire de décider si un ajournement sera accordé mais ce pouvoir discrétionnaire est régi par la notion de tenue régulière d'une enquête «approfondie». En d'autres termes, le pouvoir discrétionnaire doit être exercé en conformité avec les principes de l'équité et de la justice naturelle.

L'appelante ne prétend pas que la procédure d'enquête a violé les principes de justice naturelle. Elle prétend plutôt qu'elle a le droit de s'adresser au ministre en application de l'art. 37 et que l'arbitre est donc tenu de lui accorder l'ajournement pour le lui permettre. On ne peut parvenir à ce résultat que si l'art. 37 ou une autre disposition prive l'arbitre du pouvoir discrétionnaire d'ajourner l'enquête dont bénéficient les tribunaux administratifs et qui est reconnu à l'arbitre par l'al. 113*e*) de la Loi et l'art. 35 du Règlement. Compte tenu de la pratique habituelle relative au pouvoir d'accorder un ajournement que j'ai exposée auparavant, je m'attendrais à ce que la loi ou le règlement s'exprime en termes explicites si tel était le résultat voulu.

Il ne fait aucun doute que l'arbitre a le pouvoir discrétionnaire d'accorder un ajournement pour permettre la présentation d'une demande en vertu du par. 37(1) (voir *Tam c. Ministre de l'Emploi et de l'Immigration*, [1983] 2 C.F. 31 (C.A.), et *Widmont*, précité). À cet égard, je ne peux accepter la prétention de l'intimé selon lequel le par. 35(1) du Règlement oblige l'arbitre à rejeter une demande d'ajournement pour permettre la présentation d'une demande en vertu du par. 37(1). Il nous reste donc à examiner la proposition inverse: l'arbitre est-il obligé d'accorder une demande d'ajournement dans ces circonstances?

L'argument central de l'appelante consiste à dire que, après le prononcé d'une ordonnance de renvoi, le ministre ne peut accorder une demande présentée en vertu de l'art. 37 et que l'arbitre est donc tenu d'accorder cette possibilité à l'appelante. C'est exagérer les conséquences du refus d'accor-

1989 CanLII 131 (SCC)

the Minister is barred only as long as the removal order remains unexecuted. No doubt removal from the country may make such an application more difficult, but did Parliament intend that this potential difficulty requires that the proceedings before the adjudicator be automatically stayed upon application to the Minister under s. 37?

This relationship between a removal order and a Minister's permit under s. 37(1) was created in the first amendments to the *Immigration Act* of 1952 (S.C. 1966-67, c. 90, s. 26) and has been continued into the present Act. Parliament amended the *Immigration Act* of 1952 a number of times prior to repealing it in 1976. Its replacement, the present *Immigration Act, 1976*, has subsequently been frequently amended. However, in not one of these amendments did Parliament remove the statutory bar which an unexecuted removal order poses to the issuance of a Minister's permit. Neither has Parliament seen fit to require an adjudicator to adjourn an inquiry in this circumstance, nor to empower the Minister to impose a stay of inquiry proceedings upon receipt of an application under s. 37(1).

This may be usefully contrasted with other provisions of the Act which explicitly require an adjournment for specified purposes. The adjudicator shall adjourn the inquiry if: the subject of the inquiry is under eighteen years of age and unrepresented by a parent or guardian (s. 29(5)); the subject of the inquiry who is to be removed from Canada claims, during the inquiry, to be a Canadian citizen (s. 43(1)); or the subject of the inquiry who is to be removed from Canada claims, during the inquiry, to be a Convention refugee (s. 45(1)).

Moreover an adjudicator is not required to adjourn an inquiry to await the outcome of other proceedings taken under the *Immigration Act* such as an application for sponsorship (see *Minister of Manpower and Immigration v. Tsakiris*, [1977] 2 F.C. 236 (C.A.)) As well, the Federal Court of Appeal has held that an adjudicator is not required to adjourn the inquiry to enable the subject of the

der un ajournement. Ce n'est que tant que l'ordonnance de renvoi n'est pas exécutée que la demande au ministre est interdite. Nul doute que le renvoi du pays rend la présentation d'une telle demande plus difficile mais le Parlement a-t-il voulu que cette difficulté potentielle ait pour effet que l'enquête devant l'arbitre soit automatiquement suspendue dès la présentation d'une demande au ministre en vertu de l'art. 37?

Le rapport entre une ordonnance de renvoi et un permis du ministre en vertu du par. 37(1) remonte aux premières modifications de la *Loi sur l'immigration* de 1952 (S.C. 1966-67, chap. 90, art. 26) et a été conservé dans la présente Loi. Le Parlement a modifié plusieurs fois la *Loi sur l'immigration* de 1952 avant de l'abroger en 1976. Celle qui l'a remplacée, l'actuelle *Loi sur l'immigration de 1976*, a souvent été modifiée depuis. Cependant le Parlement n'a pas supprimé dans ces modifications l'interdiction législative de délivrer un permis du ministre tant que l'ordonnance de renvoi n'est pas exécutée. Il n'a pas jugé bon non plus d'obliger l'arbitre à ajourner l'enquête dans ce cas, ni de permettre au ministre d'imposer la suspension de la procédure d'enquête sur réception d'une demande visée au par. 37(1).

Il peut être utile de faire une comparaison avec d'autres dispositions de la Loi qui exigent expressément un ajournement dans des cas précis. L'arbitre doit ajourner l'enquête dans les cas suivants: la personne visée est âgée de moins de dix-huit ans et n'est pas représentée par son père, sa mère ou son tuteur (par. 29(5)); la personne visée, alors qu'elle doit être renvoyée du Canada, revendique la citoyenneté canadienne au cours de l'enquête (par. 43(1)); la personne visée, alors qu'elle doit être renvoyée du Canada, revendique au cours de l'enquête le statut de réfugié au sens de la Convention (par. 45(1)).

En outre, l'arbitre n'est pas tenu d'ajourner une enquête pour attendre le résultat d'autres procédures prises en vertu de la *Loi sur l'immigration*, comme une demande de parrainage (voir *Ministre de la Main-d'œuvre et de l'Immigration c. Tsakiris*, [1977] 2 C.F. 236 (C.A.)) De même, la Cour d'appel fédérale a conclu qu'un arbitre n'est pas tenu d'ajourner l'enquête pour permettre à la per-

1989 CanLII 131 (SCC)

inquiry to pursue an application under the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (now R.S.C. 1985, c. H-6): *Lodge v. Minister of Employment and Immigration*, [1979] 1 F.C. 775. Likewise, an adjudicator is not required to adjourn the inquiry to enable the subject of the inquiry to apply for Canadian citizenship under the *Citizenship Act*, S.C. 1974-75-76, c. 108 (now R.S.C. 1985, c. C-29): *Minister of Employment and Immigration v. Hae Soo Han*, [1984] 1 F.C. 976. In *Han*, a deportation order issued at the close of the inquiry, before the processing of the citizenship application, would have precluded the granting of citizenship to the applicant (p. 981).

The logic of the appellant's submission would thus require that the adjudicator adjourn the inquiry whenever the result of that inquiry has the potential to inhibit the subject of that inquiry from pursuing an alternative remedy. This would amount to reading into the legislation an automatic stay. Absent clear statutory language, it is untenable to hinder the adjudication process under the *Immigration Act, 1976*, by laying down such an inflexible rule for the conduct of an inquiry.

The appellant's submission, therefore must be rejected unless, as the appellant contends, such a conclusion is preordained by this Court's decision in *Ramawad v. Minister of Manpower and Immigration, supra*. I now turn to consider that decision and cases in which it has been applied. The appellant bolsters her reliance on *Ramawad* by reference to its interpretation by the Trial Division of the Federal Court in *Laneau v. Rivard*, [1978] 2 F.C. 319, and *Nesha v. Minister of Employment and Immigration*, [1982] 1 F.C. 42, and by the minority of the Federal Court of Appeal in *Louhisdon v. Employment and Immigration Canada*, [1978] 2 F.C. 589; *Oloko v. Canada Employment and Immigration*, [1978] 2 F.C. 593, and *Widmont, supra*. On the other hand, the respondent relies on the consistent interpretation of *Ramawad* by the majority in the Federal Court of Appeal (see *Louhisdon, supra*; *Oloko, supra*; *Widmont, supra*; *Murray v. Minister of Employment and*

sonne qui en fait l'objet de poursuivre ses démarches en application de la *Loi canadienne sur les droits de la personne*, S.C. 1976-77, chap. 33 (maintenant L.R.C. (1985), chap. H-6): *Lodge c. Ministre de l'Emploi et de l'Immigration*, [1979] 1 C.F. 775. De même encore, l'arbitre n'est pas tenu d'ajourner une enquête pour permettre à la personne qui en fait l'objet de demander la citoyenneté canadienne en application de la *Loi sur la citoyenneté*, S.C. 1974-75-76, chap. 108 (maintenant L.R.C. (1985), chap. C-29): *Ministre de l'Emploi et de l'Immigration c. Hae Soo Han*, [1984] 1 C.F. 976. Dans *Han*, une ordonnance d'expulsion prononcée à la fin de l'enquête, avant le traitement de la demande de citoyenneté, aurait empêché le demandeur d'obtenir la citoyenneté canadienne (p. 981).

Logiquement, l'argument de l'appelante obligerait donc l'arbitre à ajourner l'enquête chaque fois que le résultat de celle-ci risquerait d'interdire à la personne qui en fait l'objet de poursuivre une autre voie de recours. Cela équivaudrait à voir dans la Loi une suspension automatique. En l'absence de langage législatif clair, il est injustifiable d'entraver le processus décisionnel prévu dans la *Loi sur l'immigration de 1976* en posant une règle aussi rigide pour la tenue d'une enquête.

L'argument de l'appelante doit donc être rejeté à moins, comme elle le prétend, qu'une telle conclusion ressorte de l'arrêt de cette Cour, *Ramawad c. Ministre de la Main-d'œuvre et de l'Immigration*, précité. Je vais maintenant examiner cet arrêt et des décisions dans lesquelles il a été appliqué. L'appelante s'appuie sur l'arrêt *Ramawad* en invoquant l'interprétation qu'en a retenue la Division de première instance de la Cour fédérale dans les décisions *Laneau c. Rivard*, [1978] 2 C.F. 319, et *Nesha c. Ministre de l'Emploi et de l'Immigration*, [1982] 1 C.F. 42, et, par la minorité de la Cour d'appel fédérale, dans *Louhisdon c. Emploi et Immigration Canada*, [1978] 2 C.F. 589, *Oloko c. Emploi et Immigration Canada*, [1978] 2 C.F. 593, et *Widmont*, précitée. Par ailleurs, l'intimé s'appuie sur l'interprétation constante de l'arrêt *Ramawad* retenue par la majorité en Cour d'appel fédérale (voir *Louhisdon*, précité; *Oloko*, précité; *Widmont*, précité; *Murray c. Ministre de l'Emploi*

1989 CanLII 131 (SCC)

Immigration, [1979] 1 F.C. 518, and *Stalony v. Minister of Employment and Immigration* (1980), 36 N.R. 609). Determining which interpretation can be sustained requires a careful examination of what was actually decided in *Ramawad*.

Ramawad was decided under the former *Immigration Act*, R.S.C. 1970, c. I-2. The appellant entered Canada as a non-immigrant under s. 7(1)(*h*) of that Act. Upon his arrival he was granted an employment visa authorizing him to work for one year as a jeweller for Jolyn Jewellery Products. One of the conditions of the visa was that the appellant obtain further authorization from an immigration officer if he altered his conditions of employment. The appellant was subsequently dismissed by his employer, and took work with another jewellery company. The appellant failed to inform immigration officials of his change in employment; they did not become aware of the change until the appellant applied for an extension of his visa at the end of the one-year authorization. Upon being informed that his visa had expired when he breached its condition, the appellant applied for a new employment visa. The appellant was, at that point, deemed to be seeking entry into Canada. Section 3C(1) of the *Immigration Regulations, Part I*, SOR/73-20, stated:

> 3C. (1) Subject to section 3F,
>
> (*a*) no person may enter Canada as a non-immigrant for the purpose of engaging in employment, and
>
> (*b*) no person other than
>
> (i) a Canadian citizen,
>
> (ii) a permanent resident, or
>
> (iii) a person authorized to enter Canada under a written permit issued by the Minister pursuant to section 8 of the Act that expressly states that the holder thereof is authorized to engage in employment,
>
> shall engage in employment in Canada, unless he is in possession of a valid employment visa.

A Special Inquiry Officer held an inquiry under s. 23(2) of the *Immigration Act*. Section 3D(2) of the Regulations required that an issuing officer issue an employment visa on application unless "(*b*) the applicant has violated the conditions of any employment visa issued to him within the

et de l'Immigration, [1979] 1 C.F. 518, et *Stalony v. Ministre de l'Emploi et de l'Immigration* (1980), 36 N.R. 609). Il faut donc examiner soigneusement ce qui a vraiment été décidé dans l'arrêt *Ramawad* pour déterminer quelle interprétation retenir.

L'arrêt *Ramawad* a été rendu en vertu de l'ancienne *Loi sur l'immigration*, S.R.C. 1970, chap. I-2. L'appelant était entré au Canada à titre de non-immigrant en vertu de l'al. 7(1)*h*) de cette Loi. À son arrivée, il avait obtenu un visa d'emploi l'autorisant à travailler pendant un an comme bijoutier pour Jolyn Jewellery Products. Une des conditions du visa était que l'appelant obtienne une nouvelle autorisation d'un agent d'immigration s'il modifiait ses conditions d'emploi. L'appelant a été congédié ultérieurement par son employeur et s'est trouvé du travail chez un autre bijoutier. L'appelant a omis d'aviser les fonctionnaires de l'immigration de son changement d'emploi; ils en ont été informés lorsque l'appelant a demandé la prorogation de son visa à l'expiration de l'autorisation d'un an. En apprenant que son visa avait expiré parce qu'il en avait violé les conditions, l'appelant a demandé un nouveau visa d'emploi. À cette étape, l'appelant était réputé demander l'entrée au Canada. Le paragraphe 3C(1) du *Règlement sur l'immigration, Partie I*, DORS/73-20, prévoyait:

> 3C. (1) Sous réserve de l'article 3F,
>
> *a*) nul ne peut entrer au Canada en qualité de non-immigrant pour y exercer un emploi, et
>
> *b*) nul autre
>
> (i) qu'un citoyen canadien,
>
> (ii) un résident permanent, ou
>
> (iii) une personne autorisée à entrer au Canada en vertu d'un permis écrit délivré par le Ministre en application de l'article 8 de la Loi, et qui énonce expressément que le détenteur est autorisé à exercer un emploi,
>
> ne peut exercer un emploi au Canada sans posséder un visa d'emploi valide.

