Court File No. T-1621-19

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

APPLICANT/MOVING PARTY

- and -

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

RESPONDENTS/RESPONDING PARTIES

BOOK OF AUTHORITIES OF THE RESPONDENT/RESPONDING PARTY

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proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

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

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

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

Reference by federal tribunal

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

ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

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

Renvoi d'un office fédéral

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

How proceeding against Crown instituted

48 (1) A proceeding against the Crown shall be instituted by filing in the Registry of the Federal Court the original and two copies of a document that may be in the form set out in the schedule and by payment of the sum of $2 as a filing fee.

Procedure for filing originating document

(2) The original and two copies of the originating document may be filed as required by subsection (1) by being forwarded, together with a remittance for the filing fee, by registered mail addressed to "The Registry, The Federal Court, Ottawa, Canada".

R.S., 1985, c. F-7, s. 48; 2002, c. 8, s. 45.

No juries

49 All causes or matters before the Federal Court of Appeal or the Federal Court shall be heard and determined without a jury.

R.S., 1985, c. F-7, s. 49; 2002, c. 8, s. 45.

Stay of proceedings authorized

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

Stay of proceedings required

(2) The Federal Court of Appeal or the Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown if it appears that the claimant has an action or a proceeding in respect of the same claim pending in another court against a person who, at the time when the cause of action alleged in the action or proceeding arose, was, in respect of that matter, acting so as to engage the liability of the Crown.

Lifting of stay

(3) A court that orders a stay under this section may subsequently, in its discretion, lift the stay.

R.S., 1985, c. F-7, s. 50; 2002, c. 8, s. 46.

Stay of proceedings

50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or

Acte introductif d'instance contre la Couronne

48 (1) Pour entamer une procédure contre la Couronne, il faut déposer au greffe de la Cour fédérale l'original et deux copies de l'acte introductif d'instance, qui peut suivre le modèle établi à l'annexe, et acquitter la somme de deux dollars comme droit correspondant.

Procédure de dépôt

(2) Les deux formalités prévues au paragraphe (1) peuvent s'effectuer par courrier recommandé expédié à l'adresse suivante : Greffe de la Cour fédérale, Ottawa, Canada.

L.R. (1985), ch. F-7, art. 48; 2002, ch. 8, art. 45.

Audition sans jury

49 Dans toutes les affaires dont elle est saisie, la Cour fédérale ou la Cour d'appel fédérale exerce sa compétence sans jury.

L.R. (1985), ch. F-7, art. 49; 2002, ch. 8, art. 45.

Suspension d'instance

50 (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

a) au motif que la demande est en instance devant un autre tribunal;

b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

Idem

(2) Sur demande du procureur général du Canada, la Cour d'appel fédérale ou la Cour fédérale, selon le cas, suspend les procédures dans toute affaire relative à une demande contre la Couronne s'il apparaît que le demandeur a intenté, devant un autre tribunal, une procédure relative à la même demande contre une personne qui, à la survenance du fait générateur allégué dans la procédure, agissait en l'occurrence de telle façon qu'elle engageait la responsabilité de la Couronne.

Levée de la suspension

(3) Le tribunal qui a ordonné la suspension peut, à son appréciation, ultérieurement la lever.

L.R. (1985), ch. F-7, art. 50; 2002, ch. 8, art. 46.

Suspension des procédures

50.1 (1) Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande

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Règles des Cours fédérales

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(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

(a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

Mistakes

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

Erreurs

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

Stay of order

398 (1) On the motion of a person against whom an order has been made,

(a) where the order has not been appealed, the court that made the order may order that it be stayed; or

(b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.

Sursis d'exécution

398 (1) Sur requête d'une personne contre laquelle une ordonnance a été rendue :

a) dans le cas où l'ordonnance n'a pas été portée en appel, la Cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;

b) dans le cas où un avis d'appel a été délivré, seul un juge de la Cour saisie de l'appel peut surseoir à l'ordonnance.

Conditions

(2) As a condition to granting a stay under subsection (1), a judge may require that the appellant

(a) provide security for costs; and

(b) do anything required to ensure that the order will be complied with when the stay is lifted.

Conditions

(2) Le juge qui sursoit à l'exécution d'une ordonnance aux termes du paragraphe (1) peut exiger que l'appelant :

a) fournisse un cautionnement pour les dépens;

b) accomplisse tout acte exigé pour garantir, en cas de confirmation de tout ou partie de l'ordonnance, le respect de l'ordonnance.

Setting aside of stay

(3) A judge of the court that is to hear an appeal of an order that has been stayed pending appeal may set aside the stay if the judge is satisfied that the party who sought the stay is not expeditiously proceeding with the appeal or that for any other reason the order should no longer be stayed.

SOR/2004-283, s. 40.

Annulation du sursis

(3) Un juge de la Cour saisie de l'appel d'une ordonnance qui fait l'objet d'un sursis peut annuler le sursis, s'il est convaincu qu'il n'y a pas lieu de le maintenir, notamment en raison de la lenteur à agir de la partie qui a demandé le sursis.

DORS/2004-283, art. 40.

Setting aside or variance

399 (1) On motion, the Court may set aside or vary an order that was made

(a) *ex parte*; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

Annulation sur preuve *prima facie*

399 (1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue :

a) toute ordonnance rendue sur requête *ex parte*;

b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 39
Date: September 6, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

arguments on this issue. The purpose of this ruling is to make a determination on the issue of compensation to victims/survivors of Canada's discriminatory practices.

III. The Panel's summary reasons and views on the issue of compensation

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real

needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group namely, First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the AGC's position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

IV. Parties' positions

[16] The Panel carefully considered all submissions from all the parties and interested parties and in the interest of brevity and conciseness, the parties' submissions will not be reproduced in their entirety.

[17] The Caring Society states that the evidence in this case is overwhelming: Canada knew about, disregarded, ignored or diminished clear, cogent and well researched evidence that demonstrated the FNCFS Program's discriminatory impact on First Nations

short-term issues creating critical needs for health and social supports or affecting their activities of daily living (see 2017 CHRT 35 at, para.19, i).

[213] Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy. (see 2017 CHRT 35 at, para.19, ii).

[214] What is more, the Panel rejects the AGC's argument that compensation is inappropriate in Jordan's Principle cases since the Tribunal already ordered Canada to retroactively review the cases that were denied. The retroactive review of cases ensures the child receives the service if not too late and eliminate discrimination. It does not account for the suffering borne by children and their parents while they did not receive the service.

[215] On the issue of there being no basis in the *Act* to award compensation to complainant organizations or non-complainant individuals under Jordan's Principle, the Panel applies the same reasoning outlined above. On the argument advanced by Canada that when it has implemented policies that satisfactorily address discrimination no further orders are required, the Panel also relies on its reasons above where it says that systemic and individual remedies can co-exist if the evidence in the specific case supports it and is deemed appropriate by the Panel.

[216] Also, the Panel ordered the use of a broad definition of Jordan's Principle that applies to all First Nations services across all services. It is worth mentioning that many Jordan's Principle cases involve vulnerable children who experience mental and/or physical disabilities. We will return to this right after a review of the purpose of the *CHRA* below:

> The purpose of the *CHRA* is to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as

> MS BAGGLEY: "Tomatoe/tomato".
>
> MR. WUTTKE: Between half a year and three quarters of a year?
>
> MS BAGGLEY: Yes, yes.
>
> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?
>
> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

[225] The Panel finds there is sufficient evidence in the record as demonstrated above to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53 (2) (e) of the *CHRA* is experienced by First Nations children and families as a result of Canada's approach to Jordan's Principle that led to the Tribunals' rulings in this case.

[226] First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

XIII. Special compensation wilful and reckless

[227] The special compensation remedy sought as part of this ruling is found at para. 53 (3) of the *CHRA*:

> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand

> The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the Decision (see 2017 CHRT 14 at, para. 94).

[242] The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grand-parents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.

[243] The AFN filed affidavit evidence on the Indian Residential School Settlement Agreement (IRSSA) as part of these proceedings and the Panel opted to adopt a similar approach in determining the remedies to victims/survivors in this case so as to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped at a $20,000$ under the *CHRA*. The dispositions of the IRSSA found in Mr. Jeremy Kolodziej's affidavit affirmed on April 4, 2019 and reproduced below illustrate the rationale behind the lump sum payment to those victims/survivors who attended Residential School:

> "CEP" and "Common Experience Payment" mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;
>
> 5.02 Amount of CEP
>
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
>
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and (3) less the amount of any advance payment on the CEP received
>
> Recommendations

> 1.0 To ensure that the full range of harms are redressed, we recommend that a lump sum award be granted to any person who attended an Indian Residential School, irrespective of whether they suffered separate harms generated by acts of sexual, physical or severe emotional abuse.
>
> The Indian Residential School Policy was based on racial identity. It forced students to attend designated schools and removed them from their families and communities. The Policy has been criticized extensively. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented. The distinctive and unique forms of harm that were a direct consequence of this government policy include reduced self-esteem, isolation from family, loss of language, loss of culture, spiritual harm, loss of a reasonable quality of education, and loss of kinship, community and traditional ways. These symptoms are now commonly understood to be "Residential School Syndrome." Everyone who attended residential schools can be assumed to have suffered such direct harms and is entitled to a lump sum payment based upon the following:
>
> 1.1 A global award of sufficient significance to each person who attended Indian Residential Schools such that it will provide solace for the above losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused.
>
> 1.2 An additional amount per each additional year or part of a year of attendance at an Indian Residential School to recognize the duration and accumulation of harms, including the denial of affection, loss of family life and parental guidance, neglect, depersonalization, denial of a proper education, forced labour, inferior nutrition and health care, and growing up in a climate of fear, apprehension, and ascribed inferiority.
>
> **As attendance at residential school is the basis for recovery, a simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. (emphasis ours).**

[244] The Panel believes that the above rationale is applicable in this case. As for the process, it needs to be discussed further as it will be explained in the next section.

XIV. Orders

All the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child in the child welfare system

[245] The Panel finds there is sufficient evidence and other information (see section 50 (3) (c) of the *CHRA*), in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA.* Canada is ordered to pay $ 20,000 to each First Nation child removed from its home, family and Community between **January 1, 2006** (date following the last WEN DE report as explained above) until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

[246] The Panel believes there is sufficient evidence and other information to find that even if a First Nation child has been apprehended and then reunited with the immediate or extended family at a later date, the child and family have suffered during the time of separation and that the trauma outlasts the time of separation.

[247] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's Decisions 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living

on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse had their child unnecessarily apprehended and placed in care outside of their homes, families and communities and, especially in regards to of substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to keep their child safely in their homes, families and communities. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*.

[248] Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent of a First Nation child removed from its home, family and Community between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below. This order applies for each child removed from the home, family and community as a result of the above-mentioned discrimination. For clarity, if a parent or grand-parent lost 3 children in those circumstances, it should get $60,000, the maximum amount of $20,000 for each child apprehended.

Compensation for First Nations children in cases of necessary removal of a child in the child welfare system

[249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and

communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nation child removed from its home, family and Community from **January 1, 2006** until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out of home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $ 20,000 to each First Nation child removed from its home and placed in care in order to access services and for each First Nations child who

was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living on reserve or off reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the CHRA. Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grand-parent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nation child, parent or grand-parent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware

of the discriminatory practices of its child welfare Program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nation child and parent or grand-parent identified in the orders above.

[254] Canada is ordered to pay $ 20,000 to each First Nation child and parent or grand-parent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grand-parent recognizes that some children may not have parents and were in the care of their grand-parents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grand-parent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grand-parents are caring for the child, both grand-parents are entitled to compensation as described above.

[256] For clarity, parents or grand-parents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

[257] A parent or grand-parent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be

compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grand-parent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grand-parents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common experience payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para.10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grand-parents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than **December 10, 2019**. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation.

[270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.

XVI. Interest

[271] Pursuant to section 53(4) of the *Act*, the Complainants seek interest on any award of compensation made by the Tribunal.

[272] Section 53(4) allows for the Tribunal to award interest at a rate and for a period it considers appropriate:

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 2
Date: January 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Decision

Members: Sophie Marchildon and Edward Lustig

f. The Crown's fiduciary relationship with Aboriginal peoples

[87] Furthermore, AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship between the Crown and Aboriginal peoples.

[88] The Complainants submit that the relationship between the Crown and Aboriginal peoples is a fiduciary relationship that gives rise to a fiduciary duty in relation to the FNCFS Program. While AANDC acknowledges there is a general fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, it argues that fiduciary duty principles are not applicable to the Complaint.

[89] It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16 [*Haida Nation*]). It is also well established that there exists a special relationship between the Crown and the Aboriginal peoples of Canada, qualified as a *sui generis* relationship. This special relationship stems from the fact that Aboriginal peoples were already here when the Europeans arrived in North America (see *R. v. Van der Peet*, [1996] 2 SCR 507, at para. 30).

[90] In 1950, in a case about the application of section 51 of the *Indian Act, 1906* and concerning reserve lands, the Supreme Court stated that the care and welfare of First Nations people are a "political trust of the highest obligation":

> The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.
>
> (*St. Ann's Island Shooting And Fishing Club v. The King*, [1950] SCR 211 at p. 219 [per Rand J.])

[91] However, this "political trust" was not enforceable by the courts. This changed when the Supreme Court moved away from the political trust doctrine. In the context of a case dealing with the sale of surrendered land at conditions quite different from those agreed to

at the time of the surrender, the Supreme Court qualified the relationship between the Crown and Aboriginal peoples as a fiduciary relationship in *Guerin v. The Queen*, [1984] 2 SCR.335, at page 376 (*Guerin*):

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

[92] This special relationship is also rooted in the large degree of discretionary control assumed by the Crown over the lives and interests of Aboriginal peoples in Canada:

> English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
>
> (*Mitchell v. M.N.R.*, 2001 SCC 33, at para. 9)

[93] After the entry into force of section 35 of the *Constitution Act, 1982*, in *R.* v. *Sparrow*, [1990] 1 SCR 1075, at page 1108, the Supreme Court further confirmed and defined the duty of the Crown to act in a fiduciary capacity as the "general guiding principle" for section 35:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial and, contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[94] This general guiding principle is not limited to section 35(1) of the *Constitution Act, 1982*, but has broader application as confirmed by the Supreme Court in *Wewaykum Indian Band* v. *Canada*, 2002 SCC 79, at paragraph 79 (*Wewaykum*).

[95] First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (*Wewaykum* at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in *Haida Nation*, at paragraph 17:

> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[96] That being said, it is also well established that this fiduciary relationship does not always give rise to fiduciary obligations. While the fiduciary relationship may be described as general in nature, requiring that the Crown act in the best interest of Aboriginal peoples, fiduciary obligations are specific, related to precise aboriginal interests:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically […]
>
> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> (*Wewaykum* at paras. 80-81)

[97] The Supreme Court has relied on private law concepts to define circumstances that can give rise to a fiduciary obligation because, although the Crown's obligation is not a

private law duty, it is nonetheless in the nature of a private duty, susceptible of giving rise to enforceable obligations :

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.
>
> (*Guerin* at p. 385)

[98] *Guerin* stands for the principle that a fiduciary obligation on the Crown towards Aboriginal peoples arises from the fact that their interest in land is inalienable except upon surrender to the Crown. In another case where the Supreme Court found that the Crown has a fiduciary obligation to prevent exploitative bargains in the context of a surrender of reserve land, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paragraph 38, it referred to private law criteria to define a situation that could give rise to a fiduciary obligation:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[99] The present case does not raise land related issues. The Panel is aware that fiduciary obligations have yet to be recognized by the Supreme Court in relation to Aboriginal interests other than land outside the framework of section 35(1) of the *Constitution Act, 1982* (see *Wewaykum* at para. 81). However, the Panel is also aware that in *Frame v. Smith*, [1987] 2 SCR 99, at paragraph 60, Wilson J. held that fiduciary duties did not apply only to legal and economic interests but could extend to human and personal interests:

> To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme.

[100] In fact, in *Wewaykum* the Supreme Court noted that since the *Guerin* case the existence of a fiduciary obligation has been argued in a number of cases raising a variety of issues (see at para. 82). While it did not comment on these cases, the Court in *Wewaykum*, at paragraph 83, did state that a case by case approach would have to focus on the specific interest at issue and whether or not the Crown had assumed discretionary control giving rise to a fiduciary obligation:

> I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature […], and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[101] Recent case law from the Supreme Court confirms that a fiduciary obligation may also arise from an undertaking. The following conditions are to be met:

> In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in Frame: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36 (*Elder Advocates Society*); see also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 50 [*Manitoba Metis Federation*])

[102] AANDC argues that there must be an undertaking of loyalty by the Crown to the point of forsaking the interests of all others in favour of those of the beneficiaries for a fiduciary obligation to apply (see *Elder Advocates Society* at para. 31; and, *Manitoba Metis Federation* at para. 61).

[103] However, in *Elder Advocates Society*, at paragraph 48, it should be noted that the Supreme Court held that the necessary undertaking was met with respect to Aboriginal peoples:

> In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere.

[104] In view of the above and the evidence presented on this issue, the relationship between the federal government and First Nations people for the provision of child and family services on reserve could give rise to a fiduciary obligation on the part of the Crown. Arguably the three criteria outlined in *Elder Advocates Society* have been met in this case.

[105] The FNCFS Program and other related provincial/territorial agreements were undertaken and are controlled by the Crown. This undertaking is explicitly intended to be in the best interests of the First Nations beneficiaries, including that the "best interests of the child" and the safety and well-being of First Nations children are objectives of the program. The Crown has discretionary control over the FNCFS Program through policy and other administrative directives. It also exercises discretionary control over the application of the other related provincial/territorial agreements as First Nations are not party to their negotiation. The FNCFS Program and other related provincial/territorial agreements also have a direct impact on a vulnerable category of people: First Nations children and families in need of child and family support services on reserve.

[106] The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by AANDC's discretion and control over the FNCFS Program and other related provincial/territorial agreements. The Panel agrees with the AFN, Caring Society and the COO that the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *R. v. Côté*, [1996] 3 SCR 139 at paragraph 56:

> In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.

[107] Similarly, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraph 26 (*Doucet-Boudreau*), the Supreme Court stated the following with regard to the relation between language and culture:

> This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:
>
> > . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[108] In certifying a class action based on the operation of the child welfare system on reserve in Ontario, Justice Belobaba on the Ontario Superior Court of Justice, in *Brown v. Canada (AG)*, 2013 ONSC 5637 at paragraph 44, expressed his views on the existence of a fiduciary duty based on the discretionary Crown control over Aboriginal interests in culture:

> it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.

[109] The Panel agrees with the Caring Society that it is not necessary for the purposes of this case to further define the contours of Aboriginal rights in language and culture or a fiduciary duty related thereto. It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* indigenous cultures and languages must be considered as "specific indigenous interests" which may trigger a fiduciary duty. Accordingly, where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty. However, such a finding is not necessary to make a determination regarding whether or not AANDC provides a service; or, more broadly, to determine whether there has been a discriminatory practice under the *CHRA*.

[110] Suffice it to say, AANDC's development of the FNCFS Program and related agreements, along with its public statements thereon, indicate an undertaking on the part of the Crown to act in the best interests of First Nations children and families to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon. Whether or not that gives rise to a fiduciary obligation, the existence of the fiduciary relationship between the Crown and Aboriginal peoples is a general guiding principle for the analysis of any government action concerning Aboriginal peoples. In the current "services" analysis under the *CHRA*, it informs and reinforces the public nature of the relationship between AANDC and First Nations on reserves and in the Yukon in the provision of the FNCFS Program and other provincial/territorial agreements.

iii. Summary of findings

[111] Overall, the Panel finds the evidence indicates the FNCFS Program and other related provincial/territorial agreements are held out by AANDC as assistance or a benefit

Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca>).

[453] The international instruments and treaty monitoring bodies referred to above view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality. These international legal instruments also reinforce the need for due attention to be paid to the unique situation and needs of children and First Nations people, especially the combination of those two vulnerable groups: First Nations children.

[454] The concerns expressed by international monitoring bodies mirror many of the issues raised in this Complaint. The declarations made by Canada in its periodic reports to the various monitoring bodies clearly show that the federal government is aware of the steps to be taken domestically to address these issues. Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.

[455] Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage.

VI. Complaint substantiated

[456] In light of the above, the Panel finds the Complainants have presented sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *CHRA*. Specifically, they *prima facie* established that First Nations children and families living on reserve and in the Yukon are denied [s. 5(a)] equal child and family services and/or differentiated adversely [s. 5(b)] in the provision of child and family services.

[457] Through the FNCFS Program and other related provincial/territorial agreements, AANDC provides a service intended to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserve. With specific regard to the

FNCFS Program, the objective is to ensure culturally appropriate child and family services to First Nations children and families on reserve and in the Yukon that are intended to be in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances. However, the evidence in this case demonstrates that AANDC does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserve.

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.
- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.
- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;
- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.

- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

[459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.

[460] AANDC's evidence and arguments challenging the Complainants' allegations of discrimination have been addressed throughout this decision. Overall, the Panel finds AANDC's position unreasonable, unconvincing and not supported by the preponderance of evidence in this case. Otherwise, as mentioned earlier, AANDC did not raise a statutory exception under sections 15 or 16 of the *CHRA*.

[461] Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on- reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with

provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

[465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In

this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[466] As a result, and having weighed all the evidence and argument in this case on a balance of probabilities, the Panel finds the Complaint substantiated.

[467] The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves.

VII. Order

[468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the

[481] The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[482] More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity "…equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2).

[483] That said, given the complexity and far-reaching effects of the relief sought, the Panel wants to ensure that any additional orders it makes are appropriate and fair, both in the short and long-term. Throughout these proceedings, the Panel reserved the right to ask clarification questions of the parties while it reviewed the evidence. While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis.

[484] Within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis.

C. Compensation

[485] Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the

discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in wilfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000.

[486] The Caring Society asks the Panel to award compensation under section 53(3) for AANDC's wilful and reckless discriminatory conduct with respect to each First Nations child taken into care since February 2006 to the date of the award. In the Caring Society's view, as early as the 2000 findings of the *NPR*, AANDC voluntarily and egregiously omitted to rectify discrimination against First Nations children. It also notes that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. As a result, it believes the maximum amount of $20,000 should be awarded per child. The Caring Society requests the compensation be placed in an independent trust to fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services.

[487] The AFN also requests compensation. It asks for an order that it, AANDC, the Caring Society and the Commission form an expert panel to establish appropriate individual compensation for children, parents and siblings impacted by the child welfare practices on reserve between 2006 and the date of the Tribunal's order.

[488] Amnesty International submits any compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.

[489] AANDC submits there is insufficient evidence before the Tribunal to award the requested compensation. It argues the Caring Society's request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of AANDC's funding practices. According to AANDC, the Caring Society's assertions overlook the complex nature of factors that lead to a child being removed from his or her home and, given the absence of individual evidence thereon, it is impossible for the Tribunal to assess compensation on an individual basis. Furthermore, AANDC submits

the Complainants' authority to receive and distribute funds on behalf of "victims" has not been established.

[490] Similar to its comments above, the Panel has outstanding questions regarding the Complainants' request for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Again, within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered.

D. Costs for obstruction of process

[491] As part of a motion for disclosure decided in ruling 2013 CHRT 16, the Complainants requested costs from AANDC with respect to its alleged obstruction of the Tribunal's process. At that time, the Panel took the costs request under reserve and indicated the issue would be the subject of a subsequent ruling. The Complainants have reiterated their request for costs as part of their closing submissions on this Complaint. In response, AANDC reaffirmed its assertion that the Tribunal does not have the authority to award such costs.

[492] The Panel continues to reserve its ruling on the Complainants' request for costs in relation to the motion for disclosure decided in ruling 2013 CHRT 16. A ruling on the issue will be provided in due course.

E. Retention of jurisdiction

[493] The Complainants, Commission and Interested Parties request the Panel retain jurisdiction over this matter until any orders are fully implemented.

[494] As indicated above, the Panel has outstanding questions on the remedies being sought by the Complainants and Commission. A determination on those remedies is still to be made. As such, the Panel will maintain jurisdiction over this matter pending the determination of those outstanding remedies. Any further retention of jurisdiction will be re-evaluated when those determinations are made.

VIII. Annex: exhibit references

1. **Exhibit HR-6, Tab 74**: *Glossary of Social Work Terms*, prepared for the Canadian Human Rights Commission by Michelle Sturtridge (February 2013)

2. **Exhibit HR-1, Tab 3**: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy Review Final Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)

3. **Exhibit HR-3, Tab 29**: Department of Indian and Northern Affairs Canada, *First Nations Child and Family Services National Program Manual* (Ottawa: Social Policy and Programs Branch, 2004)

4. **Exhibit HR-13, Tab 272**: Indian and Northern Affairs Canada, *National Social Programs Manual* (January 31, 2012)

5. **Exhibit HR-11, Tab 214**: *Memorandum of Agreement Respecting Welfare Programs for Indians*, between the Government of Canada and the Government of the Province of Ontario (19 May, 1966)

6. **Exhibit HR-13, Tab 270**: *Arrangement for the Funding and Administration of Social Services*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of Alberta (23 January, 1992)

7. **Exhibit HR-13, Tab 275**: *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve*, between the Province of British Columbia and Her Majesty the Queen in right of Canada (March 30, 2012)

8. **Exhibit HR-13, Tab 274**: *Memorandum of Understanding for the Funding of Child Protection Services for Indian Children*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of the province of British Columbia (28 March, 1996)

9. **Exhibit HR-13, Tab 305**: *Funding Agreement*, between Her Majesty the Queen in Right of Canada and the Government of Yukon (March 23, 2012)

10. **Exhibit HR-4, Tab 38**: *Fact Sheet – First Nations Child and Family Services* (October 2006), previously online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/info/fnsocec/fncfs_e.html>

11. **Exhibit HR-13, Tab 285**: Indian and Northern Affairs Canada, *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* by Megan Reiter, Barbara D'Amico & Steven Singer (March 16, 2011)

12. **Exhibit HR-15, Tab 404**: Indian and Northern Affairs Canada, *Reform of the FNCFS Program in Quebec (Information for the Deputy Minister)* by Rosalee LaPlante & Catherine Hudon (July 7, 2008)

13. **Exhibit HR-1, Tab 4**: John Loxley, Fred Wien and Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, a summary of research needed to explore three funding models for First Nations child welfare agencies* (Vancouver: First Nations Child and Family Caring Society of Canada, 2004)

14. **Exhibit HR-4, Tab 32**: Indian and Northern Affairs Canada, *Evaluation of the First Nations Child and Family Services Program* (Departmental Audit and Evaluation Branch, March 2007)

15. **Exhibit HR-1, Tab 5**: Dr. Cindy Blackstock et al., *Wen:De We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society, 2005)

16. **Exhibit HR-1, Tab 6**: John Loxley et al., *Wen:De The Journey Continues* (Ottawa: First Nations Child and Family Caring Society, 2005)

17. **Exhibit HR-3, Tab 11**: Auditor General of Canada, *May 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2008)

18. **Exhibit HR-3, Tab 15**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Ottawa: Communication Canada-Publishing, March 2009, 40th Parliament, 2nd session)

19. **Exhibit HR-3, Tab 16**: *Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Presented to the House of Commons on August 19, 2009) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

20. **Exhibit HR-5, Tab 53**: Auditor General of Canada, *2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves* (Ottawa: Minister of Public Works and Government Services Canada, 2011)

21. **Exhibit HR-4, Tab 45**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Ottawa: Public Works and Government Services Canada, February 2012, 41st Parliament, 1st session)

22. **Exhibit HR-5, Tab 54**: *Government Response to the Report of the Standing Committee on Public Accounts on Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Presented to the House of Commons on June 5, 2012) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

23. **Exhibit HR-11, Tab 239**: Indian and Northern Affairs Canada, Strategic Direction and Policy Directorate, Ontario Region, Discussion Paper: *1965 Agreement Overview* (November 2007)

24. **Exhibit HR-11, Tab 21**: Commission to Promote Sustainable Child Welfare, Discussion Paper: *Aboriginal Child Welfare in Ontario* (July 2011)

25. **Exhibit HR-14, Tab 362**: Letter from Mary Anne Chambers, Minster of Children and Youth Services, to John Duncan, Minister of Indian and Norther Affairs Canada (February 23, 2007)

26. **Exhibit HR-11, Tab 222**: Letter from Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario, to John Duncan, Minister of Indian and Norther Affairs Canada (March 25, 2011)

27. **Exhibit HR-11, Tab 223**: Letter from John Duncan, Minister of Indian and Norther Affairs Canada, to Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario (n.d. July 7, 2011?)

28. **Exhibit HR-11, Tab 224**: Department of Indian Affairs and Northern Development Canada, *Abinoojii Mental Health Services Mandate*, Information for Regional Director General and Assistant Reginal Directors General prepared by Nicole Anthony (April 1, 2011)

29. **Exhibit HR-11, Tab 209**: Ontario Association of Children's Aid Societies, *Child Welfare Report* (2012)

30. **Exhibit HR-13, Tab 281**: Letter from Glen Foulger, Revenue Manager, and Robert Parenteau, Director of Operations for Aboriginal Regional Support Services, Ministry of Children and Family Development, British Columbia, to Linda Stiller, Manager of Inter-Governmental Affairs, Indian and Northern Affairs Canada (June 22, 2007)

31. **Exhibit HR-14, Tab 353**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS)*, presentation to Policy Committee (April 12, 2005)

32. **Exhibit HR-6, Tab 64**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS) Q's and A's* (n.d.)

33. **Exhibit HR-13, Tab 330**: Indian and Northern Affairs Canada, *Explanations on Expenditures of Social Development Programs* (n.d.)

34. **Exhibit HR-14, Tab 354**: Indian and Northern Affairs Canada, *Social Programs*, presentation (February 7, 2006)

35. **Exhibit HR-6, Tab 81**: Indian and Northern Affairs Canada, *First Nation Child and Family Services: Putting Children and Families First in Alberta*, presentation [n.d.]

36. **Exhibit HR-3, Tab 17**: Letter from Micheal Wernick, Deputy Minister, Indian and Northern Affairs Canada, to Bruce Stanton, Chair of the Standing Committee on Aboriginal Affairs and Northern Development (11 September 2009)

37. **Exhibit HR-5, Tab 48**: Indian and Northern Affairs Canada, *Final Report: Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, September 2010)

38. **Exhibit HR-12, Tab 247**: Aboriginal Affairs and Northern Development Canada, *Final Report: Implementation Evaluation of the Enhanced Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, November 23, 2012)

39. **Exhibit HR-9, Tab 146**: Aboriginal Affairs and Northern Development Canada, *Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia*, presentation (April 27, 2012)

40. **Exhibit HR-12, Tab 248**: Aboriginal Affairs and Northern Development Canada, *First Nations Child and Family Services Program (FNCFS) The Way Forward*, presentation by Odette Johnson, Director of the Children and Family Services Directorate of AANDC to Françoise Ducros, Assistant Deputy Minister, ESDPPS (August 29, 2012)

41. **Exhibit HR-13, Tab 288**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (October 31, 2012)

42. **Exhibit HR-13, Tab 289**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (November 2, 2012)

43. **Exhibit R-14, Tab 85**: Aboriginal Affairs and Northern Development Canada, *British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework*, working draft (December 19, 2013)

44. **Exhibit HR-14, Tab 351**: Indian and Northern Affairs Canada, *Comparability of Provincial and INAC Social Programs Funding*, attachment to an email sent by Serge Menard, Policy Analyst, Social Policy and Programs Branch (October 16, 2008)

45. **Exhibit HR-3, Tab 20**: *Private Members' Business*, 39th Parliament, 2nd Session, *Hansard*, 012 (October 31, 2007); and, *Vote No. 27*, 39th Parliament, 2nd Session, Sitting No. 36 (December 12, 2007)

46. **Exhibit R-14, Tab 41**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Indian and Northern Affairs Canada and Health Canada (June 24, 2009)

47. **Exhibit HR-11, Tab 235**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Aboriginal Affairs and Northern Development Canada and Health Canada (January 2013)

48. **Exhibit R-14, Tab 39**: Health Canada, *Update on Jordan's Principle: The Federal Government Response*, presentation (June 2011)

49. **Exhibit HR-15, Tab 420**: *Jordan's Principle Case Conferencing to Case Resolution Federal/Provincial Intake Form* (November 21, 2012)

50. **Exhibit R-14, Tab 54**: *Federal Focal Points Tracking Tool Reference Chart – Manitoba Region* (January 2013)

51. **Exhibit HR-6, Tab 78**: Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009)

52. **Exhibit HR-3, Tab 10**: Government of Canada, *Statement of Apology - to former students of Indian Residential Schools* (June 11, 2008)

53. **Exhibit HR-14, Tab 340**: Amy Bombay, Kim Matheson and Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential Schools Survivors" (2011), 48(4) Transcultural Psychiatry 367

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)

Decision of the Tribunal Dated: January 26, 2016

Dates and Place of Hearing: February 25, 26, 27 and 28, 2013;
March 1, 2013;
April 2, 3, 4, 8 and 9, 2013;
May 13, 14, 16, 21 and 22, 2013;
July 15, 16, 17, 19, 22 and 24, 2013;
August 7, 12, 28, 29 and 30, 2013;
September 5, 6, 11, 12, 23, 24, 25 and 26, 2013;
October 28, 29 and 30, 2013;
November 6, 2013;
December 5 and 9, 2013;
January 9, 10, 13 and 14, 2014;
February 10, 11, 12 and 13, 2014;
March 17, 18, 19 and 20, 2014;
April 2, 3, 4 and 30, 2014;
May 1, 7, 8, 14, 15, 28, 29 and 30, 2014;
October 20, 21, 22, 23 and 24, 2014

Ottawa, Ontario

Appearances:

Paul Champ, Yavar Hameed, Anne Levesque, Michael Sabet, Sébastien Grammond, Sarah Clarke, Robert Grant and David Taylor, counsel, for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Philippe Dufresne, Sarah Pentney, and Samar Musallam counsel, for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Nicole Arsenault, Ainslie Harvey, Michelle Casavant and Terry McCormick, counsel, for the Respondent

Michael Sherry, counsel for the Chiefs of Ontario, Interested Party

Justin Safayeni, counsel for Amnesty International, Interested Party

Canada Post Corporation (*Applicant*)

v.

Public Service Alliance of Canada and **Canadian Human Rights Commission** (*Respondents*)

T-1989-05

Public Service Alliance of Canada (*Applicant*)

v.

Canada Post Corporation and **Canadian Human Rights Commission** (*Respondents*)

INDEXED AS: CANADA POST CORP. V. PUBLIC SERVICE ALLIANCE OF CANADA (F.C.)

Federal Court, Kelen J.—Ottawa, November 5, 9, 13, 21, 22, 2007; January 16, 17, 18 and February 21, 2008.

Human Rights — Applications for judicial review of Canadian Human Rights Tribunal decision upholding 1983 wage discrimination complaint filed with Canadian Human Rights Commission — Tribunal concluding Canada Post violated Canadian Human Rights Act (CHRA), s. 11 by paying employees in male-dominated Postal Operations (PO) group more than employees in female-dominated Clerical and Regulatory (CR) group for work of equal value (Canada Post application), discounting by 50 percent amount of damages awarded (Public Service Alliance of Canada (PSAC) application) — (1) Tribunal's conclusion application of Equal Wages Guidelines, 1986 to complaint not retroactive reasonable since concept of systemic discrimination continuing in nature — (2) In determining whether discrimination existing, Tribunal having to be satisfied on balance of probabilities evidence reliable — Tribunal misapplying standard of proof herein by considering principle applying to quantum of damages — Finding job information "reasonably reliable" at "lower reasonably reliable sub-band" level less than finding job information reliable on balance of probabilities — (3) Although Tribunal analyzed evidence about appropriateness of PO group as comparator group, unreasonably ignored fact largest group of women at Canada Post working as mail sorters within PO group; best paid unionized employees thereat — Canada Post application allowed — (4) Once complainant establishing existence of prima facie discrimination under CHRA, s. 11, rebuttable presumption of gender-based discrimination existing — That "legal presumption" not arising herein since Tribunal chose unreasonable comparator groups, applied wrong standard of proof to determine existence of pay discrimination — (5) Tribunal's decision to award damages incorrect, unreasonable since not properly finding pay discrimination complaint established on balance of probabilities — PSAC application dismissed.

Construction of Statutes — Judicial review of Canadian Human Rights Tribunal decision Canada Post violating Canadian

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal.

[41] In *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.) (*PSAC*), Mr. Justice Evans also recognized the "significant expertise" of the Tribunal in relation to its findings of fact, stating at paragraph 86:

These observations are, of course, applicable to the Tribunal members whose decision is under review here. I would note, however, that the Tribunal held over 250 days of hearings, many of which apparently resembled educational seminars conducted by the expert witnesses for the benefit of the parties and the Tribunal, studied volumes of documentary evidence and lived with this case for seven years. It is reasonable to infer from this that the members of the Tribunal were likely to have a better grasp of the problems of operationalizing the principle of pay equity in the federal public service than a judge would probably be able to acquire in the course of even an 8 1/2 day hearing of an application for judicial review.

Accordingly, considerable deference will be accorded to the Tribunal's factual findings.

[42] The third factor, the nature of the legislation and the provisions in question, also suggests the Tribunal's decision should be accorded some deference. Mr. Justice Evans made clear in *PSAC*, above, at paragraph 53, that the CHRA is a quasi-constitutional statute whose provisions are to be given a "broad and liberal interpretation so as to further its underlying purposes." Further, the construction of section 11 of the CHRA, in particular, which legislates the principle of pay equity without addressing its implementation, leaves "considerable scope to the Commission and the Tribunal" in deciding how the principal is to be "operationalized" in an employment context: *PSAC*, at paragraph 76. As Mr. Justice Evans stated, at paragraphs 83-84 of *PSAC*:

Reverting to section 11, I cannot attribute to Parliament an intention that, by enacting the principle of equal pay for work of equal value, it thereby provided a definitional blueprint of such specificity that its implementation in any given context inevitably involves the Tribunal in questions of statutory interpretation, and hence of law, that are reviewable on a standard of correctness in an application for judicial review.

The fact that the implementation of a statutory provision calls for a range of technical expertise much broader than that possessed by courts of law is a clear indication that more than general questions of law, legal reasoning or quasi-constitutional values are involved.

[43] The fourth factor to be considered is the nature of the question or questions before the Court. The Federal Court of Appeal has concluded that, in relation to the different questions decided by a tribunal under the CHRA, questions of law should be accorded no deference, questions of fact should be accorded great deference, and questions of mixed fact and law should be accorded some deference: *Lincoln v. Bay Ferries Ltd.* (2004), 322 N.R. 50 (F.C.A.); *Morris v. Canada (Canadian Armed Forces)* (2005), 334 N.R. 316 (F.C.A.).

[44] In the case at bar, the first issue is one of mixed fact and law, as the Tribunal must characterize the particular fact situation and then apply the appropriate guidelines to that situation. The second issue is also a question of mixed fact and law, as the Court must determine on the facts whether the Tribunal applied the appropriate standard of proof to the material evidence in determining whether a *prima facie* case of pay discrimination has been proven. The third

issue is a question of mixed fact and law since the Tribunal must consider the evidence presented before it while applying the principles relating to the choice of a comparator group that are found within the applicable guidelines. The fourth issue is a question of statutory interpretation, and is a clear question of law. The fifth and final issue is a question of mixed fact and law, since the CHRA grants broad discretionary power to the Tribunal in relation to damages, and since such an award is largely dependent on the facts of the case. However, there is a legal element to the Tribunal's decision, as it must interpret and apply the legal standard of proof on liability before assessing damages.

[45] Having been guided by the pragmatic and functional approach mandated by the Supreme Court in *Dr. Q*, above, I conclude that:

(1) the issue of whether the Tribunal erred in retroactively applying the Commission's 1986 Guidelines to a complaint filed in 1983 will be reviewed on a standard of reasonableness *simpliciter*;

(2) the issue of whether the Tribunal erred in applying an incorrect standard of proof will be reviewed on a standard of reasonableness *simpliciter*. However, challenges to the Tribunal's factual findings regarding this issue will only be set aside if found to be patently unreasonable;

(3) the issue of whether the Tribunal erred in finding the PO group to be an appropriate comparator will be reviewed on a standard of reasonableness *simpliciter*;

(4) the issue of whether the Tribunal erred in holding that once a wage disparity is established, section 11 of the CHRA enacts a legal presumption of gender-based discrimination that can only be rebutted by the reasonable factors in section 16 of the 1986 Guidelines will be reviewed on a standard of correctness; and

(5) the issue of whether the Tribunal erred in discounting the damage award by 50 percent to account for uncertainties in the evidence will be reviewed on a standard of reasonableness *simpliciter*.

[46] In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, the Supreme Court interpreted the standards of reasonableness *simpliciter* and patent unreasonableness. Mr. Justice Iacobucci, writing for the Court, at paragraphs 48-49, stated that under a standard of reasonableness *simpliciter*, a reviewing court must uphold an administrative decision if the reasons adequately support the ultimate conclusion:

> Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable (see *Southam*, [[1997] 1 S.C.R. 748], at para. 61). In *Southam*, at para. 56, the Court described the standard of reasonableness *simpliciter*:
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. . . .
>
> This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though

Date: 20100222

Dockets: A-129-08
A-130-08
A-139-08

Citation: 2010 FCA 56

CORAM: **SEXTON J.A.**
EVANS J.A.
RYER J.A.

Dockets A-129-08 and A-130-08

BETWEEN:

Public Service Alliance of Canada

Appellant

and

Canada Post Corporation and
Canadian Human Rights Commission

Respondents

Docket A-139-08

BETWEEN:

Canadian Human Rights Commission

Appellant

and

Canada Post Corporation
Public Service Alliance of Canada

Respondents

Heard at Ottawa, Ontario, on November 3, 2009.

Judgment delivered at Ottawa, Ontario, on February 22, 2010.

REASONS FOR JUDGMENT BY: SEXTON J.A. and RYER J.A.

DISSENTING REASONS BY: EVANS J.A.

reduced damages awards in order to take into account uncertainties in determining the precise amount of loss. While there were no uncertainties about future events that could affect the amount of wages already lost by the CR group, the Tribunal came back to its finding that the evaluation of the jobs and the non-monetary component of the wages had met only the "lower sub-band" of reasonable reliability. On this basis, it reduced by 50% the amount represented by the wage gap identified by CHRC.

[300] PSAC argues that the Tribunal's reduction of the compensation was unreasonable. First, it submits, the same data and the same methodology proved both the existence and the extent of a wage gap. Having accepted that the evidence established a wage gap, the Tribunal could not logically find that it did not also establish the extent of the gap. Second, if the Tribunal could factor in uncertainties in the evidence when determining the amount of compensation payable, it had no basis for concluding that the evidence over-estimated, rather than under-estimated, the extent of the actual wage gap. Counsel noted that Dr Wolf had testified that the Professional Team had taken the limitations in the evidence into account when evaluating the jobs: when in doubt, they had evaluated a PO position up and a CR position down, and had thus underestimated the extent of the wage gap.

[301] I do not agree. Specialized tribunals are owed a particularly high degree of deference in their exercise of a broad statutory discretion to fashion an appropriate remedy. The Tribunal directed itself correctly in law when it stated that an award of compensation should aim to make the victims whole. However, it was, in my view, also open to the Tribunal to extend by analogy principles used to take into account future uncertainties to uncertainties about the past, and on this basis to reduce

the amount of compensation. Indeed, this was done in somewhat similar circumstances where it was uncertain whether a person would have obtained a job if he had not been denied it because of the unlawful discriminatory conduct of the employer: *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 at 412 (C.A.).

[302] Nor was it unreasonable for the Tribunal to conclude that, while the evidence was good enough to establish the existence of a wage gap, it was not good enough to measure it precisely. PSAC had the burden of proving on a balance of probabilities both the existence and the extent of any wage gap. Accordingly, if the Tribunal was not satisfied that PSAC had discharged its evidential burden by proving the amount of the wages lost on a balance of probabilities, it could reasonably award less than the amount indicated by the evidence that PSAC had adduced.

[303] The following sentence from the passage in Professor Waddams' text, *The Law of Damages* (at ¶13-30), is particularly apt in this context:

> If the amount [of a loss] is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff.

As I have already noted, neither PSAC nor CHRC was without some responsibility for the state of the evidence.

[304] For these reasons, I am not persuaded that the Tribunal's award of compensation should be set aside as unreasonable.

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091026

Docket: A-89-08

Citation: 2009 FCA 309

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

DONNA MOWAT

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

Heard at Toronto, Ontario, on September 16, 2009.

Judgment delivered at Ottawa, Ontario, on October 26, 2009.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
SEXTON J.A.

groups. On its appearances before the Tribunal, the Commission represents the public interest (section 51 of the Act).

[24] The Tribunal functions as an adjudicative body. Its responsibilities were described in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 (*Bell Canada*), at paragraph 23, as follows:

> It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints; the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

[25] This case is concerned with subsection 53(2) of the Act which furnishes the Tribunal with broad remedial powers where, at the conclusion of the inquiry, the Tribunal finds that the complaint is substantiated. Specifically in issue is paragraph 53(2)(*c*). It provides:

Canadian Human Rights Act, R.S. 1985, C. H-6	*Loi canadienne sur les droits de la personne* (L.R., 1985, ch. H-6)
53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate: …	53(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire : […]
	c) d'indemniser la victime de la

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;	totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

The Role of an Appellate Court

[26] The role of an appellate court ─ in instances where the Court of Appeal is dealing not with judicial review of an administrative decision, but with appellate review of a subordinate court ─ is to determine, first, whether the reviewing judge has chosen the correct standard of review: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 (*Dr. Q*). Next, the appellate court must determine whether the standard of review was applied correctly. In performing this analysis, this Court "steps into the shoes of the subordinate court": *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645 (*Zenner*); *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 F.C.R. 610 (F.C.A.) (*Prairie Acid Rain*).

The Standard of Review

[27] It is common ground that the proper standard of review for the application judge's choice of standard is correctness: *Dr. Q* (para. 43). In this instance the debate centers on the Federal Court judge's choice of the reasonableness standard of review with respect to the Tribunal's decision.

[28] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*) established a two-step process for determining the applicable standard of review. The first step requires the court to

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 10
Date: April 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

I. Continuation of remedial order

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*).

[2] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[3] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[4] The Panel advised the parties it would address the outstanding questions on remedies in three steps. First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

[5] Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*.

II. Progress to date

[6] INAC accepts the *Decision* and has not sought judicial review of its findings or general orders. It is committed to working with child and family services agencies; front-line service providers; First Nations organizations, leadership, and communities; the Complainants; and the provinces and territories, on steps towards program reform and meaningful change for children and families. It has also specifically committed to the following:

- A full-scale reform of its child welfare program.
- Review of the *1965 Agreement*.
- Not to reduce or restrict funding to the FNCFS Program
- To immediately re-establish the National Advisory Committee.
- And, it supports the new iteration of the Canadian Incidence Study.

[7] INAC's submissions also indicated that immediate relief in response to the *Decision* would include increased funding for the FNCFS Program. The 2016 federal budget allocated $634.8 million over five years for the FNCFS Program. According to INAC, $71.1 million is to be provided in 2016-2017 for the following:

- $54.2 million for:
    - immediate adjustments to Operations and Prevention through additional investments to update existing funding agreements;
    - increases to the per child service purchase amounts (including for prevention services);
    - funding for intake and investigation services;
    - upward adjustments for agencies with more than 6% of children in care; and,

  - investments for providing federal support to expand provincial case management systems on reserve.

- $16.2 million for prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador and Yukon at nationally-consistent levels across all jurisdictions.

- $700,000 to INAC resources for outreach, engagement and effective allocation of funding to service providers.

[8] In addition to the funding identified in the 2016 budget, INAC also commits to provide additional funding for:

- maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements, as they arise; and

- support for an engagement process going forward in conjunction with the National Advisory Committee and Regional Tables to work on medium and long-term reform.

[9] The Panel acknowledges the commitments made by the Federal government so far and is encouraged by its efforts to implement the Tribunal's orders.

III. Updated order

[10] It is worth reiterating some of the Tribunal's remedial principles in order to foster a common understanding of the Panel's goals and authorities in crafting a remedy in response to the *Decision*.

[11] Human rights legislation expresses fundamental values and pursues fundamental goals. In fact, the Supreme Court of Canada has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). In line with this special status, the

CHRA must be interpreted in a broad, liberal and purposive manner so that the rights enunciated therein are given their full recognition and effect (see *Mowat* at paras. 33 and 62).

[12] Likewise, when crafting a remedy following the substantiation of a complaint, the Tribunal's powers under section 53 of the *CHRA* must be interpreted so as to best ensure the objects of the *Act* are obtained. Pursuant to section 2, the purpose of the *CHRA* is to give effect to the principle that:

> all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

[13] It is the Tribunal's responsibility to consider this dominant purpose in crafting an order under section 53 of the *CHRA*. Consistent with that purpose, the aim in making an order under section 53 is not to punish the person found to be engaging or to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud* at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134 [*Action Travail des Femmes*]).

[14] On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination (see *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134).

[15] That said, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of

the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility."

[16] Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[17] The application of these broad remedial authorities can override an organization's right to manage its own enterprise and, with particular regard to section 53(2)(b), can afford the victim of a discriminatory practice a remedy in specific performance (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 165 and 167, varied on other grounds in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; and *Canada (Attorney General) v. McAlpine* (1989), 12 CHRR D/253 (FCA) at para. 6). In line with ensuring remedial orders are effective in promoting the rights it protects, section 53(2)(a) can also be used to craft remedies designed to educate individuals about the rights enshrined in the *CHRA* (see *Schuyler v. Oneida Nation of the Thames*, 2006 CHRT 34 at paras. 166-170; and *Robichaud v. Brennan* (1989), 11 CHRR D/194 (CHRT) at paras. 15 and 21).

[18] With specific regard to the circumstances of this case, section 53(2)(a) of the *CHRA* has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the *CHRA*, S.C. 1976-77, c. 33, s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).

[19] It is with these remedial principles in mind that the Panel approaches the task of continuing to craft an effective and meaningful order to address the discriminatory practices identified in the *Decision*.

A. The FNCFS Program

[20] The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short and long term were summarized at paragraphs 384-389 (see also para. 458) of the *Decision* and include (emphasis added):

> [384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.
>
> [385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.
>
> [386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations

> reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[21] The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the *Decision*. While the Panel did request clarification on certain remedial items and understood the Federal government may need some time to review the *Decision* and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the *Decision* addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*. Instead of being immediate relief, some of these items may now become mid-term relief.

[22] Again, while it appreciates the Federal government's commitments and efforts to date, the Panel requires more clarity from INAC moving forward to ensure its orders are effectively and meaningfully implemented. As the Assembly of First Nations stated in its submissions; "[a]n order for immediate relief to the FNCFS Program should be meaningful but temporary until such time that the FNCFS Program can be completely overhauled." The Panel agrees with this statement. To address this, the Panel believes the best course of action is for INAC to provide ongoing reporting to the Tribunal. That is, the Panel will supervise the implementation of its orders by way of regular detailed reports created by INAC, to which the parties will have an opportunity to provide submissions.

[23] The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on

budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.

[24] INAC is directed to provide this report within four weeks of this ruling. Following reception of the report, and given the length of time that has elapsed since the *Decision*, an in-person case management meeting will then occur to provide an opportunity for the parties and Panel to discuss the report, ask questions, and make submissions, if any. Thereafter, the Panel will issue a further ruling if necessary. The Tribunal will canvass the parties for dates for this case management meeting in the days following the release of this ruling.

[25] The Panel recognizes that INAC provided additional information regarding its 2016 budget allocation for the FNCFS Program following the close of submissions for this ruling and invited the parties to meet to discuss the issue. The Complainants raised concerns with the timing and manner in which this information was sent to the Tribunal. Neither is interested in another round of submissions on the issue at this time. The Panel did not consider INAC's additional information regarding the 2016 budget as part of this ruling. However, in a much more detailed fashion, this information will presumably form part of the material to be included in the report to follow and the other parties will have an opportunity to provide submissions thereon.

B. The *1965 Agreement*

[26] The Panel's main finding with regard to the *1965 Agreement* was that it had not been updated to ensure on-reserve communities in Ontario could fully comply with the *Child and Family Services Act*, including the provision of Band Representatives and mental health services (see the *Decision* at paras. 217-246 and 458).

[27] The Federal government has indicated that it has met with the Government of Ontario and expressed a need to review the *1965 Agreement*. It submits these preliminary

territories in these discussions. It anticipates options for changes to Jordan's Principle could be developed within twelve months.

[32] However, the Panel's order specifically indicated that INAC was to "…immediately implement the full meaning and scope of Jordan's principle" (the *Decision* at para. 481). While it understands a period of time may have been needed to meet with partners and stakeholders and put a framework in place, the Panel did not foresee this order would take more than three months to implement. The order is to "immediately implement", not immediately start discussions to review the definition in the long-term. There is already a workable definition of Jordan's Principle that has been adopted by the House of Commons. While review of this definition and the Federal government's framework for implementing it may benefit from further long-term review, the Panel sees no reason why the current definition cannot be implemented now.

[33] Therefore, the Panel orders INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[34] INAC will report to the Panel within two weeks of this ruling to confirm this order has been implemented.

D. Other issues

[35] The Complainants made various other submissions with respect to implementing the Panel's orders in the short term. While some were addressed by INAC, others were not (see for example para. 16 of the First Nations Child and Family Caring Society's submissions dated March 31, 2016; and paras. 12-15 of the Assembly of First Nations' submissions dated March 3, 2016). It would be helpful to the Panel and the parties if INAC could respond to those additional immediate relief items as part of its report on the FNCFS Program ordered above. Therefore, in its FNCFS Program report, the Panel directs INAC

to address the immediate relief items sought by the Complainants that have not been addressed in INAC's submissions to date.

E. Retention of jurisdiction

[36] Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33).

[37] Given the ongoing nature of the orders above, and given the Panel still needs to rule upon other outstanding remedial requests, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following the further reporting by INAC and the Panel's ruling on the other outstanding remedies.

IV. Concluding remarks by Panel Chairperson

[38] I wish to share some concluding remarks with the parties. Member Lustig has read and supports these remarks.

[39] The hearings in this matter were held in a spirit of reconciliation, with an overarching goal of maintaining an atmosphere of peace and respect. Respect for all involved was paramount and, given the nature of the case, respect for Aboriginal peoples not only participating in the proceedings, but also following the proceedings in person and on the Aboriginal Peoples Television Network. Fostering this atmosphere of peace and respect is of paramount importance considering the Tribunal's key role in determining fundamental human rights and in safeguarding the public's confidence in the administration of justice, especially for Aboriginal peoples.

[40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 16
Date: September 14, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and –

Attorney General of Canada

(Representing the Minister of Aboriginal Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

[5] In general, the Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN), along with the Commission and the Interested Parties participating at this stage of the proceedings, the Chiefs of Ontario (the COO) and the Nishnawbe Aski Nation (the NAN), are in agreement about the orders requested of the Panel to address the findings of the *Decision* in the short-term. Their submissions and requested orders are collectively referred to as those of the 'Complainants, Commission and Interested Parties' or 'CCI Parties' in this ruling. Where the submissions of the Complainants, Commission or Interested Parties may differ, those submissions are specifically outlined.

II. Preliminary remarks

[6] The Panel thanks the parties and interested parties for their most recent submissions. It has carefully considered them and found them to be very helpful. The Panel recognizes the time, effort and resources dedicated by the parties to complete them. Generally, the Panel is supportive of the majority of the orders requested made by the CCI Parties.

[7] The Panel is pleased to learn that the federal government has accepted to do a number of important things in response to the *Decision* and has made some progress in implementing the findings and orders from the *Decision*. Overall, the Panel believes the federal government is working towards reforming its approach to First Nations child and family services and implementing meaningful change for First Nations children and families.

[8] That said, and as addressed in this ruling, more progress still needs to be made in the immediate and long-term to ensure the discrimination identified in the *Decision* is remedied. In this regard, as emphasized in its last ruling (2016 CHRT 10), the Panel believes the dissemination of relevant and timely information continues to be of the utmost importance in rebuilding trust between the parties and avoiding conflicts and delays going forward.

[9] Generally, the Panel fails to understand why much of the information provided in INAC's most recent submissions could not have been delivered earlier, especially if this information formed part of the rationale for determining the budget for the FNCFS Program back in March 2016. INAC ought to have known this information was and remains important in responding to the Panel's information requests and reporting orders. Indeed, the Panel and the CCI Parties have been requesting this type of information for months now. It rests on INAC and the federal government to implement the Panel's findings and orders, and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data and/or documentation, ensures the Panel and the parties that this is indeed the case.

[10] INAC has also recognized the CCI Parties as partners in the reform process and identified a need to consult Indigenous peoples across Canada to obtain their input on reforms. While this is necessary and consistent with the federal government's duty to consult Indigenous peoples, again, improved communication surrounding such endeavours would greatly assist the Panel in understanding INAC's strategy to address the *Decision* and would help build the trust necessary to establish a partnership between the parties. It is also unclear if or who has been consulted among the Indigenous community at this point, including if any social workers or other experts in the field of child welfare have been consulted. On this last point, INAC has previously acknowledged that it does not have expertise in the provision of child and family services to First Nations. Therefore, the need to consult with experts in the field, including the Caring Society, should be a priority.

[11] Likewise, the Panel has made a number of comments since the *Decision* on the importance of the parties meeting to discuss reform of the FNCFS Program and the *1965 Agreement* in the immediate and long term. In this regard, the Panel notes the Caring Society, the AFN and INAC did not even acknowledge until their most recent submissions that they had met several times to discuss reforms and the reestablishment of the National Advisory Committee (the NAC). This is important information because the ability of the parties to work together at this immediate relief stage is a good way to test if the reinstatement of the NAC will yield success in reforming the provision of First Nations child

[160] In addition to the orders in the *Decision* and in 2016 CHRT 10, and pursuant to the ruling above, the Panel orders as follows.

A. Additional Immediate measures to be taken

1. INAC will not decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle (see paras. 121-123 above);

2. INAC will determine budgets for each individual FNCFS Agency based on an evaluation of its distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the FNCFS Agency's ability to provide services (see paras. 33, 37, 40 and 47 above);

3. In determining funding for FNCFS Agencies, INAC is to establish the assumptions of 6% of children in care and 20% of families in need of services as minimum standards only. INAC will not reduce funding to FNCFS Agencies because the number of children in care they serve is below 6% or where the number of families in need of services is below 20% (see para. 38 above);

4. In determining funding for FNCFS Agencies that have more that 6% of children in care and/or that serve more than 20% of families, INAC is ordered to determine funding for those agencies based on an assessment of the actual levels of children in care and families in need of services (see para. 39 above);

5. In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level (see para. 40 above);

6. INAC is to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and/or operations funding streams (see paras. 56-61 above); and

7. INAC is to immediately apply Jordan's Principle to all First Nations children (not only to those resident on reserve) (see paras. 117-118 above).

B. Reporting

1. By October 31, 2016, INAC is to provide a detailed compliance report indicating:

a. How it has complied with the immediate measures ordered above in section A of this order;

b. How it is immediately addressing funding for legal fees (see para. 48 above);

c. How it is immediately addressing the costs of building repairs where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations (see para. 49 above);

d. How it determined funding for each FNCFS Agency for the child service purchase amount and the receipt, assessment and investigation of child protection reports (see para. 50 above);

e. How much it is allocating for each "growth and future cost driver" and to detail how it arrived at its corresponding allocations for each FNCFS Agency, including for Ontario (see paras. 51-55 above);

f. How new funding is immediately addressing the adverse effects identified with respect to the *1965 Agreement*, especially in terms of mental health services and Band Representatives (see paras. 69-74 above);

g. How it determined funding for remote FNCFS Agencies that allows them to meet the actual needs of the communities they serve, taking into account such things as travel to provide or access services, the higher cost of living and service delivery in remote communities and the ability of remote FNCFS Agencies to recruit and retain staff (see paras. 75-81 above);

h. How immediate relief funding is being distributed in Ontario (see paras. 82-88 above);

i. How it has complied with the order to immediately implement the full meaning and scope of Jordan's Principle (see paras. 107-120 above), including:

    i. confirmation that it is applying the principle to all First Nations children (not just to those resident on reserve);

    ii. an explanation as to why it formulated the application of the principle to children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports";

    iii. details as to what action it has taken to comply with the "government of first contact" provision in the order;

    iv. clarification as to what process will be followed to manage Jordan's Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order;

v. clarification as to how it will ensure that First Nations, CCI Parties and FNCFS Agencies are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan's Principle;

vi. providing all First Nations and FNCFS Agencies with the names and contact information of the Jordan's Principle focal points in all regions and informing them of any changes of such; and

j. If it is providing funding for the Aboriginal component of the Canadian Incidence Study, including whether that component of the study will include data collection specific to remote and northern First Nations communities (see paras. 132-134 above).

C. Additional information to be provided

1. By September 30, 2016, INAC is directed to serve and file:

a. The rationale, data and any other relevant information it states it used to determine its five-year plan for investing in the FNCFS Program and in determining budgets for each FNCFS Agency, including its cost driver study and trend analysis documentation, how it arrived at financial projections beyond fiscal year 2016-2017, any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates, the information used to determine the caseload ratios in Quebec and Manitoba and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance and legal services; and

b. The correspondence with the Province of Ontario referred to in its submissions (see paras. 85-87).

2. By October 31, 2016, INAC is directed to serve and file:

a. A list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far in response to the findings in the *Decision* and Jordan's Principle, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions (see paras. 42 and 114 above);

b. A response indicating its views on the request that it reimburse costs for travel to access physician-prescribed special needs services and assessments, special needs rehabilitative and support services and respite care, and support for families in crisis as part of immediate relief investments in Ontario (see para. 94 above);

c. A response indicating its views on dealing with the infrastructure needs of FNCFS Agencies as part of immediate relief investments in Ontario (see para. 97 above);

d. A response indicating its views on the request to expand the eligibility requirements of the *1965 Agreement* as part of immediate relief investments in Ontario (see para. 100 above);

e. A response indicating its views on the request that it conduct a special study on the application of the *1965 Agreement* in Ontario (see paras. 103-104 above); and

f. A response indicating if it is agreeable to providing funds for the CCI Parties' participation in the upcoming in-person case management meeting and any subsequent meetings (see para. 156 above).

D. Retention of jurisdiction

[161] Given the ongoing nature of the Panel's orders, and given the Panel still needs to rule upon other outstanding remedial requests (see para. 4 above), the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by INAC, the upcoming in-person case management meeting and any ruling on the other outstanding remedies.

VIII. In-person case management meeting

[162] The Tribunal will be in contact with the parties shortly to schedule an in-person case management meeting between the Panel and the parties. Subject to the availability of those involved, the intention is to have the meeting as soon as is possible. As indicated throughout this ruling, there will be many items up for discussion. Any other outstanding issues can also be discussed at the meeting.

[163] With the additional information and reporting requested as part of this ruling, the Panel's hope is that all outstanding short-term remedial requests can be resolved by the end of the meeting as to not delay immediate action any further. The Panel also hopes the meeting can be used to begin discussions on mid to long-term orders, including compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Therefore, the parties should anticipate several days for this meeting.

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 14
Date: May 26, 2017
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Outline

I. Motions for immediate relief related to Jordan's Principle

[1] Jordan River Anderson of the Norway House Cree Nation was born with a serious medical condition. Because of a lack of available medical services in his community, Jordan's family turned to provincial child welfare care in order for him to get the medical treatment he needed. After spending the first two years of his life in hospital, Jordan could have gone to a specialized foster home close to his medical facilities in Winnipeg. However, for two years, Indigenous and Northern Affairs Canada ("INAC"), Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs. Ultimately, Jordan remained in hospital until he passed away, at the age of five, having spent his entire life in hospital.

[2] In recognition of Jordan, Jordan's Principle provides that where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service. It is a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. On December 12, 2007, the House of Commons unanimously passed a motion that the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[3] The Complainants and Interested Parties (with the exception of Amnesty International) have each brought motions challenging, among other things, Canada's implementation of Jordan's Principle in relation to this Panel's decision and orders in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 ("the *Decision*"). Canada and the Commission filed submissions in response to the motions. The motions were heard from March 22 to 24, 2017 in Ottawa. As with the hearing on the merits, the hearing of these motions was broadcasted on the Aboriginal Peoples Television Network.

[4] This ruling deals specifically with allegations of non-compliance and related requests for further orders with respect to Jordan's Principle. Other aspects of the parties' motions not dealt with in this ruling will be determined as part of a separate ruling.

II. Findings and orders with respect to Jordan's Principle to date

[5] In the *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, the Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, INAC was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[6] Three months following the *Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[7] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. We noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further

indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34). Again, the ruling and related orders were not challenged by way of judicial review.

[8] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[9] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[10] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In 2016 CHRT 16, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC

was ordered to provide all First Nations and First Nations Child and Family Services Agencies (“FNCFS Agencies”) with the names and contact information of the Jordan’s Principle focal points in all regions.

[11] Finally, the Panel noted that INAC’s new formulation of Jordan’s Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to “First Nations children on reserve” (as opposed to all First Nations children) and to First Nations children with “disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports.” The Panel ordered INAC to immediately apply Jordan’s Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC’s formulation of Jordan’s Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with “disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports” (see 2016 CHRT 16 at paras. 107-120). This third ruling was also not challenged by way of judicial review.

III. Canada’s further actions in relation to Jordan’s Principle

[12] In response to the present motions, Canada states that its definition of Jordan’s Principle now applies to all First Nations children and is not limited to those residing on reserve or normally resident on reserve. It also applies to all jurisdictional disputes, including those between federal government departments.

[13] According to Canada, its revised interpretation of Jordan’s Principle aims to ensure that anytime a need for a publicly-funded health, education or social care service or support for a First Nations child is identified, it will be met. Any jurisdictional issues that might arise will be dealt with after ensuring the need is met. New processes have been created so that the services needed for any Jordan's Principle case are not delayed due to case conferencing or policy review. Urgent cases are addressed within 12 hours; other cases within 5 business days; and, complex cases which require follow-up or consultation with others within 7 business days.

[14] Canada states it has also taken the necessary steps to ensure the requisite funding and human resources are available to implement the expanded definition of Jordan's Principle. In this regard, it has undertaken new policy initiatives to improve health and social service needs for First Nations children. According to Canada, the Child-First Initiative (the "CFI") supports the expanded application of Jordan's Principle by providing mechanisms for Canada to prevent or resolve jurisdictional disputes and gaps, before they occur. Canada submits the CFI identifies First Nations children at risk, through enhanced service coordination, and provides a source of funds to meet children's needs in cases where those needs cannot be met through existing publically available programs. Canada also points to the 2016/17 First Nations and Inuit Health Branch regional operation plan as supporting the correct interpretation of the application of Jordan's Principle. That plan calls for $64 million for First Nations mental health programs and services in Ontario, in addition to regular mental health programs.

[15] In addition, Canada submits that it is also focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available and given an opportunity to get involved and share their views.

[16] Finally, Canada states that while Jordan's Principle cannot fund everything, firm lines regarding what is recoverable are not being drawn. Any publicly-funded service that is available to other Canadian children is eligible under Jordan's Principle and has been covered when brought forward.

IV. Analysis

[17] The Complainants and the Interested Parties believe Canada has failed to comply with the Panel's orders to date, or certain aspects of those orders. Generally, each of their respective submissions focused on a different aspect of the complaint and made requests for immediate relief orders related to that focus. Based on statements made in their submissions and at the hearing, the Complainants and the Interested Parties are generally supportive of each other's positions and requested orders.

[18] The Commission believes that, despite a number of positive and encouraging developments, Canada is not yet in full compliance with this Panel's orders and, therefore, it is open to the Panel to provide additional clarification and/or guidance with respect to its orders.

[19] With respect to Jordan's Principle, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and the Commission request that additional orders be made in relation to the definition of the principle, the dissemination of that definition to the public and stakeholders, and the process for dealing with Jordan's Principle cases and the tracking of those cases.

[20] The Assembly of First Nations (the "AFN") was originally concerned about its lack of involvement in Health Canada's Jordan's Principle activities given it has an Engagement Protocol with the First Nations and Inuit Health Branch. Health Canada has since invited the AFN to co-chair a working group on Jordan's Principle, which the AFN accepted. The AFN's submissions echo many of the concerns raised by the Caring Society and the Commission in terms of the definition and process surrounding Jordan's Principle.

[21] The Chiefs of Ontario's (the "COO") and the Nishnawbe Aski Nation's (the "NAN") submissions with respect to Jordan's Principle focus mainly on the provision of mental health services under the *Memorandum of Agreement Respecting Welfare Programs for Indians* ("the *1965 Agreement*") in Ontario. While this ruling will deal with Jordan's Principle generally, specific issues with respect to the *1965 Agreement*, along with other requests, will be dealt with in a separate ruling.

[22] In addition, the Panel highlights that NAN's motion had also sought a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal identifying children and youth at risk of suicide. Health Canada has since committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. As such, and at NAN's request, the Panel adjourned the request for a "Choose Life" order (see 2017 CHRT 7).

A. Legal arguments

(i) Burden of proof and compliance

[23] In general, and in deciding all aspects of the motions now before the Panel, the Caring Society and the AFN submit that Canada bears the burden of demonstrating to the Tribunal that it has complied with the orders for immediate relief made to date. Canada is in possession of the necessary information to show whether the immediate relief ordered by the Tribunal has been provided. Furthermore, it would be unjust, having proved that Canada has discriminated against First Nations children and their families in a systemic way, to bear a "burden of proof" to show that discrimination is continuing in the absence of further orders.

[24] In the absence of evidence clearly demonstrating that Canada has fully addressed the immediate relief items ordered by the Tribunal, the Complainants and the Interested Parties have, among other things, asked the Tribunal to find that Canada continues to discriminate, that it has not complied with the Panel's orders to date, and, in some cases, asked that the Tribunal issue an order declaring Canada non-compliant.

[25] The Commission submits that, where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to: (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In its view, despite a number of positive and encouraging developments, Canada has not yet brought itself into full compliance with the Tribunal's rulings regarding Jordan's Principle. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

[26] Canada submits that there is no established legal test governing a motion for non-compliance before this Tribunal. The test to be met on this motion must accordingly be derived from the general principles that guide human rights law. According to Canada, the law is clear that the moving parties have the legal burden to prove their allegations on a

balance of probabilities: in this case, allegations of non-compliance. In Canada's view, the moving parties have not met their burden and, therefore, their motions should be dismissed. In any event, Canada states it has complied with the Tribunal's orders.

[27] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* ["the *Act*"]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at paras. 61 and 67, aff'd 2011 FCA 202 ["*Walden*"]). In determining the present motions, this is the situation in which the Panel finds itself.

[28] In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal's determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified.

[29] Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an

intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36).

[30] It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial.

[31] In the same vein, the Panel's role in ruling upon the present motions is not to make declarations of compliance or non-compliance *per se*. Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's orders and it may make findings as to whether those actions are or are not in compliance with those orders.

[32] As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided

additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*.

[33] While that approach has yielded some results, it has now been over a year since the *Decision* and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada's assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders.

[34] This is the context in which the present motions have been filed. The Tribunal's remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties.

(ii) Separation of powers

[35] In crafting further orders, Canada urges the Tribunal to bear in mind general principles regarding the appropriate separation of powers. That is, the Tribunal should leave the precise method of remedying the breach to the body charged with responsibility for implementing the order. According to Canada, the Tribunal would exceed its authority if it were to make orders resulting in it taking over the detailed management and coordination of the reform currently being undertaken.

[36] Canada submits deference must be afforded to allow it to exercise its role in the development and implementation of policy and the spending of public funds. Absent statutory authority or a challenge on constitutional grounds, courts and tribunals do not have the institutional jurisdiction to interfere with the allocation of public funds or the development of public policy. To the extent the Tribunal is being asked to make additional

remedial orders that would require it to dictate policies or authorize the spending of public funds, Canada contends those requests should be denied as they would exceed the Tribunal' s jurisdiction.

[37] Canada's separation of powers argument lacks specificity. Aside from one specific order requested by the Caring Society, which the Panel will address in a separate ruling, Canada has not pointed to any other orders requested by the other parties to which this argument would apply. For the purposes of this ruling, it has not identified any requested orders related to Jordan's Principle that may offend the separation of powers. In any event, as explained in the reasons below, any further orders made by the Panel are based on the findings and orders in the *Decision* and subsequent rulings, which Canada has accepted; the evidence presented on these motions; and, the Panel's powers under section 53(2) of the *Act*. In performing this analysis, Canada's generalized separation of powers argument is not particularly helpful.

B. Further orders requested

(i) Definition of Jordan's Principle

[38] Despite Canada's assurances that its definition of Jordan's Principle now applies to all First Nations children, regardless of their condition or place of residency, the Caring Society submits that government officials have been promulgating a restrictive definition of Jordan's Principle that still focuses on children with disabilities or with a critical short-term condition requiring heath or social services. The Caring Society adds that INAC has yet to undertake a review of past Jordan's Principle cases where services were denied. While Health Canada is engaged in a process of looking at past Jordan's Principle cases where services were denied, the Caring Society and the AFN are unclear about the number of years into the past this process is considering.

