OH-4-2011

Case Book of Coastal First Nations Reply to the Attorney General of Canada's Response to Requests For Leave of the Panel to Question Federal Government Participants During the Questioning Phase of the Final Hearings, dated August 3, 2012

1. Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817
2. Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board), 2012 ABCA 208

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

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches,
the Canadian Foundation for Children, Youth and the Law,
the Defence for Children International-Canada,
the Canadian Council for Refugees,
and the Charter Committee on Poverty Issues *Interveners*

Indexed as: Baker *v.* Canada (Minister of Citizenship and Immigration)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the federal court of appeal

Immigration -- Humanitarian and compassionate considerations -- Children's interests -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption

to requirement that application for immigration be made abroad -- Application denied without hearing or formal reasons -- Whether procedural fairness violated -- Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) – Immigration Regulations, 1978, SOR/93-44, s. 2.1 -- Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law -- Procedural fairness -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Whether participatory rights accorded consistent with duty of procedural fairness -- Whether failure to provide reasons violated principles of procedural fairness -- Whether reasonable apprehension of bias.

Courts -- Appellate review -- Judge on judicial review certifying question for consideration of Court of Appeal -- Legal effect of certified question -- Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration -- Humanitarian and compassionate considerations -- Standard of review of humanitarian and compassionate decision -- Best interests of claimant's children -- Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law -- Review of discretion -- Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and

compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court -- Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached

the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this

decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Per Cory and Iacobucci JJ.: The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

Cases Cited

By L'Heureux-Dubé J.

Applied: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **disapproved:** *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4; *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238; **not followed:** *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157; *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170; *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62; *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R.

241; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646; **referred to:** *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 370; *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), [1989] 2 S.C.R. 879; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57; *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531; *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120; *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71; *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316; *Boyle*

v. Workplace Health, Safety and Compensation Commission (N.B.) (1996), 179 N.B.R. (2d) 43; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Francis v. The Queen*, [1956] S.C.R. 618; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Young v. Young*, [1993] 4 S.C.R. 3.

By Iacobucci J.

Applied: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; **referred to:** *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

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APPEAL from a judgment of the Federal Court of Appeal, [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

Roger Rowe and *Rocco Galati*, for the appellant.

Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for the respondent.

Sheena Scott and *Sharryn Aiken*, for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

John Terry and *Craig Scott*, for the intervener the Charter Committee on Poverty Issues.

Barbara Jackman and *Marie Chen*, for the intervener the Canadian Council of Churches.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ. was delivered by

1 L'HEUREUX-DUBÉ J. -- Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the

approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she

were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter dated April 18, 1994 and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
> Letter of Aug. '93 from psychiatrist from Ont. Govm't.
> Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.
>
> There is also a potential for violence - see charge of "assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

> **82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court -- Trial Division.
>
> **83.** (1) A judgment of the Federal Court -- Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court -- Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.
>
> **114.** . . .
>
> (2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's

admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent

> member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.
>
> Article 12
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. *Federal Court -- Trial Division* (1995), 101 F.T.R. 110

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a

significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a "serious question of general importance" under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?"

B. *Federal Court of Appeal*, [1997] 2 F.C. 127

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision "concerning"

children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

IV. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

> (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
>
> (2) Were the principles of procedural fairness violated in this case?
>
> > (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
> >
> > (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
> >
> > (iii) Was there a reasonable apprehension of bias in the making of this decision?
>
> (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

V. Analysis

A. *Stated Questions Under Section 83(1) of the Immigration Act*

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, that the requirement, in s. 83(1), that a "serious question of general importance" be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 370 (T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a "question of general importance" has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. *The Statutory Scheme and the Nature of the Decision*

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the

role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she

has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the Regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived

in Canada, has become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. *Procedural Fairness*

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms.

Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to

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

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

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be

required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

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

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

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

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

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own

procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected 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.

(2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of

a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although

judicial review may be applied for with leave of the Federal Court -- Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result -- the claimant and his or her close family members -- and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah, supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put

before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-

maker's reasons: see *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157, at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (F.C.T.D.), and *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62, it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241, an H & C decision was set aside because the decision-making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . .

The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 180-81.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M. H. Morris, "Administrative Decision-makers and the

Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-68; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531, imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances, a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (C.A.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316 (T.D.), imposed a reasons requirement on a ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle*

v. Workplace Health, Safety and Compensation Commission (N.B.) (1996), 179 N.B.R. (2d) 43 (C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many

ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they

are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. *Review of the Exercise of the Minister's Discretion*

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the Regulations. Since it is important to address the central questions which led to this

appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to her show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the Regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a

statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748; and *Pushpanathan, supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the

decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*,

at para. 30; *Pushpanathan, supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam, supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given

considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court -- Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a "serious question of general importance" by the Federal Court -- Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision- maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to exempt applicants, in certain circumstances, from the requirements of the Act or its Regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to the determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

> 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. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the "serious question of general importance" stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H & C factors", read as follows:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, *supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .
>
> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis

added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) *The Objectives of the Act*

68 The objectives of the Act include, in s. 3(*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

(b) *International Law*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) *The Ministerial Guidelines*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might

not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "wholly a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of

children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. *Conclusions and Disposition*

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

The reasons of Cory and Iacobucci JJ. were delivered by

78 IACOBUCCI J. - I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of ministerial discretion pursuant to s. 114(2) of the *Immigration Act*,

R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the

domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed with costs.

Solicitors for the appellant: Roger Rowe and Rocco Galati, North York.

Solicitor for the respondent: The Deputy Attorney General of Canada, Toronto.

Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees: The Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitors for the intervener Charter Committee on Poverty Issues: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener the Canadian Council of Churches: Jackman and Associates, Toronto.

In the Court of Appeal of Alberta

Citation: Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board), 2012 ABCA 208

Date: 20120719
Docket: 1101-0006-AC
1101-0008-AC
Registry: Calgary

Docket: 1101-0006-AC

Between:

Inter Pipeline Fund

Appellant
(Applicant)

- and -

Energy Resources Conservation Board and Taylor Processing Inc.

Respondents
(Respondents)

Docket: 1101-0008-AC

And Between:

BP Canada Energy Company and BP Canada Energy Resources Company

Appellants
(Applicants)

- and -

Energy Resources Conservation Board and Taylor Processing Inc.

Respondents
(Respondents)

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of The Honourable Madam Justice Hunt
Concurred in by The Honourable Madam Justice Rowbotham

Reasons for Judgment Reserved of
The Honourable Mr. Justice Martin Dissenting in Part

Appeal from the Decision of the
Alberta Energy Resources Conservation Board
Dated the 7th day of December, 2010
(Decision: 2010-036)

Reasons for Judgment Reserved of
The Honourable Madam Justice Hunt

[1] The appellants attack a decision of the Energy Resources Conservation Board (Board) approving a project to co-stream natural gas. They allege inadequate reasons and a lack of procedural fairness.

[2] The appeal is dismissed.

A. Brief Background

[3] The respondent, Taylor Processing Inc., sought the Board's approval for a proposed co-streaming[1] project at its Harmattan plant. It intended to alter its existing gas processing facility and then divert natural gas to it from a common stream of gas owned by a variety of parties, remove various natural gas liquids (NGLs) from the gas, and return the residue gas to the common stream downstream from the appellant, Inter Pipeline Fund's (IPF) straddle[2] plant at Cochrane.