Un enquêteur spécial a tenu une enquête en application du par. 23(2) de la *Loi sur l'immigration*. Le paragraphe 3D(2) du Règlement exigeait que le fonctionnaire compétent délivre un visa d'emploi sur demande sauf «*b*) si le candidat a enfreint les conditions d'un visa d'emploi qui lui a

1989 CanLII 131 (SCC)

preceding two years". The Special Inquiry Officer determined that the appellant had violated his previous visa by changing employers without authorization, thus he could not be issued an employment visa and could not stay in Canada. The appellant was ordered to be detained and deported.

Just prior to the conclusion of the inquiry, counsel for the appellant sought to invoke the benefit of s. 3G(*d*) of the Regulations. Section 3G read:

> 3G. Notwithstanding subparagraph 3D(2)(*a*)(i) and paragraph 3D(2)(*b*), an employment visa may be issued
>
> . . .
>
> (*d*) to a person in respect of whom subparagraph 3D(2)(*a*)(i) and paragraph 3D(2)(*b*) should not, in the opinion of the Minister, be applied because of the existence of special circumstances.

The Special Inquiry Officer responded at p. 380:

> With full respect to counsel, I have carefully considered all the evidence adduced at this inquiry and, in my opinion, there are no special circumstances in existence at the present time in order to apply paragraph 3G(*d*) of the Immigration Regulations as requested by counsel.

This Court allowed an appeal from a judgment of the Federal Court of Appeal dismissing an application to set aside the deportation order. This Court based its decision on the appellant's first ground of appeal: namely, that the Special Inquiry Officer acted without authority when, in the purported exercise of the Minister's authority, the Special Inquiry Officer decided that the "special circumstances" envisaged in s. 3G(*d*) did not exist. Pratte J., speaking for the Court, held that the authority of the Minister to consider "special circumstances" under s. 3G(*d*) had not been implicitly delegated to the Special Inquiry Officer. Usurpation of this authority by the Special Inquiry Officer rendered his decision invalid (p. 382).

The main issue having been decided, Pratte J. then went on to hold that the invalid decision made by the Special Inquiry Officer vitiated the deportation order issued by him. The right of the appellant applying for an employment visa to have the Minister consider "special circumstances" under

été délivré au cours des deux années précédentes». L'enquêteur spécial a conclu que l'appelant avait violé son visa précédent en changeant d'employeur sans autorisation et qu'il ne pouvait donc plus obtenir de visa d'emploi ni rester au Canada. L'enquêteur a ordonné la détention et l'expulsion de l'appelant.

Juste avant la fin de l'enquête, l'avocat de l'appelant a tenté d'invoquer l'al. 3G*d*) du Règlement:

> 3G. Nonobstant les dispositions du sous-alinéa 3D(2)*a*)(i) et de l'alinéa 3D(2)*b*), un visa d'emploi peut être délivré
>
> . . .
>
> *d*) à une personne à l'égard de laquelle les dispositions du sous-alinéa 3D(2)*a*)(i) et de l'alinéa 3D(2)*b*) ne devraient pas s'appliquer, de l'avis du Ministre, en raison de circonstances particulières.

L'enquêteur spécial a répondu (à la p. 380):

> [TRADUCTION] Avec égards envers l'avocat, j'ai examiné attentivement la preuve soumise à l'enquête et il n'y a, à mon avis, aucune circonstance particulière en l'espèce qui justifierait l'application de l'al. 3G*d*) du Règlement sur l'immigration comme le demande l'avocat.

Cette Cour a accordé l'autorisation de pourvoi contre le jugement de la Cour d'appel fédérale qui rejetait la demande d'annulation de l'ordonnance d'expulsion. Cette Cour a fondé sa décision sur le premier moyen d'appel de l'appelant qui consistait à dire que l'enquêteur spécial avait excédé ses pouvoirs en prétendant exercer le pouvoir du ministre lorsqu'il a décidé que les «circonstances particulières» envisagées à l'al. 3G*d*) n'existaient pas. Le juge Pratte, s'exprimant au nom de la Cour, a conclu que le pouvoir du ministre de prendre en considération les «circonstances particulières» en vertu de l'al. 3G*d*) n'avait pas été délégué implicitement à l'enquêteur spécial. La décision de l'enquêteur spécial était invalide parce qu'il avait usurpé ce pouvoir (p. 382).

La principale question ayant été tranchée, le juge Pratte a ensuite conclu que l'invalidité de la décision de l'enquêteur spécial avait vicié l'ordonnance d'expulsion qu'il avait prononcée. En exerçant abusivement le pouvoir du ministre, l'enquêteur spécial avait supprimé le droit de l'appelant,

1989 CanLII 131 (SCC)

s. 3G(*d*) of the Regulations was nullified by the Special Inquiry Officer's improper exercise of the Minister's authority. Pratte J. concluded his discussion of the merits with a broadly-worded final paragraph at p. 384:

> In my view, the making of an application seeking the opinion of the Minister pursuant to para. 3G(*d*) has the effect of suspending the authority of the Special Inquiry Officer to issue a deportation order, and the only possible course of action for the Special Inquiry Officer under such circumstances is to adjourn making his decision until such time as the Minister has disposed of the application.

Ramawad involved provisions of the Act and Regulations specific to an application for an employment visa. The determination of that issue depended on whether there was a violation of a condition of a prior employment visa and whether the violation would be waived by the Minister by reason of special circumstances. This issue could not be finally determined without obtaining the decision of the Minister. Obviously the appellant was entitled to the Minister's decision before this issue was resolved against him. The Special Inquiry Officer failed to consider whether the adjournment was necessary for a full and proper inquiry; he simply decided that there were no special circumstances. In doing so, he usurped the Minister's authority. In these circumstances the determination of the applicant's right to an employment visa gave him the right to have the Minister's decision because that issue was to be determined in part by the Minister. I therefore agree with Pratte J. in *Louhisdon*, *supra*, at p. 591, that

> [a]ll that was decided in that case [*Ramawad*], in my opinion, is that a person who is seeking an employment visa under sections 3B *et seq.* of the *Immigration Regulations*, *Part I*, and who requests that his case be submitted to the Minister so that the latter may exercise the power conferred on him by section 3G(*d*) of the Regulations, may not be deported on the ground that he has no employment visa until the matter has been put before the Minister.

In the present case the application to the Minister under s. 37(1) is not an integral part of the proceedings before the adjudicator under s. 27(3)

demandeur d'un visa d'emploi, à ce que le ministre considère les «circonstances particulières» en application de l'al. 3G*d*) du Règlement. Le juge Pratte a conclu son examen au fond par un dernier paragraphe formulé en termes larges (à la p. 384):

> À mon avis, dès que l'on demande au Ministre son avis conformément à l'al. 3G*d*), tout pouvoir de l'enquêteur spécial de rendre une ordonnance d'expulsion est alors suspendu et la seule chose que ce dernier peut faire dans ces circonstances est d'ajourner sa décision jusqu'à ce que le Ministre ait tranché la question.

L'arrêt *Ramawad* portait sur des dispositions de la Loi et du Règlement qui visaient spécifiquement les demandes de visa d'emploi. La résolution de ce litige dépendait de l'existence d'une violation d'une condition d'un visa d'emploi antérieur et de la question de savoir si le ministre pouvait passer outre à cette violation en raison de circonstances particulières. On ne pouvait répondre à cette question de façon définitive sans obtenir la décision du ministre. L'appelant avait évidemment le droit d'obtenir la décision du ministre avant que cette question soit tranchée à son encontre. L'enquêteur spécial a omis de se demander si l'ajournement était nécessaire à la tenue régulière d'une enquête approfondie; il a simplement décidé qu'il n'existait aucune circonstance particulière. Ce faisant, il a usurpé le pouvoir du ministre. Dans ces circonstances, la décision relative au droit du requérant d'obtenir un visa d'emploi conférait à ce dernier le droit d'obtenir la décision du ministre parce que cette question devait être résolue en partie par le ministre. Je partage donc l'avis du juge Pratte dans *Louhisdon*, précité, à la p. 591, selon lequel

> [t]out ce qu'on a décidé dans cette affaire [*Ramawad*], selon moi, c'est que celui qui sollicite un visa d'emploi en vertu des articles 3B et suivants du *Règlement sur l'immigration, Partie I*, et qui demande que son cas soit soumis au Ministre pour qu'il exerce le pouvoir que lui confère l'article 3G*d*) du Règlement ne peut, aussi longtemps que le Ministre n'a pas été saisi de l'affaire, être expulsé en raison du fait qu'il n'a pas de visa d'emploi.

En l'espèce, la demande présentée au ministre en vertu du par. 37(1) ne fait pas partie intégrante de la procédure devant l'arbitre selon le par. 27(3)

1989 CanLII 131 (SCC)

but a remedy that is clearly separate from that proceeding. The mere fact that there is an alternative remedy open to the appellant does not convert it into an automatic concomitant right to have other proceedings adjourned to accommodate the application. Nothing in s. 37 suggests that an application under that section is to be treated any differently than an application for other remedies which, as I have discussed, have not been accorded the recognition of an automatic stay.

As I have decided that *Ramawad*, *supra*, must be read in the context of its facts and the particular employment visa provisions at issue, I need not discuss at length the decisions which have interpreted that decision. I will, however, make a few comments on those decisions which have interpreted *Ramawad*, *supra*, as authority for the broad proposition which the appellant puts forth.

In *Laneau v. Rivard*, *supra*, Decary J. of the Federal Court Trial Division, was the first to use the decision in *Ramawad*, *supra*, to require that an adjournment be granted in order that the subject of the inquiry might pursue her application for a Minister's permit. In *Laneau*, the applicant met all the requirements of the former *Immigration Act* until she was forced to stop work as a domestic due to complications in her pregnancy. The applicant's fiancé, a Canadian citizen, did not show up for their wedding. The applicant feared that a deportation order might make it impossible for her to pursue a paternity suit against her former fiancé. Thus, the applicant applied to the Minister for a permit over five months prior to the commencement of the inquiry. The timeliness of the application by the applicant was clearly of importance to Decary J. (at p. 320):

> It is important to note that this application was made before the immigration authorities summoned or even communicated with applicant;

The merits of the applicant's case heavily influenced a number of the decisions in which *Ramawad*, *supra*, was interpreted broadly. In

mais constitue une voie de recours tout à fait distincte de cette procédure. Le simple fait que l'appelante dispose d'un autre recours ne transforme pas ce dernier en un droit automatique concomitant à l'ajournement des autres procédures afin de faciliter la demande. Rien dans l'art. 37 ne suggère qu'une demande présentée en vertu de cet article devrait être traitée différemment d'une demande présentée dans le cadre d'autres recours qui, selon mon analyse, ne donnent pas lieu à une suspension automatique.

Puisque j'ai conclu que l'arrêt *Ramawad*, précité, doit être interprété dans le contexte des faits de cette affaire et des dispositions particulières relatives au visa d'emploi en cause, je n'ai pas à examiner en détail les décisions qui l'ont interprété. Je vais cependant faire quelques remarques sur les décisions qui ont interprété l'arrêt *Ramawad*, précité, comme précédent à l'appui de l'argumentation générale présentée par l'appelante.

Dans *Laneau c. Rivard*, précité, le juge Decary de la Division de première instance de la Cour fédérale a été le premier à utiliser l'arrêt *Ramawad*, précité, pour exiger qu'un ajournement soit accordé afin que la personne qui faisait l'objet de l'enquête puisse poursuivre ses démarches en vue d'obtenir un permis du ministre. Dans l'affaire *Laneau*, la requérante remplissant toutes les conditions exigées par l'ancienne *Loi sur l'immigration* avant d'être obligée d'arrêter de travailler comme aide ménagère en raison de complications de sa grossesse. Son fiancé, un citoyen canadien, ne s'est pas présenté à leur mariage. La requérante craignait qu'une ordonnance d'expulsion l'empêche de poursuivre son action en déclaration de paternité intentée contre son ancien fiancé. Elle a donc fait au ministre une demande de permis plus de cinq mois avant le début de l'enquête. Pour le juge Decary, il est clair que le moment choisi par la requérante pour présenter sa demande était important (à la p. 320):

> ... cette demande, il est important de le souligner, fut faite avant même que les autorités de l'immigration n'aient convoqué, ou communiqué avec la requérante;

Le bien-fondé de la cause du requérant a lourdement influencé un certain nombre de décisions dans lesquelles l'arrêt *Ramawad*, précité, a reçu

1989 CanLII 131 (SCC)

Nesha v. Minister of Employment and Immigration, supra, the applicant had worked steadily as a housekeeper for the five years since her illegal entry into Canada. She wrote a letter to the Minister requesting special consideration immediately upon her arrest under the *Immigration Act, 1976*. In that letter, the applicant outlined the threats made against her by her common-law husband in Guyana and her belief that she would be killed by him upon her return to that country. In finding that the adjudicator was required to adjourn the inquiry, Smith D.J. commented at p. 51:

> It does not seem just, in any event, that genuine cases, in which the known facts indicate there is sufficient merit to warrant a reasonable hope of success, should be frustrated in advance by the issuing of a deportation order. It is difficult for me to think that Parliament intended such an outcome.
>
> It is not my function to pass an opinion on the present applicant's case. I will only say that if the allegations in her letter to the Minister of July 29, 1980, should be shown to be correct, it is not impossible to think her application might succeed.