[39] Moreover, the Caring Society is concerned that the definition of Jordan's Principle is limited to children as defined by provincial legislation. In some provinces, a child is defined as being under the age of 16. Such an approach is unacceptable to the Caring Society because Jordan's Principle is not restricted to services provided under a

province's child and family services legislation. Similarly, the Caring Society submits that Jordan's Principle requires an outcome-based, and not process-based, approach to access to services. That is, the provincial/territorial normative standard of care is an inadequate measure when designing programs and initiatives to provide substantive equality to First Nations children.

[40] The Commission generally agrees with the Caring Society that the Tribunal should provide additional guidance by clarifying the exact definition of Jordan's Principle that is to be applied, going forward, to redress the discriminatory practices identified in the *Decision*. Considering the rulings already made by the Panel to date, the Commission suggested certain key principles that any definition of Jordan's Principle must include.

[41] While Canada has done some work to implement Jordan's Principle since the *Decision*, it still has not implemented its full meaning and scope. As mentioned above, in 2016 CHRT 16, the Panel indicated that a definition of Jordan's Principle that applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" appeared to be more restrictive than formulated by Parliament. Following the Panel's request for further information, and pursuant to the evidence presented in the course of these motions, the Panel can now confirm that Canada has indeed been applying a narrow definition of Jordan's Principle that is not in compliance with the Panel's previous orders.

[42] Canada put forward three witnesses in response to the motions of the Complainants and the Interested Parties:

- Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada's First Nations and Inuit Health Branch;
- Ms. Cassandra Lang, Director, Children and Families, in the Children and Families Branch at INAC; and,
- Ms. Lee Cranton, Director, Northern Operations in Ontario Region within Health Canada's First Nations and Inuit Health Branch.

[43] Each of these three witnesses swore an affidavit and was cross-examined thereon by the other parties, all of which was put before the Panel in the context of these motions. Generally, the three witnesses presented similar testimonial evidence in support of Canada's position. However, as the Panel will explain in the pages that follow and with a primary focus on the evidence of Ms. Buckland, their testimony in relation to Jordan's Principle was not corroborated by the bulk of the documentary evidence emanating from Canada and dated over the last year since the *Decision*.

[44] Ms. Buckland is the federal government official responsible for implementing Jordan's Principle. She has been involved in doing so since the *Decision*'s release (see Gillespie Reporting Services, transcript of Cross-Examination of Robin Buckland, Ottawa, Vol. I at p. 15, lines 21-23 [*Transcript of Cross-Examination of Ms. Buckland*]).

[45] In her affidavit, Ms. Buckland states that the previous restrictions found in the definition of Jordan's Principle have now been eliminated, including the requirement that First Nations children must have multiple disabilities that require multiple service providers or that they must reside on reserve. Despite this, she states that families are often not coming forward to request support. In this regard, she indicates proactive efforts in partnership with service delivery organizations on the ground will need to continue and that Canada has commenced various engagement activities to help facilitate the broader application of Jordan's Principle (see *affidavit of Ms. Robin Buckland*, January 25, 2017, at paras. 3, 16-17).

[46] Ms. Buckland further explained that the current definition of Jordan's Principle, which applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports", was to focus efforts on the most vulnerable children:

> [I]t's more about looking for the highest area of need and, and trying to focus our efforts.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 17, lines 12-13.
> [A] child living on reserve with an interim, a condition or short-term condition or a disability affecting their activities of daily living was a focus of our efforts, was and is a focus of our efforts in terms of Jordan's Principle.

Transcript of Cross-Examination of Ms. Buckland at p. 39 lines, 17-21.

> Whenever you're working on a complex health issue, you always take a multi-modal approach to it. There's always different angles from which you need to be able to address the problem if you are going to make a difference. The focus on First Nations children on reserve with a disability or a short-term condition with -- that affects their activities of daily living is an effort, is our effort to try to get at a segment of the population, a subset of the population where we feel there is an opportunity to make -- where we feel there is the greatest need and where we feel there is an opportunity to make the greatest difference.
> So I think as I said earlier, we were -- it was unfortunate that our communications in the beginning did not -- were not properly prefaced, indicating that Jordan's Principle applies to all First Nations children.

Transcript of Cross-Examination of Ms. Buckland at p. 40, lines 10-25.

> We're trying to focus, we're trying to start somewhere and trying to -- where are we likely to find the greatest number of jurisdictional disputes.

Transcript of Cross-Examination of Ms. Buckland at p. 41, lines 4-6.

> Children with disability or critical interim need is, is a particular focus. Jordan`s Principle, as I mentioned just moments ago, applies to all first nations kids and who have an unmet need in terms of health and social needs.

Transcript of Cross-Examination of Ms. Buckland at p. 275, lines 19-23.

[47] As the Caring Society points out at paragraph 24 of its December 16, 2016 submissions, the *Decision* found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Decision* at paras. 350-382). Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision,* entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation*

Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see *Decision* at paras. 368-373).

[48] As the Panel also highlighted in the *Decision*, the Federal Court likewise found Health Canada and INAC's focused approach to Jordan's Principle to be narrow and the finding that the principle was not engaged with respect to Jeremy Meawasige, a teenager with multiple disabilities and high care needs, to be unreasonable (see *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 ["*Pictou Landing*"]).

[49] The justification advanced by Ms. Buckland for the focused approach to Jordan's Principle is the same one advanced by Canada in the past and underscored by the Panel in the *Decision* (see paras. 359 and 368-369). Specifically, in a Health Canada PowerPoint presentation from 2011, entitled *Update on Jordan's Principle: The Federal Government Response* (Exhibit R-14, Tab 39 at p. 6), Canada indicated:

> This slide presents an overview of the federal response to Jordan's Principle. We acknowledge that there are differing views regarding Jordan's Principle. The federal response endeavors to ensure that the needs of the most vulnerable children at risk of having services disrupted as a result of jurisdictional disputes are met.
>
> […]
>
> The Government of Canada's focus is on children with multiple disabilities requiring services from multiple service providers whose quality of life will be negatively impacted by jurisdictional disputes. These are children who are the most vulnerable – children like Jordan.

[50] Despite the findings in the *Decision*, Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle. In February 2016, a few weeks after the release of the *Decision*, Canada considered various new definitions of Jordan's Principle. Those new definitions and their implications are found in a document entitled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*, dated February 11, 2016 (*Exhibits to the Cross-Examination of Ms. Cassandra Lang on her affidavit dated January 25, 2017*, February 7-8, 2017, at tab 4):

Proposed Definition Options	Key Elements and Considerations
Option One: Jordan's Principle is a child-first approach to address the needs of First Nation children assessed as having disabilities/special needs by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements** Similar to the criteria and scope as original JP response but broader than original definition (which was limited to "children with multiple disabilities requiring services from multiple service providers), this approach maintains a focus on children with special needs. Broadens the definition of jurisdictional dispute to include intergovernmental disputes (not just federal/provincial) this responds **Considerations:** • May draw criticism due the continued focus on special needs (while broader) as the original JP response. • Maintaining the notion of comparability to provincial resources may not address the criticism of the Tribunal regarding the need to ensure substantive equality in the provision of services. • The focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services.
Option Two: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** Similar to Option One with the exception of broadening the scope to include all First Nation children on reserve rather than limited to special needs. Maintains original focus on: • jurisdictional disputes • normative standards set by province (with a modification to move away from specific reference to geographical comparability **Considerations:** • Responds to the key direction of the Tribunal by broadening the scope beyond children with special needs. However, the broader scope may also dilute the focus on some of the most vulnerable children. • May have significant resources implications and may go beyond current policy authorities and/or program mandates.

Proposed Definition Options	Key Elements and Considerations
Option Three: Jordan's Principle is a child-first approach to address the assessed needs of First Nation c children by ensuring cross jurisdictional issues to not disrupt delay or prevent a child from accessing services. In the event that there is a dispute over payment of services between or within governments, First Nation children will receive required social and health supports. The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** • Broader scope – does not limit the response to First Nation children living on reserve. • A dispute between governments or within government is still required in order to trigger JP. **Considerations:** • The inclusion of all First Nation children may have far reaching resource implications and will require additional policy and program mandates. • The continued focus on instances where there is a dispute may limit the ability for JP to respond to gaps in service (where no jurisdiction is providing the required service).
Option Four: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, First Nation children will receive required social and health supports. The issue of payment will be resolved by the government involved, the agency of first contact will pay for the services until there is a resolution.	**Key Elements:** A very broad application of the principle that includes all First Nation children and does not require an identified jurisdictional dispute in order to trigger JP. **Considerations:** • Considerable resource and policy and program implications • Goes beyond the Tribunal recommendations and has implications for federal mandate given that there are gaps in services that are not currently funded by any level of government. • Provinces may react to federal definition as it may put additional financial pressures on partners involved

[51] The Panel finds *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document relevant and reliable. Not only is it an internal government document filed into evidence but, similar to the August 2012 presentation entitled *First Nations Child and Family Services Program (FNCFS) The Way Forward* discussed in the *Decision* (see at paras. 292-302), it presents options that inform government decision making. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document specifies:

> The definitions and/or principles described above represent a menu of possible options (not mutually exclusive) that the federal government could

> draw from to meet the Tribunal's order to cease applying a narrow definition of Jordan's Principle and take measures to implement its full meaning and scope.

[52] Ultimately, it was "option one" that was selected for implementation, an option that *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document considers to not be fully responsive to the Tribunal's order. As the Caring Society and the Commission highlight in their submissions and the Panel confirmed in its review of the documents on record, including those referenced at pages 59-60 of the Caring Society's February 28, 2017 submissions, this definition and approach to Jordan's Principle was recently presented internally and externally to a number of organizations and First Nations in the following terms:

- First Nations children living on reserve with a disability or a short-term condition.
- First Nations children living on reserve with a disability or a short-term condition requiring health or social services.
- First Nations children with a disability or a critical short-term health or social service need living on reserve, or who ordinarily reside on reserve.
- First Nation child with a disability or a discrete condition that requires services or supports that cannot be addressed within existing authorities.
- First Nation children living on reserve with an ongoing disability affecting their activities of daily living, as well as those who have a short term issue for which there is a critical need for health or social supports.
- First Nations children living on reserve and in the Yukon who have a disability or an interim critical condition affecting their activities of daily living have access to health and social services comparable to children living off reserve.
- First Nations children with a disability or interim critical condition living on reserve have access to needed health and social services within the normative standard of care in their province/territory of residence.

[53] These iterations of Jordan's Principle do not capture all First Nations children. Instead, as stated by the Caring Society at paragraph 15 of its December 16, 2016 submissions, they capture "…varying subsets of First Nations children with disabilities or

short-term conditions." Notwithstanding the above, Ms. Buckland indicates that Canada still meant for Jordan's Principle to apply to all First Nations children and that the fact the definition does not reflect all First Nations children is a communications issue and not a narrow application of the principle.

[54] The Panel does not accept this explanation. Ms. Buckland's assertion is not supported by the preponderance of evidence presented on this motion, which includes various charts, communication documents, and even extracts from INAC's website.

[55] A significant example is *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document referred to above. The consideration of each of the four options indicates that the definition of Jordan's Principle adopted by Canada was a calculated, analyzed and informed policy choice based on financial impacts and potential risks rather than on the needs or the best interests of First Nations children, which Jordan's Principle is meant to protect and should be the goal of Canada's programming (see *Decision* at para. 482).

[56] Another example is a letter dated January 19, 2017, addressed to Ontario First Nation Chiefs and Council Members, entitled *Attention: Ontario First Nation Chiefs and Council Members, Subject: Update-Jordan's Principle- Responding to the needs of First Nations children* (*Answers to requests of Lee Cranton*, March 7, 2017, at tab 13). In the letter, the Ontario Regional Executive for the First Nations and Inuit Health Branch announces the implementation of a new initiative designed to address the health and social needs of First Nations children with "…an ongoing disability affecting their daily living, or for those with a short-term issue where there is a critical need for health or social services." The letter comes almost a year after the *Decision*, nearly 9 months after the April 2016 ruling and, more significantly, after the Panel indicated in its September 2016 ruling that Health Canada and INAC's definition of Jordan's Principle appeared to be overly narrow and not in line with the Panel's previous findings and orders.

[57] A Health Canada presentation entitled *Jordan's Principle – Child First Initiative* presented on September 15, 2016 to the Non-Insured Health Benefits Committee, and on October 6, 2016 to the Innu Round Table, indicates that the new approach to Jordan's

Principle, restricted to children with disabilities or critical interim conditions living on reserve, will continue up to 2019 (see September 15, 2016 presentation at *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at pp. 4-5; and, October 6, 2016 presentation at A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at pp. 4-5). At page 5, the presentation provides a "Then and Now" table comparing Canada's approach to Jordan's Principle from 2008-2016 to that in 2016-2019:

2008-2016	**2016-2019**
• Dispute-based, triggered after declaration of a dispute over payment for services within Canada, or between Canada and a province	• *Needs-based*, child-first approach to ensure access to services without delay or disruption due to jurisdictional gaps.
• First Nations child living on reserve or ordinarily resident on reserve	• Still First Nations child on reserve or ordinarily resident on reserve
	• Are within the age range of "children" as defined in their province/territory of residence

• Child assessed with:
  • multiple disabilities requiring multiple providers
	• Children assessed with needing health and/or social supports because of:
	  • a disability affecting activities of daily living; OR
	  • an interim critical condition affecting activities of daily living

• Child required services comparable to provincial normative standards of care for children off-reserve in a similar geographic location	• Child requires services comparable to provincial normative standards of care, AND requests BEYOND the normative standard will be considered on a case-by-case basis

[58] The *Jordan's Principle – Child First Initiative* presentation specifies that the goal of the new approach to Jordan's Principle is "…to help ensure that children living on reserve with a disability or interim critical condition have equitable access to health and social services comparable to children living off reserve" (at p. 6). At page 8, the October 6, 2016 presentation goes on to provide a "JP Fund – Eligibility Determination Checklist" which asks questions such as: is the request for a child as defined by provincial law? Does the child live on reserve or ordinarily lives on reserve? Does the child have a disability that impacts his/her activities of daily living at home, school or within the community, or has an interim critical condition requiring health or social services or supports? Does the request fall within the normative standard of care of the province or territory of residence?

[59] These presentations are meant to inform and guide individuals on how Canada is implementing Jordan's Principle. In another similar example, in a letter dated August 8, 2016, addressed to all First Nations and Inuit Health Branch and Band employed nurses in Alberta, with the subject line "Government of Canada's New Approach to Implementing Jordan's Principle" (see A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I at p.2), the Director of Nursing for the First Nations and Inuit Health Branch, Alberta Region, writes:

> - Please read the information below/attached to orientate yourself to the new approach.
>
> - There will be further details coming to help guide your assistance with these clients.
>
> - As part of your regular work, if you see or are approached about a First Nations child with disabilities (short-term or long term) that may not be receiving the needed health or social services normally provided to a child off-reserve please contact FNIHB-AB.

[60] The letter attaches a guide illustrating the process to be followed in assessing a potential Jordan's Principle case. Despite the case-by-case analysis stated in other presentations for situations falling outside the eligibility criteria, the process indicated in the chart for nurses steers those cases away from the application of Jordan's Principle. The first question in the chart is: "Does the child have needs related to a disability or a short term health issue that are not being met?" If the answer is 'no', the chart indicates that the "Client/Family should access regular programming." If the answer to this first question is 'yes', then the next question is: "Are there programs on reserve, or easily accessed off reserve, that could meet those needs?" If the answer to this second question is 'no', the chart directs the nurses to: "Gather the related information and send to the JP focal point (JPFP) (See Contacts)." If the answer to the second question is 'yes', the nurse can "…make these referrals as they normally would i.e. Home Care, NIHB, PCN services."

[61] At the time of Ms. Buckland's cross-examination, in February 2017, INAC's website continued to espouse the narrow definition of Jordan's Principle:

> The Government of Canada's new approach to Jordan's Principle is a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition.
>
> "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children", Government of Canada (February 4, 2017), *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 7; see also *Transcript of Cross-Examination of Ms. Buckland* at pp.43-45.

[62] Canada submits that it has now removed any restrictions in its definition of Jordan's Principle. However, only one document submitted prior to Ms. Buckland's cross-examination supports this point. A November 2016 presentation to the "ADM Oversight Steering Committee" states: "Jordan's Principle (JP) reflects a commitment to ensure all First Nations children receive access to services available to other Canadian children, in a timely manner" [Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at p. 2)]. It goes on to indicate that Health Canada and INAC are implementing a child-first approach, "addressing specific needs of children on a case-by-case basis." When compared to other presentations submitted into evidence, as outlined above, it does not appear that this presentation was widely communicated, within or outside government. It is also unclear that the principles enunciated therein have been implemented.

[63] Two other documents could be said to support Canada's assertion that it has now removed any restrictions in its definition of Jordan's Principle. Both those documents were submitted following Ms. Buckland's cross-examination and in answer to requests from the other parties.

[64] The first document is another presentation, dated December 21, 2016. It indicates, among other things, that Jordan's Principle applies to all First Nations children, that the Government of Canada recognizes that First Nations on reserve face greater difficulty in accessing Federal/Provincial/Territorial supports, and, that Canada is focused on the most

vulnerable children – those with a disability or critical short-term condition (see Health Canada, *Improving Access to Health and Social Services for First Nations Children*, presentation dated December 21, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, tab 3B, at pp. 2 and 5). The presentation does not specify who it was presented to and, again, when compared to other presentations submitted into evidence, it does not appear to have been widely distributed or communicated, if at all.

[65] The other document contains notes from a "February 10th" meeting with regional executives (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A). It states:

> Update on JP
> - applies to all FN children, not just on reserve
> - JP not limited to short term needs and disabilities
> - all FN children, all disputes, all needs
> - each order from CHRT has clarified our responsibilities
> - focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes
> - comms tools and key messages – getting these out
> - will be asked to go back to all stakeholders and clarify our directions
>
> […]
>
> Next Steps
> - will follow up with written lines which will say:
> - all FN children, on and off reserve
> - all jurisdictional disputes e.g. between departments
> - not limited to children with disabilities or short term critical needs

[66] Based on the wording of the notes, it is clear that they came from a meeting in February 2017: "applies to all FN children, not just on reserve" (this requirement was clarified in September 2016 in 2016 CHRT 16); "each order from CHRT has clarified our responsibilities" (only one order in February 2016); and, "focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes" (this more detailed "focus" characterization only arises following Ms. Buckland's cross-examination). Again, when compared to the other evidence, the definition of Jordan's Principle discussed at this meeting does not appear to have been widely distributed or communicated, if at all, and it is also unclear that the principles enunciated therein have now been implemented.

[67] Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the *Decision* and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the *Decision* and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.

[68] Presumably, while Canada could have implemented the actual definition of Jordan's Principle, as ordered by the Panel, and at the same time implemented a method to focus on the urgent needs of certain children, that was not the course of action taken by Canada. Having a broad definition does not exclude the possibility of having a process to deal with some children on a more urgent basis. However, there is a distinction between, on the one hand, having an inclusive definition and then attributing priorities in terms of urgencies and, on the other hand, limiting the definition with the result of excluding individuals for the sake of focusing on more vulnerable cases.

[69] Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the *Decision* with respect to substantive equality and the need for culturally appropriate services (see *Decision* at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see *Decision* at paras. 399-427).

[70] In this regard, the normative standard of care in a particular province may help to identify some gaps in services to First Nations children. It is also a good indicator of the services that any child should receive, whether First Nations or not. For example, in the hearing on the merits, the Panel heard that Health Canada will only pay for one medical device out of three and, if it is a wheelchair, it is paid for once every five years. The normative standard of care generally provides for all three devices to be paid for (see *Decision* at para. 366 and *Jordan's Principle Dispute Resolution Preliminary Report*

(Terms of Reference Officials Working Group, May 2009), Exhibit HR-13, tab 302). This example highlights the gap and flawed rationale contributing to Health Canada's policy, which does not take into account a child's growth over five years.

[71] However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

[72] This potential gap in services was highlighted in the *Pictou Landing* case mentioned above and in the *Decision*. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see *Pictou Landing* at paras. 96-97). Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the *Decision* at paragraphs 421-422:

> [421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).
>
> [422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive

> adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[73] Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.

[74] Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families (as will be discussed in the next section), along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

[75] Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of

Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

[76] On this last point, the evidence indicates and the Panel wishes to highlight that any funding set aside to address Jordan's Principle cases that is not spent in a given year cannot be carried over into the next year. It is set and has to be spent on Jordan's Principle cases or it is returned to the consolidated revenue fund of Canada. In this regard, from July 2016 to February 2017, only approximately $12 million or a little over 15% of the $76.6 million budgeted for Jordan's Principle in 2016-2017 had been spent, $8 million of which was for respite care services in Manitoba [see "Jordan's Principle - Child First initiative", presentation to the Non-Insured Health Benefits Committee, September 15, 2016 (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at p. 10); "Jordan's Principle, Health Canada and INAC 2016-17 Dashboard, Service Access Resolution Funding", valid as of January 11, 2017 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit A); "Memorandum to Senior Assistant Deputy Minister, Requests for Funding for Respite Care and Allied Services under Jordan's Principle", October 3, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); "Memorandum to Senior Assistant Deputy Minister, Request for Funding in Manitoba Region for Specialized Therapy Services Under Jordan's Principle", December 9, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); and, "2016-17 JP-CFI Allocation by Region" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 9)].

[77] Canada's current approach to Jordan's Principle is similar to the strategy it employed from 2009-2012 and as described in paragraph 356 of the *Decision*. During that time, Canada allocated $11 million to fund Jordan's Principle. The funds were provided

annually, in $3 million increments. No Jordan's Principle cases were identified and the funds were never accessed and lapsed. The Panel determined it was Health Canada and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle (see *Decision* at paras. 379-382).

[78] Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *Decision* at para. 356). In this sense, the evidence shows that Canada's funding of $382 million over three years for Jordan's Principle is not an investment that covers the broad definition ordered by the Panel in the *Decision* and subsequent rulings. Similar to Canada's past practice, it is a yearly pool of funding that expires if not accessed. Also, it is tailored to be responsive to the narrow definition Canada selected and, as specifically mentioned in Canada's own documents, this fund only covers First Nations children on reserve. Now, with a broadening of the definition of Jordan's Principle and the expiration of some of the funding, resources to address Jordan's Principle may become scarce [see "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A)].

[79] Again, the Panel recognizes that Canada made some efforts to implement Jordan's Principle and had a short time frame within which to do so following this Panel's ruling in April 2016. However, the same cannot be said for the numerous months following the April ruling, especially following the September 2016 ruling and up to the time of the hearing of these motions in March 2017. That said, the Panel believes Canada wants to comply with the *Decision* and related orders and has communicated as much [for example, see "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", May 18, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, at tab 5, p. 1)].

[80] Despite this, nearly one year since the April 2016 ruling and over a year since the *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada. In this regard, to redress Canada's previous discriminatory practices, the Panel notes that there are no restrictions that it is aware of that would stop individuals who were previously denied funding under Jordan's Principle, or who would now be considered to fall within the application of Jordan's Principle, from now coming forward and submitting or resubmitting their request. In fact, as highlighted by the Caring Society, considering Canada's previously narrow application of Jordan's Principle from at least 2009 to present, it would be appropriate and reasonable for Canada to review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, to ensure compliance with the correct application of Jordan's Principle ordered in this ruling.

[81] All the Panel's orders with respect to the implementation of the full meaning and scope of Jordan's Principle are detailed in the "Order" section below, under "Definition of Jordan's Principle.

(ii) Changes to the processing and tracking of Jordan's Principle cases

[82] Canada believes its new processes ensure any Jordan's Principle case is not delayed due to case conferencing or policy review. As mentioned above, it alleges urgent cases are addressed within 12 hours, while other cases are addressed within 5 business days, and complex cases which require follow-up or consultation with others are addressed within 7 business days.

[83] The Caring Society submits that Canada's revised processes for dealing with Jordan's Principle cases still impose delays. The AFN shares the Caring Society's view that the arm of government first contacted still does not address the matter directly by funding the service and seeking reimbursement afterwards as is required by Jordan's

Principle. In this regard, Canada's service standards relate to the lapse of time for a decision to be made and not the time it takes for the services to be actually provided to a child. Therefore, Canada should be required to confirm to the Tribunal that its process has been modified so that the government organization that is first contacted pays for the service without the need for policy review or case conferencing before funding is provided.

[84] Also, the Caring Society points out that Canada lacks a transparent and independent mechanism for a family or service provider to appeal a Jordan's Principle case. While a family of a child can request an appeal, there are no appeal procedures described or provided, no timelines for the appeal process and no assurance that written reasons will be provided.

[85] Furthermore, the Caring Society submits that Canada is not formally tracking the number of Jordan's Principle cases that are denied or in progress. It is also not measuring its performance against its stated timelines for resolving Jordan's Principle cases. In this regard, the AFN highlights that Jordan's Principle is meant to cover gaps in federal funding to First Nations children; however, Canada has not yet developed an internal understanding of what those gaps are.

[86] The Commission agrees with the Caring Society's request that Canada immediately: (i) cease imposing service delays due to policy review or case conferencing, and (ii) implement reliable systems to ensure the identification of Jordan's Principle cases. However, there are arguably multiple different methods of compliance. Therefore, the Tribunal should simply set a specific deadline by which the required procedures should be put in place, and require that Canada report to the parties at that time on the means chosen.

[87] Aside from some answers from its witnesses, Canada did not specifically address the submissions with respect to the first contact principle, appeal mechanisms or tracking.

[88] As highlighted in the Panel's last ruling in this matter (2017 CHRT 7), in January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact

amongst a group of young children and youth. This information was contained in a detailed July 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[89] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle'' (see *affidavit of Dr. Michael Kirlew*, January 27, 2017, at para. 16).

[90] While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle.

[91] Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see *Transcript of Cross-Examination of Ms. Buckland* at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16).

[92] If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay

was part of the process, as there was no clarity surrounding what the process actually was [see “Jordan’s Principle, ADM Executive Oversight Committee, Record of Decisions”, September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F, at p. 3); see also *Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 1-12].

[93] More significantly, Ms. Buckland’s comments suggest the focus of Canada’s Jordan’s Principle processing remains on Canada’s administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan’s Principle. The Panel finds Canada’s new Jordan’s Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process.

[94] The timelines imposed on First Nations children and families in attempting to access Jordan’s Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision*. According to Ms. Buckland, a Jordan’s Principle case comes to Canada’s attention through the local Jordan’s Principle focal point, which receives the intake form and then sends it to headquarters. The case is then evaluated by staff at headquarters, who first evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service requested. It is unclear how long this intake and initial evaluation can take.

[95] For example, the Panel was provided with an exchange of emails between Health Canada and a First Nations mother looking for assistance in busing her son with severe cerebral palsy to an off-reserve service centre with a program for special needs children (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 12). Following the initial request and an exchange of further information on January 19 and 20, 2017, Health Canada provided an update to the mother on January 27, 2017 indicating that it is working with INAC to determine if their education program could address the request. The mother wrote to Health Canada on

February 3, 2017 requesting a further update from Health Canada because she had yet to hear back for them. Two weeks after receiving the initial request, Canada was still trying to navigate between its own services and programs. When presented with this case under cross-examination, Ms. Buckland indicated “So I guess there's additional work to be done and, and I'm not sure that I have a better answer for it than that” (*Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 10-12).

[96] Where an existing program cannot resolve the service need, headquarters staff will then determine whether the case can be determined at the staff level, the Executive Director level, or the Assistant Deputy Minister level. It is only at this point that Canada’s timelines come into play (urgent cases addressed within 12 hours, other cases within 5 business days, and complex cases within 7 business days). Even then, the evidence indicates these timelines were not fully implemented at the time of Ms. Buckland’s cross-examination. A draft flow chart entitled “Jordan’s Principle Approval Process”, dated February 20, 2017, and provided following Ms. Buckland’s cross-examination, is marked as being in draft format (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 11). As Ms. Buckland indicated in her cross-examination, the process is still being refined (see *Transcript of Cross-Examination of Ms. Buckland* at p. 119, lines 13-19).

[97] The evidence indicates, and Ms. Buckland testified as much, that access to Jordan’s Principle funding is a last resort (see *Transcript of Cross-Examination of Ms. Buckland* at p. 51, lines 3-9; pp. 65-67; p. 72, lines 6-21; and, pp. 76-78). The new Jordan’s Principle process outlined above is very similar to the one used in the past, which the Panel found to be contributing to delays, gaps and denials of essential health and social services to First Nations children and families. Ultimately, this process factored into the Panel’s findings of discrimination (see *Decision* at paras. 356-358, 365, 379-382, and 391).

[98] The new process still imposes delays due to exchanges among federal government departments, whether it is called case conferencing, policy review or service navigation. As the Panel found in the *Decision*, this added layer of administration is counterintuitive to a principle designed to address exactly those issues, which result in delays, disruptions and/or denials of goods or services for First Nations children. Pursuant to Jordan’s

Principle, once a service need is determined to exist, the government should pay for the service and determine reimbursement afterwards. In practical terms, this means that the delay in the process to evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service should be eliminated. This administrative hurdle or delay, and the clear lack of coordination amongst federal programing to First Nations children and families, should be borne by Canada and not put on the shoulders of First Nations children and families in need of service.

[99] Jordan's Principle requires that there be a direct evaluation of need at the focal point or headquarters stage and that a decision be made expeditiously. Access to Jordan's Principle funding should be a priority, not a last resort. In this regard, no specific explanation was provided for why most cases will take an average of 5 business days to process. Given urgent cases can be processed within 12 hours, it is reasonable to assume that Canada can process most Jordan's Principle cases within a similar timeframe and shall be ordered to do so.

[100] For appeals, there is no formal process. In her affidavit, Ms. Buckland indicated that "Canada is implementing an approval and appeal process to review all requests in a timely manner" (*Affidavit of Robin Buckland*, January 25, 2017, at para. 11). Under cross-examination, she indicated that the appeals process is still being refined but currently consists of a family notifying the local Jordan's Principle focal point of the desire to appeal and that, thereafter, the case is referred to her for review at the Assistant Deputy Minister level (see *Transcript of Cross-Examination* of Ms. Buckland at p. 117, line 3, to p. 119, lines 3-19).

[101] In another draft flow chart entitled "Jordan's Principle Appeal Process", again in draft format and subject to further refinement, dated February 20, 2017 and provided following Ms. Buckland's cross-examination, a few additional details regarding the appeals process are elaborated upon (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 11; and, *Transcript of Cross-Examination of Ms. Buckland* at p. 117, line 3, to p. 119, line 19). Under "Guiding Principles" it mentions, among other things, that "[d]ecisions are consistently applied, and based on impartial judgement", that the "[p]rocess is open, available to the public, and easily understandable", and that "[d]ecisions are made within a

reasonable time period, without delay, and in keeping with established service standards of Jordan's Principle."

[102] However, it is unclear how these principles are incorporated into the actual appeals process. All that is described in the flow chart is that the regional Jordan's Principle focal point receives the request to appeal; the focal point then sends the request with any new or additional information for review to Health Canada's Senior Assistant Deputy Minister, First Nations and Inuit Health Branch and/or INAC's Assistant Deputy Minister, Education and Social Development Programs and Partnership. If the appeal is denied, the client is provided a rationale. No timelines are mentioned in the chart and no other information on the appeals process is found in the documentary record.

[103] In terms of the Jordan's Principle process overall, the Panel finds there is a clear need for improvement to ensure the principle is meeting the needs of First Nations children and addressing the discrimination found in the *Decision*. Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

[104] In terms of tracking Jordan's Principle cases, there was little evidence to suggest Canada is formally doing so beyond a very basic level. As Ms. Buckland put it, tracking "…definitely needs to be augmented to further track with better detail" (*Transcript of Cross-Examination of Ms. Buckland* at p. 96, line 25, to p. 97, line; see also p. 72, line 22, to p. 73, line 22; p. 92, lines 12-15; and, p. 97, line 10, to p. 98, line 2). A November 2016 presentation to the Assistant Deputy Minister Oversight Steering Committee, entitled "Jordan's Principle: Engaging with partners to design long-term approach" (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H), indicates under "Activities & Timelines" at page 6 that from Fall 2016 to Winter 2017 a data collection tool will be rolled out for use by INAC and Health Canada Service Coordinators and Jordan's Principle focal points. However, in light of the narrow definition of Jordan's Principle that was being used by

Canada, as discussed above, it is likely that any current tracking of cases may not capture all potential Jordan's Principle case, gaps in services and all First Nations children.

[105] With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the *Jordan's Principle – Child First Initiative* presentation, presented to the Innu Round Table on October 6, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, *Jordan's Principle – Child First Initiative*, presentation dated October 12, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at p. 12).

[106] There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions.

[107] Therefore, the Panel orders Canada to track and collect data on Jordan's Principle cases pursuant to the definition of Jordan's Principle ordered in this ruling. In order to ensure Jordan's Principle is being implemented correctly by Canada, the Panel agrees with the Caring Society that Canada should be formally tracking the number of Jordan's Principle cases that are approved, denied or in progress. Additionally, performance measures should be tracked in terms of stated timelines for resolving Jordan's Principle cases and in providing approved services. Consequently, pursuant to section 53(2)(a) of the *Act*, the Panel makes the remaining orders detailed in the "Order" section below, under "Processing and tracking of Jordan's Principle cases."

(iii) Publicizing the compliant definition and approach to Jordan's Principle

[108] Given Canada has disseminated a narrow definition of Jordan's Principle, the Caring Society requests that Canada be required to proactively, and in writing, correct the record with any person, organization or government who received, or could be in receipt of flawed material on Jordan's Principle. Relatedly, the Caring Society asks that Canada revisit any funding agreements or other arrangements already concluded to ensure that they reflect the full and proper scope and implementation of Jordan's Principle.

[109] The Caring Society is also concerned that Canada has failed to take any formal measures to ensure that all staff are aware, understand and have the tools and resources necessary to implement the findings in the *Decision* related to Jordan's Principle, along with the subsequent rulings and orders issued by the Panel in this regard.

[110] The Commission agrees that it would be appropriate for the Tribunal to supplement its initial order by directing Canada to take specific steps, within fixed timeframes, to adequately inform government officials, FNCFS Agencies and the general public about its compliant approach to Jordan's Principle. It adds that the Caring Society and the other parties to this complaint have invaluable expertise to contribute to any discussion about how best to educate the public about Jordan's Principle. Together, they can help to ensure that any public relations material contains up-to-date, reliable and first-hand information from those who work daily in delivering child welfare and other services to First Nations children. Therefore, the Commission asks that it, the Caring Society, the AFN and the Interested Parties be consulted by Canada on the distribution of any public education materials.

[111] Canada submits it is focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available to support First Nations children, and given an opportunity to get involved and share their views. It adds that, with Canada's initial work to reform its approach to Jordan's Principle complete, there is now greater room for engagement with the parties to this matter and other stakeholders regarding the impact of Canada's changes. According to

Canada, reform is an evolving process, and one that it acknowledges will benefit from engagement moving forward.

[112] In light of the evidence and findings with respect to the definition and processing of Jordan's Principle cases, the Panel finds there is a clear need for Canada to go back to its employees, the organizations it works with and its First Nation partners to inform them of the correct definition and processes surrounding Jordan's Principle. As stated previously, the multiple presentations made by Canada to date included a restricted definition of Jordan's Principle and its processes surrounding the principle have recently been changed and will continue to be changed following this ruling. Canada's previous definition of Jordan's Principle led to families not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children. A corrected definition and process surrounding Jordan's Principle warrants new publicity and education to public, employees, applicable organizations and all First Nation partners. INAC and Health Canada's websites would be a prominent and reasonable place to begin this publicity. Also, given the hearing of this complaint and the present motions was broadcasted on APTN, the Panel's believes this would also be an important and reasonable place to publicize the corrected definition and process surrounding Jordan's Principle.

[113] In doing so, there is no doubt that the Commission should be consulted. It has been actively involved in pursuing this case for over a decade and played a central role in leading the majority of the evidence at the hearing of the merits of the complaint. Furthermore, section 53(2)(a) of the *Act* specifically provides that the Panel can order that "…the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures…" (emphasis added).

[114] However, aside from the Commission, the *Act* and applicable case law suggest the Tribunal does not have the power to order consultation with other parties (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 164-169 [*Johnstone*]). Nevertheless, in the circumstances of this case, the Panel agrees that the Caring Society and other parties to this complaint have invaluable expertise to contribute to any

discussion about how best to educate the public, especially First Nations peoples, about Jordan's Principle.

[115] A number of important considerations lead to this conclusion. Primarily, the *Act* must be interpreted in light of its purpose, which is to give effect to the principle that:

> [A]ll individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices.

[116] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children. This was not the situation in *Johnstone*. As canvassed in the *Decision*, the relationship between Canada and Aboriginal peoples is trust−like, rather than adversarial, and the contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship (see *Decision* at para. 93, citing *R. v. Sparrow*, [1990] 1 SCR 1075, at page 1108). It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Decision* at para. 89, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16). This requires Canada to treat Aboriginal peoples fairly and honourably, and there is a special fiduciary relationship between the Crown and Aboriginal peoples (see *Decision* at paras. 91-95). The Crown also has a constitutional duty to consult Indigenous peoples on decisions that affect them and those consultations must be meaningful (see 2016 CHRT 16 at para. 10). The unique position that Aboriginal peoples occupy in Canada is recognized in section 35 of the *Constitution Act, 1982* and section 25 of the *Canadian Charter of Rights and Freedoms*. With respect to the *Act*, when section 67 was repealed in 2008, Parliament confirmed in section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, that:

> For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

[117] This case is about the provision of child welfare services to First Nations children and families. This is an area that directly affects the fundamental rights of First Nations children, families and communities and is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As stated in the *Decision* at paragraph 346, in reference to Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved in making decisions about children, not only for judges and lawyers, but for also assessors and mediators.

[118] To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials.

[119] This consultation is also reasonable based on Canada's submissions and actions in this matter. Canada has stressed consultation with First Nations peoples and organizations since the *Decision* (see for example *Respondent's Factum*, March 14, 2017, at paras. 36 and 39). It has also recognized the AFN and the Caring Society as key partners in the reform of its policies and programs. The AFN has been participating in the Executive Oversight Committee since July 2016. Dr. Cindy Blackstock, the Executive Director of the Caring Society, was also invited by the Minister of Health to participate in the Executive Oversight Committee [see *Affidavit of Robin Buckland*, January 25, 2017, at paras. 17-18; "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F,

p. 2); Letter from The Honourable Jane Philpott, Minster of Health, to Dr. Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada (December 22, 2016) (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit G); Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at pp. 3-7); "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", September 14, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, tab 5, p. 2)].

[120] Canada is committed to working with child and family services agencies, front-line service providers, First Nations organizations, leadership and communities, the Complainants, and the provinces and territories, on steps towards program reform and meaningful change for children and families (see 2016 CHRT 10 at para. 6). The Panel supports this commitment and an order to consult with the Complainants and the Interested Parties on how best to educate the public, especially First Nations peoples, about Jordan's Principle essentially reinforces what is already partially occurring in this matter. The Panel wants to ensure this commitment to partnership continues and is improved in a meaningful way by formalizing it in an order. Therefore, pursuant to section 53(2)(a) of the *Act*, the Panel makes the orders detailed in the "Order" section below, under "Publicizing the compliant definition and approach to Jordan's Principle."

(iv) Future reporting

[121] The Caring Society requests that, moving forward, Canada produce its compliance reports in the form of an affidavit and that a timeline be established very early on in the process to allow for cross-examination of the affiants, followed by the filing of written arguments and oral submissions. Exchanging evidence and having the opportunity to cross-examine makes the remedial process more transparent. The AFN is supportive of the Caring Society's request for future reporting, while the COO has made a similar request with respect to the orders it is requesting.

[122] The Commission takes no position on this request, other than to suggest that if such an order is to be granted, the Tribunal should include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[123] The Caring Society's proposed process for future reporting is similar to the process employed to hear and determine the present motions. The Panel found this process efficient and found the use of affidavit evidence, and having that evidence tested under cross-examination, was of great assistance to the Panel in determining the issues put before it.

[124] However, moving forward, the Panel would prefer that the cross-examination of affiants occur in a hearing before the Panel and be governed by the Tribunal process. In the present motions, the cross-examination occurred outside the Tribunal process, without the Panel present, and with a transcript of the evidence presented to the Panel afterwards for its consideration. This resulted in two issues. First, a dispute arose as to whether a party has an obligation, in the context of a cross-examination on an affidavit, to give undertakings to make inquiries and provide answers to which the affiant does not know the answers. Second, the Panel did not have the ability to ask its own questions to the witnesses.

[125] On the first issue, the NAN made requests for undertakings regarding Canada's refusal to fund the Wapekeka proposal for a mental health service team based within the community. Canada refused to provide undertakings because, in its view, the affiant answered the NAN's questions to the best of her ability, while other questions sought information that fell outside the scope of her employment. Furthermore, Canada states there is no legal obligation to provide undertakings during a cross-examination on an affidavit. The NAN submitted arguments and case law to the contrary and requested that the witness appear before the Panel to complete her evidence.

[126] The Panel refused this request because it was more akin to a discovery request in a civil action than to a cross-examination of a witness during a Tribunal hearing. While section 48.9(2) of the *Act* empowers the Chairperson to make rules governing discovery

proceedings before the Tribunal, no such rules have been made thus far. Rather, parties before the Tribunal have an obligation to disclose and produce arguably relevant documents throughout the Tribunal's proceedings [see Rules 6(1)(d) and (e); and, Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*]. The purpose of disclosure is to divulge the case a party intends to make, which in turn allows each party to effectively prepare and present its respective case. The question is whether the information sought is arguably relevant and necessary for the party to prepare its case before the Tribunal.

[127] While the information sought by the NAN is arguably relevant to the issues raised in its amended motion, and is highly important for the families and communities who lost their children, it did not prevent the NAN from making its case on its motion.

[128] The information was also not determinative for the Panel in order to make findings on the NAN's motion. The Tribunal was able to draw inferences from the affiant's inability to answer the NAN's questions. That is, with respect to the issues raised in the NAN's motion, the NAN's questioning was sufficient to shed light on the need for more rigorous processes surrounding access to Jordan's Principle funding to ensure the Wapekeka proposal situation is not repeated.

[129] In all fairness, while the Panel agreed to have the parties cross-examine affiants outside of the Tribunal's hearing process, no process with respect to undertakings was specifically agreed to by the parties or the Panel. Moving forward, if the Panel is present during cross-examinations, it can deal with these types of issues right away, without the need for further submissions or rulings.

[130] On the second issue, the Panel would like the opportunity to ask questions to the witnesses, should it have any. The advantage of having a cross-examination occur before the Panel is that it allows the Panel to efficiently ask its questions, without the need to recall a witness, while also allowing the parties the opportunity to ask additional questions arising out of those asked by the Panel.

[131] Therefore, future reporting by Canada in this matter will be supported by an affidavit or affidavits attesting to the information found in the report. Timelines will be established to allow for cross-examination of the affiants before the Panel, followed by the filing of written

arguments and, if necessary, oral submissions. In any future reporting in this matter, the Panel will keep in mind the Commission's suggestion that it include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[132] Pursuant to the above and to section 53(2)(a) of the *Act*, the Panel retains jurisdiction over the above orders until it is assured that they are fully implemented. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of those orders, pursuant to the process outlined in the "Order" section below, under "Retention of jurisdiction and reporting."

V. Orders

[133] The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

[134] Specific timelines for the implementation of each of the Panel's orders are indicated below to ensure a clear understanding of the Panel's expectations and to avoid misinterpretation issues that have occurred previously in this matter (such as with the term "immediately").

[135] Pursuant to the above, the Panel's orders are:

1. Definition of Jordan's Principle

A. **As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.

B. **As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key principles:

i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.

iii. When a government service is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government;

iv. When a government service is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government.

v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.

C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).

D. Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1st, 2009**, to ensure compliance with the above principles. Canada shall complete this review by **November 1st, 2017**.

2. Processing and tracking of Jordan's Principle cases

A. Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by **June 28, 2017**:

i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.

ii. The initial evaluation and a determination of the request shall be made within 12-48 hours of its receipt.

iii. Canada shall cease imposing service delays due case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided.

iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided; and

v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.

C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including when the service was actually provided.

D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

3. Publicizing the compliant definition and approach to Jordan's Principle

A. By **June 09, 2017** Canada shall post a clear link to information on Jordan`s Principle, including the compliant definition, on the home pages of both INAC and Health Canada.

B. **By June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.

C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.

D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.

E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

4. Retention of jurisdiction and reporting

A. The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.

B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.

C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

D. Canada may provide a reply, if any, by **December 6, 2017**.

E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 26, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: May 26, 2017

Date and Place of Hearing: March 22-24, 2017 at Ottawa, Ontario

Appearances:

David Taylor, Anne Levesque, Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

Jonathan Tarlton and Melissa Chan, counsel for the Respondent

Maggie Wente and Krista Nerland, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 4
Date: February 1, 2018
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon and Edward P. Lustig

maintenance pressures, deficits and payments resulting from the impacts of provincial reform. According to Canada, this additional funding to address maintenance pressures provides needed support for the expenditures of children in care and removes the need for agencies to divert spending from prevention or operations funding streams.

[6] With respect to the assumption of 6% of children in care as a basis for funding, Canada indicates that the assumption is now used as a minimum only. Where the number of children in care is above 6%, Canada is basing funding on the actual number of children receiving care.

[7] With respect to the other assumption that 20% of families require service, Canada only uses the assumption as a minimum standard. While data is not available on the actual number of families in need of services, where there is a greater number than 6% of children in care, Canada is also adjusting the 20% upward. According to Canada, to the extent that this can be achieved in the interim without data on the actual number of families that use, or would use, prevention services if they were available, Canada has complied.

[8] For small agencies and the Tribunal's order that Canada cease the practice of reducing funding to agencies that serve less than 251 eligible children, Canada confirms it has set the minimum threshold for core operational funding for agencies at the level previously provided to agencies with a minimum child population served of 300 children (0 to 18 years). This is an interim approach while further engagement is undertaken with agencies and other partners.

[9] With regard to the *1965 Agreement*, Canada provided immediate relief funding of $5.8 million for 2016/2017. The $5.8 million was distributed according to a formula agreed on by INAC, the province of Ontario and the Chiefs of Ontario (COO).

[10] Additionally, Canada confirmed that approximately $64 million was allocated to First Nations mental health programming in Ontario for the 2016/17 fiscal year, along with a $69 million investment over a three-year period to address the mental health needs of First Nations and Inuit communities across the country.

from fulfilling its quasi-constitutional mandate to protect fundamental human rights. To put it in the words of the Supreme Court, human rights legislation is “the final refuge of the disadvantaged and the disenfranchised” (see *Zurich Insurance v. O.H.R.C* [1992] 2 S.C.R. 321).

[45] If all that Canada has to do is to argue the separation of powers argument to stop the Tribunal from making any orders on policy or public funds, in our view this infringes the proper administration of justice and reduces the Tribunal’s role to making findings and general orders that can only be implemented at Canada’s discretion, akin to a Commission of inquiry. This is not the intent of Parliament expressed in section 2 of the *CHRA*. Nor is it consistent with the wording of s. 53 of the *CHRA*. Given that human rights legislation aims to eliminate and prevent discrimination (see for example *Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84 at para. 13 [Robichaud], *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 at p. 1134 [Action Travail des Femmes]). The Panel believes that agreeing with Canada’s position would strip the Tribunal and the *CHRA* of any significance.

[46] It is also important to reiterate that this case is about Indigenous children, families and communities who have been recognized by this Panel and the Courts, including the Supreme Court, as a historically disadvantaged group. The best interest of children is not advanced by legalistic positions such as Canada’s. It is also sending a message that the Tribunal has no power and human rights can be violated and are remedied only if Canada finds money in their budget. This is in our view, a misapplication of the *CHRA* and of the Executive powers especially given that the Bona Fide Occupational Requirement (BFOR) cost defense provided for in the *CHRA* was not advanced in this case.

[47] **More importantly, this case is vital because it deals with mass removal of children. There is urgency to act and prioritize the elimination of the removal of children from their families and communities.**

[48] While the Tribunal wants to craft responsive remedies to address the discrimination, it is not interested in drafting policies, choosing between policies, supervising policy-drafting or unnecessarily embarking in the specifics of the reform. It is

[79] The TRC calls for cooperation and coordination between all levels of government and civil society to implement its calls to action, and for government to fully adopt and implement the UNDRIP as the framework for reconciliation.

[80] Canada recognized the need to renew the Nation-to-Nation relationship with Indigenous communities.

[81] Furthermore, the Panel believes that national legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the UNDRIP.

[82] **In 2016, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) recommended that Canada review and increase its funding to family and child welfare services to Indigenous Peoples living on reserve and to fully comply with the Tribunal's January 26, 2016 *Decision***, (see Affidavit of Dr. Blackstock at par. 33 and Exhibit L: CESCR March 23, 2016, Concluding Observations).

[83] The above informs the Panel's reasons and orders in this ruling.

B. Context and further orders requested

i. The FNCFS Program and Prevention

[84] The AFN is particularly concerned with INAC's failure to fund prevention services on the basis of need and in light of the historically disadvantaged circumstances of First Nations children and families on reserve, while fully funding apprehensions.

[85] The AFN requests an order that INAC immediately develop, in consultation with the AFN, the Caring Society, COO, NAN and the Commission, a protocol grounded in the honor of the Crown, for engaging in consultations with First Nations an FNCFS agencies that are affected by the *Decision and* the Remedial Orders herein. The AFN requests that INAC engage in consultations in a manner consistent with the protocol and the honor of the Crown, to address the elimination of discrimination substantiated in the Panel's *Decision*.

request within the federal government, and we would need support, and we would need clear way to establish calculations, clear support and be able to provide a solid case to move forward with the request. We can't just have something- We need to have something that is sound in terms of the background and support, the supporting information and evidence that we can bring forward, to have the request considered." (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 107, lines 10-21, [Transcript of Cross-Examination of Ms. Lang]).

[130] Ms. Lang added: "we would need to have data to be able to calculate that. The rationale for this is that in the past the government has been criticized for just going ahead and providing a number without having those conversations, so we're trying to take steps to, based on what we understand of what kind of numbers we might be able to calculate, but also have those conversations. So it's trying to balance two pieces in order to put a sound case going forward." (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 111, lines 12-20, [Transcript of Cross-Examination of Ms. Lang]).

[131] The Panel understands this to be the usual and reasonable process for any financial request. It is to be expected and followed in normal circumstances. This is not the case here. Canada was found liable under the *CHRA* for having discriminated against First Nations children and their families. Canada has international and domestic obligations towards upholding the best interests of children. Canada has additional obligations towards Indigenous children under UNDRIP, the honor of the Crown, Section 35 of the Constitution and its fiduciary relationship, to name a few. All this was discussed in the *Decision*.

[132] Ms. Lang's evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short term plan was presented to address this matter. The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children.

[133] The Panel finds that no satisfactory response was provided by Canada to prevent Canada from funding now all actual costs for prevention services and actual costs for legal

practice in accordance with the Panel's findings. It is for the Respondent to clearly demonstrate it has complied and how it addressed the discriminatory practice.

[380] It is true that information and funding amounts were shared with the Tribunal and the parties. However, they were not shared in a way that clearly demonstrates how the discriminatory practice is remedied or how the gaps are being addressed. The numerous questions were possibly a result of the lack of clarity and information on how these funding amounts were addressing the discrimination.

[381] As stated above, the evidence also shows that Canada has yet to analyse the gaps and which programs addresses what need. The Panel and the parties have been asking questions to understand how Canada arrived to its numbers.

[382] NAN was granted interested party status after the hearing to bring its unique perspective on communities in Northern Ontario. Mental health and youth suicides, while unfortunately not unique to NAN, sadly form part of this perspective.

[383] The Panel acknowledges that the part about respite care was not specifically referred to in the *Decision*. However, it is linked to gaps and denials that the Jordan Principle can address.

[384] While the Panel agrees that this remedy phase should not be an occasion to add anything and everything and new issues which would be unmanageable, this is not what has happened here.

[385] There is no unfairness to Canada here. The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long term relief that will address the discrimination identified and explained at length in the *Decision*. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long term relief.

[386] Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc.

[387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.

[388] Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here.

[389] In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination.

NAN's directed verdict and orders request:

[390] The Panel has reviewed the case law and submissions and, after consideration, the Panel believes this argument is applicable to Courts in the context of a judicial review and not directly applicable to the Tribunal. While the Tribunal has broad powers under the *CHRA,* its powers are statutory and the *CHRA* does not provide a Court Status with inherent jurisdiction to the Tribunal. In any event, section 53 of the *CHRA* is broad and sufficient to allow the Tribunal to make wide-ranging orders such as the orders made in this ruling.

Dissemination of information

[391] According to the Caring Society, Canada has consistently failed to confirm in writing its policies relating to funding and to demonstrate that it is clearly communicating these polices to FNCFS Agencies in a timely manner. Therefore, it asks that any immediate relief ordered by the Tribunal be communicated clearly to FNCFS Agencies in order to

ensure that these measures are implemented fully and properly and in a manner to reduce the adverse impacts on First Nations children.

[392] The Commission agrees that it is critically important to ensure that key information about the Tribunal decisions, and resulting changes to policies and procedures, are quickly and consistently communicated to employees of Canada who are responsible for implementing the policies and procedures, Agencies, other stakeholders and the public. For this reason, the Commission joins the request for an order that underscores Canada's obligation to properly publicize any changes to the FNCFS Program and *1965 Agreement*. It submits, however, that the details of such obligations be left as a matter for the parties to discuss as part of the consultations that the Commission encourages the Tribunal to order, and that the communications strategies actually used be described in detail as part of the corresponding reporting obligations.

[393] Given the history of communication in this case and the different views shared by the parties, the Panel agrees with the Commission on this issue.

[394] The Panel orders Canada to communicate clearly to FNCFS Agencies any immediate relief ordered by the Panel in order to ensure that these measures are implemented fully, properly, and in a manner to reduce the adverse impacts on First Nations children by **March 15, 2018.** The details of such obligations will be left as a matter for the parties to discuss as part of the consultations ordered below, and the communications strategies used shall be described in detail as part of the corresponding reporting obligations.

Consultation

[395] The AFN submits that INAC cannot avoid immediate relief by claiming it must first consult with its partners and FNCFS Agencies. INAC has the information it needs to eliminate the discrimination according to the Panel's findings. According to the AFN, INAC's efforts to consult may not be in good faith, but rather a delay tactic used to avoid complying with the Panel's remedial orders. Furthermore, INAC and Health Canada are engaged in consultations with FNCFS Agencies about reforming the FNCFS Programs.

The AFN submits that, for unknown reasons, INAC and Health Canada decided to unilaterally exclude both co-complainants from these consultations, despite both parties being national organizations that represent First Nations and FNCFS Agencies across Canada, respectively. Therefore, the AFN requests that INAC be required to enter into a protocol with the AFN and the other complainant parties on consultations to ensure that consultations are carried out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision*.

[396] The Commission submits the time is right for the Tribunal to make a binding order under section 53(2)(a) of the *Act*, requiring Canada to consult not only with the Commission, but also directly with the Moving Parties. Including the voices of the Complainants and Interested Parties in the reform of services that directly affect their interests, and the Indigenous children and communities they serve, will further the objective of reconciliation, giving voice to those who have historically been excluded from decision-making processes. Section 53(2)(a) of the *Act* should be expansively interpreted to allow this to happen.

[397] The Commission also submits that a number of recent decisions and reports have lamented the suffering that resulted when past decisions about the welfare of Indigenous children were made without the direct involvement of Indigenous stakeholders. Using section 53(2)(a) of the *Act* to require consultation with Indigenous stakeholder organizations will help to ensure that the current reform of the FNCFS Program and the *1965 Agreement* does not repeat the mistakes of the past.

[398] Furthermore, according to the Commission, the Caring Society and the AFN have invaluable expertise to contribute to any discussion about reform of the FNCFS Program and *1965 Agreement*, and COO and NAN share expertise on such matters as they relate to their constituent communities in Ontario. Indeed, the Commission notes that the Tribunal has already recognized that INAC is not itself an expert in the delivery of child welfare services, and that consulting with experts (such as the Caring Society) should therefore be a priority.

[399] In a previous ruling, the Panel discussed consultation (see at 2017 CHRT 14 paras 113-120) for a specific issue. For the same reasons outlined and, relying on its previous ruling, the Panel makes the following order:

[400] Canada is ordered under section 53(2)(a) of the *Act,* to consult not only with the Commission, but also directly with the AFN, the Caring Society, the COO and the NAN on the orders made in this ruling, the *Decision* and its other rulings. INAC is ordered to enter into a protocol with the AFN, the Caring Society, the COO, the NAN and the Commission on consultations to ensure that consultations are carried out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision* by **February 15, 2018**. The parties will report on the progress of the implementation of this order and any issues that arise to the Tribunal by **February 8, 2018**.

Future reporting

[401] Consistent with what was decided in 2017 CHRT 14, the Panel would like an opportunity to ask questions to the witnesses, should it have any. The advantage of having a cross-examination occur before the Panel is that it allows the Panel to efficiently ask its questions, without the need to recall a witness, while also allowing the parties the opportunity to ask additional questions arising out of those asked by the Panel.

[402] Therefore, future reporting by Canada in this matter will be supported by an affidavit or affidavits attesting to the information found in the report. Timelines will be established to allow for cross-examination of the affiants before the Panel, followed by the filing of written arguments and, if necessary, oral submissions. In any future reporting in this matter, the Panel will keep in mind the Commission's suggestion that it include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[403] The Panel, pursuant to sections 53 (2) (a) and (b), orders Canada to serve and file a report and affidavit materials detailing its compliance with each of the orders in this ruling by **May 24, 2018.**

Date: 20071026

Docket: A-398-07

Citation: 2007 FCA 336

Present: **NOËL J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

NORTHROP GRUMMAN OVERSEAS SERVICES CORPORATION, LOCKHEED MARTIN CORPORATION and RAYTHEON COMPANY

Respondents

Heard at Ottawa, Ontario, on October 23, 2007.

Order delivered at Ottawa, Ontario, on October 26, 2007.

REASONS FOR ORDER BY: NOËL J.A.

agreed that the recommendations made by the CITT were appropriate in the event that the complaint was found to be valid – and does not want to give effect to the recommendations, it must seek and obtain an appropriate stay.

[21] An order will therefore issue declaring that the application for judicial review filed by the Attorney General on behalf of PWGSC does not have the effect of staying the recommendations made by the CITT, and ordering PWGSC to abide by these recommendations pending the outcome of the judicial review application. In the circumstances, I believe it appropriate to grant PWGSC leave to apply for a stay of the decision of the CITT conditionally upon this application being brought without delay. The order will so provide.

[22] Given this outcome, it is not necessary to deal with the motion in the alternative. Northrop Grumman is entitled to the costs of this motion regardless of the outcome of PWGSC's judicial review application.

"Marc Noël"

J.A.

Apotex Inc. v. Merck & Co., [2006] F.C.J. No. 786

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

Evans J.A.

Heard: May 23, 2006.

Judgment: May 25, 2006.

Docket A-232-06

[2006] F.C.J. No. 786 | *[2006] A.C.F. no 786* | *2006 FCA 198* | *2006 CAF 198* | *351 N.R. 97* | *53 C.P.R. (4th) 79* | *149 A.C.W.S. (3d) 7*

Between Apotex Inc., appellant, and Merck & Co., Inc., Merck Frosst Canada & Co., Merck Frosst Canada Ltd., Syngenta Limited, AstraZeneca UK Limited and AstraZeneca Canada Inc., respondents

(33 paras.)

Case Summary

Motion by Apotex for an order staying a Federal Court judgment pending the disposition of its appeal. The Federal Court found that, by making and selling its product, Apo-Lisinopril, Apotex had infringed the respondent's patent in respect of the medicine lisinopril, a compound said to be used for the treatment of hypertension. The patent was to expire in 2007. The Federal Court granted an injunction against future infringement by Apotex and awarded damages to the plaintiff's. The Court granted a 30-day temporary stay of the order, which expired on May 26, 2006, pending Apotex' determination of whether or not to proceed with an appeal.

HELD: Motion dismissed.

Apotex failed to prove that it, or the public, would suffer irreparable harm if the stay was denied pending the hearing of the appeal in September 2006. That was so given the fact that the respondents' undertook to compensate any loss suffered by Apotex that should be compensated, in the event that its appeal was successful, as an answer to Apotex' allegations of financial loss flowing directly from its compliance with the order.

Appeal From:

Motion for a stay from the judgment of the Federal Court dated April 26, 2006, no. T-2792-96.

Counsel

Harry B. Radomski, Nando De Luca and Katherine Cornett, for the appellant.

R. Paradis Charlton and F. Amrouni, for the respondent (Merck & Co., Inc.).

Gunars A. Gaikis and Nancy P. Pei, for the respondent (Syngenta Ltd. et al.).

The judgment of the Court was delivered by

EVANS J.A.

1 This is a motion by Apotex Inc. for an order staying a judgment of Hughes J. of the Federal Court, dated April 26, 2006, pending the disposition of its appeal of the judgment to this Court. The Judge made the order at the end of a 14-week trial of a patent infringement action, which had commenced in 1996. He found that, by making and selling its product, Apo-Lisinopril, Apotex had infringed Canadian Letters Patent Number 1,275,350 (the "'350 patent") in respect of the medicine lisinopril, a compound said to be useful for the treatment of hypertension. The '350 patent expires in 2007.

2 Hughes J. granted an injunction against future infringement by Apotex and awarded damages to the plaintiffs, who include the patent owner, Merck & Co., Inc. ("Merck"), and licensees, Merck Frosst Canada Inc. ("Merck Frosst"), and AstraZeneca Canada Ltd. ("AstraZeneca"). He rejected Apotex' defence that the '350 patent was invalid. The Judge granted a 30-day temporary stay of his order, which expires on May 26, 2006, pending Apotex' determination of whether to appeal. Apotex has now filed a notice of appeal.

3 At the start of the hearing, I indicated that the appeal would be expedited, to which counsel assented. All counsel stated that they would be available in the week commencing September 11, 2006, for a hearing of the appeal in Toronto.

4 Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions. That is, the moving party must establish that there is an arguable issue to be decided on the appeal, adduce clear evidence that it will suffer irreparable harm if the stay is not granted, and demonstrate that the balance of convenience favours the grant of a stay.

5 I would only add that a stay is a discretionary remedy awarded, ultimately, in the interest of justice. It is also an extraordinary form of relief, in the sense that, when a court has issued a judgment finding a defendant liable, the plaintiff is normally entitled to have access to its remedy without further delay.

6 It is conceded that Apotex' grounds of appeal include arguable issues. This motion turns principally on whether the moving party has produced clear evidence that, without a stay, it will suffer irreparable harm, an issue which I now consider. Apotex relied on various kinds of irreparable harm.

Irreparable Harm

(i) financial loss

7 Apotex says that if the order of Hughes J. is not stayed and it wins the appeal, it will not able to recover the profits lost as a result of being enjoined from selling Apo-Lisinopril between May 26, 2006 and the disposition of the appeal. Since it has no right of action to recover this loss it is irreparable. However, this argument was undermined when an undertaking in damages was offered on behalf of the respondents.

8 The undertaking was calculated to indemnify Apotex against irrecoverable financial loss that it may suffer, in the

Pearson v. Canada, [1999] F.C.J. No. 1298

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

Richard A.C.J.

Heard: May 31, 1999.

Judgment: August 16, 1999.

Court File No. T-290-99

[1999] F.C.J. No. 1298 | *[1999] A.C.F. no 1298* | *91 A.C.W.S. (3d) 75* | *43 W.C.B. (2d) 389* | *1999 CanLII 8631*

Between Edwin Pearson, plaintiff, and Her Majesty the Queen, defendant

(37 paras.)

Case Summary

Courts — Federal Court of Canada — Jurisdiction, Trial Division — Acts of officer or servant of Crown — Stay of proceedings — Affecting actions in other courts.

Appeal by the plaintiff, Pearson, from an order staying proceedings against the Crown. Pearson was tried by a judge and jury. After the jury found him guilty on four of five counts, he moved for a stay of proceedings on the ground of entrapment. The judge concluded that the defence had not been made out, confirmed the jury verdicts, and imposed sentence. Pearson appealed to the Court of Appeal, which affirmed the jury's verdicts but overruled the decision on the entrapment issue. A new hearing on the issue was ordered, and the convictions and sentence were vacated. The appeal was based on the Crown's failure to disclose material documents. A second trial was held, and Pearson's motion for a stay of proceedings based on entrapment was again dismissed. His appeal from that decision was still pending. Pearson brought an action against the Crown in the Federal Court for damages for willful abuse of process and malicious violations of his rights under the Canadian Charter of Rights and Freedoms. The Prothonotary granted the Crown's motion for a stay of the proceedings until the criminal proceedings had been resolved.

HELD: Appeal dismissed.

The civil action was the reciprocal of Pearson's defence in the criminal proceeding. The issue had to be determined by the Quebec courts before being tried in the Federal Court.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 11(d). Constitution Act, 1982, Part 1.

Federal Court Act, *R.S.C. 1985, c. F-7, s. 50, 50(1), 50(1)(a), 50(1)(b), 50(2)*.

(2) Sur demande du procureur général du Canada, la Cour suspend les procédures dans toute affaire relative à une demande contre la Couronne s'il apparaît que le demandeur a intenté, devant un autre tribunal, une procédure relative à la même demande contre une personne qui, à la survenance du fait générateur allégué dans la procédure, agissait en l'occurrence de telle façon qu'elle engageait la responsabilité de la Couronne.

(3) La suspension peut ultérieurement être levée à l'appréciation de la Cour.

Standard of review

19 The standard of review of a decision to grant or not a stay of proceedings was expressed as follows by the Supreme Court of Canada in Tobiass[1]:

> A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in Elsom v. Elsom, *[1989] 1 S.C.R. 1367*, at p. 1375:
>
> > [A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

Legal principles

20 The phrase "interest of justice" involves a consideration of many things and not only the interest of a party to a judicial proceeding.

21 In Tobiass, the Supreme Court of Canada referred to paragraph 50(1)(b) of the Federal Court Act:

> Though Cullen J. derived his power to enter a stay of proceedings from s. 50(1)(b) of the Federal Court Act and not from the Charter or the common law, the same principles that govern stays of proceedings under the latter heads of power apply equally well here. The "interest of justice" referred to in s. 50(1)(b) of the Federal Court Act is not fundamentally different from the concerns that animate the jurisprudence developed under s. 24(2) of the Charter, although the context in which s. 50(1)(b) operates may be different.
>
> Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a "residual category" of cases in which a stay may be warranted. L'Heureux-Dubé J. described it this way, in R. v. O'Connor, *[1995] 4 S.C.R. 411*, at para. 73:
>
> > This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.
>
> The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.

22 In determining what is in the interest of justice, the court may be called upon to examine diverse circumstances and, accordingly, a broad meaning must be given to the phrase.

23 Each application for a stay must be decided on its own facts. One must not only evaluate and balance the interests of the parties but also the integrity of the judicial process.

24 In Harry[2], Joyal J. stated:

AIC Ltd. v. Infinity Investments Counsel Ltd., [1998] F.C.J. No. 1303

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

Richard A.C.J.

Heard: August 31, 1998

Judgment: September 14, 1998

Court File No. T-1712-97

[1998] F.C.J. No. 1303 | 161 F.T.R. 199 | 82 C.P.R. (3d) 508 | 82 A.C.W.S. (3d) 1061

Between AIC Limited, plaintiff, and Infinity Investment Counsel Ltd., Infinity Funds Management Inc., Richard Charlton, David Singh, Jeffrey Lipton and Grant Jung, defendants

(10 pp.)

Case Summary

Practice — Trials — Stay of proceedings — Circumstances when refused — Judgments and orders — Summary judgments.

This was a motion by AIC Limited for a stay of proceedings pending the disposition of an appeal. AIC brought an action for damage against Infinity Investments Counsel and others. A number of months later, it filed a motion to obtain summary judgment on the terms of an alleged settlement agreement. The motion was dismissed and AIC appealed. Infinity and the others brought a motion to obtain summary judgment dismissing all claims. AIC argued that its appeal would be illusory if Infinity and the others were permitted to proceed with their motion before a ruling on the appeal.

HELD: Motion dismissed.

The power to stay proceedings should be exercised only in the clearest cases. AIC failed to establish that Infinity and the others would not suffer any prejudice as a result of a stay of proceedings. It also failed to demonstrate that the bringing of a motion for summary judgment by Infinity and the others would result in prejudice or injustice to it.

Statutes, Regulations and Rules Cited:

Federal Court Act, *R.S.C. 1985, c. F-7, ss. 4*, 50, 50(1).

Federal Court Rules, Rules 213, 214, 215, 216, 217, 218, 219.

12 The plaintiff appealed the decision of the Mister Justice Rothstein, on May 15, 1998. The appeal is now pending before the Federal Court of Appeal and has not been heard.

13 On August 4, 1998, the defendants brought a motion under Rules 213 to 218 of the Federal Court Rules, 1998, for summary judgment dismissing all the claims set out in the statement of claim. A special date for the hearing of the motion was requested by the defendants but has not been fixed, pending the disposition of this motion.

14 On August 21 1998, the defendants brought the present motion returnable on August 31, 1998, seeking a stay of proceedings.

ISSUE

15 The issues in this motion to the stay proceedings can be summarized in one question:

> Having regard to the law and the facts of this case, should the motion to stay these proceedings be granted by this Court?

THE APPLICABLE LAW

16 Subsection 50 (1) of the Federal Court Act, provides that the Court may exercise its discretion to stay proceedings in any cause or matter in two situations: firstly, on the ground that the claim is proceeding in another court or jurisdiction or, secondly, where for any other reason it is in the interest of justice that the proceedings be stayed.

17 By reason of Section 4 of the Federal Court Act, the Federal Court of Appeal is not a separate court but a division of the Federal Court of Canada as is the Trial Division.

18 The principle governing the stay of proceedings was well establish by our Court in the judgment of Mister Justice McNair, Varnam[1] at page 36:

> "A stay of proceedings is never granted as a matter of course. The matter is one calling for the exercise of a judicial discretion in determining whether a stay should be ordered in the particular circumstances of the case. The power to stay should be exercised sparingly and a stay will only be ordered in the clearest cases."

19 The test established by this Court in Varnam[2], was followed in Apotex Inc.,[3] Discreet Logic Inc.[4] and in Compulife Software Inc.[5]. It is now established that a stay of proceedings should not be granted unless it can be shown that (1) the continuation of the action would cause prejudice or injustice, not merely inconvenience or additional expense, to the defendant, and (2) that the stay would not be unjust to the plaintiff. The onus is on the party requesting the stay to prove that these conditions exist.

20 The Supreme Court of Canada has confirmed the principle that a stay of proceedings is a discretionary remedy[6].

21 All of the cases to which I have been referred, deal with a defendant who seeks to stay the plaintiff's action. However, here, I am faced with a most unusual situation. The plaintiff, and not the defendants, seeks to stay a proceeding which it has commenced.

22 Rule 213 of the Federal Court Rules, 1998, provides:

Erichs Tobiass *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and between

Johann Dueck *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and between

Helmut Oberlander *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and

The Canadian Jewish Congress *Intervener*

INDEXED AS: CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) *v.* TOBIASS

File No.: 25811.

1997: June 26; 1997: September 25.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Courts — Jurisdiction — Appeals — Federal Court of Appeal — Federal Court Trial Division staying citizenship revocation proceedings — Whether stay of proceedings a decision made under s. 18(1) of Citizenship Act — Whether decision to stay proceedings can be appealed to Federal Court of Appeal — Citizenship Act,

Erichs Tobiass *Appelant*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et entre

Johann Dueck *Appelant*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et entre

Helmut Oberlander *Appelant*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Congrès juif canadien *Intervenant*

RÉPERTORIÉ: CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION) *c.* TOBIASS

N° du greffe: 25811.

1997: 26 juin; 1997: 25 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Tribunaux — Compétence — Appels — Cour d'appel fédérale — Section de première instance de la Cour fédérale suspendant des procédures en révocation de la citoyenneté — La suspension des procédures constituait-elle une décision visée à l'art. 18(1) de la Loi sur la citoyenneté? — La décision de suspendre les procédures peut-elle faire l'objet d'un appel devant la Cour d'appel fédérale? — Loi sur la citoyenneté, L.R.C. (1985),

R.S.C., 1985, c. C-29, s. 18(1), (3) — Federal Court Act, R.S.C., 1985, c. F-7, s. 27(1).

Courts — Judges — Judicial independence — Government official meeting with Chief Justice of Federal Court to express concern about slow progress of citizenship revocation proceedings — Whether meeting between government official and chief justice interfered with judicial independence — If so, whether stay of proceedings appropriate remedy.

Civil procedure — Remedies — Stay of proceedings — Meeting between government official and chief justice causing damage to appearance of judicial independence — Whether stay of proceedings appropriate remedy.