[4] IPF's Cochrane plant is currently the only[3] straddle plant on the NOVA Gas Transmission Ltd. (NGTL) Western Alberta System (western leg), which gathers natural gas for use within the province and delivers it to the Alberta/British Columbia boundary point for connection with export pipelines.

[5] The appellants, BP Canada Energy Company and BP Canada Energy Resources Company (BP), among other things, purchase NGL production from the Cochrane plant, own a pipeline which

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[1] co-streaming is defined by the Board as "[t]aking gas from the [NOVA Gas Transmission Ltd.] System upstream of an existing straddle plant, extracting [natural gas liquids including ethane, propane, butanes, pentanes plus, and mixtures of the components] from the gas, and injecting the dry residue gas downstream of the straddle plant": *Decision* Appendix 2.

[2] "Gas processing plants for NGL extraction, referred to as straddle plants, are located on rate regulated main gas transmission pipelines and process gas (that may have been processed in the field) to recover NGL that remain in the common gas stream. These plants remove much of the propane plus (C3+) and ethane volumes, with the degree of recovery being determined by the plant's extraction capability, contractual arrangements and product demand. In 2007, 76 percent of Alberta ethane production occurred at straddle plants. In the same year straddle plants were responsible for recovering 51 percent of propane supply, 33 percent of butanes production and 9 percent of pentanes plus production in the province": *Inquiry Into Natural Gas Liquids (NGL) Extraction Matters*, Decision 2009-009 at p 5, footnotes omitted.

[3] *Inquiry Into Natural Gas Liquids (NGL) Extraction Matters*, Decision 2009-009 at p 12.

transports NGL production from Cochrane to Edmonton, and own substantial straddle plant capacity at Empress, located on the NGTL's eastern leg (Extracts of Key Evidence (EKE) A78).

[6] Taylor or its predecessor made two previous applications to the Board for similar projects. The first application (in 2004) was denied and the second (in 2006) was eclipsed by the Board's general inquiry into NGL extraction matters. The inquiry resulted in a report that, among other things, set out seven non-determinative factors to be taken into account in deciding future co-streaming applications: *Inquiry Into Natural Gas Liquids (NGL) Extraction Matters*, Decision 2009-009, ("Inquiry Report").

[7] IPF and BP objected to Taylor's application. Among the various procedural steps that followed were IPF's application for an information request (IR) process (which the Board granted); BP's request for an adjournment because it had retained new counsel (which the Board denied in part because BP had obtained a copy of the application more than a year earlier); and BP's application for further and better IR responses (which the Board denied in part because of its view that BP and others had "sufficient information" to proceed to a hearing). BP advised that it would file no evidence but would participate by way of cross-examination and final argument.

[8] Taylor's application relied on a gas supply forecast prepared in July 2009 by Ziff Energy Group (Ziff forecast). In its request for better IR responses, one of BP's main complaints concerned Taylor's responses to questions arising from the Ziff forecast. Taylor later submitted a new gas supply forecast prepared by TransCanada, owner of the NGTL system (TCPL forecast). It then notified the Board that it would not be relying on the Ziff forecast and would not be presenting a witness from Ziff. Meanwhile, as part of its evidence, IPF filed its own gas supply forecast, prepared by August 2010 by Purvin & Gertz Inc. (P&G), which referenced a number of gas supply forecasts.

[9] During the hearing, there were complaints from some parties about the fact that Taylor's witnesses had no expertise on gas plant design. Taylor tendered an additional witness, Maddocks, for cross-examination on this topic. Neither appellant objected, and both cross-examined him.

B. Board Decision

[10] The Board approved Taylor's application: *Taylor Processing Inc. Applications for Three Pipeline Licences and a Facility Licence Amendment Harmattan-Elkton Field*, (December 7, 2010), ERCB Decision 2010-036 ("Decision"). In addition to the seven factors set out in the Inquiry Report, it considered a number of other factors raised by the appellants. It emphasized that its decision was based on all the evidence: paras 1, 18, 149. Despite the appellants' contrary arguments, the Board considered that there was sufficient evidence to permit it to determine whether the project was in the public interest: paras 23-26.

[11] Concerning public interest, the Board said (footnotes omitted):

> [24] The Board notes that its assessment as to whether an application is in the public interest involves considering the social, economic, and environmental impacts of a project. It also notes that to be in the public interest, a project must not only benefit the applicant and those directly connected to it but must benefit Albertans in general. The Board recognizes that while the determination of the public interest is a subjective matter, constrained only by the objectives of the legislation and the Board's power to carry out those purposes, such determination must arise from the evidence presented and the careful and fair consideration of that evidence by the Board.
>
> [25] The Board also notes that its assessment of the public interest with respect to the Applications requires considering the factors from the NGL Inquiry report. It also notes that these factors vary in significance, depending on the facts, circumstances, and issues surrounding a particular co-streaming or side-streaming application and that no single objective test of what constitutes the public interest can be formed. It is the Board's view that no single factor presents a barrier to the approval of a project that may be in the overall public interest.
>
> (emphasis added)

[12] In justifying its conclusion that the project was in the public interest, the Board addressed in detail each of the seven factors from the Inquiry Report. Apart from the specific issues the appellants raise on appeal (discussed below), the Board:

- emphasized that the project would provide competition for IPF's monopoly from the Cochrane plant, which in turn could increase efficiencies, innovations, volumes of recovered NGLs and fairness to gas shippers: paras 133, 145. The Board stated that competition was very important to its assessment of the public interest: *ibid*;

- considered that Taylor had demonstrated an adequate degree of industry support for its project: para 141;

- concluded that resulting energy inefficiencies were insignificant: para 86;

- was satisfied that it could ensure the use of raw gas for processing by imposing conditions: para 108; and

- felt that facilities proliferation was a relatively minor concern: para 114.

[13] The appellants' complaints focus on two key matters, gas supply forecasts and NGL extraction efficiency. IPF also asserts the reasons are deficient as to the impact of Taylor's proposal

on its Cochrane plant. These matters are discussed in more detail below, but an overview at this point will help set the context.

[14] The gas supply issue formed part of the Board's consideration of whether Taylor had established that its proposal supported resource conservation and efficient utilization of resources. The Board emphasized that NGL recovery from the western leg is in the public interest. It accepted both Taylor's and IPF's evidence about NGL recovery rates from each plant.

[15] It acknowledged that future gas flow volumes would impact the incremental volume of NGLs from the project. It noted the limitations of predicting future gas flows, as evidenced by the wide variations in forecasts presented to it: para 74. Rather than accepting one forecast, it concluded that the answer would lie somewhere between the TCPL and P&G forecasts: para 75. It recognized the potential negative impact on gas supply from the recently-approved Ruby pipeline, but expected this to be at least partially offset by gas supplies from British Columbia and unconventional production in Alberta: para 75.

[16] The Board accepted that incremental NGL recovery would depend on gas flows, with significant incremental NGL recovery at the higher rate of gas flow on the western leg: para 77. At lower levels, the Taylor project might have a small incremental effect on NGL recovery. But it would not diminish NGL recovery and would present a significant upside for future NGL recovery if gas flows on the western leg remained the same or somewhat increased: para 78.

[17] The Board acknowledged that the Taylor project would impact the Cochrane plant but noted there was no evidence that the Cochrane plant would no longer be viable as a result: paras 56, 62, 98, 143.

C. Leave to Appeal

[18] Leave was granted on two issues. Did the Board: (a) give adequate reasons explaining its assessment of the critical evidence; and (b) breach its duty of procedural fairness?: *Inter Pipeline Fund v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 242 (available on CanLII).