This passage was cited by MacGuigan J., in dissent in *Minister of Employment and Immigration v. Widmont, supra*, and followed by this comment at p. 298:

> The merits of the application of the respondent here for a Minister's permit seem equally apparent.

In *Widmont*, the respondent entered Canada legally from Poland and was unaware of the expiry date on her visitor's visa due to her inability to speak either French or English. The respondent herself approached immigration authorities to clarify her status due to her upcoming marriage to a Canadian citizen. Whatever the comparative circumstances of the present appellant may be, I do not believe that sympathy for the circumstances in which the subject of the inquiry finds himself or herself, is sufficient to transform an adjudicator's discretion to adjourn into a duty to adjourn. No doubt such circumstances are relevant to the exercise of the adjudicator's discretion and they will,

une interprétation large. Dans *Nesha c. Ministre de l'Emploi et de l'Immigration*, précité, la requérante avait travaillé sans interruption comme ménagère pendant cinq ans après son entrée illégale au Canada. Elle avait écrit au ministre en invoquant les circonstances particulières dès qu'elle avait été arrêtée en vertu de la *Loi sur l'immigration de 1976*. Dans sa lettre, la requérante soulignait que son conjoint de fait en Guyane lui avait fait des menaces et qu'elle croyait qu'il la tuerait lorsqu'elle retournerait dans son pays. En décidant que l'arbitre était tenu d'ajourner l'enquête, le juge suppléant Smith a fait remarquer, à la p. 51:

> En tout cas, il ne semble pas juste que des cas sérieux, dont les faits connus révèlent qu'ils ont une chance raisonnable de succès, se voient fermer à l'avance un recours par la délivrance d'une ordonnance d'expulsion. Je ne saurais admettre que le Parlement a voulu un tel résultat.
>
> Il ne m'appartient pas d'exprimer d'opinion sur le cas de la présente requérante. Je dirai seulement que si les allégations contenues dans la lettre qu'elle a adressée au Ministre le 29 juillet 1980 s'avèrent exactes, il est permis de penser que sa demande sera accueillie.

Le juge MacGuigan, dissident dans l'arrêt *Ministre de l'Emploi et de l'Immigration c. Widmont*, précité, a cité cet extrait et l'a fait suivre de cette remarque, à la p. 298:

> Le bien-fondé de la demande d'un permis du Ministre faite par l'intimée en l'espèce semble tout aussi évident.

Dans l'affaire *Widmont*, l'intimée, qui venait de Pologne, était entrée au Canada légalement et ne connaissait pas la date d'expiration de son visa parce qu'elle ne parlait ni l'anglais ni le français. L'intimée elle-même avait contacté les fonctionnaires de l'immigration pour clarifier son statut compte tenu de son mariage prochain avec un citoyen canadien. Quels que soient les points de comparaison avec la présente espèce, je ne crois pas que la sympathie que l'on éprouve en raison des circonstances auxquelles fait face la personne qui fait l'objet de l'enquête suffise à transformer le pouvoir discrétionnaire de l'arbitre d'ajourner l'enquête en une obligation. Nul doute que de telles circonstances sont pertinentes quant à l'exercice du pouvoir discrétionnaire de l'arbitre et aboutiront, lorsque ce sera justifié, à un ajournement. Toute-

1989 CanLII 131 (SCC)

where warranted, result in an adjournment. They are not, however, *per se*, a proper basis for appellate review of the adjudicator's discretion.

I conclude that an adjudicator acting pursuant to s. 27(3) of the Act is neither bound to accede to a request for an adjournment to enable an application under s. 37 to be brought, nor is he or she required to refuse it. Rather the adjudicator has a discretion. In some circumstances, an adjournment may well be granted to enable such an application; in other circumstances, it may properly be refused. While the adjudicator must be cognizant that a "full and proper inquiry" be held, the adjudicator must also ensure that the statutory duty to hold an inquiry is fulfilled. As Wydrzynski, op. cit., notes at p. 266:

> Above all, there is a need to proceed expeditiously, and adjournments should not be viewed as a method to interminably delay the inquiry.

The adjudicator might consider such factors as the number of adjournments already granted and the length of time for which an adjournment is sought in exercising his or her discretion to adjourn. Where an adjournment is requested in order that an application under s. 37 might be pursued, the adjudicator might also consider the opportunity available to the subject of the inquiry to apply to the Minister prior to the request for an adjournment. In the present appeal, the appellant could have applied at any time between the date of her removal from Canada on June 6, 1984, and the recommencement of the inquiry on November 21, 1984; she did not send a letter to the Minister's office until November 16, 1984.

For these reasons, I would dismiss the appeal.

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting)—The facts, set out in my colleague Justice Sopinka's opinion, are not in issue here. It is not for us to decide whether appellant should be given immigrant status in this country. A single question of law is raised in this appeal: did the adjudicator err in

fois, elles ne justifient pas en elles-mêmes une révision par voie d'appel du pouvoir discrétionnaire de l'arbitre.

Je conclus qu'un arbitre qui agit en application du par. 27(3) de la Loi n'est obligé ni d'accorder ni de rejeter une demande d'ajournement pour permettre qu'une demande soit présentée en application de l'art. 37. L'arbitre dispose plutôt d'un pouvoir discrétionnaire. Dans certains cas, il est fort possible qu'un ajournement soit accordé pour permettre la présentation d'une telle demande; dans d'autres cas, il peut être refusé à bon droit. Si l'arbitre doit être bien conscient que la Loi exige la tenue d'une «enquête approfondie», il doit également voir à ce que soit observée l'obligation prévue par la Loi de tenir une enquête. Comme le souligne Wydrzynski, *op. cit.*, à la p. 266:

> [TRADUCTION] Avant tout, il est nécessaire de procéder de façon expéditive, et il ne faudrait pas considérer les ajournements comme un moyen de retarder indéfiniment l'enquête.

L'arbitre peut considérer des facteurs comme le nombre d'ajournements déjà accordés et la durée de l'ajournement demandé dans l'exercice de son pouvoir discrétionnaire d'ajourner l'enquête. Lorsqu'un ajournement est demandé en raison d'une demande fondée sur l'art. 37, l'arbitre pourrait également tenir compte de la possibilité qu'avait la personne qui fait l'objet de l'enquête de s'adresser au ministre avant la présentation d'une demande d'ajournement. En l'espèce, l'appelante aurait pu s'adresser au ministre à n'importe quel moment entre la date de son renvoi du Canada, le 6 juin 1984, et la date de la reprise de l'enquête, le 21 novembre 1984; elle n'a pas envoyé de lettre au bureau du ministre avant le 16 novembre 1984.

Pour ces motifs, je suis d'avis de rejeter le pourvoi.

Version française des motifs des juges Wilson et L'Heureux-Dubé rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—Les faits, exposés dans l'opinion de mon collègue, le juge Sopinka, ne sont pas ici en litige. Il ne nous appartient pas de décider si l'appelante devrait obtenir le statut d'immigrante au Canada. Une seule question de droit se pose dans ce pourvoi:

1989 CanLII 131 (SCC)

refusing to adjourn the immigration inquiry pending a decision on the application made by the appellant prior to the inquiry pursuant to ss. 37(1) and 115(2) of the *Immigration Act, 1976*, S.C. 1976-77, c. 52?

These sections confer onto the Minister and Governor in Council special powers to grant, in certain cases, the right to remain in Canada. The relief under s. 37 takes the form of a ministerial permit. That provision reads in relevant part as follows:

37. (1) The Minister may issue a written permit authorizing any person to come into or remain in Canada if that person is

(*a*) in the case of a person seeking to come into Canada, a member of an inadmissible class, or

(*b*) in the case of a person in Canada, a person with respect to whom a report has been or may be made under subsection 27(2).

(2) Notwithstanding subsection (1), a permit may not be issued to

(*a*) a person against whom a removal order has been made who has not been removed from Canada pursuant to such an order or has not otherwise left Canada, unless an appeal from that order has been allowed;

(*b*) a person to whom a departure notice has been issued who has not left Canada; or

(*c*) a person in Canada with respect to whom an appeal made pursuant to section 79 has been dismissed.

Exemptions may be granted as well by the Governor in Council acting pursuant to s. 115(2) of the *Immigration Act, 1976*, which provides:

115. ...

(2) The Governor in Council may by regulation exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Governor in Council is satisfied that the person should be exempted from such regulation or his admission should be facilitated for reasons of public policy or due to the existence of compassionate or humanitarian considerations.

The granting of adjournments by the adjudicator is provided for by s. 35(1) of the *Immigration Regulations, 1978*, SOR/78-172:

l'arbitre a-t-il commis une erreur en refusant d'ajourner l'enquête d'immigration en attendant la décision sur la requête préalable de l'appelante faite en vertu des par. 37(1) et 115(2) de la *Loi sur l'immigration de 1976*, S.C. 1976-77, chap. 52?

Ces dispositions donnent au ministre et au gouverneur en conseil des pouvoirs spéciaux d'accorder dans certains cas le droit de demeurer au Canada. Le redressement prévu à l'art. 37 prend la forme d'un permis du ministre, tel qu'il appert des extraits pertinents de cet article:

37. (1) Le Ministre peut délivrer un permis écrit autorisant une personne à entrer au Canada ou à y demeurer. Peuvent se voir octroyer un tel permis

a) les personnes faisant partie d'une catégorie non admissible, désireuses d'entrer au Canada, ou

b) les personnes se trouvant au Canada, qui font l'objet ou sont susceptibles de faire l'objet du rapport prévu au paragraphe 27(2).

(2) Par dérogation au paragraphe (1), ne peuvent obtenir le permis

a) les personnes ayant fait l'objet d'une ordonnance de renvoi, qui se trouvent encore au Canada sauf si l'appel interjeté de cette ordonnance a été accueilli;

b) les interdits de séjour qui n'ont pas encore quitté le Canada; ou

c) les personnes se trouvant encore au Canada dont l'appel interjeté en vertu de l'article 79 a été rejeté.

Le gouverneur en conseil peut également accorder des dispenses en se fondant sur le par. 115(2) de la *Loi sur l'immigration de 1976*, qui dispose:

115. ...

(2) Lorsqu'il est convaincu qu'une personne devrait être dispensée de tout règlement établi en vertu du paragraphe (1) ou que son admission devrait être facilitée pour des motifs de politique générale ou des considérations d'ordre humanitaire, le gouverneur en conseil peut, par règlement, dispenser cette personne du règlement en question ou autrement faciliter son admission.

L'arbitre peut accorder des ajournements en vertu du par. 35(1) du *Règlement sur l'immigration de 1978*, DORS/78-172:

1989 CanLII 131 (SCC)

35. (1) The adjudicator presiding at an inquiry may adjourn the inquiry at any time for the purpose of ensuring a full and proper inquiry.

The starting point for the analysis of these statutory provisions is the judgment of this Court in *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375. The appellant in that case entered the country as a non-immigrant pursuant to s. 7(1)(*h*) of the old *Immigration Act*, R.S.C. 1970, c. I-2. Upon his arrival, he was given an employment visa which authorized him to work as a jeweller for Jolyn Jewellery Products. One of the conditions under which the visa was issued was a duty on the appellant to seek further authorization from immigration officials prior to changing his employment. Some time after he had started to work, the appellant was fired by his employer and subsequently found employment with another jewellery company. However, the immigration officers were not informed of this change in the conditions of employment until the appellant applied for an extension of his visa.

This oversight by the appellant caused an inquiry to be held by the Special Inquiry Officer under s. 23(2) of the *Immigration Act*. Under paragraph 3D(2)(*b*) of the old *Immigration Regulations, Part I*, the officer was under a duty to renew an employment visa, unless the applicant had "violated the conditions of any employment visa issued to him within the preceding two years." There was also a discretion conferred by para. 3G(*d*) of the *Immigration Regulations, Part I*, to issue an employment visa notwithstanding para. 3D(2)(*b*):

3G. Notwithstanding ... paragraph 3D(2)(*b*), an employment visa may be issued.

. . .

(*d*) a person in respect of whom ... paragraph 3D(2)(*b*) should not, in the opinion of the Minister, be applied because of the existence of special circumstances.

Near the conclusion of the inquiry, the appellant's counsel invoked the benefit of para. 3G(*d*). The Special Inquiry Officer answered that there were no special circumstances in existence at that time to apply para. 3G(*d*) as requested by counsel.

35. (1) L'arbitre qui préside l'enquête peut l'ajourner à tout moment afin de veiller à ce qu'elle soit complète et régulière.

Le point de départ de l'analyse de ces dispositions législatives est l'arrêt de cette Cour *Ramawad c. Ministre de la Main-d'œuvre et de l'Immigration*, [1978] 2 R.C.S. 375. L'appelant dans cette affaire est entré au Canada à titre de non-immigrant en vertu de l'al. 7(1)*h*) de l'ancienne *Loi sur l'immigration*, S.R.C. 1970, chap. I-2. À son arrivée, il a obtenu un visa d'emploi l'autorisant à exercer la profession de bijoutier chez Jolyn Jewellery Products. Une des conditions de son visa était qu'il obtienne une nouvelle autorisation des fonctionnaires de l'immigration avant de changer d'emploi. Peu de temps après avoir commencé à travailler, l'appelant a été remercié de ses services par son employeur et s'est par la suite trouvé un emploi chez un autre bijoutier. Les fonctionnaires de l'immigration n'ont cependant été avisés de ce changement dans ses conditions d'emploi que lorsque l'appelant a demandé la prorogation de son visa.

Cet oubli de l'appelant est à l'origine de la tenue d'une enquête par l'enquêteur spécial en vertu du par. 23(2) de la *Loi sur l'immigration*. En vertu de l'al. 3D(2)*b*) de l'ancien *Règlement sur l'immigration, Partie I*, le fonctionnaire était tenu de renouveler un visa d'emploi sauf si le candidat avait «enfreint les conditions d'un visa d'emploi qui lui a été délivré au cours des deux années précédentes». L'alinéa 3G*d*) du *Règlement sur l'immigration, Partie I*, conférait également un pouvoir discrétionnaire de délivrer un visa d'emploi nonobstant l'al. 3D(2)*b*):

3G. Nonobstant [...] l'alinéa 3D(2)*b*), un visa d'emploi peut être délivré

. . .

d) à une personne à l'égard de laquelle les dispositions [...] de l'alinéa 3D(2)*b*) ne devraient pas s'appliquer, de l'avis du Ministre, en raison de circonstances particulières.