In January 1995 the appellants received notices informing them that the respondent Minister intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. At the appellants' request, the cases were referred to the Federal Court — Trial Division. Numerous procedural disputes then arose. On December 12, 1995 counsel for one of the appellants argued for the whole day on the preliminary motions before the Associate Chief Justice. In January 1996 the court advised the parties that May 15 and 16 had been set aside for the completion of the argument. Counsel for the respondent wrote a letter to the court administrator, a copy of which he sent to counsel for the appellants, complaining in strong terms about the slow progress of the cases. Following a teleconference with the parties, the Associate Chief Justice confirmed that oral argument on the preliminary issues would take place on May 15 and 16, 1996. On March 1, T, the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with the Chief Justice of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. In his letter to the Chief Justice, T referred to the fact that the Attorney General was being asked to consider taking a reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Trial Division was unable or unwilling to proceed with the cases expeditiously. In his reply, the Chief Justice stated that he had discussed T's concerns with the Associate Chief Justice, and that both were prepared to take all reasonable steps to avoid such a reference. He added that the Associate Chief Justice said he had not

ch. C-29, art. 18(1), (3) — Loi sur la Cour fédérale, L.R.C. (1985), ch. F-7, art. 27(1).

Tribunaux — Juges — Indépendance judiciaire — Rencontre d'un fonctionnaire du gouvernement avec le juge en chef de la Cour fédérale pour protester contre la lenteur des procédures en révocation de la citoyenneté — La rencontre a-t-elle porté atteinte à l'indépendance judiciaire? — Dans l'affirmative, la suspension des procédures était-elle une réparation convenable?

Procédure civile — Réparations — Suspension des procédures — La rencontre entre le fonctionnaire du gouvernement et le juge en chef a compromis l'impression d'indépendance que doit donner le pouvoir judiciaire — La suspension des procédures était-elle une réparation convenable?

En janvier 1995, les appelants ont reçu des avis les informant que le ministre intimé avait l'intention de demander la révocation de leur citoyenneté canadienne pour le motif qu'ils avaient obtenu cette dernière en omettant de divulguer aux fonctionnaires canadiens les circonstances de leur participation à des atrocités commises durant la Seconde Guerre mondiale. À la demande des appelants, les causes ont été renvoyées devant la Section de première instance de la Cour fédérale. Par la suite, il s'en est suivi plusieurs contestations ayant trait à la procédure. Le 12 décembre 1995, l'avocat de l'un des appelants a présenté ses arguments durant toute la journée relativement aux requêtes préliminaires dont le juge en chef adjoint était saisi. En janvier 1996, la cour a avisé les parties que les dates du 15 et du 16 mai 1996 avaient été retenues pour terminer l'audition des arguments. L'avocat de l'intimé a envoyé une lettre, dont il a transmis copie aux avocats des appelants, à l'administrateur de la cour pour protester avec véhémence contre la lenteur du procès. Suite à une conférence téléphonique qu'il a eue avec les parties, le juge en chef adjoint a confirmé que les plaidoiries orales concernant les questions préliminaires auraient lieu les 15 et 16 mai 1996. Le 1er mars, T, alors sous-procureur général adjoint chargé du contentieux des affaires civiles au ministère fédéral de la Justice, a rencontré le juge en chef de la Cour fédérale. Les deux hommes ont discuté du renvoi à l'audience des causes des appelants et, plus tard ce jour-là, ils ont échangé des lettres, dont copie n'a été transmise à aucun des avocats des appelants. Dans sa lettre adressée au juge en chef, T a mentionné le fait que le procureur général du Canada avait été invité à envisager la possibilité d'un renvoi à la Cour suprême du Canada pour résoudre certaines questions de droit préalables, en raison surtout du fait que la Section de première instance ne pouvait ou ne voulait pas faire

fully appreciated "the urgency of dealing with these matters as expeditiously as the Government would like" until he had read T's letter. However, now that he was aware of the Government's concerns he would devote one week from May 15 to deal with the cases not only with respect to the preliminary points but also with respect to the merits. The respondent provided copies of these letters to the appellants. Counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that T and the Chief Justice had interfered with the independence of the Associate Chief Justice. The Associate Chief Justice then recused himself. He directed that the appellants' cases should go forward under a new judge. The appellants' application for a stay of proceedings was granted. The Federal Court of Appeal, having decided that it had jurisdiction to consider the appeal, set aside the stay.

Held: The appeal should be dismissed.

The Federal Court of Appeal had jurisdiction to hear the Crown's appeal in this case. The stay of proceedings ordered was not a decision made "under" s. 18(1) of the *Citizenship Act*. Section 18(1) refers to a very particular kind of decision: a decision as to whether a person "has obtained, retained, renounced or resumed citizenship" by false pretences. Whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings. Section 18(3) of the *Citizenship Act*, which provides that no appeal lies from a decision of the Trial Division made under s. 18(1), thus does not apply. A decision allowing or denying a motion for a stay of proceedings is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out in s. 27 of that Act.

The appearance of judicial independence suffered significantly as a result of the meeting between T and the Chief Justice. The test for determining whether the

diligence pour instruire les affaires. Dans sa réponse, le juge en chef a dit qu'il avait fait part des préoccupations de T au juge en chef adjoint et qu'ils étaient prêts, tous les deux, à prendre toutes les mesures raisonnables afin d'éviter un tel renvoi. Il a ajouté que le juge en chef adjoint avait dit qu'il ne se rendait pas pleinement compte, avant de lire la lettre de T, «de la nécessité qu'il y a à les [les affaires] instruire de façon aussi urgente que le souhaite le gouvernement». Cependant, s'en étant rendu compte, il allait consacrer, à compter du 15 mai, une semaine à l'audition non seulement des questions préliminaires, mais aussi de la cause au fond. L'intimé a transmis des copies de ces lettres aux appelants. Les avocats des appelants ont avisé la cour qu'ils demanderaient une suspension des procédures pour le motif que T et le juge en chef avaient porté atteinte à l'indépendance du juge en chef adjoint. Le juge en chef adjoint s'est alors récusé. Il a ordonné que l'instance soit instruite par un nouveau juge. La demande des appelants visant à obtenir une suspension des procédures a été accueillie. La Cour d'appel fédérale, ayant décidé qu'elle avait compétence pour examiner l'appel, a annulé la suspension.

Arrêt: Le pourvoi est rejeté.

La Cour d'appel fédérale avait compétence pour entendre l'appel du ministère public en l'espèce. La suspension des procédures ordonnée ne constituait pas une décision «visée au» par. 18(1) de la *Loi sur la citoyenneté*. Le paragraphe 18(1) renvoie à un genre très particulier de décision: il s'agit de décider si une personne a acquis, conservé ou répudié la citoyenneté ou a été réintégrée dans celle-ci par des moyens frauduleux . Que le par. 18(1) soit interprété de façon stricte de manière à viser seulement la décision ultime tranchant la question de savoir si la citoyenneté a été obtenue par des moyens frauduleux ou de façon plus libérale afin d'englober les jugements interlocutoires se rapportant à cette décision qui sont rendus dans le cadre d'une audience visée par le par. 18(1), il est manifeste qu'il ne comprend pas une ordonnance accordant ou refusant la suspension des procédures. Le paragraphe 18(3) de la *Loi sur la citoyenneté*, qui prévoit qu'aucune décision de la Section de première instance visée au par. 18(1) n'est susceptible d'appel, ne s'applique donc pas. Une décision accueillant ou rejetant la requête en suspension des procédures est une décision prévue à l'art. 50 de la *Loi sur la Cour fédérale* et elle peut faire l'objet d'un appel conformément aux règles énoncées à l'art. 27 de cette Loi.

L'impression d'indépendance que doit donner le pouvoir judiciaire a été compromise de façon substantielle par la rencontre entre T et le juge en chef. Le critère

appearance of judicial independence has been maintained is whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges. As a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. The meeting between T and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases. Again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of T. While a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness, the actions of the Chief Justice here were in the nature of a response to a party rather than to a problem. Similarly, the Associate Chief Justice acted inappropriately by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of those involved, nor is there any solid evidence that the independence of the judges in question was actually compromised.

pour déterminer si l'impression d'indépendance que doit donner le pouvoir judiciaire a été maintenue consiste à se demander si un observateur raisonnable aurait conclu que la cour pouvait mener ses affaires en toute liberté, à l'abri d'une intervention du gouvernement et des autres juges. Une règle de conduite générale veut que l'avocat d'une partie ne discute pas d'une affaire donnée avec le juge sauf si les avocats des autres parties sont au courant et de préférence, participent à la discussion. La rencontre entre T et le juge en chef, à laquelle les avocats des appelants n'ont pas assisté, violait cette règle et était manifestement inappropriée, bien que la rencontre ait eu pour origine une préoccupation bien légitime au sujet de la progression excessivement lente de l'instance. Encore une fois en règle générale, le juge ne devrait pas accéder aux demandes d'une partie sans accorder aux avocats des autres parties la possibilité de présenter leurs points de vue. C'était donc manifestement une erreur, et une erreur grave, de la part du juge en chef de parler au juge en chef adjoint à la demande de T. Bien qu'un juge en chef soit responsable de l'instruction diligente des affaires dont sa cour est saisie et qu'il puisse, dans certains cas, être obligé de prendre des mesures pour corriger les retards, les actes du juge en chef en l'espèce ont été accomplis davantage pour répondre à l'une des parties que pour régler un problème. De même, le juge en chef adjoint a agi de façon intempestive en réagissant comme il l'a fait à l'intervention du juge en chef, sans demander le concours des avocats des appelants. Un observateur raisonnable au fait des travaux de la Cour fédérale et de toutes les circonstances conclurait que le juge en chef et le juge en chef adjoint ont été influencés de façon indue et incorrecte par un haut fonctionnaire du ministère de la Justice. Cependant, aucune preuve convaincante n'établit que l'un des acteurs de ce drame ait agi de mauvaise foi et il n'y a pas non plus de preuve solide que l'indépendance des juges en question ait été compromise dans les faits.

An appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay of proceedings, which is a discretionary remedy. While a stay is usually sought to remedy some unfairness to the individual that has resulted from state misconduct, there is also a "residual category" of cases in which a stay may be warranted. This residual category comprises cases in which a prosecution is conducted in such an unfair or vexatious manner that it contravenes notions of justice and thus undermines the integrity of the judicial process. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution

Une cour d'appel ne peut pas intervenir à la légère dans la décision d'un juge de première instance d'accorder ou de ne pas accorder la suspension des procédures qui est une réparation discrétionnaire. Bien qu'on demande habituellement la suspension des procédures pour corriger l'injustice dont est victime un particulier du fait de la conduite répréhensible de l'État, il existe aussi une «catégorie résiduelle» de cas où une telle suspension peut être justifiée. Cette catégorie résiduelle comprend les affaires dans lesquelles la poursuite est menée d'une manière inéquitable ou vexatoire au point de contrevenir aux notions fondamentales de justice et de miner ainsi l'intégrité du processus judiciaire. Pour que la suspension des procédures soit appropriée dans

will offend society's sense of justice. It must also be shown that no remedy other than a stay is reasonably capable of removing this misconduct. As well, it may be necessary in some cases to balance the interests that would be served by granting a stay of proceedings against the interest that society has in having a final decision on the merits. This balancing process would not be appropriate in the case of an ongoing affront to judicial independence or of a particularly egregious interference, either of which would outweigh any interest society might have in continuing the proceedings. Neither of these circumstances is present here.

A stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. The appropriate remedy here is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division who has had nothing to do with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. The Chief Justice and Associate Chief Justice should not have anything further to do with these cases.

Cases Cited

Referred to: *Roberts v. Canada*, [1989] 1 S.C.R. 322; *ITO–International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654; *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Hinse*, [1995] 4 S.C.R. 597; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *R. v. Carosella*,

un cas visé par la catégorie résiduelle, il doit ressortir que la conduite répréhensible de l'État risque de continuer à l'avenir ou que la poursuite des procédures choquera le sens de la justice de la société. Il doit également être établi qu'aucune autre réparation ne peut raisonnablement corriger cette conduite répréhensible. En outre, il peut s'avérer nécessaire dans certains cas de mettre en balance les intérêts que servirait la suspension des procédures et l'intérêt que représente pour la société un jugement définitif statuant sur le fond. Cette mise en balance ne serait pas appropriée s'il y avait atteinte persistante à l'indépendance judiciaire ou ingérence particulièrement grave car l'une ou l'autre l'emporterait sur l'intérêt de la société de poursuivre le débat judiciaire. Aucune de ces hypothèses ne se présente en l'espèce.

La suspension des procédures n'est pas la réparation convenable en l'espèce. Premièrement, il n'y a pas de risque que la poursuite des procédures révèle, perpétue ou aggrave quelque abus. Deuxièmement, la réparation moindre qui consiste à ordonner l'instruction de l'instance devant un autre juge de la Section de première instance, avec interdiction au juge en chef et au juge en chef adjoint de donner des directives ou d'intervenir, suffira. Troisièmement, l'intérêt du Canada à ne pas donner refuge à ceux qui ont dissimulé leur participation en temps de guerre à des atrocités l'emporte sur tout préjudice prévisible que la poursuite des procédures pourrait causer aux appelants ou à l'intégrité du système. La réparation convenable en l'espèce consiste à permettre l'instruction des poursuites dirigées contre les appelants par un juge de la Section de première instance non mêlé jusqu'ici aux affaires qui font l'objet du présent pourvoi. Le juge désigné ne devra pas tenir compte des directives données antérieurement par le juge en chef adjoint ou le juge en chef dans ces dossiers. Le juge en chef et le juge en chef adjoint ne doivent plus intervenir.

Jurisprudence

Arrêts mentionnés: *Roberts c. Canada*, [1989] 1 R.C.S. 322; *ITO–International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752; *Quebec North Shore Paper Co. c. Canadien Pacifique Ltée*, [1977] 2 R.C.S. 1054; *McNamara Construction (Western) Ltd. c. La Reine*, [1977] 2 R.C.S. 654; *Luitjens c. Canada (Secrétaire d'État)* (1992), 9 C.R.R. (2d) 149; *R. c. Seaboyer*, [1991] 2 R.C.S. 577; *R. c. Jewitt*, [1985] 2 R.C.S. 128; *R. c. Hinse*, [1995] 4 R.C.S. 597; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Lippé*, [1991] 2 R.C.S. 114; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Elsom c. Elsom*, [1989] 1 R.C.S. 1367; *R. c. Carosella*,

[1997] 1 S.C.R. 80; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Conway*, [1989] 1 S.C.R. 1659; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *R. v. Vermette*, [1988] 1 S.C.R. 985; *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279; *R. v. Latimer*, [1997] 1 S.C.R. 217; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710.

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Federal Court Rules, C.R.C., c. 663, rr. 5, 450-455, 461, 477, 900-920, 1714-1715.
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APPEAL from a judgment of the Federal Court of Appeal, [1997] 1 F.C. 828, 142 D.L.R. (4th) 270, 208 N.R. 21, [1997] F.C.J. No. 2 (QL), setting aside a stay of proceedings entered by the Federal Court — Trial Division, [1996] 2 F.C. 729, 116 F.T.R. 69, 41 Admin. L.R. (2d) 272, [1996] F.C.J. No. 865 (QL). Appeal dismissed.

Gesta J. Abols, for the appellant Tobiass.

Donald B. Bayne, for the appellant Dueck.

Michael Code, for the appellant Oberlander.

W. Ian C. Binnie, Q.C., for the respondent.

Ed Morgan, for the intervener.

[1997] 1 R.C.S. 80; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *R. c. Conway*, [1989] 1 R.C.S. 1659; *Ruffo c. Conseil de la magistrature*, [1995] 4 R.C.S. 267; *R. c. Vermette*, [1988] 1 R.C.S. 985; *R. c. Hubbert* (1975), 29 C.C.C. (2d) 279; *R. c. Latimer*, [1997] 1 R.C.S. 217; *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358; *Attorney-General c. Times Newspapers Ltd.*, [1973] 1 Q.B. 710.

Lois et règlements cités

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Loi sur la Cour fédérale, L.R.C. (1985), ch. F-7, art. 6(1), (3), 27(1) [mod. 1990, ch. 8, art. 7], 46, 50(1).
Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 40.
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POURVOI contre un arrêt de la Cour d'appel fédérale, [1997] 1 C.F. 828, 142 D.L.R. (4th) 270, 208 N.R. 21, [1997] A.C.F. nº 2 (QL), qui a annulé la suspension des procédures ordonnée par la Section de première instance de la Cour fédérale, [1996] 2 C.F. 729, 116 F.T.R. 69, 41 Admin. L.R. (2d) 272, [1996] A.C.F. nº 865 (QL). Pourvoi rejeté.

Gesta J. Abols, pour l'appelant Tobiass.

Donald B. Bayne, pour l'appelant Dueck.

Michael Code, pour l'appelant Oberlander.

W. Ian C. Binnie, c.r., pour l'intimé.

Ed Morgan, pour l'intervenant.

The following is the judgment delivered by

THE COURT — This appeal raises three principal questions. The first and threshold question is whether this Court has jurisdiction to hear an appeal from a decision of a judge of the Federal Court — Trial Division to stay a citizenship revocation proceeding. The second question is whether certain events constituted an actual or apparent affront to judicial independence. The third question is whether, if there was any affront to judicial independence, a stay was, under the circumstances, the appropriate remedy.

I. Facts

The facts of this appeal present some difficulties. Much of the relevant evidence was known to Cullen J., who considered the appellants' application at first instance. But other items of evidence emerged only recently, following an order of this Court dated May 5, 1997. The additional evidence was not considered at trial and so has not given rise to any findings of fact. It is accordingly for this Court to determine the weight that should be assigned to it.

A. *The Evidence That Was Available to the Trial Division*

The following was known to the Trial Division and to the Federal Court of Appeal. Both courts based their decisions entirely upon it.

On January 27, 1995, the Registrar of Canadian Citizenship sent Notices of Revocation to the appellants, Helmut Oberlander, Johann Dueck and Erichs Tobiass. The purpose of these notices was to inform the appellants that the Minister of Citizenship and Immigration ("the Minister") intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. Mr. Oberlander, it was said, had concealed his "membership in the German *Sicherheitspolizei und SD* and Einsatzkommando

Version française du jugement rendu par

LA COUR — Le présent pourvoi soulève trois questions principales. La première question — qui est aussi la question préliminaire — est de savoir si notre Cour a compétence pour entendre un pourvoi formé contre une décision d'un juge de la Section de première instance de la Cour fédérale suspendant des procédures en révocation de la citoyenneté. La deuxième question est de savoir s'il y a eu atteinte, réelle ou apparente, à l'indépendance judiciaire. Dans l'affirmative, la troisième question est de savoir si la suspension des procédures était, dans les circonstances, la réparation convenable. 1

I. Les faits

Les faits du présent pourvoi suscitent certaines difficultés. Bon nombre des éléments de preuve pertinents étaient connus du juge Cullen, qui a examiné la demande des appelants en première instance. Mais d'autres éléments de preuve ont été produits seulement récemment à la suite de l'ordonnance rendue par notre Cour le 5 mai 1997. Ces éléments n'ont pas été examinés au procès et n'ont ainsi donné lieu à aucune conclusion de fait. Il appartient donc à notre Cour de déterminer quel poids devra leur être attribué. 2

A. *Les éléments de preuve portés à la connaissance de la Section de première instance*

Les faits suivants étaient connus de la Section de première instance et de la Section d'appel de la Cour fédérale. Les deux cours ont fondé leurs décisions entièrement sur ces faits. 3

Le 27 janvier 1995, le greffier de la citoyenneté canadienne a envoyé des avis de révocation aux appelants, Helmut Oberlander, Johann Dueck et Erichs Tobiass. Ces avis visaient à les informer que le ministre de la Citoyenneté et de l'Immigration («le ministre») avait l'intention de demander la révocation de leur citoyenneté canadienne pour le motif qu'ils avaient obtenu cette dernière en omettant de divulguer aux fonctionnaires canadiens les circonstances de leur participation à des atrocités commises durant la Seconde Guerre mondiale. Les avis précisaient que M. Oberlander avait dissimulé son [TRADUCTION] «appartenance au 4

10A during the Second World War and [his] participation in the executions of civilians during that period of time"; Mr. Dueck his "membership in the Selidovka district (*ralon*) police in German occupied Ukraine during the period 1941 to 1943, and [his] participation in the executions of civilians and prisoners-of-war during that time"; and Mr. Tobiass his "membership in the *lettische Sicherheitshilfspolizei* (commonly known as the *Arajs Kommando*) subordinate to the German *Sicherheitspolizei und SD* during the period 1941 to 1943 in German occupied Latvia and [his] participation in the executions of civilians during that time and [his] membership in the *Waffen SS* during the period 1943 to 1945".

Sicherheitspolizei und SD et au Einsatzkommando 10A allemands durant la Seconde Guerre mondiale et [sa] participation aux exécutions de civils durant cette période», M. Dueck, son [TRADUCTION] «appartenance à la police du district (*ralon*) de Selidovka dans l'Ukraine occupée par les Allemands durant la période allant de 1941 à 1943 et [sa] participation aux exécutions de civils et de prisonniers de guerre durant cette période», et M. Tobiass, son [TRADUCTION] «appartenance à la *lettische Sicherheitshilfspolizei* (connue sous le nom du *Arajs Kommando*) qui était subordonnée à la *Sicherheitspolizei und SD* allemande durant la période de 1941 à 1943 dans la Lettonie occupée par les Allemands et [sa] participation aux exécutions de civils durant cette période ainsi que [son] appartenance aux *Waffen SS* durant la période allant de 1943 à 1945».

5 As they were entitled to do under s. 18(1)(*a*) of the *Citizenship Act*, R.S.C., 1985, c. C-29, the appellants asked the Minister to refer their cases to the Federal Court — Trial Division. By May 1, 1995, the Minister had referred all three cases to the court.

Ainsi qu'ils en avaient le droit en vertu de l'al. 18(1)*a*) de la *Loi sur la citoyenneté*, L.R.C. (1985), ch. C-29, les appelants ont demandé au ministre de renvoyer leurs causes devant la Section de première instance de la Cour fédérale. Dès le 1er mai 1995, le ministre a renvoyé les trois affaires devant la cour.

6 There then followed many procedural disputes. In May of 1995, the respondent sought directions from the court about the procedure to be followed and the appellants sought disclosure of the respondent's case. On June 30, 1995, the respondent's motions for directions came on for hearing before Jerome A.C.J. During the initial hearing, counsel for the appellants raised many preliminary issues. The Associate Chief Justice ordered the three cases joined for purposes of resolving the preliminary issues and he set a timetable for the filing of arguments in relation to them.

Il s'ensuivit plusieurs contestations ayant trait à la procédure. En mai 1995, l'intimé a demandé à la cour des directives au sujet de la procédure à suivre et les appelants ont demandé que l'intimé divulgue sa preuve. Le 30 juin 1995, les requêtes de l'intimé en vue d'obtenir des directives ont été plaidées devant le juge en chef adjoint Jerome. Durant l'audience initiale, les avocats des appelants ont soulevé de nombreuses questions préliminaires. Le juge en chef adjoint a ordonné la jonction des trois affaires en vue du règlement des questions préliminaires et il a fixé un échéancier pour le dépôt des mémoires s'y rapportant.

7 Throughout the summer of 1995, the appellants sought disclosure of documents that they judged to be relevant to their preliminary motions. In addition, they pressed the respondent to produce the details of the case against them. On August 25, 1995, Mr. Christopher Amerasinghe, who was counsel for the respondent at the time, informed counsel for the appellant Dueck that many of the

Tout au long de l'été 1995, les appelants ont demandé la communication des documents qu'ils jugeaient pertinents relativement à leurs requêtes préliminaires. De plus, ils ont pressé l'intimé de produire les détails de la preuve recueillie contre eux. Le 25 août 1995, Me Christopher Amerasinghe, qui était l'avocat de l'intimé à l'époque, a informé l'avocat de l'appelant Dueck que bon

relevant documents were in the process of being translated and so were unavailable.

nombre des documents pertinents étaient en cours de traduction et ne pouvaient donc être communiqués.

On October 4, 1995, Jerome A.C.J. telephoned the parties to schedule the argument of the preliminary motions. Mr. Amerasinghe indicated that he intended to claim that certain documents sought by the appellants were privileged. The parties agreed that the questions of disclosure and privilege had to be settled before the cases could proceed. The Associate Chief Justice chose December 12, 1995 as the date upon which he would hear argument concerning those questions. Mr. Amerasinghe agreed that December 12 was "a reasonable date as scheduling goes in courts in Toronto".

8 Le 4 octobre 1995, le juge en chef adjoint Jerome a téléphoné aux parties afin de fixer une date pour l'audition des requêtes préliminaires. Me Amerasinghe a indiqué qu'il avait l'intention d'invoquer un privilège à l'égard de certains des documents demandés par les appelants. Les parties ont convenu que les questions concernant la communication des pièces et le privilège devaient être réglées avant que l'instance puisse se poursuivre. Le juge en chef adjoint a fixé au 12 décembre 1995 l'audition des arguments des parties sur ces questions. Me Amerasinghe était d'accord pour dire que le 12 décembre était [TRADUCTION] «une date raisonnable compte tenu des délais judiciaires à Toronto».

In November, the respondent released some documents to the appellants but withheld others. On December 12, 1995, counsel for the appellant Dueck argued for the whole day. At the end of the day, the matter was set over for continuation.

9 En novembre, l'intimé a communiqué quelques-uns des documents aux appelants mais a retenu les autres. Le 12 décembre 1995, l'avocat de l'appelant Dueck a présenté ses arguments durant toute la journée. À la fin de la journée, l'affaire a été remise à une date ultérieure.

On January 10, 1996, the Federal Court — Trial Division advised the parties that May 15 and 16, 1996 had been set aside for the completion of the argument that had begun on December 12, 1995. Less than a week later, Mr. Amerasinghe wrote to the Court Administrator to protest the May dates. In the letter, a copy of which he sent to counsel for the appellants, Mr. Amerasinghe pointed out that many of the proposed witnesses were of "advanced age" and "frail in health". He complained in strong terms about the slow progress of the cases.

10 Le 10 janvier 1996, la Section de première instance de la Cour fédérale a avisé les parties que les dates du 15 et du 16 mai 1996 avaient été retenues pour terminer l'audition des arguments commencée le 12 décembre 1995. Moins d'une semaine plus tard, Me Amerasinghe a écrit à l'administrateur de la cour pour protester contre les dates fixées en mai. Dans sa lettre, dont il a transmis copie aux avocats des appelants, Me Amerasinghe a fait remarquer que plusieurs des témoins proposés étaient [TRADUCTION] «d'un âge avancé» et «de santé fragile». Il a protesté avec véhémence contre la lenteur des procédures.

On February 19, 1996, the parties and the Associate Chief Justice participated in a teleconference. Mr. Amerasinghe repeated the points he had made earlier in his letter to the Court Administrator and offered to make submissions in writing in order to expedite the resolution of the preliminary issues. The Associate Chief Justice decided that he wished to have oral submissions. He confirmed that the

11 Le 19 février 1996, les parties et le juge en chef adjoint ont participé à une conférence téléphonique. Me Amerasinghe a repris les points qu'il avait exposés dans la lettre adressée à l'administrateur de la cour et il a offert de présenter des observations écrites afin d'accélérer le règlement des questions préliminaires. Le juge en chef adjoint a décidé qu'il voulait recevoir des observations

oral argument would take place on May 15 and 16, 1996.

12 The events that form the heart of this appeal took place on March 1, 1996. On that day, Mr. Ted Thompson, who was the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with Isaac C.J. of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. The letters read as follows:

March 1, 1996 HAND DELIVERED

The Honourable Chief Justice J. A. Isaac
Federal Court of Canada
Supreme Court of Canada Building
Ottawa, Ontario
K1A 0H9

Dear Chief Justice Isaac:

Re: Erichs Tobiass, T-569-95, Helmut Oberlander, T-866-95 and Johann Dueck, T-938-95

Further to our meeting of this morning in which I advised you that the Attorney General of Canada is being asked to consider taking a Reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Federal Court Trial Division is unable or unwilling to proceed with the subject cases expeditiously.

Notices of Intention to revoke the citizenship of the above-named individuals were sent out in January of 1995. They were persons who had been investigated in connection with allegations of war crimes and crimes against humanity during the second world war. Over the course of the next three months the cases were referred to the Federal Court. After complying with the requirements of Rule 920, Motions were brought requesting directions from the Court regarding discovery of evidence and taking evidence on commission. The Motions were filed April 13th (Tobiass), May 11th (Oberlander) and May 18th (Dueck), 1995 respectively. These Motions were necessary as there are no procedural rules governing these proceedings. We suggested the procedure followed in the *Luitjens* case be followed. Our Motion

Les événements à l'origine du présent pourvoi sont survenus le 1er mars 1996. Ce jour-là, Me Ted Thompson, alors sous-procureur général adjoint chargé du contentieux des affaires civiles au ministère fédéral de la Justice, a rencontré le juge en chef Isaac de la Cour fédérale. Les deux hommes ont discuté du renvoi à l'audience des causes des appelants et, plus tard ce jour-là, ils ont échangé des lettres, dont copie n'a été transmise à aucun des avocats des appelants. Les lettres étaient rédigées ainsi:

[TRADUCTION]

Le 1er mars 1996 PAR MESSAGER

L'honorable J.A. Isaac, juge en chef
Cour fédérale du Canada
Édifice de la Cour suprême du Canada
Ottawa (Ontario)
K1A 0H9

Objet: Erichs Tobiass, T-569-95, Helmut Oberlander, T-866-95 et Johann Dueck, T-938-95

Monsieur le Juge en chef,

À la suite à notre rencontre de ce matin, au cours de laquelle je vous ai informé que le procureur général du Canada a été engagé à envisager de saisir la Cour suprême du Canada d'un renvoi tendant à résoudre certaines questions de droit préalables, en raison surtout du fait que la Section de première instance de la Cour fédérale ne peut ou ne veut pas faire diligence pour juger les causes susmentionnées.

Les avis d'intention de révoquer la citoyenneté des individus susnommés ont été envoyés en janvier 1995. Ces personnes avaient fait l'objet d'enquêtes pour crimes de guerre et crimes contre l'humanité durant la Seconde Guerre mondiale. Au cours des trois mois suivants, leurs dossiers ont été déférés à la Cour fédérale. Après les formalités prévues à la règle 920, des requêtes ont été introduites pour demander à la Cour des directives en matière de communication des preuves et de commission rogatoire. Ces requêtes, respectivement déposées les 13 avril (Tobiass), 11 mai (Oberlander) et 18 mai 1995 (Dueck), étaient nécessaires en ce qu'il n'existe aucune règle de procédure régissant les causes de ce genre. Nous avons suggéré d'appliquer la procédure suivie dans l'affaire *Luitjens*. Notre requête devait être entendue le 30 juin

was originally set down for argument on June 30, 1995. Associate Chief Justice Jerome had become seized of the three cases and determined to hear all preliminary motions regarding them. On June 30th, counsel for Dueck argued that the three cases should be joined and also indicated that he wished to bring a Motion to stay the proceedings for abuse of process. Jerome, A.C.J. joined the three cases and granted adjournments over the objections of our counsel. September 15, 1995 was set as the date for the filing of facta and in a tele-conference call on October 4, 1995 he set December 12, 1995 as the date on which argument was to be heard.

On December 12th, counsel for Dueck was permitted to argue all day and it was necessary to set the matter over for continuation. Jerome, A.C.J. indicated that the continuing date would be in February of 1996 despite our request for an earlier date and having regard to the fact that counsel for Dueck was available in early January. The Court declined to fix a date for continuation while all parties were present. When our counsel called the Court in January of 1996 requesting a date for continuation, he was advised several days later that argument had been set down for May 15th and 16th. We wrote the Court expressing concern about the long day [*sic*] and the urgency of proceeding with this matter. We suggested concluding the argument by written submissions. Counsel for Mr. Dueck objected and Jerome, A.C.J. indicated that even with written submissions he would want oral argument and on February 18th via teleconference with all parties he ordered that the dates of May 15 and 16 stand.

There are likely to be approximately 12 similar cases brought to the Federal Court with as many as 6 persons being given notice during the course of this year.

We are very concerned if these cases are not dealt with expeditiously they will never be heard on their merits. A crucial witness on the *Tobiass* case has cancer and may not be able to testify. In the *Dueck* case one key witness has died, one is in hospital and two others are so ill that they are unable to travel. Our counsel has estimated that at the current pace of proceeding and considering appeals in respect to interlocutory matters it will be years before these matters can be heard on their merits.

1995. Le juge en chef adjoint Jerome, qui avait été saisi des trois dossiers, a décidé d'entendre toutes les requêtes préliminaires qui s'y rapportaient. Le 30 juin, l'avocat de Dueck soutient qu'il fallait fusionner les trois dossiers, et fait savoir qu'il se proposait d'introduire une requête en suspension des procédures pour abus de procédure. Le juge en chef adjoint Jerome a fusionné les trois dossiers et accordé l'ajournement malgré les objections de notre avocat. Il a fixé au 15 septembre 1995 le dépôt des mémoires et, lors d'une téléconférence tenue le 4 octobre 1995, il a fixé au 12 décembre 1995 l'ouverture des débats.

Le 12 décembre, l'avocat de Dueck a pu présenter ses arguments pendant une journée entière et il a été nécessaire de prévoir une reprise de l'audience. Le juge en chef adjoint Jerome a fait savoir que l'audience reprendrait en février 1996 malgré notre demande d'une date plus proche et bien que l'avocat de Dueck fût disponible au début de janvier. La Cour a refusé de fixer une date pour la reprise de l'audience alors que toutes les parties étaient présentes. Lorsque notre avocat appela la Cour en janvier 1996 pour demander la fixation d'une date pour la reprise de l'audience, il a été informé plusieurs jours après que les débats reprendraient les 15 et 16 mai. Nous avons écrit à la Cour pour faire part de nos préoccupations au sujet du long délai et de la nécessité qu'il y avait à instruire d'urgence ces dossiers. Nous avons suggéré de poursuivre l'argumentation au moyen de mémoires écrits. L'avocat de M. Dueck s'y est opposé, et le juge en chef adjoint Jerome a fait savoir que même en cas de mémoires écrits, il tenait à entendre l'argumentation de vive voix; au cours d'une téléconférence tenue le 18 février avec toutes les parties, il a confirmé les dates des 15 et 16 mai pour les débats.

La Cour fédérale sera probablement saisie d'une douzaine de cas semblables, et rien que pour cette année, il se peut que 6 personnes reçoivent un avis à cet effet.

Nous craignons que si ces affaires ne sont pas diligemment instruites, elles ne soient jamais entendues au fond. Un témoin primordial dans l'affaire *Tobiass* est atteint de cancer et ne sera peut-être pas en mesure de témoigner. Dans l'affaire *Dueck*, un témoin à charge principal est mort, un autre est à l'hôpital, et deux autres sont si malades qu'il leur est impossible de voyager. Notre avocat estime qu'à l'allure actuelle de la procédure et compte tenu des appels relatifs aux questions interlocutoires, il se passera des années avant que ces causes puissent être entendues au fond.

As you know, there is great public interest in seeing these cases disposed of on their merits and the potential for embarrassment is very high should it be seen that the Justice system is unable to respond to these urgent cases in a timely way.

I would appreciate any assistance you can offer.

Yours very truly,

J. E. Thompson
Assistant Deputy Attorney General
Civil Litigation
[Phone numbers]

By Hand

Mr. J. E. (Ted) Thompson, Q.C.
Assistant Deputy Attorney General
Civil Litigation Section
Department of Justice
Ottawa K1A 0H8

Dear Mr. Thompson:

Re: Erichs Tobiass T-569-95, Helmut Oberlander T-866-95 and Johann Dueck T-938-95

I refer to our discussions this morning and to your subsequent letter concerning these matters.

I have discussed your concerns with the Associate Chief Justice and, like me, he is prepared to take all reasonable steps possible to avoid a Reference to the Supreme Court of Canada on these matters.

The Associate Chief Justice has informed me that there are now before the Court five citizenship revocation cases — the three mentioned in your letter which are being dealt with by Mr. Amerasinghe and, two earlier ones: one is being dealt with by Ms. Charlotte Bell (*Khalil*) and the other by Mr. Amerasinghe (*Nemsila*). The Associate Chief Justice has heard all of the evidence and argument in *Nemsila* but he had been asked by counsel for *Nemsila* to defer judgment in that case until *Khalil* has been concluded. Argument has commenced in that latter case and has been adjourned to 29 April for continuation.

In light of the concerns expressed in your letter the Associate Chief Justice will meet with Ms. Bell and, Ms. Jackman who appears for the Respondent, early next week to fix an early date for final argument. If an early date cannot be fixed he will give judgment in

Comme vous le savez, le public manifeste un grand intérêt pour le jugement au fond de ces affaires et le risque d'embarras est très élevé s'il devait penser que la justice n'est pas en mesure de s'occuper en temps voulu de ces causes urgentes.

Je vous serais obligé de toute aide que vous pourriez apporter en la matière.

Veuillez agréer, Monsieur le Juge en chef, les assurances de ma haute considération.

J.E. Thompson
Sous-procureur général adjoint
Contentieux des affaires civiles
[numéros de téléphone]

Par messager

Monsieur J.E. (Ted) Thompson, c.r.
Sous-procureur général adjoint
Direction du contentieux des affaires civiles
Ministère de la Justice
Ottawa K1A 0H8

Objet: Erichs Tobiass T-569-95, Helmut Oberlander T-866-95 et Johann Dueck T-938-95

Monsieur Thompson,

Je vous écris au sujet de notre conversation de ce matin et de votre lettre subséquente concernant ces affaires.

J'ai fait part de vos préoccupations au juge en chef adjoint et, tout comme moi, il est prêt à prendre toutes les mesures raisonnables possibles afin d'éviter un renvoi à la Cour suprême du Canada.

Le juge en chef adjoint m'a informé que la Cour est actuellement saisie de cinq affaires de révocation de la citoyenneté: les trois mentionnées dans votre lettre et dont s'occupe M. Amerasinghe, et deux dossiers antérieurs, l'un mené par M^me^ Charlotte Bell (*Khalil*) et l'autre par M. Amerasinghe (*Nemsila*). Le juge en chef adjoint a entendu tous les témoignages et arguments dans l'affaire *Nemsila*, mais l'avocat de ce dernier lui a demandé de différer son jugement en attendant l'issue de la cause *Khalil*. L'argumentation de vive voix a commencé dans cette dernière affaire mais a été ajournée pour reprendre le 29 avril.

Vu les préoccupations exprimées dans votre lettre, le juge en chef adjoint rencontrera M^me^ Bell, ainsi que M^me^ Jackman qui représente l'intimé, au début de la semaine prochaine pour fixer une date pour l'argumentation finale. S'il est impossible de fixer une date

Nemsila and then deal with *Khalil* at the earliest possible date.

As regards the three cases about which you wrote, the Associate Chief Justice says firstly, that he did not fully appreciate until he read your letter, the urgency of dealing with these matters as expeditiously as the Government would like. However, now that he is aware he will devote one week from 15 May to deal with these cases not only with respect to the preliminary points but also with respect to the merits. Finally, he has authorized me to say that additional cases of this class coming into the Court will be given the highest priority in light of the concerns expressed in your letter.

Yours truly,

Julius A. Isaac

c.c.—The Hon. James A. Jerome
Associate Chief Justice

proche, il rendra jugement dans l'affaire *Nemsila* puis entendra la cause *Khalil* le plus tôt possible.

En ce qui concerne les trois dossiers visés par votre lettre, le juge en chef adjoint fait savoir en premier lieu qu'avant de lire votre lettre, il ne se rendait pas pleinement compte de la nécessité qu'il y a à les instruire de façon aussi urgente que le souhaite le gouvernement. Cependant, maintenant qu'il s'en est rendu compte, il consacrera, à compter du 15 mai, une semaine à l'audition non seulement des questions préliminaires, mais aussi de la cause au fond. Enfin, il m'a demandé de vous faire savoir qu'à l'avenir, la Cour accordera la plus haute priorité aux causes de ce genre étant donné les préoccupations exprimées dans votre lettre.

Veuillez agréer, Monsieur Thompson, les assurances de ma considération distinguée.

Julius A. Isaac

c.c.—L'honorable James A. Jerome
Juge en chef adjoint

On March 7, 1996, the respondent provided copies of these letters to the appellants. In the cover letter, Mr. Amerasinghe explained that Mr. Thompson had approached the Chief Justice at the beginning of March to discuss the conduct of citizenship revocation cases generally and had, in the course of the meeting, happened to mention the appellants' cases.

13 Le 7 mars 1996, l'intimé a transmis des copies de ces lettres aux appelants. Dans la lettre d'accompagnement, M^e^ Amerasinghe expliquait que M^e^ Thompson avait contacté le juge en chef au début du mois de mars pour discuter de la conduite des demandes de révocation de la citoyenneté en général et, au cours de la rencontre, il avait mentionné les dossiers des appelants.

On April 2, 1996, counsel for the appellants Dueck and Oberlander requested disclosure of all documents that related directly or indirectly to the meeting that took place on March 1, 1996. Mr. Amerasinghe answered the next day that "there is no other correspondence between Mr. Thompson and the Chief Justice relating to this matter". No disclosure was made of any documents besides the letters themselves.

14 Le 2 avril 1996, les avocats des appelants Dueck et Oberlander ont demandé communication de tous les documents se rapportant directement ou indirectement à la rencontre qui avait eu lieu le 1^er^ mars 1996. M^e^ Amerasinghe a répondu le lendemain que [TRADUCTION] «M^e^ Thompson et le juge en chef n'ont pas échangé d'autres lettres relativement à cette question». Seules les lettres elles-mêmes ont été communiquées.

On April 10, 1996, the Court Administrator informed counsel that the Associate Chief Justice would hear argument concerning preliminary motions on May 15 and 16, 1996, and if necessary during the following week. The Associate Chief Justice also sent word that he intended to be done with the cases by July of 1996.

15 Le 10 avril 1996, l'administrateur de la cour a informé les avocats que le juge en chef adjoint entendrait les arguments des parties concernant les requêtes préliminaires les 15 et 16 mai 1996 et, au besoin, durant la semaine suivante. Le juge en chef adjoint a également fait savoir qu'il comptait en avoir terminé avec les dossiers au plus tard en juillet 1996.

16 On April 23, 1996, counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that Mr. Thompson and Isaac C.J. had interfered with the independence of Jerome A.C.J. On April 30, counsel for the appellants Dueck and Oberlander indicated that they would be content to have the Associate Chief Justice remain in charge of the cases. Counsel for the appellant Tobiass had nothing to say on the subject, though he had indicated earlier that he would not object to having the Associate Chief Justice remain to settle the preliminary motions.

17 On May 6, the Associate Chief Justice recused himself. He directed that the appellants' cases should go forward under a new judge on May 15, 1996 and indicated that the new judge's list would be cleared to permit him to deal expeditiously with any remaining questions that the cases might pose.

B. *Further Evidence*

18 On May 5, 1997, this Court ordered the respondent to produce "[t]he internal Department of Justice documents concerning the fact[s] referred to" in a report prepared for the Government by former Chief Justice of the Ontario Court of Appeal, the Honourable Charles Dubin. On May 22, the Court ordered the respondent to comply fully with the order of May 5. In response to the two orders, the respondent disclosed many internal documents.

19 The following emerges from these documents.

20 Counsel for the respondent objected strongly to the Associate Chief Justice's management of the appellants' cases. It appears that Mr. Amerasinghe had concluded as early as December 14, 1995 that the Associate Chief Justice was a "problematic" judge.

21 On February 27, 1996, the Department of Justice's Litigation Committee decided that "our only option in the circumstances [i.e. in response to delay in the Federal Court — Trial Division] appears to be a reference to the Supreme Court of Canada of the preliminary questions that have been raised". Mr. Thompson seems not to have been

Le 23 avril 1996, les avocats des appelants ont avisé la cour qu'ils demanderaient une suspension des procédures pour le motif que M^e^ Thompson et le juge en chef Isaac avaient porté atteinte à l'indépendance du juge en chef adjoint Jerome. Le 30 avril, les avocats des appelants Dueck et Oberlander ont indiqué qu'ils s'estimeraient satisfaits si le juge en chef adjoint restait saisi des dossiers. L'avocat de l'appelant Tobiass n'avait rien à dire à ce sujet, même s'il avait fait savoir précédemment qu'il ne s'opposerait pas à ce que le juge en chef adjoint statue sur les requêtes préliminaires.

Le 6 mai, le juge en chef adjoint s'est récusé. Il a ordonné que l'instance soit instruite par un nouveau juge le 15 mai 1996 en précisant que celui-ci serait déchargé pour qu'il puisse s'occuper avec célérité des autres questions susceptibles d'être soulevées.

B. *Les autres éléments de preuve*

Le 5 mai 1997, notre Cour a ordonné à l'intimé de produire [TRADUCTION] «[l]es documents internes du ministère de la Justice concernant le[s] fait[s] visé[s]» dans un rapport préparé pour le gouvernement par l'ancien juge en chef de la Cour d'appel de l'Ontario, l'honorable Charles Dubin. Le 22 mai, la Cour a ordonné à l'intimé de se conformer en tous points à l'ordonnance du 5 mai. En réponse à ces deux ordonnances, l'intimé a communiqué de nombreux documents internes.

Il est ressorti ce qui suit de ces documents.

L'avocat de l'intimé s'est élevé vigoureusement contre la façon dont le juge en chef adjoint menait les causes des appelants. M^e^ Amerasinghe aurait conclu dès le 14 décembre 1995 que le juge en chef adjoint [TRADUCTION] «faisait problème».

Le 27 février 1996, le Comité du contentieux du ministère de la Justice a décidé qu'il n'avait [TRADUCTION] «d'autre choix dans les circonstances [c.-à-d. en réaction à la lenteur des procédures devant la Section de première instance de la Cour fédérale] que de saisir la Cour suprême du Canada des questions préliminaires qui ont été soulevées».

present during the discussion. A reference in a subsequent memorandum reveals that "the Litigation Committee at its meeting on February 27, 1996, specifically recommended that no one should approach the Chief Justice to apprise him of the government's intention to refer certain questions to the Supreme Court".

On March 1, 1996, Mr. Amerasinghe made the following note of a telephone conversation between himself and Mr. Thompson:

J.E.T. [J. Edward (Ted) Thompson] Called and informed me he had met with Isaac who told him that he would get Jerome to recuse himself from the cases and would put an efficient judge to deal quickly with the cases. Isaac had said he would ensure any appeals would be dealt with speedily.

According to Mr. Amerasinghe, later that same day the Chief Justice dined at Mr. Thompson's home.

More than two months after the meeting between Mr. Thompson and the Chief Justice took place, Mr. Amerasinghe recorded his suspicion that Mr. Thompson's real intention in approaching the Chief Justice had been to protect a friend from the embarrassment of a reference to the Supreme Court. Indeed, Mr. Amerasinghe indicated that Mr. Thompson and the Chief Justice were friends and frequent interlocutors. According to Mr. Amerasinghe's report, the Chief Justice invited Mr. Thompson to inform him of perceived problems with the administration of the Federal Court, and Mr. Thompson obliged.

II. Judgments in Appeal

A. *Trial Division*, [1996] 2 F.C. 729

On the strength of the letters exchanged by Mr. Thompson and the Chief Justice on March 1, 1996, Cullen J. concluded that irreparable harm had been done to the appearance of judicial impartiality. He entered a stay of proceedings.

Cullen J. thought that a reasonable observer presented with the letters of March 1, 1996 might

Me Thompson ne semble pas avoir assisté à la discussion. Il est mentionné dans une note de service subséquente que [TRADUCTION] «le Comité du contentieux à sa réunion du 27 février 1996 a recommandé expressément que personne ne fasse part au juge en chef de l'intention du gouvernement de déférer certaines questions à la Cour suprême».

Le 1er mars 1996, Me Amerasinghe a rédigé la note suivante relativement à une conversation téléphonique entre lui-même et Me Thompson: 22

[TRADUCTION] J.E.T. [J. Edward (Ted) Thompson] m'a appelé pour me dire qu'il avait rencontré Isaac, qui lui a dit qu'il persuaderait Jerome de se récuser et désignerait un juge efficace pour instruire rapidement les affaires. Isaac a dit qu'il veillerait à ce que tout appel soit traité avec célérité.

Selon le rapport de Me Amerasinghe, plus tard ce jour-là, le juge en chef a dîné chez Me Thompson.

Plus de deux mois après la rencontre entre Me Thompson et le juge en chef, Me Amerasinghe a noté qu'il soupçonnait que la véritable raison pour laquelle Me Thompson était intervenu auprès du juge en chef était d'éviter à un ami l'embarras d'un renvoi à la Cour suprême. En effet, Me Amerasinghe a indiqué que Me Thompson et le juge en chef étaient amis et se parlaient souvent. D'après le rapport de Me Amerasinghe, le juge en chef a prié Me Thompson de lui signaler les difficultés qu'il estimait liées à l'administration de la Cour fédérale qu'il avait constatées, et Me Thompson s'est exécuté. 23

II. Les jugements portés en appel

A. *Section de première instance*, [1996] 2 C.F. 729

En se fondant sur les lettres échangées par Me Thompson et le juge en chef le 1er mars 1996, le juge Cullen a conclu que l'impression d'impartialité que doit donner le pouvoir judiciaire avait été irrémédiablement compromise. Il a ordonné la suspension des procédures. 24

Le juge Cullen pensait qu'un observateur raisonnable prenant connaissance des lettres du 1er mars 25

conclude that, as a result of the meeting between Mr. Thompson and the Chief Justice, pressure was brought to bear on the Associate Chief Justice to hurry the appellants' cases along, quite possibly to the appellants' detriment. In this way damage was done to the appearance of judicial independence.

26 Because it was the Chief Justice who intervened, and the Chief Justice enjoys some authority over the entire court, Cullen J. thought that a reasonable observer would worry that the independence of all the judges and not only of the Associate Chief Justice had been compromised.

27 Having concluded that the appearance of judicial independence had suffered, Cullen J. considered whether a stay of proceedings was the appropriate remedy. He concluded that no remedy other than a stay of proceedings would cure the wrong done to the appearance of judicial independence. A less radical remedy would only "weaken judicial independence and leave the impression that transgressions of the Court's integrity may be reprimanded but, ultimately, will be forgotten" (p. 748).

B. *Federal Court of Appeal*

28 The respondent purported to appeal Cullen J.'s decision.

(i) Motion to Quash for Want of Jurisdiction

29 The appellants moved to quash the appeal for want of jurisdiction. They argued that s. 18(3) of the *Citizenship Act* placed Cullen J.'s decision to stay the proceedings beyond appeal. The court dismissed the motion over Pratte J.A.'s dissent: (1996), 208 N.R. 49.

(a) *Marceau J.A.*

30 Marceau J.A. held that Cullen J.'s decision was capable of appeal. He concluded that s. 18(3) bars appeal only of decisions that a person has or has not obtained citizenship by impermissible means.

1996 pourrait conclure qu'à la suite de la rencontre entre Me Thompson et le juge en chef, des pressions avaient été exercées sur le juge en chef adjoint pour accélérer l'instruction des causes des appelants, peut-être bien au détriment de ces derniers. En ce sens, une atteinte avait été portée à l'impression d'indépendance que le pouvoir judiciaire doit donner.

Comme c'est le juge en chef qui est intervenu et qu'il exerce son autorité sur l'ensemble de la cour, le juge Cullen s'est dit d'avis qu'un observateur raisonnable craindrait que l'indépendance de tous les juges, et non seulement celle du juge en chef adjoint, ne soit compromise.

Après avoir conclu que l'impression d'indépendance que doit donner le pouvoir judiciaire avait été compromise, le juge Cullen s'est demandé si la suspension des procédures était la réparation convenable. Il a conclu qu'aucune autre réparation ne remédierait au tort qui avait été causé. Toute autre solution moins radicale «compromettrait [l']indépendance [judiciaire] et donnerait l'impression que les atteintes à l'intégrité de la Cour sont peut-être réprimandées mais qu'à la longue, elles seront oubliées» (p. 748).

B. *Cour d'appel fédérale*

L'intimé entendait interjeter appel de la décision du juge Cullen.

(i) Requête en annulation pour défaut de compétence

Les appelants ont demandé l'annulation de l'appel pour défaut de compétence. Ils ont soutenu que le par. 18(3) de la *Loi sur la citoyenneté* mettait la décision suspendant les procédures rendue par le juge Cullen à l'abri de tout appel. La cour a rejeté la requête, le juge Pratte étant dissident: (1996) 208 N.R. 49.

a) *Le juge Marceau*

Le juge Marceau a déclaré que la décision du juge Cullen était susceptible d'appel. Il a conclu que le par. 18(3) interdisait d'interjeter appel des seules décisions portant qu'une personne a obtenu

He agreed (at p. 53) that the bar extends also to "all interlocutory rulings and decisions made with a view to ultimately coming to" a decision on the merits. However, he thought that the decision to enter a stay of proceedings did not come within the bar, because such a decision is neither a decision on the merits nor a decision made with a view to coming to a decision on the merits.

ou n'a pas obtenu la citoyenneté par des moyens inadmissibles. Il était d'accord (à la p. 53) pour dire que l'interdiction s'étendait également à «tous les règlements et décisions de nature interlocutoire rendus dans le but d'arriver finalement à» une décision sur le fond. Toutefois, il pensait que la décision d'accorder la suspension des procédures n'était pas visée par l'interdiction parce qu'une telle décision n'est ni une décision sur le fond ni une décision rendue en vue d'en arriver à une décision sur le fond.

(b) *Stone J.A.*

b) *Le juge Stone*

Stone J.A. read s. 18(3) of the *Citizenship Act* as barring appeal only of decisions made under s. 18(1). Section 18(3), he argued, does not bar appeal of decisions made under other provisions of the *Citizenship Act* or under other Acts of Parliament. Because Cullen J. entered the stay using a power given by s. 50(1) of the *Federal Court Act*, R.S.C., 1985, c. F-7, s. 18(3) of the *Citizenship Act* did not bar an appeal of it.

31 Selon le juge Stone, le par. 18(3) de la *Loi sur la citoyenneté* interdisait seulement d'interjeter appel des décisions visées au par. 18(1). Le paragraphe 18(3), a-t-il décidé, n'interdisait pas d'en appeler des décisions rendues en vertu d'autres dispositions de la *Loi sur la citoyenneté* ou d'autres lois du Parlement. Comme le juge Cullen a prononcé la suspension des procédures en exerçant un pouvoir conféré par le par. 50(1) de la *Loi sur la Cour fédérale*, L.R.C. (1985), ch. F-7, le par. 18(3) de la *Loi sur la citoyenneté* n'interdisait pas d'interjeter appel de cette décision.

(c) *Pratte J.A. (dissenting)*

c) *Le juge Pratte (dissident)*

Pratte J.A. interpreted s. 18(3) as barring appeal not only of a final decision on the merits of a citizenship reference but also of "the myriad of decisions that the Trial Division may make in the course of the reference including . . . a decision granting or refusing a stay of the reference proceedings" (p. 52). He judged that any other reading of the provision would lead to absurdities.

32 D'après le juge Pratte, le par. 18(3) interdisait d'interjeter appel non seulement d'une décision définitive tranchant sur le fond un renvoi en matière de citoyenneté mais également de «toutes les décisions susceptibles d'être rendues par la Section de première instance dans le cadre du renvoi y compris [. . .] une décision accordant ou refusant une suspension des procédures relatives au renvoi» (p. 52). Il a jugé que toute autre interprétation de la disposition mènerait à des absurdités.

(ii) Stay of Proceedings

(ii) La suspension des procédures

Having decided that it had jurisdiction to consider the appeal, the court unanimously set aside the stay of proceedings: [1997] 1 F.C. 828. Each judge offered his own reasons for doing so.

33 Ayant décidé qu'elle avait compétence pour examiner l'appel, la cour a annulé à l'unanimité la suspension des procédures: [1997] 1 C.F. 828. Chacun des juges a exposé ses propres motifs.

(a) *Marceau J.A.*

34 Marceau J.A. concluded that the Associate Chief Justice had retained his judicial independence throughout the period in question. He noted that it is part of the role of a chief justice to manage his or her court. A chief justice must ensure that the court provides "timely justice". Therefore, when a chief justice learns, by whatever means, that the pace of a proceeding is abnormally slow, he or she has a positive duty to investigate, though care must be taken not to interfere with the adjudicative functions of the presiding judge. In the light of this understanding of the role of a chief justice, Marceau J.A. could find no evidence to support the conclusion that the Chief Justice had done anything improper in approaching the Associate Chief Justice to discuss the pace of the appellants' case.

35 Marceau J.A. likewise concluded that the appearance of judicial independence had not suffered as a result of the Chief Justice's intervention with the Associate Chief Justice.

36 Although in Marceau J.A.'s view there had been no affront to judicial independence, he nevertheless considered whether, if there had been an affront, a stay of proceedings would have been the appropriate remedy. He concluded that it would not have been.

37 The question, in Marceau J.A.'s mind, was whether going ahead with the proceedings would perpetuate the appearance of impropriety. The inquiry was forward-looking. What happened in the past could not justify a stay unless its ill effects were likely to persist. Marceau J.A. concluded that if the proceedings were to go ahead under some other judge, the appearance of an affront to judicial independence would be dispelled. It was quite unreasonable to suppose, as Cullen J. did, that there entire bench of the Trial Division had been tainted.

38 Because he concluded that Cullen J. had exercised his discretion to grant a stay on the basis of a

a) *Le juge Marceau*

Le juge Marceau a conclu que le juge en chef adjoint avait conservé son indépendance durant toute la période en question. Il a noté que la gestion de la cour fait partie des attributions d'un juge en chef. Celui-ci doit veiller à ce que la cour rende «justice dans les meilleurs délais». Par conséquent, lorsque le juge en chef apprend, par un moyen ou par un autre, que la progression d'une instance est anormalement lente, il a l'obligation concrète de faire enquête, tout en évitant de s'immiscer dans l'exercice des fonctions juridictionnelles du juge saisi du dossier. Compte tenu de cette conception du rôle du juge en chef, le juge Marceau n'a pas pu trouver d'éléments de preuve à l'appui de la conclusion selon laquelle le juge en chef avait commis une irrégularité en parlant au juge en chef adjoint de la progression de l'affaire des appelants.

Le juge Marceau a conclu de même que l'impression d'indépendance que doit donner le pouvoir judiciaire n'avait pas été compromise par suite de l'intervention du juge en chef auprès du juge en chef adjoint.

Bien que, de l'avis du juge Marceau, il n'y ait pas eu atteinte à l'indépendance judiciaire, il s'est néanmoins demandé si la suspension des procédures aurait été la réparation convenable dans le cas contraire. Il a conclu par la négative.

La question, selon le juge Marceau, était de savoir si la poursuite des procédures perpétuerait l'impression d'irrégularité. La question se posait pour l'avenir. Ce qui s'était produit dans le passé ne pouvait justifier une suspension des procédures à moins que les effets néfastes ne risquent de persister. Le juge Marceau a conclu que, si les procédures devaient se poursuivre devant un autre juge, l'impression d'atteinte à l'indépendance judiciaire serait dissipée. Il était tout à fait déraisonnable de supposer, comme l'a fait le juge Cullen, que toute la formation de la Section de première instance de l'époque avait été éclaboussée.

Parce qu'il a conclu que le juge Cullen avait exercé son pouvoir discrétionnaire d'accorder la

mistaken understanding of the governing principles, Marceau J.A. held that the stay should be set aside.

(b) *Pratte J.A.*

Pratte J.A. wrote only to add two observations to Marceau J.A.'s reasons. The first was that no reasonable person would ever conclude from the Chief Justice's intervention in the appellants' cases that the independence of every member of the Trial Division had been compromised. The second was that Cullen J. was wrong to conclude that there was nothing unusually slow about the pace of the proceedings. The pace of the proceedings before the Associate Chief Justice "had been so slow as to certainly give rise to a suspicion that justice was not rendered with reasonable diligence" (p. 835). Thus, when the Chief Justice learned of the situation, regardless of how the information came to him, he was "duty bound to intervene".

(c) *Stone J.A.*

Although concurring with his colleagues, Stone J.A. took an approach slightly different from theirs. He agreed with them there was "nothing in the record to suggest that the motivation for the meeting with and the letter to the Chief Justice was other than to convey the concern of a party for perceived delay in the progress of the cases in view of the age and state of health of the respondents and of potential witnesses" (p. 867). However, he believed that the appearance of judicial independence had suffered as a result of the events of March 1, 1996.

Having found some apprehension of bias, Stone J.A. had to consider what the appropriate remedy might be. He was not persuaded that what he had before him amounted to one of the "clearest of cases", in which a stay of proceedings was warranted. Although what transpired was improper, there was no evidence that either Mr. Thompson or

suspension des procédures en interprétant de façon erronée les principes applicables, le juge Marceau a estimé que la suspension des procédures devait être annulée.

b) *Le juge Pratte*

39 Le juge Pratte a rédigé des motifs uniquement pour ajouter deux observations aux motifs du juge Marceau. En premier lieu, il a fait observer qu'aucune personne raisonnable n'aurait jamais conclu à la suite de l'intervention du juge en chef dans les affaires des appelants que l'indépendance de chacun des juges de la Section de première instance avait été compromise. En deuxième lieu, il s'est dit d'avis que le juge Cullen a conclu à tort que la progression des procédures n'avait rien d'inhabituellement lent. Le déroulement de l'instance devant le juge en chef adjoint «était si len[t] qu'on pouvait légitimement se demander si justice était rendue avec une diligence raisonnable» (p. 835). Ainsi, lorsque le juge en chef a été mis au courant de la situation, peu importe comment, il avait «le devoir d'intervenir».

c) *Le juge Stone*

40 Tout en souscrivant aux motifs de ses collègues, le juge Stone a adopté une approche quelque peu différente. Il était d'accord avec eux pour dire qu'on ne pouvait «rien trouver dans le dossier qui permette de penser que la rencontre avec le juge en chef et la lettre qui lui a été adressée par la suite avaient d'autre but que de faire part des préoccupations d'une partie qui se plaignait de la lenteur de la procédure, eu égard à l'âge et à l'état de santé des intimés et des témoins éventuels» (p. 867). Cependant, il a jugé que l'impression d'indépendance que doit donner le pouvoir judiciaire avait été compromise en raison des événements du 1er mars 1996.

41 Ayant conclu à l'existence d'une crainte de partialité, le juge Stone devait se demander quelle serait la réparation convenable. Il ne pensait pas que le litige dont il était saisi était l'un des «cas les plus manifestes» justifiant la suspension des procédures. Même si une irrégularité avait été commise, rien ne prouvait que Me Thompson ou le juge en

the Chief Justice had acted in bad faith. Stone J.A. agreed with Marceau J.A. that the lesser remedy of a new proceeding before a new judge would sufficiently answer any affront that the appearance of judicial independence had suffered.

chef fussent de mauvaise foi. Le juge Stone était d'accord avec le juge Marceau pour dire que la réparation moindre qu'est la tenue d'une nouvelle instance devant un nouveau juge suffirait pour corriger toute atteinte à l'impression d'indépendance que doit donner le pouvoir judiciaire.

III. Issues

III. Les questions en litige

42 This appeal presents three issues. The first is whether an appeal lies from a decision of a judge of the Trial Division to grant a stay of proceedings in a citizenship revocation proceeding commenced under s. 18(1) of the *Citizenship Act*. The second is whether judicial independence, or the appearance of it, suffered as a result of the meeting between Mr. Thompson and Isaac C.J. The third is whether, if any damage was done to the appearance of judicial independence, the trial judge properly exercised his discretion to enter a stay of proceedings.

Le présent pourvoi soulève trois questions. La première question est de savoir si appel peut être interjeté de la décision d'un juge de la Section de première instance accordant la suspension des procédures en révocation de la citoyenneté intentées en application du par. 18(1) de la *Loi sur la citoyenneté*. La deuxième est de savoir si l'indépendance du pouvoir judiciaire, ou l'impression d'indépendance qu'il doit donner, a été compromise par la rencontre entre M^e^ Thompson et le juge en chef Isaac. Si l'impression d'indépendance que doit donner le pouvoir judiciaire a été compromise, la troisième est de savoir si le juge de première instance a exercé correctement son pouvoir discrétionnaire en accordant la suspension des procédures.

IV. Analysis

IV. Analyse

43 We conclude that an appeal lies from a decision of the Trial Division to grant a stay of proceedings in a case such as this one. We further conclude that the appearance, but not the fact, of judicial independence suffered as a result of the meeting between Mr. Thompson and the Chief Justice, but that a stay of proceedings is not the appropriate remedy.

Nous concluons qu'il peut être interjeté appel d'une décision de la Section de première instance accordant la suspension des procédures dans une affaire comme la présente espèce. Nous concluons également que l'impression d'indépendance que doit donner le pouvoir judiciaire, non pas son indépendance dans les faits, a été compromise à la suite de la rencontre entre M^e^ Thompson et le juge en chef, et que la suspension des procédures ne constitue pas la réparation appropriée.

A. *Jurisdiction*

A. *La compétence*

44 The appellants contend that, in light of s. 18(3) of the *Citizenship Act*, Cullen J.'s order was final and could not be appealed either to the Federal Court of Appeal or to this Court. To properly assess the merits of this submission, the interplay between s. 18 of the *Citizenship Act* and ss. 27 and 50 of the *Federal Court Act* must be considered.

Les appelants prétendent que, compte tenu du par. 18(3) de la *Loi sur la citoyenneté*, l'ordonnance du juge Cullen était définitive et non susceptible d'appel devant la Cour d'appel fédérale ou notre Cour. Pour évaluer correctement le bienfondé de cet argument, il faut examiner le jeu de l'art. 18 de la *Loi sur la citoyenneté* et des art. 27 et 50 de la *Loi sur la Cour fédérale*.

Section 18 of the *Citizenship Act* provides that:

18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

(*a*) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(*b*) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

. . .

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom. [Emphasis added.]

Section 2 of the same Act makes it clear that the "Court" referred to in s. 18 is the Federal Court – Trial Division.

Sections 27 and 50 of the *Federal Court Act* provide that:

27. (1) An appeal lies to the Federal Court of Appeal from any

(*a*) final judgment,

(*b*) judgment on a question of law determined before trial,

(*c*) interlocutory judgment, or

(*d*) determination on a reference made by a federal board, commission or other tribunal or the Attorney General of Canada,

of the Trial Division.

50. (1) The Court may, in its discretion, stay proceedings in any cause or matter,

. . .

(*b*) where for any . . . reason it is in the interest of justice that the proceedings be stayed.

Section 27 of the *Federal Court Act* provides a general right of appeal from final and interlocutory judgments of the Federal Court — Trial Division.

L'article 18 de la *Loi sur la citoyenneté* prévoit que: 45

18. (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée:

a) l'intéressé n'a pas, dans les trente jours suivant la date d'expédition de l'avis, demandé le renvoi de l'affaire devant la Cour;

b) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels.

. . .

(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel. [Nous soulignons.]

L'article 2 de la même Loi précise que la «Cour» mentionnée à l'art. 18 est la Section de première instance de la Cour fédérale.

Les articles 27 et 50 de la *Loi sur la Cour fédérale* sont libellés comme suit: 46

27. (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Section de première instance:

a) jugement définitif;

b) jugement sur une question de droit rendu avant l'instruction;

c) jugement interlocutoire;

d) jugement sur un renvoi d'un office fédéral ou du procureur général du Canada.

50. (1) La Cour a le pouvoir discrétionnaire de suspendre les procédures dans toute affaire:

. . .

b) lorsque, pour quelque [. . .] raison, l'intérêt de la justice l'exige.

L'article 27 de la *Loi sur la Cour fédérale* prévoit un droit d'appel général de tous les jugements définitifs et de tous les jugements interlocutoires 47

Section 18(3) of the *Citizenship Act*, however, provides that "notwithstanding any other Act of Parliament", no appeal lies from any decision of the Federal Court — Trial Division made "under" s. 18(1). Thus, s. 18(3) of the *Citizenship Act* effectively removes the general right of appeal set out at s. 27 of the *Federal Court Act* with respect to all decisions made "under" s. 18(1).

48 No doubt Parliament may validly limit the jurisdiction of the Federal Court of Appeal in this manner. As this Court held in *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 331, "the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts". See also: *ITO–International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 766; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; and *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654. There is no appeal to the Federal Court of Appeal save in those circumstances specifically provided by statute.

49 Nevertheless, during the oral hearing and in the submissions made subsequently, some doubt was expressed as to whether s. 18(3) of the *Citizenship Act* had the effect of ousting the jurisdiction conferred upon this Court by s. 40 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (assuming without deciding that this provision would otherwise apply). Furthermore, it was suggested that, if s. 18(3) had such an effect, s. 7 of the *Canadian Charter of Rights and Freedoms* may be the source of a right of appeal directly to this Court in certain circumstances. However, in light of the conclusion reached as to the interpretation of s. 18(3) of the *Citizenship Act*, it will not be necessary to address these issues.

50 We agree with the conclusion of the Federal Court of Appeal that the stay of proceedings ordered by Cullen J. was not a decision made "under" s. 18(1) of the *Citizenship Act*. Section 18(3) of the *Citizenship Act* therefore does not

rendus par la Section de première instance de la Cour fédérale. Le paragraphe 18(3) de la *Loi sur la citoyenneté*, cependant, prévoit que «par dérogation à toute autre loi fédérale», aucune décision de la Section de première instance de la Cour fédérale «visée au» par. 18(1) n'est susceptible d'appel. Ainsi, le par. 18(3) de la *Loi sur la citoyenneté* supprime effectivement le droit d'appel général énoncé à l'art. 27 de la *Loi sur la Cour fédérale* relativement à toute décision «visée au» par. 18(1).

Il ne fait aucun doute que le législateur fédéral peut valablement limiter la compétence de la Cour d'appel fédérale de cette manière. Comme notre Cour l'a jugé dans l'arrêt *Roberts c. Canada*, [1989] 1 R.C.S. 322, à la p. 331, «la Cour fédérale n'a aucune compétence inhérente comme celle des cours supérieures des provinces». Voir également *ITO–International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, à la p. 766; *Quebec North Shore Paper Co. c. Canadien Pacifique Ltée*, [1977] 2 R.C.S. 1054; et *McNamara Construction (Western) Ltd. c. La Reine*, [1977] 2 R.C.S. 654. Il n'y a pas d'appel à la Cour d'appel fédérale si ce n'est dans les cas prévus expressément par la loi.

Néanmoins, durant l'argumentation orale et dans les observations faites subséquemment, un doute a été exprimé sur la question de savoir si le par. 18(3) de la *Loi sur la citoyenneté* avait pour effet de retirer à notre Cour la compétence que lui confère l'art. 40 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, (à supposer, sans pour autant trancher la question, que cette disposition s'applique par ailleurs). De plus, on a soutenu que, si le par. 18(3) avait un tel effet, il se pouvait que l'art. 7 de la *Charte canadienne des droits et libertés* soit à l'origine d'un droit d'appel direct à notre Cour dans certains cas. Toutefois, compte tenu de la conclusion tirée au sujet de l'interprétation du par. 18(3) de la *Loi sur la citoyenneté*, il ne sera pas nécessaire d'aborder ces questions.

Nous souscrivons à la conclusion de la Cour d'appel fédérale selon laquelle la suspension des procédures ordonnée par le juge Cullen ne constituait pas une décision «visée au» par. 18(1) de la *Loi sur la citoyenneté*. Le paragraphe 18(3) de la

apply to it and an appeal lies to the Federal Court of Appeal pursuant to s. 27 of the *Federal Court Act*.

Loi sur la citoyenneté ne s'applique donc pas et un appel peut être interjeté devant la Cour d'appel fédérale en conformité avec l'art. 27 de la *Loi sur la Cour fédérale*.

This conclusion flows from the wording of s. 18. Section 18(1) refers to a very particular kind of decision: a decision as to whether a person "has obtained, retained, renounced or resumed citizenship" by false pretences. However, a stay of proceedings is entered for reasons which are completely unrelated to the circumstances surrounding the obtaining, retaining, renouncing or resuming of citizenship. Indeed, a decision to order (or not to order) a stay of proceedings is different from the type of determination that the Court is called upon to make under subsection 18(1). 51

Cette conclusion découle du libellé de l'art. 18. Le paragraphe 18(1) renvoie à un genre très particulier de décision: il s'agit de décider si une personne a acquis, conservé ou répudié la citoyenneté ou a été réintégrée dans celle-ci par des moyens frauduleux. Cependant, la suspension des procédures est ordonnée pour des motifs qui n'ont absolument rien à voir avec l'acquisition, la conservation ou la répudiation de la citoyenneté ni avec la réintégration dans celle-ci. En effet, la décision d'ordonner (ou de ne pas ordonner) la suspension des procédures diffère du genre de décision que la cour est appelée à rendre sous le régime du par. 18(1).

This point was recognized by the Federal Court of Appeal in *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149, where it was held that a decision under s. 18(1) of the *Citizenship Act* is not a "final judgment" of the Federal Court — Trial Division for the purposes of s. 27 of the *Federal Court Act* (at p. 152): 52

Ce point a été reconnu par la Cour d'appel fédérale dans l'arrêt *Luitjens c. Canada (Secrétaire d'État)* (1992), 9 C.R.R. (2d) 149, où il a été jugé qu'une décision visée au par. 18(1) de la *Loi sur la citoyenneté* n'est pas un «jugement définitif» de la Section de première instance de la Cour fédérale pour l'application de l'art. 27 de la *Loi sur la Cour fédérale* (à la p. 152):

> . . . there is no conflict at all between s. 18(3) and s. 27(1). First, this decision is not a "final judgment" of the court, nor is it an "interlocutory judgment". Although the decision followed a hearing at which much evidence was adduced, it was merely a finding of fact by the court, which was to form the basis of a report by the minister and, eventually, a decision by the Governor in Council, as described by ss. 10 and 18(1). The decision did not finally determine any legal rights.