D. Standard of Review

(a) Adequacy of Reasons

[19] IPF acknowledges the Supreme Court's decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Nurses*] which holds that tribunal reasons are to be assessed on the reasonableness standard. Nonetheless, IPF suggests that when a statutory delegate has a legislated obligation to give reasons, the standard of review is more demanding, and correctness applies. Here, the *Authorities Designation Regulation*,

Alta Reg 64/2003 and section 7 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 oblige the Board to give reasons:

> 7 When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
>
> (a) the findings of fact on which it based its decision, and
>
> (b) the reasons for the decision.

[20] The only authority put forward in support of the correctness standard is a pre-*Nurses* single judge leave decision, *Judd v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 159, 513 AR 260. The specific point was not addressed in *Nurses*. Nor did it arise in *Calgary (City) v Alberta (Municipal Government Board)*, 2012 ABCA 13, 92 MPLR (4th) 15 (when this Court applied *Nurses*). There is little to support IPF's position and it must be rejected for three reasons.

[21] First, the companion case to *Nurses*, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*ATA*], concerned an appeal of an issue not raised before the statutory delegate. The majority of the Court of Appeal applied a correctness standard. The Supreme Court applied the reasonableness standard, not to the reasons (since there were no reasons as such, the decision on the contentious point having been implicit), but to the reasons that could have been offered to support the decision-maker's conclusion.

[22] The Supreme Court said that its direction in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (a reviewing court should give respectful attention to reasons "which could be offered in support of a decision") is apposite when the issue on appeal was not raised before the decision maker. However,

> [54] ... this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (e.g., *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. ....
>
> (emphasis added)

[23] Nothing in this language suggests correctness should apply when there is a duty to give reasons.

[24] Secondly, there is no hint in *Nurses* or *ATA* of any need for a bifurcated standard of review on the adequacy of reasons. Rather, the language in *Nurses* is categorical. For example, Abella J. says "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": para 14. And, in assessing whether the decision is reasonable in light of the outcome and the reasons, courts must not substitute their own reasons but may look to the record in order to assess the reasonableness of the outcome: para 15. Similarly, a decision maker is not required to make an explicit finding on each constituent element leading to its final conclusion and does not need to include all the arguments: para 16. And, "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": para 16. Additionally, courts should pay respectful attention to the reasons, and be cautious about substituting their own view of the proper outcome "by designating certain omissions in the reasons to be fateful": para 17. Of particular importance to this appeal is paragraph 18, where Abella J. quotes Evans J.A.: "perfection is not the standard", but rather whether, in light of the evidence and the statutory task, "the reasons explain the bases of its decision". Paragraph 20 clearly states that deficiencies in the reasons are not part of procedural fairness subject to correctness, and paragraph 22 notes that challenges to the reasons should be made on reasonableness standard.

[25] Finally, an analogous issue arose in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. That decision considered whether the common law standards of review developed in *Dunsmuir* were displaced by statutory requirements governing judicial review found in the *Federal Courts Act*, RSC 1985, c F-7. The Court held that the general principles of judicial review are not ousted by legislation: para 25. More specifically, if the legislative language permits, the court will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and will presume the existence of a discretion to grant or withhold relief based in part on *Dunsmuir* including a restrained approach to judicial intervention in administrative matters: para 51.

[26] I conclude that tribunal reasons are to be assessed on the reasonableness standard, even if a tribunal is statutorily obligated to give reasons. According to *Dunsmuir*, the reasonableness test will be met if there is justification, transparency and intelligibility within the decision-making process and the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law: para 47.

(b) Procedural Fairness

[27] The parties agree that procedural fairness is reviewable on the correctness standard: *Anderson v Alberta Securities Commission,* 2008 ABCA 184 at para 30, 437 AR 55; *Allsop v Alberta (Appeals Commission for Alberta Workers Compensation)*, 2011 ABCA 323 at para 21, 29 Admin LR (5th) 321.

[28] Simply put, "administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, '[t]he observance of fair procedures is central to the notion of the 'just' exercise of power'": *Dunsmuir* at para 90.

[29] Fairness, however, must be reviewed within the context in which the issue arises.

> As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75):
>
> *ibid* at para 79

[30] More recently, the Supreme Court stated more pointedly: "the particular legislative and administrative context is crucial to determining [procedural fairness] content": *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para 41. And, at para 40:

> In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if ... administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion".

[31] As BP's counsel fairly conceded during argument, in this case the context includes the Board's enabling statute and procedural rules.

E. Legislation

[32] The *Energy Resources Conservation Act*, RSA 2000, c E-10, provides (emphasis added):

> 3 Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

[...]

16 The Board, in the performance of the duties and functions imposed on it by this Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions.

[...]

26(2) ... if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person ...

(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,

(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,

(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and

(e) an adequate opportunity of making representations by way of argument to the Board or its examiners.

[33] The Board's rules (*Energy Resources Conservation Board Rules of Practice*, Alta Reg 252/2007 with emphasis added) state:

1 These Rules must be liberally construed in the public interest to ensure the most fair, expeditious and efficient determination on its merits of every proceeding before the Board.

29(1) A party may request another party, within the time limit set out in the notice of hearing, to provide information necessary

(a) to clarify any documentary evidence filed by the other party,

(b) to simplify the issues,

(c) to permit a full and satisfactory understanding of the matters to be considered, or

(d) to expedite the proceeding.

(2) An information request under subsection (1) must

(a) be in writing,

(b) be directed to the party from whom a response is sought,

(c) contain specific questions for clarification about the party's evidence, documents or other material that is in the possession of the party and relevant to the proceeding,

(d) be filed and served as directed by the Board, and

(e) set out the date on which the information request is filed.

30(1) A party who is served with an information request under section 29 shall prepare a response that

(a) repeats each question in the information request,

(b) provides a full and adequate response to each question, and

(c) identifies the individual or individuals who were responsible for preparing the response.

(2) A response under subsection (1) must

(a) be in writing,

(b) be filed and served as directed by the Board, and

(c) set out the date on which the response is filed.

31(1) If a party who is served with an information request under section 29 is not able or not willing to prepare a response in accordance with section 30, the party shall do one of the following:

> (a) if the party contends that the information request is not relevant, file and serve on the party making the request a response in writing that sets out the specific reasons in support of that contention;
>
> (b) if the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, file and serve on the party making the request a response in writing that
>
> (i) sets out the specific reasons in support of that contention, and
>
> (ii) contains such other information that the party considers would be of assistance to the party making the information request;
>
> (c) if the party contends that the information requested is confidential, file and serve on the party making the request a response in writing that sets out the specific reasons why the information is confidential and any harm that may be caused if it were disclosed.
>
> (2) If a party is not satisfied with a response under subsection (1), the party may bring a motion under section 9 requesting that the matter be settled by the Board.

F. Analysis

(a) Adequacy of Reasons

[34] In its factum IPF contends that the Board's reasons are deficient on four main points. Orally, it argued that even if the reasonableness standard governs, it was breached.

i. Board's Weighing of Forecasts

[35] IPF asserts that the Board did not explain what led it to give the same weight to the TCPL forecast as to the P&G report: Factum para 14. I am not persuaded that the Board gave them the same weight. It certainly never said so. Rather, at paragraph 74 it noted the serious limitations in forecasting future gas flows, as illustrated by the evidence. It characterized the TCPL forecast as being at the high end and P&G being at the low end (para 75), adding that its expectation was somewhere in between. It acknowledged that the Ruby pipeline will displace some gas volumes (see

point ii. below for more detail), but not as much as predicted by P&G. In its view, some mitigation of this effect will be provided by British Columbia gas and Alberta unconventional production, although not to the extent predicted by TCPL.