Vers la fin de l'enquête, l'avocat de l'appelant a invoqué l'al. 3G*d*). L'enquêteur spécial a répondu qu'il n'existait alors aucune circonstance particulière qui permettait d'appliquer l'al. 3G*d*) comme

1989 CanLII 131 (SCC)

The officer then ordered the appellant to be detained and deported.

This Court allowed an appeal from a judgment of the Federal Court of Appeal dismissing an application under s. 28 of the *Federal Court Act* to set aside the deportation order. Delivering the reasons for the unanimous Court, Pratte J. held that, as a matter of statutory interpretation, the power to grant relief under para. 3G(*d*) had not been implicitly delegated by the Minister to the Special Inquiry Officer. Accordingly, the officer's determination that there were no special circumstances to grant the relief was "invalid" (p. 382).

It was further held that the invalidity of the officer's decision vitiated the deportation order. Pratte J. said that para. 3G(*d*) conferred a "substantive right" onto the appellant which the Special Inquiry Officer had no power to abrogate. Under section 8 of the old *Immigration Act*, the Minister had no power to issue a permit once a deportation order had been issued. Accordingly, when he dismissed the request for an adjournment and issued a deportation order, the officer "effectively denied the appellant his right to have the Minister decide whether the special circumstances envisaged in para. 3G(*d*) existed" (p. 383). (Emphasis added.) Pratte J. concluded (at p. 384):

> In my view, the making of an application seeking the opinion of the Minister pursuant to para. 3G(*d*) has the effect of suspending the authority of the Special Inquiry Officer to issue deportation order, and the only possible course of action for the Special Inquiry Officer under such circumstances is to adjourn making his decision until such time as the Minister has disposed of the application. [Emphasis added.]

There is no indication in *Ramawad* purporting to restrict the application of the judgment to the facts of the case nor to the specific provisions of the old *Immigration Regulations, Part I*. To the contrary, the reasoning in *Ramawad* was based on a broad appreciation of the statutory scheme and a purposive interpretation of the ministerial powers of relief. Such considerations appeared to some to be likely to help the disposition of other cases;

le demandait l'avocat. L'enquêteur a alors ordonné la détention et l'expulsion de l'appelant.

Cette Cour a accueilli le pourvoi contre le jugement de la Cour d'appel fédérale qui avait rejeté, en vertu de l'art. 28 de la *Loi sur la Cour fédérale*, une demande d'annulation de l'ordonnance d'expulsion. Rédigeant les motifs unanimes de la Cour, le juge Pratte a conclu que, pour ce qui était de l'interprétation législative, le ministre n'avait pas implicitement délégué à l'enquêteur spécial le pouvoir d'accorder le redressement visé à l'al. 3G*d*). Par conséquent, la décision de l'enquêteur selon laquelle il n'existait aucune circonstance particulière lui permettant d'accorder le redressement était «invalide» (p. 382).

La Cour a également jugé que l'invalidité de la décision de l'enquêteur viciait l'ordonnance d'expulsion. Le juge Pratte a estimé que l'al. 3G*d*) conférait à l'appelant un «droit» que l'enquêteur spécial n'avait aucun pouvoir d'abroger. En vertu de l'art. 8 de l'ancienne *Loi sur l'immigration*, le ministre n'avait aucun pouvoir de délivrer un permis une fois prononcée l'ordonnance d'expulsion. Par conséquent, lorsqu'il a rejeté la demande d'ajournement et rendu une ordonnance d'expulsion, l'enquêteur «a en réalité privé l'appelant de son droit de faire trancher par le Ministre la question de l'existence de circonstances particulières au sens de l'al. 3G*d*)» (p. 383). (Je souligne.) Le juge Pratte a conclu (à la p. 384):

> À mon avis, dès que l'on demande au Ministre son avis conformément à l'al. 3G*d*), tout pouvoir de l'enquêteur spécial de rendre une ordonnance d'expulsion est alors suspendu et la seule chose que ce dernier peut faire dans ces circonstances est d'ajourner sa décision jusqu'à ce que le Ministre ait tranché la question. [Je souligne.]

Rien dans l'arrêt *Ramawad* n'indique qu'on entendait restreindre son application aux faits de l'espèce ou à des dispositions précises de l'ancien *Règlement sur l'immigration, Partie I*. Au contraire, le raisonnement de *Ramawad* est fondé sur une appréciation globale de l'économie de la loi et sur une interprétation des pouvoirs du ministre d'accorder un redressement qui tient compte du but de la loi. Certains ont vu là la possibilité que

1989 CanLII 131 (SCC)

indeed, one author commented: "The application of the *Ramawad* decision to the right to apply for a Minister's permit would seem to be obvious" (Wydrzynski, *Canadian Immigration Law and Procedure* (1983), at p. 352). In *Laneau v. Rivard*, [1978] 2 F.C. 319, the Trial Division of the Federal Court applied the *Ramawad* reasoning to prevent the Special Inquiry Officer from proceeding with an inquiry held under the auspices of the old *Immigration Act*, on the ground that an application for a Minister's permit had been made before the inquiry was ever begun. As well, *Ramawad* was applied by the Trial Division of the Federal Court to an inquiry brought about in application of the new *Immigration Act, 1976*. In *Nesha v. Minister of Employment and Immigration*, [1982] 1 F.C. 42, an order was issued to stop a special inquiry initiated by a report made pursuant to s. 27(2) of the *Immigration Act, 1976*, pending the Minister's consideration of an application for a permit pursuant to s. 37 of the Act which had also been made before the inquiry began.

ces considérations puissent s'appliquer à d'autres cas; en fait, un auteur a fait ce commentaire: [TRADUCTION] «L'application de l'arrêt *Ramawad* au droit de demander un permis du ministre semblerait évidente» (Wydrzynski, *Canadian Immigration Law and Procedure* (1983), à la p. 352). Dans *Laneau c. Rivard*, [1978] 2 C.F. 319, la Division de première instance de la Cour fédérale a appliqué le raisonnement de l'arrêt *Ramawad* pour empêcher l'enquêteur spécial de procéder à une enquête en vertu de l'ancienne *Loi sur l'immigration*, parce que la demande de permis du ministre avait été présentée avant le début de l'enquête. De même, la Division de première instance de la Cour fédérale a appliqué l'arrêt *Ramawad* à une enquête instituée en application de la nouvelle *Loi sur l'immigration de 1976*. Dans la décision *Nesha c. Ministre de l'Emploi et de l'Immigration*, [1982] 1 C.F. 42, la Division de première instance a rendu une ordonnance interdisant la poursuite d'une enquête spéciale commencée par un rapport fait en vertu du par. 27(2) de la *Loi sur l'immigration de 1976*, jusqu'à ce que soit rendue la décision du ministre sur une demande de permis en vertu de l'art. 37 de la Loi, présentée également avant le début de l'enquête.

To others, however, the reasoning in *Ramawad* could not be applied beyond the facts or statutory background of that case. In *Louhisdon v. Employment and Immigration Canada*, [1978] 2 F.C. 589, a majority of the Federal Court of Appeal (Pratte and Ryan JJ.) decided that a Special Inquiry Officer acting pursuant to the old *Immigration Act* had not erred in refusing to grant a request to adjourn the making of the deportation order and to refer the matter to the Minister for a decision as to whether a special permit should be issued under s. 8 of the Act. Writing for the majority, Pratte J. found that "[s]ection 8 of the *Immigration Act* simply gives the Minister the power to grant a permit; it does not create any right in favour of those who might benefit from the exercise of this power" (p. 591). Accordingly, Pratte J. held that the appellant in that case could not complain that the making of the deportation order deprived him of the "option of obtaining a permit".

Pour d'autres cependant, le raisonnement de l'arrêt *Ramawad* ne saurait s'appliquer qu'aux faits de cette affaire ou aux dispositions législatives spécifiques en cause. Dans l'arrêt *Louhisdon c. Emploi et Immigration Canada*, [1978] 2 C.F. 589, la Cour d'appel fédérale à la majorité (les juges Pratte et Ryan) a décidé qu'un enquêteur spécial agissant en vertu de l'ancienne *Loi sur l'immigration* n'avait pas commis d'erreur en refusant d'accorder l'ajournement du prononcé de l'ordonnance d'expulsion et de renvoyer l'affaire au ministre pour qu'il décide s'il y avait lieu de délivrer un permis spécial en vertu de l'art. 8 de la Loi. Le juge Pratte, au nom de la majorité, a conclu que «[l]'article 8 de la *Loi sur l'immigration* n'accorde au Ministre que le pouvoir de décerner un permis; il ne crée aucun droit en faveur de ceux qui pourraient bénéficier de l'exercice de ce pouvoir» (p. 591). Par conséquent, le juge Pratte a conclu que l'appelant ne pouvait se plaindre que le prononcé de l'ordonnance d'expulsion le privait de «la possibilité que le Ministre lui délivre un permis».

1989 CanLII 131 (SCC)

With respect to the decision of this Court in *Ramawad*, Pratte J. concluded as follows:

In my view, the decision of the Supreme Court in *Ramawad* cannot help applicant. All that was decided in that case, in my opinion, is that a person who is seeking an employment visa under sections 3B *et seq* of the *Immigration Regulations, Part I*, and who requests that his case be submitted to the Minister so that the latter may exercise the power conferred on him by section 3G(*d*) of the Regulations, may not be deported on the ground that he had no employment visa until the matter has been put before the Minister.

Ryan J. concurred in the reasons expressed by Pratte J. Le Dain J. (as he then was) dissented for the reasons given in the companion case of *Oloko v. Canada Employment and Immigration*, [1978] 2 F.C. 593.

In *Oloko*, the Special Inquiry Officer had originally granted an adjournment to allow the applicant to seek a Minister's permit under the authority of s. 8 of the *Immigration Act*. The permit was refused. When the inquiry resumed, the applicant's wife had just given birth to a premature baby and the applicant once again requested an adjournment in order that these new circumstances be considered by the Minister. The request was denied on the ground that the circumstances which might justify consideration on a humanitarian basis had already been fully considered, and a deportation order was made.

A majority of the Federal Court of Appeal (Pratte and Ryan JJ.) dismissed the subsequent application to quash the deportation order. Delivering the reasons of the majority, Pratte J. simply referred to his reasons in *Louhisdon*.

Le Dain J. wrote a forceful dissent. Contrary to the majority, he was of the view that the reasoning in *Ramawad* applied. He said that there was as much of a "substantive right" to obtain a decision under s. 8 of the *Immigration Act* as there was under para. 3G(*d*) of the old *Immigration Regulations, Part I*. Further, as in *Ramawad*, Le Dain J. expressed the view that it was not open for an immigration official not vested with the Minister's authority to prevent an applicant from having his case considered for a permit. In the circumstances

Pour ce qui est de l'arrêt *Ramawad* de cette Cour, le juge Pratte conclut:

À mon avis, la décision de la Cour suprême dans l'affaire *Ramawad* ne peut aider le requérant. Tout ce qu'on a décidé dans cette affaire, selon moi, c'est que celui qui sollicite un visa d'emploi en vertu des articles 3B et suivants du *Règlement sur l'immigration, Partie I*, et qui demande que son cas soit soumis au Ministre pour qu'il exerce le pouvoir que lui confère l'article 3G*d*) du Règlement ne peut, aussi longtemps que le Ministre n'a pas été saisi de l'affaire, être expulsé en raison du fait qu'il n'a pas de visa d'emploi.

Le juge Ryan a souscrit aux motifs du juge Pratte. Le juge Le Dain (plus tard juge de cette Cour) était dissident pour les motifs donnés dans une affaire connexe, *Oloko c. Emploi et Immigration Canada*, [1978] 2 C.F. 593.

Dans l'affaire *Oloko*, l'enquêteur spécial a d'abord accordé un ajournement pour permettre au requérant de demander un permis du ministre en vertu de l'art. 8 de la *Loi sur l'immigration*. Le permis a été refusé. À la reprise de l'enquête, l'épouse du requérant venait de donner naissance à un enfant prématuré et le requérant a encore une fois demandé un ajournement pour que le ministre tienne compte de leur nouvelle situation. La demande a été refusée pour le motif que les circonstances qui pouvaient justifier un examen pour des motifs humanitaires avaient déjà été examinées, et une ordonnance d'expulsion a été rendue.

La Cour d'appel fédérale à la majorité (les juges Pratte et Ryan) a rejeté la demande subséquente d'annulation de cette ordonnance d'expulsion. Le juge Pratte, qui a rédigé les motifs de la majorité, a simplement renvoyé à ses motifs dans l'arrêt *Louhisdon*.

Le juge Le Dain a rédigé une forte dissidence. Contrairement à la majorité, il a estimé que le raisonnement de l'arrêt *Ramawad* s'appliquait. Selon lui, il existait tout autant «un droit» d'obtenir une décision en vertu de l'art. 8 de la *Loi sur l'immigration* qu'en vertu de l'al. 3G*d*) de l'ancien *Règlement sur l'immigration, Partie I*. En outre, comme dans l'arrêt *Ramawad*, le juge Le Dain a exprimé l'opinion qu'il n'était pas loisible à un fonctionnaire de l'immigration non autorisé à exercer le pouvoir du ministre d'empêcher l'examen de

1989 CanLII 131 (SCC)

before him, Le Dain J. found that in dismissing the request for an adjournment on the ground that all the facts had already been fully considered in the first application, the Special Inquiry Officer usurped the discretion of the Minister to grant a permit. Le Dain J. added (at pp. 601-2):

> In my respectful opinion it is a clear implication of the *Ramawad* decision that when an application is made in the course of an inquiry for the consideration of a case on a humanitarian basis, in other words, for a Minister's permit, and there has not been a previous refusal to grant such a permit, based on the circumstances existing at the time the application is made, the authority of the Special Inquiry Officer to proceed with the inquiry is suspended until the application has been dealt with.