> Il n'y a [. . .] aucune contradiction entre les deux paragraphes. Tout d'abord, la décision n'est pas un «jugement définitif» de la Cour, pas plus qu'un «jugement interlocutoire». Même si la décision faisait suite à une audience au cours de laquelle de nombreux éléments de preuve ont été produits, il s'agissait simplement d'une conclusion de fait de la part de la Cour, qui devait constituer le fondement d'un rapport du ministre et, à terme, d'une décision du gouverneur en conseil, comme le décrivent l'article 10 et le paragraphe 18(1). La décision n'a déterminé en fin de compte aucun droit juridique.

By way of contrast, a stay of proceedings is most definitely a "final judgment" of the Federal Court — Trial Division. It has the effect of permanently bringing the proceedings to an end. It is a decision made under s. 50 of the *Federal Court Act* and not under s. 18(1) of the *Citizenship Act*. 53

Par contraste, la suspension des procédures est manifestement un «jugement définitif» de la Section de première instance de la Cour fédérale. Elle a pour effet de mettre fin aux procédures de façon permanente. C'est une décision rendue en application de l'art. 50 de la *Loi sur la Cour fédérale* et non du par. 18(1) de la *Loi sur la citoyenneté*.

54 It may be argued that a literal interpretation of s. 18(1) leads to the absurd and inequitable result that only a decision that a person obtained citizenship by false pretences would be final and without appeal. The opposite decision, namely that a person did not obtain citizenship by false pretences, could be appealed by the Minister.

55 Yet the language of s. 18(1) of the *Citizenship Act* should not be taken to mean that this subsection encompasses only a positive decision that citizenship was obtained by false pretences. It is true that s. 18(1) provides that the Minister may issue a report under s. 10 only if the court decides that citizenship was in fact obtained by false pretences. However, this language necessarily implies that the court may arrive at the opposite conclusion. Therefore, on its plain meaning, s. 18(1) empowers the Federal Court — Trial Division to decide whether citizenship was "obtained, retained, renounced or resumed" by false pretences. Such a decision, be it affirmative or negative, is a decision made "under" s. 18(1). It may not be appealed either by the person who is the subject of the reference or by the Minister.

56 Although the issue does not arise here, there is a great deal of force to the argument that s. 18(1) of the *Citizenship Act* encompasses not only the ultimate decision as to whether citizenship was obtained by false pretences, but also those decisions made during the course of a s. 18 reference which are related to this determination. This would encompass all the interlocutory decisions which the court is empowered to make in the context of a s. 18 reference (see, for instance, s. 46 of the *Federal Court Act* and Rules 5, 450-455, 461, 477, 900-920, 1714 and 1715 of the *Federal Court Rules*, C.R.C., c. 663). This interpretation of s. 18(1) was adopted by the Federal Court of Appeal in *Luitjens*, *supra*, where it was held that interlocutory decisions made in the context of s. 18(1) reference are decisions made "under" s. 18(1). It is not necessary for the purpose of this decision to determine whether this conclusion

On peut soutenir qu'une interprétation littérale du par. 18(1) mène à un résultat absurde et inéquitable: seule la décision portant que la citoyenneté a été obtenue par des moyens frauduleux serait définitive et non susceptible d'appel. La décision contraire, à savoir que la citoyenneté n'a pas été obtenue par des moyens frauduleux, pourrait faire l'objet d'un appel formé par le Ministre.

Cependant, il ne faudrait pas interpréter le par. 18(1) de la *Loi sur la citoyenneté* comme signifiant que ce paragraphe ne vise que la décision portant que la citoyenneté a été obtenue par des moyens frauduleux. Il est vrai que le par. 18(1) prévoit que le ministre peut établir un rapport visé à l'art. 10 seulement si la cour décide que la citoyenneté a, de fait, été obtenue par des moyens frauduleux. Toutefois, ce libellé suppose nécessairement que la cour peut arriver à la conclusion contraire. Par conséquent, selon le sens ordinaire des mots, le par. 18(1) confère à la Section de première instance de la Cour fédérale le pouvoir de décider si la citoyenneté a été acquise, conservée, répudiée ou réintégrée, par des moyens frauduleux. Une telle décision, qu'elle soit affirmative ou négative, est une décision «visée au» par. 18(1). Elle ne peut être portée en appel ni par la personne qui fait l'objet du renvoi ni par le Ministre.

Bien que la question ne se pose pas en l'espèce, l'argument suivant est très séduisant: le par. 18(1) de la *Loi sur la citoyenneté* vise non seulement la décision ultime tranchant la question de savoir si la citoyenneté a été obtenue par des moyens frauduleux, mais également les décisions rendues au cours du renvoi prévu à l'art. 18 s'y rapportant. Cela comprendrait tous les jugements interlocutoires que le tribunal a le pouvoir de rendre dans le contexte d'un renvoi prévu à l'art. 18 (voir, par exemple, l'art. 46 de la *Loi sur la Cour fédérale* et les règles 5, 450 à 455, 461, 477, 900 à 920, 1714 et 1715 des *Règles de la Cour fédérale*, C.R.C., ch. 663). Cette interprétation du par. 18(1) a été adoptée par la Cour d'appel fédérale dans l'arrêt *Luitjens*, précité, où il a été décidé que les jugements interlocutoires rendus dans le contexte d'un renvoi prévu au par. 18(1) sont des décisions «visée[s] au» par. 18(1). Il n'est pas nécessaire aux

should be varied. That should only be done in an appeal where the issue arises from the facts.

fins du présent pourvoi de déterminer si cette conclusion devrait être modifiée. Cela ne devrait être fait que dans le cadre d'un appel où la question découlerait des faits.

However, whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings.

57 Cependant, que le par. 18(1) soit interprété de façon stricte de manière à viser seulement la décision ultime tranchant la question de savoir si la citoyenneté a été obtenue par des moyens frauduleux, ou de façon plus libérale afin d'englober les jugements interlocutoires se rapportant à cette décision qui sont rendus dans le cadre d'une audience visée par le par. 18(1), il est manifeste qu'il ne comprend pas une ordonnance accordant ou refusant la suspension des procédures.

Unlike interlocutory decisions, a stay of proceedings will not be made in order to more efficiently determine the ultimate question of whether citizenship was obtained by false pretences. An order staying proceedings is therefore not related to this ultimate decision.

58 Contrairement aux jugements interlocutoires, la suspension des procédures ne sera pas prononcée afin de trancher plus efficacement la question ultime de savoir si la citoyenneté a été obtenue par des moyens frauduleux. L'ordonnance qui suspend les procédures n'est donc pas liée à cette décision ultime.

Furthermore, it may be that allowing appeals from interlocutory decisions made in the context of a s. 18 reference would effectively defeat Parliament's goal of finality in citizenship matters. As McLachlin J. observed in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, there is a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them" (p. 641). This same concern will not, however, generally apply to orders staying proceedings. Stays of proceedings are granted but rarely and only in the "clearest of cases". They are granted for reasons unrelated to the merits of the s. 18 reference and are usually divorced from the "citizenship" context of the reference. Allowing appeals from stays of proceedings would therefore not seriously threaten the goal of finality in citizenship matters.

59 En outre, il se peut qu'en autorisant les appels formés contre les jugements interlocutoires rendus dans le contexte d'un renvoi prévu à l'art. 18 on aille effectivement à l'encontre du but que le législateur fédéral visait en conférant un caractère définitif aux décisions en matière de citoyenneté. Comme le juge McLachlin l'a fait remarquer dans l'arrêt *R. c. Seaboyer*, [1991] 2 R.C.S. 577, des préoccupations de politique générale légitimes justifient la lutte menée contre la «pléthore d'appels interlocutoires avec les retards qu'ils entraînent nécessairement» (p. 641). Ces préoccupations ne valent pas toutefois pour les ordonnances suspendant l'instance. La suspension est accordée rarement et seulement dans les «cas les plus manifestes». Elle est accordée pour des motifs qui n'ont aucun rapport avec le bien-fondé du renvoi prévu à l'art. 18 et sont habituellement étrangers au contexte «citoyenneté» du renvoi. Permettre que des appels soient formés contre des décisions prononçant la suspension des procédures ne menacerait pas sérieusement le but visé par l'attribution d'un caractère définitif aux décisions rendues en matière de citoyenneté.

60 It should be noted that, even if s. 18(1) of the *Citizenship Act* were to be interpreted as encompassing not only the final determination as to whether citizenship was obtained by false pretences but also any decisions related to this determination, an exception should be made for a decision to deny a motion for a stay of proceedings. It is arguable that a decision denying a stay of proceedings is "related" to the question of whether citizenship was obtained by false pretences insofar as it has the effect of allowing the inquiry on the merits to proceed. However, it would appear to be fundamentally unfair, and contrary to the rules of natural justice, to allow appeals to be taken from a decision to order a stay of proceedings but not from a decision refusing to order a stay. Such a result could not have been intended by Parliament.

Il convient de noter que, même si le par. 18(1) de la *Loi sur la citoyenneté* devait être interprété comme visant non seulement la décision définitive tranchant la question de savoir si la citoyenneté a été obtenue par des moyens frauduleux mais également toutes les décisions s'y rapportant, il faudrait faire une exception dans le cas de la décision rejetant une demande de suspension des procédures. On peut soutenir que la décision qui refuse la suspension des procédures est «liée» à la question de savoir si la citoyenneté a été obtenue par des moyens frauduleux dans la mesure où elle a pour effet d'autoriser la poursuite de l'examen du bien-fondé de la demande. Cependant, il paraîtrait fondamentalement inéquitable, et contraire aux règles de justice naturelle, de permettre qu'il soit interjeté appel d'une décision ordonnant la suspension des procédures mais non d'une décision refusant de l'accorder. Le législateur fédéral n'a pas pu vouloir ce résultat.

61 It follows that a decision allowing or denying a motion for a stay of proceedings is not a decision made "under" s. 18(1). It is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out at s. 27 of that Act. The appellants contend that this is at odds with the principles set out in *R. v. Jewitt*, [1985] 2 S.C.R. 128. They argue that the better interpretation of s. 18 of the *Citizenship Act* is that all decisions made in the context of a s. 18 reference, be they final or interlocutory, "on the merits" or procedural, should be considered to have been made "under" s. 18(1) and therefore are subject to s. 18(3).

Il s'ensuit qu'une décision accueillant ou rejetant la requête en suspension des procédures n'est pas une décision «visée au» par. 18(1). C'est une décision prévue à l'art. 50 de la *Loi sur la Cour fédérale* et elle peut faire l'objet d'un appel conformément aux règles énoncées à l'art. 27 de cette Loi. Les appelants prétendent que cela n'est pas conforme aux principes énoncés dans l'arrêt *R. c. Jewitt*, [1985] 2 R.C.S. 128. Ils soutiennent que l'interprétation correcte de l'art. 18 de la *Loi sur la citoyenneté* veut que toutes les décisions rendues dans le contexte d'un renvoi prévu à l'art. 18, qu'elles soient définitives ou interlocutoires, qu'il s'agisse d'une décision «sur le fond» ou ayant trait à la procédure, devraient être considérées comme étant «visée[s] au» par. 18(1) et donc assujetties au par. 18(3).

62 At issue in *Jewitt* was s. 605(1)(*a*) (now s. 676(1)(*a*)) of the *Criminal Code* which provided for a right of appeal by the Crown "against a judgment or verdict of acquittal" in certain circumstances. It was held that any order of the Court, regardless of the terminology used, which effectively brings proceedings to a final conclusion in favour of the accused is tantamount to a verdict of

Dans l'arrêt *Jewitt*, il était question de l'al. 605(1)*a*) (maintenant l'al. 676(1)*a*)) du *Code criminel*, qui prévoyait un droit d'appel du ministère public «contre un jugement ou verdict d'acquittement d'un tribunal de première instance» dans certains cas. Il a été jugé que toute ordonnance de la cour, indépendamment de la terminologie utilisée, qui donne effectivement au litige une solution

acquittal for the purposes of appeal. Such an order includes a stay of proceedings.

finale favorable à l'accusé est assimilable à un verdict d'acquittement aux fins de l'appel. Une telle ordonnance embrasse la suspension des procédures.

The appellants contend that if, in the criminal law context, a stay of proceedings is for the purposes of appeal tantamount to a decision on the merits, there is no reason for holding that it is not tantamount to a decision as to whether citizenship was obtained by false pretences under s. 18(1) of the *Citizenship Act*. The principle underlying *Jewitt*, it is argued, is that substance ought to triumph over form. If the order has the effect of bringing the proceedings to a close, it should, for the purposes of appeal, be considered a decision on the merits in favour of the person against whom the proceedings were instituted.

63 Les appelants prétendent que, si, dans le contexte du droit criminel, la suspension des procédures vaut, aux fins de l'appel, une décision sur le fond, il n'y a aucune raison de conclure qu'elle n'est pas assimilable à une décision tranchant la question de savoir si la citoyenneté a été obtenue par des moyens frauduleux, rendue en application du par. 18(1) de la *Loi sur la citoyenneté*. Selon les appelants, le principe sous-tendant l'arrêt *Jewitt* est que le fond doit l'emporter sur la forme. Si l'ordonnance a pour effet de mettre fin aux procédures, elle devrait, aux fins de l'appel, être considérée comme une décision sur le fond favorable à la personne contre laquelle les procédures ont été engagées.

On their face the reasons in *Jewitt* appear to be compelling authority in favour of the appellants' position. However, *Jewitt* must be read in light of the more recent judgment of *R. v. Hinse*, [1995] 4 S.C.R. 597. There, the accused sought leave to appeal a judgment of the court of appeal setting aside his conviction and entering a stay of proceedings. The issue was whether such a judgment is tantamount, for the purposes of appeal, to a judgment setting aside a conviction and entering a verdict of acquittal or ordering a new trial. The majority of this Court held that it was not.

64 À première vue, les motifs exposés dans l'arrêt *Jewitt* semblent favoriser de façon convaincante la position des appelants. Cependant, il faut interpréter l'arrêt *Jewitt* à la lumière de l'arrêt plus récent *R. c. Hinse*, [1995] 4 R.C.S. 597. Dans cette affaire, l'accusé demandait l'autorisation de se pourvoir contre un jugement de la cour d'appel annulant la déclaration de culpabilité et prononçant l'arrêt des procédures. La question était de savoir si un tel jugement équivalait, aux fins de l'appel, à un jugement annulant une déclaration de culpabilité et prononçant un verdict d'acquittement ou ordonnant un nouveau procès. Notre Cour a statué à la majorité que ce n'était pas le cas.

The statutory basis of the court of appeal's power to order a stay of proceedings was held to be not s. 686(2) of the *Criminal Code* (which empowers the court to set aside a conviction and from which no appeal by the accused lies), but s. 686(8) (which empowers the court to make ancillary orders). Furthermore, it was held that, as an order made under s. 686(8) of the *Criminal Code*, a stay of proceedings does not represent "a functionally integral part of a 'judgment . . . setting aside or affirming a conviction' " (p. 626). Rather, it was held that "an order rendered under s. 686(8) represents a separate, divisible judicial act from

65 Il a été décidé que le fondement juridique du pouvoir de la cour d'appel d'ordonner la suspension des procédures n'était pas le par. 686(2) du *Code criminel* (qui habilite la cour à annuler une déclaration de culpabilité sans que l'accusé puisse interjeter appel), mais le par. 686(8) (qui habilite la cour à rendre des ordonnances accessoires). De plus, il a été jugé que la suspension des procédures, en tant qu'ordonnance fondée sur le par. 686(8) du *Code criminel*, ne fait pas «partie intégrante d'un "jugement [. . .] annulant ou confirmant [une déclaration de culpabilité]"» (p. 626). Au contraire, il a été jugé qu'«une ordonnance fon-

which the accused or the Crown may independently seek leave to appeal under s. 40(1) of the *Supreme Court Act*" (p. 626). On this point, Lamer C.J. held, at pp. 619-20, that:

> The power of an appellate court to impose a stay of criminal proceedings, similar to a trial court, derives its origin from the inherent jurisdiction of a superior court of record at common law. But given the breadth of the language of the residual order provision, I believe that the concrete exercise of that inherent power necessarily manifests itself through the statutory font of s. 686(8). . . . While the power of a court of appeal to order a stay of proceedings for abuse of process traces its origins to the common law, the actual exercise of that authority inevitably carries a statutory gloss by virtue of s. 686(8) of the *Criminal Code*. . . .
>
> But while an appellate court's power to direct a stay of criminal proceedings ought to be properly understood as an exercise of its authority to enter an order under s. 686(8) of the *Code*, an order under s. 686(8) nonetheless represents a fundamentally distinct judicial order from an order for a new trial in accordance with s. 686(2)(*b*) within the structure of the appeals regime of the *Criminal Code*. As such, I do not believe that both types of orders are necessarily jointly excluded from this Court's general jurisdiction to grant leave by virtue of s. 40(3) of the *Supreme Court Act*. [Emphasis added.]

66 This reasoning applies with equal force in the context of the *Citizenship Act*. The power to order a stay does not flow by necessary implication from the power to decide if citizenship was obtained by false pretences, set out at s. 18(1). Rather, it is a power which not only has its source in a different statutory provision (s. 50 of the *Federal Court Act*) but is also unrelated to the power set out at s. 18(1). To borrow the words of Lamer C.J. in *Hinse*, it is a "separate, divisible judicial act" (p. 626). Appeals from a decision to stay proceedings (or to refuse to enter a stay) should therefore be governed by the rules applicable to the statutory provision empowering the court to make this decidée sur le par. 686(8) est un acte judiciaire distinct et divisible contre lequel l'accusé ou le ministère public peut indépendamment demander une autorisation de pourvoi en vertu du par. 40(1) de la *Loi sur la Cour suprême*» (p. 626). Sur ce point, le juge en chef Lamer a conclu, aux pp. 619 et 620, que:

> Le pouvoir d'une cour d'appel d'ordonner un arrêt de procédures criminelles, semblable à celui que possède un tribunal de première instance, a son origine dans le pouvoir inhérent d'une cour supérieure d'archives en common law. Mais compte tenu de la portée des termes de la disposition relative au pouvoir résiduel de rendre d'autres ordonnances, je crois que l'exercice concret de ce pouvoir inhérent se manifeste nécessairement par le biais du par. 686(8). [. . .] Bien que le pouvoir d'une cour d'appel d'ordonner un arrêt des procédures pour cause d'abus de procédure ait son origine dans la common law, l'exercice réel de ce pouvoir comporte inévitablement un certain éclat législatif en raison du par. 686(8) du *Code criminel* . . .
>
> Mais, bien que le pouvoir d'une cour d'appel d'ordonner un arrêt de procédures criminelles doive être correctement interprété comme un exercice de son pouvoir de rendre une ordonnance fondée sur le par. 686(8) du *Code*, une ordonnance fondée sur le par. 686(8) n'en est pas moins une ordonnance judiciaire fondamentalement distincte d'une ordonnance de nouveau procès rendue en vertu de l'al. 686(2)*b*), conformément à la structure du régime d'appels établi par le *Code criminel*. Je ne crois pas que ces deux types d'ordonnances soient, en vertu du par. 40(3) de la *Loi sur la Cour suprême*, nécessairement et conjointement exclus, comme tels, de la compétence générale que possède notre Cour pour accorder une autorisation. [Nous soulignons.]

Ce raisonnement s'applique avec autant de force dans le contexte de la *Loi sur la citoyenneté*. Le pouvoir d'ordonner la suspension des procédures ne découle pas nécessairement du pouvoir de décider si la citoyenneté a été obtenue par des moyens frauduleux prévu au par. 18(1). Au contraire, c'est un pouvoir qui non seulement a pour origine une disposition législative différente (l'art. 50 de la *Loi sur la Cour fédérale*) mais n'a pas de rapport avec le pouvoir visé au par. 18(1). Pour reprendre les termes du juge en chef Lamer dans l'arrêt *Hinse*, c'est un «acte judiciaire distinct et divisible» (p. 626). Les appels formés contre une décision de suspendre les procédures (ou de refuser de les sus-

sion. Those rules are set out at s. 27 of the *Federal Court Act* and they provide expressly for a right of appeal. It follows that the Court of Appeal had jurisdiction to hear the Crown's appeal in this case.

pendre) devraient être régis par les règles applicables à la disposition législative habilitant la cour à rendre cette décision. Ces règles sont énoncées à l'art. 27 de la *Loi sur la Cour fédérale* et elles prévoient expressément un droit d'appel. Il s'ensuit que la cour d'appel avait compétence pour connaître de l'appel du ministère public en l'espèce.

B. *Judicial Independence*

B. *L'indépendance judiciaire*

We conclude that the meeting between Mr. Thompson and Isaac C.J. and the subsequent conduct of officials of the Department of Justice did indeed cause damage to the appearance of judicial independence. The question remains as to the extent of that damage and how it should be weighed in considering whether a stay should be granted in these significant and important proceedings.

67 Nous concluons que la rencontre entre Me Thompson et le juge en chef Isaac ainsi que le comportement subséquent des fonctionnaires du ministère de la Justice ont en effet porté atteinte à l'impression d'indépendance que doit donner le pouvoir judiciaire. Reste à savoir dans quelle mesure et quelle importance il faudrait accorder à l'atteinte pour décider s'il y a lieu de prononcer la suspension des importantes procédures engagées en l'espèce.

The independence of judges has two aspects: an institutional aspect and a personal aspect. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 691:

68 L'indépendance judiciaire revêt un double aspect: un aspect institutionnel et un aspect individuel. Comme le déclare le juge Le Dain dans l'arrêt *Valente c. La Reine*, [1985] 2 R.C.S. 673, à la p. 691:

> . . . the word "independent" in s. 11(*d*) of the *Charter* is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.

> . . . le terme «indépendant» de l'al. 11*d*) de la *Charte* doit être interprété comme visant le statut ou la relation d'indépendance judiciaire, autant que l'état d'esprit ou l'attitude du tribunal dans l'exercice concret de ses fonctions judiciaires.

The parties agree that it is the personal aspect of judicial independence — what is sometimes called "impartiality" — that is at issue here. No one alleges, and indeed there is no credible evidence to suggest, that the integrity of the Federal Court as an institution has been compromised.

Les parties sont d'accord pour dire que c'est l'aspect individuel de l'indépendance judiciaire — qu'on appelle parfois «l'impartialité» — qui est en cause ici. Personne n'affirme, et en effet aucun élément de preuve crédible ne permet de croire, que l'intégrité de la Cour fédérale en tant qu'institution a été compromise.

Though it is very important that the judiciary should actually remain independent, it is equally important that the judiciary should be seen to be independent. In our view, there is not sufficient evidence to support the conclusion that the Chief Justice and the Associate Chief Justice did not in fact remain independent. However, the evidence does compel us to conclude that the appearance of

69 Si le maintien dans les faits de l'indépendance du pouvoir judiciaire est très important, l'impression d'indépendance qu'il doit donner ne l'est pas moins. À notre avis, il n'y a pas suffisamment d'éléments de preuve pour étayer la conclusion selon laquelle le juge en chef et le juge en chef adjoint n'ont pas de fait conservé leur indépendance. Toutefois, la preuve nous oblige effective-

judicial independence suffered significantly as a result of what happened on March 1, 1996.

70 The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised. As Lamer C.J. wrote in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139, "[t]he overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality".

71 The essence of judicial independence is freedom from outside interference. Dickson C.J., in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, described the concept in these words, at p. 69:

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

72 What emerges from all of this is a simple test for determining whether the appearance of judicial independence has been maintained: whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.

73 There are many principles of professional conduct that must be observed in order to maintain the appearance of judicial independence. Two of these are particularly relevant here.

74 First, and as a general rule of conduct, counsel for one party should not discuss a particular case

ment à conclure que l'impression d'indépendance que doit donner le pouvoir judiciaire a été compromise de façon substantielle par les événements du 1er mars 1996.

Le critère qui permet de déterminer si l'impression d'indépendance que doit donner le pouvoir judiciaire a été maintenue est un critère objectif. Il s'agit de savoir si un observateur bien informé et raisonnable conclurait que l'indépendance du pouvoir judiciaire a été compromise. Comme le juge en chef Lamer l'a dit dans l'arrêt *R. c. Lippé*, [1991] 2 R.C.S. 114, à la p. 139, «[l]a garantie d'indépendance judiciaire vise dans l'ensemble à assurer une perception raisonnable d'impartialité».

L'essence de l'indépendance judiciaire est le fait d'être libre de toute ingérence extérieure. Dans *Beauregard c. Canada*, [1986] 2 R.C.S. 56, à la p. 69, le juge en chef Dickson a défini ce concept en ces termes:

> Historiquement, ce qui a généralement été accepté comme l'essentiel du principe de l'indépendance judiciaire a été la liberté complète des juges pris individuellement d'instruire et de juger les affaires qui leur sont soumises: personne de l'extérieur — que ce soit un gouvernement, un groupe de pression, un particulier ou même un autre juge — ne doit intervenir en fait, ou tenter d'intervenir, dans la façon dont un juge mène l'affaire et rend sa décision. Cet élément essentiel continue d'être au centre du principe de l'indépendance judiciaire.

Ces considérations permettent de dégager un critère simple pour déterminer si l'impression d'indépendance que doit donner le pouvoir judiciaire a été maintenue: un observateur raisonnable aurait-il conclu que la cour pouvait mener ses affaires en toute liberté, à l'abri d'une intervention du gouvernement et des autres juges?

De nombreux principes déontologiques doivent être observés pour préserver l'impression d'indépendance que doit donner le pouvoir judiciaire. Deux d'entre eux sont particulièrement pertinents en l'espèce.

Premièrement, une règle de conduite générale veut que l'avocat d'une partie ne discute pas d'une

with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. See the Honourable J. O. Wilson, *A Book for Judges* (1980), at p. 52. The meeting between Mr. Thompson and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, and this despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases.

affaire donnée avec le juge sauf si les avocats des autres parties sont au courant et de préférence, participent à la discussion. Voir J. O. Wilson, *A Book for Judges* (1980), à la p. 52. La rencontre entre Me Thompson et le juge en chef, à laquelle les avocats des appelants n'ont pas assisté, violait cette règle et était manifestement inappropriée, et ce, bien que la rencontre ait eu pour origine une préoccupation bien légitime au sujet de la progression excessivement lente de l'instance.

Second, and again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of Mr. Thompson. We agree with Pratte J.A. that a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness. Yet, the actions of Isaac C.J. were more in the nature of a response to a party rather than to a problem. Thus, an action that might have been innocuous and even obligatory under other circumstances acquired an air of impropriety as a result of the events that preceded it. Quite simply, it was inappropriate.

75 Deuxièmement, et encore une fois en règle générale, le juge ne devrait pas accéder aux demandes d'une partie sans accorder aux avocats des autres parties la possibilité de présenter leurs points de vue. C'était donc manifestement une erreur, et une erreur grave, de la part du juge en chef de parler au juge en chef adjoint à la demande de Me Thompson. Nous sommes d'accord avec le juge Pratte pour dire qu'un juge en chef est responsable de l'instruction diligente des affaires dont sa cour est saisie et qu'il peut, dans certains cas, être obligé de prendre des mesures pour corriger les retards. Cependant, les actes du juge en chef Isaac ont été accomplis davantage pour répondre à l'une des parties que pour régler un problème. Ainsi, un acte qui aurait pu être inoffensif et même obligatoire dans d'autres circonstances a revêtu une apparence d'irrégularité à cause des événements qui l'ont précédé. Tout simplement, cette conduite était déplacée.

In similar fashion, by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants, Jerome A.C.J. acted inappropriately. We believe that there is ample evidence that might lead a reasonable observer to conclude that the Associate Chief Justice was not able to conduct the appellants' cases free from the interference of the federal Department of Justice and of the Chief Justice of his court. Before March 1, 1996, the Associate Chief Justice was content with the pace at which the appellants' cases were advancing through his court. Indeed, even after Mr. Amerasinghe wrote to the Court Administrator to complain about the slow pace of the proceedings, the Associate Chief Justice resolved not to expedite consideration of

76 De même, en réagissant comme il l'a fait à l'intervention du juge en chef, sans demander le concours des avocats des appelants, le juge en chef adjoint Jerome a agi de façon intempestive. Nous croyons qu'il y a amplement d'éléments de preuve pour amener un observateur raisonnable à conclure que le juge en chef adjoint n'était pas capable de mener les affaires des appelants à l'abri de l'intervention du ministère de la Justice fédéral et du juge en chef de la cour. Avant le 1er mars 1996, le juge en chef adjoint était satisfait de la progression des causes des appelants devant lui. En effet, même après que Me Amerasinghe eut écrit à l'administrateur de la cour pour se plaindre de la lenteur des procédures, le juge en chef adjoint a décidé de ne pas accélérer l'examen des requêtes

the preliminary motions. Instead, he insisted on hearing oral argument according to the original, exceedingly dilatory schedule. It was only after the March 1, 1996 meeting between Mr. Thompson and the Chief Justice that Jerome A.C.J. acquired an appreciation of the Government's position. In his letter of March 1, 1996, the Chief Justice wrote:

> As regards the three cases about which you wrote, the Associate Chief Justice says firstly, that he did not fully appreciate until he read your letter, the urgency of dealing with these matters as expeditiously as the Government would like. However, now that he is aware he will devote one week from 15 May to deal with these cases not only with respect to the preliminary points but also with respect to the merits. Finally, he has authorized me to say that additional cases of this class coming into the Court will be given the highest priority in light of the concerns expressed in your letter. [Emphasis added.]

77 Subsequent developments confirmed that the Associate Chief Justice had indeed finally received the Government's message. On April 10, 1996, the Associate Chief Justice retreated from his earlier position and announced that he would set aside sufficient time in May to dispose of all the preliminary issues in the appellants' cases. He also indicated that he would bring the cases to a final conclusion by July.

78 We do not see how a reasonable observer could fail at least to wonder whether the Government, through Mr. Thompson, had succeeded in influencing the Associate Chief Justice to take a position more favourable to the Government's interests than he would otherwise have done. Making this conclusion even more likely is the undertaking of the Chief Justice and the Associate Chief Justice to Mr. Thompson that all reasonable steps would be taken to avoid a reference to the Supreme Court of Canada.

79 The respondent tries to resist this conclusion by saying that the impetus to efficiency came not from Mr. Thompson and the Government but from

préliminaires. Il a plutôt insisté pour que les arguments soient présentés verbalement conformément à l'échéancier initial, extrêmement dilatoire. Ce n'est qu'après la rencontre du 1er mars 1996 entre Me Thompson et le juge en chef que le juge en chef adjoint Jerome s'est rendu compte de la position du gouvernement. Dans sa lettre du 1er mars 1996, le juge en chef écrivait:

> [TRADUCTION] En ce qui concerne les trois dossiers visés par votre lettre, le juge en chef adjoint fait savoir en premier lieu qu'avant de lire votre lettre, il ne se rendait pas pleinement compte de la nécessité qu'il y a à les instruire de façon aussi urgente que le souhaite le gouvernement. Cependant, maintenant qu'il s'en est rendu compte, il consacrera, à compter du 15 mai, une semaine à l'audition non seulement des questions préliminaires, mais aussi de la cause au fond. Enfin, il m'a demandé de vous faire savoir qu'à l'avenir, la Cour accordera la plus haute priorité aux causes de ce genre étant donné les préoccupations exprimées dans votre lettre. [Nous soulignons.]

La suite des événements est venue confirmer que le juge en chef adjoint avait en effet finalement reçu le message du gouvernement. Le 10 avril 1996, le juge en chef adjoint a abandonné sa position antérieure et a annoncé qu'il prévoirait suffisamment de temps en mai pour statuer sur toutes les questions préliminaires soulevées dans le cadre des causes des appelants. Il a aussi indiqué qu'il donnerait une solution définitive au litige au plus tard en juillet.

Nous ne voyons pas comment un observateur raisonnable pourrait ne pas à tout le moins se demander si le gouvernement, grâce à l'intervention de Me Thompson, n'avait pas réussi à amener le juge en chef adjoint à adopter un point de vue plus favorable aux intérêts du gouvernement que celui qu'il aurait retenu. Ce qui rend cette conclusion encore plus vraisemblable, c'est l'assurance donnée par le juge en chef et le juge en chef adjoint à Me Thompson que toutes les mesures raisonnables seraient prises afin d'éviter un renvoi à la Cour suprême du Canada.

L'intimé essaie de réfuter cette conclusion en disant que cet élan d'efficacité n'est pas venu de Me Thompson et du gouvernement mais du juge en

the Chief Justice. The Chief Justice, the respondent says, was duty-bound to look into what was, by any objective standard, a serious delay in proceedings in his court. The respondent thus offers the Chief Justice as a kind of *novus actus interveniens* who stands between the Government and the Associate Chief Justice and, by the propriety of his own intentions, severs what would otherwise be an improper link between them.

chef. Le juge en chef, dit l'intimé, avait le devoir d'examiner ce qui était, selon toute norme objective, un retard important des procédures se déroulant devant sa cour. L'intimé présente ainsi le juge en chef comme une sorte de *novus actus interveniens* placé entre le gouvernement et le juge en chef adjoint qui, par la justesse de ses propres intentions, vient rompre ce qui autrement constituerait un lien irrégulier entre eux.

What the respondent's submission overlooks is that the Chief Justice was not able to exercise his administrative function entirely free from outside interference. Mr. Thompson approached the Chief Justice and told him that if the Associate Chief Justice did not pick up the pace, the Federal Court would face the embarrassment of having the Government go "over its head" to this Court. The Chief Justice's letter to Mr. Thompson suggests that this "threat" carried some weight with him and with the Associate Chief Justice as well: 80

Ce dont l'argument de l'intimé ne tient pas compte, c'est que le juge en chef ne pouvait pas exercer ses fonctions administratives à l'abri de toute ingérence extérieure. M^e^ Thompson a dit au juge en chef que si le juge en chef adjoint n'accélérait pas le traitement des dossiers, la Cour fédérale serait placée dans une situation où le gouvernement «la court-circuiterait» pour s'adresser à notre Cour. La lettre du juge en chef à M^e^ Thompson porte à croire que cette «menace» a eu une certaine influence sur lui et sur le juge en chef adjoint:

> I have discussed your concerns with the Associate Chief Justice and, like me, he is prepared to take all reasonable steps possible to avoid a Reference to the Supreme Court of Canada on these matters.

> [TRADUCTION] J'ai fait part de vos préoccupations au juge en chef adjoint et, tout comme moi, il est prêt à prendre toutes les mesures raisonnables possibles afin d'éviter un renvoi à la Cour suprême du Canada.

It is reasonable to suppose that the threat of appeal to a higher authority influenced the Chief Justice and Associate Chief Justice to act in a way that would otherwise have been unpalatable to them. In this we agree entirely with Stone J.A., who found that "an informed person would conclude that this decision, by which the hearing of all preliminary motions and the trials would be compressed into a relatively short time frame, would redound to the disadvantage of the individual respondents [now appellants] and was taken so as 'to avoid' a reference to the Supreme Court" (p. 868). To interfere with the scheduling of cases because of delay is one thing but to pledge to take all reasonable steps to avoid a reference to the Supreme Court of Canada is quite another. It is wrong and improper for a judge to give such an undertaking. What is pertinent is to avoid delays, not to avoid appeals or recourse to higher courts.

Il est raisonnable de supposer que la menace d'un appel à un tribunal supérieur a incité le juge en chef et le juge en chef adjoint à agir d'une façon qui autrement leur aurait été désagréable. Sur ce point nous sommes tout à fait d'accord avec le juge Stone qui a conclu qu'«une personne informée conclurait que cette décision, par laquelle toutes les requêtes préliminaires ainsi que le jugement au fond seraient comprimés dans un laps de temps relativement court, aurait pour effet ultime de défavoriser chacun des intimés [maintenant les appelants], et qu'elle a été prise "afin d'éviter" un renvoi à la Cour suprême» (p. 868). Intervenir dans la mise au rôle des causes en raison d'un retard, c'est une chose, mais s'engager à prendre toutes les mesures raisonnables pour éviter un renvoi à la Cour suprême du Canada, c'en est une autre. Il est répréhensible et déplacé de la part d'un juge de prendre un tel engagement. Ce qui est pertinent, c'est d'éviter les délais, non d'éviter les appels ou le recours à des tribunaux supérieurs.

81 However, the respondent is quite right to observe that the delay in the Federal Court — Trial Division was inordinate and arguably inexcusable, and posed a real problem for the Department of Justice and for the Chief Justice. The fact is that in the space of a year, the Associate Chief Justice heard only one day of argument, and that on a preliminary motion. In our view, the Associate Chief Justice's dilatoriness defies explanation. The appellants attempt nevertheless to explain it, saying that the Associate Chief Justice had reason to delay the proceedings until judgment had been given by himself in a case called *Nemsila*, which might have cast some light on citizenship revocation cases generally. The Chief Justice for his part mentioned the *Nemsila* case in his letter of March 1, 1996, though he did not attempt to offer it as a justification for delay in the appellants' cases.

Cependant, l'intimé a entièrement raison de faire remarquer que le délai en Section de première instance de la Cour fédérale était excessif et, on pourrait le soutenir, inexcusable et qu'il soulevait un réel problème pour le ministère de la Justice et le juge en chef. Le fait est qu'en l'espace d'un an, le juge en chef adjoint n'avait consacré qu'une journée à l'audition des arguments et ce, relativement à une requête préliminaire. À notre avis, la lenteur du juge en chef adjoint défie toute explication. Les appelants cherchent néanmoins à l'expliquer, en disant que le juge en chef adjoint avait raison de reporter les procédures jusqu'à ce qu'il ait lui-même rendu jugement dans l'affaire *Nemsila*, susceptible d'apporter une lumière sur les cas de révocation de la citoyenneté en général. Le juge en chef a, quant à lui, mentionné l'affaire *Nemsila* dans sa lettre du 1er mars 1996, bien qu'il n'ait pas essayé de s'en servir pour justifier le retard dans les dossiers des appelants.

82 However, even accepting that there was reason to await the rendering of judgment in *Nemsila*, the proper procedure would have been to hear argument on the appellants' motion and, if necessary, to reserve judgment. To call three cases to a halt awaiting the outcome of another case strikes us as a procedure calculated to create unnecessary delay. The appellants also point out that the respondent was not ready to proceed to a hearing on the merits. Apparently the respondent had not finished translating certain witness statements. But no one has suggested that the matter should have been brought to a conclusion on the merits before May 15, 1996, only that some progress should have been made toward resolving the preliminary questions before that date, and to settle the preliminary questions would not have required that all the witness statements should be available. Therefore, the fact that the respondent was not yet ready to proceed to trial cannot excuse the delay in the Associate Chief Justice's consideration of the preliminary questions.

Toutefois, même en admettant qu'il était justifié d'attendre le prononcé du jugement dans l'affaire *Nemsila*, la procédure à suivre consistait à entendre l'argumentation relativement à la requête des appelants et, au besoin, de réserver le jugement. Interrompre trois causes en attendant l'issue d'une quatrième nous apparaît comme une procédure visant à créer un retard inutile. Les appelants font également remarquer que l'intimé n'était pas prêt à présenter ses arguments quant au fond. Apparemment, il n'avait pas fini de faire traduire les déclarations de certains témoins. Mais personne n'a affirmé qu'il aurait fallu statuer au fond avant le 15 mai 1996, on a seulement soutenu que des progrès auraient du être réalisés en ce qui concerne le règlement des questions préliminaires avant cette date. Le règlement de ces questions préliminaires n'aurait pas exigé que toutes les déclarations des témoins soient disponibles. Par conséquent, le fait que l'intimé n'était pas encore prêt à poursuivre le procès ne peut pas excuser le temps mis par le juge en chef adjoint à examiner les questions préliminaires.

83 What all this means is that Mr. Thompson went to the Chief Justice with a legitimate grievance. This fact does not excuse what Mr. Thompson did

Tout cela signifie que Me Thompson a soumis au juge en chef un sujet de plainte légitime. Ce fait n'excuse pas Me Thompson — celui-ci a assuré-

— he assuredly chose an impermissible means of presenting his grievance — but it does cast into very real doubt the sinister interpretation that the appellants have attempted to place on his conduct. Given the vexing delay that the respondent had faced in the Trial Division, it is quite understandable that Mr. Thompson would have wished to do something about it. We believe that Mr. Thompson's motives were proper. It was his judgment that is questionable. What Mr. Thompson did was not wicked or done in bad faith. It is enough to say that what he did was inappropriate. As senior counsel in the Department of Justice, he arranged to speak privately — without opposing counsel present — to the Chief Justice, concerning cases which were pending. This he should not have done.

The appellants suggest that there was a "conspiracy" to have the Associate Chief Justice recuse himself from the cases. Clearly there is insufficient evidence before this Court to dispose of this question fully, and we do not believe that it is crucial to the outcome of this appeal. Still, in our view, to accept that suggestion would stretch the bounds of credulity. Although Mr. Amerasinghe recorded that Mr. Thompson had gotten the Chief Justice to agree to have the Associate Chief Justice recuse himself, the evidence is all inconsistent with the existence of any such agreement. As events developed, the Associate Chief Justice did not recuse himself. Quite the contrary, on April 10, 1996, the Associate Chief Justice indicated that he wished to hear argument concerning the preliminary motions on May 15 and 16, as previously scheduled. It was only after the appellants indicated that they would seek a stay of proceedings on the ground that the Associate Chief Justice's independence had been compromised that the Associate Chief Justice recused himself. In the light of these events, the only way that the suggestion of a conspiracy can be credited is on the supposition that Mr. Thompson, the Chief Justice, and the Associate Chief Justice orchestrated the whole affair, from the disclosure of the March 1 correspondence through to the appellants' motion for a stay of proceedings. Again, we would emphasize that we lack the evidence necessary to decide this question and

ment choisi un moyen inadmissible de présenter sa plainte — mais il jette effectivement un véritable doute sur l'interprétation sinistre de sa conduite que les appelants ont essayé de faire. Vu la lenteur injustifiée des procédures auquel l'intimé s'est heurté en Section de première instance, il est bien compréhensible que Me Thompson ait voulu faire quelque chose à ce sujet. Nous croyons que les motifs de Me Thompson étaient légitimes. C'est son jugement qui est discutable. Me Thompson n'était pas poussé par la méchanceté ni par la mauvaise foi. Il suffit de dire que ce qu'il a fait était déplacé. En tant qu'avocat principal au ministère de la Justice, il s'est arrangé pour parler en privé — à l'insu des avocats des parties adverses — au juge en chef, au sujet de causes qui étaient pendantes. Il n'aurait pas dû le faire.

84 Les appelants laissent entendre qu'il y a eu «conspiration» en vue d'amener le juge en chef adjoint à se récuser. À l'évidence, il n'y a pas suffisamment de preuve au dossier pour que nous puissions vider la question et nous ne pensons pas non plus que ce soit essentiel pour l'issue du présent pourvoi. Mais, à notre avis, accepter cette proposition c'est forcer le sens du mot crédulité. Bien que Me Amerasinghe ait noté que Me Thompson avait amené le juge en chef à convaincre le juge en chef adjoint de se récuser, la preuve est incompatible avec l'existence d'une telle entente. Selon la suite des événements, le juge en chef adjoint ne s'est pas récusé. Bien au contraire, le 10 avril 1996, le juge en chef adjoint a indiqué qu'il voulait entendre les requêtes préliminaires les 15 et 16 mai, comme il avait été prévu. C'est seulement après que les appelants eurent fait savoir qu'ils demanderaient la suspension des procédures pour le motif que l'indépendance du juge en chef adjoint avait été compromise que ce dernier s'est récusé. Compte tenu de ces événements, la seule façon qu'on puisse accorder du crédit à l'idée d'une conspiration est de supposer que Me Thompson, le juge en chef et le juge en chef adjoint ont orchestré toute l'affaire, depuis la divulgation de la correspondance échangée le 1er mars jusqu'à la requête en suspension des procédures présentée par les appelants. Nous faisons à nouveau remarquer que nous ne disposons pas des

do not purport to do so. But that supposition passes all belief. Certainly no reasonable observer, apprised of all the facts, would believe it. Therefore, all that Mr. Amerasinghe's note shows is that Mr. Amerasinghe believed that some arrangement had been made to have the Associate Chief Justice recuse himself. The outcome of this appeal cannot turn on what Mr. Amerasinghe believed.

85 In short, the evidence supports the conclusion that the appearance of judicial independence suffered a serious affront as a result of the March 1, 1996 meeting between Mr. Thompson and Isaac C.J. This affront very seriously compromised the appearance of judicial independence. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of the actors in this drama, nor is there any solid evidence that the independence of the judges in question was actually compromised.

C. *The Remedy*

86 Although the meeting and subsequent exchange of letters between Mr. Thompson and the Chief Justice were very serious matters that compromised the appearance of the Chief Justice's and the Associate Chief Justice's independence, on balance the damage was not sufficiently serious to warrant the granting of that ultimate remedy of a stay of proceedings. The lesser remedy of ordering the appellants' cases to proceed before a different judge of the Federal Court — Trial Division will, together with the additional conditions, suffice.

(i) The Standard of Review

87 A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our

preuves nécessaires pour trancher la question et que nous n'entendons pas le faire. Mais cette supposition est tout à fait incroyable. Il est certain qu'aucun observateur raisonnable, mis au courant de tous les faits, n'y croirait. Par conséquent, tout ce que montre la note de Me Amerasinghe, c'est que ce dernier croyait qu'une sorte d'entente était intervenue pour que le juge en chef adjoint se récuse. L'issue du présent pourvoi ne peut pas reposer sur les croyances de Me Amerasinghe.

Bref, la preuve vient étayer la conclusion qu'il y a eu atteinte grave à l'impression d'indépendance que doit donner le pouvoir judiciaire à la suite de la rencontre du 1er mars 1996 entre Me Thompson et le juge en chef Isaac. Cette atteinte a compromis très sérieusement l'impression d'indépendance que doit donner le pouvoir judiciaire. Un observateur raisonnable au fait des travaux de la Cour fédérale et de toutes les circonstances conclurait que le juge en chef et le juge en chef adjoint ont été influencés de façon indue et incorrecte par un haut fonctionnaire du ministère de la Justice. Cependant, aucune preuve convaincante n'établit que l'un des acteurs de ce drame ait agi de mauvaise foi et il n'y a pas non plus de preuve solide que l'indépendance des juges en question ait été compromise dans les faits.

C. *La réparation*

Bien que la rencontre et l'échange subséquent de lettres entre Me Thompson et le juge en chef constituent des actes très graves qui ont compromis l'impression d'indépendance que doivent donner le juge en chef et le juge en chef adjoint, tout compte fait, le préjudice n'est pas suffisamment grave pour justifier le recours à l'ultime réparation qu'est la suspension des procédures. Une réparation moindre, assortie de conditions supplémentaires, soit la désignation d'un autre juge de la Section de première instance de la Cour fédérale pour entendre les causes, suffira.

(i) La norme de contrôle

La suspension des procédures est une réparation discrétionnaire. Par conséquent, une cour d'appel ne peut pas intervenir à la légère dans la décision d'un juge de première instance d'accorder ou de ne

colleague Gonthier J. described it in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375:

> [A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

See also *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 48.

(ii) The Legal Principles

Though Cullen J. derived his power to enter a stay of proceedings from s. 50(1)(*b*) of the *Federal Court Act* and not from the *Charter* or the common law, the same principles that govern stays of proceedings under the latter heads of power apply equally well here. The "interest of justice" referred to in s. 50(1)(*b*) of the *Federal Court Act* is not fundamentally different from the concerns that animate the jurisprudence developed under s. 24(2) of the *Charter*, although the context in which s. 50(1)(*b*) operates may be different.

Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a "residual category" of cases in which a stay may be warranted. L'Heureux-Dubé J. described it this way, in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.

pas accorder cette suspension. La situation en l'espèce ressemble à celle que notre collègue le juge Gonthier a évoquée dans l'arrêt *Elsom c. Elsom*, [1989] 1 R.C.S. 1367, à la p. 1375:

> [U]ne cour d'appel ne sera justifiée d'intervenir dans l'exercice du pouvoir discrétionnaire d'un juge de première instance que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice.

Voir également l'arrêt *R. c. Carosella*, [1997] 1 R.C.S. 80, au par. 48.

(ii) Les principes juridiques

88 Bien que le juge Cullen ait tiré son pouvoir de suspendre les procédures de l'al. 50(1)*b*) de la *Loi sur la Cour fédérale* et non pas de la *Charte* ou de la common law, les principes qui régissent la suspension des procédures sous leur régime concernent également la présente espèce. L'«intérêt de la justice» mentionné à l'al. 50(1)*b*) de la *Loi sur la Cour fédérale* n'est pas fondamentalement différent des préoccupations qui nourrissent la jurisprudence élaborée en vertu du par. 24(2) de la *Charte*, quoique le contexte dans lequel s'applique l'al. 50(1)*b*) puisse être tout autre.

89 Le plus souvent, on demande la suspension des procédures pour corriger l'injustice dont est victime un particulier en raison de la conduite répréhensible de l'État. Toutefois, il existe une «catégorie résiduelle» de cas où une telle suspension peut être justifiée. Le juge L'Heureux-Dubé l'a décrite de cette façon dans l'arrêt *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 73:

> Cette catégorie résiduelle ne se rapporte pas à une conduite touchant l'équité du procès ou ayant pour effet de porter atteinte à d'autres droits de nature procédurale énumérés dans la *Charte*, mais envisage plutôt l'ensemble des circonstances diverses et parfois imprévisibles dans lesquelles la poursuite est menée d'une manière inéquitable ou vexatoire au point de contrevenir aux notions fondamentales de justice et de miner ainsi l'intégrité du processus judiciaire.

Cette catégorie résiduelle, il faut le noter, est une petite catégorie. Dans la grande majorité des cas, l'accent sera mis sur le caractère équitable du procès.

90 If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

(*O'Connor*, *supra*, at para. 75.)

91 The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

92 After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceed-

S'il appert que l'État a mené une poursuite de façon à rendre les procédures inéquitables ou qu'il a porté par ailleurs atteinte à l'intégrité du système judiciaire, il faut satisfaire à deux critères pour que la suspension constitue une réparation convenable. Les voici:

(1) le préjudice causé par l'abus en question sera révélé, perpétué ou aggravé par le déroulement du procès ou par son issue;

(2) aucune autre réparation ne peut raisonnablement faire disparaître ce préjudice.

(*O'Connor*, précité, au par. 75.)

Le premier critère est d'une importance capitale. Il reflète le caractère prospectif de cette réparation. La suspension des procédures ne corrige pas le préjudice causé, elle vise à empêcher que ne se perpétue une atteinte qui, faute d'intervention, continuera à perturber les parties et la société dans son ensemble à l'avenir. Voir l'arrêt *O'Connor*, au par. 82. Pour cette raison, il faut satisfaire au premier critère même s'il s'agit d'un cas visé par la catégorie résiduelle. Voir l'arrêt *O'Connor*, au par. 75. Le simple fait que l'État se soit mal conduit à l'égard d'un individu par le passé ne suffit pas à justifier la suspension des procédures. Pour que la suspension des procédures soit appropriée dans un cas visé par la catégorie résiduelle, il doit ressortir que la conduite répréhensible de l'État risque de continuer à l'avenir ou que la poursuite des procédures choquera le sens de la justice de la société. Ordinairement, la dernière condition ne sera pas remplie à moins que la première ne le soit aussi — la société ne s'offusquera pas de la poursuite des procédures à moins qu'une forme de conduite répréhensible soit susceptible de persister. Il peut y avoir des cas exceptionnels où la conduite reprochée est si grave que le simple fait de poursuivre le procès serait choquant. Mais de tels cas devraient être relativement très rares.

Après avoir exprimé ces deux exigences, la cour peut encore estimer nécessaire de tenir compte d'un troisième facteur. Comme l'a dit le juge L'Heureux-Dubé, «lorsque l'atteinte au franc-jeu et à la décence est disproportionnée à l'intérêt de la société d'assurer que les infractions criminelles soient efficacement poursuivies, l'administration

ings": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding.

de la justice est mieux servie par l'arrêt des procédures»: *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1667. Selon nous, cela veut dire qu'il peut y avoir des cas où il sera approprié de mettre en balance les intérêts que servirait la suspension des procédures et l'intérêt que représente pour la société un jugement définitif statuant sur le fond. Naturellement, cela ne signifie pas qu'une préoccupation publique passagère puisse jamais l'emporter sur un acte apparenté à une conduite répréhensible grave. Au contraire, ce facteur ne fait que reconnaître que, dans certains cas, lorsqu'il n'est pas sûr que l'abus justifie la suspension des procédures, l'intérêt irrésistible de la société à ce qu'il y ait un débat sur le fond pourrait faire pencher la balance en faveur de la poursuite des procédures.

(iii) Application of the Law to the Facts

(iii) L'application du droit aux faits

93 For several reasons, a stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. In this connection, we believe that, if Isaac C.J. or Jerome A.C.J. considered the situation and the possible perception of bias by reasonable observers, they would agree that it would be preferable if they did not participate in any future cases dealing with the same or related issues. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. To the extent that he thought otherwise, the trial judge was in error.

Pour plusieurs raisons, la suspension des procédures n'est pas la réparation convenable en l'espèce. Premièrement, il n'y a pas de risque que la poursuite des procédures révèle, perpétue ou aggrave quelque abus. Deuxièmement, la réparation moindre qui consiste à ordonner l'instruction de l'instance devant un autre juge de la Section de première instance, avec interdiction au juge en chef et au juge en chef adjoint de donner des directives ou d'intervenir, suffira. Dans cet ordre d'idées, nous croyons que, si le juge en chef Isaac ou le juge en chef adjoint Jerome examinaient la situation et tenaient compte de la possibilité que des observateurs raisonnables concluent à la partialité, ils seraient d'accord pour dire qu'il est préférable qu'ils ne participent à l'instruction d'aucune cause ultérieure concernant les mêmes questions ou des questions connexes. Troisièmement, l'intérêt du Canada à ne pas donner refuge à ceux qui ont dissimulé leur participation en temps de guerre à des atrocités l'emporte sur tout préjudice prévisible que la poursuite des procédures pourrait causer aux appelants ou à l'intégrité du système. Dans la mesure où il a pensé le contraire, le juge de première instance se trompait.

(a) *No Likelihood That Any Abuse Will Be Manifested in the Future*

94 Although damage was done to the appearance of judicial independence, there is no indication that it will be manifested, perpetuated or aggravated by any future proceeding. Therefore, a stay of proceedings is not an appropriate remedy.

95 The appellants' best argument is that this case falls into the "residual category" mentioned in *O'Connor* because the state conducted its case against them so unfairly and vexatiously that harm was done to the very integrity of the judicial system. To carry forward in the light of what was done, they submit, would be to condone official misconduct and thereby to aggravate the abuse.

96 The problem with the appellants' submission is that it reflects a misunderstanding of the stay of proceedings as a remedy. When one looks at the criteria identified by L'Heureux-Dubé J. in *O'Connor*, *supra*, at para. 75, and the accompanying discussion, what emerges, in our view, are the following propositions. A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent — a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptionable manner, would be unfair. Similarly, if the authorities were to fabricate and plant evidence at the scene of a crime, the continued

a) *Aucun risque qu'un abus ne soit révélé à l'avenir*

Bien qu'il y ait eu atteinte à l'impression d'indépendance que doit donner le pouvoir judiciaire, rien n'indique que le préjudice sera révélé, perpétué ou aggravé par quelque procédure ultérieure. Par conséquent, la suspension des procédures ne constitue pas la réparation convenable.

Le meilleur argument des appelants est que la présente espèce entre dans la «catégorie résiduelle» mentionnée dans l'arrêt *O'Connor* parce que l'État a mené les poursuites contre eux de façon si inéquitable et vexatoire qu'une atteinte a été portée à l'intégrité même du système judiciaire. Compte tenu de ce qui est arrivé, soutiennent-ils, poursuivre l'instance équivaudrait à fermer les yeux sur une conduite répréhensible officielle et à aggraver l'abus.

Le problème c'est que cet argument dénote une méconnaissance de la suspension des procédures en tant que réparation. Selon nous, les propositions qui suivent peuvent être dégagées des critères énoncés par le juge L'Heureux-Dubé dans l'arrêt *O'Connor*, précité, au par. 75, et de l'analyse qui en est faite. La suspension des procédures n'est pas une forme de punition. Ce n'est pas un genre de châtiment infligé à l'État et ce n'est pas une mesure générale de dissuasion. Si tant est qu'il convienne de parler de punition, la meilleure façon de décrire la suspension des procédures est probablement de la considérer comme une mesure de dissuasion particulière — une réparation visant à empêcher la perpétuation ou l'aggravation d'un abus. De l'aveu général, s'il était suffisamment grave, un abus commis dans le passé pourrait ébranler la confiance du public dans l'administration de la justice au point où le simple fait de poursuivre l'instance constituerait un nouvel abus persistant justifiant la suspension des procédures. Toutefois, seul un abus extrêmement grave pourrait jamais déconsidérer de façon prolongée l'administration de la justice. Nous supposons qu'il est concevable qu'un justiciable subisse un traitement si traumatisant au cours d'un procès que le fait de continuer la poursuite contre lui, même d'une manière qui par ailleurs n'aurait rien d'exception-

pursuit of a criminal prosecution might well be damaging to the integrity of the judicial system.

However, the damage that the appearance of judicial independence suffered as a result of the meeting between Mr. Thompson and the Chief Justice was not so serious that to proceed despite it would constitute an abuse. A reasonable, fully-informed member of the public, confronted with a continuation of the proceedings, would not think that an injustice was being perpetuated. Mr. Thompson, the Chief Justice and the Associate Chief Justice acted imprudently, but not to such an extent that they undermined public confidence in the justice system. Nothing was done that could have rendered the proceedings oppressive for the appellants. Undoubtedly, the appellants had a legitimate concern that the judge who had charge of their cases and the Chief Justice had become partial to the state. But that concern had to do only with the particular judges involved and not with the justice system as a whole. Thus it is clear that remedies other than a stay will rectify this unfortunate situation.

The appellants further submit that the appearance of judicial partiality will continue in the future if the cases are allowed to proceed. In our view, there is no prospect of judicial partiality in the future. The Chief Justice intervened only with the Associate Chief Justice. His conduct did not compromise the integrity of any other judges. The taint is confined to the Associate Chief Justice and the Chief Justice and can be readily contained.

Despite these rather obvious facts, Cullen J. found that a reasonable person would worry that the Chief Justice would exercise an improper influence over any judge appointed to hear the appellants' cases. With respect, we do not agree. His finding rests on an incomplete view of the law. Contrary to public perception, it is clear that a chief justice is only "*primus inter pares* in the court". *Ruffo v. Conseil de la magistrature*, [1995]

nel, serait inéquitable. De même, si les autorités devaient introduire des preuves fabriquées sur les lieux d'un crime, la continuation d'une poursuite criminelle pourrait bien porter atteinte à l'intégrité du système judiciaire.

97 Cependant, l'atteinte portée à l'impression d'indépendance que doit donner le pouvoir judiciaire du fait de la rencontre entre Me Thompson et le juge en chef n'est pas grave au point que la poursuite des procédures constituerait un abus. Un citoyen raisonnable et bien informé constatant la poursuite de l'instance ne penserait pas qu'une injustice est en train de se perpétuer. Me Thompson, le juge en chef et le juge en chef adjoint ont agi de façon imprudente, mais pas au point de miner la confiance du public dans le système de justice. Aucun acte n'a été accompli qui aurait pu rendre oppressives les procédures dirigées contre les appelants. Il est légitime, sans aucun doute, que les appelants aient redouté de la part du juge chargé de leurs dossiers et du juge en chef une partialité en faveur de l'État. Mais cette inquiétude visait uniquement les juges saisis des dossiers et non le système de justice dans son ensemble. Il est donc clair que des réparations autres que la suspension des procédures corrigeront cette malheureuse situation.

98 Les appelants soutiennent également que l'impression de partialité du pouvoir judiciaire subsistera si la poursuite des procédures est autorisée. À notre avis, la probabilité de partialité judiciaire à l'avenir est nulle. Le juge en chef est intervenu seulement auprès du juge en chef adjoint. Sa conduite n'a compromis l'intégrité d'aucun autre juge. L'atteinte ne concerne que le juge en chef adjoint et le juge en chef et elle peut facilement être réprimée.

99 Malgré ces faits assez évidents, le juge Cullen a conclu qu'une personne raisonnable redoutera que le juge en chef n'exerce une influence indue sur tout juge désigné pour instruire les causes des appelants. Nous sommes dans l'obligation d'exprimer notre désaccord sur ce point. Sa conclusion se fonde sur une conception incomplète du droit. Contrairement à la perception du public, il est clair que le juge en chef est seulement «*primus inter*

4 S.C.R. 267, at para. 59. He or she enjoys no particular authority over other judges, save an administrative one. See *Federal Court Act*, s. 6(1).

100 Any influence that the Chief Justice might have had over the Associate Chief Justice might have been by virtue of some particular quality of their personal relationship. In this respect, we cannot refrain from commenting that the formal structural relationship between the Chief Justice and the Associate Chief Justice is not clear and in the aftermath of these events, perhaps the appropriate authorities might wish to consider the matter further to clarify the situation. But that aside, what happened between the Chief Justice and the Associate Chief Justice should not be taken as a reflection of the institutional relationship between them. A reasonable observer would understand this, and would understand also that the individual judges of the Trial Division "have nothing to gain by not deciding as their consciences dictate and nothing to lose by doing justice": *Ruffo*, *supra*, at para. 101.

101 The sturdy resolve that Cullen J. himself demonstrated in deciding to grant a stay of proceedings was no aberration. It is precisely what any reasonably intelligent person, apprised of the workings of the Federal Court, would expect. However, by failing to credit the reasonable observer with sufficient understanding to recognize what was apparent even in his own conduct, Cullen J. committed an error of law. His exercise of discretion was founded on a misdirection and so cannot be allowed to stand.

102 The decision of this Court in *R. v. Vermette*, [1988] 1 S.C.R. 985, affords a good illustration of the correct approach to problems of apparent partiality. *Vermette* involved certain inflammatory and well-publicized remarks made by the Premier of Quebec about a case that was then before the courts. The trial judge entered a stay of proceedings, in part on the ground that the Premier's remarks had infringed the accused's right to a fair

pares au sein de la cour». *Ruffo c. Conseil de la magistrature*, [1995] 4 R.C.S. 267, au par. 59. Il n'exerce aucun pouvoir sur les autres juges, si ce n'est un pouvoir de nature administrative. Voir la *Loi sur la Cour fédérale*, par. 6(1).

Tout ascendant que pourrait exercer le juge en chef sur le juge en chef adjoint aurait pu résulter de la qualité particulière de leurs rapports personnels. À cet égard, nous ne pouvons nous empêcher de faire remarquer que le lien structurel formel existant entre le juge en chef et le juge en chef adjoint n'est pas clair et, qu'à la suite de ces événements, les autorités compétentes voudront peut-être examiner la question davantage afin de clarifier la situation. Mais cela mis à part, ce qui s'est produit entre le juge en chef et le juge en chef adjoint ne devrait pas être considéré comme la manifestation du lien institutionnel qui les lie. Un observateur raisonnable le comprendrait et admettrait également que les juges de la Section de première instance, pris individuellement, «n'ont rien à gagner en ne décidant pas selon leur conscience pas plus qu'ils n'ont à perdre en rendant justice»: *Ruffo*, précité, au par. 101.

La détermination bien arrêtée dont le juge Cullen lui-même a fait preuve en décidant d'accorder la suspension des procédures n'était pas une aberration. C'est précisément ce à quoi toute personne raisonnablement intelligente, au fait du fonctionnement de la Cour fédérale, se serait attendue. Cependant, en n'accordant pas à l'observateur raisonnable une intelligence suffisante pour reconnaître ce qui était manifeste même dans sa propre conduite, le juge Cullen a commis une erreur de droit. L'exercice de son pouvoir discrétionnaire était fondé sur une considération erronée et il ne peut être accepté.

L'arrêt de notre Cour *R. c. Vermette*, [1988] 1 R.C.S. 985, illustre bien la façon correcte d'aborder les problèmes de partialité apparente. L'arrêt *Vermette* avait trait à certaines remarques incendiaires et bien médiatisées faites par le premier ministre du Québec au sujet d'une cause qui était devant les tribunaux. Le juge de première instance a prononcé l'arrêt des procédures, en partie pour le motif que les remarques du premier ministre

trial by making it unlikely that an impartial panel of jurors could be found. This Court set aside the stay. It held that the trial judge had founded his decision on impermissible speculation. La Forest J., for the majority, observed that there was "no evidence indicating that it will be impossible to select an impartial jury in a reasonable time" (p. 992). He further emphasized that, in the words of the Ontario Court of Appeal, "[t]here is an initial presumption that a juror . . . will perform his duties in accordance with his oath". See *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279, at p. 289.

avaient violé le droit de l'accusé à un procès équitable en rendant presque impossible la constitution d'un jury impartial. Notre Cour a annulé l'arrêt des procédures. Elle a statué que le juge de première instance avait fondé sa décision sur des spéculations inadmissibles. Le juge La Forest a fait remarquer, au nom de la majorité, qu'«aucune preuve n'indiquait qu'il serait impossible de former un jury impartial dans un délai raisonnable» (p. 992). Il a en outre signalé que, pour reprendre les termes employés par la Cour d'appel de l'Ontario, [TRADUCTION] «[i]l existe une présomption de base voulant qu'un juré [. . .] se déchargera de ses fonctions conformément à son serment». Voir *R. c. Hubbert* (1975), 29 C.C.C. (2d) 279, à la p. 289.

The same kind of reasoning applies here. It is mere speculation that no impartial judge can be found. There is an initial presumption of fundamental importance that judges will be faithful to their solemn oath of office and not pay heed to any ill-advised interventions of a chief justice whose authority to intervene is limited to administrative matters. This serves as an answer not only to the suggestion that Mr. Thompson and the Chief Justice will persist in their improper behaviour but also to the recent suggestion that Mr. Thompson's interference in the affairs of the Federal Court was more extensive than previously believed. Even if it is true that Mr. Thompson served as a sort of informer for the Chief Justice, reporting to him on judges whose performance was not acceptable to the federal government, still there is no reason to believe that such chicanery has impaired or will impair the ability of the judges of the Federal Court to function independently and in accordance with their oaths. The judge's oath is a solemn and weighty covenant, not lightly betrayed. Until some evidence appears that the independence of a particular judge may have been compromised, as happened with respect to the Associate Chief Justice as a result of the Chief Justice's letter of March 1, 1996, it remains a matter of speculation that a judge will be anything less than entirely faithful to the office.

103 Le même genre de raisonnement s'applique ici. C'est pure spéculation que de dire il est impossible de trouver un juge impartial. Une présomption de base d'une importance fondamentale veut que les juges respectent leur serment professionnel et ne tiennent pas compte des interventions mal avisées d'un juge en chef dont le pouvoir d'intervention se limite aux questions administratives. Cet argument vient réfuter non seulement la proposition selon laquelle M^e^ Thompson et le juge en chef persisteront dans leur comportement inapproprié, mais également l'affirmation récente voulant que l'intervention de M^e^ Thompson dans les affaires de la Cour fédérale soit plus importante qu'on ne l'avait cru antérieurement. Même s'il est vrai que M^e^ Thompson a fait office d'informateur auprès du juge en chef en lui signalant les juges dont le rendement était jugé inacceptable par le gouvernement fédéral, il n'y a aucune raison de croire, encore là, qu'un tel procédé a porté ou portera atteinte à la capacité des juges de la Cour fédérale d'exercer leurs fonctions en toute indépendance et conformément au serment qu'ils ont prêté. Le serment prononcé par le juge est un engagement solennel et lourd de conséquences qu'on ne saurait rompre à la légère. En l'absence d'éléments prouvant que l'indépendance d'un juge particulier a pu être compromise, comme cela est arrivé en ce qui concerne le juge en chef adjoint par suite de la lettre du juge en chef du 1^er^ mars 1996, l'idée qu'un juge ne sera pas entièrement fidèle à son serment professionnel relève de la spéculation.

(b) *A Lesser Remedy Is Sufficient*

104 For reasons similar to the ones we have already given, the abuse will be sufficiently remedied if we order that the cases against the appellants should go forward under a different judge of the Trial Division. There is every reason to think that the example of independence set by Cullen J. below will be followed by his successor.

105 If any illustration is needed of the sufficiency of a new trial as a remedy for bias, no better one can be found than the recent decision of this Court in *R. v. Latimer*, [1997] 1 S.C.R. 217. In that case, it emerged following the trial that Crown counsel and the police had administered a sort of litmus test to prospective jurors. In particular, they had sought to discover what prospective jurors thought about moral issues that would arise in the course of the trial. Five of the jurors who had been questioned in this way became members of the jury. This Court condemned the actions of Crown counsel as "nothing short of a flagrant abuse of process and interference with the administration of justice" (para. 43).

106 The reasonable inference to be drawn is that if the lesser remedy of a new trial was adequate in *Latimer*, which arguably involved a more serious apprehension of bias than this appeal does, then *a fortiori* it is adequate here.

(c) *Society's Interests Weigh Against a Stay*

107 If we had concluded that having regard to the other factors it was unclear whether the abuse was sufficient to warrant a stay, we would have found that the societal interest in seeing these cases through to their conclusion tips the balance against a stay. The following words of L'Heureux-Dubé J., in *O'Connor*, *supra*, at para. 81, are apt:

> . . . in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in

b) *Une réparation moindre est suffisante*

Pour des raisons analogues à celles que nous avons déjà exposées, l'abus sera suffisamment corrigé si nous ordonnons que les poursuites intentées contre les appelants soient instruites par un autre juge de la Section de première instance. Nous avons tout lieu de penser que l'exemple de l'indépendance dont a fait preuve le juge Cullen de la juridiction inférieure sera suivi par son remplaçant.

S'il fallait illustrer d'un exemple la suffisance d'un nouveau procès comme réparation en cas de partialité, on ne saurait mieux trouver que l'arrêt *R. c. Latimer*, [1997] 1 R.C.S. 217, rendu récemment par notre Cour. Dans cette affaire, il est apparu après le procès que le substitut du procureur général et la police avaient soumis les candidats jurés à une sorte de test décisif. Tout particulièrement, ils avaient tenté de découvrir ce que les candidats jurés pensaient au sujet des questions morales qui allaient être soulevées au cours du procès. Cinq des personnes interrogées de cette façon ont fait partie du jury. Notre Cour a condamné les actes du substitut du procureur général qu'elle a qualifiés d'«abus de procédure flagrant et [d']entrave à l'administration de la justice» (par. 43).

La déduction raisonnable à tirer est que, si la réparation moindre consistant en un nouveau procès convenait dans l'affaire *Latimer*, qui, on peut le soutenir, inspirait une crainte de partialité plus sérieuse que le présent pourvoi, *a fortiori* elle convient en l'espèce.

c) *Les intérêts de la société l'emportent sur la suspension des procédures*

Si nous avions conclu que, eu égard aux autres facteurs, il n'était pas sûr que l'abus soit suffisant pour justifier une suspension des procédures, nous aurions décidé que l'intérêt qu'a la société à voir ces affaires aboutir l'emporte sur la suspension des procédures. Les propos suivants du juge L'Heureux-Dubé dans l'arrêt *O'Connor*, précité, au par. 81, sont pertinents:

> . . . pour déterminer s'il est possible de remédier au préjudice causé à l'intégrité du système judiciaire, il faut tenir compte des intérêts communautaires et individuels

obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused.

Perhaps the first thing to notice is that what is at stake for the appellants in this case is arguably different from what is at stake for the typical accused in the typical criminal case. The state is trying to deprive the appellants of their citizenship and not of their liberty. Canadian citizenship is undoubtedly a very "valuable privilege" (see *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para. 72). For some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty. Yet for most, liberty is more valuable still. Therefore, the interests on the appellants' side of the balance do not weigh quite so heavily as they would if the proceedings were purely criminal in nature.

On the other side of the balance, society's interest in having a final decision on the merits is obvious. It is imperative that the truth should come to light. If it is not proven that the appellants did the things they are said to have done, then they will retain their citizenship. But if some or all of the alleged acts are proven then the appropriate action must be taken. What is at stake here, in however small a measure, is Canada's reputation as a responsible member of the community of nations. In our view, this concern is of the highest importance

An ongoing affront to judicial independence may be such that any further proceedings in the case would lack the appearance that justice would be done. In such a case the societal interest would not be served by a decision on the merits that is tainted by an appearance of injustice. The interest in preserving judicial independence will trump any interest in continuing the proceedings. Even in the absence of an ongoing appearance of injustice, the very severity of the interference with judicial independence could weigh so heavily against any societal interest in continuing the proceedings that the balancing process would not be engaged. This would occur rarely and only in the clearest of cases. Neither of these circumstances is present

à la détermination de la culpabilité ou de l'innocence. Il va sans dire que ces intérêts seront proportionnels à la gravité des accusations portées contre l'accusé.