[36] Even if the Board's statements can be interpreted as giving the same weight to each forecast, there would be no basis for this Court's interference. The weighing of evidence is a matter for the Board, not a reviewing court: *Schroder v Alberta (Workers' Compensation Board)*, 2010 ABCA 344, 490 AR 298; *Alberta (Securities Commission) v Workum*, 2010 ABCA 405, 493 AR 1.

[37] In any event, before the Board made its decision, it had a number of general gas supply forecasts (from the National Energy Board, the Energy Resources Conservation Board, and the Canadian Association of Petroleum Producers, etc.) in addition to those from P&G and TCPL which concerned gas volumes on the western leg of the NGTL. There was evidence to support its conclusions about gas supply. Indeed, IPF's witness on gas supply eventually conceded on cross-examination that reasonable people could have different forecasts: Transcript 521.

[38] Courts must be careful not to conclude that reasons are inadequate simply because they may disagree with a tribunal's conclusion, based on evidence before it: *Nurses* at para 21.

ii. Impact of Ruby Pipeline on Gas Volumes

[39] In its factum IPF also argues that the Board failed to address its evidence about the extent to which the Ruby pipeline would displace the volume of gas: para 22. One difficulty with this argument is that it involves parsing a small part of the Board's reasons, rather than looking at the reasonableness of the outcome, as required by *Nurses* (para 15). Here, the underlying question for the Board was whether the Taylor project was in the public interest.

[40] Moreover, the evidence about the Ruby pipeline was mixed. Cross-examination of the P&G expert, for example, revealed that there was evidence that an IPF executive had speculated that the impact of the Ruby pipeline could fall into a range beginning with no impact: Transcript 511-2.

[41] Thus, evidence supported the Board's conclusion that the impact of the Ruby pipeline would not necessarily be as great as that suggested by IPF's witness.

iii. NGL Extraction Efficiency

[42] As IPF points out, part of its complaint about the Board's analysis of this issue arises from its criticisms about the Board's treatment of gas supply forecasts: Factum para 27. Its argument in that regard has been rejected above.

[43] IPF also submits that, at the last minute, Taylor provided a witness, Maddocks, to address the design of the Harmattan plant. However, no objection was made to Maddocks testifying, and

IPF's lawyer was given time to prepare his cross-examination. Moreover, it is hard to see how this complaint relates to adequacy of reasons.

[44] The Board explained the circumstances under which, in its view, there would be an increase in NGL recovery as a result of Taylor's application: paras 78-80. The Board accepted Taylor's evidence concerning plant efficiency, which it was entitled to do: para 73. Its reasons meet the test of reasonableness.

iv. Impact on Cochrane Plant

[45] IPF asserts that the Board failed to address its submission that the quality and composition of gas received at the Harmattan plant should closely match the quality and composition of gas received at the Cochrane plant. Although it was suggested to Taylor witnesses that such a condition ought to be imposed by the Board (a proposal rejected by the witness), nothing further was said about the point, for example, through IPF's own evidence or in its final submissions. Under such circumstances, the Board's failure to highlight the issue cannot be said to undermine the reasonableness of its overall analysis.

[46] As for the impact of the application more generally on the Cochrane plant, the Board acknowledged this issue but mentioned at several points (see above) that there was no evidence Cochrane would shut down or no longer be economically viable. IPF did not tender such evidence, which evidence was obviously particularly within its (not Taylor's) knowledge. Indeed, the IPF witness, Mansell, said that to determine viability it would be necessary to do a private financial analysis of the Cochrane plant: Transcript 474.

v. Summary

[47] The issues about gas supply and extraction efficiency arose in the context of the Board's assessment of the impact of the project on total NGL recovery. The Board gave elaborate reasons for deciding that the project would result in incremental recovery under certain scenarios. In particular, the Board emphasized the long-term prospects for enhanced NGL recovery, a point that was reasonable given that the life estimates of the plant were 40 to 50 years: Transcript 273.

[48] IPF's attempts to undermine the Board's conclusion that the project was in the public interest must fail, at least in part because the Court is obliged to assess the reasonableness of the Board's overall conclusions, resisting any temptation to engage in a line-by-line analysis of points that contribute to the overall assessment. When approached this way, it is impossible to conclude that the Board's reasons are not "within the range of acceptable and rational conclusions" or lack "justification, transparency and intelligibility within the decision-making process": *Dunsmuir* at para 47.

(b) Procedural Fairness

[49] BP points out that section 26(2) of the *ERC Act* guarantees procedural rights to parties affected by an application. In particular, subsection 26(2)(b) obliges the Board to ensure that such a party will have a reasonable opportunity to learn the facts bearing on an application. It also relies on rules 29 to 31 of the Board's rules, which outline the information request (IR) process. It says these procedural rights were breached in several ways.

[50] To briefly recap the sequence of events critical to this aspect of the appeal, IPF asked for, and was granted, an IR process. BP sought an adjournment of the hearing because it had retained new counsel; at the same time it sought to alter the timing of the IR process. The Board rejected its adjournment request because, in the Board's view, BP had been aware of the application for over a year and had received a copy of the application several months earlier. Although the Board considered that BP ought to have commented earlier on the IR process, it nevertheless made minor amendments to its timetable to give BP additional time.

[51] When BP concluded that some of Taylor's IR replies were inadequate, it moved for further and better responses, asserting that Taylor had frustrated the efforts of interveners "to inquire into the facts relevant to the Application": EKE A220. IPF supported the motion but concluded that it would pursue these matters through cross-examination: EKE A226.

[52] While the Board agreed some of Taylor's answers might have been more comprehensive, it rejected BP's motion, concluding that it was:

> satisfied that, irrespective of concerns raised regarding some of Taylor's responses to BP's information requests, it has sufficient information to proceed to an efficient hearing of Taylor's applications. The Board is also satisfied that BP and the other interveners have been provided with an opportunity to learn all of the facts presented to the Board bearing on the applications. As such, they have a reasonable opportunity to reply in their submissions to Taylor's applications. Further, BP, along with the other interveners, will have the opportunity to examine Taylor at the hearing. To the extent that the responses to information requests with which BP is dissatisfied relate to areas that prove to be relevant to the proceeding, parties can pursue these matters in their cross-examination of Taylor's witnesses.
>
> EKE A229

[53] Shortly thereafter, BP announced its decision not to file evidence, but to participate through cross-examination. It did not indicate that this decision resulted from the paucity of information it had received from Taylor. Subsequently, Taylor filed the TCPL forecast, and later elected not to rely on the 2009 Ziff forecast.

[54] Before examining in detail BP's allegations, an overview of the Board's powers will be helpful since, as discussed above, the statutory context helps to inform an assessment of whether or not the Board provided procedural fairness.

[55] Section 3 of the *ERC Act* directs the Board to take account of the public interest in its hearings. Section 16 gives it general powers to do everything necessary for or incidental to the performance of its duties or functions. Section 26, already referred to, uses language such as "reasonable opportunity", "fair opportunity" and "adequate opportunity".

[56] The Board's rules (made pursuant to s 49 of the *Act*) are to be construed in the public interest "to ensure the most fair, expeditious and efficient determination" on merits of proceedings before the Board: r 1. Rule 7 permits the Board to dispense with, vary or supplement any part of the Rules if it is satisfied that the circumstances so require.