The majority decisions in *Louhisdon* and *Oloko* were approved by the Federal Court of Appeal in *Murray v. Minister of Employment and Immigration*, [1979] 1 F.C. 518 (leave to appeal to this Court refused, January 24, 1979, [1979] 1 S.C.R. x), although in that case, no formal application had been made for a ministerial permit prior to the inquiry.

The *Louhisdon*, *Oloko* and *Murray* decisions were reconsidered by the Federal Court of Appeal in *Minister of Employment and Immigration v. Widmont*, [1984] 2 F.C. 274. In *Widmont*, the applicant sought an order prohibiting the adjudicator presiding an immigration inquiry from rendering a decision before the disposition of an application for a ministerial permit made in the course of the inquiry. A majority of the Federal Court of Appeal (Urie and Mahoney JJ.) allowed the appeal from the decision of the Trial Division which had granted the order sought. Nevertheless, the Court of Appeal stayed execution of the judgment until the expiration of the time fixed to apply for leave to appeal to this Court, which was never done by the applicant.

In his reasons, Mahoney J. remarked that the *Immigration Act, 1976*, makes "no express provision for the adjournment of an inquiry to allow the

la demande de permis d'un requérant. Considérant les circonstances dont il était saisi, le juge Le Dain a conclu qu'en rejetant la demande d'ajournement pour le motif que tous les faits avaient déjà été pleinement pris en considération dans la première demande, l'enquêteur spécial avait usurpé le pouvoir discrétionnaire du ministre d'accorder un permis. Le juge Le Dain ajoute (aux pp. 601 et 602):

> À mon humble avis, la décision dans l'affaire *Ramawad* implique clairement que lorsqu'une demande est faite, au cours d'une enquête, pour qu'un cas examiné sur un aspect humanitaire, en d'autres termes, pour obtenir un permis du Ministre, et que ce permis n'a pas été refusé auparavant, d'après les circonstances qui existaient au moment où la demande a été faite, le pouvoir de l'enquêteur spécial de procéder à l'enquête est suspendu jusqu'à ce que la demande ait été étudiée.

Les arrêts *Louhisdon* et *Oloko* rendus à la majorité ont été approuvés par la Cour d'appel fédérale dans l'arrêt *Murray c. Ministre de l'Emploi et de l'Immigration*, [1979] 1 C.F. 518 (autorisation de pourvoi à cette Cour refusée, le 24 janvier 1979, [1979] 1 R.C.S. x) mais, dans cette dernière affaire, aucune demande formelle de permis du ministre n'avait été présentée avant l'enquête.

Dans l'arrêt *Ministre de l'Emploi et de l'Immigration c. Widmont*, [1984] 2 C.F. 274, la Cour d'appel fédérale a réexaminé les arrêts *Louhisdon*, *Oloko* et *Murray*. Dans l'affaire *Widmont*, la requérante a requis une ordonnance interdisant à l'arbitre qui présidait une enquête d'immigration de rendre une décision avant que le ministre ait fait connaître sa décision sur une demande de permis présentée au cours de l'enquête. La Cour d'appel fédérale à la majorité (les juges Urie et Mahoney) a accueilli l'appel de la décision de la Division de première instance qui avait accordé l'ordonnance demandée. La Cour d'appel a décidé néanmoins de surseoir à l'exécution du jugement jusqu'à l'expiration du délai fixé pour demander une autorisation de pourvoi en cette Cour, ce que la requérante n'a jamais fait.

Dans ses motifs, le juge Mahoney a noté que la *Loi sur l'immigration de 1976* ne contenait «aucune disposition explicite sur l'ajournement des

1989 CanLII 131 (SCC)

Minister to deal with a request for a permit under subsection 37(1)" (p. 285). By contrast, he noted that there are provisions mandating an adjournment in a number of other circumstances (ss. 29(5), 43(1), 45(1) of the Act, and s. 27(3) of the *Immigration Regulations, 1978*). Commenting on s. 35(1) of the Regulations, which gives a discretion to adjourn "for the purpose of ensuring a full and proper inquiry", Mahoney J. said (at p. 285):

I think it fair to say that the currently accepted view is that the Minister's consideration of whether to issue a permit under subsection 37(1) has nothing at all to do with ensuring a full and proper inquiry and that, therefore, an adjudicator is not required to adjourn for that purpose.

He then considered the *Ramawad* case and subsequent interpretation in *Louhisdon*, *Oloko* and *Murray*, and concluded that it had been "consistently held that the refusal of an adjudicator to adjourn an inquiry to allow the person concerned to seek relief under either section 37 or 115 did not vitiate the ensuing deportation order or departure notice" (p. 289). Mahoney J. saw no reason to reverse or distinguish these cases (at p. 292):

The majority and dissenting judgments in *Louhisdon* leave me in no doubt that the Court there fully considered the issue. It chose to restrict the application of *Ramawad* to its own facts, rather than to apply its principle more generally. It may have been wrong. If it was it is plainly a situation which Parliament, indeed the Governor in Council, is at liberty to alter and the Supreme Court to correct. Whether it be termed judicial comity or an application of the principle of *stare decisis*, I consider myself obliged to apply *Louhisdon*. [Emphasis added.]

Urie J. agreed with these reasons. He wrote additional, concurring reasons, saying that *Louhisdon* and *Oloko* were not distinguishable "in any meaningful sense", and found himself unable to say that these cases had been wrongly decided because he was not "satisfied that the Courts in *Louhisdon*, *Oloko* and *Murray* cases and in subsequent interpretation in *Louhisdon*, *Oloko* and *Murray*, and concluded that it had been "consistently held that the refusal of an adjudicator to adjourn an inquiry to allow the person concerned to seek relief under either section 37 or 115 did not vitiate the ensuing deportation order or departure notice" (p. 289). Mahoney J. saw no reason to reverse or distinguish these cases (at p. 292):

enquêtes en vue de permettre au Ministre de statuer sur une demande de permis présentée en vertu du paragraphe 37(1)» (p. 285). Par contre, il a signalé la présence de dispositions qui exigeaient un ajournement dans plusieurs autres circonstances (par. 29(5), 43(1), 45(1) de la Loi, et le par. 27(3) du *Règlement sur l'immigration de 1978*). Commentant le par. 35(1) du Règlement qui donne le pouvoir discrétionnaire d'ajourner «afin de veiller à ce qu'elle [l'enquête] soit complète et régulière», le juge Mahoney a dit (à la p. 285):

Je crois qu'on peut à bon droit affirmer que tous s'entendent pour dire que la décision du Ministre d'octroyer un permis en vertu du paragraphe 37(1) n'a rien à voir avec l'obligation de veiller à ce que l'enquête soit complète et régulière et que, par conséquent, l'arbitre n'est pas tenu d'ajourner une enquête à cette fin.

Il a alors examiné l'arrêt *Ramawad* et son interprétation ultérieure dans les arrêts *Louhisdon*, *Oloko* et *Murray*, et a conclu que «la Cour fédérale a statué de façon constante que le refus de l'arbitre d'ajourner une enquête afin de permettre à la personne en cause de demander un redressement en vertu des articles 37 ou 115 ne vicie pas l'ordonnance d'expulsion ou l'avis d'interdiction de séjour prononcé par la suite» (p. 289). Le juge Mahoney n'a vu aucune raison de renverser ces arrêts ou de les distinguer (à la p. 292):

Je suis persuadé, à la lecture des jugements de la majorité et du juge dissident dans l'affaire *Louhisdon*, que la Cour a examiné la question à fond. La Cour a choisi de restreindre l'application de l'arrêt *Ramawad* à ses propres faits, au lieu de donner une application plus générale aux principes qui y étaient dégagés. La Cour a peut-être eu tort. Dans ce cas, il s'agit manifestement d'une situation que le Parlement, et, bien sûr, le gouverneur en conseil, sont libres de modifier et que la Cour suprême peut corriger. Qu'on qualifie le problème de question de courtoisie judiciaire ou d'application du principe du *stare decisis*, je me considère obligé d'appliquer l'arrêt *Louhisdon*. [Je souligne.]

Le juge Urie a été d'accord avec ces motifs. Il a rédigé des motifs supplémentaires au même effet, disant que les arrêts *Louhisdon* et *Oloko* comportaient de légères différences mais qu'elles n'étaient pas «suffisamment importantes» pour établir une distinction. Il s'est dit incapable d'affirmer que ces arrêts étaient erronés parce qu'il n'était pas «con-

1989 CanLII 131 (SCC)

quent appeals which followed those cases, failed properly to distinguish the *Ramawad* case" (p. 282).

MacGuigan J. wrote a strong dissent. Contrary to the majority, he did not feel bound to apply *Louhisdon* and *Oloko*, as he believed his "higher duty [was] surely to apply the law as interpreted by the Supreme Court of Canada" (pp. 295-96). He could not agree with the restrictive interpretation of *Ramawad* adopted in these cases. He emphasized that an applicant had a right to have a demand under s. 37 of the *Immigration Act, 1976*, considered by the Minister, and that the applicant should be given a genuine opportunity to exercise that right "before that opportunity is forever foreclosed by an order of deportation issued by a lower-level official" (p. 297). In MacGuigan J.'s opinion, it did not matter whether an application was on its face a meritorious or non-meritorious one for ministerial intervention. The judgment to be exercised pursuant to s. 37 of the Act involved not only humanitarian and compassionate considerations, but political ones as well, and, in MacGuigan J.'s view, such powers of appreciation fell outside the adjudicator's sphere of inquiry. Accordingly, he concluded that "an adjudicator must grant an adjournment in all cases when faced with an application for a Minister's permit under subsection 37(1)" (p. 300). (Emphasis added.)

This Court is now being asked to bring a definitive end to this jurisprudential controversy. It is not without significance that this appeal comes to this Court by way of special leave from the Federal Court of Appeal, [1985] 2 F.C. 81.

In her oral pleadings, the appellant abandoned her ground of appeal based on the application pursuant to s. 115(2) of the *Immigration Act, 1976*. I will accordingly limit my own reasons to the request for an adjournment in the context of an application under s. 37(1) of the Act.

Generally speaking, the statutory regime instituted by the *Immigration Act, 1976*, is a very

vaincu que les tribunaux n'ont pas établi les distinctions appropriées entre l'arrêt *Ramawad* et les décisions *Louhisdon*, *Oloko*, *Murray* et les appels qui les ont suivis» (p. 282).

Le juge MacGuigan a rédigé une forte dissidence. Contrairement à la majorité, il ne s'est pas estimé tenu d'appliquer les arrêts *Louhisdon* et *Oloko* car il a été d'avis que son «obligation première [était] certainement d'appliquer la loi selon l'interprétation qu'en a faite la Cour suprême du Canada» (p. 296). Il n'a pu accepter l'interprétation restrictive de l'arrêt *Ramawad* adoptée dans ces arrêts. Il a souligné qu'un requérant avait le droit de voir sa demande fondée sur l'art. 37 de la *Loi sur l'immigration de 1976* examinée par le ministre et que le requérant devrait avoir une possibilité réelle d'exercer ce droit «avant que cette occasion ne lui soit enlevée à jamais par un ordre d'expulsion délivré par un fonctionnaire d'un niveau inférieur» (p. 297). Selon le juge MacGuigan, il n'importait pas de savoir si une demande paraissait ou ne paraissait pas mériter l'intervention du ministre. Le jugement à exercer en application de l'art. 37 de la Loi implique non seulement des considérations à caractère humanitaire, mais aussi à caractère politique, et, de l'avis du juge MacGuigan, ces pouvoirs d'appréciation ne peuvent relever de la compétence de l'arbitre dans le cadre d'une enquête. Par conséquent, il a conclu «qu'un arbitre doit accorder un ajournement dans tous les cas où il est confronté à une demande de permis du Ministre en vertu du paragraphe 37(1)» (p. 300). (Je souligne.)

On prie maintenant cette Cour de mettre fin à cette controverse dans la jurisprudence. Il n'est pas sans importance de signaler que ce pourvoi nous vient par suite d'une autorisation spéciale de la Cour d'appel fédérale, [1985] 2 C.F. 81.

Dans sa plaidoirie, l'appelante a abandonné son moyen d'appel fondé sur la demande faite en application du par. 115(2) de la *Loi sur l'immigration de 1976*. Je limiterai donc mes motifs à la demande d'ajournement dans le contexte d'une demande fondée sur le par. 37(1) de la Loi.

De manière générale, le régime institué par la *Loi sur l'immigration de 1976* est très rigide. Les

1989 CanLII 131 (SCC)

rigid one. Persons other than Canadian citizens must comply with the strict conditions and requirements of the legislation. Where there exists information indicating that a non-citizen has failed to act in conformity with the statute or has breached the conditions of his right to remain in the country, immigration officials are empowered to submit a report to the Deputy Minister. The latter may in his discretion cause an immigration inquiry to be held, for the purpose of determining whether the allegations in the report are well-founded. If this is found to be so, the adjudicator presiding the inquiry is under a statutory duty to make a removal order against the person concerned. Visitors and immigrants thus find themselves in a more vulnerable situation under the law than Canadian citizens. In addition to criminal justice which applies to all, improper conduct on the part of non-citizens can result further in their removal from the country.