Peut-être faut-il d'abord noter que l'enjeu n'est 108
pas le même pour les appelants en l'espèce que pour l'accusé type dans une cause criminelle classique. L'État tente de priver les appelants de leur citoyenneté, non de leur liberté. La citoyenneté canadienne est indubitablement un «précieux privilège» (voir *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358, au par. 72). Pour certains, comme ceux qui pourraient devenir apatrides s'ils étaient privés de leur citoyenneté, elle peut être aussi précieuse que la liberté. Cependant, pour la plupart, la liberté est plus précieuse encore. Par conséquent, les intérêts des appelants ne pèsent pas autant dans la balance que si les procédures étaient de nature purement criminelle.

De l'autre côté de la balance, l'intérêt de la 109
société à ce que soit rendu un jugement définitif sur le fond est évident. Il est impératif que la vérité se manifeste. S'il n'est pas prouvé que les appelants ont fait les choses qu'on leur reproche, ils garderont leur citoyenneté. Mais si les actes allégués sont établis, en tout ou en partie, les mesures appropriées devront être prises. Ce qui est en jeu ici, si peu que ce soit, c'est la réputation du Canada en tant que membre solidaire de la communauté internationale. À notre avis, cette préoccupation est de la plus haute importance.

L'atteinte persistante à l'indépendance judiciaire 110
peut être telle que la poursuite du débat judiciaire ne donnera pas l'impression que justice sera faite. Dans ce cas, l'intérêt de la société ne serait pas servi par un jugement tranchant sur le fond mais vicié par une apparence d'injustice. L'intérêt de préserver l'indépendance du juge l'emportera sur l'intérêt de poursuivre le débat judiciaire. Même en l'absence d'une apparence d'injustice persistante, la gravité même de l'atteinte à l'indépendance du juge pourra être si nettement défavorable à l'intérêt de la société de poursuivre le débat judiciaire que la mise en balance ne sera même pas enclenchée. Cela se produira rarement et seulement dans les cas les plus manifestes. Ni l'une ni l'autre de ces

here. We have concluded that continuing the proceedings under the conditions we have outlined will not result in an ongoing appearance of injustice. Moreover, the affronts to judicial independence were serious but not so serious as to warrant a stay without balancing the harm to the image of the justice system against the interest of society in seeing alleged war criminals brought to justice. The crimes involved rank among the most heinous in history, and the civilized world's resolve to apply the appropriate sanctions should not be interfered with lightly. What transpired between Mr. Thompson and the Chief Justice on March 1, 1996 cannot justify such an interference, wrong and improper as it was. It if were established that Mr. Thompson and the Chief Justice had acted in bad faith and not out of a legitimate concern for the expeditious conduct of the appellants' cases, then this might well have constituted one of those rare and clearest of cases. But this was not the case. As matters stand, society's interest in seeing the cases through to their conclusion is of a most pressing nature and outweighs the affront to the appearance of judicial independence.

111 Therefore, the only just decision under the circumstances is that the cases should be allowed to proceed. To paraphrase the remarks of our colleague La Forest J. in *Vermette*, *supra*, at p. 994, "judicial abdication is not the remedy". It is in the public interest that allegations of the most wicked kinds of criminal activity should be scrutinized by the judiciary. In all the circumstances, the imprudent actions of Mr. Thompson, the Chief Justice, and the Associate Chief Justice should not be permitted to frustrate the judicial process.

(iv) Conclusion

112 A stay of proceedings should not be granted in this case. Rather, the appropriate remedy is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division, one who has, up to this point, had nothing to do

hypothèses ne se présentent en l'espèce. Nous avons conclu que la poursuite du procès dans les conditions que nous avons exposées n'engendrera pas une apparence d'injustice persistante. De plus, les atteintes à l'indépendance judiciaire étaient graves, mais pas au point de justifier la suspension des procédures sans mettre en regard le tort causé à l'image du système de justice et l'intérêt de la société de voir à ce que des criminels de guerre présumés soient amenés devant les tribunaux. Les crimes dont il s'agit sont parmi les plus haineux de l'histoire, et il y a lieu de ne pas contrecarrer à la légère la décision du monde civilisé d'appliquer les sanctions appropriées. Ce qui s'est passé entre M^e^ Thompson et le juge en chef le 1^er^ mars 1996 ne peut pas justifier une telle ingérence, si répréhensible et déplacée qu'ait été leur conduite. S'il avait été établi que M^e^ Thompson et le juge en chef ont agi de mauvaise foi plutôt que par souci légitime d'assurer la conduite diligente des dossiers des appelants, il aurait bien pu s'agir de l'un de ces cas rares et des plus manifestes. Mais il n'en a pas été ainsi. Étant donné l'état actuel des choses, l'intérêt de la société à voir à ce que les poursuites soient menées à terme revêt un caractère des plus impérieux et l'emporte sur l'atteinte portée à l'impression d'indépendance que doit donner le pouvoir judiciaire.

Par conséquent, la seule décision équitable dans les circonstances est d'autoriser l'instruction des procès. Pour paraphraser les remarques de notre collègue le juge La Forest dans l'arrêt *Vermette*, précité, à la p. 994, «l'abdication judiciaire n'est pas le remède». Il est dans l'intérêt du public que les allégations d'activités criminelles les plus iniques soient examinées par les tribunaux. Vu les circonstances, il y a lieu de ne pas permettre que les actes imprudents de M^e^ Thompson, du juge en chef et du juge en chef adjoint fassent échec au processus judiciaire.

(iv) Conclusion

La suspension des procédures ne devrait pas être accordée en l'espèce. La réparation convenable consiste plutôt à permettre l'instruction des poursuites dirigées contre les appelants par un juge de la Section de première instance non mêlé jusqu'ici

with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. Isaac C.J. and Jerome A.C.J. should not have anything further to do with these cases.

aux affaires qui font l'objet du présent pourvoi. Le juge désigné ne devra pas tenir compte des directives données antérieurement par le juge en chef adjoint ou le juge en chef dans ces dossiers. Le juge en chef Isaac et le juge en chef adjoint Jerome ne doivent plus intervenir.

Before we conclude, there is one final matter that bears mentioning. It is this.

113 Avant de conclure, nous voulons aborder un dernier point qui mérite d'être mentionné. C'est le suivant.

A well-known rule of Parliamentary practice holds that no Member of the House of Commons should comment upon any matter that is pending before the courts. The following account of what is called the "*sub judice* rule" appears in *Beauchesne's Rules & Forms of the House of Commons of Canada* (6th ed. 1989), at p. 153 (para. 505):

114 Une règle bien connue de la pratique parlementaire veut qu'aucun député ne fasse de remarques sur les affaires en instance devant les tribunaux. L'exposé suivant de ce qu'on appelle la «règle *sub judice*» figure dans le *Règlement annoté et formulaire de la Chambre des commune du Canada* de Beauchesne (6e éd. 1991), à la p. 160 (par. 505):

Members are expected to refrain from discussing matters that are before the courts or tribunals which are courts of records. The purpose of this *sub judice* convention is to protect the parties in a case awaiting or undergoing trial and persons who stand to be affected by the outcome of a judicial inquiry. It is a voluntary restraint imposed by the House upon itself in the interest of justice and fair play.

Les députés s'entendent pour ne pas évoquer les affaires dont un tribunal ou une cour d'archives sont saisis. Cette convention a pour but de protéger les parties, tant avant que pendant le procès, et les personnes qui pourraient être touchées par les résultats d'une enquête judiciaire. Il s'agit d'une contrainte à laquelle la Chambre s'assujettit elle-même dans l'intérêt de la justice et de l'équité.

Though the rule is a matter of Parliamentary convention and not of statutory law, "[i]t is desirable that the convention of Parliament as to matters sub judice should, so far as possible, be the same as the law administered in the courts", or, in other words, that parliamentarians should act in a way that does not render more difficult the administration of the law by judges. See *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710 (C.A.), at pp. 740-41, *per* Lord Denning M.R.

Bien que cette règle fasse l'objet d'une convention parlementaire et non pas d'une loi, [TRADUCTION] «[i]l est souhaitable que la convention du Parlement au sujet des affaires dont les tribunaux sont déjà saisis soit, le plus possible, la même que les règles de droit appliquées devant les tribunaux» ou, autrement dit, que les parlementaires agissent d'une façon à ne pas rendre plus difficile encore l'application du droit par les juges. Voir *Attorney-General c. Times Newspapers Ltd.*, [1973] 1 Q.B. 710 (C.A.), aux pp. 740 et 741, motifs de lord Denning, maître des rôles.

It seems to us that the decision to make public the report of the Honourable Charles Dubin on communications between Department of Justice officials and the courts while the matter was before the courts raises concerns about the *sub judice* rule. The Honourable Mr. Dubin was under retainer to the Department of Justice. He was responsible to the Minister of Justice. If Parlia-

115 Il nous semble que la décision de diffuser le rapport de l'ancien juge en chef Dubin sur les communications entre les fonctionnaires du ministère de la Justice et les tribunaux pendant que l'affaire était devant la justice soulève des préoccupations au sujet de la règle *sub judice*. M. Dubin était sous contrat avec le ministère de la Justice. Il relevait du ministre de la Justice. Si la convention parle-

mentary convention did not permit the Minister to speak about the conduct of Mr. Thompson and the Chief Justice, then arguably it did not permit him to retain a third party to speak on his behalf about important aspects of the same subject matter that was before the courts.

116 The release of the report complicated the conduct of the appeal. Once it was released the appellants moved for production of many documents that the Department of Justice had handed over to Mr. Dubin. Their demands involved first the Federal Court of Appeal and later this Court in difficult and time-consuming inquiries into questions of privilege, and ultimately placed this Court in the awkward position of having to consider without the benefit of a trial judge's findings of fact the credibility of certain items of evidence. These difficulties could easily have been avoided had the report not been released until after the conclusion of proceedings in the courts.

117 Nevertheless, the *sub judice* rule was not raised as a ground of appeal. Therefore, it is not for us to say whether the Minister violated the rule. However, we can say that even if the release of the report did constitute a violation of the rule, still that would not be a sufficient reason to grant a stay of proceedings in the circumstances of this case. As La Forest J. wrote in *Vermette, supra*, at p. 994, "judicial abdication is not the remedy for an infringement of the *sub judice* rule".

118 Also of concern is the intervention of the Canadian Judicial Council. We understand that one of the Council's committees issued a report in which comments were made about the conduct of Isaac C.J. and Jerome A.C.J. in connection with the appellants' cases. Although the Canadian Judicial Council is not bound by the *sub judice* rule, it might have been preferable in these circumstances for the Council to have refrained from making its report while the matter of the stay of proceedings was still working its way through the courts. There is a further complication arising from the premature release of these reports. It arises because these reasons could be taken as indicating that we take a

mentaire empêchait le ministre de parler de la conduite de M^e^ Thompson et du juge en chef, on pourra soutenir qu'elle ne lui permettait pas de retenir les services d'un tiers pour parler en son nom d'aspects importants de la même affaire dont les tribunaux étaient saisis.

La publication du rapport a compliqué le déroulement de l'appel. Dès la publication, les appelants ont demandé la production de bon nombre de documents que le ministère de la Justice avait transmis à M. Dubin. Leurs demandes ont amené d'abord la Cour d'appel fédérale et ensuite notre Cour à effectuer des examens difficiles et exigeant beaucoup de temps relativement à des questions de privilège et, en fin de compte, elles ont placé notre Cour dans la situation délicate de devoir examiner, sans le bénéfice des conclusions de fait d'un juge de première instance, la crédibilité de certains éléments de preuve. Ces difficultés auraient pu être évitées facilement si le rapport avait été diffusé après la fin des procédures devant les tribunaux.

Néanmoins, la règle *sub judice* n'a pas été invoquée comme moyen de pourvoi. Par conséquent, nous n'avons pas à décider si le ministre a violé la règle. Cependant, nous pouvons dire que, même si la divulgation du rapport constituait effectivement une violation de la règle, ce ne serait pas une raison suffisante pour accorder la suspension des procédures dans les circonstances de l'espèce. Comme l'a déclaré le juge La Forest dans l'arrêt *Vermette*, précité, à la p. 994, «l'abdication judiciaire n'est pas le remède à la violation de la règle *sub judice*».

L'intervention du Conseil canadien de la magistrature est également un sujet de préoccupation. Il semble que l'un des comités du Conseil ait présenté un rapport dans lequel des remarques ont été formulées au sujet de la conduite du juge en chef Isaac et du juge en chef adjoint Jerome relativement aux dossiers des appelants. Bien que le Conseil canadien de la magistrature ne soit pas assujetti à la règle *sub judice*, il aurait été préférable dans ces circonstances que le Conseil s'abstienne de présenter son rapport pendant que la question de la suspension des procédures était encore devant les tribunaux. Une autre complication résulte de la divulgation prématurée de ces rapports. Elle tient

more serious view of these events than did either the Honourable Mr. Dubin or the Judicial Council although the Council did not have the benefit of all the material that was before this Court.

au fait que les présents motifs pourraient donner à penser que nous considérons plus sérieusement ces événements que M. Dubin ou le Conseil de la magistrature bien que le Conseil n'ait pas eu l'avantage de prendre connaissance de tous les documents dont disposait notre Cour.

V. Disposition

We would dismiss the appeal. The stay of proceedings is set aside and the cases against the appellants are directed to proceed before a judge of the Trial Division. In accordance with s. 6(3) of the *Federal Court Act*, which provides for the precedence of judges in the event that the Chief Justice and Associate Chief Justice are unable to act, the senior judge who is able to act should choose a presiding judge from among those judges of the Trial Division who have heretofore had nothing to do with the conduct of these cases. The judge thus chosen will ignore any undertakings that Isaac C.J. or Jerome A.C.J. made to Mr. Thompson. Neither Isaac C.J. nor Jerome A.C.J. will have anything further to do with these cases.

V. Dispositif

Nous sommes d'avis de rejeter le pourvoi. La suspension des procédures est annulée et il est ordonné que les poursuites dirigées contre les appelants soient instruites par un juge de la Section de première instance. Conformément au par. 6(3) de la *Loi sur la Cour fédérale* qui prévoit l'ordre de préséance des juges en cas d'empêchement du juge en chef et du juge en chef adjoint, le juge le plus ancien en poste en mesure d'exercer ces fonctions devrait désigner le juge chargé de l'instruction parmi les juges de la Section de première instance qui n'ont pas été mêlés à la conduite de ces affaires. Le juge ainsi désigné ne doit pas tenir compte des engagements que le juge en chef Isaac ou le juge en chef adjoint Jerome ont pris envers M^e^ Thompson. Le juge en chef Isaac et le juge en chef adjoint Jerome ne doivent plus intervenir dans ces dossiers. 119

Under all the circumstances, we would award costs to the appellants here and in the courts below.

Compte tenu de toutes les circonstances, les appelants ont droit à leurs dépens devant toutes les cours. 120

Appeal dismissed with costs to the appellants.

Pourvoi rejeté avec dépens en faveur des appelants.

Solicitor for the appellant Tobiass: Gesta J. Abols, Toronto.

Procureur de l'appelant Tobiass: Gesta J. Abols, Toronto.

Solicitors for the appellant Dueck: Bayne Sellar Boxall, Ottawa.

Procureurs de l'appelant Dueck: Bayne Sellar Boxall, Ottawa.

Solicitors for the appellant Oberlander: Sack Goldblatt Mitchell, Toronto.

Procureurs de l'appelant Oberlander: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent: George Thomson, Toronto.

Procureur de l'intimé: George Thomson, Toronto.

Solicitor for the intervener: Ed Morgan, Toronto.

Procureur de l'intervenant: Ed Morgan, Toronto.

Kent v. Universal Studios Canada Inc., [2008] F.C.J. No. 1129

Federal Court Judgments

Federal Court

Toronto, Ontario

Aalto, Prothonotary

Heard: July 21, 2008.

Judgment: July 25, 2008.

Docket T-754-08

[2008] F.C.J. No. 1129 | 2008 FC 906 | 333 F.T.R. 63 | 76 C.P.R. (4th) 449 | 179 A.C.W.S. (3d) 802

Between George Arthur Kent, Plaintiff, and Universal Studios Canada Inc., Defendant

(38 paras.)

Case Summary

Civil litigation — Civil procedure — Stay of action — Another proceeding pending — Motion for temporary stay of action dismissed — Plaintiff alleged that a movie made unauthorized use of his footage — Defendant sought stay pending resolution of similar U.S. proceedings — Defendant contended there must be a finding of infringement in the U.S. case first — Defendant was required to demonstrate that continuation raised prejudice to defendant, and that the stay would not work as injustice to plaintiff — Findings under U.S. copyright law would not necessarily be the same as Canadian law — Plaintiff would suffer prejudice if action stayed — Defendant failed to demonstrate continuation would cause them prejudice.

Intellectual property law — Copyright — Procedure — Interlocutory applications and motions — Motion for temporary stay of action dismissed — Plaintiff alleged that a movie made unauthorized use of his footage — Defendant sought stay pending resolution of similar U.S. proceedings — Defendant contended there must be a finding of infringement in the U.S. case first — Defendant was required to demonstrate that continuation raised prejudice to defendant, and that the stay would not work as injustice to plaintiff — Findings under U.S. copyright law would not necessarily be the same as Canadian law — Plaintiff would suffer prejudice if action stayed — Defendant failed to demonstrate continuation would cause them prejudice.

Motion by Universal Canada for temporary stay of action. The plaintiff Kent was a journalist who had a prepared a news report for the BBC from film footage he had shot in Afghanistan. Kent alleged that the movie Charlie Wilson's War made unauthorized use of the report which was a work authored by Kent. Kent brought an action in the United States against 20 parties including Universal Pictures, and brought a Canadian action against the defendant, who had been the distributor of the film. Universal Canada sought a temporary stay pending the resolution of the similar proceeding in the States. The defendant contended that the action in the U.S. was primarily the same, and that there had to be a finding of infringement in the U.S. case before there could be a finding of infringement in Canada against the distributor of the movie. The defendant argued that Kent would not have suffered any injustice by the stay, as he would have his day in court in the U.S., and he would be free to pursue any remaining actions afterward as the defendant was seeking only a temporary stay.

persuaded that a stay should be granted and, thus, Universal Canada will be granted an appropriate time frame within which to file its Statement of Defence.

Should A Stay be Granted?

14 Section 50(1) of the *Federal Courts Act* gives the Court discretion to grant a stay in certain circumstances. Section 50(1) provides as follows:

> 50(1) Stay of proceedings authorized -- The Federal Court of Appeal or Federal Court may, in its discretion, stay proceedings in any cause or matter
>
> (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
>
> (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

15 The general test to be applied on a motion for a stay pursuant to section 50(1) of the *Federal Courts Act* is a two-part test, which has been consistently applied by this Court and other Courts over many years. This two-part test requires that the defendant demonstrate:

(a) that the continuation of the action will cause prejudice or injustice (not merely inconvenience or extra expenses) to the defendant; and

(b) that the stay will not work an injustice to the plaintiff.

There is a long line of cases that support this two-part test. They include: *Empire-Universal Films Limited et al. v. Rank*, [1947] O.R. 775 (H.C.), at p. 779; *Hall Development Co. of Venezuela, C.A. v. B. and W. Inc.* (1952), 16 C.P.R. 67 (Exch. Ct.), at p. 70; *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 5 C.P.R. (2d) 122 (F.C.T.D.), at pp. 129-130; *Varnam v. Canada (Minister of National Health and Welfare)*, [1987] F.C.J. No. 511 (F.C.T.D.), at p. 3; *Figgie International Inc. v. Citywide Machines Wholesale Inc.* (1992), 50 C.P.R. (3d) 89 (F.C.T.D.), at p. 92; *Discreet Logic Inc. v. Registrar of Copyrights* (1993), 51 C.P.R. (3d) 191 (F.C.T.D.), at p. 191; *Biologische Heilmittel Heel GmBH et al. v. Acti-Form Ltd.* (1995), 64 C.P.R. (3d) 198 (F.C.T.D.), at p. 201; *Compulife Software Inc. v. Compuoffice Software Inc.* (1997), 77 C.P.R. (3d) 451 (F.C.T.D.), at p. 456; *Canadian Pacific Railway Co. v. Ship Sheena M* (2000), 188 F.T.R. 16 (F.C.T.D.), at p. 16; *White v. E.B.F. Manufacturing Ltd.,* 2001 FCT 713 (CanLII), at para. 5; and, *Safilo Canada Inc. v. Contour Optik Inc.* (2005), 48 C.P.R. (4th) 339 at p. 27.

16 It should also be noted that the granting of a stay is a discretionary order and the Court's discretion must be exercised sparingly and only in the clearest of cases. There are many cases which support this proposition including: *Mugesera v. Canada*, [2005] 2 S.C.R. 91, at para. 12; *Safilo Canada Inc. v. Contour Optik Inc*., *supra,* at para. 27; and, *Compulife Software Inc. v. Compuoffice Software Inc., supra,* at para. 16.

17 A summary of guidelines which have evolved over time to assist in the determination of whether a stay should be granted are usefully summarized by Justice Dubé of this Court in *White v. EBF Manufacturing Limited et al*., [2001] F.C.J. 1073 as follows:

1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the Defendant?
2. Would the stay work an injustice to the Plaintiff?
3. The onus is on the party which seeks a stay to establish that these two conditions are met;
4. The grant or refusal of the stay is within the discretionary power of the Judge;
5. The power to grant a stay may only be exercised sparingly and in the clearest of cases;
6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?

Minister of Citizenship and Immigration *Appellant/Respondent on motion*

v.

Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho *Respondents/Applicants*

and

League for Human Rights of B'nai Brith Canada, PAGE RWANDA, Canadian Centre for International Justice, Canadian Jewish Congress, University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch *Interveners*

Ministre de la Citoyenneté et de l'Immigration *Appelant/Intimé à la requête*

c.

Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri et Marie-Grâce Hoho *Intimés/Requérants*

et

Ligue des droits de la personne de B'nai Brith Canada, PAGE RWANDA, Le Centre canadien pour la justice internationale, Congrès juif canadien, University of Toronto, Faculty of Law — International Human Rights Clinic et Human Rights Watch *Intervenants*

INDEXED AS: MUGESERA *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

Neutral citation: 2005 SCC 39.

File No.: 30025.

Hearing and judgment: December 8, 2004.

Reasons delivered: June 28, 2005.

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

RÉPERTORIÉ : MUGESERA *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

Référence neutre : 2005 CSC 39.

N° du greffe : 30025.

Audition et jugement : 8 décembre 2004.

Motifs déposés : 28 juin 2005.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

MOTION FOR A PERMANENT STAY OF PROCEEDINGS

Practice — Abuse of process — Motion for permanent stay of proceedings — Motion alleging Minister's decision to appeal strongly influenced by certain organizations — Appointment to Supreme Court of Canada of judge whose spouse chaired committee of one of these organizations — Allegation of abuse of power in respect of this appointment — Whether permanent stay of proceedings should be granted owing to abuse of process.

Courts — Supreme Court of Canada — Bias — Voluntary recusal of judge whose spouse chaired committee

REQUÊTE EN SUSPENSION DÉFINITIVE DES PROCÉDURES

Pratique — Abus de procédure — Requête en suspension définitive des procédures — Requête alléguant que la décision d'un ministre d'interjeter appel a été fortement influencée par certains organismes — Nomination à la Cour suprême du Canada d'une juge dont le conjoint a été président d'un comité de l'un de ces organismes — Allégation d'abus de pouvoir relativement à cette nomination —Y a-t-il lieu de prononcer la suspension définitive des procédures pour cause d'abus de procédure?

Tribunaux — Cour suprême du Canada — Partialité — Récusation volontaire d'une juge dont le conjoint

of Canada were relentless and biased in their handling of the case. Strongly influenced by Jewish individuals and organizations, they are alleged to have decided to appeal the Federal Court of Appeal's decision and have Mr. Mugesera deported at all costs. To this end, the current Minister of Justice, the Honourable Irwin Cotler, allegedly plotted to have Justice Abella appointed to the Supreme Court of Canada, so she could sit on this appeal. All the members of this Court were said to be "contaminated" by her appointment and incapable of being impartial toward the respondents.

11 In summary, Mr. Bertrand's arguments and his personal affidavit evidence alleged influential members of the Jewish community manipulated the Canadian political system and the country's highest court for the sole purpose of having Mugesera deported, and it would be impossible for the respondents to receive a fair hearing as a consequence. The only solution, the respondents submitted, would be for the Court to acknowledge its inability to act impartially because of its contamination, and to grant a permanent stay of proceedings.

III. Principles Governing a Review of Abuse of Process and the Application of Judicial Impartiality

12 The legal framework for stays of proceedings and the principles defining the tests for judicial independence and the impartiality requirement are well known. On the one hand, the stay of proceedings is a drastic remedy for an abuse of process. In the case at bar, the relief sought by the respondents would mean that the substantive arguments filed by the Minister in this appeal in support of the validity of Mr. Mugesera's deportation order would never be reviewed in a definitive manner by the Court. Nor would the public's interest in having this review take place be protected. However, this decision must be made in a legal context in which this Court has in past decisions ruled that the stay of proceedings is a remedy that must be limited to the most serious cases, such as in situations involving abuse by the prosecution (*R. v. Regan*, [2002] 1 S.C.R. 297, 2002

la Justice et procureur général du Canada ont fait preuve d'acharnement et de partialité dans ce dossier. Fortement influencés par des individus et des organismes juifs, ils auraient décidé d'interjeter appel du jugement de la Cour d'appel fédérale et d'obtenir à tout prix l'expulsion de M. Mugesera. Pour obtenir ce résultat, le ministre actuel de la Justice, l'honorable Irwin Cotler, aurait manœuvré pour faire nommer la juge Abella à la Cour suprême du Canada afin qu'elle puisse participer à l'audition du présent pourvoi. Tous les membres de notre Cour auraient supposément été « contaminés » par sa nomination et seraient incapables d'impartialité à l'égard des intimés.

En bref, l'argumentation de M^e^ Bertrand et sa déclaration assermentée déposée en preuve soutiennent que des membres influents de la communauté juive ont manipulé à leur gré le système politique canadien et la plus haute cour du Canada dans le seul but d'obtenir l'expulsion de M. Mugesera. Ce contexte ne permettrait pas aux intimés d'obtenir justice. Les intimés ne voient qu'une solution : la Cour devrait reconnaître son incapacité d'agir impartialement du fait qu'elle a été contaminée et prononcer la suspension définitive des procédures.

III. Les principes régissant le contrôle de l'abus de procédure et la mise en œuvre de l'impartialité judiciaire

Le cadre juridique de l'arrêt des procédures de même que les principes définissant les critères de l'indépendance judiciaire et l'exigence d'impartialité sont bien connus. D'une part, l'arrêt des procédures constitue une forme de réparation draconienne d'un abus de procédure. Dans l'espèce, la conclusion recherchée par les intimés signifierait que les moyens de fond soumis par le ministre dans cet appel, pour soutenir la validité de l'ordre d'expulsion de M. Mugesera, ne seraient jamais examinés de façon finale par notre Cour. L'intérêt public à ce que cet examen s'effectue ne serait pas non plus préservé. Cette décision doit toutefois se prendre dans un contexte juridique où la jurisprudence de notre Cour a statué qu'il faut réserver la réparation que constitue l'arrêt des procédures aux cas les plus graves, notamment dans les situations d'abus de la

SCC 12, at para. 53; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 59; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 59 and 68).

On the other hand, we recently considered the principles that define the nature of a judge's duty of impartiality and how this duty is applied in the review of an application to vacate a judgment of this Court (see *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45). The duty of impartiality requires that judges approach all cases with an open mind (see para. 58). There is a presumption of impartiality. The burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality, who must establish actual bias or a reasonable apprehension of bias. In the case at bar, the situation must be considered in the context of the role and operating procedures of a collegial court consisting of nine judges serving as Canada's court of final resort.

IV. Application of the Principles

As stated, this motion is flagrantly without basis in fact or in law. First, the Minister of Citizenship and Immigration, in deciding to appeal, availed himself to a recourse provided for by law in respect of a matter of public policy and was granted leave to appeal. It should be noted that his decision to appeal was made and endorsed by a succession of members of the federal cabinet at various stages in the proceedings, including the application for leave to appeal. The Honourable Irwin Cotler, currently the Minister of Justice, was not in Cabinet at the time.

Next, none of the judges who were scheduled to hear and have now heard the appeal were in any way involved in this case. No reasonable person would think, after Abella J. voluntarily recused herself, that her mere presence on the Court would impair the ability of the balance of its members to remain impartial. If there is a duty on the part of one

part de la poursuite (*R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12, par. 53; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, par. 59; *R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 59 et 68).

13 D'autre part, nous avons examiné récemment les principes définissant la nature de l'obligation d'impartialité des juges et encadrant sa mise en œuvre à l'occasion de l'examen d'une demande visant l'annulation d'un jugement de notre Cour (voir *Bande indienne Wewaykum c. Canada*, [2003] 2 R.C.S. 259, 2003 CSC 45). L'obligation d'impartialité exige que le juge aborde tout dossier avec un esprit ouvert (voir par. 58). Une présomption d'impartialité existe. Le fardeau de la preuve appartient à la partie qui soulève la violation réelle ou appréhendée de l'obligation d'impartialité. Il lui faut établir soit la partialité réelle, soit l'apparence raisonnable de partialité. Dans le présent cas, la situation doit s'apprécier aussi par rapport au rôle et au mode de fonctionnement d'une cour collégiale composée de neuf juges, siégeant en dernier ressort au Canada.

IV. Application des principes

14 Comme nous l'avons déjà souligné, l'absence de fondement de la requête est flagrant en fait comme en droit. D'abord, lorsqu'il a décidé d'interjeter appel, le ministre de la Citoyenneté et de l'Immigration a exercé un recours prévu par la loi relativement à une question d'intérêt public et il a obtenu l'autorisation d'engager le pourvoi. On remarquera d'ailleurs que cette décision a été prise et partagée par des membres successifs du cabinet fédéral à des étapes différentes de la procédure, notamment à celle de la requête pour autorisation de pourvoi. Cependant, le ministre actuel de la Justice, l'honorable Irwin Cotler, n'était pas membre du cabinet à l'époque.

15 Par ailleurs, aucun des juges qui devaient entendre et qui ont maintenant entendu le pourvoi n'a été impliqué, à quelque titre que ce soit, dans cette affaire. Aucune personne raisonnable ne croirait, après la récusation volontaire de la juge Abella, que sa seule présence au sein de la Cour porterait atteinte à la capacité de ses autres membres de demeurer

Safilo Canada Inc. v. Contour Optik Inc., [2005] F.C.J. No. 384

Federal Court Judgments

Federal Court

Montréal, Quebec

de Montigny J.

Heard: February 9, 2005.

Judgment: February 23, 2005.

Docket T-1021-04

[2005] F.C.J. No. 384 | *[2005] A.C.F. no 384* | *2005 FC 278* | *2005 CF 278* | *280 F.T.R. 66* | *48 C.P.R. (4th) 339* | *146 A.C.W.S. (3d) 473*

Between Safilo Canada Inc., plaintiff/respondent, and Contour Optik Inc. and Chic Optic Inc., defendants/applicants

(40 paras.)

Counsel

François Guay and Jean-Sébastien Brière, for the plaintiff/respondent.

Marc-André Boutin, for the defendants/applicants.

REASONS FOR ORDER

de MONTIGNY J.

1 de The applicants Contour Optik Inc. (CONTOUR) and Chic Optic Inc. (CHIC) have applied to this Court seeking dismissal or, in the alternative, a stay of the action brought by Safilo Canada Inc. (SAFILO) to invalidate patent No. 2,180,714 (hereinafter patent 714E) held by CONTOUR and for which CHIC has an exclusive licence in Canada.

2 The situation in which this motion was made and the pleadings preceding it are of some importance, and so it would be appropriated to take the time to consider them before looking at the parties' arguments on the merits.

Chronology of proceedings

3 Patent 714 E and the CHIC licence deal with the marketing, sale and distribution of spectacles equipped with a magnetic attachment system of solar clips sold under various names (the best known undoubtedly being "Easyclip". This system essentially makes it possible to add to the primary frame tinted lenses mounted on an auxiliary frame, known as a "clip-on", which is held to the primary mount with an arm used to anchor it.

4 In 2004 SAFILO introduced to the Quebec market two mount brands which, in the submission of CONTOUR and CHIC, infringed several claims in patent 714 E.

two actions cannot go forward simultaneously and that it was SAFILO's action in the Federal Court that should be stayed, in view of its conduct.

27 The courts have developed a number of guidelines to determine the circumstances in which a stay of proceedings should be ordered (Discreet Logic Inc. v. Canada (Registrar of Copyrights) *(1993), 51 C.P.R. (3d) 191*, aff. by *(1994), 55 C.P.R. (3d) 167* (F.C.A.); Plibrico (Canada) Limited v. Combustion Engineering Canada Inc., *30 C.P.R. (3d) 312*; Ass'n of Parents Support Groups v. York, *14 C.P.R. (3d) 263*; Compulife Software Inc. v. Compuoffice Software Inc. *(1997), 77 C.P.R. (3d) 451*; 94272 Canada Ltd. v. Moffatt, (1990) F.C.J. No. 422; General Foods v. Struthers, *[1974] S.C.R. 98*). These guidelines have been well summarized by Dubé J. in White v. E.B.F., (2001) F.C.J. No. 1073:

1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
2. Would the stay work an injustice to the plaintiff?
3. The onus is on the party which seeks a stay to establish that these two conditions are met.
4. The grant or refusal of the stay is within the discretionary power of the judge.
5. The power to grant a stay may only be exercised sparingly and in the clearest of cases.
6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?
7. What are the possibilities of inconsistent findings in both Courts?
8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction.
9. Priority ought not necessarily be given to the first proceeding over the second or, vice versa.

28 As we noted earlier, it appears that the main reason the applicants opted for the Superior Court was the fact that they thought they could obtain a provisional injunction more readily in that Court than in the Federal Court. That was certainly their right. They have now obtained that injunction, provisional then interlocutory, which would continue to be in effect while the Federal Court proceeding is under way. It is thus hard to see what prejudice CHIC and CONTOUR would suffer, apart from the fact that they may have to proceed in both cases rather than in one, with the risks of contradiction that would entail, and to which we will return below.

29 For its part, the plaintiff/respondent alleged that it would suffer serious prejudice if it was prevented from asserting its rights in the Federal Court, since only that Court could rule on the actual validity of the patent and dispose of it at a national level, while the Superior Court judgment would only be valid between the parties and in Quebec. Additionally, counsel for SAFILO went on, the Superior Court could decide not to rule on the validity of patent 714 E, thereby leaving that question open, and not enabling SAFILO or other manufactures to determine clearly whether they should take this patent into account in future product development. Moreover, it was because there was no identity of cause and object that the Quebec Court of Appeal concluded that there was no lis pendens in the case at bar.

30 To meet this difficulty, counsel for CHIC and CONTOUR referred the Court to the solution adopted in Apotex Inc. v. Astrazeneca Canada Inc. (*[2003] 4 F.C. 826*, affirming the trial judgment at *[2003] F.C.J. 149*; leave to appeal denied in the Supreme Court). In that case, very similar to the one at bar apart from the fact that the Copyright Act was at issue, Astrazeneca initiated an action in Ontario for a judgment declaring that it held the copyright to certain product monographs and seeking indemnity for infringement. It also claimed an interlocutory injunction or summary judgment. A few days later, Apotex filed an action in the Federal Court seeking a judgment that no copyright subsisted as well as an order striking the Astrazeneca copyright registrations. Malone J.A., for the Federal Court of Appeal, ruling on a motion to stay the proceeding regarding the action brought in the Federal Court, affirmed the orders made by the prothonotary and subsequently by the Federal Court Trial Division and allowed the motion.

Compulife Software Inc. v. Compuoffice Software Inc., [1997] F.C.J. No. 1772

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

Wetston J.

Heard: November 10, 1997

Judgment: December 17, 1997

Court File No. T-1398-97

[1997] F.C.J. No. 1772 | *[1997] A.C.F. no 1772* | *143 F.T.R. 19* | *77 C.P.R. (3d) 451* | *76 A.C.W.S. (3d) 1003* | *1997 CanLII 5905*

Between Compulife Software Inc., applicant, and Compuoffice Software Inc., respondent

(7 pp.)

Case Summary

Trademarks, Names and Designs — Trademarks — Practice — Stay of proceedings — Grounds — Concurrent expungement and infringement proceedings.

Application by the respondent Compuoffice for a stay of proceedings of the Compulife's application for expungement of its registered trade-mark. In the alternative, Compuoffice sought an order joining the two proceedings. Compuoffice argued that Compulife had brought an action in infringement regarding the same trade-mark. Compulife submitted that the infringement action was wider in scope than the expungement proceeding and the infringement action preceded the expungement application.

HELD: Application dismissed.

Compuoffice failed to establish that it would be prejudiced if no stay were granted. Additionally, the expungement application would resolve the issue of registrability thereby simplifying the infringement action. The expungement application was likely to be heard before the infringement action went to trial. It was clear moreover that Parliament intended to provide a separate right of access to the courts to dispute the registration of trade-marks. The same tests were applied to the application for joinder, which failed as well.

Statutes, Regulations and Rules Cited:

Federal Court Act, s. 50(1).
Federal Court Rules, Rules 419, 1714.

Compulife should simply amend its statement of claim to address the issue of the validity of that registration, rather than proceed with a duplicitous application for expungement.

8 Compuoffice submits that the infringement action is wider in scope than the expungement proceeding, so as to completely address, among other things, the issue of the validity of the registration of the marks in question. Moreover, Compulife's infringement proceedings preceded the expungement proceeding. Accordingly, Compuoffice argues that the Court should exercise its discretion to grant a stay since these multiple proceedings launched by Compulife are vexatious and an abuse of process, and therefore, not in the interests of justice.

9 Finally, Compuoffice argues that, if no stay is granted, in the interest of judicial economy, the two proceedings should be joined, under Rule 1714 of the Federal Court Rules, since to do so would not prejudice the parties: Gund Inc. v. Ganz Bros. Toys Ltd. *(1990), 29 C.P.R. (3d) 55* (F.C.T.D.) at 57.

10 Compulife argues that a stay should not be granted since the applicant has not established that the continuation of the s. 57 proceeding would prejudice or cause injustice to the defendant; or that a stay would not prejudice the plaintiff. It is submitted that the Court should exercise its discretion to stay sparingly, and only where there is a risk of imminent adjudication in two different forums. Therefore, Compulife submits that Compuoffice has failed to demonstrate that the expungement proceedings are prejudicial or would cause them an injustice. Compulife also submits that this same test applies to the motion for joinder: Mon-Oil Ltd. v. Canada *(1989), 27 F.T.R. 50* at 51.

11 Compulife further argues that Parliament intended that a process be available whereby the issue of registrability could be determined on a summary basis, in addition to any remedy which may be sought for infringement. It did so by way of s. 57 of the Act. Moreover, the Federal Court Rules provide for a more expedited proceeding, involving the exchange of affidavit evidence and examinations. Compulife argues that it should not be denied its statutory right to proceed under s. 57, at this time. To do so would also prevent it from moving forward the proceedings before the Ontario Ministry of Consumer and Commercial Relations.

12 Compulife submits that the expungement application should proceed, in order to resolve the issue of registrability of the marks in question , thereby simplifying the infringement action. While it would not completely resolve the action, because issues of causation and damages, as well as satisfaction of the requirements for an injunction, would nonetheless need to be determined, a s. 57 determination would expedite the trial issues.

13 Compulife submits that it will also discontinue its claim, in its defence to the Compuoffice counter-claim, that the "ACROSS THE BOARD" mark is invalid, if a stay is not granted in respect of the expungement application. It will do so in the interest of avoiding unnecessary duplication in adjudication.

14 I could find no authority in this court that has considered whether to grant a stay proceedings where both the action for infringement and the application for expungement are in the Federal Court. However, a stay of an expungement proceeding in the Federal Court was not granted, notwithstanding that an infringement proceeding, based on identical marks, and also containing a claim of invalidity, was underway in a provincial superior court: Association of Parents Support Groups v. York *(1987), 14 C.P.R. (3d) 263* (F.C.T.D.).

15 It is well established that a stay of proceedings should not be granted unless it can be shown that (1) the continuation of the action would cause prejudice or injustice, not merely inconvenience or additional expense, to the defendant, and (2) that the stay would not be unjust to the plaintiff. The onus is on the party requesting the stay to prove that these conditions exist: Discreet Logic Inc. v. Canada (Registrar of Copyrights) *(1993), 51 C.P.R. (3d) 191* (F.C.T.D.) at 191. In this case, Compuoffice has failed to demonstrate that continuation of the expungement proceeding would result in such prejudice or injustice. I am of this opinion despite the very thorough and able arguments of Compuoffice's counsel.

16 The Court will exercise its discretion to grant a stay, under s. 50(1) of the Federal Court Act, only in the clearest of cases. In consideration of whether granting a stay would be unjust to the plaintiff or applicant, this Court will be

reluctant to interfere with any right of access, unless there is a risk of imminent adjudication in two different forums: Canadian Olympic Association v. Olympic Life Publishing Ltd. *(1986), 8 C.P.R. (3d) 405* (F.C.T.D.) at 407-408; Discreet Logic, supra; York, supra.

17 In the case before me, the parties are still in the process of exchanging amended pleadings, having not even proceeded to the discovery stage in the infringement action. As such, the expungement proceeding is likely to be heard and disposed of before the infringement action goes to trial. The expungement proceeding will result in a decision in rem concerning the validity of the registered marks, which should, to some extent, narrow the issues in the infringement proceeding: Keramchemie GMBH v. Keramchemie (Canada) Ltd. *(1993), 50 C.P.R. (3d) 289* (Proth.).

18 The expungement proceeding involves a decision in rem concerning the registrability of the marks in question, while the infringement proceeding involves a decision in personam concerning the use of such marks, and the damages, if any, that result: Gainers Inc. v. Robin Hood Multifoods Inc. *(1996), 67 C.P.R. (3d) 349* (F.C.T.D.) at 355; Canadian Olympic, supra. Moreover, an expungement proceeding is summary in nature, whereas an action is not.

19 It is clear that in enacting s. 57 of the Trade-marks Act, Parliament intended to provide a separate right of access to this court, to dispute the registration of trade-marks under the Act. To grant a stay of such proceedings is to limit access to this Court that is provided by statute. In order to justify a stay, the party seeking the stay must not merely demonstrate that the stay is required on a balance of convenience, but that it is in the interest of justice that one should be granted: Dominion Mail Order Products Corp. v. Weider *(1976), 28 C.P.R. (2d) 27* (F.C.T.D.) at 30.

20 It would appear that recent jurisprudence has not favoured use of a balance of convenience test in considering the issuance of a stay: Sanwa Tekki Corporation v. Pacific Scientific Co. *(1984), 3 C.I.P.R. 154* (F.C.T.D.) at 155; Jordan & Ste-Michelle Cellars Ltd. v. Anders Wines Ltd. *(1979), 45 C.P.R. (2d) 189* (F.C.T.D) at 193; Inline Fiberglass Ltd. v. Omniglass Ltd. *(1993), 48 C.P.R. (3d) 214* at 215 (A.S.P.). The current approach, with which I agree, suggests that a stay should be granted to avoid the risk of conflicting adjudications, not overlapping proceedings: 94272 v. Moffatt, *[1990] F.C.J. No. 1013* (Q.L.)(F.C.T.D.).

21 Compuoffice has requested, in the alternative, that two paragraphs contained within the originating notice of motion be struck under Rule 419 of the Federal Court Rules. This Court does not have authority under Rule 419 to strike out any portion of an originating notice of motion: David Bull Laboratories v. Pharmacia Inc., *[1995] 1 F.C. 588* (F.C.A.) at 594.

22 Compuoffice has also requested, in the alternative, that the application for expungement be joined with the action for infringement. However, the same standard that applies to a motion for a stay of proceedings applies to a motion for joinder: Mon-Oil, supra. As Compuoffice has failed to demonstrate that it would suffer any injustice or prejudice, should the application be allowed to proceed, joinder with the action is not appropriate. In my opinion, Gund, supra, is distinguishable because it involved the joinder of two actions, one for infringement of industrial design registration, and the other for copyright infringement and statutory passing-off, not joinder of an action for infringement and an application for expungement.

23 The motion shall therefore be denied, except that Compuoffice shall be granted an additional 40 days from the date of this Order, in order to file its reply and affidavit evidence concerning Compulife's application for expungement under section 57 of the Trade-marks Act. I have allowed ten (10) days longer than requested since the date of this Order is approaching the holiday season.

24 With respect to the costs of this motion, they should be considered by the judge hearing the application for expungement.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140501

Docket: A-95-14

Citation: 2014 FCA 112

Present: STRATAS J.A.

BETWEEN:

JANSSEN INC.

Appellant

and

ABBVIE CORPORATION, ABBVIE DEUTSCHLAND GMBH & CO. KG AND ABBVIE BIOTECHNOLOGY LTD.

Respondents

Heard at Toronto, Ontario, on April 29, 2014.

Order delivered at Ottawa, Ontario, on May 1, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

[14] I disagree. All three questions must be answered in the affirmative. Put another way, Janssen must establish all three requirements. I offer three reasons for this conclusion.

– I –

[15] Although in the leading case of *RJR-MacDonald* the Supreme Court is not explicit on the issue, it seems to regard an affirmative answer to all three questions to be essential for relief.

[16] Certainly that is the position in this Court: *Chinese Business Chamber of Commerce v. Canada*, 2006 FCA 178; *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 33.

[17] This Court is bound by these earlier authorities unless it is persuaded that they are "manifestly wrong": *Miller v. Canada (Attorney General)*, 2002 FCA 370. I have not been so persuaded.

– II –

[18] Janssen cites some authorities in support of its submission: *Domco Industries Ltd. v. Armstrong Cork Canada Ltd.*) (1981), 56 C.P.R. (2d) 198 (Fed. T.D.); *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.); *Longley v. Canada (Attorney General)*, 2007 ONCA 149. All are distinguishable. *Domco* and *International Corona*

predate *RJR-MacDonald*. *Longley* concerns the specific wording of an Ontario Rule different from any existing in the *Federal Courts Rules*.

– III –

[19] Each branch of the test adds something important. For that reason, none of the branches can be seen as an optional extra. If it were otherwise, the purpose underlying the test would be subverted.

[20] The test is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing: *Mylan Pharmaceuticals ULC v. AstraZeneca Inc.*, 2011 FCA 312 at paragraph 5. The binding, mandatory nature of law – which I shall call "legality" – matters. Indeed, it is an aspect of the rule of law, a constitutional principle: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58.

[21] Therefore, a suspension or stay should be granted only after all three branches of the test, with their associated policies, favour a temporary suspension of legality.

[22] I shall illustrate this by examining the policies under each branch. Usefully, this also summarizes the law I must apply on this motion.

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal . . . .

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. *Summary*

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. Le statu quo

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

Federal Court | Cour fédérale

Date: 20101112

Dockets: T-1016-09, T-1025-09

Citation: 2010 FC 1135

Ottawa, Ontario, November 12, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

T-1016-09

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

ATTORNEY GENERAL OF CANADA (REPRESENTING SOCIAL DEVELOPMENT CANADA, TREASURY BOARD OF CANADA, AND PUBLIC SERVICE HUMAN RESOURCES MANAGEMENT AGENCY OF CANADA), AND RUTH WALDEN ET AL.

Respondents

AND BETWEEN:

T-1025-09

RUTH WALDEN et al.

Applicants

and

ATTORNEY GENERAL OF CANADA, CANADIAN HUMAN RIGHTS COMMISSION, ANN BOYLAN CURRIE LOUISE DUNCAN, CHARLENE DYKSTRA, DZIDRA GOOR (Deceased), CARRIE GRONAU, JEAN HALPENNY, MARLENE HARRISON, MARY LOU KIGHTLEY, SUZANNE MATAIS, MARGARET MEESTER, ANNE NOLET, SUSAN PETTERSONE, JAMES (JIM) ROBERTS, ANDREA TAYLOR, MICHELLE WATSON, ANNETTE WETHERLY

Respondents

[72] The Attorney General argues that the Tribunal rightly concluded that awards of pain and suffering cannot be made *en masse* based on representative evidence, but, rather, must be made based on evidence of individual complainants.

[73] I disagree. The Tribunal held that it could not award pain and suffering damages without evidence that spoke to the pain and suffering of individual claimants. This does not, however, mean that it necessarily required direct evidence from each individual. As the Commission noted, the Tribunal is empowered to accept evidence of various forms, including hearsay. Therefore the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[74] In the Interim Decision, the Tribunal indicated that the evidence that had been given was sufficient to demonstrate pain and suffering for all, and so asked for a list of complainants and their length of service. This implied that the Tribunal would calibrate the pain and suffering awards to the length of each complainant's service. In this case, there was evidence before the Tribunal from Ms. Walden regarding the pain and suffering that she and other medical adjudicators suffered, which Ms. Walden testified resulted from the workplace environment and feelings of mistrust and under-appreciation that stemmed from the discriminatory classification practice.

[75] It is for the Tribunal to weigh the evidence before it. It is open to the Tribunal to require more evidence from the applicants regarding their pain and suffering. It is not appropriate at this

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 36
Date: November 7, 2017
File No.: T1873/10312

Between:

Kouroush Alizadeh-Ebadi

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Decision

Member: Edward P. Lustig

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I. Background

[1] Mr. Kouroush Alizadeh-Ebadi filed a complaint with the Canadian Human Rights Commission (the Commission) dated May 30, 2010 against Manitoba Telecom Services Inc. (MTS), alleging that it had discriminated against him while he was employed by MTS between mid-2001 and April 2009 on the prohibited grounds of race, national or ethnic origin and religion under section 3(1) of the *Canadian Human Rights Act* (*CHRA*) by engaging in the discriminatory practices of adverse differentiation and harassment that he described in his complaint, contrary to sections 7(b) and 14(1)(c) of the *CHRA*.

[2] Sections 3(1), 7(b), 14(1)(c), 41(1)(e), 49(1) and (2), 50(1), 53 and 65(1) and (2) of the *CHRA* are relevant to this case and provide as follows:

> **Prohibited grounds of discrimination**
> 3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> **Employment**
> **7** It is a discriminatory practice, directly or indirectly,
> **(b)** in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination.
>
> **Harassment**
> **14 (1)** It is a discriminatory practice,
> **(c)** in matters related to employment,
> to harass an individual on a prohibited ground of discrimination.
>
> **Commission to deal with complaint**
> **41 (1)** Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
> **(e)** the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Request for inquiry

49 (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

Chairperson to institute inquiry

(2) On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members.

Conduct of inquiry

50 (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

Complaint dismissed

53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

Acts of employees, etc.

65 (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

Exculpation

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[3] By its letter dated October 5, 2012, the Commission requested the Canadian Human Rights Tribunal (the Tribunal) to institute an inquiry into the complaint under s. 49 of the *CHRA*.

[4] The hearing of the case was originally scheduled to start in Winnipeg on the morning of June 18, 2014. The day before the hearing was to start, Mr. Alizadeh-Ebadi

filed an amended Statement of Particulars to add new language to paragraph 17 of his Statement of Particulars that had been filed on June 12, 2013. The new language specifically referred to the prohibited ground of disability, which was not previously cited by Mr. Alizadeh-Ebadi in his complaint. It covered a new allegation not included in his complaint alleging adverse differentiation on the basis of "race and prior history of disability", through the failure by MTS to accommodate Mr. Alizadeh-Ebadi with a gradual return to work program, as a result of injuries sustained in a car accident that was not his fault outside of the workplace in 2007, that resulted in him being away from work until 2009.

[5] This proposed amendment was objected to by MTS, on a preliminary basis, at the outset of the hearing on June 18, 2014. MTS submitted that this allegation and the ground of disability was not mentioned in Mr. Alizadeh-Ebadi's complaint and, as such, was not investigated by the Commission and therefore was not part of what was referred by it to the Tribunal for an inquiry. MTS submitted that it was therefore not properly before the Tribunal for adjudication as part of the inquiry into the complaint requested by the Commission.

[6] A recess took place to allow the parties to discuss this matter further with each other. After resuming the hearing later that morning Mr. Alizadeh-Ebadi, on consent of MTS, requested an adjournment of the case to allow him to return to the Commission for the purpose of requesting the Commission to consider a further complaint respecting the new allegation referred to in the proposed amendment to paragraph 17, including the prohibited ground of disability. I granted Mr. Alizadeh-Ebadi's request for an adjournment *sine die*.

[7] A letter was sent to the Tribunal by counsel for Mr. Alizadeh-Ebadi dated November 7, 2014 respecting the status of the case. In the letter counsel stated that Mr. Alizadeh-Ebadi "...has filed an additional complaint with the Canadian Human Rights Commission ("CHRC") relating, *inter alia*, to allegations that MTS discriminated against him on the basis of a disability..." The letter referred to the fact that the Commission was reviewing the matter in relation to the possible application of section 41(1)(e) of the *CHRA* and that an

investigation by the Commission of the additional complaint would only occur if the section 41 issue was resolved.

[8] Subsequently, the Commission decided not to deal with the additional complaint of Mr. Alizadeh-Ebadi, on the basis that it was out of time under section 41(1)(e) of the *CHRA*. As such, the additional complaint was not investigated or referred to the Tribunal for an inquiry. There was no judicial review of the Commission's decision to not deal with the additional complaint. Following the Commission's decision, Mr. Alizadeh-Ebadi filed a re-amended Statement of Particulars removing from paragraph 17, as amended, the language referring to the new allegation and the prohibited grounds of both race and disability related thereto. The three versions of Paragraph 17, in Mr. Alizadeh-Ebadi's original Statement of Particulars, in his proposed Amended Statement of Particulars, and in his Re-amended Statement of Particulars read as follows:

> **1. Original Statement of Particulars**
>
> Between 2007 and early 2009, the Complainant was on an extended sick leave arising out of a serious motor vehicle accident that was not his fault. While he was away, his then TEAM leader, Brenda Coutts, removed his computer without saving the contents of the computer on a compact disk. When the Complainant expressed his dissatisfaction with this upon his return to work, Ms. Coutts told him "shit happens - suck it up". When he took issue with this response, Ms. Coutts replied that he was "bordering on insubordination." She later apologized for her comments.
>
> **2. Proposed Amended Statement of Particulars**
>
> Between 2007 and early 2009, the Complainant was on an extended sick leave arising out of a serious motor vehicle accident that was not his fault. MTS required that the Complainant only return to work after he had fully recovered from the accident. MTS would not permit a gradual return to work or any other meaningful accommodation. This treatment by his supervisors, including Wayne Horseman and Brenda Coutts, was different than the treatment provided to other employees returning to work from a leave of absence which the Complainant attributes to his race and prior history of disability. While he was away, his then TEAM leader, Brenda Coutts, removed his computer without saving the contents of the computer on a compact disk. When the Complainant expressed his dissatisfaction with this upon his return to work, Ms. Coutts told him "shit happens - suck it up". When he took issue with this response, Ms. Coutts replied that he was "bordering on insubordination." She later apologized for her comments.

> **3. Re-amended Statement of Particulars**
>
> Between April 26, 2007 and February 2009, the Complainant was on an extended sick leave arising out of a serious motor vehicle accident that was not his fault. From June 2007 to February 2009 this absence was without pay from MTS. The Complainant received income replacement indemnity benefits from Manitoba Public Insurance Corporation ("MPI") from May 3, 2007 until April 11, 2008, Throughout the Complainant's absence from MTS, the Return to Work Coordinator, Des Hathaway, and MTS exchanged communication with respect to the Complainant's return to the workplace. While he was away, his then TEAM leader, Brenda Coutts, removed his computer without saving the contents of the computer on a compact disk. When the Complainant expressed his dissatisfaction with this upon his return to work, Ms. Coutts told him "shit happens - suck it up". When he took issue with this response, Ms. Coutts replied that he was "bordering on insubordination." She later apologized for her comments.

Further, it should be noted that Part B of Mr. Alizadeh-Ebadi's original Statement of Particulars was never amended and has always read as follows, without any reference to the prohibited ground of disability:

> **B. Complainant's Position on Legal Issues**
>
> **1. Did MTS fail to provide a harassment free work environment?**
>
> The Complainant's position is that MTS failed to provide a harassment free work environment.
>
> **2. Did the Complainant receive adverse differential treatment which adversely impacted his career at MTS?**
>
> The Complainant asserts that he was treated in a differential manner on the basis of his race, national/ethnic origin and religion and that his career was therefore adversely impacted.

[9] The hearing was resumed and held in Winnipeg during the weeks of August 2nd and November 7th, 2016; and during the week of February 13th, 2017, and on May 19th, 2017. The evidence phase of the hearing was completed on February 17th, 2017. On May 19th, 2017 the parties made oral arguments, having agreed to exchange with each other and file with the Tribunal their written arguments on May 15th.

II. Facts

[10] Mr. Alizadeh-Ebadi self identifies as an ethnic Azerbaijani (Azeri) Turk. He was born in the City of Urmia in the Province of West Azerbaijan, in Iran. His religious background is Islam. While in Iran he and his family were persecuted by the Farsi majority on account of his Turkish ethnicity. He moved from Iran to Turkey when he was 19 years old. In 1989 he moved to Canada and became a Canadian citizen in 1992.

[11] Mr. Alizadeh-Ebadi was hired by MTS in March of 2000 as a co-op student from the University of Manitoba. He was initially hired to a term position and thereafter became a full time employee of MTS, working in its Corporate Information Systems department (CIS) later renamed the Information Technology Service Management department (ITSM). From March 2000 to December 2000 Mr. Alizadeh-Ebadi worked as a Local Area Network (LAN) Administrator. From December 2000 to April 2001 he was a Technical Support Representative. From April 2001 to July 2009 he was an Information Services Specialist, later renamed a Client Support Specialist (CSS) "tier 2". At all material times, he was the only Muslim in the ITSM department but there were employees of various races, ethnicities and religions there then. At all material times Mr. Alizadeh-Ebadi was a member of the Telecommunications Employees' Association of Manitoba (TEAM).

[12] In the "tier 2" CSS role Mr. Alizadeh-Ebadi provided support to MTS employees experiencing more complex problems with their computers than could be handled at the Service Desk by the front line "tier 1" CSSs.

[13] Mr. Alizadeh-Ebadi had a car accident outside of work in November of 2001 that was 100% not his fault. As a result of the injuries he sustained he was off work until January of 2002 and was then on a graduated return to work program, for the most part working half days, until May of 2003 when he returned to regular work hours.

[14] Mr. Alizadeh-Ebadi had another car accident outside of work that was also 100% not his fault in April of 2007. As a result of the injuries he sustained in this accident he was off work until he returned to work on February 23, 2009. Mr. Alizadeh-Ebadi was not on a graduated return to work program following this accident. From June 2007 to February

2009, this absence was without pay from MTS but Mr. Alizadeh-Ebadi did receive income replacement benefits through the Manitoba Personal Injury Protection Plan.

[15] After he returned to work he became ill on March 23, 2009 and, as a result, was off work on a leave of absence for illness until he resigned from MTS as at July 25, 2009.

[16] MTS was acquired by BCE Inc. in March of 2017 before the last week of the hearing and is now known as Bell MTS. It is the primary telecommunications company in Manitoba and employs several thousand employees in Manitoba.

[17] There is a series of events (the Events) during Mr. Alizadeh-Ebadi's career at MTS from about 2001 until 2009 that evidence was presented about at the hearing that Mr. Alizadeh-Ebadi feels establishes that MTS engaged in the discriminatory practices against him on the prohibited grounds, as alleged in his complaint. In his view, these Events ultimately caused him to suffer anxiety, nervousness and depression that resulted in him resigning from MTS, as of July 25, 2009.

[18] Fourteen witnesses, who were all employees or former employees of MTS at some time during Mr. Alizadeh-Ebadi's career with MTS, testified at the hearing about these Events. The witnesses were as follows: For Mr. Alizadeh-Ebadi, in addition to himself, Neil Wyrchowny, Ernest Desmarais, Qwin DeBrant and Ryan Bird testified at the hearing. For the Respondent, David Atwell, Stephen Grant, Glen Fryatt, Ryan Workman, Brenda Coutts, Brian Elliott, Rejean David, Caroline Taylor and Don Rooney testified.

[19] Each of the Events are described by the following descriptive captions below, and will be elaborated on in further detail herein:

1. Remarks made by David Atwell
2. Denial of a second computer
3. Denial of training requests
4. Use of the "nicknames" "Crash" or "Kourash"
5. Comments about Mr. Alizadeh-Ebadi's trips to Turkey and his work ethic
6. Relegation to service desk

7. Hostile work environment/TEAM meeting
8. Denial of Promotion to Senior Client Support Specialist position
9. Failure to provide accommodation for a disability through a gradual return to work program 2007-2009
10. Treatment on return to work in 2009
11. MTS Internal Investigation and Report

Event 1: Remarks made by David Atwell

[20] David Atwell was a Supervisor in ISTM in the Hardware and Software Distribution division during part of Mr. Alizadeh-Ebadi's career at MTS. He didn't actually directly supervise Mr. Alizadeh-Ebadi, as he directly supervised employees who worked in the Hardware and Software Distribution division that provided hardware support to employees of MTS. Mr. Alizadeh-Ebadi worked in the Workstation (Desktop) LAN Support division that, as stated, provided software support to computer users and was directly supervised by Neil Wyrchowny until 2003 and thereafter by Brenda Coutts (and by Brian Elliott in Brenda Coutts' absence) as his supervisors or "Team Leads".

[21] The two divisions, while separate, fell under one Director. During the early part of the period of the complaint until about 2003 the Director was Ken Barchuck. He was followed by Rob Pettit until about 2005 who was then followed by Wayne Horseman. The two divisions had various interactions with each other in serving the information system technology needs of MTS employees. David Atwell thus interacted in the workplace with Mr. Alizadeh-Ebadi and they communicated with each other, from time to time, for both work related reasons and for casual reasons, such as breaks in the cafeteria for coffee and meals. MTS had several workplace locations in Winnipeg and both Mr. Alizadeh-Ebadi and David Atwell moved between some of these workplaces during the term of this complaint.

[22] I accept the evidence at the hearing from Mr. Alizadeh-Ebadi and other witnesses that David Atwell made disparaging and offensive remarks to or about Mr. Alizadeh-Ebadi,

including remarks following the tragic events of the 9/11 terrorist attack, that suggested that Mr. Alizadeh-Ebadi was a member of Al-Qaeda and a terrorist.

[23] The exact words that were used, the frequency that the remarks were made, the duration that the remarks continued for and whether management of MTS was aware of them, were the subject of varying accounts given by different witnesses. A number of the witnesses testified that, as a great deal of time had elapsed since the events took place, it was difficult for them to remember some things with complete clarity or certainty.

[24] I find, on the evidence. that around the time of 9/11 and for a period thereafter, David Atwell made remarks in the workplace to or about Mr. Alizadeh-Ebadi along the lines of “Kouroush when are you going to show us your Al -Qaeda membership card?” (on several occasions); and “we better check Kouroush’s lunch to see if there is a bomb in there”; and “don’t get Kouroush angry or he will fly a jet into a building”; and that Kouroush was a “sleeper cell”; and that it would be best if “we bombed the Middle East back into the Stone Age”. In addition to David Atwell making these remarks directly to Mr. Alizadeh-Ebadi, some of these remarks were also made in front of other employees and were known by a number of employees to have been made by David Atwell.

[25] David Atwell claimed at the hearing that he didn’t remember making the remarks to Mr. Alizadeh-Ebadi described in paragraph 24 above, as a result of certain memory deficiencies. He admitted that if other witnesses who gave evidence at the hearing, such as Neil Wyrchowny, said that he had made some of those remarks (like the Al-Qaeda remarks in particular) that he probably did make those remarks. He also admitted that it was possible that he made some of the other remarks referred to in paragraph 24 above. He admitted that it was wrong for him to have made those remarks; that he understands that the remarks were hurtful to Mr. Alizadeh-Ebadi; and that he is sorry for having made the remarks and for hurting Mr. Alizadeh-Ebadi. He apologised to Mr. Alizadeh-Ebadi at the hearing as follows:

> “Mr. Ebadi, I know the things I said back then were hurtful and wrong. And I would like to apologize to you and I would like to sincerely ask for your forgiveness if you can find it. If you can’t, I completely understand that, but I would like to apologize to you personally for that time in my life and yours.”

After making the above apology at the hearing in examination in chief, he later also stated as follows in response to questions in his cross examination:

> "I admitted yesterday that the comments I made were inappropriate, were wrong, were hurtful. I stand by that apology and I hope that Kouroush can accept my apology. I hope that he can find it in his heart to forgive me at some point in his life, but again, I understand if he can't. I'm not disputing that that was wrong."

[26] MTS stated in its submissions that "MTS does not dispute that in the days following 9/11 and for a time thereafter that ended no later than 2003 (the "Impugned Period"), Mr. Atwell made inappropriate comments to Mr. Alizadeh-Ebadi based on his ethnicity. MTS does not dispute that such comments amount to harassment under the Act." Further it also stated that "...the reason that we have admitted harassment is because there are five or six comments about an Al-Qaeda card and I believe one about a bomb being brought to work by Mr. Alizadeh-Ebadi in the wake of 9/11, a very sensitive time. Those five or six comments at that time, constitutes harassment, we admit that. How far past that event, that is for the Tribunal to determine. We are not admitting anything further."

[27] I accept the evidence given at the hearing that for a period of time David Atwell also regularly made derogatory and belittling comments, some of which were racist, about other people in the workplace. These comments included doing work "on Indian time", suggesting laziness in relation to an employee who was First Nations and comments to a Mennonite employee suggesting hypocrisy in the Mennonite teachings and practices in relation to liquor consumption.

[28] There is no need to go into the further detail about the derogatory comments made by David Atwell about other people, as this case relates to Mr. Alizadeh-Ebadi, however, the facts are noted here for contextual purposes. David Atwell and many of the other witnesses at the hearing testified about his past inappropriate behaviour at MTS invoking descriptions of David Atwell as an "equal opportunity jerk" and a "junior high bully" who would then regularly making ethnic remarks and other negative comments in the workplace that he considered to be "jokes" as part of a "locker room" atmosphere that existed then at MTS.

[29] There was evidence from David Atwell and other witnesses that at that time he was loud, abusive and vulgar; that he would pick a target like Mr. Alizadeh-Ebadi and, if he got a rise, he would go after that person; and that he regularly made "jokes" about other people's ethnic backgrounds and race anywhere from 4 to 12 times a day. David Atwell stated in his evidence that he was then "blissfully unaware of what he was doing and how it was affecting his co-workers."

[30] In his evidence, David Atwell explained that he came from a military background. He was a member of the Canadian Army Reserves for 31 years. He retired as a Lieutenant Colonel in 2013. He was in command of the Fort Garry Horse Regiment in Winnipeg at the time of the 9/11 terrorist attack and trained and supervised many of the soldiers from Winnipeg who served in Afghanistan. He explained that his behaviour at MTS at the time of 9/11 and for a period thereafter, until he started to change with the help of mentoring by Wayne Horseman, was in part based upon this regimented military background and in part based upon personal problems he was having away from work and at home.

[31] I find, on the evidence, including Mr. Alizadeh-Ebadi's evidence, that the remarks by David Atwell referenced in paragraph 24 above were made because of Mr. Alizadeh-Ebadi's race, national or ethnic origin or religion and that they were serious, persistent and deeply hurtful to Mr. Alizadeh-Ebadi who complained about them to David Atwell and others.

[32] Neil Wyrchowny, who witnessed the "Al Qaeda membership card" remarks, told Mr. Atwell, at the time, that those remarks were completely inappropriate and that he shouldn't be making remarks like that. Mr. Atwell laughed off Neil Wyrchowny's admonition about his remarks and continued his negative behaviour for some time thereafter, despite knowing that Mr. Alizadeh-Ebadi objected to the remarks.

[33] Neil Wyrchowny did not report the "Al Qaeda" remarks to his supervisor Ken Barchuck or anyone else above him in management at MTS at the time because he felt that it would not make any difference if he did, given his view of management's indifferent attitudes about such things then.

[34] There was no evidence that any written complaint was made to MTS management concerning David Atwell's disparaging comments and behaviour towards Mr. Alizadeh-Ebadi prior to the internal complaint in 2009 that resulted in the Taylor internal MTS investigation discussed later in this decision, even though a number of Mr. Alizadeh-Ebadi's colleagues knew about the comments and knew that the comments were not appreciated by Mr. Alizadeh-Ebadi. There was evidence that management did discipline other employees, including Neil Wyrchowny, on occasions when they actually received written complaints about other employees' inappropriate behaviour that was contrary to MTS's Respectful Workplace Policy in effect at the time.

[35] There was, however, evidence that management of MTS knew or ought to have known about David Atwell's behaviour towards Mr. Alizadeh-Ebadi at the time the remarks were being made. In fact, David Atwell conceded in his cross examination that management "should have been aware". Stephen Grant, a credible witness called by MTS, testified that David Atwell's inappropriate actions "more than likely would have been known to management". Moreover, there was evidence that after Rob Pettit was replaced by Wayne Horseman in around 2005, Mr. Horseman mentored David Atwell in helping him to change his behaviour, suggesting that he knew that David Atwell's behaviour in the workplace needed to change. I accept the evidence from MTS' own witnesses that MTS knew or should have known about David Atwell's harassing behaviour towards Mr. Alizadeh-Ebadi at the time as well as his intolerant attitude toward him because of his race, national or ethnic origin or religion, long before the internal investigation in 2009 by MTS.

[36] I find on the evidence that it is probable that the frequency and persistence of hurtful comments and behaviour towards Mr. Alizadeh-Ebadi by David Atwell based on his race, national or ethnic origin or religion was not limited to one or two or three specific instances such as the Al-Qaeda/terrorist card comments. It was more frequent and persistent than that, particularly given David Atwell's own evidence about the frequency of his ethnic comments generally in paragraph 29 above, as well as Mr. Alizadeh-Ebadi and other witnesses' evidence about the frequency of comments to Mr. Alizadeh-Ebadi specifically.

[37] While the open, direct, explicit racist or ethnic remarks by David Atwell about Mr. Alizadeh-Ebadi being a member of Al Qaeda etc., as referred to in paragraph 24 above, appear to have stopped by sometime in 2003, I believe that David Atwell probably continued his bad behaviour to Mr. Alizadeh-Ebadi for some time after because at that time David Atwell was intolerant of his race, national or ethnic origin or religion.

[38] I believe that David Atwell, by his own admissions about his behaviour generally at that time regarding making ethnic "jokes" frequently in the workplace and based upon his apology at the hearing, was then a racist and did not change or discontinue his offensive remarks and behaviour to Mr. Alizadeh-Ebadi and others until some time later.

[39] Exactly when that change started to take place was not absolutely clear from the evidence. Mr. Alizadeh-Ebadi testified that the negative behaviour by David Atwell to him continued for a very long time after the events of 9/11 although he gave few specifics besides the racist comments referred to in paragraph 24 above and the Events involving David Atwell related to the denial of a second computer and the training on the Win2K project and the use of the name "Crash" or "Kourash" described later in this decision. There is no record of any racist comments by David Atwell either in the minutes of the TEAM union meeting in 2005, discussed later in this decision or in Mr. Alizadeh-Ebadi's comments about the workplace in his performance reviews (PP&Rs) that took place in 2004, 2005 or 2006.

[40] There was a change in circumstances organizationally around 2003 that limited the verbal interactions between the David Atwell and Mr. Alizadeh-Ebadi. Rob Pettit retired sometime in the first half of 2005 and was replaced by Wayne Horseman who began to mentor David Atwell to help him change his behaviour. One of Mr. Alizadeh-Ebadi's witnesses testified that the harassing behaviour by David Atwell to Mr. Alizadeh-Ebadi continued until 2010 but that does not seem to be possible. A number of witnesses for both sides place the date of the change in David Atwell's behaviour some time in around 2004. My sense is that as of that date, or sometime shortly thereafter, David Atwell stopped harassing Mr. Alizadeh-Ebadi.

[41] A number of witnesses who testified about how deplorable David Atwell's behaviour was during the earlier part of the term of this complaint also testified that David Atwell was now a changed person and doesn't behave the way he used to and hasn't for some time. This was also David Atwell's evidence about himself. It is to be hoped that his apology and his regret for his past behaviour towards Mr. Alizadeh-Ebadi as expressed at paragraph 25 above is genuine as is his claim that he is a changed person but still in the process of continuing to try to be a better person.

[42] There was no evidence that any other person at MTS made disparaging racial, ethnic or religious remarks to or about Mr. Alizadeh-Ebadi during his employment. Unfortunately, Mr. Alizadeh-Ebadi was hurt by the intolerant remarks he suffered at the hands of David Atwell, based upon Mr. Alizadeh-Ebadi's race, national or ethnic origin or religion. I accept the evidence of David Atwell and Stephen Grant, who were both MTS's own witnesses, concerning MTS' knowledge of David Atwell's behaviour at paragraph 35 above. That evidence relates to a period of time when no action was taken by MTS to stop David Atwell's behaviour to Mr. Alizadeh-Ebadi--well before the internal investigation of David Atwell's comments and behaviour by MTS in 2009.

Event 2: Denial of a second computer

[43] Soon after Mr. Alizadeh-Ebadi became a permanent employee in June of 2001 he requested a second computer to do various tasks including testing new software systems and doing research for MTS and for educational purposes to assist him in maintaining his important Microsoft Certified Systems Engineer Certificate (MCSE). The above noted testing and research tasks were more efficiently done on a separate computer from the computer he was using to do his essential work of responding to work orders ("tickets") to try to solve MTS employee computer problems. Many of the other CSS's had second computers for these purposes.

[44] A request for a second computer was made on Mr. Alizadeh-Ebadi's behalf by Neil Wyrchowny to David Atwell, who controlled the issuance of hardware including second computers. The request was in accordance with the proper protocol for such requests as

testified to by David Atwell --i.e. a request by the Team Lead. The request was for a used or recycled computer that was available, not for a new computer. MTS sold or disposed of its recycled computers but there were many at any time that were kept in storage pending sale or other disposal.

[45] David Atwell refused the request from Neil Wyrchowny and subsequent requests made by Mr. Alizadeh-Ebadi for a second computer. Various reasons were given for the refusal of the request to have a second computer, including directions from management to not provide second computers unless a solid business case was made and also to set an example.

[46] David Atwell testified that the business case was not provided in enough detail, although the evidence was that Neil Wyrchowny requested it for Mr. Alizadeh-Ebadi in an email to David Atwell for what appears to be a legitimate business reasons--maintaining his valuable MCSE certification.

[47] There were as many as 200-300 recycled computers in storage available at the time of the request. The evidence was that unlike Mr. Alizadeh-Ebadi, many of his co-workers simply took second computers from storage and used them without asking David Atwell and without encountering any problem. One witness testified the David Atwell had actually told him to “just...take one.” Neil Wyrchowny couldn’t remember anyone else actually being refused a second computer when requested by a supervisor.

[48] In my view, based on the evidence, the reasons for the refusal by David Atwell to issue the second computer at that time, are not convincing. I find that David Atwell’s refusal, when many others in Mr. Alizadeh-Ebadi’s position had recycled second computers for the same reasons he was requesting one, was at least, in part, a result of David Atwell’s intolerant thinking at the time about Mr. Alizadeh-Ebadi as a person because of his race, national or ethnic origin or religion, as borne out in the evidence about David Atwell’s behaviour towards Mr. Alizadeh-Ebadi at the time as described in Event I above.

Event 3: Denial of training requests

[49] This Event was considerably narrowed at the hearing to relate to David Atwell's refusal of a request on behalf of Mr. Alizadeh-Ebadi by his supervisor Neil Wyrchowny to be put Mr. Alizadeh-Ebadi on the "Win2K" project related Microsoft's then new software operating system.

[50] David Atwell agreed in evidence that he could have put Mr. Alizadeh-Ebadi on this project. This may have resulted in Mr. Alizadeh-Ebadi being entitled to a second computer. On the evidence, in my opinion, there does not appear to be any factually based rationale for the refusal of this request made on behalf of Mr. Alizadeh-Ebadi by his supervisor at the time, Neil Wyrchowny.

[51] In my opinion, David Atwell's refusal of this request is closely tied to his refusal of the request for a second computer explained above. This refusal by David Atwell, in my opinion, was based, in part, on David Atwell's intolerant attitude and behaviour at the time towards Mr. Alizadeh-Ebadi's because of his race, national or ethnic origin or religion. It was consistent with the inappropriate behaviour that David Atwell admitted to in his apology to Mr. Alizadeh-Ebadi referred to in paragraph 25 above.

Event 4: Use of the "nicknames" "Crash" or "Kourash"

[52] In June of 2001, before Mr. Alizadeh-Ebadi's first car accident, an email complimentary of his work was sent by one of his co-workers referring to his name as "Kurash". This may have been either a mistake or a play on his ethnic name but Mr. Alizadeh-Ebadi let his co-workers know that he didn't appreciate the name and it stopped for awhile.

[53] After his first car accident, when he was on graduated return to work, the name "Krash", or "Crash" or "Kourash" began to be used by various persons including David Atwell and others.

[54] The use of the “nicknames” was not appreciated by Mr. Alizadeh-Ebadi and he complained to his co-workers that he did not like their use of these names but they continued to be used intermittently during his career at MTS.

[55] The last use of the “nickname” was in the subject line of an email Glen Fryatt forwarded to him through Brenda Coutts on his return to work in 2009, concerning the loss of his administrative access identification explained later.

[56] Mr. Alizadeh-Ebadi testified that he felt that that use of the names made him a “laughing stock” and brought back bad memories of very serious and painful injuries he suffered in car accidents that were not his fault.

[57] Several witnesses at the hearing including Brenda Coutts, Glen Fryatt and David Atwell testified that in retrospect they understood that, as opposed to other “nicknames” used in the workplace that may have been lighthearted or even complimentary, these nicknames were not complimentary. They testified that in retrospect they could understand why Mr. Alizadeh-Ebadi would not want to be called those names as they were insensitive and inappropriate given his serious car accidents and injuries.

[58] Glen Fryatt testified that he apologized to Mr. Alizadeh-Ebadi in the hallway outside of the hearing for using the “nicknames”. Brenda Coutts testified that referring the Glen Fryatt email to Mr. Alizadeh-Ebadi with the subject line reference of “Kurash” was worthy of an apology. David Atwell testified that he “tried to stop” but it is not clear when this occurred.

[59] At all material times during the period of this complaint, MTS had a Respectful Workplace Policy in place. The “nicknames” might have offended the policy but there was no formal complaint made by Mr. Alizadeh-Ebadi or anyone else about them under this policy until the internal MTS complaint was made in 2009 prompting the Taylor investigation discussed later in this decision.

[60] I accept the evidence of the witnesses at the hearing that the use of the “nicknames” stemmed from Mr. Alizadeh-Ebadi’s driving and his car accidents and were not related to his race, ethnicity or religion. I also accept the fact that, as they related to his

car accidents from which he suffered serious injuries, that they were hurtful and unacceptable to Mr. Alizadeh-Ebadi to hear.

Event 5: Comments about Mr. Alizadeh-Ebadi's trips to Turkey and his work ethic

[61] In his complaint and Re-amended Statement of Particulars, the Complainant alleges that Brian Elliott made a number of negative and disparaging comments in the workplace about Mr. Alizadeh-Ebadi "faking" illness and taking trips to Turkey during his sick leave absences and about having a poor work ethic.

[62] The time period referred to in the complaint that these comments were made by Brian Elliott was after his first car accident and also specifically in the Fall of 2005. It was alleged by Mr. Alizadeh-Ebadi in his complaint that at that time another employee overheard Brian Elliott say that Mr. Alizadeh-Ebadi was "faking it and probably taking a trip to Turkey" when he was on sick leave.

[63] At the hearing there was evidence by several witnesses that Brenda Coutts also made disparaging and negative comments in the workplace suggesting that Mr. Alizadeh-Ebadi was faking injuries and taking trips to Turkey when he was on sick leave and questioning his work ethic and commitment to his job. Brian Elliott and Brenda Coutts both denied making these comments in their evidence.

[64] Brian Elliott admitted in evidence that he wasn't a "fan of Kouroush's work ethic" in the early years, even though he didn't supervise him and couldn't explain his rationale or impression for forming that opinion based on anything concrete.

[65] Several of Mr. Alizadeh-Ebadi's peers testified that there was a lot of gossip and chatter among his co-workers about a perception that Mr. Alizadeh-Ebadi was faking illness and taking trips to Turkey while he was on sick leave. There was evidence that, as a result of this perception, some of his peers resented Mr. Alizadeh-Ebadi because his sick leave absences resulted in them having to do more work and be under greater pressure to make up for his absence from work.

[66] There was no evidence presented that Mr. Alizadeh-Ebadi's absences from work for illness were in any way unjustified from a medical stand point or that his injuries from the car accidents were not real or that any trips he took to Turkey, including to visit his mother who was ill, were in any way illegitimate. Further, there was no evidence from his supervisors Neil Wyrchowny or Brenda Coutts that Mr. Alizadeh-Ebadi was a poor performer or had a poor work ethic. His performance reviews by Brenda Coutts were generally positive.

[67] There was conflicting evidence about this Event. On balance, I find Brian Elliott and Brenda Coutts' denials about having made these comments to be credible and more consistent and convincing than the accounts of this Event by others. Brian Elliott and Brenda Coutts did not appear to waiver in their evidence in this regard and in my opinion were credible in their denials.

[68] On the other hand, there was vagueness and inconsistency with respect to the evidence of others about who made the comments and when and where they were made. For example, Ryan Workman who Mr. Alizadeh-Ebadi claimed to have overheard the 2005 comments by Brian Elliott, could not recall in his evidence that this actually occurred. Neil Wyrchowny gave very vague evidence where he suggested that he only recently remembered such comments having been made by Brian Elliott but couldn't remember where or when. Neil Wyrchowny had told a Commission investigator years earlier that he didn't recall these comments.

[69] In any event, I can find no evidence that even if these comments were made that they would have been made in relation to Mr. Alizadeh-Ebadi's race, ethnicity or religion. There was no evidence presented that either of Brian Elliott or Brenda Coutts made racist, ethnic or anti-Muslim comments to or about Mr. Alizadeh-Ebadi. Nor am I able to infer that they were influenced by the racist comments made by David Atwell referred to in paragraph 24 above so as to discriminate against Mr. Alizadeh-Ebadi on the basis of his race, national or ethnic origin or religion.

Event 6: Relegation to Service Desk

[70] As noted above, there were two "tiers" of CSSs. Tier 1 CSSs worked at the "Service Desk" and attempted to solve problems encountered by computer users at the "front line" so to speak. If the problem couldn't be solved by the Service Desk it would be sent to the Tier 2 CSSs who would receive a "ticket" (i.e. work order) to attempt to solve the problem. As such, by and large, the more complex work was done by the Tier 2 CSSs and the perception was that the Service Desk was a "step down" for Tier 2 CSSs.

[71] The Complainant raised this matter in his complaint, referring to a period in 2005 where he alleged that Brenda Coutts, Brian Elliott and Rob Pettit were attempting to "shove" him into the Service Desk position but that it didn't happen as a result of efforts by his co-workers to prevent it. There was no mention of this matter in his Re-amended Statement of Particulars.

[72] At the hearing there was evidence that Mr. Alizadeh-Ebadi was one of several of the Tier 2 CSSs who took a turn at the service desk for several months.

[73] The suggested corporate purpose at the time of this initiative was to cross train CSSs to improve their experience and knowledge in order to better serve the users. However, it was also the evidence of some witnesses the that the people chosen first by MTS to do their stint on the service desk were those perceived to be on management's "shit list" and that this was punishment for poor performance and troublemaking.

[74] Brenda Coutts, who made the selection of who served on the service desk from her group, testified that Mr. Alizadeh-Ebadi was not in conflict with her at that time but he was one of the employees who did a turn for several months there.

[75] Although the matter was not grieved, it was clear that there were concerns and opposition expressed by a number of the employees affected by the service desk initiative. MTS terminated the initiative around 2005 in part, as a result of these concerns and opposition.

[76] It is to be noted that that both Mr. Alizadeh-Ebadi and another witness who did a turn on the service desk expressed the opinion that their experience on the service desk

was actually helpful. Further, the group that did their turns included employees who had no distinguishing protected characteristics.

[77] The evidence was that it was a group, not Mr. Alizadeh-Ebadi alone, who were chosen for this initiative. I am not able to find on the evidence that Mr. Alizadeh-Ebadi was sent to the service desk because of his race, national or ethnic origin or religion.

Event 7: Hostile Work Environment/TEAM meeting

[78] This is not an Event, as such, but rather relates to Mr. Alizadeh-Ebadi and other witnesses' perceptions about conditions in their department during the Rob Pettit period that some described as "toxic". It was not included as an item in either the complaint or in the Re-amended Statement of Particulars.

[79] On September 14, 2004 a meeting was held by Mr. Alizadeh-Ebadi and a number of his co-workers who were also members of TEAM. The Minutes of the meeting were part of the evidence at the hearing. A number of the employees who attended the meeting, including Mr. Alizadeh-Ebadi, Neil Wyrchowny, Stephen Grant, Ryan Workman, Qwin DeBrant, and Ernest Desmarais were witnesses at the hearing. According to the Minutes, the following items were raised with the TEAM Executive reps who also attended the meeting:

1. Job titles changes-combining pay scales

2. Acting assignments-selection and length

3. Selection and compensation for CSSs who were appointed as site primes for particular work location

4. Bullying-actively encouraged by Rob Pettit - "dog house" system of discipline for taking any contrary stand and then becoming a target-"favored" employees given job opportunities and opportunities to advance

5. Training-lack of relevant training and training given to "favored" people

6. Compensation differences

7. Innovation thinking not accepted

8. Unrealistic expectations for job performance

9. Different rules for BT&IT

10. Process driven not Client Driven-- Rob Pettit has an unchanging closed door policy

11. Lack of confidence in ITSM management team

12. Staffing issues-vacancies not filled or filled with “Acting” jobs resulting in “unbearable” stress levels

[80] Items 1 and 6 above were the only two items that were covered under the heading “Priorities” in the Minutes of the meeting.

[81] Mr. Alizadeh-Ebadi’s comments at the meeting were covered in the Minutes as follows: “New jobs (promotions-advancements) usually created as acting positions”

[82] None of the matters that were discussed at the meeting were grieved under the collective agreement with MTS. Brenda Coutts gave evidence that she became aware of the meeting and the Minutes after it was held and that management were probably aware of the items but that no follow up was taken by MTS to address any of the items other than to terminate the service desk rotation initiative.

[83] Ryan Workman testified that Brian Elliott told him not to grieve the service desk issue and “not to rock the boat”. Ryan Workman testified that after Rob Pettit retired the work atmosphere improved.

[84] There was evidence given Ryan Workman, who was a very credible witness, that at the time of the meeting, the conduct of some of the so called “Bad Dog Box” group that included him, Mr. Alizadeh-Ebadi and several others, may have been somewhat less than exemplary for doing things like taking longer lunches and other breaks than permitted.

[85] The Minutes and the evidence about the meeting clearly indicate that Mr. Alizadeh-Ebadi and his co-workers at the time were unhappy and frustrated about some of the conditions that existed arising out of actions or inactions by management of MTS-- in particular by the leadership of Rob Pettit.

[86] Mr. Alizadeh-Ebadi and some of his co-workers who gave evidence at the hearing felt that they were on a “shit list” of management and were not treated well or fairly as a result, leading to their perception that the atmosphere there then was “toxic”.

[87] None of the items described in paragraph 79 above, however, were particular to Mr. Alizadeh-Ebadi as opposed to the group of concerned employees, most of whom had no distinguishing protected characteristics. Nor were the matters specifically related to grounds specified in the complaint. As such, I do not feel that this Event establishes behaviour by MTS against Mr. Alizadeh-Ebadi based upon his race, national or ethnic origin or religion.

Event 8: Denial of Promotion to Senior Client Support Specialist (Site Prime) position

[88] In the various MTS locations or sites in Winnipeg that CSSs worked there were CSSs identified as “Site Primes” who, as the term implies, were ranked above the other CSSs. There was a pay differential for taking on this added responsibility and it was seen as a promotion. Prior to 2006, the positions were all established in an acting capacity. As such, the acting Site Primes had been appointed on the recommendations of Brian Elliott and Brenda Coutts, as the two Team Leads that supervised the acting Site Primes, not through a job competition process. Mr. Alizadeh-Ebadi served for two months in an acting Site Prime position to fill a temporary absence on one occasion but for the most part the incumbents were in the acting positions for much lengthier periods of time.

[89] In 2006 MTS decided to fill these positions on a permanent basis and opened a competition for the jobs of which there were six positions to be filled.

[90] Article 8 of the Collective Agreement between Team and MTS governs the posting and filling of vacant positions in the bargaining unit.

[91] MTS has a process that is to apply in job competitions. Pursuant to that process MTS:

a. posts the job vacancy in accordance with the Collective Agreement;

b. receives and assesses all applicants for the vacancy against the criteria identified in the particular posting;

c. pre-screens out those applicants whose applications indicate they do not possess the criteria set out in the job posting or whose attendance levels or work performance is unacceptable;

d. interviews those applicants whose applications indicate they meet the criteria in the job posting and have acceptable attendance levels and work performance;

e. awards the position.

[92] In 2006 Mr. Alizadeh-Ebadi, among others, applied to fill approximately six vacant Site Prime positions. To fill the vacancies MTS executed the process outlined in paragraph 91.

[93] Mr. Alizadeh-Ebadi met the criteria set out in the job posting and had acceptable attendance levels and work performance. As such, along with eight other applicants he was interviewed by a three person panel consisting of Brian Elliott, Brenda Coutts and Cathy Hanischuk-Morris, a Human Resources recruiting specialist whose duties included recruiting both internal and external applicants for vacancies. The panel interviewed applicants who were not pre-screened out of the process.

[94] Normally, MTS would use a three person panel consisting of the supervisor for the job vacancy, a “neutral” person from another department who was not involved with the job and an HR specialist to guide the process. Since the applicants for these particular six jobs were going to be supervised separately by both Brenda Coutts and Brian Elliott (three each), as the two Team Leads for these positions, it was decided by MTS that it would be more efficient to have both Team Leads on the panel and not use a neutral person from another department on the panel.

[95] Most, if not all, of the incumbent acting Site Primes, all of whom had been recommended for the existing acting positions by either Brenda Coutts or Brian Elliott, applied for the permanent positions and were granted interviews.

[96] The process involved the following:

a. The qualifications for the job description were prepared by Brian Elliott and Brenda Coutts based on an existing precedent for the Site Prime position;

b. In advance of the interviews, the interview questions were drafted, as was an interview key which indicated what constituted a good answer. There were two types of questions: technical and core competency. Brenda Coutts and Brian Elliott drafted the technical questions and answer and Cathy Hanischuk-Morris drafted the core competency question;

c. In advance of the interview, a scoring system based on 100 points was created, 5 points were allocated to the presentation of the interview, the remaining 95 points were allocated to responses to interview questions. Of those remaining points, approximately 60 percent were allocated to technical questions and 40 percent to core competency questions. Each question was allocated a maximum point value that varied from question to question. Brian Elliott and Brenda Coutts determined the point values for the technical questions. Cathy Hanischuk-Morris determined the point values for the core competency questions. In order to obtain the position the applicant would have to pass a pre-determined scoring threshold;

d. In advance of the interviews, Cathy Hanischuk-Morris instructed the panel that the same question had to be asked of each applicant in the same order by the same person and there was to be no prompting or other assistance given;

e. Cathy Hanischuk-Morris explained how the interview process would be conducted to each applicant immediately before the applicant started;

f. Each applicant's interview would be scored immediately after it ended and before the next applicant would be interviewed. All three members of the panel had equal input on the scoring of each individual question and the panel would come to a consensus on a score for each question. During the process the panel compared notes on how the applicant's answers compared to the answer key. A final score for the interview was arrived at by adding up all the individual scores;

g. Once all of the applicants were interviewed and scored, the panel met again to consider if the scoring adjustments were necessary. The purpose of this meeting was to ensure consistency in scoring throughout all of the interviews such that the applicants were not penalized for their scoring depending on when they were interviewed relative to other applicants;

h. Ultimately a final ranking of candidates was arrived at on the interview scores. Since there were six available Site Prime positions, the top six ranked applicants would be offered the positions, provided they passed the scoring threshold.

[97] Mr. Alizadeh-Ebadi was not offered a position. The positions were offered and accepted by the six acting Site Prime applicants. Rejean David was ranked 7th in the competition, Mr. Alizadeh-Ebadi was ranked 8th and Qwin DeBrant was ranked 9th. A number of months after the competition, a Site Prime vacancy opened up and MTS appointed Rejean David to fill the vacancy without a competition.

[98] The results of the job competition were not grieved and the documentation relating to the job competition, including documents showing what the actual interview scores were or how they were calculated was no longer available for the purposes of this inquiry.

[99] Evidence at the hearing about this Event was given by Mr. Alizadeh-Ebadi, Brenda Coutts, Brian Elliott and Don Rooney who was the MTS Director of Labour Relations, Safety and Environment at all material times and still holds that position.

[100] Mr. Alizadeh-Ebadi's evidence was that the competition was predetermined by Brenda Coutts and Brian Elliott to assist and advance their favourites--the incumbents whom they had appointed to the acting positions and were thereby placed in an advantageous position in the competition. Further, he felt that the decision was impacted by previous negative jokes and comments made about him by David Atwell and Brenda Coutts including those in reference to his trips to Turkey and his absences for work on sick leave and his work ethic.

[101] Mr. Alizadeh-Ebadi also questioned the process of not having a truly neutral third panel member involved rather than either Brenda Coutts or Brian Elliott who he claimed

didn't like him. Finally, he questioned the results in terms of his greater seniority over some of the successful applicants and in terms of his superior technical knowledge, education, and competence in comparison to some of the other successful applicants in his opinion.

[102] Brenda Coutts' evidence was that the process described in paragraph 96 above was strictly followed in this case and that despite there being no "neutral" person it was carried out exactly the same way as in previous competitions that she was involved in.

[103] Brenda Coutts' evidence was that while the incumbents likely had an advantage because of their experience in acting in the Site Prime positions for extended periods of time, the results of the competition were based entirely on the interview scores and not predetermined or based on any favouritism toward incumbents or upon the race, religion or ethnicity of any applicant. She testified that half the six successful applicants were visible minorities (two were Filipino and one was Aboriginal) and that two thirds of the applicants who were unsuccessful were Caucasian males.

[104] Specifically, Brenda Coutts testified that while Mr. Alizadeh-Ebadi's score met or exceeded the minimum threshold qualifying him to hold the position, his score was 8th out of the 9 applicants who were interviewed. She testified that while he scored well on the technical questions he did not score as well on the on the core competency questions.

[105] Brian Elliott's evidence corroborated Brenda Coutts' evidence. He also testified that the panel composition was dictated by HR. Further, he testified while that Cathy Hanischuk-Morris only scored the core competency questions as she was not familiar with the technical questions. Mr. Alizadeh-Ebadi performance was stronger on the technical questions than on the core competency questions. He testified that while Mr. Alizadeh-Ebadi was better than Rejean David on the technical side, Mr. David scored higher than Mr. Alizadeh-Ebadi in the interview. He testified that seniority played no role in the interview process and that he did not bring any biases about Mr. Alizadeh-Ebadi into the interview process.

[106] Don Rooney did not participate in the 2006 Site Prime job competition but he gave evidence about the process in general terms from an HR perspective. He confirmed that

the process for the 2006 competition was completely in conformity with the process for all other MTS competitions during the period from 1989 to 2015 across three bargaining units at MTS.

[107] Don Rooney testified that this was not the first time there was more than one hiring manager on a job completion. It happens in all three bargaining units at MTS where there are multiple vacancies that span across two managers. He was not aware that it had happened in a TEAM bargaining unit prior to 2006 but it has happened since. When there are two hiring managers with respect to a job competition the composition of the interview panel is each hiring manager and the HR person. This is dictated by the HR representative. It saves MTS resources to conduct job competitions in this manner rather than having more than one set of job competitions conducted for the same positions.

[108] I found the evidence of Brenda Coutts, Brian Elliott and Don Rooney to be very clear and consistent about this Event. I found all of these witnesses to be credible in their evidence about the Event. Their evidence was not contradicted, in my opinion, by anything presented by Mr. Alizadeh-Ebadi and did not leave me with any impression that the manner by which the process and interviews were handled was unfair or biased against Mr. Alizadeh-Ebadi in any way.

[109] I found Mr. Alizadeh-Ebadi's evidence to be self-serving and impressionistic about this Event. He didn't convince me that any of the applicants, including Rejean David, who were offered positions as a result of their performance on the interview were equally qualified or less qualified than he was but lacked the distinguishing feature which is the gravamen of his complaint.

[110] Mr. Alizadeh-Ebadi also testified at the hearing about his view that he was treated unfairly in not being assigned to acting Prime Site roles by Brenda Coutts other than the one time mentioned above. He testified that he felt that this was proof of a bias by Brenda Coutts against him as she made the appointments for the group of CSSs he was a part of who reported to her. He had cited "acting positions" as a problem during the TEAM meeting described in Event 7 above, although the Minutes on this are not specific. He said he felt that these acting opportunities that turned out to be long term improved the

actors' chances for training and moving up in the organization. In any case, it doesn't appear that he raised this issue with Brenda Coutts in any of his performance reports or with Neil Wyrchowny who he was very close with and who was the originator of the acting Site Prime positions. He was not able to identify an acting opportunity that went to anyone equally qualified or less qualified than him but lacking the distinguishing feature which is the gravamen of his complaint.

[111] Brenda Coutts testified that she was unaware of his concern in this regard and that after his acting turn she wrote very favourably to Wayne Horseman about that assignment and alluded to his good work in his next performance evaluation. She also testified that following his unsuccessful application for the permanent Site Prime positions he wrote an email about his disappointment and she spoke with him and counselled him to improve his skills that were lacking and to keep trying. Wayne Horseman also counselled him in the same way. Brenda Coutts testified that her choices of acting Site Primes were limited but were not based on race, ethnicity or religion. I believe she was credible in her evidence and accept that evidence for this Event.

Event 9: Failure to provide accommodation for a disability through a gradual return to work program 2007-2009

[112] As noted in paragraphs 4 to 8 inclusive above, this Event and the prohibited ground of disability was not included in Mr. Alizadeh-Ebadi's complaint or his Re-amended Statement of Particulars. The Commission decided not to deal with an additional complaint to cover this Event, filed by Mr. Alizadeh-Ebadi after the adjournment of this hearing on June 18, 2014. The additional complaint was therefore neither investigated or referred by the Commission to the Tribunal for an inquiry. The Commission's decision was not judicially reviewed. After the Commission's decision, Mr. Alizadeh-Ebadi removed language relating to this Event including both the prohibited grounds of race and disability from his proposed amended Statement of Particulars in a new re-amended Statement of Particulars. The Event is included herein as an Event, despite the foregoing, because after the evidence phase of the hearing had concluded, counsel for Mr. Alizadeh-Ebadi

included it in his written arguments filed and exchanged with MTS on May 15, 2017 and also in his oral arguments that were made on May 19, 2017.

[113] MTS provided a gradual return to work program for Mr. Alizadeh-Ebadi after his first car accident in 2001, as described in paragraph 13 above. MTS did not provide a gradual return to work program for Mr. Alizadeh-Ebadi after his second car accident, as described in paragraph 14 above.

[114] Des Hathaway was assigned by MTS in May 11, 2007 to Mr. Alizadeh-Ebadi as a Return to Work Coordinator from an outside independent firm. He was not called as witness at the hearing, although various correspondence and a summary of notes he kept during the period from 2007 to 2009 were attached to the Agreed Statement of Facts of the parties that was entered as an Exhibit at the hearing. These notes were not referred to at the hearing in any significant way.

[115] From the evidence at the hearing, it appears that on the direction of Wayne Horseman, Mr. Alizadeh-Ebadi was not provided a graduated return to work program until he was deemed to be 100% fit to return to work. However, there was scant evidence at the hearing of what actually transpired with respect to graduated return to work opportunities for Mr. Alizadeh-Ebadi at the time and his capacity and willingness to return on a graduated basis. Wayne Horseman was not called as a witness at the hearing nor were any medical practitioners, nor, as stated was Des Hathaway.

[116] Don Rooney, who was not involved in this Event, testified, in part, as follows:

> "No. I think in this case -- I mean I don't know -- I wasn't involved in this case back then, I wasn't involved in the decision-making process. From what I see, Mr. Horseman, who is no longer with the company, was allowed to say, 'I'm putting my foot down. We're not accommodating.' If that decision was brought up to Bill Kominsky for example, who I would think was looking after the accommodation piece at that time, he would have brought it to me and we absolutely would have said, 'Wayne Horseman, you're wrong. I know you have budgets to meet, but this is bigger than your departmental budget. You must accommodate him.'"

[117] Don Rooney also testified that MTS' practice during 2007 to 2009 was to accommodate employees who required a graduated return to work program from a disability.

Event 10: Treatment on return to work in 2009

[118] This Event captures number of incidents that occurred after Mr. Alizadeh-Ebadi's return to work on February 23, 2009 that he feels demonstrates that MTS was insensitive and unwelcoming to him as an employee who was returning to work after almost two years off because of serious injuries sustained in a car accident that was not his fault. He feels that this treatment is further evidence of discrimination.

(a) no Administrative Level Access provided

[119] On his first day back at work on February 23, 2009 Mr. Alizadeh-Ebadi discovered that he did not have full Administrative Level Access to all of the MTS systems. Such access was necessary in order for him to do his job. Mr. Alizadeh-Ebadi had to spend some time and effort to get this fixed. Brenda Coutts sent Mr. Alizadeh-Ebadi an email early that afternoon to confirm that Glen Fryatt had reset the access for him. The subject of her email was "Krash's Admin ID". Mr. Alizadeh-Ebadi felt that this reference was insensitive to him after suffering serious injuries and showed that MTS was not serious about his return to work.

(b) initial refusal of holidays for Turkish holiday of Nevruz

[120] As well, on his first day back to work on February 23, 2009 Mr. Alizadeh-Ebadi had a meeting with his supervisor Brenda Coutts who was not well that day but came in to work to meet with Mr. Alizadeh-Ebadi. A memo summarizing that meeting was prepared by Brenda Coutts and emailed to Mr. Alizadeh-Ebadi that day. The email included references suggesting that Mr. Alizadeh-Ebadi ask for assistance, if needed, with respect to lifting things; about the expectation that Mr. Alizadeh-Ebadi not request time off for the next two weeks during his retraining as such requests would not be approved; and that

Brenda Coutts would be away on holidays until March 16, 2009. Mr. Alizadeh-Ebadi was also informed by Brenda Coutts that he needed to take his 5 days of accumulated holidays before the end of April that year or they would be lost.

[121] On or about March 10, 2009 Mr. Alizadeh-Ebadi advised Brian Elliott, who was acting as his supervisor while Brenda Coutts was still on holidays, that he wished to book vacation on March 12 and 13, 2009 to observe the traditional Turkish cultural holiday of Nevruz, celebrating the New Year. Nevruz is the spring equinox that actually falls on or about March 21 but it is celebrated on four Wednesdays before the actual date none of which would have fallen on March 12 or 13 in 2009. There was some conflicting evidence between Mr. Alizadeh-Ebadi and Brenda Coutts about whether he had initially requested the days off for Nevruz or for a personal matter.

[122] Brian Elliott initially refused the request on the basis of his mistaken understanding that it was contrary to Brenda Coutts' directive about not requesting time off and also because it was too late in order to adequately deal with employee scheduling. A heated exchange of emails between Mr. Alizadeh-Ebadi and Brian Elliott ensued. Eventually, after elevating the refusal of the request, Wayne Horseman granted Mr. Alizadeh-Ebadi the holidays. After Brenda Coutts returned from her holiday she admonished Mr. Alizadeh-Ebadi in an email about the tone of his emails to Brian Elliott and Wayne Horseman.

[123] Mr. Alizadeh-Ebadi felt that the initial refusal was unreasonable and unfair and would not have happened but for his ethnicity. He felt it made him feel stressed and anxious about his return to the workplace.

(c) inadequate retraining

[124] As noted in paragraph 120 above, there was an expectation that there would be a period of retraining for Mr. Alizadeh-Ebadi when he returned to the workplace on February 23, 2009 after being away from work for so long.

[125] There was no formal retraining program put in place, rather Brenda Coutts expected that for the first two weeks, Mr. Alizadeh-Ebadi would "self-train" by asking his

Site Prime, Rejean David, questions and by taking “easy” tickets. While Brenda Coutts advised a number of CSS’ to be aware of Mr. Alizadeh-Ebadi’s return to work and to assist him she didn’t actually sit down with Rejean David and give him direction on her expectations.

[126] What occurred, from Mr. Alizadeh-Ebadi perspective, was that he was not given meaningful retraining despite needing help in technical matters as the world of technology changed so rapidly in the period of time that he was away from the workplace. He testified that Rejean David was not really available to him when he needed help and that, while he got some help from some of his colleagues, it was insufficient and showed MTS’ lack of interest in him. As a result he looked incompetent to his colleagues and the user community and he felt depressed.

[127] Rejean David, who was a very credible witness, testified that he did not receive any specific instructions from Brenda Coutts about a retraining program for Mr. Alizadeh-Ebadi. He testified that he was often too busy to answer questions but he also testified that he felt that when Mr. Alizadeh-Ebadi returned to work he seemed very withdrawn and unhappy. He also testified that the retraining given to Mr. Alizadeh-Ebadi was essentially the same that he had observed with other people coming back to work. He had a cubicle right beside Mr. Alizadeh-Ebadi and he testified that whenever he asked Mr. Alizadeh-Ebadi how things were going Mr. Alizadeh-Ebadi simply said he was “OK”.

[128] Brenda Coutts’ testimony with respect to this incident included the following:

i. she made arrangements for Mr. Alizadeh-Ebadi that were consistent with how Mr. Alizadeh-Ebadi, on a previous return to work from a disability and others returning from medical leave or being introduced or re-introduced into the workplace are treated; and

ii. she was unaware of a need to provide Mr. Alizadeh-Ebadi with any additional support or training as Mr. Alizadeh-Ebadi had never informed her of such a need and had left a message with Des Hathaway on March 3, 2009 that “MTS was being lenient and that he had no complaints” and had emailed Brian Elliott indicating that he had caught up quickly; and

iii. she had directed Rejean David to assist and mentor Mr. Alizadeh-Ebadi and had approached other peers of Mr. Alizadeh-Ebadi to assist and support him on his return to work; and

iv. she was told after she returned from her holidays by Rejean David and others that Mr. Alizadeh-Ebadi's transition was not as smooth as she had been led to believe but the information she received was that he wasn't engaging and seemed detached.

(d) loss of computer hard drive information

[129] When Mr. Alizadeh-Ebadi was away his computer was given to another employee. Typically, when an employee is absent for a prolonged period of time his or her computer is assigned to another employee but the contents of the hard drive are supposed to be stored on a compact disc so that when the employee returns he can access the data again. Normally the data goes back to the manager of the employee who returns it to the employee on his return. Some employees don't use the hard drive but store their data on a server but that was not the case for Mr. Alizadeh-Ebadi.

[130] Mr. Alizadeh-Ebadi's computer was reassigned in compliance with normal procedure but the contents of his hard drive were not stored on a compact disc, contrary to company policy. This deprived Mr. Alizadeh-Ebadi of important information both for professional and personal reasons and he was frustrated and upset by this.

[131] Brenda Coutts had given James Dondo another CSS the task of saving Mr. Alizadeh-Ebadi's hard drive information but, unknown to Ms. Coutts, Mr. Dondo failed to carry out this task. She did not follow up with him to retrieve Mr. Alizadeh-Ebadi's stored data on a disc until the request by Mr. Alizadeh-Ebadi on his return to work. After checking into this Ms. Coutts realized that the data had not been saved by Mr. Dondo on a disc as he was instructed to do.

[132] When Mr. Alizadeh-Ebadi raised this problem with Brenda Coutts, on the first day of her return to work from her holidays on March 16, 2009, a heated exchange of emails ensued. Initially after Mr. Alizadeh-Ebadi asked about it, Ms. Coutts responded that Mr. Dondo had not archived the data as he was supposed to. Mr. Alizadeh-Ebadi then sarcastically responded "Way to go ISTM" to which Brenda Coutts then responded "Suck it up...shit happens". Mr. Alizadeh-Ebadi then responded "…act like a lady if you don't

wanna act like a manager…" to which Brenda Coutts responded by warning Mr. Alizadeh-Ebadi "Careful you are bordering on insubordination. There is nothing I can do".

[133] Subsequently, on the same day Brenda Coutts and Mr. Alizadeh-Ebadi had a meeting where she apologised to him for her comments and Mr. Alizadeh-Ebadi claims he also apologised to her which Brenda Coutts denies. After the meeting, Brenda Coutts sent him an email summarizing the meeting which included her apology and acknowledgment to him that her comments were unprofessional and that she understood his frustration. She did not mention any apology from him to her. Further, the email went on to admonish him for his emails to her and his requests for vacation time while she was away. This made Mr. Alizadeh-Ebadi feel unwelcome again and that he was being discriminated against.

[134] Later that day after receiving Brenda Coutts' email, Mr. Alizadeh-Ebadi left work complaining of chest pains and attended St. Boniface General Hospital. He was discharged from the hospital on that day.

[135] Between February 23, 2009 and March 23, 2009, Mr. Alizadeh-Ebadi was at work for 14 days between absences for illness and holidays. Of these dates Brenda Coutts was at work for 5 of those days. Des Hathaway reported on March 3, 2009 that Mr. Alizadeh-Ebadi had expressed to him that his return to work after the initial week with accommodated duties had gone "ok". Mr. Hathaway reported on March 5, 2009 that when he spoke to Mr. Alizadeh-Ebadi that day about an illness that he was away from work for on March 3rd and 4th he received information that the problem was apparently resolving itself.

[136] On March 23rd Mr. Alizadeh-Ebadi departed from work during the day leaving Brenda Coutts a note simply saying that he was ill and was going to his doctor. On that date a letter was issued by Dr. Groohi of the Red River Medical Clinic in Winnipeg saying that Mr. Alizadeh-Ebadi would need to be off work from March, 24 to April, 24, 2009 "due to his illness". March 23rd was Mr. Alizadeh-Ebadi's last day on the job. Des Hathaway spoke to Mr. Alizadeh-Ebadi on March 25th and reported that his illness then was not related to his previous illnesses.

[137] By April of 2009 Mr. Alizadeh-Ebadi had moved to Vancouver and was being treated there by Dr. Samborski. Initially, through contacts that Des Hathaway made with Mr. Alizadeh-Ebadi and with Dr. Samborski on April 16, 2009, he thought that Mr. Alizadeh-Ebadi would be able to return to work on about April 24, 2009, and efforts were underway for his return to work. However, on April 26, 2009 Dr. Samborski issued a note saying that Mr. Alizadeh-Ebadi would be off work "due to illness" until July 25th.

[138] On May 15, 2009 Des Hathaway wrote to Dr. Samborski asking for information to help MTS make arrangements for Mr. Alizadeh-Ebadi to return to work with accommodation if necessary. Des Hathaway noted that it appeared that Mr. Alizadeh-Ebadi's absence then was not related to physical problems but rather due to stress from work conditions. He forwarded a Return to Work program form for Dr. Samborski to complete.

[139] Dr. Samborski completed and signed the form on May 22, 2009. In his comments he indicated that Mr. Alizadeh-Ebadi was being treated for a non-physical ailment and while he hoped that Mr. Alizadeh-Ebadi could return to work at some time in the next 4-6 weeks but that he would not be able to return to his old job and was not "planning on a return to MTS".

[140] I accept Mr. Alizadeh-Ebadi's evidence that the actions of Brenda Coutts and others at MTS in the incidents described in this Event frustrated and upset him and made him feel unwelcome on his return to work. Mistakes were made and inappropriate and heated emails were exchanged. I cannot, however, infer or find, from the evidence before me, that any of these incidents were related to Mr. Alizadeh-Ebadi's race, national or ethnic origin or religion. In reviewing the evidence, I also do not believe that anyone at MTS other than David Atwell exhibited racist behaviour towards Mr. Alizadeh-Ebadi during his employment with MTS.

Event 11: MTS internal investigation and report

[141] On March 25, 2009 Team wrote a letter on behalf of Mr. Alizadeh-Ebadi to Sandy Adelman, MTS' Employment Equity Specialist, advising her among other things, that Mr.

Alizadeh-Ebadi believes he was subjected to racial harassment, bullying and discrimination for many years. The letter included references to the David Atwell comments; the "Crash nickname"; the "unwelcome" reception upon his return in 2009; the initial refusal of holidays for Nevruz; the lack of advancement opportunities; the refusal of the second computer--all resulting in him being on sick leave at that time for anxiety and depression. There was no mention in the letter of Event 9 described herein.

[142] The letter was considered an Internal Complaint under MTS' Harassment and Respectful Workplace Policy that was in place during the entire period of this complaint. It was referred to Caroline Taylor, who was then MTS' Senior Specialist, HR Policy and Governance, based in Toronto, for an investigation.

[143] On April 7, 2009 Ms. Taylor conducted a phone interview with Mr. Alizadeh-Ebadi to try to formulate a list of items that he felt she should investigate. She prepared notes from the call that she sent to him for his review and comments. Thereafter, she prepared a document listing the subjects of his complaints and describing them on the basis of her call with him. She then sent him the documents and requested his comments. She spoke with him again by phone and exchanged emails with him between April 7 and April 16. He suggested a number of revisions to the document which she incorporated into the final version of the document.

[144] The final version of the document included the following subjects with descriptions of each of the subjects. "Denial of Request for Second P.C for research purposes"; "Disrespectful Comments in 2001/2002"; "Lack of Technical Training in 2002"; "Lack of Advancement in 2006"; "Lack of Retraining following extended absence after the second car accident--February 2009"; "Request for Turkish Cultural Holidays Declined in March 2009"; and "Disrespectful Comment relating to Removal of P.C. Contents During Extended Absence--March 2009". There was no mention in the document of Event 9 (ie lack of accommodation for disability) described herein.

[145] Ms. Taylor then had phone interviews with Wayne Horseman, David Atwell, Brenda Coutts, Brian Elliott, Qwin DeBrant between April 20th and May 19th, 2009 respecting the

Internal Complaint and made notes of her interviews. She did not interview any former employees such as Neil Wyrchowny or Ernest Desmarais.

[146] On May 20, 2009 Ms. Taylor delivered a report of her findings with respect to the Internal Complaint. The Summary and Recommendations read as follows:

> "Summary of Findings:
>
> While some discriminatory comments appear to have been made over five years ago, a review of the complaint itself and the Emails provided by Kouroush do not provide evidence of current discrimination on the basis of race or national or ethnic origin. Interviews with those alleged to have discriminated against Kouroush in many cases provide alternative explanations for decisions made.
>
> It appears that Kouroush's expectations for resources, training, advancement and time off with little notice are unrealistic and have not been met for reasons unrelated to race or national origin.
>
> Kouroush's tone in Emails to management that he himself provided is disrespectful and antagonistic and has provoked on at least one occasion an unprofessional response from management but this is not seen as discrimination.
>
> The above findings were reviewed with Mark Eklove, Legal Counsel and Daniele Malcolm, Director, HR Policy & Governance on May 20th, 2009 and the following recommendations have been developed:
>
> Recommendations:
>
> 1. Management to be reminded to communicate professionally with Kouroush at all times.
>
> 2. Kouroush to be coached to be respectful and courteous in all dealings with management.
>
> 3. Kouroush to be coached on possible strategies for meeting his career goals as part of the PP &R process."

[147] Caroline Taylor's report included the following about the David Atwell disparaging comments:

> "Item 2: Disrespectful Comments
>
> A. Al Qaeda Membership card comment in 2001

> Kouroush alleges that Team Leader Dave Atwell asked him two or three times when he was going to reveal his AI Qaeda membership card following 9/11. Dave denies doing so, however Qwin De Brant confirms that he overheard Dave make two or three AI Qaeda references to Kouroush between 2001 and 2004. Qwin has heard no other disrespectful comments from Dave to or about Kouroush. Qwin stated that Dave has made derogatory comments about others as well in the past but that he has not done so in a very long time.
>
> These comments were made over five years ago with no prior complaint having been lodged and Kouroush's confirmation that he did not ask Dave to stop these comments.
>
> B "Crash" Nickname in 2002
>
> Kouroush states that Dave began calling him "Crash" in front of others after his car accident in 2002. Dave admits to doing this and indicated he picked up the nickname from Kouroush's peers. The nickname Crash did not relate to race or national origin but rather to driving record."

[148] Following her release of the report Ms. Taylor emailed Mr. Alizadeh-Ebadi a copy of the report and had a discussion with him about it on May 27, 2009.

[149] Mr. Alizadeh-Ebadi's reaction to the report is captured in an email that he sent to MTS on July 9, 2009, resigning from his employment effective July 25, 2009.

> "Hi Don,
>
> Considering the fact that I was discriminated against for so long and, following the biased internal investigation that blamed me for faults, I am left with no choice but to resign.
>
> The anger and frustration that I have after a "protective" investigation result, is causing me anxiety and nervousness, I do not want to end up in hospital again.
>
> Even imagining or a thought of returning to that environment makes me ill and I am willing to throw my years of hard work in order to gain my mental and physical wellbeing.
>
> This is to inform you and MTS that following my sick leave (that ends on July 25th) I will not return to work, so therefore this should be considered as my notice.
>
> Thanks,
>
> Kouroush"

[150] Brenda Coutts filled out an exit report on Mr. Alizadeh-Ebadi in which she noted her views at that time that Mr. Alizadeh-Ebadi had high absenteeism was difficult to train and was not performing at the level as other members of the team. While Mr. Alizadeh-Ebadi did have high absenteeism there is no evidence that any absences were unjustified. Further, while it seemed that at the end of his work he was withdrawn there was no evidence to corroborate Brenda Coutts' opinion at that time that he was difficult to train or not performing satisfactorily under the circumstances.

[151] MTS no longer uses in house personnel to conduct investigations of Internal Complaints but hires independent third parties to carry them out.

III. Legal Framework-Liability

[152] The complainant has the initial burden of proving a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. The *prima facie* case is decided on the basis of the complainant's evidence alone-the respondent's answer is not a factor in the assessment.

Ontario (Human Rights Commission) and O'Malley v. Simpson Sears Ltd., [1985] 2 S.C.R. 536 ("O'Malley").

[153] The applicable standard of proof is the civil standard of the balance of probabilities.

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39, [2015] 2 S.C.R. 789.

[154] Complainants are not required to prove that respondents intended to discriminate in order to establish a *prima facie* case. Indeed, it is often said that discrimination is not a practice that would ordinarily be displayed openly and direct evidence is often not available to a complainant in cases of discrimination. As a result, one must examine all of the circumstances to determine if there exists what has been described by the Tribunal as the "subtle scent of discrimination". Such a determination may involve drawing an inference

from circumstantial evidence. An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

Basi v. Canadian National Railway Co. (1988), 9 CHRR D/5029 ("*Basi*").

[155] A *prima facie* case cannot be supported by mere sincere allegations or allegations that are supported by evidence that lacks specifics. The allegations have to be "complete and sufficient". Evidence that is vague, impressionistic and consisting primarily of personal opinions is insufficient to establish a prima facie case.

Khiamal v. Greyhound Canada Transportation Corporation, 2007 CHRT 34; *Hill v. Air Canada*, 2003, CHRT 9 ("*Hill*"); *Morin v. Canada (Attorney General)*, 2005 CHRT 41 ("Morin").

[156] In order to establish a *prima facie* case of discrimination under section 7(b) of the *CHRA*, the Complainant must establish that the Respondent adversely differentiated in its treatment of the Complainant compared to others and that there was a connection between the adverse differential treatment and a prohibited ground of discrimination under section 3 of the *CHRA*. Differential adverse treatment requires a distinction between the Complainant and another employee(s) which is harmful or hurtful towards the Complainant.

Opheim v. Gaigan Gill & Gillco Inc., 2016 CHRT 12; *Chaudhary v. Smoother Movers*, 2013 CHRT 15.

[157] In job competition cases under section 7(b) of the *CHRA*, where the Complainant is not hired and someone else is, the Tribunal has established a three part test as a useful guide. In such cases, the Complainant must show that he was qualified for the job at issue; he was not given the job at issue; and someone no better qualified, but lacking the distinguishing feature which is the gravamen of the human rights complaint, was given the job. This test, however, is not to be applied in a rigid or arbitrary fashion, rather the circumstances in each case need to be weighed. Ultimately, the question will be whether the Complainant has satisfied the *O'Malley* test, that is: if believed, is the evidence before

the Tribunal complete and sufficient to justify a verdict in favour of the Complainant, in the absence of an answer from the Respondent.

Premakumar v. Air Canada, 2002 CanLII 23561 (CHRT)

[158] Once the complainant has met his burden of proving a *prima facie* case of discrimination, the burden shifts to the respondent to prove, on the balance of probabilities, that there is a reasonable explanation for what appears to be discriminatory behaviour. The answer or explanation must be believed and not shown to be a pretext. It is not necessary that discriminatory consideration be the sole reason for the decision or conduct at issue in order for a complaint to succeed. It is sufficient if discrimination was a factor, even if other factors were also at play.

Basi, supra.

[159] The Tribunal's authority to institute an inquiry into a complaint is derived from the Commission's decision to request the Tribunal to institute an inquiry pursuant to section 49 of the *CHRA*. If the Commission decides not to deal with a complaint pursuant to section 41(1)(e) of the *CHRA*, an investigation into the complaint will not occur and no request by the Commission to the Tribunal to institute an inquiry into the complaint pursuant to section 49 will take place. As such, there is no authority for the Tribunal to institute an inquiry into a complaint that the Commission has decided not to deal with.

[160] Section 50(1) of the *CHRA* provides that parties to an inquiry before the Tribunal shall have the full and ample opportunity to appear at the inquiry, present evidence and make representations. That a party to a hearing is entitled to know the allegations against him and be able to have a fair opportunity to respond is a matter of procedural fairness in accordance with the principles of natural justice embodied in this section of the *CHRA*.

[161] The duty of procedural fairness provides that parties affected by a decision should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision. The Courts and the Tribunal have recognized this duty in many decisions.

Baker v. Canada (Minister of Citizenship and Immigration, [1999] 2 S.C.R. 817; *Prassad v. Canada (Minister of Employment and Immigration),* [1989] 1 S.C.R. 569; *Culic v. Canada Post Corporation,* 2007 CHRT 1; *Durrer v Canadian Imperial Bank of Commerce,* 2007, CHRT 6; *Fahmy v. Greater Toronto Airports Authority,* 2008 CHRT 12; *Whyte v. Canadian National Railway,* 2009 CHRT 33.

[162] While proposed amendments to complaints and pleadings that are disputed can be decided by the Tribunal on motions brought by the party seeking the amendment, the Tribunal has held in such cases that amendments sought on motions of this kind will be decided based on both jurisdictional and fairness considerations, namely 1) whether or not there is a logical nexus between the amendment sought and the original complaint, so that the proposed amendment does not create a new complaint that has not been dealt with by the Commission, investigated and properly referred to the Tribunal to institute an inquiry; and 2) whether there will be unacceptable prejudice to the respondent to the motion if the amendment is granted, depriving him of a fair hearing. However, these cases always arise within the context of a motion for an amendment by a complainant actually being brought before the Tribunal before the end of the evidence phase of the hearing when the respondent still may have a fair opportunity to respond.

*Attaran v. IRCC,*2017 CHRT 21; *Tran v. Canada Revenue Agency,* 2010 CHRT 31;*Cook v. Onion Lake First Nation,* 2002 CanLII 61849 (CHTR);*Gaucher v. Canadian Armed Forces,* 2005 CHRT 1; *Canada v. Pitawanakwat* (1991) 43 F.T.R.47.

[163] Section 14(1)(c) of the *CHRA* makes it a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters of employment. While the *CHRA* does not define the term “harassment” the Tribunal and the Courts have provided guidance with respect to the application of this term that are relevant to this case, including the following:

i. the conduct has to be unwelcome by the victim and related to a prohibited ground of discrimination that detrimentally affects the work environment or leads to adverse job related consequences for the victim;
Morin, supra.

ii. the gravamen of harassment lies in the creation of a hostile work environment which violates the personal dignity of the complainant;

Dawson v. Canada Post Corporation, 2008 CHRT 41 ("*Dawson*").

iii. in certain circumstances a single incident may be enough to create a hostile work environment and in others some element of repetition or persistence is required. Accordingly, the nature of the conduct should be calculated according to the inversely proportional rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated;
Dawson, supra.

iv. harassment does not include expressions that are rude and offensive but not connected to a particular characteristic. Conduct can be offensive and based on personal circumstances, but not repetitive enough or serious enough to constitute harassment under the *CHRA*;
Morin, supra.

v. in determining whether the conduct is unwelcome, an objective standard must be applied based on what a reasonable person would perceive from the perspective of the victim;
Hill, supra.

vi. in assessing the "reasonableness" of the conduct at issue, the touchstone is the usual limits of social interaction in the circumstances. The following more specific factors are relevant in the determination: the nature of the conduct; the workplace environment; the pattern of prior conduct between the parties; whether the alleged harasser is in a position of authority over the complainant; and whether an objection has been made.
Hill, supra.

vii. by virtue of section 65 of the *CHRA* any act or omission committed by an employee of an association or organization, in the course of employment of said employee, shall, for the purposes of the *CHRA*, be deemed to be an act or omission committed by that association or organization. This remains the case unless the

association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and subsequently, to mitigate or avoid the effect thereof;

viii. employers have an obligation to their employees to create and maintain a discrimination-free work environment and their duty of diligence exists once it becomes aware of an act that, by reason of its intrinsically offensive, humiliating or degrading character, would likely degenerate into harassment if it were subsequently repeated.
Dawson, supra.

ix. the existence of an anti-harassment policy itself is not enough to release the employer from all due diligence. There is a positive duty upon an employer to take prompt and effectual action when it knows or should know of the conduct in the workplace amounting to racial harassment and to avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the workplace and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment.
Hinds v. Canada 1988 CarswellNat 993.

IV. Issues

[164] The issues in this case are as follows:

1. i) Should the Tribunal decide allegations of discrimination with respect to Event 9 described above, based upon the prohibited grounds of race and/or disability?; and

   ii) Should the Tribunal decide any allegations of discrimination with respect to any of the other Events described above, based upon the prohibited ground of disability?

2. Has Mr. Alizadeh-Ebadi discharged his onus of proving a *prima facie* case of discrimination with respect to any of the Events described above that the Tribunal is deciding?

3. If Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination with respect to any of the Events described above that the Tribunal is deciding, has MTS discharged it's onus by proving a reasonable explanation that is not a pretext?

4. What, if any, remedies should be ordered in this case?

V. Analysis-Liability

A. Issue 1

[165] In spite of the facts set out in paragraphs 4 to 8 inclusive above and referenced again in paragraph 112 above, counsel for Mr. Alizadeh-Ebadi submitted written arguments to support allegations of discrimination by MTS against Mr. Alizadeh-Ebadi, with respect to Event 9 described above, not only based on the prohibited grounds of race, national or ethnic origin and religion but also based on the prohibited ground of disability. As well, counsel for Mr. Alizadeh-Ebadi submitted written arguments in support of allegations of discrimination by MTS against Mr. Alizadeh-Ebadi with respect to other Events described above, based on prohibited grounds that included the prohibited ground of disability. At no time prior to submitting these arguments was there any motion brought before the Tribunal to amend Mr. Alizadeh-Ebadi's complaint or the pleadings, neither of which referenced Event 9 or cited disability as a prohibited ground with respect to any Event.

[166] As noted in paragraph 9 above, the written arguments of both parties were exchanged by agreement between counsel for the parties several days before oral arguments were heard. Counsel for MTS did not include in their written arguments any reference to Event 9 or any reference to the prohibited ground of disability in relation to any other Event described above. MTS' written submissions referred to the Events (other than Event 9 which was not mentioned) as "incidents" and analysed them each in relation to the prohibited grounds listed in the complaint, namely-- race, national or ethnic origin and religion but not to disability which was not mentioned in Mr. Alizadeh-Ebadi's complaint or pleadings.

[167] In his oral arguments on May 19, 2017, counsel for Mr. Alizadeh-Ebadi acknowledged that counsel for MTS had not referred to Event 9 described above or to the prohibited ground of disability in their written arguments with respect to any of the Events. Counsel for Mr. Alizadeh-Ebadi also acknowledged in his oral arguments that MTS had a "get out of jail card" for Event 9 described above, as a result of the Commission's decision not to deal with Mr. Alizadeh-Ebadi's additional complaint.

[168] However, counsel for Mr. Alizadeh-Ebadi submitted in his oral arguments that the Tribunal should, in deciding this case, consider "prior history of disability" as a prohibited ground for the alleged discrimination by MTS in relation to some of the other Events described in the complaint, even though disability is not mentioned in the complaint or pleadings as a prohibited ground. "Prior history of disability" was part of the language removed by Mr. Alizadeh-Ebadi from his amended Statement of Particulars (together with race) in relation to Event 9 described above, after the Commission refused to deal with it as an additional complaint. That ground, according to counsel for Mr. Alizadeh-Ebadi in his oral arguments, arises out of the fact that while Mr. Alizadeh-Ebadi was accommodated by MTS by providing him with a graduated return to work program for about one and a half years after his first car accident in 2001, Brenda Coutts and Brian Elliott and other managers at MTS allegedly did not believe that Mr. Alizadeh-Ebadi was disabled at that time and made comments in the workplace that he was "faking" and was probably taking trips to Turkey during his prior disability and therefore that he had a poor work ethic.

[169] In his oral arguments, counsel for Mr. Alizadeh-Ebadi submitted that this alleged conduct on the part of Brenda Coutts and Brian Elliott and other MTS managers of not believing that Mr. Alizadeh-Ebadi's the prior disability was true and of making related unsubstantiated comments about his work ethic and trips to Turkey, was a factor in a number of the alleged discriminatory actions by MTS against Mr. Alizadeh-Ebadi, including the use of the name "Krash" and of Mr. Alizadeh-Ebadi not being promoted in 2006. Put another way, even though disability as a prohibited ground is not mentioned in the complaint or pleadings, nevertheless, according to counsel for Mr. Alizadeh-Ebadi in his oral arguments, Mr. Alizadeh-Ebadi's disability resulting from the first car accident (for

which he was accommodated) was a factor in a number of the allegedly discriminatory Events by MTS that followed that accident because Mr. Alizadeh-Ebadi's prior disability was not believed by managers of MTS. The Tribunal, according to the oral submissions of counsel for Mr. Alizadeh-Ebadi, should now take this into consideration in deciding this case.

[170] Counsel for Mr. Alizadeh-Ebadi cited the case of *Egan v. Canada Revenue Agency* (2012) CHRT a ruling that I made in a case that I am still seized of. In that case I allowed an amendment to a complaint because I found that there was a logical nexus between the amendment and the original complaint and that there would be no prejudice to the respondent as it would have ample time to respond. My ruling in that 2012 case, unlike this case, was decided by me on a preliminary motion brought by the complainant long before the hearing started. In fact, the hearing in that case has only very recently started.

[171] As noted in paragraph 166 above, counsel for MTS did not refer to Event 9 described above and the prohibited ground of disability with respect to any of the Events in their written arguments exchanged with counsel for Mr. Alizadeh-Ebadi a few days before the last day of the hearing when oral arguments were scheduled to take place. Counsel for MTS in their oral arguments disagrees with counsel for Mr. Alizadeh-Ebadi with respect to Issue 1 on the basis that, 1) Event 9 and the prohibited ground of disability with respect to any of the Events is not properly before the Tribunal to decide, as it wasn't part of the complaint dealt with by the Commission and was therefore neither investigated or referred to the Tribunal; and 2) at this late stage when the evidence in the hearing has been completed, it would be unfair for the Tribunal to decide that either Event 9 or the prohibited ground of disability with respect to any Event is properly before the Tribunal to decide.

[172] I accept the arguments of MTS with respect to Issue 1 for the following reasons.

[173] Failure to accommodate any disability was not alleged by Mr. Alizadeh-Ebadi in his complaint or his pleadings and no reference to the prohibited ground of disability appears in any of these documents.

[174] The Commission refused to deal with Mr. Alizadeh-Ebadi's additional complaint alleging failure to accommodate Mr. Alizadeh-Ebadi for a disability by providing him with a

graduated return to work program after the 2007 accident. That additional complaint was made on the basis of the prohibited grounds of race and prior history of disability after a proposed amendment to add this allegation to his Statement of Particulars was objected to by MTS.

[175] It must be assumed that in requesting the adjournment of this hearing in June of 2014 and filing the additional complaint thereafter, Mr. Alizadeh-Ebadi had concluded that Event 9 described above and the grounds of race and prior history of disability in relation to it were not included in the original complaint. There was no judicial review taken of the decision of the Commission nor was there a motion made to the Tribunal to amend the complaint or the pleadings. After the Commission's decision not to deal with the additional complaint and before the hearing resumed in June of 2016, Mr. Alizadeh-Ebadi removed the words "race and prior history of disability" from the proposed amendment to the Statement of Particulars together with any allegation of failure to accommodate a disability with respect to the 2007 car accident.

[176] As such, with respect to the first part of Issue 1, in my opinion, based on the facts in this case and on paragraph 159 above, Event 9 described above, is not properly before the Tribunal for determination and the Tribunal should not decide allegations of discrimination with respect to Event 9 on the basis of race and/or disability.

[177] Counsel for Mr. Alizadeh-Ebadi argues that the Tribunal should decide that MTS discriminated against Mr. Alizadeh-Ebadi in a number of the other Events described above, based, in part, on the prohibited ground of disability related to the alleged disbelief by certain managers of Mr. Alizadeh-Ebadi's prior history of disability following his first car accident for which Mr. Alizadeh-Ebadi was accommodated by providing him with a graduated return to work program. The Tribunal is being asked to make this determination at the argument phase of this hearing after the evidence phase has long ago been concluded, without any motion having been made to the Tribunal to amend the complaint or the pleadings. As previously noted, there is no reference in the complaint or the pleadings to the prohibited ground of disability or to an allegation of failure to accommodate any particular disability.

[178] In my opinion, at the close of the evidence phase of the hearing, MTS had every reason to believe that allegations based upon the prohibited ground of disability were not part of this inquiry, given the facts set out in paragraphs 4 to 8 inclusive above and also the references to those facts in paragraph 112. MTS presented its case on that basis and it would be unfair and contrary to the principles of natural justice to now change the scope of the inquiry in this case because of arguments made by counsel for Mr. Alizadeh-Ebadi that the prohibited ground of disability is part of this inquiry.

[179] As such, with respect to the second part of Issue 1, in my opinion, based on the facts in this case and on paragraphs 160, 161 and 162 above, it would be unfair to decide any allegations of discrimination with respect to any of the other Events described above on the basis of the prohibited ground of disability.

B. Issues 2 and 3

Event 1: Remarks made by David Atwell

[180] Based on the evidence in this case, including my findings in paragraphs 22, 24, 27, 31, 35, 36, 37 and 40 above, in my opinion, Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 14(1)(c) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 1 described above.

[181] As noted in paragraphs 25 and 26 above, David Atwell apologised for his behaviour to Mr. Alizadeh-Ebadi and MTS admitted that Mr. Atwell's conduct in making certain derogatory comments to Mr. Alizadeh-Ebadi in the workplace over a period of time amounted to harassment under the *CHRA*.

[182] MTS's explanations for this conduct are essentially that (i) there was a limited number of comments and a limited time during which they were made and therefore the harassment was not of a serious or persistent nature; and (ii) that Mr. Alizadeh-Ebadi is too sensitive about the comments and exaggerated them in his evidence and (iii) the

Event was not reported to management until the Taylor internal Report and therefore MTS is exculpated under section 65(2) of the *CHRA*.

[183] In my opinion, the evidence and my findings including those in paragraphs 31, 35, 36 and 40 above counters the explanations of MTS referred to above. Regarding section 65(2) of the *CHRA*, on the basis of my findings at paragraph 35 above, according to MTS' own witnesses there was or should have been knowledge by MTS' management of Mr. Atwell's harassing behaviour towards Mr. Alizadeh-Ebadi long before Caroline Taylor's report.

[184] As such, MTS should have acted positively to deal with the harassment when the disparaging remarks by David Atwell occurred. It failed in its duty to take prompt and effectual action in line with the legal principles set out in paragraph 163 (viii) and (ix) above.

Event 2: Denial of a Second Computer

[185] Based on the evidence in this case, including my finding in paragraph 48 above, in my opinion, Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 2 described above.

[186] In my opinion, David Atwell, at the time of this Event, was intolerant of Mr. Alizadeh-Ebadi because of his race, national or ethnic origin or religion and adversely differentiated against him in refusing his legitimate request through his supervisor Neil Wyrchowny for the same privilege to have a second computer necessary to him as most of his peers had. The reasons for the refusal advanced by David Atwell in his evidence are not believable or reasonable in my view as a second computer was a necessary tool for Mr. Alizadeh-Ebadi to do his work and the request made for one from his supervisor Neil Wyrchowny was legitimate from a business case point of view.

[187] MTS's explanations of this conduct are that i) Mr. Alizadeh-Ebadi was not treated differently than others; and ii) the refusal was not based on a prohibited ground specified in

the complaint. I do not accept these explanations based on the evidence. Clearly, on the evidence, there was adversely differential treatment of Mr. Alizadeh-Ebadi compared to his peers in refusing a second computer where virtually none of them had been refused. Further, David Atwell, at that time, was intolerant of Mr. Alizadeh-Ebadi's race, ethnicity or religion as per my findings in Event 1 and his attitude towards Mr. Alizadeh-Ebadi, in my opinion, was a pervasive factor in all of his dealings with him.

[188] In my view the legal principles as set out in paragraph 154 above are supportive of my reasoning with respect to Event 2 on the basis of an inference that I have made that the "subtle scent of discrimination" is present in this Event in the actions of David Atwell.

Event 3: Denial of training requests

[189] Based on the evidence in this case, including my finding in paragraph 51 above, in my opinion, Mr. Alizadeh-Ebadi has discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 3 described above.

[190] Exactly the same reasoning set out in paragraphs 186, 187 and 188 above with respect to Event 2 is applicable to Event 3 in the sense that, in my opinion, David Atwell at the time of this Event was intolerant towards Mr. Alizadeh-Ebadi on the basis of his race, national or ethnic origin or religion. As a result, he adversely differentiated on the basis of those prohibited grounds in refusing the Win2K project training request made on behalf of Mr. Alizadeh-Ebadi while not refusing this training to other peers of Mr. Alizadeh-Ebadi who did not have his personal characteristics. Once again, I am able to draw the inference from the evidence with respect to this Event that the "subtle scent of discrimination" is present in the actions of David Atwell.

Event 4: Use of the "nicknames" "Crash" or "Kourash" either section

[191] Based on the evidence in this case, including my findings in paragraph 60 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case

of discrimination against MTS pursuant to either section 14(1)(c) or section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 4 described above.

[192] These “nicknames” were not pleasant for Mr. Alizadeh-Ebadi to hear or read in view of the injuries he sustained in his car accidents. The use of these plays on his name showed insensitivity and disrespect for a person who had been through painful injuries as a result of accidents that were not his fault. Mr. Alizadeh-Ebadi made it known to his colleagues that he didn’t appreciate the use of these names and yet they persisted until the end of his career with MTS. However, the arguments advanced by Mr. Alizadeh-Ebadi in respect of this Event specifically relate to the prohibited ground of disability that, for the reasons detailed above in Part V. Analysis Issue 1, is not before the Tribunal for determination in this case.

Event 5: Comments about Mr. Alizadeh-Ebadi’s trips to Turkey and his work ethic

[193] Based on the evidence in this case, including my findings in paragraphs 67, 68 and 69 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to either section 14(1)(c) or section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 5 described above.

[194] In my opinion, Mr. Alizadeh-Ebadi’s supervisor Brenda Coutts as well as Brian Elliott, who supervised him in Ms. Coutt’s absence, were not tainted by their association with David Atwell so as to make discriminatory comments about Mr. Alizadeh-Ebadi. They may or may not have been good managers but, as noted above, I accept their evidence and denials, that they did not make these comments. I found their evidence to be credible and consistent on this Event. I found that the evidence of Mr. Alizadeh-Ebadi and other witnesses who suggested that they did make these comments was vague, inconsistent and impressionistic.

[195] Finally, Mr. Alizadeh-Ebadi's arguments with respect to this Event related these comments to the prohibited ground of disability that, for the reasons detailed above in Part V. Analysis Issue 1, is not before the Tribunal for determination in this case.

Event 6: Relegation to Service Desk

[196] Based on the evidence in this case, including my finding in paragraph 77 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA* on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 6 described above.

[197] The evidence with respect to this Event is clear, in my opinion, that the actions taken by MTS were not directed at Mr. Alizadeh-Ebadi alone but were directed to a group of employees including Mr. Alizadeh-Ebadi and some of his peers. It may have been a poor decision by MTS to try out this program and may also have been, in part, directed to a group of employees, some of whom were not held in high esteem for their performance by management. However, in my opinion, it was not directed at Mr. Alizadeh-Ebadi alone and not based upon the prohibited grounds of race, national or ethnic origin or religion. Many of the group of peers affected by the program had no distinguishing protected characteristics.

Event 7: Hostile work environment/TEAM meeting

[198] Based on the evidence in this case, including my finding in paragraph 87 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to either section 14(1) (c) or section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion with respect to Event 7 described above.

[199] The meeting that was the subject of the Event, indicates that a number of unionized workers with their representatives met to discuss a number of issues that may have indicated a bad work atmosphere at the time in the ITSM Department because of various

actions or inactions by management of MTS. Management actions complained of at the meeting did not include discrimination under the *CHRA*. The "Bad Dog Box" group that was referred to in the Minutes of the meeting was not applicable to Mr. Alizadeh-Ebadi alone but a group of his peers including him. Many of whom had no distinguishing protected characteristics.

[200] I my opinion, similar to my reasoning in paragraph 197 above concerning Event 6, this Event does not constitute discrimination as it was not directed to Mr. Alizadeh-Ebadi alone or related to the prohibited grounds of race, national or ethnic origin or religion.

Event 8: Denial of Promotion to Senior Client Support Specialist (Site Prime) position

[201] Based on the evidence in this case, including my findings in paragraphs 108, 109 and 111 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to section 7(b) of the *CHRA* on the prohibited grounds of race, national or ethnic origin, or religion with respect to Event 7 described above.

[202] The evidence in this Event was very clear to me that a decision was made by the three person panel based on a fair assessment of all applicants' performances in response to a set of test questions that were fairly and consistently administered and scored. Nothing about the competition leaves me with the impression that it was biased against Mr. Alizadeh-Ebadi in any way. I can find no "subtle scent" of discrimination against Mr. Alizadeh-Ebadi by MTS with respect of this Event.

[203] Moreover, as noted in paragraphs 108, 109 and 111 above, in my opinion, the evidence of Brenda Coutts, Brian Elliott and Don Rooney was very credible while the evidence of Mr. Alizadeh-Ebadi was very vague and impressionistic about this Event nor did it establish in any way that the three part test guide referred to in paragraph 157 above had been satisfied with respect to the job competition for the Site Prime positions or any other acting opportunities that were not awarded to him.

Event 10: Treatment on return to work in 2009

[204] Based on the evidence in this case, including my findings in paragraph 140 above, in my opinion, Mr. Alizadeh-Ebadi has not discharged his onus of proving a *prima facie* case of discrimination against MTS pursuant to either section 14(1)(c) or section 7(b) of the *CHRA* on the prohibited grounds of race, national or ethnic origin, or religion with respect to Event 10 described above.

[205] The evidence with respect to this Event indicates to me that Mr. Alizadeh-Ebadi's supervisors and some of his peers were not as sympathetic or helpful to him as they should have been given his circumstances at that time. Undoubtedly, this made him feel unwanted, frustrated and depressed. I also believe, based on the evidence, that Mr. Alizadeh-Ebadi was not a particularly happy or motivated employee at that time and acted accordingly for reasons pertaining to his recent injuries, time off work and his unwelcome reception in the workplace. The combination of these factors, in my opinion, led to some of the unfortunate and inappropriate actions and behaviour between management and Mr. Alizadeh-Ebadi, much of which demonstrated poor management on the part of MTS and Brenda Coutts in particular.

[206] Although no medical witnesses were called at the hearing, it is likely, based on the report from his intake and discharge at the St. Boniface General Hospital on March 16, 2009, that the incidents that day concerning his loss of computer information and the heated exchanges on that subject with Brenda Coutts, caused him to leave work and go to the hospital complaining of chest pains and stress. I do not, however, detect the "subtle scent of discrimination" against Mr. Alizadeh-Ebadi in the incidents described in this Event. As noted at paragraph 140 above, I am unable to infer or find that any of these incidents were related in any way to Mr. Alizadeh-Ebadi's race, national or ethnic origin or religion.

Event 11: MTS Internal Investigation and Report

[207] Obviously, for the reasons set out paragraphs 180 to 188 above, I do not agree with the findings with respect to Items 1 and 2 in the Investigation and Internal Report (which are Events 2 and 1 above) or with the recommendations related thereto. In my opinion, as

noted above, MTS failed in its obligation to create and maintain an harassment free environment by failing to take prompt and effectual actions against David Atwell at the time of the harassment and the unfair actions against Mr. Alizadeh-Ebadi by Mr. Atwell with respect to these Items, when it knew or ought to have known about them. Both the findings and the recommendations of Caroline Taylor related to these Items are, in my opinion, erroneous and ineffective in concluding that, as the harassment by David Atwell had occurred in the past and without any official internal complaint having been filed there was nothing more to be done about it. As such, remedial orders with respect to these Items are being issued below.

[208] Moreover, I feel that the Internal Investigation and Report was undertaken in a somewhat superficial manner and without proper objectivity. In that regard, in my opinion, the investigation should have included former key employees such as Neil Wyrchowny and Ernest Desmarais who would not be influenced by an existing employment relationship with MTS, rather than relying only on current internal employees of MTS (some of whom, including David Atwell, appear to have given Caroline Taylor a somewhat different version of the evidence than I heard). Further, having an investigator who also works for the company and having her report reviewed by internal company lawyers before its release, is also problematic in terms of ensuring objectivity and fairness in this type of exercise. I assume that MTS, by changing its practices in this regard, as noted in paragraph 151 above, agrees with this latter point.

[209] Notwithstanding paragraphs 206 and 207 above, based upon the evidence before me, in my opinion, the undertaking of the Internal Investigation and Report and its findings and recommendations by Caroline Taylor, do not themselves represent adverse differential treatment or harassment towards Mr. Alizadeh-Ebadi by Ms. Taylor or MTS under the *CHRA*, on the basis of the prohibited grounds of race, national or ethnic origin or religion. As noted above, I disagree with certain aspects of the manner by which the Internal Investigation and Report was undertaken and with some of the findings and recommendations. I also understand that the results of the Internal Investigation and Report upset and disappointed Mr. Alizadeh-Ebadi. However, I am unable to conclude on the evidence before me that Caroline Taylor or MTS acted in a discriminatory manner

towards Mr. Alizadeh-Ebadi in undertaking the Internal Investigation and Report or producing its findings and recommendations.

VI. Decision

[210] For the foregoing reasons, I find that the complaint is substantiated with respect to:

(a) Event 1 described above, pursuant to section 14(1)(c) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion;

(b) Event 2 described above, pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion;

(c) Event 3 described above, pursuant to section 7(b) of the *CHRA*, on the prohibited grounds of race, national or ethnic origin or religion.

[211] For the foregoing reasons, I find that the complaint is not substantiated with respect to Events 4 to 8 inclusive described above and 10 and 11 described above, and I hereby dismiss same. Event 9, described above, is not properly before me as previously explained and the complaint in respect of it is therefore also dismissed.

VII. Legal Framework-Remedies

[212] Section 53(2) of the *CHRA*, as set out in paragraph 2 above, provides that if at the conclusion of the inquiry the member finds that the complaint is substantiated, subject to section 54, the member may make an order against the person found to have engaged in the discriminatory practices and include in the order terms that the member considers appropriate as set out in clauses (a) to (e) inclusive.

[213] When evidence establishes pain and suffering, an attempt to compensate for it must be made. Awarding the maximum amount allowed under section 53(2)(e) of the *CHRA* is reserved for the most egregious discriminatory practices.

Grant v. Manitoba Telecom Services Inc. 2012 CHRT 10 ("*Grant*").

[214] Section 53(3) of the *CHRA* is a provision intended to provide a deterrent and to discourage those who deliberately discriminate. A finding of willfulness requires that the discriminatory act and the infringement of the person's rights under the Act is intentional. A finding of recklessness generally denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly. The award of the maximum under the section should be reserved for the very worst cases.

Grant, supra.

[215] The Tribunal has the discretion pursuant to section 53(2)(b) of the *CHRA* to order reinstatement of an employee who has lost his job as a consequence of discrimination against him by his employer. In order for the Tribunal to exercise this discretion, it must be satisfied that there is at least a serious possibility, if not probability that the Complainant would be in that position but for the discrimination and whether reinstatement is appropriate in the circumstances, as well as analyzing the link between the discriminatory practice and the loss claimed.

Grant, supra.

[216] While the Tribunal has wide discretion to order remedies under section 53(2) of the *CHRA* if a complaint is substantiated in order to put the complainant in the position he would have been had the discrimination not occurred, the use of the words "as a result of" means there must be a causal connection between the remedy awarded and the discrimination. Therefore, careful consideration of all surrounding facts, on a case by case basis, must be considered by the Tribunal to determine whether a sufficient causal connection exists to justify the remedy.

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), [2001] F.C.J. No. 1922. ("*Carter*").

[217] The onus is on the Complainant to prove entitlement to the remedies claimed. He must prove that had the discrimination not occurred, he would have obtained the payments and benefits he is seeking in remedies (or in the case of seeking reimbursement, would not have been out those expenses). To discharge this onus the

Complainant must prove on a balance of probabilities that there is a serious possibility that the conduct which violated the *CHRA* caused the damage for which the Complainant claims compensation.

Culic v. Canada Post Corporation, 2007 CHRT 1.

[218] The Tribunal is to be guided by common sense which requires that limits be placed upon liability for the consequences flowing from an act, absent bad faith. Common sense tells us that consequences which appear down the chain of causality but are too remote are to be excluded.

Carter, supra.

VIII. Analysis-Remedies

C. Issue 4

[219] In the argument phase of the hearing in this matter, Mr. Alizadeh-Ebadi argued that all of the Events described above had been proved and that his complaint should be substantiated. Mr. Alizadeh-Ebadi also provided his submissions on remedies at the same time, obviously not knowing then what my decision would be on liability in the case. He advanced the position that, given the facts of this case, I should make an order under section 53(2) and (3) of the *CHRA* against MTS including the following terms:

a. General damages for his pain and suffering resulting from the discriminatory practices, for the maximum amount of $20,000.00, pursuant to section 53(2)(e) of the *CHRA*.

b. Special compensation for having willfully or recklessly engaged in discriminatory practices, for the maximum amount of $20,000.00, pursuant to section 53(3) of the *CHRA*;

c. Reinstatement of Mr. Alizadeh-Ebadi to a similar position to the one he had before he resigned, pursuant to section 53(2)(b) of the *CHRA*;

d. Pursuant to section 53(2)(b)(c) and (d) of the *CHRA*–

i. an award for lost wages from February 23, 2009 until June 30, 2015 (the latter date agreed to by the parties in their Agreed Statement of Facts), in the amount of $161,180.00 for the difference in total wages (including Variable Pay Plan, Employee Share Ownership Plan, Dental charges and bonus amounts under the Collective Agreement) between what Mr. Alizadeh-Ebadi would have earned at MTS if he was employed by MTS during the period and the income he actually did earn during the period;

ii. as well as an award for an amount for lost pension to be quantified later;

iii. as well as an award for relocation expenses to relocate he and his family to British Columbia in the amount of $12,419.30 (comprised of $4000.00 moving expenses and $8,419.30 for a mortgage payout penalty on his home in Winnipeg).

Mr. Alizadeh-Ebadi argues that all of the foregoing losses and expenses would not have occurred or been incurred had he remained an employee of MTS which would have been the case, but for the discrimination by MTS that caused him to have to resign from his job.

e. An award of interest on all heads of damages at the Bank of Canada Rate from the date of loss to June 30, 2015 or as otherwise determined by the Tribunal, pursuant to section 53(4) of the *CHRA*.

f. Pursuant to section 53(2)(a) of the *CHRA* order MTS to provide its front-line managers with sensitivity training and training about discrimination and its obligations under the *CHRA*. As well, order MTS to work with the Commission to ensure that it has appropriate policies in place, especially those related to harassment, discrimination and respectful workplace.

Mr. Alizadeh-Ebadi argues that these orders are required because it is not clear that MTS has learned from this experience and that it needs to change its ways with respect to how it deals with discrimination in the workplace going forward.

[220] Mr. Alizadeh-Ebadi argues that this case is about an accumulation of all of the discriminatory Events described above, culminating with Events 10 and 11 that finally

caused him to resign from MTS to protect himself and his well-being. He argues that he had to leave work and go to the hospital with chest pains and stress following his unwelcome return to work by his colleagues in February of 2009, after an absence of two years as a result of injuries sustained in an accident that was not his fault. He says he then had flashbacks of all of the previous Events described above that he felt were all discriminatory. When he finally complained internally about these Events under MTS' Respectful Workplace Policy, he was rebuffed by MTS in what he felt was a "whitewashed" Internal report. He says he realized then that he could not return to work at MTS because of this accumulation of discriminatory behaviour by MTS over the years that was not being addressed and was making him feel depressed, anxious and unwell while working at MTS. So after he had left MTS and moved to British Columbia, despite Des Hathaway's attempts during this time to try to accommodate him back into the workforce, he resigned. He argues that, but for the Events described above that he believes were all discriminatory, he would not have resigned from MTS. Hence, Mr. Alizadeh-Ebadi argues that the remedies described in paragraph 219 above should be ordered against MTS on the basis that the discriminatory Events at MTS were hurtful, harmful and deliberate and caused him to resign from his job at MTS.

[221] MTS argues that only in Event 1 has discriminatory behaviour been established and only for a relatively short period a long time ago. MTS argues that it is not liable for Event 1 because it didn't consent to it pursuant to section 65(2) of the *CHRA*, as it received no complaint about it. It further argues that in each of the other Events discrimination has not been established on the basis of the prohibited grounds of race, national or ethnic origin or religion or that if it has been established, MTS has provided a reasonable explanation for the behaviour that is not a pretext. Hence it argues that no remedies should be ordered.

[222] I have found that the complaint is substantiated with respect to Events 1, 2 and 3 described above, as set out in paragraph 210 above, but that the rest of the complaint, with respect to Events 4 to 11 inclusive as described above is dismissed, as set out in paragraph 211 above.

[223] In essence, I have found that the discrimination by MTS against Mr. Alizadeh-Ebadi in this case relates specifically to the behaviour of David Atwell during the earlier part of Mr. Alizadeh-Ebadi's employment, because he was then intolerant of Mr. Alizadeh-Ebadi's race, ethnic or national origin or religion and engaged in the discriminatory practices referred to in Events 1, 2 and 3 as described above; that Mr. Alizadeh-Ebadi was very upset and distressed because of these Events and let others know about his feelings; that MTS knew or should have known about these discriminatory practices by David Atwell and should have then acted appropriately to ensure that they did not continue; and that MTS failed in its duty to do so.

[224] As such, I find that an order ought to be made against MTS in respect of the discrimination I have found with respect to Events 1, 2 and 3 described above because they were willfully discriminatory and caused Mr. Alizadeh-Ebadi serious pain and suffering. I think the conduct of David Atwell in these Events was deliberate and very hurtful and harmful to Mr. Alizadeh-Ebadi. MTS should have stopped it many years ago as it knew or ought to have known what was going on. Accordingly, I find that the amount of $20,000.00 for each of the two heads of damages in section 53(2)(e) and section 53(3) of the *CHRA* is justified and appropriate in this case and should be ordered to be paid by MTS to Mr. Alizadeh-Ebadi for these Events of discrimination, together with interest as prescribed in section 53(4) of the *CHRA* on the each of the two $20,000.00 amounts calculated and payable from January 1, 2002 until June 30, 2015.

[225] In essence, I have found that Events 4 to 8 inclusive and Events 10 and 11 were upsetting and distressful to Mr. Alizadeh-Ebadi, for various reasons that are quite understandable. In some cases they involved poor management by MTS and in some other cases they involved poor behaviour by employees of MTS towards Mr. Alizadeh-Ebadi. However, in my opinion, they did not involve discriminatory behaviour against Mr. Alizadeh-Ebadi by anyone at MTS on the prohibited grounds of race, national or ethnic origin or religion. As such, I am unable to find that there is a causal relationship between these Events and Mr. Alizadeh-Ebadi's resignation based on discrimination that would justify me to order the remedies under the *CHRA* that Mr. Alizadeh-Ebadi seeks in paragraph 219 (c) (d) and (e) above with respect to these Events. Nor is there, in my

opinion, a reasonable or logical causal relationship between Events 1, 2 and 3, described above and Mr. Alizadeh-Ebadi's resignation, given the lapse in time between those Events and the resignation, that would justify these remedies for those Events. In other words, while I feel that Mr. Alizadeh-Ebadi was justified in not wanting to continue to work at MTS for his own health and well-being because of his feelings about the atmosphere for him at MTS in 2009, I do not feel that the atmosphere there then was based upon discrimination by MTS against Mr. Alizadeh-Ebadi. As such, I will not make the orders that Mr. Alizadeh-Ebadi seeks in paragraph 219 (c) (d) and (e) above.

[226] I am, however, concerned that David Atwell may still need some assistance in recognizing how to be respectful to other people in the workplace, despite the evidence I heard that he had changed his ways some time ago. I am also concerned that MTS does not yet fully understand that it must be more proactive in responding to circumstance like Mr. Alizadeh-Ebadi faced with respect to Events 1, 2 and 3 above and may need to change its policies to achieve better results in that regard. As such, I am ordering MTS, to consult with the Commission to address these two areas.

IX. Orders

[227] For the foregoing reasons, I hereby order MTS

i. to pay Mr. Alizadeh-Ebadi the amount of $20,000.00 for pain and suffering, pursuant to section 53(2)(e) of the *CHRA,* together with interest thereon calculated from January 1, 2002 to June 30, 2015, pursuant to section 53(4) of the *CHRA*; and

ii. to pay Mr. Alizadeh-Ebadi the amount of $20,000.00 for special compensation, pursuant to section 53(3) of the *CHRA*, together with interest thereon calculated from January 1, 2002 to June 30, 2015, pursuant to section 53(4) of the *CHRA*; and

iii. to consult with the Commission in order to enroll David Atwell in an appropriate educational and training course(s) dealing with respectful behaviour in the workplace and discrimination and to also consult with the Commission in order to have its various policies relating to harassment, respectful behaviour in the

workplace and discrimination reviewed by the Commission and amended accordingly where necessary.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
November 7, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1873/10312

Style of Cause: Kouroush Alizadeh-Ebadi v. Manitoba Telecom Services Inc.

Decision of the Tribunal Dated: November 7, 2017

Date and Place of Hearing: June 18, 2014;

August 2 to 5, 2016;

November 7 to 10, 2016;

February 13 to 17, 2017; and

May 19, 2017

Winnipeg, Manitoba

Appearances:

Kris M. Saxberg and Tomas Masi, for the Complainant
No one appearing, for the Canadian Human Rights Commission
Paul A. McDonald, for the Respondent

Federal Court of Appeal | Cour d'appel fédérale

Date: 20100723

Docket: A-242-10

Citation: 2010 FCA 200

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

UNITED STATES STEEL CORPORATION and

U.S. STEEL CANADA

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on July 21, 2010.

Judgment delivered at Ottawa, Ontario, on July 23, 2010.

REASONS FOR JUDGMENT BY: **LAYDEN-STEVENSON J.A.**

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The Attorney General (the Crown) filed an application in the Federal Court (Court File No. T-1162-09) (the T-1162 application) under section 40 of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.) (ICA) alleging that United States Steel Corporation and U.S. Steel Canada Inc. (U.S.

Steel) had failed to comply with certain undertakings given to the Minister of Industry in connection with U.S. Steel's acquisition of Stelco Inc..

[2] U.S. Steel moved to challenge the validity of sections 39 and 40 of the ICA on the basis that they contravened section 11(d) of the *Canadian Charter of Rights and Freedoms* (the Charter) and paragraph 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985 (the Bill of Rights). The T-1162 application was held in abeyance pending the disposition of U.S. Steel's motion.

[3] On June 14, 2010, the Federal Court dismissed U.S. Steel's motion (the validity order). On June 24, 2010, U.S. Steel filed a notice of appeal from the validity order. U.S. Steel now seeks to stay the T-1162 application in the Federal Court pending this Court's disposition of the appeal from the validity order. For the reasons that follow, I conclude that U.S. Steel's motion should be dismissed.

Stay of Proceeding

[4] To obtain a stay, U.S. Steel must satisfy all three components of the tri-partite test articulated in *RJR-MacDonald v. Canada* (*Attorney General*), [1994] 1 S.C.R. 311 (*RJR*). That is, U.S. Steel must demonstrate that:

(i) a serious issue exists;

(ii) it would suffer irreparable harm is the stay is not granted; and

(iii) the balance of convenience favours the granting of the stay.

Serious Issue

[5] The serious issue component imposes a low threshold. It requires only a preliminary assessment of the merits to ensure that the appeal is neither frivolous nor vexatious: *RJR*, pp. 337-338. The Crown conceded that U.S. Steel's appeal of the validity order is not frivolous or vexatious and therefore meets the low threshold. I agree that U.S. Steel's appeal cannot be characterized as frivolous or vexatious, therefore it meets the requisite threshold to establish the existence of a serious issue.

Irreparable Harm

[6] *RJR* described the central question regarding irreparable harm as "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": para. 63. Irreparable harm refers to the nature of the harm, not the magnitude. The nature of the harm must be such that it cannot be quantified in monetary terms or cannot be cured: para. 64.

[7] The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions: *Syntex Inc. v. Novopharm Ltd*. (1991), 36 C.P.R. (3d) 129; 126 N.R. 114 (F.C.A.), leave to appeal refused 39 C.P.R. (3d) v, 137 N.R. 391n; *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (F.C.A.); *Canada* (*Attorney General*) *v. Canada* (*Information Commissioner*), 2001 FCA 25, 268 N.R. 328.

[8] U.S. Steel's written memorandum of fact and law focussed on the serious nature of the remedies at issue in the T-1162 application as the basis for the irreparable harm. It submitted that it will be deprived of its right of appeal from the validity order if the stay is not granted. More specifically, it asserted that if the stay is not granted, the validity appeal will be moot because the hearing of the T-1162 application will have proceeded on the basis of a provision and process that is unconstitutional and inconsistent with the Bill of Rights. It also alleged that it will incur significant pecuniary loss and waste considerable legal resources. The last assertion was not pursued at the hearing and I will say no more about it.

[9] At the hearing of the motion, U.S. Steel centered its argument on the process, arguing that if it has to proceed on the T-1162 application and produce evidence (which will be required within seven days of the denial of the stay), its constitutional rights will be irreparably harmed. It relies, by analogy, on cases where the production of documents was held to constitute irreparable harm because the right to be accorded protection was one of privacy or confidentiality: *Bisaillon v. R.* (1999), 251 N.R. 225; 990 D.T.C. 5517 (F.C.A.) (*Bisaillon*) and *Bining v. R.*, 2003 FCA 286, 4 C.T.C. 165 (*Bining*).

[10] More particularly, U.S. Steel claims that the process under section 40 of the ICA violates the right to know the case it has to meet and to make full answer and defence. It must respond to the Crown's case without having had any opportunity to cross-examine the Crown's witnesses. As U.S. Steel's counsel put it, if a stay of the T-1162 application is not granted, the egg will have already been scrambled.

[11] Turning to the evidence, U.S. Steel relied upon the affidavit of its Executive Vice President and Chief Operating Officer, John H. Goodish, sworn June 29, 2010. In addressing the issue of irreparable harm at paragraphs 18 and 19 of his affidavit, Mr. Goodish attested as follows:

> If the relief sought in the pending appeal is granted in whole or in part, it will either dispose of this Application or fundamentally alter the manner in which it proceeds. However, in the absence of a stay, by the time the pending appeal of the [validity] order is decided, the substantive hearing will be nearly, or fully completed. The pending appeal will then be moot. Accordingly, in the absence of a stay, [U.S. Steel] will be effectively deprived of its right to appeal the [validity] order, thus suffering irreparable harm through the loss of an appeal granted as of right under the *Rules*.
>
> In light of the expected deadlines under which the present application will proceed in the absence of a stay, by the time the appeal of the [validity] order is resolved, the issues at its core will become moot.

[12] These paragraphs, in my view, constitute a combination of opinion and argument. There is no factual foundation to support the bare and conclusive assertions. There is no specificity regarding the application process, no disclosure as to known or anticipated timelines and no information regarding any expedited deadline. There are no facts contained within the affidavit as it pertains to irreparable harm.

[13] Absent evidence of irreparable harm, the second component of *RJR* is not met. Even accepting the submissions of U.S. Steel's counsel (which are not evidence) as to the application process prescribed by the *Federal Courts Rules*, S.O.R/98-106, (the Rules), there is no basis for a finding of irreparable harm. Counsel complained that U.S. Steel does not know the case it has to meet and cannot cross-examine the Crown's witnesses before it has to respond. The Crown's application (filed July 17, 2009) must be supported by an affidavit. U.S. Steel advanced neither

evidence nor argument that the Crown's documentation was deficient to the extent that U.S. Steel did not know the case it had to meet, or at all. If such deficiency exists, U.S. Steel ought to have addressed it on this motion.

[14] As to cross-examination, it is correct that, under the Rules, in matters proceeding as applications, cross-examination is conducted after the affidavit evidence has been served. Again, there was neither evidence nor argument regarding the nature of the irreparable harm that would result because of this process. Even if this were a situation where irreparable harm was self-evident (and it is not), it must be stated as such.

[15] In relation to the allegation of mootness, U.S. Steel's position is that, if the very procedure that is the subject of the appeal is implemented (in the T-1162 application), the appeal as to process is rendered moot. This, it is said, renders any remedy this Court could grant nugatory and accordingly, constitutes irreparable harm.

[16] The first difficulty in this respect is, as discussed above, U.S. Steel's failure to explain on this motion what deficiencies exist with respect to the procedure. While counsel spoke of a right to full answer and defence and a right of full disclosure, there was no disclosure of the perceived frailties of the impugned procedure.

[17] Second, even if, for the purposes of this motion, I were to accept U.S. Steel's position as correct, it assumes that an appeal rendered moot automatically gives rise to a finding of irreparable

harm. That is not so. As Rothstein J.A. (as he then was) explained in *El Quardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76, if such a proposition were adopted, it would apply to virtually all circumstances in which a stay is sought and would essentially deprive the court of the discretion to decide questions of irreparable harm on the facts of each case.

[18] Third, I am not persuaded, if the T-1162 application continues and the application is determined before the disposition of the appeal from the validity order (which is speculative at this point) that this Court could not fashion an appropriate remedy. It is not insignificant that U.S. Steel sought declaratory relief in the Federal Court. Specifically, as noted earlier, with respect to section 40 of the ICA, it sought a declaration of invalidity on the basis that it contravened section 11(d) of the Charter and paragraph 2(e) of the Bill of Rights. If U.S. Steel were to succeed on appeal (which is speculative at this point), it would be open to this Court to grant a declaration of invalidity. If that were to occur, and U.S. Steel had been unsuccessful in the T-1162 application (which is speculative at this point), the declaration of invalidity would constitute grounds upon which to set aside the judgment in the T-1162 application.

[19] Further, the Crown's point that U.S. Steel's validity attack is premised on only two of the seven options enumerated in paragraph 40(2)(a) of the ICA is well-taken. The prospect exists, if U.S. Steel's appeal were successful (which is speculative at this point) that this Court would sever the offensive elements in which case the Federal Court could still utilize the remaining options, if U.S. Steel were unsuccessful in the T-1162 application (which is speculative at this point).

[20] All of which is to say, the only remedy that would be unavailable to this Court would be to retroactively alter the process in the T-1162 application. However, it does not necessarily follow that an appeal from the validity order would be moot. In my view, sufficient options would remain available to this Court to remedy any harm sustained by U.S. Steel. That was not the situation in *Bisaillon* and *Bining* where private information would become public and the breach would be irreversible.

[21] U.S. Steel has not established that it would suffer irreparable harm.

Balance of Convenience

[22] U.S. Steel argued that the balance of convenience favours it because the constitutional issues are of significant importance and widespread impact and there is no prejudice to the Crown. It claimed that it is in the public interest to have the issues determined with finality and it would be expedient and efficient to do so. Last, it asserted that the violations of the Charter and the Bill of Rights would be perpetrated if a stay is not granted.

[23] At the hearing, there was debate as to whether the ICA is a public interest statute. I need not make a determination as to whether it is or is not. It is apparent, on its face, that it has a public interest dimension because it is aimed at encouraging investment, economic growth and employment opportunities for the benefit of Canadians. Additionally, it is aimed at ensuring that proposed investments will not be injurious to national security. This is sufficient, in my view, to bring it within the purview of the comments of the Chief Justice in *Harper v. Canada* (*Attorney*

General), [2000] 2 S.C.R. 764 (*Harper*) that the motions judge must proceed on the basis that the law is directed to the public good and serves a valid public purpose. The assumption of the public interest in enforcing the law weighs heavily in the balance. The statement at paragraph 9 of *Harper*, reproduced below, is apt.

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on ground of alleged unconstitutionality succeed.

[24] To delay the commencement of the T-1162 application would effectively suspend the application of the legislation. U.S. Steel has not persuaded me that such an approach would itself provide a public benefit. The balance of convenience favours the Crown.

[25] The motion will be dismissed with costs.

Postscript

[26] Counsel for the parties indicated at the hearing that they have agreed to an abridged schedule in relation to the appeal from the validity order. Counsel for U.S. Steel undertook to file a formal motion to expedite the hearing of the appeal. I am confident that the motion will be filed, on consent, forthwith.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-242-10
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	July 21, 2010
REASONS FOR JUDGMENT BY:	LAYDEN-STEVENSON J.A.
DATED:	July 23, 2010

APPEARANCES:

Michael Barrack Marie Henein Ronald Podolny	FOR THE APPELLANTS
John L. Syme Jeffrey G. Johnston	FOR THE RESPONDENT
David Wilson	FOR THE INTERVENER: Lakeside Steel
Paula Turtle	FOR THE INTERVENER: United Steelworkers

SOLICITORS OF RECORD:

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Fasken Martineau DuMoulin LLP Toronto, Ontario	FOR THE INTERVENER: Lakeside Steel
Canadian Counsel for United Steelworkers Toronto, Ontario	FOR THE INTERVENER: United Steelworkers

Date: 20090428

Dockets: T-581-08
T-1685-08

Citation: 2009 FC 426

Toronto, Ontario, April 28, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Respondents

REASONS FOR ORDER AND ORDER

[1] The Attorney General of Canada seeks an order staying a "Public Interest Hearing" to be held by the Military Police Complaints Commission until the final determination of two applications for judicial review brought by the Attorney General. The hearing is to examine complaints received by the Commission with respect to the transfer of detainees held by Canadian Forces' personnel in Afghanistan to the custody of Afghan authorities. The Attorney General's

[29] The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, (2005), at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[30] That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.

[31] In this case, the Attorney General of Canada argues that three different forms of irreparable harm will result if the Commission's proceedings are not stayed. These are firstly, damage to the reputations of the individual Canadian Forces' members who are the subjects of the complaints; secondly, the risk of inadvertent disclosure of confidential information which may damage Canada's international relations, national defence or national security; and thirdly, the waste of public funds that will occur if it is ultimately determined that the Commission is acting outside of its jurisdiction. Each category of alleged irreparable harm will be considered in turn.

i) *Damage to Reputation*

[32] Ten individuals have been named as subjects of the various complaints. The Attorney General represents eight of these individuals before the Commission, and two have retained private counsel. None of these individuals have brought their own applications for judicial review with

Canada (Attorney General) v. Thwaites, [1993] F.C.J. No. 945

Federal Court Judgments

Federal Court of Canada - Trial Division

Halifax, Nova Scotia

Dubé J.

Heard: September 14, 1993

Judgment: September 20, 1993

Action No. T-1629-93

[1993] F.C.J. No. 945 | *[1993] A.C.F. no 945* | *68 F.T.R. 153* | *93 CLLC para.17,032* at *16315* | *42 A.C.W.S. (3d) 1046* | *19 C.H.R.R. D/308*

Between Attorney General of Canada, Applicant, and Simon Thwaites and Canadian Human Rights Commission, Respondents

(6 pp.)

Case Summary

Practice — Orders and judgments — Stay of order — Pending judicial review — Irreparable harm.

Application by the Crown for stay of execution of a Canadian Human Rights Tribunal order requiring the payment of money to the respondent. The respondent, a soldier, had alleged discrimination by reason of disability. The Crown argued that payment would render its application for judicial review nugatory and would cause irreparable harm. It was conceded that there was a serious issue to be considered.

HELD: Application dismissed.

Irreparable harm was harm which could not be compensated for in damages.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Human Rights Act, *R.S.C. 1985, c. H-6, ss. 53(2), 53(3), 57*.

Counsel

Mr. Russell, for the Applicant.

Ms. Reierson, for the Respondent, Simon Thwaites.

refused. In those circumstances the status quo ought to be maintained. In the view of the Attorney General, the status quo would be to hold back the payment until the judicial review is completed.

8 In response, counsel for Thwaites argues[8] that the sole evidence in support of the applicant's motion, the Weatherston affidavit, sets forth no affirmative facts to justify the applicant's concern about recovery. The concern, in any event, is speculative and insufficient to justify the granting of a stay. Moreover, while the applicant offers no exceptional circumstances justifying a stay, Thwaites' situation is exceptional[9]. Simply put, he needs the money now and is entitled to the fruit of his litigation[10] in order to maintain a certain quality of life in his dying days. Counsel submits that payment would not render the review futile as the Crown will proceed with the review in any event. On the other hand, should a stay be granted the review would very likely give rise to further appeals and further delays. Thus, the potential harm to Thwaites would be enormous.

9 Counsel for the co-respondent, the Canadian Human Rights Commission, submits that the applicant's judicial review application raises grounds other than the payment of money, and would therefore not be rendered nugatory by such payment: in any event, the issue of nugatoriness falls within the scope of irreparable harm and the applicant must show that irreparable harm would ensue should the stay not be granted[11], not merely that it could ensue.

10 In my view, the applicant has not established that he would suffer irreparable harm if the award is paid. Irreparable harm is damage that cannot be repaired by money. In any event, there is no evidence that Thwaites would dissipate, or abscond with, the money. At the present time, the status quo is that Thwaites is entitled to the award and should receive it now. As to the issue of nugatoriness, the applicant has not established that the judicial review would be futile. In his originating notice of motion for judicial review the applicant has listed seven separate grounds for quashing the decision of the Human Rights Tribunal. Some of these grounds are very substantial and deserving of judicial consideration irrespective of the mere payment of money.

11 Consequently, it is not necessary to apply the third criteria, the balance of convenience. If it were necessary, it seems obvious to me that further delay, including possible appeals to the Federal Court of Appeal and the Supreme Court of Canada[12], would cause grievous harm to Thwaites who is in dire financial straits, has no income and has had to apply for social assistance. He has already suffered extreme anxiety since 1989 and more so while awaiting the Human Rights Tribunal process to begin in June of 1992, a process which extended over seven months. He then suffered the stress of waiting six more months for the decision, only to have the judicial review application filed and now this application for a stay of execution. According to his affidavit which has not been contradicted: "I have now suffered further financial stress and the loss of pride and dignity of accepting charity at the expense of my family for the past three months". The man should be allowed to live his remaining days in dignity.

12 The application for stay is denied with costs.

DUBÉ J.

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1 By virtue of section 57 of the Act.

2 Pursuant to section 18.1 of the Federal Court Act, *R.S.C. 1985, c. F-7*, as amended.

3 August 11 letter of Bruce Russell, CAF counsel.

4 See Manitoba (Attorney General) v. Metropolitan Stores Ltd., *[1987] 1 S.C.R. 110*.

5 Director of Law/Human Rights and Information, office of the Judge Advocate General of the CAF.

Canada (Minister of Human Resources Development) v. Gattellaro, [2005] F.C.J. No. 1106

Federal Court Judgments

Federal Court

Toronto, Ontario

Snider J.

Heard: June 20, 2005.

Judgment: June 23, 2005.

Docket T-2164-04

[2005] F.C.J. No. 1106 | *[2005] A.C.F. no 1106* | *2005 FC 883* | *2005 CF 883* | *140 A.C.W.S. (3d) 576*

Between Minister of Human Resources Development, applicant, and Josephine Gattellaro, respondent

(21 paras.)

Case Summary

Civil procedure — Appeals — Extension of time — Pensions and benefits law — Pensions — Government plans — Disability pensions — Pension commissions, boards and superintendents — Appeals and judicial review of decisions.

Application by the Minister of Human Resources Development for judicial review of a decision of the Pension Appeal Board granting Gattellaro leave to appeal and an extension of time to file an appeal. Gattellaro applied for disability benefits in 1995. Her application was denied and the Review Tribunal dismissed Gattellaro's appeal in 1997. Gattellaro claimed she could not appeal earlier because of difficulties in her life, marital difficulties, the fact that her representative abandoned her and that she was raising her young children. The Board granted Gattellaro the extension of time and leave to appeal from the Tribunal's decision in 2004. The Board's decision was made ex parte and no reasons were issued.

HELD: Application allowed.

Gattellaro did not have a reasonable explanation for the delay in bringing her appeal. She provided no affidavit in support of her position. At the time of the decision by the Review Tribunal, Gattellaro's children were almost 30 years of age. The record indicated that the same representative acted on her behalf at the hearing before the Review Tribunal and the application before the Board. Despite her claimed difficulties, Gattellaro initiated a second application for disability benefits in 1999. There was no evidence of marital difficulties, as Gattellaro stated that her husband supported her application. The Board's conclusion that Gattellaro provided sufficient reasons for her delay in bringing the leave application was unsupported by the evidence. The Board failed to consider whether the Minister would be prejudiced if Gattellaro's application was granted. Allowing the application led to a lack of finality and certainty for both parties.

8 The situation faced by a member of the Board considering a request is analogous to that before a judge of the Federal Court in considering an extension of time for bringing an application for judicial review pursuant to s. 18.1(2) of the Federal Courts Act, *R.S.C. 1985, c. F-7*, as amended. That provision of the Federal Courts Act provides that an application for judicial review is to be made within 30 days "or within any further time that a judge of the Federal Court may fix or allow". The wording is almost identical to the relevant provision in the CPP. Also similar to the CPP, there is no statutory duty on a judge to give reasons for a decision to allow an extension of time. Thus, in my view, it is reasonable that the same principles applicable to a judge of the Federal Court ought to be engaged on a decision to extend time made by a member of the Board.

9 Jurisprudence relied on by the Minister (Grewal v. Canada (Minister of Employment and Immigration), *[1985] 2 F.C. 263* (F.C.A.); Baksa v. Neis (c.o.b. Brookside Transport), *[2002] F.C.J. No. 832*) has established that the following criteria must be considered and weighed:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

10 They are, in my view, equally applicable to the decision under review. I note that the decision to extend the time period has been made without submissions by the Minister, a party equally affected by the decision to proceed to an appeal. In light of this, it seems even more critical in the interests of justice, that the record demonstrates clearly that all of these factors have been addressed by the decision maker. This is not to say that this Court should intervene lightly in a decision of the designated member of the Board. Provided that the record demonstrates that there was a reasonable evidentiary basis upon which the member could assess the factors, it would not be up to this Court to re-weigh the evidence.

11 In the case before me, I am prepared to assume, without deciding, that the first two criteria have been met. However, I have serious concerns with respect to the last two factors of explanation for the delay and prejudice to the Minister.

12 On the subject of the reasons for her delay, the Respondent provided very little rationale for bringing her leave application so late. Her reasons, as set out in her initial letter to the Board dated February 8, 2004, were as follows:

> Ms. Gattellaro did not act earlier on this due to many difficulties in her life. She was having to cope with her significant depression, her marital problems and raising her young children. And the process for the Pension Appeals Board was not properly communicated to her for her full understanding of the situation.

13 In a second letter dated May 3, 2004, her reasons changed somewhat -- particularly with regard to whether she understood the process of an appeal.

> Mrs. Gattellaro was in such a state of depression that she could not take care of her affairs regarding appealing the decision from the Review Tribunal. Her former representative abandoned her case. And Mrs. Gattellaro's husband came across the documentation and persuaded her to pursue her case and that he would provide the support she required.

14 The Respondent provided no affidavit to support her position on this judicial review. I am left attempting to establish the facts from the Minister's uncontroverted affidavit evidence and from the certified copy of the material before the Board. A review of the record demonstrates that her reasons do not hold up to scrutiny.

King v. Canada (Attorney General), [2000] F.C.J. No. 196

Federal Court Judgments

Federal Court of Canada - Trial Division

Fredericton, New Brunswick

Pelletier J.

Heard: August 11, 1999.

Judgment: February 11, 2000.

Court File No. T-1530-98

[2000] F.C.J. No. 196 | *[2000] A.C.F. no 196* | *182 F.T.R. 226* | *95 A.C.W.S. (3d) 171*

Between Robert King, applicant, and Attorney General of Canada, respondent

(35 paras.)

Case Summary

Armed forces — Pensions — Disability pensions, entitlement — Judicial review, grounds.

This was an application by King for judicial review of a decision by the Veteran's Review and Appeal Board. King was receiving a disability pension due to injuries sustained in 1968. In 1991, the Director of the Pensions Medical Advisory Directorate recommended drastic reductions to King's disability pension assessment. Notwithstanding prior rulings of its own assessment panels, the Pension Commission implemented the recommendations without prior notice to King. The Board affirmed a decision by an assessment panel and reduced the assessment for ligamentous strain of the lumbar spine from 50 to 10 per cent, and for anxiety and tension headache due to psychoneurosis from 60 to 10 per cent. It also increased the assessment for coccyx fracture from zero to five per cent. The medical evidence indicated that King suffered from chronic pain, and required braces and walkers. The decision of the Board was dated May 8, but the Board's intention not to reconsider was evidenced by a letter dated July 2. The respondent Crown argued that the application for review dated July 24 was brought more than 30 days after the date of communication, and was out of time under section 18.1(2) of the Federal Court Act. King argued that the Board failed to draw favourable inferences and failed to give adequate reasons. He also argued that it arrived at a decision not supported by any evidence. Also at issue was the appropriate remedy where a previous order to refer the matter to the Commission for a complete review of entitlement had not been complied with.

HELD: Application allowed.

The matter was remitted to the Board. The Board was ordered to refer the matter to the Minister for reconsideration. The time for bringing the application was extended to the date of the notice as it was in the interests of all parties to have them attempt to resolve their differences before resorting to judicial intervention. Given the expertise of doctors in assessing disability and the legislative provisions recognizing the role they played in assessing the degree of disability, the Board erred by rejecting the physician's assessment of disability without providing meaningful reasons. In applying the medical findings to the table of disabilities as prescribed by section 35(2) of the Pension Act, it was not apparent how the Board came to its conclusion regarding the degree of disability. The failure to give reasons was an error of law, which justified court intervention. As to the appropriate remedy, simply referring the matter back to another panel would not change the result where the Board was limited to dealing with assessment questions rather than the issue of entitlement to pension.

Statutes, Regulations and Rules Cited:

Federal Court Act, ss. 18, 18.1(2), 26, 35(2).

Pension Act, *R.S.C. 1985, c. P-6, ss. 35*(2), 82, 85.

Veteran's Review and Appeal Board Act, R.S.C. 1985, c. V-1.6, ss. 3, 39, 73.

Veterans Review and Appeal Board Regulations, s. 7.

Counsel

Scott Fowler, for the applicant. Jonathan Tarlton, for the respondent.

PELLETIER J. (Reasons for Order and Order)

1 When Robert King fell off a personnel carrier in 1968 and injured his back, he could not know that 30 years later he would still be fighting with the veteran's pension administration over his disability pension. But it is now 1999[1], and Mr. King brings an application for judicial review of yet another appeal from yet another unsuccessful review his pension assessment. There was a time when Mr. King's pension, though not necessarily to Mr. King's satisfaction even then, was considerably more generous than it is now. But in 1991, the Director of the Pensions Medical Advisory Directorate (the "Director") who had not examined Mr. King, nor read his entire file, determined that Mr. King's pension assessment had been badly overstated. The Director recommended drastic reductions in Mr. King's pension assessment and, notwithstanding the prior rulings of its own Assessment Panels, the Pension Commission implemented the recommendations without prior notice to Mr. King. He has been fighting to have his pension reinstated to its former level ever since.

2 This application is the latest skirmish in this struggle. It is an application dated July 24, 1998 for judicial review of the decision of the Veteran's Review and Appeal Board (the Board) dated May 8, 1998 affirming a decision of an Assessment panel dated December 11, 1997, which the Board declined to reconsider as evidenced in a letter dated July 2, 1998. The latter date is important since it is from this date that Mr. King reckons the 30 days within which he must begin his application for judicial review.[2] The respondent argues that the application is out of time since it was communicated to Mr. King in May and s. 18.1(2) of the Federal Court Act makes the date of communication the trigger date, not the date of some later proceeding. While the respondent is generally correct in its position, in the circumstances of this case, I exercise my discretion to extend the time for the bringing of the application for judicial review up to and including July 24, 1998, the date of the Notice of Application. I do so because I believe that it is in the interests of all parties including the Court to have parties attempt to resolve their differences between them before resorting to judicial intervention. As a result, I am prepared to extend the deadline to allow for exploration of meaningful alternatives to court applications.

3 Mr. King seeks to have the Board's decision set aside on four grounds:

Federal Court of Appeal | Cour d'appel fédérale

Date: 20181101

Docket: A-212-17

Citation: 2018 FCA 199

CORAM: **STRATAS J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

BRUCE WENHAM

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 9, 2018.

Judgment delivered at Ottawa, Ontario, on November 1, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

(a) The thirty-day, extendable limitation period: *Federal Courts Act*, subsection 18.1(2)

[41] In many cases, an application for judicial review must be commenced within thirty days after communication of the decision to the applicant: subsection 18.1(2) of the *Federal Courts Act*. But a party can move for an extension of time.

[42] Extensions of time are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide this inquiry: see, *e.g.*, *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at para. 61 and many other cases such as *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.). They are:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

[43] While these four questions appropriately guide the analysis and implement the policies intended by Parliament under subsection 18.1(2) when an *individual* applies for an extension of

Competition Tribunal Tribunal de la concurrence

Reference: *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 14
File No.: CT-2017-002
Registry Document No.: 120

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a motion for a temporary suspension or stay of the application by HarperCollins Publishers LLC and HarperCollins Canada Limited.

BETWEEN:

The Commissioner of Competition
(applicant)

and

HarperCollins Publishers LLC and HarperCollins Canada Limited
(respondents)

and

Rakuten Kobo Inc
(intervenor)

Date of hearing: September 19, 2017
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order and Reasons for Order: October 6, 2017

ORDER AND REASONS FOR ORDER DISMISSING THE RESPONDENTS' MOTION FOR A TEMPORARY SUSPENSION OR STAY

I. OVERVIEW

[1] On September 1, 2017, HarperCollins Publishers LLC ("**HarperCollins US**") and HarperCollins Canada Limited ("**HarperCollins Canada**") (collectively, "**HarperCollins**") filed a Notice of Motion ("**Motion**") with the Tribunal requesting an order for a temporary suspension or stay of the proceedings in the application brought against them by the Commissioner of Competition ("**Commissioner**") under section 90.1 of the *Competition Act*, RSC 1985, c C-34 as amended ("**Act**"). In the Motion, HarperCollins asks the Tribunal to suspend the Application pending the determination of its appeal to the Federal Court of Appeal ("**FCA**") of the July 24, 2017 order of the Tribunal dismissing HarperCollins' motion for summary dismissal of the Commissioner's Application (*The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10 ("***Summary Dismissal Decision***")).

[2] HarperCollins contends that, in the circumstances of this case, staying the Application is in the "interests of justice". In support of its Motion, HarperCollins submits that: (i) its appeal ("**Appeal**") raises serious threshold issues which have not previously received appellate consideration; (ii) it faces substantial prejudice in the absence of a suspension since it would be obligated to participate in steps to advance the Application and would, therefore, run the risk of attorning to the Tribunal's *in personam* jurisdiction; (iii) the Commissioner will not be prejudiced by the suspension taking into account the prior proceedings in the United States and Canada; and (iv) the suspension will avoid unnecessary expenditure of resources by the parties and the Tribunal. The intervenor Rakuten Kobo Inc. ("**Kobo**") supports HarperCollins' Motion.

[3] The Commissioner responds that, in considering HarperCollins' Motion, the Tribunal should apply the tripartite test set forth by the Supreme Court of Canada ("**SCC**") in *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 ("***RJR-MacDonald***"), as opposed to the "interests of justice" test proposed by HarperCollins and Kobo. He submits that HarperCollins has not established two of the three prongs of the *RJR-MacDonald* test and that the Motion should thus be dismissed. The Commissioner argues that the evidence advanced by HarperCollins on irreparable harm is either non-existent or speculative since, according to the Commissioner, HarperCollins attorned to the Tribunal's jurisdiction when it filed its response to the Application ("**Response**"). The Commissioner further contends that the balance of convenience overwhelmingly favours not granting the suspension since he is presumed to be acting in the public interest, and such public interest considerations deserve significant weight.

[4] There are two issues to be decided on this Motion:

(a) What is the appropriate test to be applied by the Tribunal to HarperCollins' request for a temporary suspension of the Application pending the Appeal?

(b) Should the suspension sought by HarperCollins be granted?

[5] For the reasons that follow, HarperCollins' Motion will be dismissed. The Tribunal concludes that, as was the case in *Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14 ("***Kobo Suspension***"), the appropriate test to be applied on this Motion remains the tripartite test set forth in *RJR-MacDonald*. The Tribunal finds that, on the record before it, this test is not met. This is because HarperCollins has not demonstrated that it will suffer irreparable harm if the suspension is not granted and the Application proceeds, and because the balance of convenience does not tilt in its favour. That said, in light of the recent SCC decision in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 ("***Google***"), the Tribunal has also considered, for the sake of completeness, whether it would have been in the interests of justice to suspend the Application at this stage. Further to its review, in the particular context of this case, the Tribunal would still decline to grant the stay sought by HarperCollins, even if the appropriate test was assumed to be the "interests of justice".

II. BACKGROUND

[6] The Commissioner filed his Application on January 19, 2017, seeking relief against HarperCollins under section 90.1 of the Act, which concerns agreements or arrangements between competitors. In the Application, the Commissioner alleges that HarperCollins US formed an arrangement in the United States with other US publishers of electronic books ("**E-books**") and Apple Inc. ("**Arrangement**") whereby the wholesale distribution model used for the sale of E-books was changed to an "agency" distribution model. The Commissioner contends that, as a result of that change, retail price competition in the markets for E-books in Canada is substantially restricted.

[7] The details of the procedural history leading to the current Motion are narrated in the Summary Dismissal Decision and need not be repeated here (*Summary Dismissal Decision* at paras 9-32).

[8] Suffice to say that, on March 6, 2017, HarperCollins filed its Response as well as its motion for summary dismissal ("**Dismissal Motion**"). In these two proceedings, HarperCollins submitted that the Commissioner's Application had two fundamental flaws on its face, each of which provided a separate, independent and sufficient jurisdictional ground on which the Application should be summarily dismissed. First, HarperCollins claimed that the Tribunal lacks jurisdiction to grant the relief requested by the Commissioner as the alleged Arrangement forming the basis of his Application was entered into in the United States, and not in Canada, and that section 90.1 of the Act on civil collaborations between competitors applies only in respect of agreements or arrangements among competitors that are formed in Canada. Second, HarperCollins argued that the Arrangement was no longer "existing or proposed", as required by section 90.1 of the Act. The arguments raised by HarperCollins both relate to the Tribunal's "subject-matter" jurisdiction.

[9] It should further be noted that, at the beginning of both its Response and its Dismissal

Motion, HarperCollins included explicit language reserving its rights to challenge the Tribunal's jurisdiction. Each of the documents expressly indicated that HarperCollins' participation in the Application was made "without attornment to or acceptance of the jurisdiction of the Tribunal over the proceeding and [HarperCollins]". HarperCollins repeated this reservation of rights in the introductory paragraph of this Motion, in terms slightly more elaborate.

[10] On July 24, 2017, the Tribunal released its order dismissing HarperCollins' Dismissal Motion. As detailed in the Summary Dismissal Decision, the Tribunal concluded that it was not plain and obvious that it did not have subject-matter jurisdiction over the Application. Upon reviewing the materials filed by HarperCollins, the Commissioner and Kobo, the Tribunal was not satisfied that the Commissioner's allegations could not be supported or that the Application was certain to fail at trial because it is bereft of all possibility of success. Accepting the facts and allegations as pleaded, the Tribunal found that a "real and substantial connection" might well be established between the subject-matter of the Commissioner's Application and Canada, sufficient to provide the Tribunal with jurisdiction in this matter. The Tribunal further concluded that it was not plain and obvious that the Arrangement was no longer existing in Canada as its manifestations and expression through the agency agreements reached by HarperCollins with Canadian E-book retailers were alleged to remain in place and its anti-competitive effects were alleged to continue to be felt in this country.

[11] On August 2, 2017, HarperCollins filed its Appeal of the Summary Dismissal Decision with the FCA. In early August and September 2017, further to a direction from the Tribunal, the parties exchanged proposed timetables for the disposition of the Application. These proposed schedules dealt with the timing of the usual steps for discovery (e.g., affidavits of documents, document productions, examinations on discovery, motions arising from the discovery steps, etc.) and for the preparation of the hearing (e.g., witness statements, expert reports, requests for admissions, etc.). On September 13, 2017, the Tribunal issued an order stating that the hearing of this matter shall commence on November 13, 2018, for approximately four weeks ("**Hearing Date Order**"). The parties were also ordered to consult each other with respect to the schedule of steps necessary to bring the case on the schedule time. If the parties fail to reach an agreement by October 13, 2017, the Tribunal shall fix a schedule of the pre-hearing steps, further to a case management conference.

[12] Earlier in February, 2017, Kobo had also filed an application for judicial review in the Federal Court ("**Kobo JR Application**") in respect of the consent agreements entered into on January 19, 2017 between the Commissioner and E-book publishers other than HarperCollins ("**2017 Consent Agreements**"). On March 8, 2017, the Federal Court granted a stay of the implementation of the 2017 Consent Agreements pending the determination of the Kobo JR Application. The Commissioner had consented to such a stay in order to move rapidly to the hearing on the merits of this matter. In a decision issued on April 19, 2017, the Federal Court also temporarily stayed the Kobo JR Application itself, pending the determination of HarperCollins' Dismissal Motion by the Tribunal, as HarperCollins' jurisdictional challenge

before the Tribunal overlapped with issues raised by Kobo before the Court (*Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2017 FC 382 ("***Kobo FC***")).

[13] HarperCollins' Motion is the most recent chapter in the long-running litigation between the Commissioner and E-book publishers and retailers, dating back to February 2014 when E-book retailer Kobo filed an application before the Tribunal pursuant to section 106 of the Act. In that section 106 application, Kobo was seeking an order to rescind or vary the terms of the initial consent agreement concluded between the Commissioner and E-book publishers ("**2014 Consent Agreement**"). In March 2014, the Tribunal issued an order staying the registration of the 2014 Consent Agreement. Following its decision on a reference that was brought by the Commissioner in a related proceeding (*Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14 ("**Reference Decision**")), the Tribunal issued its decision on Kobo's section 106 application in April 2016, granting it in part and rescinding the 2014 Consent Agreement (*Rakuten Kobo Inc v The Commissioner of Competition*, 2016 Comp Trib 11). At the hearing of Kobo's section 106 application, the Commissioner had consented to rescind the 2014 Consent Agreement, as he agreed that it did not meet the requirements set out by the Tribunal in the Reference Decision.

III. ANALYSIS

A. The appropriate test is still *RJR-MacDonald*

[14] The first issue to be decided on this Motion is the appropriate test to be applied by the Tribunal to determine whether it should suspend the Application pending HarperCollins' Appeal of the Summary Dismissal Decision.

[15] Echoing what Kobo had (unsuccessfully) argued in the *Kobo Suspension* matter, HarperCollins submits that the preferable test to be applied is whether, in all the circumstances, the requested suspension is in the "interests of justice". HarperCollins relies on the FCA's decision in *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 ("***Mylan***") and on the Tribunal's decision in *Commissioner of Competition v Toronto Real Estate Board*, 2014 Comp Trib 10 ("***TREB***"). According to HarperCollins, the "interests of justice" test acknowledges that broad discretionary considerations regarding the administration of justice are at play in the exercise of the Tribunal's power to impose a stay or suspension of its own proceedings. HarperCollins notes that, while factors demonstrating irreparable harm or imbalance of convenience (which form part of the *RJR-MacDonald* tripartite test) are still relevant under the "interests of justice" test, this latter test also takes into account other factors such as the "public interest in the fair, well-ordered and timely disposition of litigation" and "the effective use of scarce public resources" (*Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, 2012 ONCA 756 ("***Korea Data***") at para 19). This, in HarperCollins' view, is a better-suited guide to be followed by the Tribunal in the context of this Motion.

[16] HarperCollins further submits that, in any event, the test effectively retained by the Tribunal does not make much of a difference as, under either the "interests of justice" test or the *RJR-MacDonald* test, the Tribunal ultimately has to determine what is a fair and just disposition of the Motion in all of the circumstances. HarperCollins notably refers to decisions of the Ontario Court of Appeal ("**ONCA**") stating that the *RJR-MacDonald* test requires the courts to "decide whether the interests of justice call for a stay" (*Essar Steel Algoma Inc, Re*, 2016 ONCA 138 ("***Essar Steel***") at para 60; *BTR Global Opportunity Trading Ltd v RBC Dexia Services Trust*, 2011 ONCA 620 ("***BTR Global***") at para 16; *Ogden Entertainment Services v Retail, Wholesale Canada, Canadian Service Sector, USWA, Local 440* (1998), 38 OR (3d) 448 (CA) ("***Ogden***") at para 4). Kobo also contends that the appropriate test is whether the interests of justice support the suspension or stay.

[17] Having heard and considered the arguments put forward by HarperCollins and Kobo, as well as the opposing views of the Commissioner, I am not persuaded that there are reasons to depart from my conclusions in *Kobo Suspension* on the appropriate test to be applied on this Motion. As stated by both the FCA in *Mylan* and the Tribunal in *TREB*, the Tribunal has the discretion to handle stays of its own proceedings pending appeal using the test it considers appropriate. I remain of the view that the Tribunal should continue to apply the *RJR-MacDonald* test when it is asked to stay or adjourn a proceeding pending an appeal of its own interlocutory decisions and that, subject to my comments below on the evolution of the case law, it is the preferable test to be used by the Tribunal in assessing the merits of HarperCollins' Motion.

a. Test for HarperCollins' Motion

[18] I essentially adopt the analysis developed in *Kobo Suspension* at paras 27-36. As pointed out by the Commissioner, in all cases except *TREB*, the Tribunal has always applied the tripartite test set out in *RJR-MacDonald* when requested to adjourn a matter pending an appeal of its decisions. In *RJR-MacDonald*, the SCC held that, to issue an order for stay or injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the injunction were refused. Third, an assessment must be made as to the "balance of convenience", which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits (*Kobo Suspension* at para 24; *The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 ("***Parkland***") at para 26).

[19] I find no grounds not to follow my recent conclusions in *Kobo Suspension* and the previous decisions of the Tribunal to the same effect, issued by Mr. Justice Rothstein in *D & B Companies of Canada Ltd v Canada (Director of Investigation and Research)*, [1994] CCTD No 17 ("***D & B***") at para 5, aff'd (1994), 58 CPR (3d) 342 (FCA) ("***D & B FCA***") at para 18, and by Madam Justice Dawson in *Commissioner of Competition v Sears Canada Inc*, 2003 Comp Trib 20 ("***Sears***") at paras 8-11.

[20] More specifically, for the reasons detailed in *Kobo Suspension*, I am still of the view that the Tribunal's approach in *D & B* and *Sears* has not been overtaken by the FCA's decision in *Mylan*. As indicated in *Kobo Suspension*, the FCA in *Mylan* specifically referred to its previous decision in *D & B FCA* and recognized that Mr. Justice Rothstein's decision in *D & B* represented the Tribunal's different (but still entirely valid) determination of what factors the Tribunal should consider when asked to adjourn a hearing before it (*Kobo Suspension* at para 30). In *Mylan*, the FCA confirmed that the Tribunal could, in the exercise of its discretion, resort to the *RJR-MacDonald* test in determining whether to grant an adjournment of its own proceedings pending an appeal of one of its interlocutory orders.

[21] I make the following additional observation. It is true that, in *Mylan*, the FCA distinguished between situations where the FCA was enjoining another body from exercising its jurisdiction and others where the Court was deciding not to exercise its own jurisdiction until later. The FCA held that, when it is deciding whether to delay its own hearings pending another appeal, the "interests of justice" should govern. I note that *Mylan* was a situation where AstraZeneca was asking the FCA to adjourn its hearing until the SCC decided another appeal in a similar case involving different parties, but where AstraZeneca was not directly involved. Arguably, AstraZeneca did not have the option of going to the SCC to seek a stay of its own case before the FCA. However, the situation differs in the current case. HarperCollins is asking the Tribunal to suspend its own proceedings pending the FCA's determination of HarperCollins' own appeal of the interlocutory Summary Dismissal Decision. In this case, HarperCollins elected to bring its Motion before the Tribunal, but HarperCollins could also have gone to the FCA and asked that Court to stay the Application pending the Appeal. Based on *Mylan*, the FCA would then have applied the *RJR-MacDonald* test to determine whether it should enjoin the Tribunal from exercising its jurisdiction. To echo the observation made by Mr. Justice Rothstein in *D & B*, "I do not understand why the Tribunal, in considering this adjournment application, would apply different principles than the Federal Court of Appeal on the stay application, both relating to the same proceedings" (*D & B* at para 5). It would certainly be strange that, had HarperCollins sought a stay of the Application at the FCA, it would have been subject to the *RJR-MacDonald* test but, because it is now raising it before the Tribunal, it would be subject to the different, and arguably less stringent, "interests of justice" test.

[22] Moreover, by rejecting HarperCollins' Dismissal Motion, the Tribunal confirmed that, in its view, the Application could go ahead and be considered on the merits. HarperCollins now asks the Tribunal not to proceed with the disposition of the Application. Seeking a stay of the Application is therefore analogous to seeking to suspend the effect of the Tribunal's interlocutory decision dismissing HarperCollins' Dismissal Motion. In other words, the stay sought by HarperCollins would have the same effect as requesting the FCA to suspend the Tribunal's Summary Dismissal Decision being appealed and to enjoin the Tribunal from carrying on its mandate and from exercising the powers granted to it by Parliament, pending the Appeal.

[23] Such a suspension of a legally binding and effective decision and of the Tribunal's statutory right to exercise its jurisdiction is most significant (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 ("***Janssen 1***") at para 20; *Mylan* at para 5). In my view, this commands the application of the *RJR-MacDonald* test. This does not correspond, in my opinion, to the type of situations envisaged by the FCA in *Mylan* for the interests of justice test. In *Mylan*, the FCA was asked to adjourn its own proceedings pending the result of an appeal before the SCC in another case involving different parties but similar issues. The current Motion is also different from the situation in *Kobo FC* where the Federal Court was the only court able to issue a stay of its own proceedings pending a parallel decision of the Tribunal. In the Kobo JR Application, Kobo did not have the option to go to another court to obtain its stay.

[24] I am also of the view that adopting the more demanding test of *RJR-MacDonald* in situations like this one is consistent with the Tribunal's enabling legislation. In particular, it echoes the imperative language contained at subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) ("**CTA**"), which imposes a mandatory obligation on the Tribunal to deal with matters "as informally and as expeditiously as the circumstances and considerations of fairness permit" (*D & B FCA* at paras 12, 18). As I mentioned in *Kobo Suspension*, subsection 9(2) is an overarching consideration which governs how the Tribunal shall handle all proceedings before it. The Tribunal should not lightly decide to adjourn or suspend hearings and proceedings before it, and resorting to the *RJR-MacDonald* test to determine whether to grant a suspension pending an appeal of its interlocutory orders is in line with the principle established by this provision (*Kobo Suspension* at para 32).

[25] Finally, I reiterate that the "interests of justice" test can be traced back to paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 ("**FC Act**"). Whereas this provision explicitly empowers the FCA and the Federal Court to stay proceedings where "it is in the interest of justice", no such provision is found in the CTA or in the Act, which define the statutory powers conferred upon the Tribunal by Parliament. I am mindful of the existence of subsection 8(2) of the CTA which, as counsel for Kobo rightly observed, confirms that the Tribunal has, with respect to "the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record". I would add that subsection 8(1), described by the SCC as "the basis of the Tribunal's jurisdiction" (*Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 at 411), further provides that the Tribunal generally has jurisdiction to hear and determine all applications made under Part VIII of the Act "and any related matters". I accept that, given the silence of the CTA on this specific point, the Tribunal's power to stay its own proceedings pending appeal may arguably find its source in section 8 of the CTA. However, it does not flow from that provision that the Tribunal, as a tribunal created by statute, enjoys the same statutory powers specifically granted by the FC Act to the Federal Court and to the FCA to stay their respective own proceedings "in the interest of justice".

[26] That said, I of course acknowledge that the Tribunal has the discretion to invoke the interests of justice even in the absence of a specific statutory provision enabling it to do so. As Madam Justice Simpson said in *TREB*, it is "open to the Tribunal to follow the [FCA's] lead and consider the interests of justice" (*TREB* at para 19).

[27] In its submissions, counsel for Kobo claims that, in his December 2014 decision to continue the suspension of Kobo's section 106 application (*Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 21 ("***Kobo 2014***")), Mr. Justice Rennie "appeared to have applied the interests of justice test". I do not share this reading of the *Kobo 2014* decision. True, the Tribunal stated in its reasons that continuing the suspension pending the determination of Kobo's appeal of the Tribunal's Reference Decision to the FCA was "a pragmatic and cost-effective approach which takes into consideration the factors set out in subsection 9(2) of the *Competition Tribunal Act*" (*Kobo 2014* at para 4). However, nowhere in the decision did the Tribunal consider whether the more demanding *RJR-MacDonald* test or the lower "interests of justice" test applied. In my view, it is not possible to decipher from Mr. Justice Rennie's reasons whether he turned his mind to a particular test before adopting the "pragmatic and cost-effective approach" he ultimately retained.

[28] As indicated above, the only occasion where the Tribunal has decided against applying the *RJR-MacDonald* test in determining whether to suspend one of its proceedings is the *TREB* decision. In that case, Madam Justice Simpson, in the exercise of her discretion, found that requiring the applicant to demonstrate irreparable harm to secure an adjournment would be "unduly onerous". The Tribunal therefore declined to use the tripartite test, determined that it would follow the FCA's decision in *Mylan* and considered the "interests of justice". In doing so, Madam Justice Simpson emphasized the particular circumstances of that case, notably the fact that the suspension was requested shortly before the scheduled hearing, at a time where the parties were about to spend significant resources to update the evidence in preparation for an imminent hearing. As detailed below, I consider that the context of this Motion is vastly different from the situation faced by Madam Justice Simpson in *TREB*.

[29] For all those reasons, I find that the appropriate test to assess the merits of HarperCollins' Motion is the *RJR-MacDonald* test.

b. Interests of justice

[30] That being said, developments in the case law since the Tribunal's November 2015 decision in *Kobo Suspension* lead me to make the following remarks on the interface between the *RJR-MacDonald* and the "interests of justice" tests.

[31] As discussed above, counsel for HarperCollins referred the Tribunal to various decisions of the ONCA stating that the overriding question in assessing the three components of the *RJR-MacDonald* test is "whether the moving party has shown that it is in the interests of justice to

grant a stay" (*Essar Steel* at para 60; *BTR Global* at para 16; *Ogden* at para 4). In light of these decisions, HarperCollins argues that the "interests of justice" and *RJR-MacDonald* tests are in fact similar. Conversely, the Commissioner relies on the jurisprudence of the FCA, and on the distinction established in *Mylan* between the two tests. Furthermore, he notably refers to *Janssen 1*, where the FCA disagreed with the submission that "the overall test [to grant a stay] is whether a stay is in the 'interests of justice'", affirming instead that the party seeking a stay must establish all three requirements of the *RJR-MacDonald* test (*Janssen 1* at paras 13-14).

[32] None of the parties has however referred, in its written or oral submissions, to the most recent pronouncement of the SCC on the *RJR-MacDonald* test, made three months ago in *Google*. In that decision, Madam Justice Abella, speaking for a majority of the Court, described the *RJR-MacDonald* test as follows (at para 25):

> [25] *RJR—MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.
>
> [emphasis added]

[33] In that decision, the SCC thus reminded that an overarching objective animates the *RJR-MacDonald* test, and that courts need to be satisfied that an interlocutory injunctive relief (and by extension, a stay) should only be granted if, ultimately, the relief is just and equitable, taking into consideration the particular circumstances of any given case. I observe that the language used by the SCC in *Google* (i.e., "just and equitable in all of the circumstances of the case") is very close to words used by counsel for HarperCollins in her submissions and by the Saskatchewan Court of Appeal in *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Ltd Partnership*, 2011 SKCA 120 ("***Potash***"), cited by HarperCollins. In *Potash*, the Court said that "[t]he ultimate focus of the court must always be in the justice and equity of the situation in issue" [emphasis added] (*Potash* at para 26). Moreover, while the words used by the SCC are certainly not identical, the statement of Madam Justice Abella in *Google* is also, to a certain extent, reminiscent of the "interests of justice" language used by the ONCA in *Essar Steel*, *BTR Global* and *Ogden* to describe the paramount objective of the *RJR-MacDonald* test.

[34] I am not saying that the SCC decision in *Google* has changed the well-accepted three-prong test of *RJR-MacDonald* or superimposed an additional consideration over it. Nor do I suggest or imply that the words "just and equitable" used by the SCC in *Google* have the same

meaning as the "interests of justice" concept used by the ONCA, or that the SCC indirectly intended to revisit the dual-track approach identified by the FCA in *Mylan*. Such questions go beyond the scope of issues raised in this Motion and are better left for another day.

[35] But the SCC decision in *Google* at least appears to reinforce that, in exercising their discretion to grant a stay or an injunction, the courts (and the Tribunal) need to be mindful of overall considerations of justice and equity, and that the *RJR-MacDonald* test may not be simply boiled down to a box-ticking exercise of the three components of the test. Arguably, it may support the view that the dividing frontier between the *RJR-MacDonald* and the "interests of justice" test should perhaps be seen more like a dotted line than a solid boundary, with the latter test somehow permeating through to the former.

[36] For that reason, and for the sake of completeness, I will therefore also consider, in my analysis, the "interests of justice" test identified in *Mylan*, and assess whether, in the circumstances of this case, it would be justified to grant the stay sought by HarperCollins if the appropriate test was assumed to be the "interests of justice".

c. Relevant binding case law

[37] I need to pause a moment to clarify which decisions are binding upon the Tribunal. As reflected in the paragraphs above, the parties in this case do not rely on the same legal sources to support their respective positions. In the context of this Motion, HarperCollins rests heavily on precedents from the ONCA, whereas the Commissioner refers mostly to decisions from the FCA.

[38] It is fair to say that there are significant differences in the case law emanating from these two appellate courts with respect to the interpretation and application of the *RJR-MacDonald* test. In fact, the *RJR-MacDonald* test is far from being similarly treated in the federal courts and in other courts across Canada. For example, the "interests of justice" dimension, expressly recognized by the ONCA in *Essar Steel* and *BTR Global* as the overarching objective of the test, appears to have been rejected by the FCA in *Janssen 1*. In addition, as indicated in Robert J. Sharpe, *Injunctions and Specific Performance*, Looseleaf (Toronto: Canada Law Book, 1992) ("***Sharpe***"), the FCA has said that evidence of irreparable harm must be clear and not speculative, and that the burden lies on the party seeking a stay to show that irreparable harm will result, not simply that harm may arguably result (*Sharpe* at 2.417). However, "most other courts have adopted a more flexible approach" (*Sharpe* at 2.418). In *Potash*, the Saskatchewan Court of Appeal aptly summarized the different perspectives of the various appellate courts on the irreparable harm prong of the *RJR-MacDonald* test: there is a "wide spectrum" of approaches on the standard of proof for irreparable harm, said the Court, and decisions of the FCA are "at the far end of the range", in requiring evidence that must be clear and not speculative (*Potash* at para 51).

[39] Which legal precedents must the Tribunal then follow and apply?

[40] It is well-recognized that the rule of *stare decisis* is based on hierarchy: "lower courts are bound to follow decisions rendered by the courts that have the power to reverse them" (*R v Vu*, 2004 BCCA 230 at para 27). In a federal state like Canada, the hierarchy of precedents is limited by the territorial jurisdiction of each court. Since appellate courts only have the power to reverse lower courts based in their province, their decisions have no binding force outside of their own province. For example, Ontario provincial courts lower than the ONCA are all bound to follow a decision of the ONCA (*Canada Temperance Act, Re*, [1939] OR 570, aff'd (*Reference re Canada Temperance Act)*, [1946] AC 193 (PC)); but they are not bound by the decisions of the appellate courts of other provinces or by decisions of the FCA (*R v Beaney*, [1969] 2 OR 71 (Co Ct)). Similarly, since appellate courts other than the FCA have no power to reverse the Federal Court, their decisions have no binding force on that Court. In other words, the Federal Court is bound by FCA decisions, but not by decisions of other appellate courts across the country.

[41] As the SCC stated in *Wolf v The Queen*, [1975] 2 SCR 107 ("***Wolf***"), "[a] provincial appellate court is not obliged, as a matter either of law or of practice, to follow a decision of the appellate court of another province unless it is persuaded that it should do so on its merits or for other independent reasons" (*Wolf* at 109; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at para 108). The principle of *stare decisis* provides that, apart from the SCC, no appellate court outside a given province has the power to overturn a court decision issued within the province (*Wolf* at 109). By the same token, the FCA itself is not bound by decisions of provincial Courts of Appeal (*Larkman v Canada (Attorney General)*, 2014 FCA 299 at para 58).

[42] This does not mean that decisions of provincial Courts of Appeal are not deserving of the greatest respect in the federal courts. They certainly are, and they can sometimes be persuasive. But they are not binding on the FCA or on the Federal Court. And when there are conflicting interpretations between the FCA and other appellate courts, the FCA and the Federal Court are bound to follow the teachings and precedents of the FCA.

[43] The same holds true for the Tribunal. Subsection 13(1) of the CTA provides that "an appeal lies to the [FCA] from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court". Furthermore, section 28 of the FC Act grants jurisdiction to the FCA to hear and determine applications for judicial review made in respect of the Tribunal's decisions. The FCA will assess the legality of the Tribunal's pronouncements in light of its own jurisprudence and precedents, not those of the ONCA or other provincial appellate courts.

[44] Since only the FCA has the "power to reverse" the Tribunal, the Tribunal is therefore bound to follow the decisions of the FCA, but not those of the ONCA. Stated otherwise, the ONCA stands outside the hierarchy of courts binding the Tribunal. There may certainly be compelling reasons why the Tribunal ought to try to conform with decisions of the ONCA or of appellate courts other than the FCA when it is persuaded that it should do so on their merits or for other independent reasons. However, in situations where conflicting interpretations arise

between the FCA and provincial appellate courts, the Tribunal is required to follow the guidance of the FCA. This is what I will do in considering this Motion.

B. The *RJR-MacDonald* test is not met

[45] Turning to the *RJR-MacDonald* test, I need to determine whether HarperCollins' Motion meets the elements of the three-pronged test for granting a stay. The test is conjunctive, and requires HarperCollins to demonstrate that: (i) there is a serious issue to be tried; (ii) it will suffer irreparable harm if no stay is granted and the Application continues; and (iii) the balance of convenience favours the granting of the suspension. Furthermore, as recently stated by the SCC in *Google*, I must assess whether the granting of the stay would ultimately be "just and equitable in all of the circumstances of the case", which will "necessarily be context-specific" (*Google* at para 25). I note that, in setting out its arguments under its "interests of justice" approach, HarperCollins in fact deals with the "serious issue", "irreparable harm" (in terms of substantial prejudice) and "balance of convenience" (through the alleged absence of prejudice to the Commissioner) elements of the *RJR-MacDonald* test.

[46] For the reasons that follow, I conclude that HarperCollins has failed to satisfy the requirements of the tripartite test. More specifically, I am not satisfied that irreparable harm will arise if the Application is not suspended. Nor am I convinced that the balance of convenience favours HarperCollins. In those circumstances, it would not be just and equitable to grant a temporary suspension of the Application.

a. General requirements for a stay

[47] At the outset, it is important to underline that a stay of proceedings is an extraordinary, discretionary equitable relief. It is an exceptional remedy, and compelling circumstances are required to justify the intervention of the Tribunal and the exercise of the Tribunal's discretion to grant a stay pending an appeal of an interlocutory decision. The burden is on the moving party to demonstrate that the conditions of this exceptional remedy are met. In *Janssen 1*, Mr. Justice Stratas emphasized that the *RJR-MacDonald* test "is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing" (*Janssen 1* at para 20).

[48] The test is conjunctive and all three elements of the test must be met in order to grant relief. None of the branches can be seen as an "optional extra" (*Janssen 1* at para 19). It is trite law, in the FCA, that "failure of any of the three elements of the test is fatal" (*Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 ("***Ishaq***") at para 15).

[49] I accept that the three prongs of the test are not water-tight compartments, that they are somewhat interrelated and that they should not be assessed in total isolation from one another

(*University of California v I-Med Pharma Inc*, 2016 FC 606 at para 27, aff'd 2017 FCA 8; *Merck & Co Inc v Nu-Pharm Inc* (2000), 4 CPR (4th) 464 (FCTD) at para 13). However, this does not mean that one of the three compartments can be completely empty and compensated by the other two being filled to a higher level. There still needs to be something in each of the three compartments and, according to the FCA's jurisprudence, none of the three elements of the test can be entirely left aside and rescued by the other two. I observe that, whereas the ONCA has ruled that the failure to prove the existence of one element of the three-prong test does not necessarily imply that a stay cannot be granted (e.g., *Essar Steel*), the FCA's approach is more formalistic and requires that all elements of the *RJR-MacDonald* test be present in order to justify a stay.

[50] In the end, each matter must be addressed on its merits and, in balancing the various elements of the *RJR-MacDonald* test, the Tribunal needs to be satisfied that granting a stay is just and equitable in all the circumstances of the case.

b. Elements of the *RJR-MacDonald* test

i. Serious issue to be tried

[51] The first part of the tripartite test is whether the evidence before the Tribunal is sufficient to satisfy it that there is a serious issue to be tried. The threshold is a low one. While a preliminary assessment of the merits of the case is required, a prolonged examination of the merits is generally neither necessary nor desirable (*RJR-MacDonald* at paras 54-55). Once the Tribunal determines that the underlying Appeal is neither vexatious nor frivolous, it should proceed to the second part of the test.

[52] For the purpose of this Motion, the Commissioner concedes that HarperCollins' Appeal raises a serious issue to be tried. I agree that it does. The first element of the *RJR-MacDonald* test is accordingly met.

ii. Irreparable harm

[53] Under the second prong of the test, the question is whether HarperCollins has provided clear and non-speculative evidence that it will suffer irreparable harm between now and the time its Appeal is disposed of. In support of its position that its request for suspension should be granted in the "interests of justice", HarperCollins relies on two heads of "substantial prejudice", which it considers determinative of its Motion: they are the "risk of attornment" and the "unnecessary expenditure of resources" to be incurred if the FCA decides the Appeal in HarperCollins' favour and strikes the Application. These two factors will be considered as part of my analysis of the second element of the *RJR-MacDonald* test, irreparable harm. The alleged absence of prejudice to the Commissioner or to competition if the suspension is granted will be discussed under the balance of convenience part of the test, as it relates to the harm claimed by

the Commissioner, and not by HarperCollins.

[54] I will deal with the risk of attornment and the unnecessary expenditure of resources in reverse order. Before doing so, it is useful to summarize the legal requirements for a finding of irreparable harm.

1. Legal requirements

[55] The SCC held in *RJR-MacDonald* that "irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured (*RJR-MacDonald* at para 64).

[56] According to the FCA, irreparable harm is a very strict test. As stated by the Tribunal in *Parkland*, irreparable harm is harm that must be "established on the basis of clear and not speculative evidence" which demonstrates how such harm will occur if the relief is not granted (*Parkland* at para 48). It is indeed well-established in the FCA that irreparable harm in the context of injunctive relief must flow from clear and non-speculative evidence (*AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff'd 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 at paras 59-61, aff'd 2005 FCA 390; *Syntex Inc v Novopharm Ltd* (1991), 36 CPR (3d) 129 (FCA) at 135).

[57] Simply claiming that irreparable harm is possible is not enough. The jurisprudence of the FCA states that "[i]t is not sufficient to demonstrate that irreparable harm is 'likely' to be suffered" (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 ("***US Steel***") at para 7). There must be evidence that the moving party will suffer irreparable harm if the injunction or the stay is denied (*US Steel* at para 7; *Centre Ice Ltd v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at 52). When the alleged harm has not yet occurred and is apprehended, harm can be inferred, but there must still be a high degree of probability that the harm will in fact occur (*Parkland* at paras 50-52).

[58] The FCA has also frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm. The evidence must be more than a series of possibilities, speculations or general assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 ("***Gateway City Church***") at paras 15-16). "Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 ("***Glooscap***") at para 31). It is not enough "for those seeking a stay […] to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable" (*Stoney First Nation v Shotclose*, 2011 FCA 232 ("***Stoney First Nation***") at para 48). Quite the contrary, there needs to "be evidence at a convincing level of particularity that demonstrates a real probability that

unavoidable irreparable harm will result unless a stay is granted" (*Gateway City Church* at para 16, citing *Glooscap* at para 31).

[59] In *Janssen 1*, the FCA stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer "real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen 1* at para 24). In that decision, Mr. Justice Stratas added that "[i]t would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief […] [or] if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief" (*Janssen 1* at para 24). In that case, Janssen was seeking an order from the FCA suspending the remedy phase of proceedings before the Federal Court, pending its appeal of that Court's infringement finding. Janssen was arguing that it would suffer irreparable harm if the remedy phase of the proceedings went ahead prior to its appeal being determined and that the Federal Court's process should therefore be suspended. The FCA refused to suspend the Federal Court's proceedings as there was not sufficient probative evidence of irreparable harm.

[60] The question for the Tribunal is therefore whether the substantial prejudice identified by HarperCollins is clear, real and not speculative, and reaches the level of irreparable harm defined by the FCA, as opposed to a simple inconvenience. As it does in all cases before it, the Tribunal will assess the evidence on a balance of probabilities standard in conducting its analysis. As I mentioned in the Summary Dismissal Decision and *Parkland*, the Tribunal always remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 ("***McDougall***"), where the SCC stated that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46).

2. Unnecessary expenditure of resources

[61] I deal first with the second head of irreparable harm claimed by HarperCollins, namely the resources (essentially in the form of litigation expenses) that it will unnecessarily have to spend if the Application is not stayed. HarperCollins submits that, without a suspension, it (as well as the other parties and the Tribunal) will risk wasting resources since several discovery and preparatory steps will need to be undertaken for the disposition and hearing of the Application, and that these steps could prove to be totally unnecessary if the Appeal is granted. In their submissions, HarperCollins and Kobo both refer more specifically to various procedural steps such as the delivery of affidavits of documents, document productions, examinations for discovery and the preparation of motions relating to these discovery steps.

[62] This claim of irreparable harm can be easily dealt with: prejudice in terms of legal costs and litigation expenses simply does not constitute irreparable harm.

[63] It is well-recognized by the FCA that expenses to be incurred for the participation in legal proceedings, or the time and money required to prepare for and attend a hearing, cannot in itself constitute irreparable harm within the meaning of the *RJR-MacDonald* test (*Canada (Human Rights Commission) v Malo*, 2003 FCA 466 ("***Malo***") at paras 15, 20). Even the "mere fact of being forced to participate in a hearing that could be ruled invalid" does not amount to irreparable harm (*Malo* at para 22). The likelihood of wasted time and effort in preparing for two proceedings is also not considered irreparable harm (*Redeemer Foundation v Canada (Minister of National Revenue)*, 2005 FCA 138 ("***Redeemer***") at para 8). In *Janssen Inc v Abbvie Corporation*, 2014 FCA 176 ("***Janssen 2***"), Mr. Justice Stratas further added that "legal and other expenses without 'abnormal, harsh consequences beyond the norm' do not qualify as irreparable harm, as these can be quantified in damages" (*Janssen 2* at para 24, citing *Laperrière v D&A MacLeod Company Ltd*, 2010 FCA 84 at para 21).

[64] This type of prejudice can be compensated in money terms, through a costs order. The fact that it could perhaps not be entirely compensated is not a ground to qualify it as irreparable harm. Indeed, the inability of a party to recover the costs associated with a hearing does not amount to irreparable harm (*Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at para 72).

[65] I am unaware of FCA, Federal Court or Tribunal case law where costs, legal expenses or being forced to participate in a hearing process or discovery steps has been recognized as irreparable harm. HarperCollins and Kobo have not cited any. Indeed, in *Kobo Suspension*, the issue of whether litigation costs unnecessarily incurred could constitute irreparable harm arose in connection with Kobo's motion to suspend its section 106 application. In rejecting such costs as a head of irreparable harm, I referred to the Tribunal's conclusions in both *D & B* and *Sears*, where it found that such additional expenses could amount to an inconvenience but did not equate with irreparable harm. It is again worth repeating the words of Madam Justice Dawson in *Sears* at para 14, made in the context of a motion for adjournment pending appeal:

> [14] […] In the event that the Tribunal hearing had concluded, and Sears had been unsuccessful before the Tribunal but was later successful on its interlocutory appeal to the Federal Court of Appeal, it would be within the jurisdiction of the Court of Appeal to remit the entire matter for rehearing, if satisfied that was appropriate and necessary. This would undoubtedly amount to serious inconvenience but, as Mr. Justice Rothstein, sitting as the presiding judicial member of the Tribunal, wrote in *D & B Companies, supra* at page 4 of the report:
>
> > The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable

> harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross-examinations have to change.

[66] I digress a moment to point out that HarperCollins and Kobo also refer to the significant waste of judicial and financial resources by the Commissioner and the Tribunal. However, these cannot be considered as irreparable harm, as only the harm suffered by the applicant can be considered at this stage of the analysis (*RJR-MacDonald* at paras 62, 84).

[67] Kobo claims that it is important to distinguish this Motion from the situation in *Kobo Suspension*. I am not convinced by that argument. I acknowledge that the situation of HarperCollins differs from Kobo's factual context in *Kobo Suspension*, where at least part of the efforts and expenses would not have been spent to no avail if Kobo's section 106 application moved ahead pending its appeal to the SCC. Kobo submits that the situation is markedly different for HarperCollins: it enjoys an appeal as of right and, if the FCA grants the Appeal and finds that the Tribunal does not have jurisdiction to grant the relief sought in the Application, a significant amount of time, money and judicial resources will have been wholly wasted in support of an application that will not proceed at all. What Kobo fails to say, however, is that, immediately after having made the observation about legal resources not being totally wasted in *Kobo Suspension*, I referred to the above extract from *Sears* and went on to note that a demonstrated waste of judicial and parties' resources does not, in any event, amount to irreparable harm (*Kobo Suspension* at paras 55-56).

[68] I am mindful of the fact that, if HarperCollins is successful in its Appeal, the parties might have pointlessly spent resources in continuing the discovery steps and the preparation for the hearing of the Application. However, not only has this not been recognized as irreparable harm but, in this case, this alleged harm is merely speculative, being unsupported by any evidence. I cannot help but underscore that no affidavit evidence was filed by HarperCollins to support its claim that it will suffer substantial prejudice as a result of a wasted expenditure of resources. We are here in that landscape of "assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence", repeatedly found insufficient by the FCA to anchor a claim of irreparable harm and to justify a stay of proceedings (*Glooscap* at para 31; *Stoney First Nation* at paras 48-49).

[69] When a litigant comes knocking on the Tribunal's door to seek that sort of exceptional

remedy, it must do more than identify harm or inconvenience in its submissions. It must demonstrate (along with the other branches of the *RJR-Macdonald* test) that "harm will actually be suffered" and "will not be able to be repaired later", and it must do so "by providing evidence concrete or particular enough to allow the Court to be persuaded on the matter" (*Stoney First Nation* at para 49). It is a pre-requisite for any litigant seeking a stay, be it a private party or the Commissioner, to adduce sufficiently clear, convincing and non-speculative evidence supporting its allegations of harm (*Parkland* at paras 86-99). This has not happened here. There is an absence of any clear and non-speculative evidence demonstrating HarperCollins' claim of unnecessary expenditure of resources or showing that these cannot be compensated or cured. In light of the FCA jurisprudence mentioned above, this basis alone also suffices to reject this claim of irreparable harm.

3. Risk of attornment

[70] I now turn to the risk of attornment.

[71] HarperCollins claims that, without a suspension of the Application, it (i.e., HarperCollins US) risks attorning to the Tribunal's *in personam* jurisdiction. HarperCollins submits that it filed its Response and its Dismissal Motion expressly "without attornment to or acceptance of the jurisdiction of the Tribunal over this proceeding and the Respondents". HarperCollins argues that, without the requested suspension or stay, it will be obligated to participate in steps advancing the Application toward a hearing during the pendency of the Appeal, and thus faces substantial prejudice from the risk of attornment to the Tribunal's jurisdiction in so doing. This, according to HarperCollins, constitutes irreparable harm.

[72] It is not disputed that HarperCollins has effectively challenged the Tribunal's subject-matter jurisdiction. This was the issue at stake in its Dismissal Motion and this is the object of the Appeal. The risk of attornment raised by HarperCollins in this Motion revolves solely around the issue of the Tribunal's *in personam* jurisdiction over it. I pause to mention that, in my view, the separate concepts of attornment and *in personam* jurisdiction may have been conflated at times in the parties' submissions and during the hearing of this Motion. It is worth reminding that, in *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 ("***Van Breda***"), the SCC adopted the three bases established by the ONCA in *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA) on which a court or tribunal can assert *in personam* jurisdiction over an out-of-province defendant:

> [19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra- provincial defendant who consents, whether by voluntary submission, attornment by appearance

> and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

[73] "Attornment" thus constitutes only one example of consent-based *in personam* jurisdiction. As such, even if it were determined, in a subsequent proceeding, that HarperCollins US' conduct does not amount to attornment in light of its express reservation of rights, it may still be open to the Tribunal to assert *in personam* jurisdiction over HarperCollins US under a "presence-based" or an "assumed" jurisdiction approach.

[74] Based on case law from the ONCA (*Essar Steel*; *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2014 ONCA 546 ("***Stuart Budd***"); *MJ Jones Inc v Kingsway General Insurance Co* (2004), 72 OR (3d) 68 (CA) ("***MJ Jones***")), HarperCollins submits that, for a prejudice to be created by the absence of a stay, it is not necessary that attornment be certain to result from a defendant's participation in proceedings pending an appeal. It argues that prejudice can arise from the possibility of attornment, and that such a possibility is sufficient to favour a stay. HarperCollins further says that its risk of attornment is compounded by the fact that the Commissioner has refused to provide an undertaking not to argue that steps taken by HarperCollins in connection with the Application constitute attornment to the *in personam* jurisdiction of the Tribunal.

[75] Before I deal with HarperCollins' arguments, I first need to address the Commissioner's position that, by its Response and its conduct in the Application so far, HarperCollins would have already attorned to the Tribunal's *in personam* jurisdiction over it.

a. Commissioner's claim of attornment

[76] The Commissioner submits that the alleged "risk of attornment" does not arise because (i) there is no issue of attornment with respect to HarperCollins Canada, as it is a Canadian corporation carrying on business in Canada; and (ii) HarperCollins US has already attorned to the Tribunal's jurisdiction as a result of responding to the Application on its merits and invoking the authority of the Tribunal and of the FCA. The Commissioner claims that, since attornment has already happened, there can be no irreparable harm flowing from a risk of attornment, as no such risk exists.

[77] I do not dispute the Commissioner's conclusion with respect to HarperCollins Canada. I have, however, serious reservations with respect to the primary position taken by the Commissioner on the attornment of HarperCollins US.

[78] The Commissioner contends that the case law is abundantly clear that, having filed a Response where it engaged in substantive issues raised by the Commissioner in the Application, HarperCollins US has thereby consented to the Tribunal's jurisdiction by its conduct. The Commissioner refers to decisions of the Tribunal in *Stargrove Entertainment Inc v Universal*

Music Publishing Group Canada, 2015 Comp Trib 26 ("***Stargrove***"), of the ONCA in *Van Damme v Gelber*, 2013 ONCA 388 ("***Van Damme***") and *MJ Jones*, of the Alberta Court of Queen's Bench in *Norex Petroleum Limited v Chubb Insurance Company of Canada*, 2008 ABQB 442 ("***Norex***") and of the British Columbia Supreme Court in *Imagis Technologies Inc v Red Herring Communications Inc*, 2003 BCSC 366 ("***Imagis***").

[79] For example, in *Norex*, the Alberta Court of Queen's Bench cited with approval authors who stated that "[o]nce a party takes steps to contest the merits of the claim, even if those steps are taken in error, or with express notice of the intention to challenge jurisdiction, the party will be precluded from challenging the jurisdiction of the court" (*Norex* at para 48). In *Imagis*, the British Columbia Supreme Court noted that, in relation to attornment, conduct supersedes intention and found that, if a party goes further than a simple appearance and engages in steps other than challenging jurisdiction, such actions will be regarded as voluntary acceptance of the court's jurisdiction (*Imagis* at paras 8-9). I observe that the Commissioner did not refer to any decisions of the FCA or the Federal Court on the issue of attornment.

[80] The problem with the Commissioner's argument is that it ignores the express reservation of rights inserted by HarperCollins in its Response and in its Dismissal Motion. Indeed, none of the cases relied on by the Commissioner addresses a situation where, as in this case, a defendant has expressly reserved its rights to challenge a court's *in personam* jurisdiction over it. I have closely reviewed the decisions cited by the Commissioner and find no indication that such a situation existed in *Stargrove*, *Van Damme*, *MJ Jones*, *Norex* or *Imagis*.

[81] I acknowledge that, according to the jurisprudence, a defendant cannot at the same time challenge the subject-matter or *in personam* jurisdiction of a court and engage in the merits of a proceeding. However, in this case, HarperCollins has prefaced its Response and its Dismissal Motion (and even this Motion) with an express reservation of rights. In my view, given the language used by HarperCollins, there is no doubt that this reservation of rights relates to the Tribunal's jurisdiction over both the subject-matter of the dispute and the parties (i.e., "subject-matter" and "*in personam*" jurisdiction). The Commissioner has been unable to offer any authority supporting the proposition that the conduct of a defendant can amount to an attornment to jurisdiction even in a case where an expressed reservation of rights has been made. When asked about this at the hearing before the Tribunal, counsel for the Commissioner could only refer to a passage from *Imagis* where the British Columbia Supreme Court stated that "[a]ttornment has not been avoided because the defendants pleaded a challenge to the assumption of jurisdiction in the defence" (*Imagis* at para 9). I agree with HarperCollins that nothing in this extract allows one to conclude that *Imagis* involved an explicit reservation of the defendant's right to challenge the *in personam* jurisdiction, similar to HarperCollins'.

[82] In my opinion, without any authority supporting the Commissioner's proposition, the Tribunal cannot simply ignore, in the context of this Motion, the express reservation of rights contained in HarperCollins' Response and Dismissal Motion. I do not agree that the explicit words used by HarperCollins can be qualified as innocuous "boilerplate" language having no

effect whatsoever on the question of attornment. I instead find that HarperCollins was careful in its Response, in its Dismissal Motion and in this Motion, and purposely prefaced its submissions with an express reservation of its rights to challenge the jurisdiction of the Tribunal over it.

[83] In the context of this Motion, I am therefore not prepared to accept that HarperCollins US has already attorned to the Tribunal's *in personam* jurisdiction. To be clear, in making this ruling, I should not be taken to have decided the merits of this jurisdictional issue, and in particular whether HarperCollins US has in fact already attorned to the Tribunal's *in personam* jurisdiction by its conduct, whether the Tribunal can otherwise assert *in personam* jurisdiction over HarperCollins US, or whether the express reservation of rights contained in its Response, Dismissal Motion and Motion can be successfully relied upon by HarperCollins US to oppose allegations that its conduct in the Application amounts to attornment. These will be matters to be decided by the Tribunal when (and if) HarperCollins effectively challenges the Tribunal's *in personam* jurisdiction over it, through an interlocutory motion or other appropriate proceeding in the context of the Application. But, on the record before me and for the purpose of this Motion, I am not persuaded by the Commissioner's submissions and authorities presented in support of his position that HarperCollins US has already attorned to the Tribunal's *in personam* jurisdiction.

[84] I concede that a more transparent approach would have been for HarperCollins to file both its Dismissal Motion based on an alleged lack of subject-matter jurisdiction and another motion challenging the Tribunal's *in personam* jurisdiction over it, or to file a Response dealing only with the jurisdictional issues. However, this does not mean that filing its Response and Dismissal Motion while expressly reserving its rights to challenge both *in personam* and subject-matter jurisdiction, as HarperCollins did in this case, necessarily amounts to attornment.

[85] The Commissioner further claims that HarperCollins has also attorned to the jurisdiction of the Tribunal by invoking the authority of the Tribunal in its Dismissal Motion and that of the FCA in its Appeal, neither of which relates to *in personam* jurisdiction. Once again, I am not persuaded by the Commissioner's proposition that filing a motion to strike alleging an absence of subject-matter jurisdiction can amount to attornment to *in personam* jurisdiction by HarperCollins, in the presence of an express reservation of rights. Stated differently, I do not accept that, in circumstances like these, the mere fact of challenging the subject-matter jurisdiction of a court can serve to take away a defendant's right to dispute the court's *in personam* jurisdiction over it. It would further imply that a foreign defendant would always have to first raise the lack of *in personam* jurisdiction before being able to raise a challenge of subject-matter jurisdiction (or, arguably, raise both challenges simultaneously). Again, the Tribunal is not aware of any case law establishing this principle, and the Commissioner has not referred to any.

[86] In brief, on the record before me and in light of the Commissioner's arguments and authorities, I am not ready to conclude that making an express reservation of one's rights to challenge *in personam* jurisdiction in every proceeding filed, as HarperCollins did, can be meaningless. However, I should add that I am not hereby suggesting that HarperCollins can surf

indefinitely on its express reservation of rights. At some point, it will have to come to shore and raise, through an appropriate proceeding before the Tribunal, the challenge it says it contemplates against the Tribunal's *in personam* jurisdiction.

b. HarperCollins' claims of irreparable harm

[87] That being said, assuming that HarperCollins has not already attorned to the Tribunal's *in personam* jurisdiction, I need to determine whether HarperCollins has met its burden of demonstrating that its alleged "risk of attornment" amounts to irreparable harm.

[88] Regarding this issue of attornment, HarperCollins relies on various decisions of the ONCA, notably *Stuart Budd* and *Essar Steel*, where the Court concluded that the possibility of being found to have attorned to jurisdiction creates some risk of irreparable harm to the moving party. In *Stuart Budd*, the ONCA stated that the Court seems to have an "unresolved position on this issue" (*Stuart Budd* at para 36), sufficient to create a possible risk of attornment. In *Essar Steel*, the ONCA said the following at para 51:

> [51] Over the past decade, judges of this court sitting in Chambers on stay motions have expressed different views about whether a party risks attorning to the jurisdiction of the Ontario court by performing court-ordered procedural steps in the face of the party's on-going challenge to the court's jurisdiction. Some decisions have viewed such participation as risking attornment, thereby creating some risk of irreparable harm: *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 2004 CanLII 6211 (ON CA), 72 O.R. (3d) 68, 242 D.L.R. (4th) 139 (C.A.), at paras. 27-31; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2014 ONCA 546 (CanLII), 122 O.R. (3d) 472, at paras. 29-36. On the other hand, in *Van Damme v. Gelber*, 2013 ONCA 388 (CanLII), 115 O.R. (3d) 470, at paras. 21-23, the court minimized any such risk from court-ordered participation, and in *Yaiguaje v. Chevron Corp*., at para. 11, MacPherson J.A. regarded any risk as a weak factor in the irreparable harm analysis.

[89] HarperCollins submits that only when a plaintiff provides an undertaking not to consider future steps by the defendant as an indicator of attornment to jurisdiction can the risk of attornment, and the irreparable harm deriving from it, be eliminated. In the current case, the Commissioner has refused to give such an undertaking, and HarperCollins argues that, without a stay of the Application, it will be forced to take steps and participate in the proceedings which could be considered as amounting to attornment, thereby suffering irreparable harm.

[90] I disagree. Further to my review of HarperCollins' arguments and of the evidence on the record before me, I am not persuaded that the prejudice allegedly flowing from HarperCollins' risk of attornment has the attributes of "irreparable harm", as these were developed and

established by the FCA. Furthermore, HarperCollins has not provided the required clear and non-speculative evidence to support any claims of harm on this front.

[91] First, I fail to see how irreparable harm arises in the case of HarperCollins. HarperCollins appears to equate the risk of attornment with irreparable harm. With respect, this is not what, in my view, the ONCA cases say. The irreparable harm considered by the ONCA in the decisions cited by HarperCollins is not the risk of attornment itself. The risk of attornment is simply the foundation of the irreparable harm. In other words, the irreparable harm is the prejudice flowing or resulting from that risk of attornment. The case law refers to the possibility of being found to have attorned, "thereby creating some risk of irreparable harm" (*Essar Steel* at para 51; *Stuart Budd* at para 36).

[92] In *BTR Global* and *MJ Jones*, the irreparable harm found by the ONCA was the fact that the risk of attornment would render the appeals or proposed appeals moot (e.g., a pending leave application to the SCC). Similarly, in *Essar Steel*, the alleged harm was that, without the granting of a stay, the moving party could be deprived of its right to seek leave to appeal. If the moving party was forced to attorn, it would render the leave to appeal to the SCC moot. In *Stuart Budd*, the harm resulting from being forced to choose between the risk of attornment and being in default for not filing a defence was the fact that the proposed appeal would be rendered moot, an incomplete record would result, and there would be no assurance that the final costs order would be returned.

[93] It is not the "risk of attornment" in and of itself that can constitute irreparable harm. It is rather the prejudice created by or flowing from that "risk of attornment". Likewise, one cannot simply equate "no undertaking not to raise a possible attornment" with irreparable harm, as suggested by HarperCollins. This means that the Tribunal has to look at the harm allegedly resulting from the risk of attornment (and not stop at the risk of attornment), in order to determine whether the alleged harm is irreparable, bearing in mind the attributes that such harm needs to feature in order to qualify as irreparable.

[94] There is no such irreparable harm here. Unlike the ONCA cases relied on by HarperCollins, there is no allegation that the risk of attornment in this case would render HarperCollins' Appeal moot. In fact, it is clear that it will not. The Appeal filed by HarperCollins relates to the Summary Dismissal Decision on the alleged lack of subject-matter jurisdiction of the Tribunal. This Appeal will not be affected by the risk of HarperCollins US attorning to the Tribunal's *in personam* jurisdiction. Even if HarperCollins is found to have consented to the *in personam* jurisdiction of the Tribunal, this will have no impact on the success or failure of the Appeal, as the Appeal is·not directed at that issue.

[95] In the current case, the only alleged harm apparently resulting from the risk of attornment relates to the further steps to be taken by HarperCollins to advance the Application and to lead up to the hearing on the merits, scheduled for November 2018. In its Memorandum, HarperCollins simply mentions that "[w]ithout the requested suspension or stay, HarperCollins

US will be obligated to participate in steps advancing the Application toward a hearing during the pendency of the Appeal, and thus faces substantial prejudice from the risk of attornment to the Tribunal's jurisdiction in so doing". I underline that, in its submissions, HarperCollins did not refer to any other manifestation of harm flowing from its alleged risk of attornment. Stated otherwise, the only "substantial prejudice" apparently linked to the risk of attornment identified by HarperCollins is the forced participation of HarperCollins in steps advancing the Application toward the hearing.

[96] As discussed above, it is well-recognized by the FCA that expenses to be incurred for the participation in legal proceedings, or the time and money required to prepare for and attend a hearing, does not constitute irreparable harm within the meaning of the *RJR-MacDonald* test (*Malo* at paras 15, 20, 22; *Redeemer* at para 8; *Janssen 2* at para 24). Therefore, it is clear that the only prejudice identified by HarperCollins as flowing from the alleged risk of attornment does not constitute irreparable harm.

[97] Second, I again observe that, in any event, no affidavit evidence has been provided by HarperCollins to support any allegations of harm resulting from the risk of attorning to the Tribunal's *in personam* jurisdiction. No affidavit from someone employed by HarperCollins US or HarperCollins Canada setting out the facts supporting the claims of irreparable harm has been filed with the Motion. No affidavit speaks to the prejudice linked to the risk of attornment that HarperCollins will suffer if the Application is not suspended. This, in and of itself, does not meet the requirements of clear and non-speculative evidence developed by the FCA.

[98] The Tribunal will not lightly delay a matter. Conversely, any litigant seeking a stay from the Tribunal should not lightly ask for one. It is trite law that a litigant who wishes to benefit from an exceptional equitable remedy like a stay must establish the facts supporting its request. More specifically, a litigant must attest to the irreparable harm claimed to be suffered. No matter how eloquent arguments from counsel may be, they cannot replace the need for the litigant to provide clear, convincing and non-speculative evidence of irreparable harm. In the circumstance of this case, such sworn evidence is just absent, and the lack of an affidavit from HarperCollins allowing me to find sufficient, reliable evidence in support of its allegations of irreparable harm is fatal to its claim.

[99] In the same vein, if, arguably, the "substantial prejudice from the risk of attornment" mentioned by HarperCollins in its Memorandum was meant to refer to some harm other than its participation in the disposition of the Application, I simply underscore that no evidence whatsoever has been provided by HarperCollins in that respect. In light of the principles established by the FCA in *Stoney First Nation*, *Gateway City Church*, *Glooscap* and *Janssen 1*, such a vague and general assertion unsupported by any level of particularity falls well short of the mark to constitute clear and non-speculative evidence of irreparable harm that could support a stay.

[100] Third, I would also add that any harm claimed by HarperCollins as resulting from a risk

of attornment is harm that was avoidable or could be avoided by HarperCollins. HarperCollins would have been able, with its express reservation of rights, to address the issue in its Response or to file a motion to strike the Application against it on the basis of a lack of *in personam* jurisdiction, but it decided not to do so. Furthermore, HarperCollins still has the option of filing such a motion, prior to engaging in further discovery steps for the disposition of the Application, again with its express reservation of rights. Harm that was avoidable or could have been avoided, or harm that a litigant can still avoid, is not irreparable harm allowing to obtain a serious relief like a stay of proceedings (*Janssen 1* at para 24). This is the case here.

[101] Moreover, I underline that, in my view, the ONCA decisions in *Stuart Budd* and *Essar Steel*, stating that a simple possibility of risk of attornment can support a finding of irreparable harm, cannot be reconciled with the FCA case law on irreparable harm. While the ONCA may have accepted that the simple possibility of a risk can be sufficient to ground a claim of irreparable harm, that approach has not been followed by the FCA. On the contrary, hypotheticals, assumptions and speculations are not sufficient to demonstrate irreparable harm (*Gateway City Church* at paras 15-16). The jurisprudence of the FCA, which binds the Tribunal, clearly states that the simple possibility of irreparable harm is not enough: there must be evidence that the moving party will suffer irreparable harm if the stay if not granted (*US Steel* at para 7). In other words, a simple possibility of attornment cannot meet the demanding threshold of irreparable harm. It may be that, according to the ONCA, irreparable harm is not a threshold as demanding and that a possible risk of attornment is sufficient to satisfy it. But this is not what the jurisprudence of the FCA says.

[102] Finally, I also agree with the Commissioner that HarperCollins' arguments on irreparable harm linked to a risk of attornment are speculative if they relate to the potential results of the Application or of a challenge to the Tribunal's *in personam* jurisdiction, as these are contingent on the outcome of future events which are not, and cannot be, known at this time. This, again, cannot support a finding of irreparable harm. It is true that, if proceedings are not suspended, the Tribunal may grant or deny the remedies sought by the Commissioner, but the result of the Application cannot be assumed to be a foregone conclusion. It is also impossible to predict how the Tribunal will rule on an eventual challenge by HarperCollins to the Tribunal's *in personam* jurisdiction over it, or how it will assess the conduct of HarperCollins and the impact of its express reservation of rights. Since it is uncertain whether these proceedings before the Tribunal will be successful or not, the harm resulting from a possible risk of attornment is currently only apprehended or alleged, and speculative. There is no clear and non-speculative evidence allowing me to make an inference that the alleged harm will in fact occur.

[103] In sum, considering all these factors and the circumstances of this case, I find that the alleged risk of attornment raised by HarperCollins does not support a finding of irreparable harm meeting the requirements established by *RJR-MacDonald* and its progeny.

[104] I make one last observation. The choice of the Commissioner to consider that HarperCollins US has already attorned to the Tribunal's *in personam* jurisdiction and to decline

to provide an undertaking not to claim that HarperCollins has attorned to the Tribunal's jurisdiction by reason of its conduct cannot, in my view, constitute a source of irreparable harm if no stay is granted and the Application continues.

[105] If the Commissioner is right in the end and if, despite the express reservation of rights, HarperCollins US is found to have already attorned to the Tribunal's *in personam* jurisdiction by filing its Response and its Dismissal Motion, no irreparable harm related to the risk of attornment will result if a stay of the Application is not granted. In this scenario, the risk of attornment would have already materialized at the time HarperCollins filed its Response. No question of irreparable harm caused by a risk of attornment without a suspension of the Application would arise as HarperCollins US would have already attorned to the Tribunal's *in personam* jurisdiction. Future steps taken by HarperCollins in the proceedings of the Application pending the Appeal would not change anything.

[106] If, on the other hand, the Commissioner ends up being wrong and HarperCollins is found not to have already attorned to the Tribunal's *in personam* jurisdiction in light of its conduct and the express reservation of rights included in its Response and its Dismissal Motion, it also cannot be said that irreparable harm will result if a stay of the Application is not granted. In this other scenario, there will be no risk of attornment because further steps to advance the Application will have continued to be taken under the protection of the express reservation of rights. As there would be no risk of attornment, no issue of irreparable harm flowing from it would arise in this second scenario either.

4. Conclusion on irreparable harm

[107] For all those reasons, I am therefore not satisfied that HarperCollins has offered the required clear and non-speculative evidence demonstrating, on a balance of probabilities, that it will suffer irreparable harm if the suspension sought is not granted. The allegations and evidence before the Tribunal, whether on the risk of attornment or on the unnecessary expenditure of resources, do not establish or allow the Tribunal to make inferences that irreparable harm will occur. The second element of the *RJR-MacDonald* test is accordingly not met.

iii. Balance of convenience

[108] I now turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as the SCC prefers to call it in *RJR-MacDonald*). Under this third part of the test, the Tribunal must determine which of the parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the Appeal (*RJR-MacDonald* at para 67). Given that HarperCollins has not proffered the evidence needed to allow the Tribunal to make a finding of irreparable harm and having concluded that it has failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. HarperCollins does not meet one element of the test and, according to the FCA case law, this is

fatal (*Ishaq* at para 15).

[109] I will nonetheless briefly address the issue as the balance of convenience is frequently viewed as a determinative factor in assessing whether a stay of proceedings should be granted.

[110] HarperCollins and Kobo allege that the balance of convenience favours a suspension of the Application, as the Commissioner has offered no evidence showing that competition in the E-books industry in Canada will be harmed if a suspension is granted. According to HarperCollins, there is no countervailing harm if the Application is stayed pending its Appeal.

[111] I do not agree. Rather, I am of the view that there is an important countervailing element on the Commissioner's side given the important public interest considerations at stake in this Motion. When compared to the alleged harm claimed by HarperCollins and Kobo in terms of unnecessary expenditures of resources and risk of attornment, this leads me to conclude that the balance of convenience weighs in favour of refusing the stay sought by HarperCollins.

[112] I acknowledge that, in this Motion, the Commissioner has adduced no evidence of anti-competitive harm, in terms of prejudice likely to be suffered by Canadian consumers and the broader economy if a stay is issued. However, that does not mean that there is no prejudice to the Commissioner if the Application is temporarily stayed or suspended. The prejudice to the Commissioner does not flow only from the potential anti-competitive effects of a conduct challenged by him. Given his mandate as the public authority defending the public interest in competition in Canada, the prejudice may also derive from the impact of a suspension on the Commissioner's exercise of his statutory mandate and duties.

[113] As I stated in *Kobo Suspension*, echoing the comments I had previously made in *Parkland* and those of Mr. Justice Rothstein in *D & B*, there is always an important question of public interest to be considered in situations where a stay of proceedings that are initiated by the Commissioner is sought from the Tribunal. I allow myself to reproduce the following passages from my reasons in *Kobo Suspension*, at paras 65-66:

> [65] (…) The Commissioner has the responsibility to protect the public interest in respect of competition in Canada in the manner conferred upon him by the Act. He may bring cases before the Tribunal when he considers it necessary in order to carry out this responsibility, and he may conclude consent agreements as he did with the Settling Publishers in this case. He is presumed to act in the public interest, and significant weight should be given to these public interest considerations and to the statutory duties carried out by the Commissioner (*D & B* at p 5; *Parkland* at paras 104-108).
>
> [66] This public interest dimension has often been looked at in the context of the third component of the *RJR-MacDonald* test, the balance

> of convenience. As Mr. Justice Rothstein said in *D & B*, a "strong case may exist therefore that there is irreparable harm if the [Commissioner] is restrained from proceeding with that action" (*D & B* at p 5). Delaying proceedings before the Tribunal is generally not in the public interest and runs even contrary to the expeditiousness principle set out in subsection 9(2) of the CTA. This public interest represented by the Commissioner's actions should always be a factor to consider when deciding whether to suspend or stay the Tribunal's proceedings. As Madam Justice Gauthier said in an order issued in *Reliance Comfort Limited Partnership v Commissioner of Competition*, A-113-13, August 2, 2013 (FCA), "the public interest in the timely pursuit of competition cases […] weighs heavily in the balance of convenience".

[114] In *D & B FCA*, the FCA further described subsection 9(2) of the CTA as a "mandatory provision" which "influenced to a great extent" the Court's decision on the balance of convenience in that case (*D & B FCA* at para 18).

[115] Here again, I find that the public interest is another material element supporting the conclusion that a stay of the Application should not be granted in the circumstances of this case. The Commissioner submits that being restrained from going ahead with the Application and from continuing the proceedings to reach the hearing on the merits scheduled for November 13, 2018 is prejudicial to his mandate and hampers the exercise of his authority under the Act. I agree. A suspension of all proceedings in the Application at this stage, more than 13 months before the start of the scheduled hearing, would not align with the purpose and objectives of the Act and of the CTA.

[116] In *RJR-MacDonald*, at paras 73-79, the SCC stated that the role of public authorities in protecting the public interest was an important factor in assessing the balance of convenience. While the comments were made in the context of Charter cases, they nonetheless guide the Tribunal in cases where the Commissioner is involved. As Chief Justice Crampton stated in *The Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376 ("***Pearson***"), "[i]t is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest" (*Pearson* at para 43). There is no question that, in the current case, the Commissioner's Application is a *bona fide* proceeding and the Commissioner is presumed to act in the public interest (*Parkland* at para 108). Here, the Commissioner's activity in bringing the section 90.1 Application before the Tribunal was undertaken pursuant to his responsibility to protect competition in Canada under the provision dealing with civil agreements between competitors.

[117] When it is established (as is the case here for the Commissioner) that a public authority is charged with the duty of promoting or protecting the public interest and that a proceeding or

activity was undertaken pursuant to that responsibility, "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" (*RJR-MacDonald* at para 76).

[118] In my opinion, the public interest and the impact of a stay on the exercise of the Commissioner's mandate is an important factor to be taken into account in this Motion. The SCC has held that it is open to either party to tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in granting or refusing the relief sought (*RJR-MacDonald* at para 71). This is what the Commissioner has done here by indicating that, in his view, a stay freezing the proceedings in the Application would prevent him from carrying on his statutory duties under the Act.

[119] I would add that there is also a public interest in allowing the Tribunal to accomplish its role under the CTA. If a stay were granted to HarperCollins, the Tribunal would also be prevented from exercising its statutory powers. There is a strong public interest in the Tribunal matters proceeding as expeditiously as possible, and this is an imperative obligation contained in subsection 9(2) of the CTA.

[120] Turning to the harm alleged by HarperCollins and Kobo as resulting from a continuation of the proceedings, it is limited to the resources that they would need to spend in respect of the Application and to the risk of attornment. As discussed above, in both instances, apart from the fact that it is not irreparable, this alleged harm is not supported by any evidence and any level of particularity, as well as being speculative. This is not harm that can be considered by the Tribunal in its assessment of balance of convenience.

[121] In those circumstances, when the harm expected to be suffered by HarperCollins in the absence of a stay is compared to the harm expected to be caused to the public interest by a suspension, I am of the view that the balance of convenience does not favour granting the stay requested by HarperCollins. The third element of the *RJR-MacDonald* test is accordingly not met either.

c. Conclusion on the *RJR-MacDonald* test

[122] Under the *RJR-MacDonald* test, HarperCollins had the obligation to satisfy the Tribunal that it met all elements of the tripartite conjunctive test in order to be successful on its Motion. On the basis of the evidence before me, I find that it has not provided clear and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour granting the suspension it is seeking.

[123] In addition, having considered the evidence presented by HarperCollins in support of its Motion, the absence of non-speculative irreparable harm, the broader public interest considerations regarding the Commissioner's mandate and authority, and the need for an expeditious resolution of competition matters by the Tribunal, I also conclude that, in the

particular circumstances of this case and at this stage in the proceedings (more than a year before the scheduled hearing), it would not be just and equitable to grant a stay of all proceedings in the Application. I acknowledge that the jurisdictional issues raised by HarperCollins in its Appeal are significant matters. However, the existence of such a serious issue to be tried is not sufficient, when balanced with the absence of any merit to HarperCollins' arguments on irreparable harm and the balance of convenience favouring the Commissioner, to make it just and equitable to grant the suspension.

[124] There are therefore no exceptional circumstances justifying the exercise of my discretion to grant the relief sought by HarperCollins.

C. It would not be in the "interests of justice" to suspend the Application at this stage

[125] For the reasons stated above in my discussion of the SCC decision in *Google*, and for the sake of completeness, I will now consider the "interests of justice" test identified in *Mylan* and assess whether, in the circumstances of this case, it would be justified to grant the stay sought by HarperCollins if the appropriate test was assumed to be the "interests of justice".

a. General principles

[126] The terms "interest of justice" are expressly stated in paragraph 50(1)(b) of the FC Act, but they have not been defined as such in the case law developed by the federal courts. It is, as acknowledged by counsel for HarperCollins at the hearing, a concept difficult to circumscribe and its actual attributes will depend on all factors of any given case. Even in the *Mylan* decision, which HarperCollins and Kobo appear to identify as the cradle decision where the interests for justice test was crystallized, the FCA offers limited guidance on what the term actually encompasses. The FCA mentions "broad discretionary considerations" coming to bear and a "public interest consideration" in the need for "proceedings to move fairly and with due dispatch" (*Mylan* at para 5).

[127] It is, however, fair to say that it is a broad and wide-reaching test, that it can cover many elements, and that delaying a matter "all depends on the factual circumstances" presented to the court (*Mylan* at para 5). Four decisions cited by HarperCollins and Kobo are helpful to identify the considerations embraced by the "interests of justice" test.

[128] In *Korea Data*, the ONCA indicated that the interests of justice start from the three elements of the *RJR-MacDonald* test (*Korea Data* at para 19). According to that decision, they certainly include factors demonstrating irreparable harm or an imbalance of convenience, though the ONCA appears to suggest that, in considering the interests of justice, the serious issue dimension or considerations respecting the merits of the appeal may be less of a concern. There are, however, other factors to take into account to measure what is in the interests of justice, and the ONCA specifically singles out the "public interest in the fair, well-ordered and timely

disposition of litigation" and the "effective use of scarce public resources" (*Korea Data* at para 19).

[129] In *Coote v Lawyers' Professional Indemnity Co*, 2013 FCA 143 ("***Coote***"), the FCA restated, as it had done in *Mylan*, that the *RJR-Macdonald* test is not suitable in the context of a stay where the Court is refraining from exercising its own jurisdiction. The case involved two appeals from interlocutory orders of the Federal Court made before the hearing of an application relating to a vexatious litigant. The FCA was being asked to stay the appeals before it pending the Federal Court's determination of the vexatious litigant application. In determining whether to grant such a stay, the FCA stated that it must consider the "factual circumstances" before it while being guided by principles other than the *RJR-Macdonald* test. These principles include securing "the just, most expeditious and least expensive determination of every proceeding on its merits", as provided by section 3 of the FC Rules (*Coote* at para 12). Additional principles were articulated as follows by the FCA: "[a]s long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – this Court should exercise its discretion against the wasteful use of judicial resources" (*Coote* at para 13). Devoting resources to one case for no good reason, said Mr. Justice Stratas, deprives the others for no good reason.

[130] HarperCollins and Kobo also rely on the decision of Chief Justice Crampton in *Kobo FC*, issued in the context of the parallel judicial review application brought by Kobo against the 2017 Consent Agreements. In that decision, the Federal Court found that, in the absence of a stay of the hearing of Kobo's application, the parties "would have to incur significant time and expense associated with proceedings before the Court and the Tribunal that are scheduled to be heard within a very short period of time of each other—less than two weeks" (*Kobo FC* at para 33). HarperCollins and Kobo highlight the following passage from Chief Justice Crampton's reasons: "requiring both proceedings to proceed almost simultaneously would not be an effective use of scarce public and judicial resources and would not be consistent with the spirit of Rule 3 of the *Federal Courts Rules*, which refers to the desirability of securing the just, most expeditious and least expensive determination of every proceeding on its merits" (*Kobo FC* at para 33).

[131] Finally, in *TREB*, the only Tribunal case where the "interests of justice" test was retained and applied, the reasons of Madam Justice Simpson reveal that considerations of prejudice to the parties (in terms of wasted resources in the preparation of updated evidence) were central to her conclusion that a stay had to be granted in the circumstances. In *TREB*, Madam Justice Simpson applied the "interests of justice" test by assessing various allegations of prejudice made by the parties. While she did not use the term "irreparable harm" or "prejudice", what ultimately led her to conclude that the interests of justice dictated the granting of an adjournment were the significant efforts and expenses, in terms of the parties' resources, involved in preparing updated evidence for an imminent hearing.

[132] While these precedents shed some light on what the "interests of justice" may entail, I agree with HarperCollins that what needs to be taken into account are, first and foremost, all the particular factors of this Application and the factual circumstances relating to HarperCollins.

b. Analysis

[133] HarperCollins submits that, in the circumstances of this case, the interests of justice supporting a suspension of the Application revolve around the following elements: the Appeal raises substantive, threshold jurisdictional issues which should receive appellate consideration before this matter proceeds towards a hearing; HarperCollins faces substantial prejudice in the absence of a suspension or stay whereas the Commissioner would not suffer any; and the parties (and the Tribunal) face the real prospect of squandering significant resources should this matter proceed during the pendency of the Appeal. Kobo also refers to the significant waste of judicial and financial resources that would result from a refusal of the stay, to the detriment of the parties and the public.

[134] Further to my review of the evidence and of the particular circumstances and timing surrounding HarperCollins' Motion, I am not persuaded that, even under the "interests of justice" test, HarperCollins has established that any of those grounds would justify the exercise my discretion in favour of the stay sought by HarperCollins. When all relevant considerations and the particular context of this Motion are factored in, the interests of justice rather call, in my view, for the continuation of the proceedings in the Application and for the parties to take the appropriate steps to move the Appeal and the Application in parallel.

i. Wasted resources

[135] As mentioned in *Korea Data*, factors "demonstrating irreparable harm or an imbalance of convenience are undoubtedly relevant when a court is contemplating delaying its proceedings" (*Korea Data* at para 19). As discussed above under the *RJR-MacDonald* test, neither of these two factors supports a stay of the Application in this Motion. In my view, the interests of justice should generally not be divorced from a requirement to show some form of irreparable harm caused by the failure to obtain the remedy sought, and none has been demonstrated by HarperCollins in this case. Needless to say, the absence of evidence of irreparable harm to HarperCollins and a balance of convenience favouring the Commissioner are factors which suggest that it would not be in the interests of justice to grant a stay of the Application.

[136] HarperCollins and Kobo insist on the waste of both private and public resources attributable to the time, efforts and money that the parties and the Tribunal would have to spend in preparing for the November 2018 hearing if the Application is not suspended. I pause to mention that the next step in the Application is for the parties to agree on a schedule for the discovery steps and the preparation of materials for the hearing. Further to the Tribunal's Hearing Date Order, the parties are to consult each other with respect to a schedule of steps

necessary to bring the case on the scheduled time and to report to the Tribunal within 30 days. As reflected in the draft proposed schedules previously exchanged between counsel for the parties, the more proximate steps include the preparation of affidavits of documents, the exchange and review of document productions, examinations on discovery, and potential motions concerning issues arising in these discovery steps. In the more distant future, and closer to the November 2018 hearing date, other steps include the preparation of witness statements, expert reports and other materials for the hearing.

[137] The context of HarperCollins' Motion can be easily distinguished from the situations in *TREB*, *Coote* or *Kobo FC* where a concern over the waste of the parties' resources supported the granting of a stay. In *TREB*, Madam Justice Simpson found that it was in the interests of justice to grant the adjournment, because the parties were on the eve of having to spend significant effort and expenses in preparing updated evidence for the reconsideration hearing. In that case, the Tribunal relied on the toll put on the parties' resources to conclude that it would be in the interests of justice to suspend the reconsideration hearing pending an application for leave to appeal to the SCC. I do not agree with HarperCollins and Kobo that the current situation is similar to the *TREB* case. In *TREB*, the hearing on the merits was imminent, scheduled to take place merely four months after the date of Madam Justice Simpson's order, and the parties were expected to prepare and file witness statements and expert reports in the weeks following her order.

[138] This is not the case here. The parties are not about to spend the type of resources considered by Madam Justice Simpson in *TREB*. Here, the hearing is scheduled for November 13, 2018, more than 13 months away. There is no evidence of significant imminent expenses to be incurred by HarperCollins and Kobo in relation to the continuation of the proceedings in the Application. The upcoming next steps will relate to discovery (affidavits of documents, document productions, examinations), not the actual preparation for the hearing, and the schedule for these steps still needs to be agreed upon by the parties or determined by the Tribunal. These steps will likely take place in the medium term (i.e., in a few months), and the parties have some latitude in terms of dates to be fixed for those. I add that no evidence has been provided by HarperCollins and Kobo as to the extent of the wasted private resources for these discovery steps.

[139] Similarly, in *Kobo FC*, this was a situation where the concern for private resources being wasted by the parties was driven by the fact that the hearing on the merits of the Kobo JR Application was scheduled in the very short term, less than two weeks after the Federal Court decision. I thus do not find that, at this juncture, the waste of the parties' resources posited by HarperCollins and Kobo is a significant factor supporting a conclusion that the interests of justice would call for a suspension of the Application in this case.

[140] With respect to the concern for a waste of public and judicial resources, I am also not convinced by the submissions of HarperCollins and Kobo. There is no evidence that the public resources of the Commissioner will be "wasted" if the Application is continued. On the contrary,

the Commissioner pleads that he himself considers that going ahead with the Application is in the public interest and constitutes a sound use of his resources in this matter. The Commissioner, who is charged with the responsibility of protecting the public interest, does not raise or complain of any misuse of public resources at his level. It is not for the Tribunal to second-guess the choice of the Commissioner on this point, as he is presumed to be acting in the public interest. This is therefore not a situation where, to borrow the words of the FCA in *Coote*, public resources would be devoted to a case for no good reason.

[141] Similarly, there is no convincing evidence of a waste of judicial resources linked to the continuation of the Application. I remind that, in *TREB*, Madam Justice Simpson considered the argument that judicial resources for the hearing of potential motions in the summer leading up to the scheduled hearing and for the Tribunal's preparatory work for the hearing would be wasted if no stay was granted. She however found that factor to be speculative and did not treat it as an important one. In my view, this is also the case in this Motion. The argument of wasted judicial resources is speculative. It is even more so here since the hearing is far from being imminent. Unlike in *TREB*, the hearing is currently over 13 months away. The judicial resources of the Tribunal will hardly be solicited until the time of discovery motions arrives. These discovery motions are unlikely to take place much before the spring of 2018, at the earliest. In addition, this is speculative at this point, as the Tribunal currently has no indication as to whether or not such discovery motions will be filed and the extent of judicial resources needed to deal with them.

[142] Comparable distinctions can be made with *Kobo FC*, where the Federal Court was about to hear the matter in less than two weeks, and where there was no doubt that important judicial resources would be rapidly solicited by the Court.

[143] Unlike the situations in *Kobo FC* or *Coote* where the imminence of the potential depletion of judicial resources was a reason supporting the conclusion that it was in the interests of justice to grant a stay, I find no issue of potential wasted judicial resources here. I am thus not convinced that, on the evidence before me and at this stage of the Application, it is a situation where scarce public and judicial resources would not be effectively used. It is, in my view, simply premature to invoke the spectre of wasted public and judicial resources.

ii. Duration of the suspension

[144] Turning to the expected duration of the stay, HarperCollins and Kobo repeatedly argue that a stay of the Application pending the determination of the Appeal would be for only a few months or a short period of time, and that it would only be a temporary suspension. Since the stay would not constitute a significant delay, they say, it is in the interests of justice to grant the suspension. In my opinion, I cannot reach that conclusion at this point in time and on the evidence before me. Contrary to what was the clear situation in *Korea Data* or in *Kobo FC*, I am not convinced that the Tribunal would be facing a relatively short and time-limited stay of the Application. At the very least, I do not find that this can be said and supported at this stage.

[145] On the contrary, the wait could be a long one.

[146] I understand that counsel for the parties have expressed the intention to move the Appeal rapidly and to expedite it. However, the evidence on record talks of a hearing before the FCA "within the first quarter of 2018 if the matter proceeds in the usual or expedited course". HarperCollins has referred to the "winter or early spring 2018" in its submissions. That already represents six months, just to reach a hearing date for the Appeal. I further see little indication that the Appeal has moved at a brisk pace so far. According to the FCA recorded entries, the most recent procedural steps, namely the filing of the agreement concerning the content of the Appeal book and the filing of the Appeal book itself, have been completed towards the very end of the statutory delays to do so under the FC Rules: it took 30 days for the former and 26 days for the latter. No request to expedite the appeal or for an expedited hearing has yet been made, though I concede that it may indeed be too early to do so. At this stage, there is also no evidence or indication as to the time it would likely take for the FCA to decide the Appeal, once it is heard. When all these factual circumstances are considered, it cannot be said, in my opinion, that the Appeal will likely be decided rapidly or that the suspension of the Application sought by HarperCollins will be for a definite short time. Instead, there is reasonable cause for concern that the delay may well be longer than just a few months.

[147] This is another important difference with *Kobo FC* and *TREB*, where the Federal Court and the Tribunal were satisfied, based on the evidence then before them, that the suspension would be of short duration ("weeks" in *Kobo FC*) and that this element supported the interests of justice argument. Here, everything points to a bare minimum of at least more than six months. It may be that, at a later date in these proceedings, the factual evidence on the prospect of a suspension being of short duration will materialize, but it is not present on the record before me.

iii. Other stays in the E-books litigation

[148] HarperCollins and Kobo have also underlined what they consider to be the peculiar context in which this Motion is brought. It is not the first time that the issue of a stay pending appeal is raised in the ongoing E-books litigation saga between the Commissioner and the E-book publishers. Throughout that process, suspensions or stays have been previously granted on several occasions, and the Commissioner has consented to some stays or elected not to challenge others that were ordered by the Tribunal. HarperCollins evokes in particular the stay issued by Mr. Justice Rennie in December 2014 in *Kobo 2014* and the consent of the Commissioner to stay the 2017 Consent Agreements in the pending Kobo JR Application. HarperCollins argues that, viewed in the context of the prior proceedings in the United States and Canada, including the ongoing Kobo JR Application, and the consents previously given by the Commissioner, the Commissioner cannot claim to be prejudiced by a temporary suspension or stay of proceedings in this Application.

[149] I do not share that view. I am mindful of the fact that the Commissioner has given his consent to previous stays in these E-books proceedings and that the overall E-books litigation will soon be four-years old. However, I do not consider this to be a material factor in determining whether it would be in the interests of justice to suspend this Application now. First, the Tribunal has to decide this Motion on the basis of the factual context before it, not against the benchmark of the Commissioner's past behaviour in handling similar requests for stay or suspension. Second, it is not the Tribunal's role to revisit the Commissioner's choices and decisions with respect to his litigation strategy in other parallel matters. Third, it is important to highlight the particular context in which the Commissioner decided to consent to certain stays or to refrain from challenging the issuance of others in the E-books litigation.

[150] When Mr. Justice Rennie issued his stay in December 2014, it was in a context where the Commissioner himself had brought the Reference Decision which was the underlying cause for the stay, and where the Commissioner had just advised the parties that he was consenting to the rescission of the 2014 Consent Agreement, following receipt of the Reference Decision. In March 2017, when the Commissioner consented to a stay of the implementation of the 2017 Consent Agreements in the context of the Kobo JR Application, he did so in order to move more rapidly to a consideration of that application on its merits. As noted by Chief Justice Crampton, all parties consented to the underlying stay "in order to proceed directly to a hearing of Kobo's Application on an accelerated basis, and thereby avoid the time and costs that would have been associated with having a separate hearing in respect of Kobo's request for that stay" (*Kobo FC* at para 47).

[151] I do not see how these facts relating to different circumstances could serve to suggest that, in the context of this Motion, the interests of justice would militate in favour of the Commissioner adopting a similar approach and in the suspension of the Application being granted.

iv. Subsection 9(2) of the CTA

[152] I also do not agree that the Application can be qualified as not being an "urgent matter". The fact that proceedings relating to the E-books business have been ongoing for several years does not mean that this Application is no longer governed by the mandatory provisions of the CTA. Subsection 9(2) of the CTA requires that all matters before the Tribunal be dealt with "as expeditiously as the circumstances and considerations of fairness permit", and compelling reasons must exist to suspend proceedings. This provision continues to apply to the Application. As a specialized expert tribunal involved in economic and business matters, the Tribunal is directed to proceed expeditiously in all matters before it. The importance of the timely pursuit of competition cases has been restated by the FCA in 2013 in an order issued by Madam Justice Gauthier in *Reliance Comfort Limited Partnership v Commissioner of Competition*, A-113-13, August 2, 2013 (FCA), a post-*Mylan* decision.

[153] I acknowledge that, in each of *Coote* and *Kobo FC*, the FCA and the Federal Court both referred to section 3 of the FC Rules on the desirability of securing "the just, most expeditious and least expensive determination of every proceeding on its merits". However, I make the two following observations.

[154] First, section 3 of the FC Rules contains language referring to both expeditiousness and judicial economy: it talks about the "most expeditious and least expensive" determination of every proceeding. This provision has a different and wider scope than subsection 9(2) of the CTA and section 2 of the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**"), which only mention the Tribunal's obligation to deal with matters informally and expeditiously. Of course, the interests of justice and the sound administration of justice always involve concerns for both efficient and timely adjudication. I do not dispute that. The interests of justice call for an adequate balance between cost-effective and time-effective resolution of matters. Favouring a least expensive avenue to the detriment of a speedy resolution cannot always prevail, just as opting for a most expeditious option at any price does not always serve the administration of justice.

[155] But, in the case of the Tribunal, acting in accordance with the requirements of subsection 9(2) of the CTA is a primary concern to determine what is "the fair, well-ordered and timely disposition of litigation" before it (*Korea Data* at para 19). Here, the timeline fixed by the Tribunal for the disposition of the Application cannot be characterized as aggressive. As Mr. Justice Phelan stated in the scheduling order fixing the hearing date in November 2018, the overall duration of the Application is "reasonably consistent (but not identical) with similar timeframes of similar cases" and "falls within the reasonable range for similarly complex cases". A suspension of the whole Application at this juncture, preventing the continuation of any steps leading to the hearing and freezing all activities for an indeterminate amount of time, would necessarily bring this Application significantly outside the timeframes for similar cases and outside the reasonable range for such cases. This, in my view, would not be consistent with the Tribunal's enacting legislation and with the requirements of subsection 9(2) of the CTA and, consequently, could not be in the interests of justice.

[156] Second, unlike the situation evoked in *Coote*, this is not a case where it can be said that no party would be unfairly prejudiced by the requested adjournment (*Coote* at para 13) The Commissioner has stated that he will be prejudiced as a public authority vested with the mandate and role to protect competition and to enforce it through the carriage of proceedings before the Tribunal. Since, as discussed above in the section on "Balance of convenience", I am of the view that the public interest would be adversely affected by a suspension of the Application, this is not a case where it can be said that there would be no prejudice to any of the parties. This is yet another important distinction to remember in assessing whether the requested stay would be in the interests of justice.

v. Kobo JR Application

[157] Finally, since both HarperCollins and Kobo drew parallels between this Application and the Kobo JR Application, I must also emphasize that the particular facts underlying the decision of the Federal Court to grant a stay in the Kobo JR Application (*Kobo FC*) need to be distinguished from those of the case at bar.

[158] In *Kobo FC*, the stay was expected to be for a very short period, the recognition of the specialized role of the Tribunal and the concern to avoid inconsistent decisions between two decision-makers were main driving factors behind the decision, and Chief Justice Crampton used his discretion against the wasteful use of judicial resources in a context where the hearing (and the spending of resources) was imminent. While HarperCollins and Kobo insist on the reference made by the Federal Court to the "potential waste of scarce public and judicial resources", I point out that this was only one of three grounds retained by Chief Justice Crampton in favour of granting the stay. The other two were directly linked to the parallel proceedings to which the Federal Court was confronted in that case: they were "the potential for inconsistent or difficult to reconcile decisions of the Court and the Tribunal" and "the loss of an opportunity for the Court and the parties to benefit from the Tribunal's consideration of the two jurisdictional issues that are common in the two proceedings" (*Kobo FC* at para 43). Evidently, none of these two factors plays a role here.

[159] In his decision, Chief Justice Crampton clearly had a recurring concern that, without a stay, there could be differing determinations by the Tribunal and the Federal Court, which could be perceived as "inconsistent or difficult to reconcile" (*Kobo FC* at paras 36, 39, 43). Chief Justice Crampton indeed concluded that it was preferable for the Court "to have the benefit of the Tribunal's determinations regarding the jurisdictional issues that have been raised in both proceedings before addressing those issues itself" (*Kobo FC* at para 39). I agree with the Commissioner that this was a key element for granting the stay as the Tribunal's decision on HarperCollins' Summary Motion would inform the Federal Court process and help to arrive at a coherent and consistent finding, without conflicting decisions between the Tribunal and the Court.

c. Conclusion on the "interests of justice" test

[160] When all those factors are considered, I am not persuaded that this is a case where, at this time, the interests of justice would support HarperCollins' position and the suspension of all proceedings in the Application. In other words, in the circumstances, it would not be a just and fair disposition to grant the stay sought by HarperCollins, even if the appropriate test was assumed to be the "interests of justice". To the contrary, I am of the view that, in the particular context of this case and at this time, what is in the interests of justice is for the parties to use options at their disposal to ensure that both the Appeal and the Application move ahead. To echo the words of the ONCA in *Korea Data*, what favours both the "public interest in the fair, well-

ordered and timely disposition of litigation" and the "effective use of scarce public resources" at this point in time is for both proceedings to progress in parallel along their respective paths. At this stage, however broad the metrics to measure the interests of justice can be, they do not dictate that a temporary suspension be granted.

[161] In my opinion, two options can easily be identified, both of which are, to a large extent, within the control of the parties. And it is up to the parties to explore them.

[162] What is first in the interests of justice in this case is for HarperCollins, Kobo and the Commissioner to take the necessary steps to expedite the Appeal, not only through an eventual request for an expedited hearing but at all steps of the appeal process, thus mitigating potential harm (*Redeemer* at para 8). As Mr. Justice Stratas reminded in *Mylan*, expediting the appeal does not only mean making a request for an expedited hearing to the Court: "[t]hose who seek expedition should themselves expedite" (*Mylan* at para 30). In order to have an opportunity for a favourable order of the FCA expediting the Appeal and the hearing date at the FCA, it is therefore up to the parties to move the Appeal at an eventful pace at their end as well. So far, it appears that this may not have always happened, as two of the early procedural steps took close to the maximum time permitted under the FC Rules. The ball is in the parties' court for the next procedural steps.

[163] What is also in the interests of justice in the factual circumstances of this case is for HarperCollins, Kobo and the Commissioner to consider ways to develop a more compressed schedule for the discovery steps and the preparation of the hearing, with dates fixed closer to the November 2018 hearing date, in order to minimize the efforts and legal resources to be spent by the parties prior to a decision of the FCA on the Appeal. As indicated above, the current timeline for the overall disposition of the Application is not an aggressive one and, in my opinion, the generous period of more than 13 months lying ahead before the November 2018 hearing leaves ample room for the parties to manoeuvre in order to lighten any prejudice that could be associated with the early spending of legal resources on the Application. Again, the ball is in the parties' court on this front as well, at least in part as the Tribunal will also have its say on scheduling issues.

[164] The Tribunal expects that these options will be considered and explored by the parties. Should the issue of a temporary suspension of the Application resurface at a later point in these proceedings (as nothing in this Order prevents any party from bringing another stay motion should the factual circumstances change), how the parties will have dealt with such possible options will undoubtedly be among the factors considered by the Tribunal in the exercise of its discretion.

[165] As always, the Tribunal will be available to consider ways to adapt the requirements of the CT Rules, to discuss schedules and timelines with the parties as needed, and to resolve issues as they arise, in order to deal with the Application as informally and expeditiously as the circumstances and considerations of fairness permit.

IV. CONCLUSION

[166] For the reasons detailed above, HarperCollins' Motion will be dismissed.

[167] Under the *RJR-MacDonald* test, HarperCollins had the obligation to satisfy the Tribunal that it met all elements of the tripartite conjunctive test in order to be successful on its Motion. On the basis of the evidence before me, I find that it has not provided clear and non-speculative evidence of irreparable harm and that the balance of convenience does not tilt in its favour. I conclude that it is therefore not just and equitable to grant a stay in the context of this Motion.

[168] Furthermore, having considered the evidence presented by HarperCollins in support of this Motion, and taking into account the particular factors of this Application and the factual circumstances relating to HarperCollins, I am also satisfied that, even if it was assumed that the more flexible test advocated by HarperCollins and Kobo should be the appropriate test, the "interests of justice" would not dictate that a stay of the Application be granted at this stage of the proceedings. In other words, a suspension of the Application would not be a just and fair disposition of this Motion. The interests of justice instead call for the parties to use the options at their disposal to ensure that the Appeal proceeds expeditiously and the Application advances in parallel in an efficient way for all involved.

[169] I consider that this is not a case for a costs award against HarperCollins.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[170] HarperCollins' Motion is dismissed. There is no order of costs.

DATED at Ottawa, this 6th day of October 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL:

For the respondents:

HarperCollins Publishers LLC and
HarperCollins Canada Limited

Katherine L. Kay
Danielle K. Royal
Mark E. Walli
Michael A. Currie

For the applicant:

The Commissioner of Competition

John Syme
Esther Rossman
Katherine Johnson

For the intervenor:

Rakuten Kobo Inc

Nikiforos Iatrou
Scott McGrath
Bronwyn Roe

Date: 20080131

Docket: A-37-08

Citation: 2008 FCA 40

Present: **RICHARD C.J.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CANADIAN COUNCIL FOR REFUGEES,
CANADIAN COUNCIL OF CHURCHES,
AMNESTY INTERNATIONAL, and
JOHN DOE

Respondents

Heard at Ottawa, Ontario, on January 30, 2008.

Order delivered at Ottawa, Ontario, on January 31, 2008.

REASONS FOR ORDER BY: RICHARD C.J.

(a) where the order has not been appealed, the court that made the order may order that it be stayed; or (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.	a) dans le cas où l'ordonnance n'a pas été portée en appel, la cour qui a rendu l'ordonnance peut surseoir à l'ordonnance; b) dans le cas où un avis d'appel a été délivré, seul un juge de la cour saisie de l'appel peut surseoir à l'ordonnance.

[17] Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions.

[18] A three-stage test is applied to applications for interlocutory injunctions and for stays in private law and *Charter* cases. At the first stage, the applicant must demonstrate a serious question to be tried. The threshold to satisfy this test is a low one. At the second stage, the applicant must establish that it will suffer irreparable harm if the relief is not granted. The third stage requires an assessment of the balance of inconvenience and it will often determine the result in applications involving *Charter* rights. The same principles apply when a government authority is the applicant. However, the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience (*RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311).

Serious Issue

[19] Justice Phelan certified three serious questions of general importance which I have referred above in paragraph 13.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20130530

Docket: A-150-13

Citation: 2013 FCA 143

Present: **STRATAS J.A.**

BETWEEN:

ANTHONY COOTE

Appellant

and

LAWYERS' PROFESSIONAL INDEMNITY COMPANY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 30, 2013.

REASONS FOR ORDER BY: STRATAS J.A.

[10] I disagree. In these circumstances the Court need only determine whether a stay is in the interests of justice: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at paragraphs 3-14; *Federal Courts Act*, *supra*, paragraph 50(1)(*b*).

[11] As explained in *Mylan*, there is a difference between this Court issuing a stay to enjoin another body from exercising its jurisdiction and this Court issuing a stay to refrain from exercising its own jurisdiction in a pending appeal. The *RJR-MacDonald* test, a test suitable for injunctive relief, applies to the former. With respect to the latter,

> …we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here.

(*Mylan*, *supra* at paragraph 5.)

[12] Whether this Court will issue a stay to refrain from exercising its own jurisdiction over a pending appeal – *i.e.*, to suspend or delay it – depends on the factual circumstances presented to the Court, guided by certain principles. These principles include securing "the just, most expeditious and least expensive determination of every proceeding on its merits": *Federal Courts Rules*, SOR/98-106, Rule 3.

[13] Additional principles guide this Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – this Court should exercise its

discretion against the wasteful use of judicial resources. The public purse and the taxpayers who fund it deserve respect. As well, cases are interconnected: one case sits alongside hundreds of other needy cases. Devoting resources to one case for no good reason deprives the others for no good reason.

[14] Applying these principles, I find that staying the consolidated appeals pending the Federal Court's determination of the vexatious litigant application does not prejudice the appellant in any way and is in the interests of justice:

a. To the extent the appellant succeeds in defending the vexatious litigant application in the Federal Court, the consolidated appeals, related as they are to the vexatious litigation application, might seen as moot (subject to the receipt of submissions on the point) and, therefore, unnecessary to prosecute.

b. To the extent the appellant fails, the vexatious litigant application is granted, and the appellant is declared a vexatious litigant, he can appeal to this Court. That appeal can then be consolidated with the consolidated appeals, or heard alongside of them. If he prevails in the consolidated appeals in this Court, this Court can consider whether the designation of the appellant as a vexatious litigant can still survive. And, of course, on appeal of that designation to this Court, the appellant can raise any other admissible grounds of appeal.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20111117

Docket: A-344-11

Citation: 2011 FCA 312

Present: **STRATAS J.A.**

BETWEEN:

MYLAN PHARMACEUTICALS ULC

Appellant

and

ASTRAZENECA CANADA, INC.
ASTRAZENECA UK LIMITED, and
THE MINISTER OF HEALTH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 17, 2011.

REASONS FOR ORDER BY: STRATAS J.A.

- *This Court enjoining another body from exercising its jurisdiction.* When we do this, we are forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, we are forbidding that body from doing what Parliament says it can do. As the Supreme Court recognized in *RJR-MacDonald Inc.*, this is unusual relief that requires satisfaction of a demanding test. Two parts of that test are particularly demanding. First, there must be persuasive, detailed and concrete evidence of irreparable harm: *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraphs 14-22. Second, there must be a demonstration, through evidence, of inconvenience that outweighs public interest considerations, such as the right of the other body to discharge the mandate given to it by Parliament: *RJR-MacDonald Inc.*, *supra* at pages 343-347.

- *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends

> on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.

[6] The conclusion that the *RJR-MacDonald* test does not apply in cases where the Court is deciding not to exercise its jurisdiction until some time later is supported by other cases in this Court: *Boston Scientific Ltd. v. Johnson & Johnson Inc.*, 2004 FCA 354; *Epicept Corporation v. Minister of Health*, 2011 FCA 209.

[7] Mylan cites another authority of this Court and says that it is to the contrary: *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research)* (1994), 58 C.P.R. (3d) 342 (F.C.A.).

[8] In *D & B Companies*, a party asked the Competition Tribunal to delay its proceedings. The Competition Tribunal refused. It held that the factors relevant to its discretion to delay its proceedings were the same as those set out in *RJR-Macdonald*. A motion was then brought in this Court to stay the Competition Tribunal's proceedings. As an attempt to have this Court enjoin another body from carrying out its mandate, the test in *RJR-Macdonald* was properly applied and the stay was refused.

Federal Court Cour fédérale

Date: 20181122

Docket: T-659-17

Vancouver, British Columbia, November 22, 2018

PRESENT: Case Management Judge Kathleen M. Ring

BETWEEN:

FRANK LOUIE

Applicant

and

TS'KW'AYLAXW FIRST NATION BAND COUNCIL

Respondent

ORDER

Overview

[1] The Applicant, Frank Louie, is a member of the Ts'kw'aylaxw First Nation. One of the reserves set aside for the Ts'kw'aylaxw First Nation is Pavilion Indian Reserve No. 1. The Applicant says that lawful possession of Lot 4 on the Pavilion Indian Reserve No. 1 was transferred to him in 1988 [Lot 4]. On May 3, 2017, he commenced an application for judicial review in respect of the refusal of the Respondent, Ts'Kw'aylaxw First Nation Band Council, to register lawful possession of Lot 4 in the name of the Applicant in the Ts'kw'aylaxw Lands Register and the First Nations Land Registry.

[26] The proposed reply evidence is relevant to the mootness issue and responsive to the Baracaldo Affidavit, and the Applicant has not demonstrated that it will suffer substantial or serious prejudice if the reply evidence is admitted. Therefore, I am satisfied that it is in the interests of justice to admit the reply evidence on an exceptional basis for the narrow purpose of determining whether it is plain and obvious that the application for judicial review is moot.

[27] The Respondent's motion for leave to file reply evidence is therefore granted.

Should the Application be Struck as Premature?

[28] The Respondent seeks to strike out the application for judicial review on the basis that the application is premature. The Respondent says that the administrative process has not run its course, and therefore the Applicant was barred from commencing the judicial review application.

[29] The general rule is that a judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained, subject to unusual or exceptional circumstances supportable in the case law. This principle is justified by the fact that judicial review remedies are remedies of last resort, and improper or premature recourse to judicial review can frustrate specialized statutory schemes enacted by Parliament and cause delay: *JP Morgan* at paras 84-85.

[30] The Court cannot strike an application for judicial review on the basis of the availability of an adequate alternative remedy unless the Court is certain that: (i) there is recourse elsewhere, now or later; (ii) the recourse is adequate and effective; and (iii) the circumstances pleaded are

Attorney General of Canada Applicant/Moving Party	and	**First Nation Child & Family Caring Society of Canada, et al** Respondents/Responding Parties	Court File No: T-1621-19

FEDERAL COURT

BOOK OF AUTHORITIES OF THE RESPONDENT/RESPONDING PARTY ASSEMBLY OF FIRST NATIONS

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