[57] As for information, rule 18(1) permits the Board to direct parties to file such additional information "as the Board considers necessary to permit a full and satisfactory understanding of an issue in a proceeding." If there is non-compliance, the Board's broad powers include dismissing the application.

[58] These provisions underscore that this expert Board, which is required to rule on highly technical and complex matters, has broad powers to control its processes. Often, hearings involve a multitude of parties (as this one did). The Board is called upon to balance the conflicting interests of various stakeholders, including scheduling issues. It has been given broad discretion to determine whether adequate information has been provided to affected parties.

[59] BP's allegations of procedural unfairness concern information it sought from Taylor on two issues, gas supply and extraction efficiency. Essentially, it says it was thwarted in its efforts to obtain adequate information (using the IR process) on these subjects before the hearing, and therefore could not properly respond to Taylor's application. Moreover, its anticipated opportunity to cross-examine Taylor's expert (author of the 2009 Ziff forecast) was also thwarted when Taylor advised shortly before the hearing that it would no longer be relying on that forecast and not calling anyone from Ziff as a witness. BP also says it was unfair that Taylor filed the TCPL gas supply forecast on short notice.

i. Gas Supply

[60] BP submits that without better replies from Taylor to BP's IRs about the 2009 Ziff forecast, it was deprived of the opportunity to meet Taylor's case. It underscores three matters raised in its unsuccessful motion for further and better responses.

> 14. Taylor alleges that the Harmattan Plant has excess or unutilized raw gas capacity and that the Application is intended to utilize such capacity. In its Application, Taylor only provided the licenced physical capacity of the Harmattan Plant, which was constructed in 1961. Taylor should be compelled

> to provide the current physical capacity of the Harmattan Plant to process raw gas.
>
> 17. [Costs of each project component are] necessary for the Board to make a public interest determination regarding effective utilization of resources. In the event that any evidence of incremental NGL extraction comes forward, and were to be accepted by the Board, the Board must assess to overall costs associated with such supply. The amount of capital that Taylor is committing to this project may be comparable to, or possibly exceed, a more efficient greenfield project. If it would not be in the public interest to construct greenfield side-stream or co-streaming plants ..., the Board must decide how it could be in the public interest to develop less efficient (more capital intensive) projects. If Taylor does not provide the requested information, the Board may not be in a position to assess whether what Taylor is proposing is comparable to a new greenfield facility.
>
> 19. Taylor commissioned Ziff Energy Group ("Ziff") to provide gas supply evidence in support of the Application. BP requested specific information from Ziff to test this gas supply evidence. BP did not expect Taylor to have this information. Taylor should have obtained this information from Ziff and provided it in Taylor's information responses. It is common practice before the Board for parties to get discovery of independent expert evidence during the course of an information request process. The right of discovery cannot be thwarted by a party, particularly an applicant, suggesting it does not have the information known to its experts. In addition, Taylor has made no attempt to explain why the information is not available or cannot be provided. Simply stating that Taylor "does not have the requested information" is not a full or adequate response and it does not comply with the requirements set out in s. 31(1)(b) of the *Rules*.

[61] Of these three requests, the last one (19) is the most pertinent to gas supply. The weakness of BP's argument is that the 2009 Ziff forecast was not relied on by Taylor and, therefore, never considered by the Board. It is hard to see how BP was prejudiced by not having more detailed information about a forecast that did not form part of the Board's deliberations. While both appellants criticize the timing of Taylor's decision not to rely on the 2009 Ziff forecast, that is not a stand-alone complaint. It is obvious from the timing of other filings (including IPF's rebuttal evidence, during the hearing itself) that all parties accept the Board's process as one that is very fluid. Perhaps this is to ensure that the Board has the most up-to-date information possible. As for the late filing of the TCPL forecast, there is nothing to suggest that BP complained about the timing of this upon receiving notification that Taylor would rely on it.

[62] Moreover, BP had the opportunity to cross-examine Taylor's witnesses on the gas supply issue. It also could have filed its own evidence, as IPF did. Indeed, IPF's rebuttal evidence (supported by BP) rebutted the TCPL forecast. BP, however, neither cross-examined nor filed evidence. Under all these circumstances it cannot be said that BP was deprived of a reasonable opportunity to meet Taylor's case on gas supply.

ii. NGL Extraction Efficiency

[63] BP contends that it needed Taylor's detailed plant design information to meet the case that Harmattan would more efficiently extract NGLs than Cochrane. Central to this issue, from BP's point of view, was that Cochrane extracts ethane from the NGTL system, whereas Taylor proposed to process both raw gas and gas from the NGTL stream. BP's IRs of Taylor included questions about its ethane recovery factor for the two separate streams, which were essentially met with the reply that such information was not available. BP's motion for further and better IRs made no reference to this issue.

[64] BP's counsel cross-examined Taylor's witnesses at length on this topic: Transcript 267ff. One response from the witnesses was that the common allocation methodology used by the industry was to combine the gas inlet streams, as Taylor had done. Taylor's witnesses acknowledged that it would have been possible to calculate the level of recovery for the two separate streams, but Taylor had not done so: Transcript 295-96. When BP's counsel put forward various scenarios for simulating the recovery rate from the separate streams, Taylor's witness replied that these hypotheticals were simplistic and meaningless because they failed to consider other relevant factors: Transcript 296-97.
[65] An examination of the transcript reveals that BP's counsel was given considerable latitude by the Board in his cross-examination (including revisiting transcripts from the 2004 hearing which also dealt with a co-streaming application at Harmattan), despite occasional objections by Taylor's counsel: see e.g., Transcript 282. BP's counsel explained at one point that his cross-examination was in lieu of IR responses, and that everything he was bringing out from the 2004 hearing was "highly relevant. It's certainly relevant to our argument": Transcript 283/16-17.

[66] In fact, BP's counsel made substantial arguments on this point in his final submission: Transcript 810ff. Among other things he asserted that Taylor had not made its case, and that it had inflated its estimates of ethane recovery.

[67] The Board's conclusion on both points was clear. It determined that Taylor had demonstrated that the project was in the public interest and its estimates of its ethane recovery rate was reliable.

[68] I cannot conclude that BP was denied procedural fairness concerning extraction efficiency. If it had considered the issue so significant, it might have been expected to include it in its motion for better responses, which it did not. It fully exploited its opportunity to cross-examine and make

arguments on the issue. In the end, the Board rejected its position. That outcome has nothing to do with an inability to obtain information from Taylor.

iii. Summary

[69] The Board has the power to determine whether the information put forward by an applicant is adequate in the sense that it will enable other parties to make an informed case against an application.

[70] The two issues raised by BP were admittedly contentious. But BP was not deprived of its ability to be an informed advocate when the Board declined to order further information from Taylor on gas supply and extraction efficiency. BP was still entitled to put in its own evidence on these matters, to cross-examine, and to make final submissions. It declined to put in evidence and did not pursue the issue of extraction efficiency in its motion to the Board. It did not cross-examine on the matter of gas supply. Moreover, by the time of the hearing the 2009 Ziff Report was no longer being relied on, with the result any information provided about it would have been irrelevant in any event.

[71] BP's right to procedural fairness was not, in all the circumstances, compromised.

G. Conclusion

[72] The appeal is dismissed.

Appeal heard on April 5, 2012

Reasons filed at Calgary, Alberta
this 19th day of July, 2012

Hunt J.A.

I concur:

Rowbotham J.A.

Reasons for Judgment Reserved of
The Honourable Mr. Justice Martin
Dissenting in Part

Introduction

[73] I have read the judgment of my colleagues. While I agree with their conclusion as to the applicable standard of review, I disagree with their decision regarding the procedural fairness issue. In my opinion, the procedure followed here was unfair to the appellants. As the appeal is to be dismissed, I will not comment on the appellants' alternate submission, that the Board's reasons were inadequate.

Factual Overview

[74] The background information provided by my colleagues is sufficient to frame the issue. I offer the following overview simply for ease of reference.

[75] The appellant, Inter Pipeline Fund ("IPF"), operates a gas plant in the Cochrane area and has done so for years. The respondent, Taylor Processing Inc. ("Taylor"), sought approval from the Energy Resources Conservation Board (the "Board") to modify its Harmattan gas processing plant and construct certain pipelines. Approval would allow Taylor to carry out a co-stream operation, whereby Taylor could divert and remove certain natural gas byproducts from the gas supply currently directed to IPF's Cochrane plant.

[76] IPF opposed Taylor's application, primarily because it is involved in extracting the same byproducts and it anticipated having unused processing capacity to do so in the future. The ultimate fear is that there is insufficient gas supply to make both operations economically viable.

[77] This is the third time that Taylor, or its predecessor, has made this application. The Board's predecessor, the Alberta Energy and Utilities Board ("EUB"), denied the first application, and adjourned (and later closed) the second application in light of the EUB's inquiry into co-streaming and side-streaming operations. In its inquiry decision, the EUB considered rejecting all such applications because there were so few of them, but decided instead to deal with future proposals on a case-by-case basis:

> Rather than recommending that all co-streaming or side-streaming facilities be disallowed, the Board is of the view that the appropriate approach is to assess each individual application on its own merits

> having regard for NGL recovery implications, potential effects on other facilities, including the straddle plants, and other elements of the public interest. [Decision 2009-009 at p 105]

[78] The EUB listed a number of factors that would influence its assessment of future co-stream and side-stream applications. One factor was the extent to which the operation furthers the effective utilization of resources and resource conservation. That assessment, in the context of a side-stream or a co-stream application, would seemingly require expert evidence regarding the forecast of the supply of natural gas as well as the effective recovery of natural gas liquids. Other factors identified by the EUB included the impact on the existing straddle plant system, as well as the degree to which the application would permit meaningful competition (rather than simply the transfer of a function from one facility and party to another).

[79] After the EUB issued its inquiry decision on February 4, 2009, Taylor submitted its application to the Board on April 22 and 23, 2009. The following is a chronology of relevant procedural steps leading to the hearing:

> - August 5, 2009 - Taylor provided submissions to the Board, including a forecast of natural gas exports prepared by Ziff Energy Group dated July 10, 2009 (the "Ziff Report"), and a study prepared by Nova Gas Transmissions Ltd., dated November 20, 2008 (the "2008 NGTL Report").
>
> - June 25, 2010 - the Board advised, by its Notice of Hearing, that a hearing would be held on August 31, 2010, and interested parties had until July 20, 2010 to file written submissions.
>
> - June 30, 2010 - counsel for IPF wrote to the Board to propose that the timelines be extended and an information request process be adopted, as permitted by the *Energy Resources Conservation Board Rules*, Alta Reg 252/2007 ("Rules").
>
> - July 7, 2010 - counsel for the appellants, BP Canada Energy Company and BP Canada Energy Resources Company (collectively "BP"), wrote in support of IPF's request for an information request process and requested a two-week adjournment, as BP's prior counsel was unexpectedly unable to act and BP's new counsel faced difficulties in providing submissions in the short time available. That same day, the Board granted the application for an information request process. (That process may also be referred to by the acronym, IR, hereafter).
>
> - July 8, 2010 - the Board denied BP's request for an adjournment, and issued an Amended Notice of Hearing to incorporate an information request process, with the following revised dates:
>
> > July 12, 2010 - final date for all interested parties to provide information requests ("IRs") to Taylor (BP was later permitted to submit its IRs by July 14, 2010).

July 26, 2010 - final date for Taylor to respond to IRs.
August 9, 2010 - final date for submissions from all interested parties.
August 20, 2010 - final date for response submissions from Taylor.

- July 12 & 14, 2010 - IPF and BP submitted their numerous IRs to Taylor.

- July 26, 2010 - Taylor provided its responses to those IRs.

- July 30, 2010 - BP filed an application with the Board seeking further and better responses to Taylor's IRs, and an extension of time for BP to make its submissions.

- August 5, 2010 - the Board denied BP's application for further and better responses to the IRs, and declined the request for an extension of time.

- August 6, 2010 - BP advised that it would not be filing evidence, but intended to cross-examine Taylor's witnesses. That same day, Taylor provided a document entitled "TransCanada 2010 Outlook," which included certain gas forecast information.

- August 9, 2010 - IPF filed its submission with the Board, including various expert reports.

- August 20, 2010 - Taylor provided its "rebuttal evidence" to the Board, and in doing so cited numerous forecasts, including one referred to as "Ziff Energy 2010" as well as the TransCanada (TCPL Report) document. More importantly, on that same day, Taylor also advised that it would no longer be relying on the Ziff Report or the 2008 NGTL Report, and that it would not call any witnesses from Ziff Energy at the hearing.

- August 31, 2010 - the hearing began.

- December 2010 - the Board issued its decision approving Taylor's application.

[80] Section 26 of the *Energy Resources Conservation Act*, RSA 2000, c E-10 (*ERC Act*), incorporates requirements that are consistent with the common law administrative law principle of *audi alteram partem* – the right to know the case to be met. It requires the Board to provide persons directly and adversely affected by an application with a reasonable opportunity to learn the facts in support of the application, and to furnish evidence to contradict or explain those facts or allegations. Where "the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application," they are to be afforded an opportunity to cross-examine witnesses in the presence of the Board: s 26(2)(d). Additionally, s 1 of the Rules provides: "These Rules must be liberally construed in the public interest to ensure the most fair, expeditious and efficient determination on its merits of every proceeding before the Board."

[81] The appellants complain that the procedure followed by the Board and some of the Board's pre-hearing rulings denied them procedural fairness.

Analysis

[82] I should note that procedural fairness was raised by both appellants on appeal, and the fact that the submissions on this point were primarily made by BP was a function of their cooperation in the presentation of their submissions, not an indication of IPF's disinterest in the point.

[83] As mentioned, Taylor had made the same application for approval to the EUB earlier, and had been unsuccessful. As Taylor had the burden of proof, it was reasonable to expect it would ensure that all relevant information was before the Board to allow the application to be decided on its merits. Unfortunately, that does not appear to have been the case. The record is replete with references that Taylor was not forthcoming with sufficient information to allow the appellants a fair opportunity to understand and challenge the application.

[84] To illustrate, BP's former counsel wrote to the Board on February 5, 2010, to complain that it had not been consulted by Taylor to resolve BP's concerns, as the Board had previously directed. Likewise, in correspondence dated June 30, 2010, counsel for IPF observed that "several aspects of Taylor's application ... remain a mystery," that IPF's repeated attempts for clarification "have repeatedly been ignored," and that IPF was prepared "to refute a clear case, but that does not exist at the present time."

[85] Unfortunately, nothing changed. By August 9, 2010, IPF's counsel continued to express concerns with the lack of transparency in Taylor's application, and complained to the Board that "much correspondence with Taylor [had gone] unanswered or was answered in a fairly cursory manner." Indeed, IPF had, on July 29, 2010, requested that Taylor confirm it would provide instructions to NGTL to design the tie-in logistics, which would affect IPF's position before the Board. Taylor failed to reply until August 20, 2010 (and well after IPF had provided its evidence to the Board), when it wrote to advise that it did not plan to design the tie-ins in advance of the hearing.

[86] Much of the appellants' concerns relate to the question of gas forecasts. This was a critical issue, which by itself could determine the Board's decision. Specifically, the application would only be approved if Taylor could demonstrate that there would be a sufficient gas supply for both it and IPF's operations. The appellants submitted the supply was not sufficient for both operations. Expert evidence forecasting available gas supply was required to resolve that dispute. Not surprisingly then, Taylor's application, as supplemented by its August 5, 2009 submissions, relied on expert opinions, specifically the Ziff Report and the more dated 2008 NGTL Report. These reports were of concern to the appellants, who asked the Board to implement the information request process in part to allow them to challenge the assumptions underlying the reports.

[87] The Rules outline the procedure for an information request process. Simply put, s 29 allows a party to request another party to provide information necessary (a) to clarify any documentary

evidence filed by the other party, (b) to simplify the issues, (c) to permit a full and satisfactory understanding of the matters to be considered, and (d) to expedite the proceeding.

[88] Section 30(1) of the Rules requires a party served with an IR to provide "a full and adequate response to each question," subject to claims of confidentiality. If the party is unable to provide a response, because the answer is either unavailable or cannot be provided with reasonable effort, the responding party shall set out "the specific reasons in support of that contention," and provide "such other information that the party considers would be of assistance to the party making the information request": s 31(1)(b).

[89] A review of Taylor's responses to the IRs indicates that it failed to meet its obligations through this pre-hearing process. To illustrate, the following constitutes an IR, again on the topic of Taylor's gas forecasts, and Taylor's impugned replies:

> Taylor-BP-14
>
> Reference: Taylor Application, Appendix 2.
>
> Preamble: Ziff Forecasts a lower Alberta gas supply available to the NGTL system than NGTL itself forecasts, but significantly higher export flow on the western leg of the NGTL system than NGTL.
>
> Request:
>
> (a) Was Ziff provided with any instructions or asked to make any assumptions by Taylor that affected its forecast? For example, Ziff considered LNG imports but not LNG exports. Also, Ziff made assumptions regarding the availability of gas from the Mackenzie Delta and Alaska.
>
> (b) Ziff's forecast was made over a year ago. Have any of the fundamentals considered by Ziff or any other factors changed since this forecast which affects the forecast? If so, identify each fundamental or factor and the impact it has on the forecast, revising the forecast accordingly.
>
> (c) How would LNG exports from the west coast of Canada affect Ziff's forecast?
>
> (d) Does Ziff foresee the potential for LNG exports from the west coast of Canada? If so, what is the potential timeframe and volumes associated with such exports?

(e) What does Ziff believe the relative potential for LNG exports from the west coast of Canada is to the potential for Ziff's assumed tie-in of Mackenzie gas into the NGTL system?

(f) At page 6 of its report Ziff notes an infrastructure limitation for east bound pipeline capacity bringing northeastern BC supply to Alberta. Is Ziff aware of any other infrastructure limitations that applied to getting northeastern BC and western Alberta gas supply to the oil sands area of the NGTL system? If so, please discuss Ziff's understanding and, in particular, how NGTL's North Central Corridor project may affect such infrastructure limitation.

(g) Does Ziff have a detailed understanding of NGTL design areas and the hydraulics of the NGTL system? If so, please provide Ziff's understanding of the design areas from which oilsands demand has been historically satisfied and how oilsands demand will be satisfied following the completion of the NGTL North Central Corridor pipeline.

(h) How did Ziff formulate its oilsands demand forecast? Please compare this forecast to other publically available forecasts. Please discuss how oilsands demand affects NGTL exports and whether they are affected differently as between the east and west legs of the NGTL system.

(i) NGTL's forecast of ABC border flow was reduced by 400 mmcf/d between 2011 and 2012. Does Ziff understand that this significant change is a result of the hydraulic design of the NGTL system? If Ziff does not understand this, what understanding, if any, does Ziff have regarding the NGTL forecast of reduced ABC border flows between 2011 and 2012?

(j) Ziff refers to the Rabaska LNG project at page 6 of its report. What is Ziff's understanding regarding the status of this, or any other LNG import projects it considered in providing its July 2009 forecast?

Response: (a) No.

(b) - (j) Taylor does not have the requested information.

[90] Taylor's response, that it did not have the requested information (and apparently could not be bothered to ask Ziff for it), totally ignored its statutory obligation to provide full and adequate responses and made a mockery of the information request process. To that time, it was understood that Taylor would call the authors of the Ziff Report as witnesses at the hearing. Taylor could have easily addressed the issues on which BP sought clarification with its experts and provided meaningful answers. The failure to do so was contemptuous of the process implemented by the Board and could only have been intended to thwart the appellants' ability to prepare an effective reply.

[91] BP reacted by applying to the Board to have it compel Taylor to provide further and better responses to the IRs, and to extend the time for BP to submit its reply submissions by two days. On August 5, 2010, the Board denied both BP's application and the request for an extension of time to file its submissions. Of significance, the Board agreed that Taylor's responses were inadequate:

> In its review of the responses to BP's information requests provided by Taylor, and in particular those for which BP seeks further and better responses, the Board was somewhat disappointed with some of Taylor's responses. The Board is inclined to believe certain responses could have been, and perhaps should have been, more fulsome. At the hearing of this matter, Taylor will bear the onus of satisfying the Board that its applications should be approved. This will require disclosure of information necessary to support the various submissions (or "allegations" as referenced by BP) advanced by Taylor. This will include disclosure of relevant information held by third parties acting on Taylor's behalf such as Ziff Energy Group. As stated by Mr. Hollingworth, Taylor must "make its case". No doubt the interveners will present argument on this point, including argument as to whether sufficient information has been provided to support Taylor's various submissions or "allegations".
>
> In regard to the requirement of the *Energy Resources Conservation Board's Rules of Practice* (the "*Rules*"), the Board recognizes that there may not have been strict compliance with those rules by Taylor. However, to achieve a fair determination of BP's motion that results in the goals of the information request process being met, the Board determined that it should dispense with the requirements of Sections 30 and 31 of the *Rules* [emphasis added].

[92] That some of Taylor's answers could have been more "fulsome" was surely an understatement – they could not have been *less* "fulsome" or informative. The resulting prejudice was compounded when, rather than directing Taylor to comply with the Rules, the Board responded to BP's complaint by dispensing with those Rules.

[93] I offer no criticism of the Board's refusal to grant BP's initial request for an adjournment of the hearing to allow new counsel time to better prepare. But that decision provides important context when considering Taylor's conduct and the fairness of the proceedings that followed. The denial of the adjournment request required BP's newly retained counsel to hastily prepare for the hearing, which in turn placed additional significance on Taylor's lack of responsiveness to the information requests. With BP's counsel under the pressure of time, the withholding of relevant information by Taylor magnified BP's disadvantage.

[94] Indeed, BP was left with only days to assess whether it could rely solely on the cross-examination of Taylor's witnesses or whether it needed to also prepare evidence in opposition to that advanced by Taylor.

[95] On the other hand, a review of the record suggests that Taylor was disinclined to do anything but fully press its advantage to the point of actually frustrating BP's and IPF's preparation.