The purpose of s. 37(1) of the *Immigration Act, 1976*, is to provide some relief from the harshness of the penalties provided by the statutory scheme. This remedial provision allows the Minister or a person designated by him to override the other provisions of the Act in order to tailor particular solutions to suit the needs of individual cases. It holds out to persons subjected to a pending inquiry that there is for them a possibility to remain in Canada notwithstanding the fact that a technical application of the statute may result in their deportation. As pointed out by Wydrzynski, op. cit., at p. 350, "permits are normally made available in situations of hardship involving humanitarian and compassionate circumstances". In this context, while I think it clear that a person suffering hardship of this kind has no legal right to obtain a permit under s. 37(1) of the *Immigration Act, 1976*, it appears equally clear to me that such a person has a right in the sense of a legal entitlement to obtain a decision from the Minister as to whether his or her case is deserving of special relief. The Minister has no power to issue a permit to a person against whom a removal order has been made, pursuant to s. 37(2) of the *Immigration Act, 1976*, although such a person might otherwise be deserving of special consideration. Accordingly, the denial of a request to adjourn the

personnes qui n'ont pas la citoyenneté canadienne doivent se conformer aux conditions et exigences strictes de la loi. Lorsque des renseignements indiquent qu'un non-citoyen n'a pas agi conformément à la loi ou a violé les conditions de son droit de demeurer au Canada, les fonctionnaires de l'immigration ont le pouvoir de présenter un rapport au sous-ministre. À sa discrétion, ce dernier peut faire tenir une enquête d'immigration en vue de déterminer le bien-fondé des allégations du rapport. Si elles sont bien fondées, l'arbitre qui préside l'enquête est sous l'obligation légale de rendre une ordonnance d'expulsion contre la personne visée. Les visiteurs et les immigrants se trouvent ainsi dans une situation plus vulnérable en vertu de la loi que les citoyens canadiens. En plus des sanctions pénales applicables à tous, les non-citoyens coupables de conduite répréhensible sont passibles d'expulsion.

Le paragraphe 37(1) de la *Loi sur l'immigration de 1976* a pour but d'apporter une certaine souplesse à la rigueur des peines prévues par le régime établi par la Loi. Cette disposition réparatrice permet au ministre ou à une personne qu'il désigne de passer outre aux autres dispositions de la Loi et de façonner des solutions particulières qui répondent aux besoins de cas particuliers. Il indique aux personnes qui font l'objet d'une enquête qu'elles ont une possibilité de demeurer au Canada, même si l'application formaliste de la loi pouvait aboutir à leur expulsion. Comme le signale Wydrzynski, *op. cit.*, à la p. 350, [TRADUCTION] «les demandes de permis sont normalement prévues pour les cas où une situation difficile fait entrer en jeu des considérations d'ordre humanitaire». Dans ce contexte, s'il est clair, à mon avis, qu'une personne se trouvant dans une situation difficile de ce genre n'a pas de droit, comme tel, à l'obtention d'un permis en vertu du par. 37(1) de la *Loi sur l'immigration de 1976*, il est tout aussi clair que cette personne possède néanmoins un droit, en ce sens qu'elle est légitimement fondée à obtenir une décision du ministre pour déterminer si son cas mérite un redressement spécial. Selon le par. 37(2) de la *Loi sur l'immigration de 1976*, le ministre n'a pas le pouvoir de délivrer un permis à une personne qui a fait l'objet d'une ordonnance

1989 CanLII 131 (SCC)

immigration inquiry pending disposition of the application for a Minister's permit generally will constitute the denial of the right to obtain a decision from the Minister as well. In my view, this result could not have been intended by Parliament. Because of the type of persons and situations s. 37 of the Act contemplates, it must rather have been intended that a priority be attached to the processing of an application for a ministerial permit. This point is clearly dealt with by Le Dain J. in his dissenting reasons in *Oloko*. Speaking with characteristic persuasiveness, he explained (at pp. 600-601):

With great respect I am unable to see how this reasoning [in *Ramawad*] does not apply to an application in the course of an inquiry that a case be considered for a Minister's permit. There is in my opinion as much of a "substantive right" to obtain a decision as to whether a Minister's permit will be granted in a particular case as there is to obtain the Minister's decision as to whether a failure to comply with the conditions of an employment visa should be waived on the ground of special circumstances. Both decisions are discretionary in nature and a favourable answer may be regarded as a matter of "privilege", but the right in each case is the right to have one's application considered and dealt with, one way or another. The power to issue a Minister's permit was conferred, it seems to me, at least in part for the benefit of persons seeking to enter or to remain in the country and not as a power to be exercised only on the Minister's initiative. I think it must have been intended that it should be possible for a person seeking to enter or remain in the country to apply for a Minister's permit and to receive a decision from the Minister or a person authorized to exercise his authority. I would take the view that a person must not be effectively prevented by action of the immigration authorities from having an application for a Minister's permit considered before it is too late—that is, before an order of deportation is pronounced against him. It is true that an application for a Minister's permit may be made outside the country before a person seeks admission. There may also be an opportunity for a person who is in the country and who seeks to remain therein to apply for a Minister's permit before deportation proceedings are commenced. But there will often be circumstances in which a person has had no reason to suspect the possible need of a Minister's permit, and for whom the first effective opportunity to apply for such a permit

d'expulsion, même si cette personne peut par ailleurs mériter une considération spéciale. Par conséquent, le refus d'ajourner l'enquête d'immigration pour attendre la décision du ministre sur une demande de permis constituera généralement une négation du droit d'obtenir une décision du ministre. À mon avis, le Parlement n'a pas pu vouloir ce résultat. À cause du genre de personnes et de situations qu'envisage l'art. 37 de la Loi, il est plus probable qu'il ait voulu qu'on accorde une certaine priorité à l'étude d'une demande de permis du ministre. Le juge Le Dain, dans ses motifs dissidents de l'arrêt *Oloko*, traite clairement de ce point. Parlant avec une persuasion caractéristique, il explique (aux pp. 600 et 601):

En toute déférence, je ne peux voir pourquoi ce raisonnement [dans *Ramawad*] ne pourrait s'appliquer lorsqu'une demande est présentée, au cours d'une enquête, pour que le cas soit étudié en vue d'obtenir un permis du Ministre. À mon avis, on peut parler d'un «droit» lorsqu'il s'agit d'obtenir une décision sur la question de savoir si un permis du Ministre sera accordé dans un cas particulier autant que lorsqu'il est question d'obtenir la décision du Ministre sur la question de savoir si l'on devrait passer outre au défaut de se conformer aux conditions d'un visa d'emploi, à cause de circonstances particulières. Les deux décisions sont de nature discrétionnaire et, si elles sont favorables, elles peuvent être considérées comme un «privilège», mais, dans chaque cas, il existe un droit de voir sa demande étudiée quel qu'en soit le résultat. Il me semblerait que le pouvoir de délivrer un permis du Ministre a été conféré, au moins en partie, à l'avantage des personnes qui désirent entrer ou demeurer au pays et ce pouvoir peut être exercé autrement que de la propre initiative du Ministre. Je pense qu'on a voulu qu'il soit possible, pour une personne qui désire entrer ou demeurer au pays, de faire une demande en vue d'obtenir un permis du Ministre et de recevoir une décision de la part de ce dernier ou d'une personne autorisée à exercer son pouvoir. Selon moi, une personne ne devrait pas être empêchée en réalité, par le fait des autorités de l'immigration, de faire examiner sa demande d'obtention d'un permis du Ministre avant qu'il ne soit trop tard, c'est-à-dire avant qu'une ordonnance d'expulsion soit prononcée contre elle. Il est vrai que cette demande peut être faite à l'extérieur du pays, avant que l'intéressé demande son admission. La même demande peut aussi être faite par une personne qui se trouve au pays et qui désire y demeurer, avant que des procédures d'expulsion soient entreprises contre elle. Mais il existe de nombreuses

1989 CanLII 131 (SCC)

arises in the course of an inquiry. It may not be until the conclusion of an inquiry that a person concerned becomes aware of the need to seek a Minister's permit. It may not be until he sees the nature of the evidence adduced and hears the Special Inquiry Officer's summing up that he realizes that his case is one calling for the humanitarian consideration permitted under section 8 of the Act. [Emphasis added.]

Moreover, the expanding doctrine of administrative fairness strongly militates in favour of ensuring that the inquiry is not held in a way which denies the applicant his entitlement to a decision from the Minister (see, in the context of an Order-in-Council under s. 115(2) of the *Immigration Act, 1976*, *Jiminez-Perez v. Minister of Employment and Immigration*, [1983] 1 F.C. 163 (C.A.), at p. 171, aff'd in part on another point [1984] 2 S.C.R. 565).

The language of s. 35(1) of the *Immigration Regulations, 1978*, must accordingly be interpreted in light of this priority which attaches to applications for a ministerial permit. As a general rule, where an application for a permit is made pursuant to s. 37(1) of the *Immigration Act, 1976*, the adjudicator must adjourn the immigration inquiry pending the disposition of the applicant's request by the Minister or someone authorized to exercise the Minister's authority. This will be the case where "there has not been a previous refusal to grant such a permit, based on the circumstances existing at the time the application is made" (*Oloko*, *supra*, at p. 601, *per* Le Dain J., dissenting). Although the adjudicator has discretion to adjourn by virtue of s. 35(1) of the *Immigration Regulations, 1978*, where an application under s. 37(1) of the Act is made before a determination is reached on the merits of the immigration inquiry, the adjudicator may exercise this discretion and refuse the adjournment in those cases where doing so will not compromise the applicant's entitlement to a consideration of his case and a decision from the Minister.

The respondent argues that the recognition of such a priority to applications for a ministerial

circonstances dans lesquelles une personne n'a eu aucune raison de se douter qu'elle aurait besoin d'un permis du Ministre et pour qui la première occasion de demander ce permis se présente au cours d'une enquête. Il peut arriver que la personne concernée ne se rende compte qu'à la fin de l'enquête qu'elle a besoin de demander un permis du Ministre. Il se peut qu'elle ne se rende compte que son cas peut donner lieu à une considération pour des motifs humanitaires permise par l'article 8 de la Loi qu'après avoir constaté la nature de la preuve fournie et entendu le résumé de l'enquêteur spécial. [Je souligne.]

De plus, la doctrine de l'équité administrative milite clairement en faveur du besoin d'assurer que l'enquête n'est pas tenue d'une manière qui nie au requérant son droit à une décision du ministre (voir, dans le contexte d'un décret en vertu du par. 115(2) de la *Loi sur l'immigration de 1976*, l'arrêt *Jiminez-Perez c. Ministre de l'Emploi et de l'Immigration*, [1983] 1 C.F. 163 (C.A.), à la p. 171, confirmé en partie sur un autre point, [1984] 2 R.C.S. 565).

Le libellé du par. 35(1) du *Règlement sur l'immigration de 1978* doit donc être interprété en fonction de la priorité à donner aux demandes de permis du ministre. En règle générale, lorsqu'une demande de permis est faite en vertu du par. 37(1) de la *Loi sur l'immigration de 1976*, l'arbitre doit ajourner l'enquête d'immigration jusqu'à ce que le ministre, ou une personne autorisée à exercer le pouvoir du ministre, rende une décision sur la demande du requérant. Ce sera le cas lorsque «ce permis n'a pas été refusé auparavant, d'après les circonstances qui existaient au moment où la demande a été faite» (*Oloko*, précité, à la p. 601, opinion dissidente du juge Le Dain). Bien qu'en vertu du par. 35(1) du *Règlement sur l'immigration de 1978*, l'arbitre ait le pouvoir discrétionnaire d'ajourner, lorsqu'une demande fondée sur le par. 37(1) de la Loi est présentée avant qu'une décision soit rendue sur le fond de l'enquête d'immigration, l'arbitre peut exercer ce pouvoir discrétionnaire et refuser l'ajournement dans les cas où cela ne compromettra pas le droit du requérant à un examen de son cas et à une décision du ministre.

L'intimé allègue que la reconnaissance d'une telle priorité aux demandes de permis du ministre

1989 CanLII 131 (SCC)

permit would "result in considerable and needless delays" and would ultimately "disrupt and paralyze the conduct of immigration inquiries". In my view there is no merit to this contention. There already are a great number of applications made for ministerial permits at various stages of the immigration process. An administrative structure has been put into place to consider and deal with these applications as efficiently as possible. It appears that the Minister has delegated his authority to issue permits to Managers of Canada Immigration Centres, which speeds up the procedure (see *Beeston v. Minister of Employment and Immigration* (1982), 41 N.R. 260 (F.C.A.)) In *Widmont*, *supra*, at p. 293, Mahoney J. said in this respect: "I cannot conceive that anything should be much easier or inexpensive than for the Minister to so order his bureaucracy that applications under section 37 would routinely be dealt with speedily and with no resulting adverse effect, including undue delay, on the adjudicative process". I share this confidence in the flexibility of the immigration system and would only add that any additional expense which might be required to bring the existing administrative structures in line with Parliament's intention and the requirements of administrative fairness is no extravagant luxury given the need for remedial provisions such as s. 37 in a public service mindful of individual concerns and especially those individuals who are in a more vulnerable position.

For these reasons, I would allow the appeal, set aside the deportation order issued against the appellant and remit the matter in the hands of the adjudicator for a redetermination of the request for an adjournment.

Appeal dismissed, WILSON *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

Solicitors for the appellant: Rothe & Co., Vancouver.

Solicitor for the respondent: The Department of Justice, Vancouver.

[TRADUCTION] «aurait comme résultat des délais considérables et inutiles» et en définitive [TRADUCTION] «interromprait et paralyserait la tenue d'enquêtes d'immigration». À mon avis, cette prétention n'est pas fondée. Il y a déjà un grand nombre de demandes de permis du ministre faites à différents stades du processus d'immigration. On a mis en place une structure administrative pour examiner ces demandes de la façon la plus efficace possible. Il appert que le ministre a délégué son pouvoir d'émettre des permis à des directeurs de Centres d'Immigration Canada, ce qui accélère la procédure (voir *Beeston c. Ministre de l'Emploi et de l'Immigration* (1982), 41 N.R. 260 (C.A.F.)) Dans l'arrêt *Widmont*, précité, le juge Mahoney a dit à ce sujet à la p. 293: «Rien n'est plus facile ni économique pour le Ministre que d'ordonner à ses fonctionnaires de s'occuper au jour le jour des demandes présentées en vertu de l'article 37 avec diligence et sans que le processus de prise de décision de l'arbitre en souffre, notamment en raison de retards injustifiés». Je partage cette confiance dans la souplesse du système d'immigration et j'ajouterais seulement qu'aucune dépense supplémentaire qui pourrait être requise pour que les structures administratives existantes se conforment à l'intention du Parlement et aux exigences de l'équité administrative ne serait une dépense extravagante étant donné le besoin de dispositions réparatrices, comme l'art. 37, dans un service public conscient des inquiétudes des individus, et en particulier de ceux qui sont dans une situation plus vulnérable.

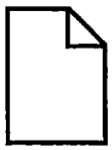
Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance d'expulsion rendue contre l'appelante et de renvoyer l'affaire à l'arbitre pour qu'il réexamine la demande d'ajournement.

Pourvoi rejeté, les juges WILSON *et* L'HEUREUX-DUBÉ *sont dissidentes.*

Procureurs de l'appelante: Rothe & Co., Vancouver.

Procureur de l'intimé: Le ministère de la Justice, Vancouver.

1989 CanLII 131 (SCC)



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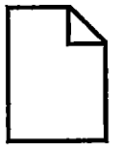

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2016 BCCA 312

Date: 20160715
Docket: CA42733

Between:

Dr. Nabil Riad Sahyoun

Appellant
(Petitioner)

And

Employment and Assistance Appeal Tribunal of British Columbia, Minister of Social Development and Social Innovation of British Columbia, and the Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 25, 2015 (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2015 BCSC 456, Vancouver Registry Docket S146526).

The Appellant appearing in person:	Dr. Nabil Riad Sahyoun
Counsel for the Respondent, Employment and Assistance Appeal Tribunal of British Columbia:	N. Iyer
Counsel for the Respondents, Minister of Social Development and Social Innovation of British Columbia, and the Attorney General of British Columbia:	K. Evans
Place and Date of Hearing:	Vancouver, British Columbia April 21, 2016
Place and Date of Judgment:	Vancouver, British Columbia July 15, 2016

2016 BCCA 312 (CanLII)

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris

2016 BCCA 312 (CanLII)

Summary:

After being denied certain benefits under the Employment and Assistance Act, the appellant unsuccessfully appealed to the Employment and Assistance Appeal Tribunal and had his judicial review of that appeal dismissed. The respondent Ministry refused to re-open its decision, and the Tribunal found that the Act does not provide the appellant with a right to appeal that refusal. The Chambers judge upheld the decision of the Tribunal. Held: appeal dismissed. The right to reconsideration under the Act applies only to certain classes of decisions – not to a refusal to reopen. The Tribunal's failure to provide the appellant with notice and an opportunity to make submissions regarding jurisdiction did not, in all the circumstances, lead to an unfair result.

2016 BCCA 312 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal is the latest chapter in the appellant's long-running attempt to obtain certain benefits under the *Employment and Assistance Act,* S.B.C. 2002, c. 40 (the "*EA Act*") and the *Employment and Assistance Regulation*, B.C. Reg. 263/2002 ("*EA Regulation*").

[2] The appellant first applied for benefits in September 2010 and January 2011. When the application was denied by the Ministry of Social Development and Social Innovation (the "Ministry"), the appellant appealed unsuccessfully to the Employment and Assistance Appeal Tribunal (the "Tribunal"). He then brought judicial review proceedings challenging the Tribunal's decision. Those proceedings were dismissed in the Supreme Court (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal),* 2012 BCSC 1306) (*Sahyoun #1*)) and in this Court (*Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2014 BCCA 86) (*Sahyoun Appeal*).

[3] Following the release of the reasons in *Sahyoun Appeal*, the appellant sought to re-open the Ministry decisions. When the Ministry refused to do so, the appellant appealed to the Tribunal. The Chair of the Tribunal refused to entertain the appeal holding that the proposed appeal did not fall within the classes of

decision subject to appeal under the *EA Act*. Madam Justice Holmes dismissed an application for judicial review. Her reasons are indexed at 2015 BCSC 456.

[4] The appellant now appeals the dismissal of his judicial review application. The main issue on the appeal is the scope of the appellant's rights of appeal to the Tribunal. The appeal also raises an issue of procedural fairness.

[5] For the reasons that follow I would dismiss the appeal.

BACKGROUND

[6] The background to this dispute has been well set out in the reasons of the chambers judge, of Stromberg-Stein J. (as she then was) in *Sahyoun #1* and of Low J.A. in *Sahyoun Appeal*. I will not repeat them other than is necessary to provide context for this appeal.

[7] The appellant and his wife were in receipt of social assistance under various provincial statutory regimes from 1986 until November 10, 2010, by which time he had turned 65 years of age. At that time, they began to receive federal income assistance.

[8] Commencing in September 2010, the appellant sought to have the Ministry designate him with the status of "a person who has persistent multiple barriers to employment" ("PPMB") under s. 2 of the *EA Regulation*, and to provide him with "medical services only" ("MSO") benefits under ss. 66.1 and 67 of the *EA Regulation*. After the Ministry denied these applications, the appellant sought reconsideration of them, and subsequently exercised his rights of appeal to the Tribunal.

[9] The Tribunal dismissed the appellant's appeal of the Ministry's denial of his application for PPMB status on May 10, 2011, and dismissed his appeal of the Ministry's denial of his application for MSO benefits on January 12, 2012 (collectively, the "Initial Decisions"). The appellant sought judicial review of the Initial Decisions and the petitions were heard together.

2016 BCCA 312 (CanLII)

[10] In support of his petitions for judicial review, the appellant sought to introduce evidence (the "New Evidence") that had not been before the Tribunal when it made the Initial Decisions. The appellant deposed that he had discovered the New Evidence in his home in March 2012 and May 2012, after the Tribunal had made the Initial Decisions.

[11] In *Sahyoun #1* Madam Justice Stromberg-Stein declined to consider the New Evidence and dismissed the appellant's petitions.

[12] On March 6, 2014, this Court in the *Sahyoun Appeal* dismissed the appellant's appeal. In dismissing the appeal Low J.A. said:

> [35] There is no merit in either appeal. The appellant attempted to persuade the ministry to backdate a designation never previously given to him, even by inference. He failed in the past and currently to provide necessary medical information. He read into past rulings designations that simply were not made. He did not meet statutory and regulatory criteria. He made his applications very late in the day when he could no longer qualify even if he had provided the necessary supporting medical information. The ministry's determinations of the issues raised by the appellant were reasonable and it is not arguable that either tribunal decision was patently unreasonable. The chambers judge did not err.

[13] The day after this Court dismissed his appeal, the appellant wrote to the Ministry and requested re-opening of the Initial Decisions. In his letter requesting that the Initial Decisions be re-opened, the appellant referenced the New Evidence he had discovered in his home in March 2012 and May 2012. In the letter the appellant says that this material was not before the Tribunal when it made the Initial Decisions but that he did put the material before the Supreme Court and the Court of Appeal court on the judicial reviews of the Initial Decisions.

[14] By letter dated March 26, 2014, in response to the appellant's request to re-open, a representative of the Ministry advised that the Ministry would not re-open the Initial Decisions.

[15] On May 29, 2014, the appellant requested reconsideration of this denial. The request for reconsideration was denied on June 11, 2014 on the basis that, under s. 17 of the *EA Act*, the Ministry can only reconsider decisions that result in a

2016 BCCA 312 (CanLII)

refusal, discontinuance or reduction of income assistance. As the refusal to re-open the Initial Decisions did not result in a refusal, discontinuance, or reduction of income assistance, it was not open to the Ministry to reconsider that refusal.

[16] On June 19, 2014, the appellant appealed to the Tribunal.

[17] On June 25, 2014, the Chair of the Tribunal wrote to the appellant and advised that the Tribunal did not have jurisdiction to proceed with the appeal. In her letter she said:

> The Ministry decision to refuse to reopen and complete a new reconsideration did not result in a refusal, discontinuance or a reduction of assistance or a supplement as set out in 17(1)(a) to (d). As a result, the Tribunal does not have the jurisdiction to proceed with the appeal and your file is now closed.

[18] Before making her decision, the Chair, contrary to Tribunal's *Practices and Procedures*, did not notify the parties in writing that the matter appeared to be outside the jurisdiction of the Tribunal. She did not invite the parties to make submissions on whether the matter was within the Tribunal's jurisdiction.

STATUTORY FRAMEWORK

[19] The statutory provisions relevant to his appeal are found in ss. 17, 18, 19, 19.1 and s. 20(2) of the *EA Act*, s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 and s. 3.2 (d) of the Tribunal's *Practices and Procedures*.

[20] The Tribunal is established under s. 19 of the *EA Act* to hear appeals from reconsideration decisions of the Ministry. Sections 17 and 18 of the *EA Act* set out the circumstances in which an appeal can be brought. Those sections read:

> **Reconsideration and appeal rights**
>
> **17** (1) Subject to section 18, a person may request the minister to reconsider any of the following decisions made under this Act:
>
> (a) a decision that results in a refusal to provide income assistance, hardship assistance or a supplement to or for someone in the person's family unit;
>
> (b) a decision that results in a discontinuance of income assistance or a supplement provided to or for someone in the person's family unit;

2016 BCCA 312 (CanLII)

(c) a decision that results in a reduction of income assistance or a supplement provided to or for someone in the person's family unit;

(d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of

(i) the maximum amount of the supplement under the regulations, and

(ii) the cost of the least expensive and appropriate manner of providing the supplement;

(e) a decision respecting the conditions of an employment plan under section 9 [*employment plan*].

(2) A request under subsection (1) must be made, and the decision reconsidered, within the time limits and in accordance with any rules specified by regulation.

(3) Subject to a regulation under subsection (5) and to sections 9 (7) [*employment plan*], 18 and 27 (2) [*overpayments*], a person who is dissatisfied with the outcome of a request for a reconsideration under subsection (1) (a) to (d) may appeal the decision that is the outcome of the request to the tribunal.

(4) A right of appeal given under subsection (3) is subject to the time limits and other requirements set out in this Act and the regulations.

(5) The Lieutenant Governor in Council may designate by regulation

(a) categories of supplements that are not appealable to the tribunal, and

(b) circumstances in which a decision to refuse to provide income assistance, hardship assistance or a supplement is not appealable to the tribunal.

No appeal from decision based on same circumstances

18 If a person reapplies for income assistance, hardship assistance or a supplement after

(a) the eligibility of the person's family unit for the income assistance, hardship assistance or supplement has been determined under this Act,

(b) a right of appeal under section 17 (3) has been exercised in respect of the determination referred to in paragraph (a), and

(c) the decision of the tribunal in respect of the appeal referred to in paragraph (b) has been implemented,

no right of reconsideration or appeal exists in respect of the second or a subsequent application unless there has been a change in circumstances relevant to the determination referred to in paragraph (a).

2016 BCCA 312 (CanLII)

[21] The *EA Act* contains a strong privative clause at ss. 24(6) and (7). Pursuant to s. 19.1 of the *EA Act,* s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 applies to the Tribunal. That section reads:

> **Standard of review with privative clause**
>
> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[22] The Tribunal's *Practices and Procedures* are established by the Chair under s. 20(2) of the *EA Act*. The *Practices and Procedures* are to be followed during the appeal process subject to any circumstances that justify a departure from their requirements. Section 3.2 provides a mechanism to screen an appeal to determine whether it complies with the specified form, has been submitted within the specified time limit and whether the tribunal has jurisdiction over the appeal. Section 3.2 (d) concerns appeals that relate to matters outside the Tribunal's jurisdiction. In relation to such appeals, the *Practices and Procedures* state:

2016 BCCA 312 (CanLII)

(i) if the appeal relates to a matter that appears to be outside the jurisdiction of the Tribunal, the Tribunal will notify the parties in writing.

(ii) the Tribunal may invite the parties to make submissions on the Tribunal's jurisdiction. The Tribunal Chair will then determine, based on any submissions received, if the Tribunal has jurisdiction over the appeal and will notify the parties in writing of the decision.

2016 BCCA 312 (CanLII)

THE JUDICIAL REVIEW DECISION

[23] In her reasons the chambers judge first determined that the Chair's decision was based on her interpretation of provisions of the Tribunal's enabling statute. Therefore, the applicable standard of review under ss. 58(1) and (2) of the *Administrative Tribunals Act* was patent unreasonableness.

[24] The chambers judge then considered the New Evidence. She held that New Evidence could not assist Dr. Sahyoun in overcoming the Tribunal's conclusion in the Initial Decisions.

[25] After addressing the New Evidence, the chambers judge turned to whether or not the Chair's decision declining to hear the appeal was patently unreasonable. That issue involved interpretation of s. 17 of the *EA Act* which sets out the Tribunal's jurisdiction to hear appeals. The chambers judge concluded that the Chair's decision was not patently unreasonable, explaining at paragraphs 14 and 15 of her reasons:

> [14] The Chair's decision amounted, rather, to a conclusion, based on her interpretation of the enabling statute, that Dr. Sahyoun's claims had been conclusively determined in the proceedings that began with the original decisions and continued to *Sahyoun* (BCCA), and that the avenues for reconsideration or appeal under ss. 17 and 18 of the *Act* were not available to Dr. Sahyoun. The right under s. 17 of the *Act* applies only to the listed classes of decisions, and the Chair clearly viewed the refusal to reopen the original decisions as not within the listed classes. The refusal to reopen was not a decision that resulted in a refusal of status or assistance, but, rather, was a refusal to revisit the refusals made and upheld years earlier.
>
> [15] In her interpretation of the *Act*, the Chair was entitled to deference. Her decision was not patently unreasonable.

[26] The chambers judge then considered and rejected the appellant's argument that s. 18 of the *EA Act* allowed for his application for reconsideration, and

therefore his appeal, because the New Evidence gave rise to a change in circumstances. She held that there was no change in circumstances as the New Evidence put forward by the appellant merely fortified positions which had already been rejected in the Initial Decisions and upheld in the prior judicial review proceedings.

[27] The Chambers judge then considered the implication of the Chair's failure to follow the Tribunal's *Practices and Procedures* and give notice and invite submissions on the jurisdiction issue. She concluded that in the circumstances of this case nothing would be gained by remitting the matter to the Chair for notice to the parties to be given. In that regard she held that the Chair was under no obligation to invite the parties to make submissions concerning the Tribunal's jurisdiction to hear the appeal. Further and in any event, even if the Tribunal heard the appeal, it was bound to fail because the New Evidence could not assist the appellant for the reasons she had discussed.

2016 BCCA 312 (CanLII)

ISSUES ON APPEAL

[28] There are two issues on the appeal. The first concerns the decision of the Chair that the Tribunal did not have jurisdiction to hear the appeal. The second concerns whether the failure of the Chair to follow the Tribunal's *Practices and Procedures* rendered the decision unfair.