[96] Ultimately, the appellants made every effort to understand Taylor's evidence. But after being stymied by the lack of substantive replies through the IR process, and in light of the Board's decision not to enforce the Rules, the appellants had to decide how best to proceed. They elected to focus on cross-examining Taylor's expert witnesses and, in the case of IPF, to present expert evidence to counter that put forth by Taylor.

[97] Then at this very late stage, the case to be met by the appellants was changed. First, Taylor provided the Board with the TCPL Report, which appears to have been an attempt to update the 2008 NGTL Report with TransCanada's 2010 forecast. Indeed, Taylor's witnesses at the hearing described this "evidence" as "updated forecasts." However, there is no indication that this document was submitted as a revision or update to the earlier report, as anticipated by s 15(2) of the Rules. Nor did this evidence meet the requirements of s 17(2) of the Rules; it was not "accompanied with a statement setting out the qualifications of the person who prepared the documentary evidence or under whose direction or control the evidence was prepared." Not only that, the TCPL Report had been prepared for the information of prospective investors, and was not intended by its authors to support the application or to assist the Board.

[98] While the TCPL Report was provided at a time when the appellants were preparing their reply submissions, a second development took place on August 20, 2010, 11 days after the appellants' deadline to submit their evidence to the Board. It was then that Taylor dramatically changed its evidence by withdrawing the Ziff and the 2008 NGTL Report, both of which Taylor admitted were "dated in light of recent North American developments." To compound the problem, Taylor advised that it would not be calling any witnesses from Ziff at the hearing. To fill this evidentiary gap, Taylor was content to "rely" on a chart contained within its rebuttal evidence illustrating the projections from various publicly available forecasts.

[99] So rather than have its experts revise its documentary evidence as anticipated by s 15(2) of the Rules, Taylor, in effect, withdrew the reports from the Board's consideration and instead opted to rely on a summary of the various public forecasts as part of Taylor "rebuttal evidence," including one labelled "Ziff Energy 2010." That Taylor relied, in part, on Ziff's 2010 forecast suggests that it would not have been difficult for Taylor to have Ziff update its opinions as part of its evidence before the Board, rather than withdraw that evidence entirely. It also calls into question whether Ziff representatives should have been called to testify at the hearing.

[100] The timing of Taylor's strategic decision was important, particularly from the appellants' perspective, as it could only have further prejudiced their right pursuant to s 26 of the *ERC Act*, "to learn the facts in support of the application, and to furnish evidence to contradict or explain those facts or allegations."

[101] To this time, Taylor had been relying on the Ziff and the NGTL Reports for more than a year, and had confirmed in its IR responses that it continued to rely on those forecasts. In fact, one would have inferred by Taylor's IR responses that it was not inclined to rely on any public forecasts. In other words, the appellants had been led to believe that Taylor's two reports would be the cornerstone of its evidence on the issue of gas forecasts.

[102] The appellants' preparation for the hearing would therefore have focused on those reports and the limited information provided by Taylor. But after Taylor changed its evidence, the appellants were denied an opportunity to rebut it and had no time to engage in further information requests relative to that information. That lack of opportunity obviously undermined any potential cross-examination.

[103] On reflection, a skeptic may be forgiven for thinking that Taylor did not provide adequate answers to the earlier information requests because it had already decided not to rely on the Ziff Report, but failed to advise the appellants of that decision for strategic reasons.

[104] In any event, the appellants were given inadequate notice of the new evidence that Taylor was relying upon to support its application, and one can well appreciate the appellants' sense of grievance at being ambushed in this way.

[105] The change in tactics and evidence created confusion when the appellants tried to address the issue of gas forecasts during the hearing. It was only then that Taylor confirmed it intended to rely "on all the supplied forecasts shown on page 3 of our rebuttal evidence." But even that assurance was equivocal as Taylor's witness later testified: "I'm not sure we're relying on it, but that's what we're presenting."

[106] Moreover, Taylor's failure to produce an expert witness to address the issue of gas flow forecasts prevented the other parties from testing that evidence, contrary to the intent of ss 42(2) and (3) of the Rules. On that point, IPF's counsel clarified during his frustrated attempt to cross-examine Taylor (in relation to the TransCanada document for which no witness was being presented): "So

we just take it at its face value for what it is, and you know nothing about the background to it or what assumptions went into it. I can't ask you questions like that." As part of that discussion, Taylor's witness responded: "We're not forecasting experts, and we don't want to answer questions regarding those forecasts." Ultimately, both IPF and BP were unfairly thwarted in their ability to cross-examine Taylor's witnesses on this issue.

[107] Taylor's counsel stressed that many of the publicly available forecasts were, in fact, cited in IPF's expert report, which forced Taylor to include additional forecasts in its rebuttal evidence. That may be so, but this argument overlooks the context of the proceedings, where IPF's evidence was tendered to counter the information initially offered by Taylor, only to have Taylor pull those reports once IPF's evidence was on the record. Had IPF known from the outset the case it had to meet, it may well have decided not to present any expert evidence in reply. I also question whether the additional forecasts submitted by Taylor constituted appropriate rebuttal evidence.

[108] In my respectful opinion, the procedure followed by the Board and the indulgences granted Taylor in the weeks preceding the hearing created an unfairness to the appellants that was not rectified at the hearing. I accept the appellants' submissions that they were denied a full and fair opportunity to challenge the application, as they were entitled to do, by Taylor's conduct: its stonewalling, its changing of reports at the last minute, and its refusal to call expert evidence regarding that evidence.

[109] But Taylor's strategy was not limited to gas forecasts. Another critical issue impacting the Board's decision related to NGL extraction efficiency. BP had made efforts to obtain relevant information regarding that issue through the IR process, but had also been frustrated on that front. Remarkably, Taylor chose to address the issue by presenting, without any notice, an expert for cross-examination at the hearing. Even more remarkable, when that expert was questioned regarding the extraction issue, he replied that he could have provided answers to the IR requests on that topic had he been asked by Taylor to do so, but was unprepared to answer those questions even at the hearing because Taylor had not asked him to prepare for that line of inquiry.

[110] I voice the same concerns I expressed earlier. While this may have been, and apparently was, a clever tactical position for Taylor to take, it contributed to a denial of procedural fairness to the appellants. Again, as this was a critical issue, I am concerned that by acquiescing in Taylor's conduct, the Board denied itself important information that may have influenced its decision. I say that because it seems that if the information had borne positively upon Taylor's application, or had even been a matter of indifference to it, then Taylor would have introduced it at the hearing, rather than opting as it did to keep the appellants and the Board in the dark.

[111] In addressing the appellants' concerns before us, Taylor's counsel (not counsel before the Board) was driven to reply that Taylor had played a superior tactical hand and essentially outmanoeuvred the appellants. That may be, but this was an important matter that should have been

determined by relevant, reliable information, not superior tactics. That is particularly so as the Board is required to make its decision in the public interest.

[112] With respect, the Board should have been more vigilant to ensure that its decision was based on the best information available, and that the procedure it followed was fair to the appellants. And even if the quality of the evidence did not suffer by the manoeuvring of Taylor, the Board should not have countenanced such tactics.

Conclusion

[113] In conclusion, this was not a minor or routine application of little impact to the parties or the public interest. The consequences on all fronts were significant. The appellants were directly impacted by the application and the Board's decision. They were therefore entitled to procedural fairness, as anticipated by the governing legislation and the Rules. With respect, it is my opinion that they were denied that procedural fairness. For that reason, I would have allowed the appeal.

Appeal heard on April 5, 2012

Reasons filed at Calgary, Alberta
this 19th day of July, 2012

Martin J.A.

Appearances:

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