DISCUSSION

[29] The standard of review is set out in s. 58 of the *Administrative Tribunals Act*. Accordingly any finding of fact or law or an exercise of discretion by the Tribunal must not be interfered with unless it is patently unreasonable. Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the Tribunal acted fairly.

[30] The avenues for reconsideration or appeal are found in ss. 17 or 18 of the *EA Act*. The Chair found, based on her interpretation of the enabling statute that

the appellant's claim had been conclusively determined in the proceedings that began with the Initial Decisions and culminated in the unsuccessful judicial reviews of those decisions. Accordingly the avenues for reconsideration or appeal under section 17 or 18 of the *EA Act* were not available to the appellant.

[31] To succeed on this appeal, the appellant must establish that the decision of the Chair was patently unreasonable. The Chair's interpretation of her home statue is entitled to deference. I can find no error in the chambers judge's analysis: I agree with her finding that the Chair's decision was not patently unreasonable. I would not accede to this ground of appeal.

[32] In regard to the question of procedural fairness, it is clear that the Chair failed to follow the Tribunal's *Practices and Procedures*. The *Practices and Procedures* required the Tribunal to notify the parties in writing if the matter appeared to be outside the jurisdiction of the Tribunal and in those circumstances, the Tribunal could invite the parties to make submissions on the Tribunal's jurisdiction. In this case, no notification was given in advance of the decision.

[33] That however is not the end of the matter. Questions of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the Tribunal acted fairly. Accepting, without deciding, that the failure to give notice and invite submissions was a breach of natural justice, I find in the circumstances of this case that it would not be appropriate to return the matter to the Tribunal. In my view the Chair's decision that the Tribunal lacked jurisdiction to hear the appeals was not only not patently unreasonable, it was correct. The right to reconsideration under s. 17 applies only to the listed classes of decisions – not to the refusal to reopen. In these circumstances, I agree with the chambers judge that nothing would be gained by remitting the matter to the Chair to invite the parties to make submissions concerning the Tribunal's jurisdiction. The Chair's actions did not lead to an unfair result.

[34] I would not accede to this ground of appeal.

2016 BCCA 312 (CanLII)

[35] For completeness I should note that the appellant spent some time in his submissions trying to convince us that the Initial Decisions were wrongly decided and he was entitled to the benefits he has been seeking from the time of his initial application in September 2010. The correctness of the Initial Decisions is not a matter before us on this appeal and it would not be appropriate for us to opine on that issue.

[36] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Harris"

2016 BCCA 312 (CanLII)

APPENDIX "B"

INDEX

This is Exhibit "J" referred to in the
Affidavit of Joanne Rodriguez
sworn (or affirmed) before me at
Toronto, Ontario
this 19th day of December, 2018.

A Commission for Taking Affidavits for Ontario
Daniel Attard
Barrister & Solicitor
LSUC # 35355T

TRANSPORTATION APPEAL TRIBUNAL OF CANADA
TRIBUNAL D'APPEL DES TRANSPORTS DU CANADA

333 Laurier Avenue West, Room 1201 – 333, avenue Laurier Ouest, Pièce 1201 – Ottawa, Canada K1A 0N5
Tel./Tél.: (613) 990-6906 – Fax/Téléc.: (613) 990-9153 – E-mail/Courriel: info@tatc.gc.ca

May 30, 2018

TATC File No.: O-4392-80
CTA File No.: 17-06204

SAUDI ARABIAN AIRLINES CORP., Applicant
and
CANADIAN TRANSPORTATION AGENCY, Respondent

BY REGISTERED MAIL:

Mr. Ehsan T. Monfared
YYZ Law
100 Richmond Street West
Suite 330
Toronto, Ontario
M5H 3K6

BY MAIL:

Ms. Kizzy Barrett
Legal, Secretariat and Registrar Services Branch
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec
K1A 0N9

c.c. Karine Matte

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN THAT A **REVIEW HEARING** on the above matter will be held:

SEPTEMBER 19, 2018

9:00 A.M.

VICTORY VERBATIM
THE ERNST & YOUNG TOWER
222 BAY STREET, SUITE 900
TORONTO, ONTARIO

A translation of the particular details in this form into the other official language may be obtained from the Tribunal.

AVIS D'AUDIENCE

SACHEZ QU'UNE **AUDIENCE EN RÉVISION** relative à l'affaire en rubrique sera tenue :

La traduction des compléments d'information de ce formulaire vers l'autre langue officielle peut être obtenue sur demande auprès du Tribunal.

Sylvie Fournier
Sylvie Fournier
Registrar / Greffière

Canada

This is Exhibit "M" referred to in the
Affidavit of Joanne Rodriguez
sworn (or affirmed) before me at
Toronto, Ontario
this 19th day of December, 2018.

A Commission for Taking Affidavits for Ontario
Daniel Attard
Barrister & Solicitor
LSUC # 35355T

TRANSPORTATION APPEAL TRIBUNAL OF CANADA
TRIBUNAL D'APPEL DES TRANSPORTS DU CANADA

333 Laurier Avenue West, Room 1201 – 333, avenue Laurier Ouest, Pièce 1201 Ottawa, Canada K1A 0N5
Tel./Tél.: (613) 990-6906 – Fax/Téléc.: (613) 990-9153 – E-mail/Courriel: info@tatc.gc.ca

September 17, 2018

TATC File No.: O-4392-80
CTA File No.: 17-06204

SAUDI ARABIAN AIRLINES CORP., Applicant
and
CANADIAN TRANSPORTATION AGENCY, Respondent

BY ELECTRONIC MAIL:

Mr. Ehsan T. Monfared
YYZ Law
100 Richmond Street West
Suite 330
Toronto, Ontario
M5H 3K6

BY ELECTRONIC MAIL:

Ms. Kizzy Barrett
Legal, Secretariat and Registrar Services Branch
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

c.c. Karine Matte

NOTICE OF CANCELLATION OF HEARING

NOTICE IS HEREBY GIVEN THAT THE **REVIEW HEARING** ON THE ABOVE MATTER SCHEDULED FOR:

SEPTEMBER 19, 2018 AT 9:00 A.M.
VICTORY VERBATIM
THE ERNST & YOUNG TOWER
222 BAY STREET, SUITE 900
TORONTO, ONTARIO

HAS BEEN CANCELLED as the notice of violation has been withdrawn. THIS FILE IS NOW CLOSED.

AVIS D'ANNULATION D'AUDIENCE

SACHEZ QU'UNE AUDIENCE EN RÉVISION relative à l'affaire en rubrique fixée :

A ÉTÉ ANNULÉE vu que l'intimé a retiré son procès-verbal de violation. PAR CONSÉQUENT, LE DOSSIER EST MAINTENANT FERMÉ.

A translation of the particular details in this form into the other official language may be obtained from the Tribunal.

La traduction des compléments d'information de ce formulaire vers l'autre langue officielle peut être obtenue sur demande auprès du Tribunal.

Sylvie Fournier
Registrar / Greffière

CAT-18NW

Canada

This is Exhibit "N" referred to in the
Affidavit of Joanne Rodriguez
sworn (or affirmed) before me at
Toronto, Ontario
this 19th day of December, 2018.

A Commission for Taking Affidavits for Ontario
Daniel Attard
Barrister & Solicitor
LSUC # 35355T

Ehsan T. Monfared

From: Ehsan T. Monfared
Sent: September 18, 2018 1:12 PM
To: 'Cannon, Mary'
Cc: Karine Matte [redacted]; Fournier, Sylvie [redacted]
Subject: RE: Notice of Cancellation - TATC File No. O-4392-80

Dear Ms. Cannon,

Thank you for this Notice of Cancellation. Despite the cancellation of the hearing, we anticipate that the Tribunal remains seized of this matter. Accordingly, pursuant to Section 19(1) of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29, we intend to make submissions to the Tribunal regarding costs incurred in this process.

We believe that this can be done by way of written submissions and affidavit evidence, rather than requiring an in-person appearance. We anticipate that these submissions can be provided to the Canadian Transportation Agency and the Tribunal within 2 weeks of today's date. We would appreciate any specific instructions that the Tribunal has with regards to the process of making such written submissions as to costs.

Thanks.

Ehsan T. Monfared
Suite 330, 100 Richmond St W, Toronto, ON M5H 3K6
Tel: 416-681-9300 | Cell: 647-236-6500 | Fax: 647-343-9229
[redacted]

YYZlaw
AVIATION AND TRAVEL LAW

CONFIDENTIALITY NOTICE: The documents accompanying this e-mail transmission contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this e-mail in error, please advise us immediately. Thank you.

From: Cannon, Mary [redacted]
Sent: September 17, 2018 12:34 PM
To: Ehsan T. Monfared
Subject: Notice of Cancellation - TATC File No. O-4392-80

Mr. Monfared:

Re: Saudi Arabian Airlines v. Canadian Transportation Agency
TATC File No. O-4392-80

Please find attached the Notice of Cancellation in the above matter.

Regards,

Mary Cannon
Deputy Registrar
Transportation Appeal Tribunal of Canada
333 Laurier Avenue West, Room 1201
Ottawa, Ontario, K1A 0N5
[redacted]
T : 613-991-2537 / F: 613-990-9153

Mary Cannon
Greffière adjointe
Tribunal d'appel des transports du Canada
333, avenue Laurier Ouest, bureau 1201
Ottawa (Ontario) K1A 0N5
[redacted]
T : 613-991-2537/ Télécopieur: 613-990-9153

This is Exhibit "P" referred to in the
Affidavit of Joanne Rodriguez
sworn (or affirmed) before me at
Toronto, Ontario
this 19th day of December, 2018.

A Commission for Taking Affidavits for Ontario
Daniel Attard
Barrister & Solicitor
LSUC # 35355T

YYZ law
AVIATION AND TRAVEL LAW

100 RICHMOND ST W, SUITE 330
TORONTO, ON. CANADA M5H 3K6
T: 416.681.9500
F: 647.343.9229

September 24, 2018

SENT VIA E-MAIL

Ms. Sylvie Fournier
Registrar
Transportation Appeal Tribunal of Canada
333 Laurier Avenue West, Room 1201
Ottawa, Ontario
K1A 0N5

Dear Ms. Fournier:

Re: Saudi Arabian Airlines v. Canadian Transportation Agency - TATC File No. O-4392-80

We write in regard to your letter of September 19, 2018, indicating that it was the Transportation Appeal Tribunal of Canada's ("TATC") opinion that it was no longer seized of the above noted matter. In light of the Canadian Transportation Agency's ("CTA") withdrawal of the Notice of Violation, a mere 2 days before the hearing was set to begin, and the Registrar's view that the TATC is accordingly, unable to accept any submissions with respect to costs arising therefrom. We would respectfully disagree with this opinion, and instead direct your attention to the enclosed cases which outline circumstances where the withdrawal of a Notice of Violation or an equivalent document by a regulatory body, does not result in the TATC losing its jurisdiction.

Of course, if the TATC requires, we would be prepared to provide formal submissions, including a factum relating to this issue and would further indicate that this decision has been taken by the TATC seemingly without seeking any input from either of the parties involved in this matter. Of course, we intended to copy counsel for the CTA, and would welcome the CTA's position with respect to the matter of the TATC's jurisdiction at issue. As the case law discloses, appellate levels of review and the Federal Court have consistently ruled that in incidences where the originator of the jurisdiction of the TATC subsequently withdraws or vacates a Notice, that this does not result in a loss of jurisdiction by the TATC. In fact, we would argue that such outcome is contrary to the public interest and the principles of administrative law.

If the position of the TATC is that it no longer possesses any jurisdiction whatsoever to order costs pursuant to Section 19(1)(a) of the *Transportation Appeal Tribunal of Canada Act, S.C. 2001, c. 29*, then we would appreciate this determination to be in the form of a formal decision such that we can pursue additional avenues that may be available to our client.

We look forward to your further correspondence and the TATC's instruction with regard to this matter.

Yours very truly,

Ehsan T. Monfared

ETM/jr

This is Exhibit "Q" referred to in the
Affidavit of Joanne Rodriguez
sworn (or affirmed) before me at
Toronto, Ontario
this 19th day of December, 2018.

A Commission for Taking Affidavits for Ontario
Daniel Attard
Barrister & Solicitor
LSUC # 35355T

TRANSPORTATION APPEAL TRIBUNAL OF CANADA
TRIBUNAL D'APPEL DES TRANSPORTS DU CANADA

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September 27, 2018

Mr. Ehsan T. Monfared
YYZ Law
100 Richmond Street West
Suite 330
Toronto, Ontario
M5H 3K6

Mr. Monfared:

RE: Saudi Arabian Corporation - TATC File No. O-4392-80

This is in response to your correspondence of September 24, 2018 regarding a motion for costs in this matter.

As mentioned previously by letter dated September 19, 2018, the Tribunal is no longer seized of the matter.

Regards,

Charles Sullivan
A/Chairperson
Transportation Appeal Tribunal of Canada

c.c. Karine Matte, Legal Counsel
Canadian Transportation Agency

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1809-18
STYLE OF CAUSE:	SAUDI ARABIAN AIRLINES CORP. v TRANSPORTATION APPEAL TRIBUNAL OF CANADA AND CANADIAN TRANSPORT AGENCY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 16, 2019

ADDITIONAL WRITTEN MATERIAL FILED PURSUANT TO THE DIRECTION OF JUSTICE CAMPBELL DATED SEPTEMBER 16, 2019

JUDGMENT AND REASONS:	CAMPBELL J.
DATED:	NOVEMBER 1, 2019

APPEARANCES:

Ehsan Monfared	FOR THE APPLICANT
Barbara Cuber	FOR THE RESPONDENT TRANSPORTATION APPEAL TRIBUNAL OF CANADA
Karine Matte	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

YYZ Law Toronto, Ontario	FOR THE APPLICANT
Transportation Appeal Tribunal of Canada Ottawa, Ontario	FOR THE RESPONDENT TRANSPORTATION APPEAL TRIBUNAL OF CANADA
Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY