TAB 13

2007 SCC 15
Supreme Court of Canada
VIA Rail Canada Inc. v. Canadian Transportation Agency
2007 CarswellNat 608, 2007 CarswellNat 609, 2007 SCC 15, [2007] 1 S.C.R. 650, [2007] S.C.J. No. 15, 279 D.L.R. (4th) 1, 360 N.R. 1, 59 C.H.R.R. D/276, 59 Admin. L.R. (4th) 1, J.E. 2007-670

# Council of Canadians with Disabilities (Appellant) and VIA Rail Canada Inc. (Respondent) and Canadian Transportation Agency, Canadian Human Rights Commission, Ontario Human Rights Commission, Commission des droits de la personne et des droits de la jeunesse, Manitoba Human Rights Commission, Saskatchewan Human Rights Commission, Transportation Action Now, Alliance for Equality of Blind Canadians, Canadian Association for Community Living, Canadian Hard of Hearing Association, Canadian Association of Independent Living Centres and DisAbled Women's Network Canada (Interveners)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Abella, Deschamps, Fish, Charron, Rothstein JJ.
Heard: May 19, 2006
Judgment: March 23, 2007*
Docket: 30909
Proceedings: reversing *VIA Rail Canada Inc. v. Canadian Transportation Agency* (2005), 330 N.R. 337, 2005 FCA 79, 2005 CarswellNat 567, 2005 CAF 79, 2005 CarswellNat 2643, 251 D.L.R. (4th) 418, [2005] 4 F.C.R. 473 (F.C.A.)

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Subject: Public; Constitutional; Contracts

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Transportation --- Railways — Federal regulatory boards — Orders and decisions — Miscellaneous**
Standard of review — Railway company purchased 139 used passenger rail cars that were not fully accesible to persons using wheelchairs — Council for Canadians with Disabilities ("CCD") applied to Canadian Transportation Agency ("Agency") for relief pursuant to Canada Transportation Act ("CTA"), alleging that cars presented "undue obstacles" to disabled persons — Agency concluded it had jurisdiction to determine complaint and issued preliminary decision requiring railway to provide evidence to show cause why certain obstacles were not undue — After considering railway's evidence, Agency issued final decision ordering railway to implement corrective measures — Railway successfully appealed Agency's preliminary and final decisions to Federal Court of Appeal — Court of Appeal found that standard of review of Agency's conclusion that obstacles were undue was patent unreasonableness, but found that Agency's conclusion regarding its jurisdiction was reviewable on correctness standard — CCD appealed to Supreme Court of Canada — Appeal allowed — Agency's decision was entitled to a single, deferential standard of review — It

was agreed with Court of Appeal that standard of review of Agency's decision on issue of whether obstacle was undue was patent unreasonableness — It was not agreed, however, that railway had raised preliminary, jurisdictional question falling outside of Agency's expertise that was, therefore, subject to different standard of review — Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes — Agency made decision with many component parts, each of which fell squarely within its mandate and expertise.

**Transportation --- Railways — Federal regulatory boards — Orders and decisions — Review and appeal — Grounds — Failure to provide full hearing**

Procedural fairness — Railway company purchased 139 used passenger rail cars that were not fully accessible to persons using wheelchairs — Council for Canadians with Disabilities ("CCD") applied to Canadian Transportation Agency ("Agency") for relief pursuant to Canada Transportation Act ("CTA"), alleging that cars presented "undue obstacles" to disabled persons — Agency issued preliminary decision requiring railway to provide evidence to show cause why certain obstacles were not undue — Railway provided some, but not all, of requested cost estimates — Agency reissued preliminary decision, giving railway 60 more days to prepare adequate response — Railway contended that it lacked time, internal expertise and funding to respond to order, and asked Agency to render final decision on basis of evidence before it — Agency issued final decision ordering railway to implement corrective measures — Railway commissioned third party report regarding cost of implementing Agency's proposed measures, which it submitted in support of its application for leave to appeal — Railway successfully appealed Agency's preliminary and final decisions — Federal Court of Appeal found that railway's rights of procedural fairness were violated when Agency ordered corrective measures without waiting for cost estimates from railway — CCD appealed to Supreme Court of Canada — Appeal allowed — Railway was not victim of procedural unfairness — Court of Appeal's conclusion that Agency violated procedural fairness by ordering corrective measures without waiting for cost estimates was difficult to sustain in face of railway's persistent refusal to provide estimates in question — Agency provided railway with adequate time and opportunity to comply with its directions — Though railway clearly could have commissioned third party report and provided it to Agency within time allotted, it did not — No issue of unfairness arises when railway seeks to offer evidence only after final decision it repeatedly requested was made, and without any reasonable explanation for why such information could not have been available during proceedings — Timing of third party report and its untested conclusions rendered it an inappropriate basis for interfering with Agency's factual findings and remedial responses.

**Human rights --- Statutory exemptions — Duty to accommodate — Undue hardship**

Railway company purchased 139 used passenger rail cars — Cars were not fully accessible to persons using wheelchairs — Council for Canadians with Disabilities ("CCD") applied to Canadian Transportation Agency ("Agency") for interim relief pursuant to Canada Transportation Act ("CTA"), alleging that cars presented "undue obstacles" to disabled persons — Agency agreed with CCD that certain obstacles existed, and issued preliminary decision requiring railway to provide evidence to show cause why obstacles were not undue — After considering evidence submitted by railway, Agency issued final decision ordering railway to implement corrective measures — Railway successfully appealed Agency's preliminary and final decisions to Federal Court of Appeal — Court of Appeal found that Agency's conclusion that obstacles were undue was patently unreasonable — CCD appealed to Supreme Court of Canada — Appeal allowed — In circumstances, Agency's findings with respect to cost and evidence relating to undue hardship were far from unreasonable, and were entitled to deference — Railway was required to discharge burden of establishing that accommodating persons with disabilities was undue hardship for it — Agency's decision made clear that this onus was not met — Where railway refuses to provide evidence in its sole possession in support of its undue hardship argument, it cannot be said that any reasonable basis exists for refusing to eliminate an undue obstacle — There was nothing inappropriate about factors Agency did and did not rely on, such as voluntary Rail Code agreement, use of personal wheelchairs, railway's network, and cost, either in determining whether obstacles were undue, or in determining what corrective measures were appropriate — Agency appropriately considered cost of remedying obstacles when determining whether it was undue, contrary to majority of Court of Appeal's assessment of evidence.

**Transports --- Chemins de fer — Organismes fédéraux de réglementation — Ordonnances et décisions — Divers**

Norme de contrôle judiciaire — Compagnie de chemin de fer a fait l'acquisition de 139 voitures de chemin de fer usagées qui étaient inaccessibles aux personnes ayant une déficience qui utilisent un fauteuil roulant personnel — Conseil des Canadiens avec déficiences (« CCD ») s'est plaint à l'Office des transports du Canada (« Office ») du fait que de nombreuses caractéristiques des voitures constituaient des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience et a demandé des mesures correctives en application de la Loi sur les transports au Canada (« LTC ») — Office a conclu qu'il avait compétence pour instruire la plainte et a rendu une décision préliminaire dans laquelle il demandait à la compagnie de chemin de fer de fournir une preuve indiquant pourquoi il ne devrait pas conclure que les obstacles étaient abusifs — Après avoir examiné la preuve fournie par la compagnie de

chemin de fer, l'Office a rendu sa décision finale et a ordonné à la compagnie de chemin de fer de mettre en oeuvre des mesures correctives — Compagnie de chemin de fer a interjeté appel à l'encontre de la décision préliminaire et de la décision finale de l'Office auprès de la Cour d'appel fédérale avec succès — Cour d'appel fédérale a conclu que la détermination par l'Office de la nature abusive des obstacles pouvait faire l'objet d'un contrôle selon la norme du caractère manifestement déraisonnable mais elle a ajouté que l'interprétation que l'Office donnait de sa compétence pouvait faire l'objet d'un contrôle selon la norme de la décision correcte — CCD a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Décision de l'Office requérait l'application d'une seule norme de contrôle faisant appel à la déférence — À l'instar de la Cour d'appel, il a été convenu que la détermination par l'Office de la nature abusive des obstacles pouvait faire l'objet d'un contrôle selon la norme du caractère manifestement déraisonnable — Par contre, la compagnie de chemin de fer avait soulevé une question préliminaire de compétence qui ne relevait pas de l'expertise de l'Office et qui était donc assujettie à une norme de contrôle différente — Office est chargé d'interpréter ses propres dispositions législatives, y compris ce en quoi consiste cette responsabilité que lui confie la Loi — Décision qu'il a rendue comportait plusieurs parties, chacune d'elles relevant clairement et inextricablement de son domaine d'expertise et de son mandat.

**Transports --- Chemins de fer — Organismes fédéraux de réglementation — Ordonnances et décisions — Révision et appel — Motifs — Défaut de tenir une audience complète**

Équité procédurale — Compagnie de chemin de fer a fait l'acquisition de 139 voitures de chemin de fer usagées qui étaient inaccessibles aux personnes ayant une déficience qui utilisent un fauteuil roulant personnel — Conseil des Canadiens avec déficiences (« CCD ») s'est plaint à l'Office des transports du Canada (« Office ») du fait que de nombreuses caractéristiques des voitures constituaient des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience et a demandé des mesures correctives en application de la Loi sur les transports au Canada (« LTC ») — Office a rendu une décision préliminaire dans laquelle il demandait à la compagnie de chemin de fer de fournir une preuve indiquant pourquoi il ne devrait pas conclure que les obstacles étaient abusifs — Compagnie de chemin de fer a fourni une partie seulement de l'estimation des coûts demandée — Office a réitéré sa décision préliminaire en accordant à la compagnie de chemin de fer 60 jours supplémentaires pour préparer une réponse adéquate — Compagnie de chemin de fer a fait valoir qu'elle manquait de temps, d'expertise interne et de fonds pour donner suite à la décision préliminaire et a demandé à l'Office de rendre une décision finale sur la base de la preuve dont il disposait — Office a rendu sa décision finale et a ordonné à la compagnie de chemin de fer de mettre en oeuvre des mesures correctives — Pour appuyer sa demande en appel, la compagnie de chemin de fer a soumis un rapport préparé par une tierce partie à qui elle avait demandé de préparer une estimation du coût global des mesures correctives ordonnées par ce dernier — Compagnie de chemin de fer a interjeté appel à l'encontre de la décision préliminaire et de la décision finale de l'Office auprès de la Cour d'appel fédérale avec succès — Cour fédérale d'appel a conclu que le droit de la compagnie de chemin de fer à l'équité procédurale avait été nié lorsque l'Office a ordonné de mettre en oeuvre des mesures correctrices sans attendre une estimation des coûts de la part de la compagnie de chemin de fer — CCD a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Compagnie de chemin de fer n'était pas une victime d'iniquité procédurale — Conclusion de la Cour d'appel fédérale selon laquelle l'Office a violé le droit de la compagnie de chemin de fer à l'équité procédurale en ordonnant des mesures correctives sans attendre l'estimation des coûts était difficilement soutenable compte tenu du fait que la compagnie de chemin de fer avait persisté à refuser de la fournir — Office a donné à la compagnie de chemin de fer le temps et les possibilités qu'il fallait pour se conformer à ses directives — Bien que la compagnie de chemin de fer aurait pu commander le rapport de la tierce partie et le remettre à l'Office dans le délai imparti, elle ne l'a pas fait — Aucune question d'iniquité ne se pose lorsqu'on tient compte du fait que la compagnie de chemin de fer a cherché à présenter une preuve uniquement après que la décision finale qu'elle avait demandée à maintes reprises eut été rendue, sans par ailleurs fournir une explication raisonnable sur les raisons pour lesquelles ces renseignements n'étaient pas disponibles pendant les procédures — Rapport de la tierce partie, en raison du moment où il a été déposé et de ses conclusions non vérifiées, ne saurait justifier de modifier les conclusions de fait tirées par l'Office et les mesures correctives qu'il a ordonnées.

**Droits de la personne --- Exemptions statutaires — Devoir d'accommodement — Contrainte excessive**

Compagnie de chemin de fer a fait l'acquisition de 139 voitures de chemin de fer usagées — Voitures étaient inaccessibles aux personnes ayant une déficience qui utilisent un fauteuil roulant personnel — Conseil des Canadiens avec déficiences (« CCD ») s'est plaint à l'Office des transports du Canada (« Office ») du fait que de nombreuses caractéristiques des voitures constituaient des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience et a demandé des mesures correctives en application de la Loi sur les transports au Canada (« LTC ») — Office a convenu avec le CCD que certains obstacles existaient et a rendu une décision préliminaire dans laquelle il demandait à la compagnie de chemin de fer de fournir une preuve indiquant pourquoi il ne devrait pas conclure que ces

obstacles étaient abusifs — Après avoir examiné la preuve fournie par la compagnie de chemin de fer, l'Office a rendu sa décision finale et a ordonné à la compagnie de chemin de fer de mettre en oeuvre des mesures correctives — Compagnie de chemin de fer a interjeté appel à l'encontre de la décision préliminaire et de la décision finale de l'Office auprès de la Cour d'appel fédérale avec succès — Cour d'appel a conclu que la décision de l'Office à l'égard de la nature abusive des obstacles était manifestement déraisonnable — CCD a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Dans les circonstances, les conclusions de l'Office relatives au coût et à la preuve en matière de contrainte excessive étaient loin d'être déraisonnables et devaient faire l'objet de déférence — Il incombait à la compagnie de chemin de fer d'établir que l'accommodement des personnes ayant une déficience représentait pour elle une contrainte excessive — Il ressort clairement de la décision de l'Office que la compagnie de chemin de fer ne s'est pas acquittée de ce fardeau — Lorsque la compagnie de chemin de fer refuse de fournir une preuve qu'elle seule possède pour étayer son argument de la contrainte excessive, on ne peut pas dire qu'il existe un motif raisonnable de refuser d'éliminer un obstacle abusif — Il n'y avait rien d'inapproprié dans les facteurs sur lesquels l'Office s'est ou ne s'est pas fondé, tels que le code ferroviaire, l'utilisation de fauteuils roulants personnels, le réseau de la compagnie de chemin de fer et les coûts tant en ce qui concerne la détermination de la nature abusive des obstacles qu'en ce qui concerne la détermination des mesures correctives appropriées — Office a, de fait, examiné de façon appropriée la question des coûts des mesures correctives à apporter aux obstacles lorsqu'il a procédé à la détermination de leur nature abusive, contrairement à ce que la majorité des juges de la Cour d'appel a conclu de la preuve.

VIA company ("railway") purchased 139 used passenger rail cars that were not fully accessible to persons using wheelchairs. The Council for Canadians with Disabilities ("CCD") applied to the Canadian Transportation Agency ("Agency") for relief pursuant to the Canada Transportation Act ("CTA"), seeking to delay or stop the railway from purchasing the cars. The CCD asked the Agency to examine the cars to determine whether they contained "undue obstacles" to the mobility of persons in wheelchairs.

The Agency agreed that some of the items raised by the CCD were "undue obstacles", and issued a preliminary decision ordering the railway to specifically address the Agency's findings. The order required the railway to provide evidence to show cause why the obstacles were not undue. The railway responded to the Agency's show cause order with a three page letter providing some, but not all, of the requested cost estimates. The Agency, finding the response inadequate, reissued its preliminary decision and gave the railway 60 more days to prepare an adequate response. The railway contended that it lacked the time, internal expertise and funding to respond to the Agency's order, and asked the Agency to render its final decision on the basis of the evidence before it. The Agency issued a final decision in which it found that the railway's response to the show cause order was inadequate, and directed the railway to take corrective measures. Once the Agency's final decision had been rendered, the railway commissioned a report from a third party, which contained cost estimates for the modifications ordered by the Agency. The railway obtained leave to appeal based in part on this report, and successfully appealed the Agency's preliminary and final decisions to the Federal Court of Appeal.

On appeal, it was held that the standard of review of the Agency's decision regarding undue obstacles was that of patent unreasonableness. The Court of Appeal held that the standard of review of the Agency's decision regarding its jurisdiction to entertain a complaint, which was not travel-based, was correctness.

The railway's appeal from the Agency's jurisdictional decision was dismissed, but the Court allowed the appeal with respect to the Agency's findings on undue obstacles. The Court disagreed with the Agency's conclusion that there was no evidence to support the railway's view that its existing network could address obstacles in the cars ("network defence"), and noted that the Agency had not properly balanced competing interests when it decided that structural modifications to the cars were the appropriate remedy. The Court of Appeal unanimously found that the Agency had violated the railway's right to procedural fairness when it issued a final decision without giving the railway an adequate opportunity to respond to the Agency's requests for costs and feasibility information. The CCD appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed

Per Abella J. (McLachlin C.J.C., Bastarache, LeBel, Charron JJ. concurring): It was agreed with the Court of Appeal that the standard for reviewing the Agency's decision on the issue of whether an obstacle was undue was patent unreasonableness. It was not agreed, however, that the railway had raised a preliminary, jurisdictional question falling outside of the Agency's expertise that was, therefore, subject to a different standard of review. The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely within its mandate and expertise. It was therefore entitled to a single, deferential standard of review.

The onus was on the railway to show that the obstacles to the mobility of persons with disabilities were not undue by establishing that it could not accommodate persons with disabilities without experiencing undue hardship. The Agency's

 

decision makes it clear that this onus was not met. There was nothing inappropriate about the factors the Agency did and did not rely on, such as the Rail Code, the use of personal wheelchairs, the network, and cost, either in determining whether the obstacles were undue, or in determining what corrective measures were appropriate. The Agency appropriately considered the cost of remedying an obstacle when determining whether it was undue, contrary to the Court of Appeal majority's assessment of the evidence.

Where the railway refuses to provide evidence in its sole possession in support of its undue hardship argument, it cannot be said that any reasonable basis exists for refusing to eliminate an undue obstacle. The Agency concluded that there was no compelling evidence of economic impediments to addressing any of the undue obstacles. Under s. 31 of the Act, the determination of the Agency on a question of fact within its jurisdiction is binding and conclusive. In the circumstances, the Agency's findings with respect to cost and evidence relating to undue hardship were far from being unreasonable and are entitled to deference.

The Court of Appeal's conclusion that the railway's rights of procedural fairness were violated by the Agency ordering corrective measures without waiting for the cost estimates it had directed the railway to provide was difficult to sustain in the face of the railway's persistent refusal to provide these estimates. The railway's position during proceedings was that it lacked the time, expertise and money to prepare cost estimates. The record did not explain how a third party was able to prepare a cost estimate for the railway in 37 days once the Agency's final decision was released, or how the railway was able to pay for it. Though the railway could clearly have commissioned the report and provided it to the Agency within the time allotted, it did not. The Agency provided the railway with adequate time and opportunity to comply with its directions. The timing of the report and its untested conclusions rendered it an inappropriate basis for interfering with the Agency's factual and remedial findings.

Per Deschamps and Rothstein JJ., dissenting (Binnie and Fish JJ. concurring): The appeal should be dismissed without costs, and the matter should be remitted to the Agency for redetermination.

Considering the factors of the pragmatic and functional analysis, the question of the Agency's jurisdiction and the determination of the applicable human rights law principles in the federal transportation context should both be reviewed on the standard of correctness.

The Agency did not exceed its jurisdiction. There was nothing to prevent the Agency from initiating an inquiry on the basis of an application from a public interest group such as CCD and no indication that an applicant need actually encountered an obstacle, as long as the alleged obstacle exists.

The human rights principles that apply in the federal transportation context are essentially the same as those applicable in other human rights cases. The outcome of the appeal turns on whether the Agency erred in law with respect to the test for determining the undueness of an obstacle. The Agency erred in law. It did not determine the correct principles and did not take into account the relevant considerations on material elements of the analysis. It was apparent that the Agency did not consider alternatives that did not meet the personal wheelchair accessibility standards of the Rail Code. The Agency erred in law by failing to consider the full range of reasonable alternatives offered through the network to address the obstacles identified in the cars.

La compagnie VIA (« compagnie ») a fait l'acquisition de 139 voitures de chemin de fer usagées qui étaient inaccessibles aux personnes ayant une déficience qui utilisent un fauteuil roulant personnel. Le Conseil des Canadiens avec déficiences (« CCD ») a déposé une demande à l'Office des transports du Canada (« Office ») en application de la Loi sur les transports au Canada (« LTC ») afin de faire reporter ou de faire cesser l'achat des voitures par la compagnie. Le CCD a demandé à l'Office de procéder à l'examen des voitures afin de déterminer si elles présentaient des « obstacles abusifs » à la mobilité des personnes se déplaçant en fauteuil roulant.

L'Office a convenu que certaines des situations soulevées par le CCD constituaient des « obstacles abusifs » et a rendu une décision préliminaire dans laquelle elle ordonnait à la compagnie de lui fournir des explications au sujet de ces situations. L'Office a rendu une décision préliminaire dans laquelle il demandait à la compagnie de chemin de fer de fournir une preuve indiquant pourquoi il ne devrait pas conclure que les obstacles étaient abusifs. La compagnie a répondu à l'ordonnance de justification de l'Office en fournissant une partie de l'estimation des coûts demandée dans une lettre de trois pages. Trouvant cette réponse insatisfaisante, l'Office a réitéré sa décision préliminaire et a donné à la compagnie 60 jours supplémentaires afin de préparer une réponse adéquate. La compagnie a fait valoir qu'elle manquait de temps, d'expertise interne et de fonds pour donner suite à la décision préliminaire et a demandé à l'Office de rendre une décision finale sur la base de la preuve dont il disposait. L'Office a rendu sa décision finale dans laquelle il a jugé la réponse de la compagnie à l'ordonnance de justification inadéquate et a imposé à la compagnie l'obligation de procéder à la mise en place de mesures correctives.

Une fois la décision finale de l'Office rendue, la compagnie a demandé à une tierce partie de préparer un rapport incluant une estimation des coûts nécessaires à la mise en place des modifications exigées par l'Office. La compagnie a

reçu l'autorisation de porter la cause en appel en partie en raison de ce rapport et a interjeté appel à l'encontre de la décision préliminaire et de la décision finale de l'Office devant la Cour d'appel fédérale avec succès.

En appel, il a été décidé que la norme de contrôle judiciaire applicable en regard de la décision de l'Office au sujet de la nature abusive des obstacles était la norme du caractère manifestement déraisonnable. La Cour d'appel a conclu que la norme de contrôle judiciaire applicable en regard de la décision de l'Office au sujet de sa propre compétence pour instruire la plainte, qui n'était pas fondée sur une expérience vécue par un voyageur, était la norme de la décision correcte.

L'appel de la compagnie à l'encontre de la décision de l'Office sur sa compétence a été rejetée mais la Cour a accueilli l'appel concernant la détermination par l'Office de la nature abusive des obstacles. La Cour n'était pas d'accord avec la conclusion de l'Office selon laquelle aucun élément de preuve versé au dossier n'étayait l'opinion de la compagnie voulant que son réseau existant permette de contourner les obstacles des voitures (« défense liée au réseau ») et a noté que l'Office n'avait pas bien soupesé les intérêts opposés lorsqu'il a décidé que les modifications structurales des voitures étaient la mesure corrective indiquée. De façon unanime, les juges de la Cour d'appel étaient d'avis que l'Office avait violé le droit de la compagnie à l'équité procédurale en ne lui donnant pas une possibilité suffisante de répondre à ses demandes de renseignements sur les coûts et la faisabilité avant de rendre une décision finale. Le CCD a formé un pourvoi devant la Cour suprême du Canada.

Abella, J. (McLachlin, J.C.C., Bastarache, LeBel, Charron, JJ., souscrivant à son opinion): À l'instar de la Cour d'appel, il a été convenu que la détermination par l'Office de la nature abusive des obstacles pouvait faire l'objet d'un contrôle selon la norme du caractère manifestement déraisonnable. Par contre, la compagnie avait soulevé une question préliminaire de compétence qui ne relevait pas de l'expertise de l'Office et qui était donc assujettie à une norme de contrôle différente. L'Office est chargé d'interpréter ses propres dispositions législatives, y compris ce en quoi consiste cette responsabilité que lui confie la Loi. La décision qu'il a rendue comportait plusieurs parties, chacune d'elles relevant clairement et inextricablement de son domaine d'expertise et de son mandat. La décision de l'Office requérait l'application d'une seule norme de contrôle faisant appel à la déférence.

Il incombait à la compagnie d'établir que les obstacles aux possibilités de déplacement des personnes ayant une déficience n'étaient pas abusifs en convainquant l'Office qu'elle ne pouvait pas accommoder ces personnes sans subir une contrainte excessive. Il ressort clairement de la décision de l'Office que la compagnie ne s'est pas acquittée de ce fardeau. Il n'y avait rien d'inapproprié dans les facteurs sur lesquels l'Office s'est ou ne s'est pas fondé, tels que le code ferroviaire, l'utilisation de fauteuils roulants personnels, le réseau de la compagnie et les coûts tant en ce qui concerne la détermination de la nature abusive des obstacles qu'en ce qui concerne la détermination des mesures correctives appropriées. L'Office a, de fait, examiné de façon appropriée la question des coûts des mesures correctives à apporter aux obstacles lorsqu'il a procédé à la détermination de leur nature abusive, contrairement à ce que la majorité des juges de la Cour d'appel a conclu de la preuve.

Lorsque la compagnie refuse de fournir une preuve qu'elle seule possède pour étayer son argument de la contrainte excessive, on ne peut pas dire qu'il existe un motif raisonnable de refuser d'éliminer un obstacle abusif. L'Office a conclu qu'il n'y avait aucune preuve convaincante de l'existence de contraintes économiques empêchant de remédier aux obstacles abusifs. Selon l'art. 31 de la loi, la décision de l'Office sur une question de fait relevant de sa compétence est définitive. Dans les circonstances, les conclusions de l'Office relatives au coût et à la preuve en matière de contrainte excessive étaient loin d'être déraisonnables et doivent faire l'objet de déférence.

La conclusion de la Cour d'appel fédérale selon laquelle l'Office a violé le droit de la compagnie à l'équité procédurale en ordonnant des mesures correctives sans attendre l'estimation des coûts était difficilement soutenable compte tenu du fait que la compagnie de chemin de fer avait persisté à refuser de la fournir. La compagnie a fait valoir qu'elle manquait de temps, d'expertise et de fonds pour préparer l'estimation des coûts. Le dossier n'explique pas comment une tierce partie a pu préparer une estimation des coûts dans les 37 jours suivant la décision finale de l'Office, ni comment la compagnie a pu en couvrir le coût. Bien que la compagnie de chemin de fer aurait pu commander le rapport de la tierce partie et le remettre à l'Office dans le délai imparti, elle ne l'a pas fait. L'Office a donné à la compagnie le temps et les possibilités qu'il fallait pour se conformer à ses directives. Rapport de la tierce partie, en raison du moment où il a été déposé et de ses conclusions non vérifiées, ne saurait justifier de modifier les conclusions de fait tirées par l'Office et les mesures correctives qu'il a ordonnées.

Deschamps, Rothstein, JJ. (Binnie, Fish, JJ., souscrivant à leur opinion) (dissidents): Le pourvoi devrait être rejeté sans dépens et l'affaire renvoyée à l'Office pour qu'il rende une nouvelle décision.

Compte tenu des facteurs à examiner dans l'analyse pragmatique et fonctionnelle, les questions touchant la compétence de l'Office et la détermination des principes applicables en matière de droits de la personne dans le contexte des règles fédérales régissant le transport doivent faire l'objet d'un examen fondé sur la norme de la décision correcte.

L'Office n'a pas outrepassé sa compétence. Pourvu que l'obstacle invoqué existe, rien n'empêchait l'Office de tenir une enquête lorsqu'un groupe de défense de l'intérêt public, comme le CCD, lui présente une demande et que rien n'indique qu'un demandeur s'est réellement heurté à un obstacle.

Les principes en matière de droits de la personne qui s'appliquent dans le contexte des systèmes de transport de régime fédéral sont essentiellement les mêmes que ceux qui s'appliquent dans d'autres affaires relatives aux droits de la personne. L'issue du pourvoi dépend de la question de savoir si l'Office a commis une erreur de droit en ce qui concerne le critère applicable pour déterminer le caractère abusif d'un obstacle. L'Office a commis une erreur de droit. Il n'a pas dégagé les bons principes et n'a pas tenu compte des facteurs pertinents dans des aspects importants de l'analyse. L'Office n'a manifestement pas pris en considération les solutions de rechange qui ne respectaient pas les normes d'accessibilité que le code ferroviaire établit à l'égard des fauteuils roulants personnels. Il n'a pas pris en considération toute la gamme de solutions de rechange raisonnables que le réseau offrait pour remédier aux obstacles relevés dans les voitures et il a, de ce fait, commis une erreur de droit.

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s. 5(g) — considered

s. 5(g)(ii) — considered

s. 17 — referred to

s. 25 — referred to

s. 25.1 — referred to

s. 27(1) — referred to

s. 28(2) — referred to

s. 29(1) — considered

s. 31 — considered

s. 32 — considered

s. 36 — referred to

s. 40 — referred to

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s. 40 — considered
s. 41(1) — referred to
s. 170 — considered
s. 170(1) — considered
s. 171 — considered
s. 172 — considered
s. 172(1) — considered
*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to
*Financial Administration Act*, R.S.C. 1985, c. F-11
Generally — referred to

**Rules considered by *Abella J.*:**

*National Transportation Agency General Rules*, SOR/88-23
Generally — referred to
R. 8 — referred to

**Rules considered by *Deschamps J., Rothstein J.*:**

*Rules of the Supreme Court of Canada*, SOR/2002-156
R. 29(3) — considered

**Regulations considered by *Abella J.*:**

*Americans with Disabilities Act, 1990*, 42 U.S.C.
*Americans With Disabilities Act (ADA) Accessibility Guidelines For Transportation Vehicles*, 42 C.F.R. 1192
Generally — referred to
*Disability Discrimination Act 1995*, 1995, c. 50
*Rail Vehicle Accessibility Regulations 1998*, SI 1998/2456
Generally — referred to

APPEAL by Council from judgment of Federal Court of Appeal, reported at *VIA Rail Canada Inc. v. Canadian Transportation Agency* (2005), 330 N.R. 337, 2005 FCA 79, 2005 CarswellNat 567, 2005 CAF 79, 2005 CarswellNat 2643, 251 D.L.R. (4th) 418, [2005] 4 F.C.R. 473 (F.C.A.), allowing railway company's appeal from decision of *Canadian Transportation Agency* under *Canada Transportation Act*.

POURVOI du Conseil à l'encontre d'un jugement de la Cour d'appel fédérale publié à*VIA Rail Canada Inc. v. Canadian*

*Transportation Agency* (2005), 330 N.R. 337, 2005 FCA 79, 2005 CarswellNat 567, 2005 CAF 79, 2005 CarswellNat 2643, 251 D.L.R. (4th) 418, [2005] 4 F.C.R. 473 (F.C.A.), ayant accueilli un appel interjeté par la compagnie de chemin de fer à l'encontre d'une décision de *l'Office des transports du Canada* fondée sur la *Loi sur les transports au Canada*.

***Abella J.*:**

1 This appeal raises questions about the degree to which persons who use wheelchairs can be self-reliant when using the national rail network.

2 Under the *Canada Transportation Act*, S.C. 1996, c. 10, it is declared to be "National Transportation Policy" that Canada's transportation services be accessible to persons with disabilities. Responsibility for determining whether there is an "undue obstacle" to the mobility of persons with disabilities is assigned by the Act to the Canadian Transportation Agency. Where such obstacles are found to exist, the Agency is also responsible for determining what corrective measures are appropriate in accordance with the Act and human rights principles.

3 In 1998, VIA Rail Canada Inc. took part in the negotiation and drafting of a voluntary Rail Code. The Code stipulated that for new or substantially refurbished rail cars, at least one car on each train should be accessible to persons using their own wheelchairs.

4 To replace its existing fleet, in late 2000 VIA purchased 139 rail cars and car parts no longer required for overnight train service through the Channel Tunnel. These rail cars, known then as the "Nightstock" fleet, were renamed the "Renaissance cars" by VIA. None of the cars was accessible to persons with disabilities using personal wheelchairs.

5 In the course of the proceedings before the Agency lasting almost three years, and contrary to the Agency's directions, VIA unilaterally made modifications to the new cars without the prior approval of the Agency. VIA was also repeatedly asked to provide cost estimates so that the Agency could assess whether the remedial measures it was considering were reasonable. VIA consistently took the position that it had neither the time nor the money to prepare extensive cost estimates, several times asking the Agency to make its decision without these estimates.

6 The Agency, persuaded by VIA to issue its final decision without further cost estimates, ordered changes to 30 of the 139 newly purchased cars so that one car per train would be accessible to persons with disabilities using their own wheelchairs.

7 Thirty-seven days after the Agency issued its final decision, VIA presented newly prepared cost estimates to the Federal Court of Appeal as part of its leave application. Because VIA chose not to provide this information to the Agency during the proceedings, these estimates were not assessed or verified.

8 The Agency, an expert and specialized body, carefully considered the evidence and the law before imposing a remedy that was consistent both with the Rail Code and internationally accepted standards. In determining whether the design of the Renaissance cars represented undue obstacles for persons with disabilities, the Agency took into account factors usually associated with an "undue hardship" analysis, such as cost, economic viability and safety. In so doing, the Agency was properly merging human rights principles with its unique statutory mandate. I would not interfere with its decision.

## I. Background

9 VIA finalized the purchase of the Renaissance fleet on December 1, 2000 and accepted delivery in 2001. At the time VIA acquired the rights to them, the cars were in various stages of assembly: 64 cars were fully assembled, construction had started on another 24, and the remaining 51 were unassembled. VIA saw the Renaissance fleet as a unique opportunity to substantially increase the size of its fleet at a comparatively moderate cost. It paid $29.8 million to purchase the Renaissance equipment, initially expecting that it would cost an additional $100 million to prepare the equipment for service, making a total estimated cost of $129.8 million. At the time of the purchase, VIA's capital expenditure budget was $401.9 million.

10 VIA's anticipated costs included the cost of transporting the cars and parts to Canada, weatherproofing the cars, modifying brake and electrical systems, removing redundant component parts, and renovating interiors. The interior changes

included expanding lounge facilities for passengers by removing interior offices, adding vending machines, decommissioning one washroom in the coach cars to create additional baggage storage space, installing computer receptacles and a coat valet in the first class ("VIA 1") cars, adding refrigeration equipment to the service cars to provide the current level of VIA 1 service, and removing one seat in each coach car to install a coat valet. The total cost of the Renaissance cars grew to $139 million.

11 There was no "plan document" to enhance accessibility when the cars were purchased. VIA's position was that the cars were sufficiently accessible. Instead of renovations that would enable passengers with personal wheelchairs to independently meet their own needs, VIA proposed that its employees would transfer passengers into on-board wheelchairs, deliver their meals, assist them with the use of washroom facilities, and provide other necessary services. VIA argued that its budget for the acquisition of the Renaissance cars did not provide "for any major redesign or reconstruction" to make the cars more accessible because any such substantial changes would have "diminished or negated the value of the opportunity".

12 On November 16, 2000, government officials and members of groups representing persons with disabilities were permitted to inspect demonstration models of the Renaissance cars.

13 On December 4, 2000, the Council of Canadians with Disabilities ("CCD") applied to the Agency under s. 172 of the *Canada Transportation Act* complaining about the lack of accessibility of the Renaissance cars. The relevant portions provide:

> 172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.
>
> . . . . .
>
> (3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

14 The Agency's mandate to address undue obstacles to the mobility of persons with disabilities originates in s. 5 of the *Canada Transportation Act*, which statesthat this mandate is an essential element of transportation services:

> **National Transportation Policy**
>
> 5. [Declaration] It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are more likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,
>
> . . . . .
>
> (g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
>
> . . . . .
>
> (ii) an undue obstacle to the mobility of persons, including persons with disabilities.

15 Under Part V of the *Canada Transportation Act*, entitled "Transportation of Persons with Disabilities", the Agency is granted two remedial approaches to the removal of "undue obstacles" from the federal transportation network — regulation-making powers under s. 170(1) and complaint adjudication powers under s. 172(1).

16 Section 170(1) empowers the Agency to "make regulations for the purpose of eliminating undue obstacles in the transportation network", including regulations respecting "the design, construction or modification of ... means of transportation and related facilities and premises" and the "conditions of carriage applicable in respect of the transportation of persons with disabilities". Under s. 172(1), the Agency

> may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

17 Where the Agency determines that an undue obstacle to the mobility of persons with disabilities exists, the Agency may, pursuant to s. 172(3), require the taking of appropriate corrective measures. Both the Agency's regulation-making power and its authority to order remedial measures are subject to review by the federal Cabinet: ss. 36 and 40.

18 CCD alleged that 46 features of the Renaissance cars constituted "undue obstacles" to the mobility of persons with disabilities: the sleeper cars were not accessible to passengers in wheelchairs; passengers in wheelchairs could not ride in the economy coach cars; wheelchair users were segregated in sleeper units adjacent to immigration/prisoner control offices in the service cars, necessitating the use of narrow on-board wheelchairs; no washroom facilities in any type of car were accessible to passenger-owned wheelchairs; and the Renaissance cars offered inadequate accommodation for persons with visual disabilities and those accompanied by assisting animals.

19 Under the mistaken impression that the cars had not yet been purchased, CCD also requested an interim order under ss. 27(1) and 28(2) of the *Canada Transportation Act* directing VIA not to take any further steps to secure the purchase of the Renaissance cars. After learning that the cars had already been purchased, CCD sought to prevent VIA from entering into contracts for, or undertaking further construction of the Renaissance fleet pending the Agency's final decision on its application.

20 CCD relied, in part, on VIA's alleged non compliance with the 1998 *Code of Practice — Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* ("Rail Code"), a voluntary code negotiated with and agreed to by VIA, setting minimum standards applicable to its transportation network. Under the Rail Code, lower standards are applied to existing equipment in recognition of the fact that it may be difficult or impossible for this older equipment to be made to comply with modern accessibility standards. Higher standards are applied to new rail cars or cars undergoing a major refurbishment. The most significant of these standards was that passengers with disabilities be able to use their personal wheelchairs on the train.

21 VIA's position before the Agency was that the Renaissance fleet, including the 75 cars that had yet to be fully assembled, were existing equipment, not new or undergoing major refurbishment. It argued that, based on the Rail Code standards that were applicable to *existing* cars, the new Renaissance cars were sufficiently accessible to persons with disabilities. Accordingly, VIA argued, it was not required to retrofit them to improve their accessibility in accordance with the requirements for new cars or cars undergoing a major refurbishment.

22 VIA asserted, in fact, that the Renaissance cars provided greater travel options and choice for passengers with disabilities by virtue of the fact that they were *differently* accessible than its existing fleet, and that "persons with disabilities who do not wish to use the Renaissance trains can continue to use [the] existing fleet for their travel purposes".

23 VIA intended, however, to replace the existing fleet with Renaissance cars on some of its routes starting in 2003.

24 The existing fleet provided one personal wheelchair accessible car per train. VIA used its VIA 1 cars for this purpose, which had been retrofitted to accommodate passenger-owned wheelchairs. A dedicated "tie-down" space had been created.

25 The size of this space was what CCD sought to have made available in the Renaissance cars because it adequately met the needs of persons with disabilities. And the washrooms on the VIA 1 cars in the existing fleet, though significantly smaller in square footage than those in the Renaissance service cars, had nonetheless been retrofitted to be accessible for personal wheelchair use. Disabled passengers travelling with assisting animals were also accommodated on the existing fleet.

## II. The Agency Proceedings

### *A. The Agency's Inquiry*

26 On January 24, 2001, the Agency declined CCD's application for an interim order which would affect VIA's agreement to purchase the Renaissance cars. However it sought a commitment from VIA that it would not enter into any contracts to construct, manufacture or retrofit the Renaissance cars prior to the Agency's final decision, and requested full particulars from VIA respecting its purchase agreement and any additional contracts it entered into with respect to the cars.

27 In January 2001, VIA filed an incomplete copy of the purchase agreement, with the financial data redacted, and requested that it be kept confidential. It advised the Agency that it had not yet entered into any contracts for the construction, manufacture or retrofitting of the Renaissance cars and repeatedly maintained that no retrofitting plans would exist until at least late August 2001. VIA expected a first phase, consisting of 24 Renaissance cars ("Phase I Renaissance Cars"), to come into service in December 2001, with later phases to follow as more cars became ready for service.

28 VIA's expectation that no retrofitting plans would be available until August 2001 meant that the Agency was unable to complete its investigation of CCD's application, filed on December 4, 2000, within the 120 days stipulated in s. 29(1) of the *Canada Transportation Act* which states:

> 29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

29 The deadline would have been April 3, 2001. In a decision dated that day, the Agency noted that the delay was caused by procedural and jurisdictional matters raised by the parties and by the fact that it was awaiting the filing of information by VIA, information VIA had indicated was not yet available. As a result, the Agency determined that it retained jurisdiction to deal with CCD's application notwithstanding the expiry of the statutory deadline. In doing so, the Agency was relying on the Federal Court of Appeal's decision in *Canadian National Railway v. Ferroequus Railway*, [2002] F.C.J. No. 762, 2002 FCA 193 (Fed. C.A.), which held that s. 29(1) was a directory, not mandatory, provision.

30 On April 24, 2001, VIA sought leave to appeal the Agency's decision of April 3, 2001 to the Federal Court of Appeal. It was granted a stay of the Agency's proceedings pending the determination of the leave application.

31 On May 25, 2001, the Thunder Bay *Chronicle Journal* published an article stating that VIA had entered into a contract with Bombardier Inc. to refurbish and modify the Renaissance cars. The text stated that "Bombardier will refurbish and modify the cars at its plant in Thunder Bay" and cited a Bombardier spokesperson as saying that the contract was worth $9.8 million, with another contract in progress. CCD filed this article with the Agency on May 28, 2001 as evidence that VIA was defying the Agency's order to provide information about the timing and details of any proposed construction and retrofitting plans and sought an interim order suspending the retrofitting process. The Agency then requested VIA's comments on the accuracy of the newspaper article.

32 VIA responded to this request by seeking to have the Agency found in contempt of the Federal Court of Appeal's order staying the proceedings. On June 8, 2001, when the Federal Court of Appeal dismissed VIA's application for leave to appeal, VIA withdrew its contempt motion.

33 In a decision dated June 29, 2001, the Agency once again ordered that VIA file a copy of its contract with Bombardier as well as the schedules to its purchase agreement which had been omitted from VIA's original filing. VIA complied, again requesting that these documents be kept confidential. The Agency in turn rejected CCD's request for an interim order suspending the retrofitting process, but put VIA on notice that, by proceeding with the Bombardier contract before the Agency had decided what was required, it could not subsequently complain that the assembly of the cars, and the changes it had unilaterally made, rendered any decision the Agency might eventually make too costly.

34 On September 20, 2001, the Agency organized a viewing of the Renaissance cars in Montreal and, with input from the parties, prepared an Inspection Report. The Inspection Report was a factual description of the dimensions and accessibility features of the Renaissance cars and a description of the changes VIA had unilaterally made.

35 Three types of Renaissance cars were inspected: sleeper cars for overnight trips, economy coach cars for standard trips and service cars containing public lounge facilities and an overnight suite intended for passengers using wheelchairs. The report revealed that as in VIA's existing fleet, passengers in wheelchairs of any size were unable to enter or use the sleeping compartments of standard sleeper cars in the Renaissance fleet. The width of the corridor was incompatible with the use of standard personal wheelchairs.

36 The economy coach cars in the Renaissance fleet were found to be less accessible than VIA's existing VIA 1 cars,

which had been retrofitted to provide tie-down space that accommodated large personal wheelchairs and had personal wheelchair accessible washrooms. Personal wheelchairs could only be accommodated in the retrofitted VIA 1 cars in the existing fleet on day trips, however, and for overnight trips only if the passenger was content to spend the night in his or her wheelchair.

37 In the Renaissance cars, personal wheelchairs could not be used anywhere. Each Renaissance economy car had three washrooms. None was wheelchair accessible. A "wheelchair tie-down" mechanism, used to secure a wheelchair to the floor of the car, had been installed. However, the dimensions of this space did not accommodate standard personal wheelchairs. Evidence before the Agency suggested that only the smallest wheelchair, the size of a child's wheelchair, could actually fit in the tie-down space provided.

38 In addition, unlike VIA's existing fleet which permitted passengers with disabilities to ride with other passengers in VIA 1 coach cars, passengers using wheelchairs were to be primarily accommodated in service cars in the Renaissance fleet. Service cars were special cars that had office space and public lounge facilities where passengers could obtain refreshment services and store their baggage.

39 There was to be a service car on every train, with a self-contained sleeper unit separate from the service cars' public passenger lounge. VIA termed this the "accessible suite". No part of the service cars, including the accessible suite, was accessible to passengers using personal wheelchairs, both because the dimensions of the doors into the "accessible suite" and washroom were too narrow for a personal wheelchair, and because there was insufficient space to manoeuver or turn a personal wheelchair even if it could enter. Passengers' personal wheelchairs were to be kept in a storage compartment near the "accessible suite" or, if VIA required that space to refrigerate food and drink for VIA 1 passengers, in the baggage car.

40 On January 16, 2002, the Agency granted a request from VIA to make oral submissions before the Agency released its Preliminary Decision. Oral submissions were heard on April 8, 2002.

41 On June 23, 2002, VIA started using the Renaissance cars.

42 On July 22, 2002, the Agency asked VIA to confirm certain measurements in the washroom of the "accessible suite". VIA advised the Agency that the measurements no longer matched those that had been jointly agreed upon in the Agency's Inspection Report.

43 The Agency also learned that VIA had made changes to essential features of accessibility, including widening two sliding doors in the "accessible suite" by only 2 or 3 cm. This change, made without the Agency's prior knowledge, was insufficient to make the "accessible suite" accessible for personal wheelchairs, despite the Rail Code standards VIA had agreed to. VIA asserted that widening the doors to meet Rail Code standards, while possible, was not reasonable because this would require a "complete re-design of the door, its pocket and the module that currently houses the control button", as well as the removal of sleeping berths.

44 In a decision dated August 14, 2002, the Agency expressed its "extreme displeasure" at what it likened to concealing evidence, namely "VIA's failure to keep the Agency informed of modifications bearing on the very mandate the Agency is called to exercise" (CTA Decision No. LET-AT-R-232-2002, at p. 2).

45 Because the changes VIA made to the cars without the Agency's knowledge created a discrepancy between the information the Agency had about the Renaissance cars and their actual condition, the Agency undertook a second inspection of the cars on September 16, 2002. This inspection revealed that in addition to the slightly widened doors, VIA had made a number of other changes to the Renaissance cars, including an expansion of the lounge area in the service cars. Because some measurements were disputed by the parties, a third inspection of the cars took place on November 26, 2002.

***B. The Agency's Preliminary Decision (No. 175-AT-R-2003)***

46 On March 27, 2003, the Agency issued a detailed Preliminary Decision of 150 pages. It was premised on the goal of having one accessible car per train.

47 The Agency's Preliminary Decision took the form of a "show cause" order. By this order, VIA was asked to "show cause" by May 26, 2003, why the obstacles the Agency had identified as potentially undue were not, in fact, undue obstacles. The Agency's show cause process was the methodology it used for assessing the hardship VIA might suffer if it were required to remove the obstacles.

48 The Agency identified five key problems with the Renaissance fleet, most of them in areas of the cars VIA itself had specifically targeted to meet the needs of passengers with disabilities. These problems led the Agency to identify 14 obstacles as being potentially undue.

49 The show cause process served two critical functions. First, it gave VIA a "final opportunity to provide specific evidence and related argument to show cause to the Agency" why the 14 obstacles it had identified were not undue and to provide feasibility and costing information relating to the remedial options under consideration by the Agency (p. 5). VIA had, until then, provided only general information about its operational, economic and structural requirements. The Agency noted that "there may be specific arguments that VIA may wish to bring forward in view of the Agency's preliminary findings" (p. 144).

50 Second, VIA was also asked to file answers to specific questions the Agency had about what remedial measures were structurally, economically and operationally possible. This gave VIA an opportunity to participate with the Agency in the accommodation of passengers with disabilities by identifying potential solutions, commenting on solutions CCD had proposed and developing a remedial plan.

51 In addition to its detailed analysis in its Preliminary Decision of the need for accessibility-enhancing measures, such as wheelchair tie-down spaces and accessible washrooms, the Agency stressed the importance of ensuring that persons with disabilities be capable of accessing features specifically designed to meet their needs in their own wheelchairs. Subject to structural and economic constraints, it was the Agency's opinion that "it is unacceptable that a person with a disability be deprived of his/her independent means of mobility in an area of the Renaissance trains that is intended to be used by persons with disabilities, including those who use wheelchairs" (p. 109).

52 VIA sought leave to appeal the Agency's Preliminary "show cause" Decision in April 2003.

53 While VIA's application for leave to appeal was pending, it responded to the Agency's "show cause" order with a three-page letter on May 26, 2003. In its opinion, "it is not reasonable to require VIA Rail to modify the cars".

54 VIA began by addressing some of CCD's safety concerns for persons with disabilities, pointing out that "the Equipment and Operations Branch of the Railway Safety Directorate has determined that there is no safety issue with respect to the Renaissance Cars".

55 VIA estimated that "the total cost and lost revenue of completing the work identified in the show cause directions is over $35 million". This was, VIA wrote, its "best estimate in answering the show cause portion of the hearing". It also stated that it "has back up for the estimates of cost", but it submitted no such evidence with its response.

56 On May 29, 2003, three days after VIA's response to the show cause order, CCD wrote to the Agency advising it that, contrary to VIA's assertions that there were no safety issues to address, the Transport Canada Rail Safety Directorate had ordered VIA to relocate washrooms in the Renaissance economy coach cars because they were located in an unsafe "crumple zone". While no final decisions had been made concerning how the mandatory modifications would be accomplished, CCD told the Agency that Transport Canada had approved three possible remedial designs. One involved the installation of an accessible washroom in each coach car ("Option 3"). CCD was told, however, that VIA intended to implement a different, less costly design that did not enhance the accessibility features of the coach cars ("Option 1").

57 On June 9, 2003, the Agency issued a decision advising VIA that its May 26, 2003 response to the Preliminary Decision lacked detail and supporting evidence and could not be verified. As part of this decision, the Agency re-issued its original show cause order, giving VIA an additional 60 days to prepare a response.

58 It also made two additional requests of VIA, each with its own deadline. First, VIA was asked to submit, by June 13,

2003, the "back-up" evidence for the cost estimates it had failed to include in its response to the Agency's show cause order. Second, VIA was asked to address, by June 23, Option 3 being considered by Transport Canada and "show cause" why it could not be implemented.

59 By July 3, 2003, both of these deadlines had passed with no response from VIA. The "back-up" evidence VIA told the Agency it had in its May 26th letter, was not provided. VIA also failed to submit any evidence to show why Option 3 should not be implemented.

60 As it was entitled to do under its enabling statute, the Agency turned its June 9, 2003 reissued Preliminary Decision into an order of the Federal Court. The Agency informed VIA that it would commence proceedings for contempt if VIA did not submit, by July 14, 2003, the additional information the Agency had requested. VIA was still to respond to the original show cause order by the extended deadline, namely August 8, 2003.

61 VIA responded on July 14, 2003. It submitted back-up evidence for the cost estimates pertaining to the arm rest and tie-down area modifications the Agency was contemplating. It also submitted copies of the three design plans for Options 1, 2 and 3 that it had devised for Transport Canada, as well as a chart outlining the pros and cons associated with each.

62 No precise costing information was provided to the Agency about these options, but the documentation stated that Option 3, which would add a wheelchair accessible washroom to the Renaissance coach cars, would cost two and a half times as much as Option 1. VIA claimed in a single paragraph that Option 3 could not be implemented because a more detailed design was still required, that there would likely be a prohibitive loss of revenue of $24.2 million, and that the direct implementation costs had not been quantified but that, in any event, VIA could not afford them.

63 VIA told the Agency that it planned to implement Option 1 in the fall of 2003. Option 1, the least expensive solution, would replace the unsafe washrooms with a coat valet.

64 VIA also told the Agency that it was unable to comply with the show cause order any further. It asserted that it lacked the internal expertise to respond to the Agency's Preliminary Decision, that it would take longer than 60 days to have cost estimates prepared, and that the government had not provided funding for it to respond to the Agency's requests.

65 VIA did not request more time to comply.

66 On August 7, 2003, VIA again indicated to the Agency that there would be no further compliance with its Preliminary Decision. It wrote: "VIA Rail makes the following submissions respectfully. It asks for an oral hearing, if necessary. Otherwise, it asks the Agency to consider all of these issues, facts and estimates and render its decision in final form."

67 The Agency declined to exercise its discretion to hold a second oral hearing because "VIA has not demonstrated that there is any value to be gained from pursuing the time-consuming and costly exercise of convening an oral hearing at this time, either to permit VIA to explain why it did not provide the supporting evidence required or to provide to VIA an opportunity to produce evidence that should have been submitted in writing, either during the pleadings process or in response to the show cause orders" (Final Decision, at p. 14).

***C. The Agency's Final Decision (No. 620-AT-R-2003)***

68 In the face of VIA's persistent refusal to provide the necessary estimates and responses, despite having had from March 27 until August 8 to do so, and in the absence of any request from VIA for more time to prepare information, the Agency acceded to VIA's request and, on October 29, 2003, issued its final decision based on the record before it.

69 In its final decision, authored by Members Marion L. Robson and Michael Sutton, the Agency ordered VIA to implement six remedial measures, five of which involved making physical changes to the Renaissance cars with cost implications. All had been identified by the Agency by the time it reissued its Preliminary Decision on June 9, 2003:

> In order to make one car in every daytime train accessible to passengers using their own wheelchairs, VIA was ordered to install an accessible washroom and a tie-down space for passengers using wheelchairs in 13 economy coach cars (i.e. implement Option 3).

In order to provide one car with accessible sleeping accommodation in each overnight train, VIA was ordered to widen one doorway and install a mechanism that would secure a passenger's own wheelchair to the floor (a "wheelchair tie-down") in the segregated sleeper unit in each of the 17 "service cars" that housed the "accessible suite".
The Agency also directed VIA to implement in more cars several of the changes it had already made or begun to make. These changes — lowering one double seat in 33 economy cars, installing two moveable armrests in 47 coach cars, and closing stair risers on 12 cars — would accommodate passengers travelling with animals to assist them, passengers able and willing to be transferred into standard coach seating, and passengers who might have difficulty navigating the entry stairs.

70 The Agency determined that the net cost to VIA of addressing Transport Canada's safety concerns in a way that could make 13 economy coach cars accessible for personal wheelchair use would be no more than $673,400 in direct costs plus $16,988 in lost passenger revenue.

71 This was the most significant remedial measure the Agency ordered. The cost was comparable to what VIA was prepared to incur each year to accommodate passengers wearing coats.

***D. Federal Court of Appeal Proceedings***

72 VIA sought leave to appeal the Agency's preliminary and final decisions. In support, it submitted a report to the Federal Court of Appeal that it had commissioned from Peter Schrum of Bombardier Inc. to review the Agency's final decision and prepare a global cost estimate of the corrective measures ordered by the Agency. Mr. Schrum's report estimated that the cost of implementing the Agency's final decision would be at least $48 million. The report was dated December 5, 2003, less than 40 days from the Agency's final decision. Leave was granted on March 10, 2004.

73 The Federal Court of Appeal unanimously agreed that the Agency's identification of undue obstacles to the mobility of persons with disabilities was reviewable on a standard of patent unreasonableness ([2005] 4 F.C.R. 473, 2005 FCA 79 (F.C.A.)). Sexton J.A. (Décary J.A. concurring) concluded that, based on its expertise, its mandate, and the presence of a strong privative clause, the Agency was entitled to a high level of deference. In reasons concurring in the result, Evans J.A. agreed that the multiplicity of factors and interests to be weighed, the technical aspects to some issues before the Agency, and the Agency's obligation to exercise discretion based on the evidence and statutory criteria, all fell within its specialized mandate and warranted considerable deference.

74 Sexton J.A. concluded, however, that the Agency was subject to a correctness standard in its interpretation of its authority to entertain CCD's application under s. 172, a provision in the Agency's enabling legislation that he concluded raised a jurisdictional issue. He determined that the Agency's authority to proceed under s. 172 in the absence of a complaint based on an actual travel experience raised a question of statutory interpretation within the expertise of the courts, not of the Agency, because it implicated human rights. In Sexton J.A.'s view, these factors, including the presence of a statutory right of appeal with leave, indicated that the Agency's interpretation of its jurisdiction under s. 172 was reviewable on the less deferential standard of correctness.

75 The Federal Court of Appeal was unanimous in its conclusion that the Agency was correct to conclude that it had jurisdiction under s. 172 to proceed with CCD's complaint.

76 On the issue of how the Agency applied its jurisdiction under s. 172, however, Sexton J.A. criticized the Agency's findings that obstacles in the Renaissance cars were undue. He concluded that the decision was made without considering VIA's entire network, the interests of non-disabled persons, and the interests of persons with disabilities other than wheelchair users. He disagreed with the Agency's conclusion that there was no evidence in the record to support VIA's view that its existing network was able to address obstacles in the Renaissance cars. He noted that while the Agency explicitly stated that it was attempting to strike an appropriate balance between the rights of persons with disabilities and those of transportation service providers in accordance with s. 5 of the *Canada Transportation Act*, it had not properly balanced the competing interests when it decided that structural modifications to the Renaissance cars were the appropriate remedy. Holding the decision to be patently unreasonable, Sexton J.A. set it aside and referred the matter back to the Agency for reconsideration.

77 Evans J.A. was "not persuaded ... that, having considered VIA's submissions regarding its network, the Agency committed reversible error when it concluded in the preliminary decision that the obstacles to the mobility of persons in wheelchairs presented by the Renaissance cars were 'undue'" (para. 98). In his view, the Agency was entitled to conclude that the evidence did not establish that the existing fleet or network would address the obstacles that it had found to exist in the Renaissance cars. The evidence showed that, over time, the existing fleet would be retired; no Renaissance cars were accessible to personal wheelchair users; and VIA's estimates of the number of passengers affected were misleadingly low because they failed to take into account the number of disabled passengers who would use VIA if it were more accessible.

78 Noting that review for patent unreasonableness does not permit a reviewing court to intervene just because it would have weighed the relevant factors and evidence differently, Evans J.A. was of the view that the Agency's balancing choices were not patently unreasonable based on the evidence before it.

79 However, the Federal Court of Appeal was unanimous in its view that, having identified the modifications it thought necessary, the Agency violated VIA's procedural fairness rights by failing to give VIA an adequate opportunity to respond to the Agency's requests for cost and feasibility information.

80 VIA had not directly raised this procedural fairness argument before the Federal Court of Appeal. What it had advanced, as one of its grounds of appeal, was that the Agency had erred in law by identifying obstacles as "undue" before VIA had obtained expert evidence assessing the cost of remedial measures. Its procedural fairness argument was a separate ground, and pertained only to the Agency's refusal to hold a second oral hearing, an argument which was rejected by the majority. Sexton J.A. was of the view that the Agency had the right to exercise its discretion in deciding whether to grant an oral hearing.

81 In reaching the conclusion that VIA's right to procedural fairness had been violated when the Agency issued a final decision without giving VIA an opportunity to provide cost estimates, the Federal Court of Appeal blended VIA's discrete grounds of appeal to find a breach of procedural fairness.

82 The court accordingly allowed VIA's appeal and remitted the matter to the Agency for reconsideration in accordance with both the network-based analysis endorsed by the majority and the "fresh evidence", namely the Schrum report, adduced by VIA on appeal.

## III. Analysis

### *A. Standard of Review*

83 The Agency's decision was that there were undue obstacles to the mobility of persons with disabilities in VIA's Renaissance fleet and it ordered that remedial steps be taken to correct the problems it identified. In so doing, the Agency was proceeding under ss. 172(1) and 172(3) of the *Canada Transportation Act*, reproduced here for ease of reference:

> 172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1)[1], regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.
>
> . . . . .
>
> (3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

84 VIA had argued that the Agency lacked jurisdiction under s. 172(1) to inquire into any complaint that was not based on an actual travel experience. The majority in the Federal Court of Appeal accepted VIA's characterization of s. 172(1) as jurisdiction-limiting because it turned on questions of statutory interpretation and human rights.

85 In Sexton J.A.'s view, s. 172, as part of Part V of the *Canada Transportation Act*, was one of several provisions that "have a human rights aspect to them", calling for a "lower level of deference" (para. 25).

86 Sexton J.A. relied on *Canadian Pacific Railway v. Canadian Transportation Agency*, [2003] 4 F.C. 558, 2003 FCA

271 (Fed. C.A.), to draw a distinction between the Agency's expertise in regulatory matters and its expertise addressing human rights. In his view, the Agency's authority to proceed with CCD's complaint was an issue implicating the protection of human rights that turned on statutory interpretation outside the Agency's area of expertise. He determined that these factors, including the presence of a statutory right of appeal with leave, indicated that the Agency's interpretation of its jurisdiction under s. 172 was reviewable on the less deferential standard of correctness, thereby enabling the court to substitute its view of the correct answer for that of the Agency.

87 As previously noted, the Federal Court of Appeal was, however, unanimous in its conclusion that the Agency had correctly concluded that it had jurisdiction under s. 172 to proceed with CCD's complaint.

88 The Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise. It ignores Dickson J.'s caution in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233).

89 If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field": D. Mullan, "Tribunals and Courts — The Contemporary Terrain: Lessons from Human Rights Regimes" (1999), 24 *Queen's L.J.* 643, at p. 660. Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.

90 Section 172 is part of the Agency's enabling legislation, the authorizing framework assigning responsibility to the Agency, and in which it is expected to apply its expertise. It is a clear example of a provision that reflects "a conscious and clearly worded decision by the legislature to use a subjective or open-ended grant of power [which] has the effect of widening the delegate's jurisdiction and therefore narrowing the ambit of jurisdictional review of the legality of its actions": D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (4th ed. 2004), at p. 140.

91 In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.), at para. 18, this Court said:

> The test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board? ... Factors such as the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise and the nature of the problem are all relevant in arriving at the intent of the legislature.

This approach, affirmed by Bastarache J. in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 26, reiterates Beetz J.'s observation in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), that:

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" [p. 1087]

92 A tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation, whether or not the questions also engage human rights issues. Bastarache J.'s dissenting reasons note in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28 (S.C.C.), at para. 86, that "the broad policy context of a specialized agency infuses the exercise of statutory interpretation such that application of the enabling statute is no longer a matter of 'pure statutory interpretation'. When its enabling legislation is in issue, a specialized agency will be better equipped than a court": See also *Pushpanathan*, at para. 37.

93 The Agency's enabling legislation clearly shows that its interpretation of its authority to proceed with CCD's application is a question Parliament intended to fall squarely within its jurisdiction and expert assessment. Under s. 172(1), "[t]he Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1)". Section 170(1) gives the Agency discretionary authority to "make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament". A list of four particular areas in which the Agency may make regulations is provided, but this list is not exhaustive. Instead, Parliament gave the Agency discretionary authority to determine whether regulations directed toward eliminating undue obstacles in the federal transportation system *could* be made, without circumscribing the Agency's discretion to identify the specific matters these regulations might address.

94 In accepting CCD's application, the Agency relied on its express authority to make regulations respecting "the design, construction or modification of ... means of transportation" and the "conditions of carriage applicable in respect of the transportation of persons with disabilities" under ss. 170(1)(*a*) and (*c*) to find that it had jurisdiction to entertain CCD's complaint. Since CCD's application clearly concerned the "design, construction or modification" of the Renaissance cars and the "conditions of carriage" confronting persons with disabilities, no jurisdictional question legitimately arises from this ground of appeal on these facts. If an experience-based complaint were required to operationalize the Agency's adjudicative authority, we would not expect to find authority to make regulations respecting the "design" or "construction" of rail cars in s. 170(1)(*c*).

95 The Agency's authority to entertain CCD's complaint, in any event, depended on its own discretionary determination of whether CCD's complaint raised an issue for which a regulation directed toward eliminating undue obstacles *could* be made. This falls squarely within the Agency's jurisdiction. Given that the Agency's jurisdiction to entertain CCD's complaint under s. 172(1) turns almost exclusively on its own discretionary decision-making, s. 172(1) is a jurisdiction-granting, not jurisdiction-limiting, provision.

96 It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction, like the Agency's discretionary authority to make regulations and adjudicate complaints, in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

97 I do not share the view that the issue before the Agency was, as a human rights matter, subject to review on a standard of correctness. This unduly narrows the characterization of what the Agency was called upon to decide and disregards how inextricably interwoven the human rights and transportation issues are. Parliament gave the Agency a specific mandate to determine how to render transportation systems more accessible for persons with disabilities. This undoubtedly has a human rights aspect. But that does not take the questions of how and when the Agency exercises its human rights expertise outside the mandate conferred on it by Parliament.

98 The human rights issues the Agency is called upon to address arise in a particular — and particularly complex — context: the federal transportation system. The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: *Pushpanathan*, at para. 26

99 The allegedly jurisdictional determination the Agency was being asked to make, like the "undueness" inquiry, falls squarely within its statutory mandate. It did not involve answering a legal question beyond its expertise, but rather requires the Agency to apply its expertise to the legal issue assigned to it by statute. The Agency, and not a reviewing court, is best placed to determine whether the Agency may exercise its discretion to make a regulation for the purpose of eliminating an undue obstacle to the mobility of persons with disabilities — a determination on which the Agency's jurisdiction to entertain applications depends.

100 The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

101 In any situation where deference is due, "there will often be no single right answer to the questions that are under review against the standard of reasonableness. ... Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable": *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), at para. 51. Just as judicial assessments of what is reasonable may vary, it is unavoidable that "[w]hat is patently unreasonable to one judge may be eminently reasonable to another": *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.), at p. 963.

102 I appreciate that it is a conceptual challenge to delineate the difference in degrees of deference between what is patently unreasonable and what is unreasonable. Both, it seems to me, speak to whether a tribunal's decision is demonstrably unreasonable, that is, such a marked departure from what is rational, as to be unsustainable. This issue was, in my view, persuasively canvassed by my colleague LeBel J. in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), and requires no further elaboration here.

103 But whatever label is used to describe the requisite standard of reasonableness, a reviewing court should defer where "the reasons, taken as a whole, are tenable as support for the decision" (*Ryan*, at para. 56) or "where ... the decision of that tribunal [could] be sustained on a reasonable interpretation of the facts or of the law" (*National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.), at pp. 1369-70, *per* Gonthier J.) The "immediacy or obviousness" to a reviewing court of a defective strand in the analysis is not, in the face of the inevitable subjectivity involved, a reliable guide to whether a given decision is untenable or evidences an unreasonable interpretation of the facts or law.

104 As Wilson J. recognized in *National Corn Growers*, at pp. 1347-48, it is the way a tribunal understands the question its enabling legislation asks it to answer and the factors it is to consider, rather than the specific answer a tribunal arrives at, that should be the focus of a reviewing court's inquiry:

> [O]ne must begin with the question whether the tribunal's interpretation of the provisions in its constitutive legislation that define the way it is to set about answering particular questions is patently unreasonable. If the tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the courts must not then proceed to a wide ranging review of whether the tribunal's conclusions are unreasonable.

To engage in a wide-ranging review of a tribunal's specific conclusions when its interpretation of its constitutive statute cannot be said to be irrational, or unreasonable, would be an unwarranted trespass into the realm of reweighing and re-assessing evidence. Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

105 Here, the Agency interpreted its authority to proceed with CCD's application under s. 172(1) in a manner that is, to use the pioneering language of Dickson J., "rationally supported by the relevant legislation": *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, at p. 237. Nothing in the Agency's enabling legislation compels subjecting any particular aspect of the Agency's interpretation of s. 172 to a more searching review or a reweighing of the factors and evidence the Agency considered.

106 The Agency, to whom the duty of interpreting and applying its broad regulation-making powers falls, is owed deference in interpreting its own legislation. It did not reach an unreasonable conclusion respecting its jurisdiction when it rejected the suggestion that an actual travel-based complaint was required to trigger its adjudicative authority.

107 I also share the view of Evans J.A. that deference is owed to the Agency's application of s. 172 on the merits. Included in its mandate is the discretion to identify obstacles for persons with disabilities, to decide whether they are undue and, if they are, what the most appropriate remedy is. Parliament designated the Agency to interpret and apply its enabling legislation, select from a range of remedial choices, protect the interests of the public, address policy issues, and balance multiple and competing interests.

108 The Agency defined the analytical process inherent in identifying "undue obstacles" in the federal transportation network in a way that is supported by the *Canada Transportation Act*. In expressing its mandate, it stated: "if the Agency finds that the accommodation provided is not reasonable or falls short of what is practicable in the circumstances, then the

Agency may find an undue obstacle and may require the taking of corrective measures to eliminate that undue obstacle" (Preliminary Decision, at p. 20).

109 Viewed as a whole, the Agency's reasons show that it approached and applied its mandate reasonably. In particular and most significantly, it complied substantially with this Court's directions in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("*Meiorin*"), assessing reasonable accommodation, and applied the correct burden of proof. While the Agency did not conduct a step-by-step application of *Meiorin*, it did apply its guiding principles and adapted them to its governing statutory mandate. In the absence of specific evidence of undue hardship, the Agency's rejection of VIA's economic arguments was consistent with this Court's guidance in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) ("*Grismer*"), at para. 41 that "impressionistic evidence of increased expense will not generally suffice.

110 To redress discriminatory exclusions, human rights law favours approaches that encourage, rather than fetter, independence and access. This means an approach that, to the extent structurally, economically and otherwise reasonably possible, seeks to minimize or eliminate the disadvantages created by disabilities. It is a concept known as reasonable accommodation.

111 In my view, as I attempt to explain in the balance of these reasons, far from being unreasonable for the Agency to adopt a frame of reference premised on achieving personal wheelchair-based accessibility in 13 economy coach cars and 17 service cars out of the 139 cars VIA purchased, it may well have been found to be patently unreasonable for the Agency not to do so. Nor did it violate VIA's rights to procedural fairness.

***B. Was the Agency's Decision Entitled to Deference?***

112 Part V of the *Canada Transportation Act* was enacted to confirm the protection of the human rights of persons with disabilities in the federal transportation context. The history of this regulatory scheme shows that it was Parliament's intention that what is now Part V of the Act be interpreted according to human rights principles and that "transportation legislation rather than human rights legislation should be used" to enforce the accessibility standards provided in the predecessor legislation, the *National Transportation Act, 1987*, R.S.C. 1985, c. 28 (3rd Supp.) (*House of Commons Debates*, vol. VI, 2nd Sess., 33rd Parl., June 17, 1987, at p. 7273 (Hon. John C. Crosbie)).

113 Amendments made to the *National Transportation Act, 1987* affirmed the government's intention that transportation legislation "be placed alongside the other laws of Canada that reflect its tradition for protecting human rights and values in Canada" (*House of Commons Debates*, vol. XIII, 2nd Sess. 33rd Parl., June 17, 1988, at p. 16573 (Hon. Gerry St. Germain)). Parliament's decision to use this particular legislation as the source of human rights protection for persons with disabilities ensures specialized protection, applying practical expertise in transportation issues to human rights principles. This both strengthens the protection and enables its realistic implementation.

114 In *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, [2006] 1 S.C.R. 513, 2006 SCC 14 (S.C.C.), at para. 26, a majority of this Court affirmed the presumption that a tribunal can look to external statutes to assist in the interpretation of provisions in its enabling legislation "because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute." Both *Craton v. Winnipeg School Division No. 1*, [1985] 2 S.C.R. 150 (S.C.C.), at p. 155, and *Werbeski* make clear that human rights legislation, as a declaration of "public policy regarding matters of general concern", forms part of the body of relevant law necessary to assist a tribunal in interpreting its enabling legislation.

115 In *Winnipeg School Division*, Dickson C.J. confirmed that where there is a conflict between human rights law and other specific legislation, unless an exception is created, the human rights legislation, as a collective statement of public policy, must govern. It follows as a natural corollary that where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles. The Agency is therefore obliged to apply the principles of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, when defining and identifying "undue obstacles" in the transportation context.

116 There is, moreover, a mandatory direction found in s. 171 from Parliament to the Agency to coordinate its activities with the Canadian Human Rights Commission to ensure policy, procedural and jurisdictional complementarity. It states:

> 171. The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

117 Section 171 confirms the Agency's obligation to interpret and apply the *Canada Transportation Act* in a manner consistent with the purpose and provisions of human rights legislation. This means identifying and remedying undue obstacles for persons with disabilities in the transportation context in a manner that is consistent with the approach for identifying and remedying discrimination under human rights law. In practice, this has resulted, as the Agency noted in its Preliminary Decision, in complaints by persons with disabilities related to the federal transportation network being referred regularly by the Canadian Human Rights Commission to the Agency for investigation and determination.

118 In this case, it is the design of the Renaissance cars that is said to represent an undue obstacle. Either the actual existence or the planned existence of an obstacle to mobility can be sufficient to trigger the Agency's jurisdiction to inquire into matters relating to design, construction, or modification of the means of transportation. The applicant is not required to establish that the obstacle is already part of the federal transportation system, or that someone has actually experienced an incident relating to the obstacle.

119 When assessing the scope of an applicant's right not to be confronted with undue obstacles to mobility, the Agency is bound by this Court's decision in *Meiorin*. *Meiorin* defines the balancing required to determine whether a workplace obstacle or standard unjustifiably infringes human rights principles. An impugned standard may be justified "by establishing on a balance of probabilities":

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. [para. 54]

120 The same analysis applies in the case of physical barriers. A physical barrier denying access to goods, services, facilities or accommodation customarily available to the public can only be justified if it is "impossible to accommodate" the individual "without imposing undue hardship" on the person responsible for the barrier. There is, in other words, a duty to accommodate persons with disabilities unless there is a *bona fide* justification for not being able to do so.

121 The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider: *Chambly (Commission scolaire régionale) c. Bergevin*, [1994] 2 S.C.R. 525 (S.C.C.) ("*Chambly*"), at p. 546.

122 In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 79, this Court noted that it is "a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'". Undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate.

123 What constitutes undue hardship depends on the factors relevant to the circumstances and legislation governing each case: *Chambly*, at p. 546; *Meiorin*, at para. 63. The factors informing a respondent's duty to accommodate "are not entrenched, except to the extent that they are expressly included or excluded by statute": *Meiorin*, at para. 63.

124 In all cases, as Cory J. noted in *Chambly*, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

125 Yet VIA argues that s. 5 of the *Canada Transportation Act*, whereby the Agency is directed to take matters of cost, economic viability, safety and the quality of services to all passengers into consideration when it makes accessible transportation decisions, "stands in stark contrast to the approach embodied in human rights statutes". The relevant portions of s. 5 of the Act are reproduced here for convenience:

> 5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are more likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,
>
> . . . . .
>
> (g) each carrier or mode of transportation, *as far as is practicable*, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
>
> . . . . .
>
> (ii) an undue obstacle to the mobility of persons, including persons with disabilities.

126 VIA asserts that the duty to accommodate arising under human rights legislation is not limited by "practicability" because human rights legislation does not balance competing interests. In VIA's view, human rights legislation provides near absolute protection for persons with disabilities, unlike s. 5 of the *Canada Transportation Act*, which, VIA submits, was intended to provide less protection out of greater deference to financial, operational and other considerations.

127 With respect, this argument misconstrues the objectives and proper application of human rights principles. The purpose of federal human rights legislation is to prevent and remedy discrimination: *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.). In particular, s. 15 of the *Canadian Human Rights Act* creates a legal duty to accommodate the needs of persons accessing its protection to the point of undue hardship. The scope of the right of persons with disabilities to be free from discrimination will depend on the nature, legitimacy and strength of the competing interests at stake in a given case. These competing interests will inform an assessment of what constitutes reasonable accommodation.

128 A factor relied on to justify the continuity of a discriminatory barrier in almost every case is the cost of reducing or eliminating it to accommodate the needs of the person seeking access. This is a legitimate factor to consider: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.), at pp. 520-21. But, as this Court admonished in *Grismer*, at para. 41, tribunals "must be wary of putting too low a value on accommodating the disabled".

129 Section 5(*a*) of the *Canadian Human Rights Act* states that "[i]t is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public to deny, or to deny access to, any such good, service, facility or accommodation". Section 15(*g*) of the *Canadian Human Rights Act* provides, however, that it is not a discriminatory practice to deny access to a good, service, facility or accommodation customarily available to the general public if "there is *bona fide* justification for that denial or differentiation". In *Central Alberta Dairy Pool*, at p. 518, this Court unanimously agreed that "[i]f a reasonable alternative exists to burdening members of a group with any given rule, that rule will not be *bona fide*". *Grismer* further elaborated that establishing a *bona fide* justification for a *prima facie* violation of human rights legislation requires a respondent to show that "the employer or service provider has made every possible accommodation short of undue hardship" (para. 21). For the Agency to find that an obstacle denying access to transportation services is justified, therefore, no reasonable alternative to burdening persons with disabilities must exist.

130 The jurisprudence of this Court reveals that undue hardship can be established where a standard or barrier "is reasonably necessary" insofar as there is a "sufficient risk" that a legitimate objective like safety would be threatened enough to warrant the maintenance of the discriminatory standard (*Ontario (Human Rights Commission) v. Etobicoke (Borough)*,

[1982] 1 S.C.R. 202 (S.C.C.)); where "such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer" have been taken (*O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.), at p. 555); where no reasonable alternatives are available (*Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.)); where only "reasonable limits" are imposed on the exercise of a right (*Eldridge*, at para. 79); and, more recently, where an employer or service provider shows "that it could not have done anything else reasonable or practical to avoid negative impacts on the individual" (*Meiorin*, at para. 38). The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain.

131 Since the Governor in Council has not prescribed standards for assessing undue hardship as authorized by s. 15(3) of the *Canadian Human Rights Act*, assessing whether the estimated cost of remedying a discriminatory physical barrier will cause undue hardship falls to be determined on the facts of each case and the guiding principles that emerge from the jurisprudence. A service provider's refusal to spend a small proportion of the total funds available to it in order to remedy a barrier to access will tend to undermine a claim of undue hardship (*Eldridge*, at para. 87). The size of a service provider's enterprise and the economic conditions confronting it are relevant (*Chambly*, at p. 546). Substantial interference with a service provider's business enterprise may constitute undue hardship, but some interference is an acceptable price to be paid for the realization of human rights (*Central Okanagan School District No. 23*, at p. 984). A service provider's capacity to shift and recover costs throughout its operation will lessen the likelihood that undue hardship will be established: *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C. Human Rights Council).

132 Other relevant factors include the impact and availability of external funding, including tax deductions (*Brock (Litigation Guardian of) v. Tarrant Film Factory Ltd.* (2000), 37 C.H.R.R. D/305 (Ont. Bd. of Inquiry)); the likelihood that bearing the net cost would threaten the survival of the enterprise or alter its essential character (*Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. of Inquiry)); and whether new barriers were erected when affordable, accessibility-enhancing alternatives were available (*Maine (Human Rights Commission) v. South Portland (City)*, 508 A.2d 948 (U.S. Me. Sup. Jud. Ct. 1986), at pp. 956 -57).

133 It bears repeating that "[i]t is important to remember that the duty to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. Those words do not constitute independent criteria. Rather, they are alternate methods of expressing the same concept": *Chambly*, at para. 33, citing *Central Okanagan School District No. 23*, at p. 984. The factors set out in s. 5 of the *Canada Transportation Act* flow out of the very balancing inherent in a "reasonable accommodation" analysis. Reconciling accessibility for persons with disabilities with cost, economic viability, safety, and the quality of service to all passengers (some of the factors set out in s. 5 of the Act) reflects the reality that the balancing is taking place in a transportation context which, it need hardly be said, is unique.

134 Setting out the factors is Parliament's way of acknowledging that the considerations for weighing the reasonableness of a proposed accommodation vary with the context. It is an endorsement of, not a rebuke to the primacy of human rights principles, principles which anticipate, as this Court said in *Chambly* and *Meiorin*, that flexibility and common sense will not be disregarded.

135 Each of the factors delineated in s. 5 of the Act is compatible with those that apply under human rights principles. Any proposed accommodation that would unreasonably interfere with the realization of Parliament's objectives as declared in s. 5 of the Act may constitute undue hardship.

136 Section 5 of the *Canada Transportation Act*, together with s. 172(1), constitute a legislative direction to the Agency to determine if there is an "undue obstacle" to the mobility of persons with disabilities. Section 5(*g*)(ii) of the Act states that it is essential that "each carrier or mode of transportation, *as far as is practicable*, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute an *undue obstacle* to the mobility of persons, including persons with disabilities". The Agency's authority to identify and remedy "undue obstacles" to the mobility of persons with disabilities requires that it implement the principle that persons with disabilities are entitled to the elimination of "undue" or "unreasonable" barriers, namely those barriers that cannot be justified under human rights principles.

137 The qualifier, "as far as is practicable", is the statutory acknowledgment of the "undue hardship" standard in the transportation context. The fact that the language is different does not make it a higher or lower threshold than what was

stipulated in *Meiorin*: *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, [2000] 1 S.C.R. 665, 2000 SCC 27 (S.C.C.), at para. 46. The same evaluative balancing is required in assessing how the duty to accommodate will be implemented.

138 That is precisely why Parliament charged the Agency with the public responsibility for assessing barriers, not the Canadian Human Rights Commission. The Agency uniquely has the specialized expertise to balance the requirements of those with disabilities with the practical realities — financial, structural and logistic — of a federal transportation system.

139 What is "practicable" within the meaning of s. 5(*g*)(ii) of the *Canada Transportation Act* is based on the evidence as to whether the accommodation of the disability results in an unreasonable burden on the party responsible for the barrier. That is the same analysis required to assess whether there is undue hardship under the *Canadian Human Rights Act* or whether, under the *Canada Transportation Act*, it would be unreasonable (or undue) to require that an obstacle be removed or rectified. No difference in approach is justified by the different context, particularly since Parliament directed the Agency in s. 171 to foster complementary policies and practices with those of the Canadian Human Rights Commission. The "reasonable accommodation" analysis in the transportation context is unique only insofar as the policy objectives articulated in s. 5 of the *Canada Transportation Act* are factors which inform a determination of the possible grounds on which undue hardship may be established. These factors inform, not dilute, the duty to accommodate to the point of undue hardship.

140 The Federal Court of Appeal's articulation of the Agency's mandate in *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), [2001] 2 F.C. 25 (Fed. C.A.), at paras. 34-37, is consistent with this approach. While no specific definition of "undue obstacle" was promulgated, an analytical approach to identifying an "undue obstacle" under the *Canada Transportation Act* was proposed with reference to the judicial interpretation of the term "undue" in other legislative contexts, including human rights enactments. The court determined that "undueness" was a relative concept, and, relying on Supreme Court jurisprudence, recognized that "undue" generally means disproportionate, improper, inordinate, excessive or oppressive, and expresses a notion of seriousness or significance.

141 The court in *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* explicitly adverted to established authority on "undue hardship" in the human rights context in discussing the need to balance the interests of various parties in an "undue obstacle analysis". Citing *Central Alberta Dairy Pool*, at p. 521, Sexton J.A. (Linden and Evans JJ.A. concurring) said: "The Supreme Court has also recognized that the term [undue] implies a requirement to balance the interests of the various parties" (para. 37). The court later determined that "the Agency was required to undertake a balancing of interests such that the satisfaction of one interest does not create *disproportionate hardship* affecting the other interest" (para. 39 (emphasis added)).

142 In the present case, the onus was on VIA to establish that the obstacles to the mobility of persons with disabilities created by its purchase of the Renaissance cars were not "undue" by persuading the Agency that it could not accommodate persons with disabilities without experiencing undue hardship. The Agency's decision makes clear that this onus was not met.

143 In finding the Agency's decision unreasonable, Sexton J.A. noted that "the system cannot afford to have every rail car equipped with every type of mechanism to be able to address every type of disability" (para. 55). That, however, is not what the Agency decided. Rather, the Agency's decision would make one coach car in each day trip accessible to persons using personal wheelchairs through the modification of 13 economy coach cars, and one sleeper unit in each overnight trip personal wheelchair accessible through the modification of 17 service cars.

144 I see nothing unreasonable in the Agency's analysis or decision in this case. In particular, I see nothing inappropriate about the factors it did - and did not - rely on, such as the Rail Code, the use of personal wheelchairs, the network, and cost, either in determining whether the obstacles were undue, or in determining what corrective measures were appropriate. Each factor will be examined in turn.

*a) The Rail Code*

145 The Agency accepted the 1998 Rail Code as a factor to consider. VIA challenged this reliance since the Rail Code was based on voluntary compliance.

 

146 The Rail Code, as previously stated, was in fact the result of a "voluntary, consensus-building process involving extensive consultation with the transportation industry, the community of persons with disabilities and other government bodies such as the Canadian Human Rights Commission ... and the Department of Transport". (Preliminary Decision, at p. 29). Developed in consultation with an expert human rights agency, the Rail Code's standards represent objectives that rail carriers, including VIA, publicly accepted. Its purpose was to function as self-imposed regulation, establishing minimum standards all rail carriers agreed to meet.

147 It was, accordingly, a proper factor in the Agency's analysis, especially since the anticipation of compliance is reflected in the language of the Rail Code itself, which provides, in s. 1.1.1: "It is expected that this [passenger rail car accessibility] Part of the Code of Practice will be followed by VIA Rail Canada Inc." The fact that the Rail Code was voluntarily agreed to and not government-imposed reinforces, rather than detracts from its relevance as a factor for assessing VIA's "undue hardship" arguments. VIA knew it had agreed to, and was expected to comply with, the Rail Code.

148 The Rail Code provides that until every grouping of passenger rail cars connected together to form a train (a "train consist") has at least one independently accessible seating/sleeping and washroom facility, any newly manufactured car, or car undergoing a major refurbishment, should provide for such accommodation. Because existing equipment can be more difficult and expensive to retrofit, the Rail Code permits some flexibility with respect to the time period during which rail carriers are expected to achieve accessibility.

149 The Agency concluded that the Renaissance cars were not existing equipment for purposes of the Rail Code, but fell instead in the category of newly manufactured cars or cars undergoing a major refurbishment within the meaning of s. 1.1.1 of the Rail Code. Seventy-five of the 139 Renaissance cars arrived in Canada as unused parts, or as partially assembled cars. VIA intended to assemble them as the next generation of rail cars for 20 to 25 years' use. It was spending at least $100 million on structural and other changes to the Renaissance cars, which had themselves cost only $29.8 million.

150 VIA's argument that the provisions of the Rail Code now represent economically and structurally unfeasible standards is an *ex post facto* argument the Agency was entitled to reject, based on the paucity of supporting evidence and cooperation it got from VIA. In the context of VIA's decision to purchase new rail cars, the Agency concluded, properly in my view, that the Rail Code put "VIA on notice of the kinds of obstacles that it should reasonably have been expected to remove when it considered purchasing new rolling stock" (Preliminary Decision, at p. 22).

*b) The Use of Personal Wheelchairs*

151 Based on the Canadian Standards Association (CSA), CAN/CSA-B651-95, *Barrier-Free Design Standard*, which sets out minimum standards for making buildings and other facilities accessible to persons with disabilities, many of which are incorporated into the Rail Code, the accessibility paradigm is access by personal wheelchair. This standard was adopted in the Rail Code, which provides that "any newly manufactured coach car or sleeping car specified by these sections to be wheelchair-accessible should be designed to be accessible to a person in a personal wheelchair" (s. 1.1.1). Transport Canada too has incorporated the CSA *Barrier-Free Design Standard* definition of a personal wheelchair into its *Passenger Car Safety Rules*, which prescribe mandatory safety standards.

152 As purchased, none of the Renaissance cars, unlike the retrofitted VIA 1 cars in the existing fleet, satisfied these standards.

153 The Agency highlighted independent access as a critical component of the concept of rail car accessibility. Personal wheelchair users are physically and psychologically more independent when they are able to remain in personal wheelchairs designed to meet their specific physical needs. In view of the importance of independent access, the Agency concluded that accommodation by supplying a narrow wheelchair on the train (on-board wheelchair), which requires that passengers be assisted into it, is not an acceptable substitute for a person's own wheelchair.

154 The Agency noted that the use of personal wheelchairs minimizes the effects of disabilities in ways that "on-board" wheelchairs cannot, and eliminates both the physical risks and the humiliation that can accompany transfers from a personal wheelchair into alternative seating accommodations or the receipt of assistance in washroom use. In its words, being forced

to rely on others for assistance gives rise to "human error, inconvenience, delays, affronts to human dignity and pride, cost, uncertainty, and no sense of confidence or security in one's ability to move through the network" (Preliminary Decision, at p. 19).

155 In the Agency's view, "on-board" wheelchair use was particularly inadequate in those parts of the train VIA had specifically intended to meet the needs of persons with disabilities, like the "accessible suite" in the service cars. Based on promoting the principle of independence, the Agency concluded that "where there are features and amenities specifically designed to meet the needs of persons with disabilities who wish to remain in their own wheelchairs, it is essential that they provide adequate dimensions and appropriate designs so as to not lessen the level of independence" (Preliminary Decision, at p. 20). According to the Rail Code, a personal wheelchair means a passenger-owned wheelchair that requires a minimum clear floor area of 750 mm by 1200 mm to accommodate the wheelchair and its occupant and a minimum clear turning space of 1500 mm in diameter (s. 1.1.1).

156 CCD had invited the Agency to adopt a different standard that better reflects the larger size of modern wheelchairs. The Agency declined to do so. While acknowledging that the CSA definition of a personal wheelchair was based on data from the 1970s when wheelchairs were smaller than those in use today, the Agency chose instead to accept the well-established CSA personal wheelchair standard.

157 The standard of personal wheelchair use is not unique to Canada. Like the Rail Code, American, British and Australian standards emphasize the importance of ensuring that persons with disabilities can access rail facilities and services in their personal wheelchairs. Legislation in each country requires that at least one car in every passenger train be personal wheelchair accessible.

158 British standards direct rail service providers to provide one personal wheelchair-sized space in each class of passenger accommodation. In Part V of the *Disability Discrimination Act 1995* (U.K.), 1995, c. 50, s. 46 authorizes the Secretary of State to enact rail vehicle accessibility regulations ensuring accessibility for persons who must remain in their wheelchairs. These mandatory British standards under the *Rail Vehicle Accessibility Regulations 1998*, SI 1998/2456, are based on a reference wheelchair only slightly smaller than the "personal wheelchair" standard under the CSA *Barrier-Free Design Standard*.

159 In the United States, the *Americans with Disabilities Act*, 42 U.S.C. §12162 (2000), provides that "it shall be considered discrimination ... for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation ... unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed ... in regulations". For American rail cars, accessibility is defined by technical standards provided in the *Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles*, 36 C.F.R. Part 1192 (1999), adopted by the Department of Transportation, many of which are substantially the same as the CSA *Barrier-Free Design Standard* for personal wheelchairs.

160 In Australia, the *Disability Standards for Accessible Public Transport 2002* ("*Disability Standards*") seek to remove discrimination on the basis of disability from public transport services over a 30-year period. To this end, the *Disability Standards* impose national requirements and mandatory performance outcomes governing such matters as the replacement or upgrading of infrastructure and capital investments. Consistent with the goal of ensuring that passengers using mobility aids can gain independent access to transportation equipment, the minimum allocated space for a single wheelchair is in accordance with what is required to accommodate a personal wheelchair as defined by Canadian standards. However, the *Disability Standards* note that the source data for this minimum standard may be dated, and warn service providers to be prepared for a future revision of these standards which would increase the dimensions to accommodate larger wheelchairs.

161 Personal wheelchair-based access as the appropriate accessibility paradigm is also consistent with this Court's human rights jurisprudence. In *Grismer*, this Court held at para. 19, that "[e]mployers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (emphasis in original). Standards, in other words, must be as inclusive as possible: *Grismer*, at para. 22.

162 The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities

as independently and seamlessly as possible. Independent access to the same comfort, dignity, safety and security as those without physical limitations, is a fundamental human right for persons who use wheelchairs. This is the goal of the duty to accommodate: to render those services and facilities to which the public has access equally accessible to people with and without physical limitations.

163 VIA is required to accommodate this right as far as is practicable not only because Canadian law requires it to do so, but because it itself has committed publicly to doing so by agreeing to the Rail Code, a set of standards devised by it and the Agency in consultation with the Canadian Human Rights Commission. And the way VIA had agreed to do so was through access based on personal wheelchair use when it purchased new cars or undertook a major refurbishment of existing cars. The operating paradigm it accepted is the Canadian and internationally accepted norm, not the exception.

164 VIA cannot now argue that it was entitled to resile from these norms because it found a better bargain for its able-bodied customers. Neither the Rail Code, the *Canada Transportation Act*, nor any human rights principle recognizes that a unique opportunity to acquire inaccessible cars at a comparatively low purchase price may be a legitimate justification for sustained inaccessibility. In the expansion and upgrading of its fleet, VIA was not entitled to ignore its legal obligations and public commitments. The situation it now finds itself in was preventable in a myriad of ways.

165 In view of the widespread domestic and international acceptance of personal wheelchair-based accessibility standards and, in particular, VIA's own Rail Code commitments, it was not unreasonable for the Agency to rely on the personal wheelchair as a guiding accessibility paradigm.

*c) The Network Defence*

166 VIA's "network defence" can be broken down into two elements. First, VIA submitted that special, as-needed accommodations, such as individual meal delivery to the service cars, assistance from trained staff with transfers into on-board wheelchairs, and staff assistance for using the washroom facilities, were adequate alternatives to requiring retrofitting that would permit passengers using personal wheelchairs to access and perform these services themselves. Second, VIA was of the view that the "greater flexibility" in travel options the Renaissance cars provided, in addition to the continuing option for the time-being of using VIA's pre-Renaissance fleet, was a complete answer to CCD's concerns.

167 Although VIA made clear that its existing and more accessible fleet would be phased out and replaced with Renaissance cars on key routes between Montreal and Halifax and Montreal and Gaspé, VIA was of the view that any obstacles in the Renaissance fleet could be diminished if persons with disabilities used its older but more accessible fleet. The Agency interpreted VIA's argument to be that, unlike persons without disabilities, those with disabilities "cannot expect to go on every train, at every time in every way" (Preliminary Decision, at pp. 36-37).

168 Sexton J.A. found that the Agency's failure to properly consider VIA's network as a whole was patently unreasonable. In his view, the Agency erred by not considering the alternative actions VIA could take to ameliorate the obstacles in the Renaissance cars, like providing alternative transportation or different trains at different times.

169 The record, however, reveals that the Agency did in fact consider VIA's network to the extent that VIA was willing to provide any information about it, but rejected it, finding that "there is no evidence on the record that supports VIA's [position] that its existing fleet or its network, generally, will address obstacles that may be found to exist in the Renaissance Cars" (Preliminary Decision, at p. 38). For example, the Agency was alive to the possibility of remedying obstacles through network-based accommodations that would not involve physical changes to the Renaissance cars. Early in the proceedings, on March 29, 2001, the Agency asked VIA "whether it will be possible for the Nightstock [Renaissance] cars to be coupled with its existing fleet". VIA replied on April 2, 2001, stating: "the Nightstock cars will not be coupled with the existing fleet, save locomotives". The Agency also had information about VIA's reservation policy, its finalized fleet deployment plans, and its service standards.

170 But when it ordered VIA to provide a list of the network services it proposed would alleviate any obstacles on the Renaissance trains, VIA replied: "This case is a review of the physical dimensions *of the Renaissance cars* and whether they represent an undue obstacle to the transportation of persons with disabilities" (emphasis added).

171 VIA added the following clarification: "There is no change in the services which VIA Rail has committed to provide persons with disabilities". VIA's network defence was that it would provide the same services — no less and no more — that it already provided to passengers with disabilities. If persons with disabilities did not like the differently accessible features of the Renaissance fleet, they could continue to ride the pre-Renaissance fleet.

172 VIA described its network as including "the reservation system, the alternative transportation policy, ground services, special handling services, train accommodation, employee training and special service requests".

173 There is very little evidence in the record about the content of these network features and how they actually accommodate passengers with disabilities. What is clear, however, is that persons in a wheelchair who wish to purchase a ticket on a VIA train cannot be assured that the train they want to take will be able to accommodate them.

174 VIA asserted before the Agency that it "has a policy for alternative transportation that is sensitive to passengers with disabilities and a history of satisfying those needs", but provided no evidence in support of this assertion. In oral argument before this Court, VIA explained that in the past it has sent passengers to their destinations by taxi when they could not be accommodated on its trains, and that passengers who call in advance may be offered assistance.

175 This *ad hoc* provision of taxis or a network of rail services with only some accessible routes is not, it seems to me, adequately responsive to the goals of s. 5 of the *Canada Transportation Act*. Section 5 provides that the transportation services under federal legislative authority are, themselves, to be accessible. It is the rail service itself that is to be accessible, not alternative transportation services such as taxis. Persons with disabilities are entitled to ride with other passengers, not consigned to separate facilities.

176 Likewise, the fact that there are accessible trains travelling along some routes does not justify inaccessible trains on others. It is the global network of rail services that should be accessible. The fact that accessibility is limited to isolated aspects of the global network — like VIA's alternative transportation policy or the suggestion that persons with disabilities can continue to ride the existing fleet for the time-being — does not satisfy Parliament's continuing goal of ensuring accessible transportation services.

177 Any ambiguity as to whether "accessible" in the English version of s. 5 of the *Canada Transportation Act* modifies the specific and plural "services" offered or the single global "network" of services provided is resolved by the use of the plural "*accessibles*" in the French version. The French text states:

> ...la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, accessibles aux personnes ayant une déficience...

178 This confirms the common sense interpretation: namely that Parliament intended that all transportation services offered to the public be accessible, and not merely pieces of the network. As David Lepofsky notes, "[a] passenger who buys a ticket to take a VIA train does not ride the entire VIA network of all trains on all routes. He or she takes a specific train on a specific route at a specific time. To a passenger with a disability who needs to travel from Montreal to Toronto, it is immaterial whether VIA runs a fully accessible train from Calgary to Vancouver": "Federal Court of Appeal De-Rails Equality Rights for Persons with Disabilities: *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* and the Important Duty Not to Create New Barriers to Accessibility" (2005-2006), 18 *N.J.C.L.* 169, at p. 188.

179 The Agency found that VIA's network defence, based on what was available on its existing fleet, ran counter to the future-centred provisions of the Rail Code, which were oriented toward the incremental accommodation of personal wheelchairs in the federal rail network. In a 1998 case based on an *Application by Yvonne Gaudet, on behalf of Marcella Arsenault* (CTA Decision No. 641-AT-R-1998), it had found that the lack of personal wheelchair accessible sleeper units in VIA's existing fleet did not constitute an undue obstacle because of the financial and other implications of making the structural changes required. This acknowledgment of the cost and difficulties involved in structural changes to the *existing* fleet was based, in part, on an understanding that VIA had, through the Rail Code, among other methods, publicly committed itself to improving the accessibility of its *future* fleet of passenger rail cars.

180 But, the Agency concluded, rather than increasingly accommodating this goal in purchasing the Renaissance cars,

VIA knowingly perpetuated the very inaccessibility problems that encumbered its existing fleet. The Agency therefore concluded that VIA could not rely on its existing equipment as an alternative accommodation.

181 VIA's proposed defence is also inconsistent with this Court's human rights jurisprudence. It ignores the fact that a significant cause of handicap is the nature of the environment in which a person with disabilities is required to function. Lepofsky has noted that "[o]ne of the greatest obstacles confronting disabled Canadians is the fact that virtually all major public and private institutions in Canadian society were originally designed on the implicit premise that they are intended to serve able-bodied persons, not the 10 to 15 percent of the public who have disabilities": "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L.J.* 1, at p. 6. It is, after all, the "combined effect of an individual's impairment or disability and the environment constructed by society that determines whether such an individual experiences a handicap": I. B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?" (1997-98), 29 *Ottawa L. Rev.* 153, at p. 164.

182 The network approach preserves the paramountcy of this paradigm, contrary to this Court's direction that standards be as inclusive as possible: *Grismer*, at para. 22.

183 Under the *Canadian Human Rights Act*, VIA is required to take positive steps to implement inclusive standards and accommodate passengers with disabilities to the point of undue hardship. VIA's network defence would have it take no further steps to accommodate passengers with disabilities beyond its existing fleet. But because the Renaissance cars would "be the only cars in operation on some of VIA's routes in the very near future and they will be a significant part of VIA's network for a considerable period of time" (Preliminary Decision, at p. 39), passengers with disabilities would have to choose between not travelling by train at all or selecting from two generations of differently inaccessible rail cars with VIA staff assisting them.

184 The American equivalent of the Agency, the Architectural and Transportation Barriers Compliance Board has explicitly rejected the relevance of a service-based "network defence" where barriers to accessible transportation exist. In developing its regulatory guidelines, the Board was asked to "permit operational procedures to substitute for compliance with the technical provisions" of the *Americans with Disabilities Act* (*Accessibility Guidelines for Transportation Vehicles: Final Guidelines*, 56 Fed. Reg. 45530 (September 6, 1991), at p. 45532). The Board rejected this approach, stating:

> ...the Board's statutory mandate is to ensure accessibility of the built environment, including instances in which operational procedures might fail. Thus, for example, the Board cannot assume that the strength, agility and attention of a driver will be sufficient to prevent a heavy wheelchair from rolling off a lift. Neither is it appropriate, as one transit operator suggested, to assume that fellow passengers will have the strength or skill to assist persons with disabilities to board vehicles. It is just as inappropriate to expect other passengers to lift a wheelchair user into a vehicle as it is to assume others should lift a wheelchair over a curb or carry someone up a flight of stairs to enter a building.
> (Fed. Reg., at p. 45532)

185 Moreover, as previously noted, in the United States, Britain and Australia, legislative instruments require, as does the Rail Code, that at least one car in every train that leaves a railway station must be accessible to persons using personal wheelchairs. Each of these jurisdictions also requires that all *new* rail equipment satisfy minimum standards designed to accommodate personal wheelchairs. VIA's network defence is conceptually antithetical to these minimum standards of accommodation.

186 The twin goals of preventing and remedying discrimination recognized in *Canadian National Railway v. Canada (Human Rights Commission)* cannot be accomplished if the creation of new, exclusionary barriers can be defended on the basis that they are no more discriminatory than what they are replacing. This is an approach that serves to perpetuate and exacerbate the historic disadvantage endured by persons with disabilities. Permitting VIA to point to its existing cars and special service-based accommodations as a defence overlooks the fact, that while human rights principles include an acknowledgment that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable.

187 *Meiorin* counsels tribunals to consider a respondent's efforts to investigate alternative, less discriminatory approaches demonstrating that no other reasonable or practical means of avoiding negative impacts on a claimant was possible in the

 

circumstances. VIA did not appear, from the evidence, to have seriously investigated the possibility of reasonably accommodating the use of personal wheelchairs or, for that matter, any other issue related to providing access for persons with disabilities.

188 When it purchased the Renaissance cars, no "plan document" or cost estimates associated with improving the accessibility of the Renaissance cars existed, undermining VIA's submission that it discharged its obligations to investigate and consider alternative means of accommodating persons with disabilities when it decided to purchase the Renaissance cars. Though VIA initially expected "commissioning" costs associated with the assembly and renovation of the cars in the neighbourhood of $100 million, no portion of this amount appears to have been dedicated to accessibility enhancements, since it was VIA's position that the Renaissance cars were already accessible.

189 VIA did not satisfy the Agency that the barriers in question could not reasonably be remedied. The form of accommodation it proposed, instead, was leaving a person with disabilities entirely dependent on others. By endorsing network accommodation on the basis of VIA's existing fleet and service standards, the majority in the Federal Court of Appeal was, with respect, insufficiently attentive to the *Meiorin* principles.

*d) Cost*

190 The Agency, in my view, appropriately considered the cost of remedying an obstacle when determining whether it was "undue", contrary to the majority's assessment of the evidence. Sexton J.A., for the majority, concluded that the Agency could not have properly determined which obstacles in the Renaissance cars were undue without knowing how much it would cost to fix them. Moreover, it was patently unreasonable, the court unanimously found, for the Agency to conclude that there was no compelling evidence of economic impediments to remedying the obstacles in the Renaissance cars before receiving the cost estimates it had asked VIA to submit.

191 These conclusions are, with respect, problematic. The record reveals that the Agency did not identify any obstacles as "undue" or order corrective action to be taken without considering the cost of remedial measures and actively attempting to secure VIA's participation in pinpointing those measures.

192 It is useful to set out the specific remedial steps the Agency ordered VIA to take in its final decision dated October 29, 2003; how the Agency had put VIA on notice that it was considering these remedial measures; and what cost-related information it sought and received from VIA before ordering them. The Agency's final decision states:

> ...the Agency hereby directs VIA to make the necessary modifications to the Renaissance passenger rail cars:
>
> 1. In the "accessible suite", to ensure that:
>
> (a) the door from the vestibule in the service car into the sleeper unit in the "accessible suite" is widened to at least 81 cm [31.89"]; and,
>
> (b) there is a wheelchair tie-down in the sleeper unit to allow a person with a disability to retain a Personal Wheelchair.
>
> 2. In the economy coach cars, through the implementation of Option 3, with the appropriate modifications, to ensure that:
>
> (a) there is a washroom that can accommodate persons using Personal Wheelchairs proximate to the wheelchair tie-down;
>
> (b) there is sufficient clear floor space in the wheelchair tie-down area to accommodate a person in a Personal Wheelchair and a service animal; and the tie-down area, in conjunction with the area that is adjacent to it, provides adequate manoeuvring and turning space to allow a person using a Personal Wheelchair to manoeuver into and out of the tie-down area;
>
> (c) there is a seat for an attendant, which faces the wheelchair tie-down; and
>
> (d) the width of the bulkhead door opening located behind the wheelchair tie-down and the width of the aisle between the "future valet/storage" are at least 81 cm [31.89"].
>
> 3. In every economy coach car, to ensure that there is one row of double seats that is lowered to floor level and that provides sufficient space for persons who travel with service animals;
>
> 4. In every coach car, to ensure that, in addition to the four moveable aisle armrests that are presently in the cars, there are at least two additional moveable aisle armrests on the double-seat side;

> 5. With respect to the exterior stairs to the cars, to ensure that the stair risers on the Phase I Renaissance Cars are closed; and,
> 6. With respect to overnight train consists where a sleeper car service is offered, to ensure that a service car is marshalled in such a way that the "accessible suite" is adjacent to the wheelchair tie-down end of the economy coach car that contains the wheelchair-accessible washroom, and this suite is offered as a sleeping accommodation. [pp. 70-71]

*(i) Corrective Measure 1(a): Widening Doors to Sleeper Unit*

193 On January 8, 2002, the Agency asked VIA to provide an estimate of the cost of widening the doors of the accessible suite to 81 cm (31.89 inches) after VIA failed to provide this information in response to a request dated November 15, 2001 from the CCD.

194 On January 14, 2002, VIA replied with a letter of the same date from Bombardier Inc. indicating that the preparation of an estimate would take 45 days and cost at least $100,000. VIA's covering letter shows it believed that the Agency was considering having both the interior doors into the "accessible suite" and the exterior doors into the service cars widened when it had this estimate of an estimate prepared. The Agency's final decision, and corrective measure 1(a), concerned only the interior door into the sleeper unit from the entry vestibule. In its correspondence with the Agency, VIA said that "[i]f VIA is required to prepare such an estimate, the Agency should direct that that be done". Again on March 1, 2002, the Agency asked VIA for the estimated cost of widening the doors in the "accessible suite".

195 Eventually, in its Preliminary Decision of March 27, 2003, the Agency formally ordered VIA to provide this estimate. A 60-day deadline for an estimate of the cost of widening the interior doors was set by the Agency in its Preliminary Decision. VIA was given a further 60 days after the Agency reissued its Preliminary Decision on June 9, 2003.

196 VIA failed to comply with either deadline notwithstanding that it had previously indicated in its January 14, 2002 letter to the Agency that it could provide an estimate addressing even the more complicated question of exterior doors within 45 days. Eventually, the Agency found "that no compelling evidence was presented by VIA indicating that, from a structural or economic perspective, the doors to the sleeper unit and the washroom in the 'accessible suite' cannot be widened to at least 81 cm" (Preliminary Decision, at p. 108).

197 VIA had, in any event, already unilaterally increased the width from 72 and 73 cm respectively to 75 cm without the Agency's knowledge. This was 6 cm shorter than the Rail Code requirement of 81cm. If VIA had structural and economic information to justify this deviation from the Rail Code, none was provided to the Agency. With VIA's own acknowledgment that a more complicated estimate would take 45 days to prepare in mind and, given the cost knowledge it would have had from widening the doors already, there was no basis for VIA failing to provide the cost-related evidence to the Agency within any of the deadlines imposed.

*(ii) Correction Measure 1(b): Installing a Tie-down in Sleeper Unit*

198 The Agency's final decision required VIA to install a wheelchair tie-down in the 'accessible suite'. This is consistent with what VIA had originally said it intended to do when, early in the proceedings, it advised the Agency that the sleeper units in the service cars would have a wheelchair tie-down installed. Correspondence dated January 3, 2001 from VIA's general counsel states that "[t]he service car has special facilities, including sleeping accommodation for two, an accessible washroom, wide door access and *will have a wheelchair tie-down*" (emphasis added).

199 The Agency's Preliminary Decision in March 2003 stated: "the Agency is of the opinion that it appears that there is no structural impediment to installing a wheelchair tie-down in the 'accessible suite' and that the relative cost to install one is likely minimal" (p. 110). Clearly, VIA had received adequate notice of the specific remedial measure the Agency was considering to prepare a cost estimate that would rebut the Agency's preliminary conclusion that the cost was likely to be "minimal".

200 In its final decision, the Agency noted that "VIA, by its own submission indicated that it is feasible to install a tie-down in the 'accessible suite' but decided not to do so in order to avoid any isolation of persons with disabilities" (p. 30).

The Agency went on to note that despite being specifically asked to provide feasibility and economic information about the installation of a wheelchair tie-down in the "accessible suite", VIA failed to provide any. VIA had already unilaterally added a tie-down to economy coach cars by this stage in the proceedings, so it would have had some information about their cost. Moreover, VIA had originally planned to add a tie-down to the 'accessible suite'. It could, accordingly, have provided any cost estimates it had previously prepared in support of these plans, if they existed. VIA failed to provide any of the cost information it had in its possession based on work it had actually completed or originally planned.

*(iii) Corrective Measure 2: Implementing Option 3*

201 The changes to the economy coach cars were the most significant ones VIA was ordered to make. In the Agency's decisions of June 9 and July 9, 2003, VIA had been put on notice that the Agency was considering ordering the implementation of Option 3, one of the redesign options VIA created to respond to Transport Canada's concern that the coach car washrooms were located in the unsafe "crumple zone" of the cars. It was given several opportunities to "show cause" why this Option could not be implemented. VIA ultimately submitted one paragraph of text with vague cost-related assertions.

202 Option 3, as proposed by VIA to Transport Canada, would alter the two washrooms located at the wheelchair tie-down end of the economy coach cars. Space from the washroom on the single-seat side of the cars would be used for an expanded wheelchair tie-down space, relocated from the double-seat side of the cars to the single-seat side. On the double-seat side, the space occupied by the inaccessible wheelchair tie-down would be used to enlarge and reconfigure the existing washroom located directly behind. While Transport Canada's concerns were unrelated to the cars' accessibility, the Agency was of the view that Option 3 could be implemented in 13 of the 33 economy coach cars in a way that would satisfy key Rail Code accessibility standards. It was the Agency's view that these changes, which it noted VIA had indicated to Transport Canada and to the Agency were structurally feasible, could concurrently address Transport Canada's safety concerns, the inaccessibility of the current wheelchair tie-down, and the absence of a wheelchair accessible washroom in close proximity to the tie-down space.

203 While VIA had not provided the dimensions associated with the tie-down space contemplated in Option 3, the Agency found that it had sufficient evidence to determine that it would, or could, readily be made personal wheelchair accessible. In the Agency's view, Option 3 would have to be modified to ensure that there was sufficient space for passengers using wheelchairs to easily manoeuver into and out of the tie-down area, which could be achieved by removing either or both of the existing bulkhead wall and the storage area VIA planned to create. The Agency was also of the opinion that because a removable seat had been installed in the tie-down mechanisms located in the VIA 1 Renaissance cars, it was equally feasible to install a removable seat in front of the Option 3 tie-down area to accommodate an attendant. The Agency planned to work with VIA to adjust Option 3 accordingly, noting that it would conduct "an examination of the general arrangement on how VIA intends to implement the corrective measures required by this Decision, which VIA is required to file with the Agency for its review and approval" (Final Decision, at p. 37).

204 Because it was less expensive, VIA preferred Option 1, under which VIA would decommission the two washrooms near the wheelchair tie-down space and replace them with storage space. The washroom at the other end of the car would be put into service, leaving no washroom at the end of the car where the wheelchair tie-down was located.

205 The Agency had made clear in its Preliminary Decision that it was only necessary to make 13 economy coach cars personal wheelchair accessible to satisfy the Rail Code (i.e. one accessible economy coach car per daytime train). Nonetheless, VIA gave the Agency cost estimates based on implementing Option 3 in all of the 47 coach cars, estimating $100,800 per car, for a total of $4.8 million. It also estimated it would lose $24.2 million in foregone passenger seat revenue over the life of the affected cars.

206 Nor did VIA subtract the costs of Option 1 from its estimate of the costs of Option 3. Because VIA would be required, in any event, to implement one of the redesign options it had prepared to address Transport Canada's safety concerns, the Agency determined that only the additional costs which VIA would bear by being required to address safety issues in a way that improved the accessibility of the Renaissance fleet were relevant. Since Option 1 would cost "at least $2.3 million" (Final Decision, at p. 39), VIA should have subtracted this amount from its estimate of the costs of implementing Option 3.

207 The Rail Code standard of one accessible car per train could be achieved by implementing Option 3 in only 13 of VIA's 33 economy coach cars at a total direct cost of $673,400. The Agency noted that these more accurate cost estimates did not reflect the various stages of completion of the coach cars and so were themselves "necessarily overstated" (Final Decision, at p. 39). The Agency made a finding of fact that "the passenger seat revenue that would be foregone as a result of implementing Option 3 would be relatively insignificant" (Final Decision, at p. 52); and its estimation of the "worst case" scenario for VIA regarding the total cost of implementing Option 3 in all 33 economy coach cars (if VIA chose to implement Option 3 exclusively) was approximately $1.7 million (Final Decision, at p. 39).

208 The Agency was also of the view that VIA's assertion that it would lose $24.2 million in passenger revenue over the 20-year life of the Renaissance cars through the implementation of Option 3 was extremely high. The Agency noted that if VIA planned "to remove up to 47 seats to accommodate passengers' coats and forego the revenues associated with this, it must be prepared to forego the revenues associated with removing up to 33 seats (or 13 seats in the 'best case scenario' ...) in order to implement Option 3" (Final Decision, at p. 53). Based on VIA's own statistics about the very small numbers of passengers who use wheelchairs on its trains, the tie-down space would be occupied less than 0.1 percent of the time. The other 99.9 percent of the time, the removable seat installed over the tie-down space could be used.

209 The Agency reassessed VIA's figures and determined that foregone passenger seat revenue would amount to $16,988 over the 20-year life of 33 economy coach cars.

*(iv) Corrective Measure 3: Space for Service Animals*

210 The Agency ordered VIA to remove a platform to lower one set of double seats in each economy coach car in order to ensure that there is space to accommodate the service animal of a passenger travelling with one. The seats in the Renaissance cars are on a raised platform that is designed to provide storage space for hand luggage. This design leaves no level space to accommodate service animals. In making changes to seats in the course of installing a wheelchair tie-down in coach cars, VIA had altered the supporting seat structure in a way that created space for service animal accommodation in each tie-down area through the installation of a removable seat. However, this seat would not be available to persons with service animals if the wheelchair tie-down was required by a passenger using a wheelchair. It was the Agency's view that a dedicated space for a passenger with a service animal was required.

211 In its Preliminary Decision, the Agency had identified "the removal of the platform from other seats in the coach cars", which would lower a double seat to create space for service animals, as "the obvious solution" to the lack of space for service animals (p. 129). The Agency provided VIA with full particulars respecting this corrective measure in its Preliminary Decision, giving VIA all the information it needed to prepare a cost estimate had VIA been inclined to do so.

212 Corrective measure 3 asks VIA to perform structural work it had already undertaken when adding wheelchair tie-downs in its coach cars. VIA did not provide the Agency with any information about how much the changes in question had cost when it installed the wheelchair tie-down area in the coach cars. If the costs of this work were prohibitive, VIA would have known by the time the Agency's Preliminary Decision was released and could have, had it chosen to do so, provided the Agency with this information.

*(v) Corrective Measure 4: Adding 2 Moveable Armrests in Coach Cars*

213 The Agency ordered VIA to add two adjustable armrests in each coach car. VIA had been advised that the Agency was considering this particular corrective measure through the Agency's Preliminary Decision, in which the Agency stated its view that "VIA should ... make the necessary modifications to provide at least two moveable aisle armrests on the double-seat side in the Renaissance coach cars" (p. 77). The purpose of adjustable armrests was to limit the height passengers transferring into standard coach seating from wheelchairs would have to be lifted, which would facilitate comfortable and safe access to standard seating.

214 When it ordered the addition of two moveable armrests in the Renaissance coach cars, the Agency had an estimated cost of $133,125 from VIA. VIA advised that "[i]t is possible to include moveable arm rests on the double seats" but was concerned to "ensure that the structural integrity of the seat is not compromised" (Final Decision, at p. 59). The estimate of

 

$133,125 in direct costs did not include the cost of servicing the mechanism over time. In the Agency's view, "the direct costs of $133,125 for the installation of two movable aisle armrests in each of the 47 Renaissance coach cars [was] a reasonable cost given the importance of such a feature to many persons with disabilities, and particularly to those persons who use a wheelchair" (Final Decision, at p. 60).

*(vi) Corrective Measure 5: Closing Stair Risers on Twelve Cars*

215 The Agency ordered VIA to "ensure that the stair risers on the Phase I Renaissance Cars are closed" (Final Decision, at p. 71). In its submissions before the Agency, VIA indicated that all of the Renaissance cars, except those first introduced into service (i.e. the Phase I Renaissance cars), would have closed risers. This was necessary because closed stair risers serve as an important orientation tool to persons with visual impairments, ensuring improved safety and security during boarding and deboarding. In its Preliminary Decision, the Agency asked VIA to provide information about the feasibility and costs of closing the stair risers in the remaining 12 cars. Since it had planned or initiated this work for all of the other Renaissance cars, this information must have been available to VIA. However, VIA provided no information in response to the Agency's request. As in the case of corrective measures 1 and 3, if the cost of closing stair risers on 12 was excessive, VIA would have known this by the time the Agency's Preliminary Decision was released and could have provided the Agency with the necessary costing information to support an argument of impracticability.

*(vii) Corrective Measure 6: Marshalling Cars to Ensure Accessibility*

216 On the basis of the evidence before it, the Agency concluded that two changes would be required to address the absence of a wheelchair accessible washroom in the "accessible suite". First, the order of the cars on the Montreal-Toronto train would have to be altered. Second, VIA would have to utilize its reservation policy to ensure that the "accessible suite" was also made available for use as sleeping accommodation for persons using personal wheelchairs. The Agency concluded that "[w]ith these two measures, persons occupying these 'accessible suites' who cannot use the washroom facilities in the suite or who prefer independent access would be able to use the wheelchair-accessible washroom in the adjacent economy coach cars" (Final Decision, at p. 60).

217 There are no obvious or significant costs associated with either of the steps VIA would have to take to implement corrective measure 6. The Agency had declined to find the inaccessible washroom in the "accessible suite" to be an undue obstacle. It was of the view that, while not ideal, passengers occupying the "accessible suite" could use the accessible washroom facilities in the economy cars. This meant that as a corresponding corrective measure, however, VIA had to ensure that its overnight train consists were marshalled in such a way that the "accessible suite" would be adjacent to the wheelchair tie-down end of an economy coach car with a wheelchair accessible washroom.

218 The record accordingly belies VIA's assertions that it could not have provided cost estimates of the remedial measures prior to the Agency's final decision because it supposedly did not know what remedial measures the Agency was contemplating. Each remedial measure with any cost implications had been previously identified by the Agency, and VIA's views on the structural, operational and economic implications of each were repeatedly sought.

219 Moreover, VIA's assertions that, in the absence of the Renaissance opportunity, it could only have afforded 36 new rail cars or that it would have taken at least four years at a cost of over $477 million to develop, design, engineer and build new rail cars, are not evidence of undue hardship in the circumstances. Retrofitting the Renaissance cars was a reasonable, and significantly cheaper, alternative than building new cars. The Agency's reasons make clear that retrofitting some cars in the Renaissance fleet to accommodate persons using personal wheelchairs would cost nowhere near the amounts claimed by VIA.

220 The majority judgment of the Federal Court of Appeal was also critical of the Agency's failure to consider the interests of passengers who are not disabled. Noting the small percentage of passengers with disabilities who utilize VIA's services, the majority was of the opinion that a remedial order which could result in significantly increased fares would unfairly economically disadvantage other members of the public.

221 This carves out from membership in the public those who are disabled. Members of the public who are physically disabled *are* members of the public. This is not a fight between able-bodied and disabled persons to keep fares down by

avoiding the expense of eliminating discrimination. Safety measures can be expensive too, but one would hardly expect to hear that their cost justifies dangerous conditions. In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion.

222 There is, moreover, no evidence in the record indicating that passenger fares are likely to increase as a result of the Agency's decision. But even if they do, VIA's passenger fares already fluctuate with the expense of operating the system. Wages, fuel, maintenance — these are among the variables. The Agency critically assessed the cost estimates VIA provided, examining this information in the context of VIA's budget, corporate plan, performance targets, total revenues, cost-recovery ratio, operational funding surplus, and a $25 million contingency fund including operational liabilities. The Agency concluded that "VIA has substantial funds reserved for future capital projects and for unforeseen events" (Final Decision, at p. 23).

223 The majority also criticized the Agency's failure to weigh the interests of those with disabilities other than those who require the use of a personal wheelchair. In its view, the cost of equipping rail cars to cope with all forms of disability would severely jeopardize the viability of rail services.

224 It has never been the case that all forms of disability are engaged when a particular one is said to raise an issue of discrimination. While there are undoubtedly related conceptual considerations involved, they may nonetheless call for completely different remedial considerations. A "reasonable accommodation", "undue hardship", or "undue obstacle" analysis is, necessarily, defined by who the complainant is, what the application is, what environment is being complained about, what remedial options are required, and what remedial options are reasonably available. Given the nature of the application and the parties before it, the Agency would have acted unreasonably in seeking representations about all conceivable forms of disability. Ironically, the Court of Appeal questioned the breadth of CCD's application as it was.

225 The threshold of "undue hardship" is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.

226 But the issue is not just cost, it is whether the cost constitutes undue hardship. VIA was required to discharge the burden of establishing that accommodating persons with disabilities was an undue hardship for it: *Grismer*, at para. 32. Concrete evidence is required to establish undue hardship: *Hutchinson v. British Columbia (Ministry of Health)* (2004), 49 C.H.R.R. D/348, 2004 BCHRT 58 (B.C. Human Rights Trib.); *Grismer*, at para. 41. As in most cases, this means presenting evidence in the respondent's sole possession. However, as Evans J.A. noted,

> the Agency's problems were compounded by an apparent lack of cooperation during the administrative process on the part of VIA. Any corporation in a regulated industry, including VIA Rail, is entitled to defend vigorously the interests of its shareholders and customers, as well as the public purse, from the imposition of regulatory burdens. Nonetheless, in viewing the limited material before the Agency on the network issue and the question of cost, I find it hard to avoid the conclusion that, if the Agency's analysis was based on incomplete information, VIA was, in part at least, the author of its own misfortune. [para. 103]

Where VIA refuses to provide evidence in its sole possession in support of its undue hardship argument, it cannot be said that any reasonable basis exists for refusing to eliminate an undue obstacle.

227 The Agency's reasons show that it was acutely aware of the issue of the cost of the remedial measures it ordered. Based on the information it had received from VIA, the Agency made findings of fact about how much it would cost to make 13 economy coach cars accessible to personal wheelchairs of a standard size and how much it would cost to install moveable armrests in 47 coach cars. The Agency also found that the cost of installing a "tie-down" space in the "accessible suite" was "likely minimal". VIA failed to provide the Agency with any cost estimates associated with other accessibility renovations despite the fact these were already complete in some cars or underway in others. It was asked at least five times for a cost estimate on how much it would cost to widen the doors to the "accessible suite" starting November 15, 2001. VIA stated that it could prepare one within 45 days, but failed to provide it to the Agency. With the information it had, the Agency

determined that the cost of the remedial measures it ordered would not be prohibitive.

228 The facts, as found by the Agency, did not justify a finding of undue hardship based on financial cost. The relevant costs of remedying the undue obstacles identified would, the Agency concluded, proportionally represent a relatively insignificant sum whether viewed in the context of VIA's entire capital expenditure budget of $401.9 million or the approximately $100 million VIA expected to spend renovating the Renaissance cars. The Agency found that VIA's financial statements "provide no indication of an inability ... to absorb the costs which it asserts would be incurred" (Final Decision, at p. 21). It also found that VIA was experiencing favourable economic conditions, with an operating surplus for the years ending December 31, 2001 and December 31, 2002 and a contingency fund of $25 million dollars. In the Agency's view, the cost of removing the obstacles caused by VIA's acquisition of inaccessible rail cars could be shifted throughout VIA's operations and mitigated through efforts to reallocate funds. Further, the Agency determined that there would be ways to remove the obstacles in issue that would not substantially impair VIA's business operations, for example by "planning the modifications to occur over time so as to minimize the impact on the operation of VIA's passenger rail network" (Final Decision, at p. 24).

229 In summary, the Agency concluded that there was no "compelling evidence of economic impediments to addressing any [of the] undue obstacles ... in the Renaissance Cars" (p. 24). Under s. 31 of the *Canada Transportation Act*, "[t]he finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive". In the circumstances, the Agency's findings with respect to cost and evidence relating to undue hardship were far from being unreasonable and are entitled to deference.

***C. Did The Agency Violate Via's Right To Procedural Fairness?***

230 Parliament entrusted the Agency with extensive authority to govern its own process. The Agency has all the powers of a superior court associated with compelling attendance, examining witnesses, ordering the production of documents, entering and inspecting property and enforcing its orders (*Canada Transportation Act*, s. 25), including the powers of the Federal Court to award costs (s. 25.1). It is responsible for enforcing the *National Transportation Agency General Rules*, SOR/88-23, which govern practice and procedure before the Agency. It may make its own rules to govern many aspects of the conduct of proceedings before it (*Canada Transportation Act*, s. 17). Under s. 8 of the *National Transportation Agency General Rules*, it has the power to grant extensions of time and did so regularly during the course of the proceedings.

231 Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies. Any assessment of what procedures the duty of fairness requires in a given proceeding should "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": *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 27, citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-70. See also *Gateway Packers (1968) Ltd. v. Burlington Northern (Manitoba) Ltd.*, [1971] F.C. 359 (Fed. C.A.), and *Allied Auto Parts Ltd. v. Canada (Canadian Transport Commission)* (1982), [1983] 2 F.C. 248 (Fed. C.A.).

232 Throughout the proceedings, the Agency asked VIA to provide cost and feasibility information about changes that could be made to the Renaissance cars to enhance their accessibility. In its Preliminary Decision of March 27, 2003, the Agency ordered VIA to provide cost and feasibility estimates in 60 days about the accessibility solutions it was considering. In the 60 days available to it, VIA prepared a three-page letter providing some, but not all, of the cost estimates requested. The Agency reissued its Preliminary Decision on June 9, 2003, giving VIA an additional 60 days to prepare an adequate response. In correspondence dated July 4, 2003, the Agency advised VIA of the specific inadequacies of its three-page response in order to assist VIA with the preparation of a more appropriate response.

233 On July 14, 2003, VIA wrote to the Agency saying that it lacked the internal expertise to respond to the Agency's Preliminary Decision, that it would take longer than 60 days, and that the government had not provided the funding required for it to respond to the Agency's orders. Instead of requesting more time, VIA asked the Agency to render its final decision.

On August 7, 2003, VIA again asked the Agency to make its final decision on the basis of the evidence before it.

234 VIA asked the Agency to render a final decision on the basis of the evidence before it in submissions dated January 3 and 31, April 2 and June 15, 2001, in addition to the requests made on July 14 and August 7, 2003 noted above. The last request, dated August 7, 2003 states: "VIA Rail ... asks for an oral hearing, if necessary. Otherwise, it asks the Agency to consider all of these issues, facts and estimates and render its decision in final form". It did not ask for more time to provide cost estimates until after receiving the final decision it had repeatedly requested.

235 The Federal Court of Appeal's conclusion that VIA's rights of procedural fairness were violated by the Agency ordering corrective measures without waiting for the cost estimates it had, more than once, directed VIA to prepare, is difficult to sustain in the face of VIA's persistent refusal to provide these estimates. VIA had consistently urged the Agency to make its decision based on the cost information it already had and did not request an extension of time to prepare the additional cost estimates the Agency requested to assist it in deciding whether any of the obstacles were undue. VIA had obviously made a tactical decision to deprive the Agency of information uniquely in VIA's possession that would have made the evaluation more complete.

236 If VIA had attempted to implement the Agency's orders within the time allotted but new facts made implementation difficult, it could have asked the Agency to reopen its decision based on the changed circumstances, under s. 32 of the *Canada Transportation Act*. Section 32 states:

> 32. The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

237 VIA did not petition the Agency to review its decision on the basis of any new facts it learned through the Schrum report. It elected instead to appeal to the Federal Court of Appeal, seeking relief based on an evidentiary vacuum of its own creation. Had it complied with the Agency's requests for cost information during the course of the proceedings, or had it been denied reasonable requests for extensions of time to comply with those requests, VIA's procedural fairness argument would have had an air of fairness to it. But when, instead, it seeks to offer this evidence only after the final decision it repeatedly requested was made without, moreover, any reasonable explanation for why such information could not have been available *during* the proceedings, no issue of unfairness arises.

238 VIA's argument that it was unable to seek expert cost opinions because it could not know what remedial measures the Agency would order in the final decision is untenable. The Agency's final decision did not order any remedial measures for which VIA had not already been asked to prepare feasibility and cost estimates. The specificity of the obstacles and possible solutions identified in the Preliminary Decision a number of months earlier provided VIA with the information necessary to comply with the show cause order, had it wished to do so. VIA already knew how to remedy many of the obstacles identified, since the work eventually ordered by the Agency had already been done or was underway. VIA's procedural fairness argument amounts, essentially, to a complaint that its own lack of cooperation throughout the Agency's process entitles it to an additional opportunity to be heard.

239 VIA's position during the proceedings was that it lacked the time, expertise and money to prepare cost estimates. The record does not explain how Peter Schrum, a third party, was able to prepare a cost estimate in 37 days once the final decision was released, or how VIA was able to pay for it. The Schrum report, which reached conclusions fundamentally at odds with some of the Agency's binding factual findings, estimated a minimum cost of $48 million to implement the Agency's decision. This estimate was based on an assumption that 47 coach cars and 17 service cars would be the subject of a major reconstruction, even though the Agency's decision required that only 13 economy coach cars would require significant modification. Considerably less significant modifications were ordered for the 17 service cars in operation, the 12 economy coaches that lacked closed stair risers and the coaches that required only two more moveable armrests to be installed (all 47) or one double-seat to be removed (33 economy coaches).

240 The Schrum report appears to assume that each corrective action the Agency ordered would require engineering work from the ground up without taking into consideration the fact that many of the modifications the Agency ordered had been completed by VIA in the past. It indicates, for example, that an engineering feasibility study, concept development and

concept refinement are steps that must be taken to add a wheelchair tie-down to the sleeper unit in the "accessible suite" and to lower one row of double seats to floor level to accommodate service animals in economy coach cars. This fails to take into account that VIA already had some, if not full, practical experience about how to effect these changes from having implemented them in the past.

241 The Agency's reasons are clear that the corrective measures it ordered would cost nowhere near $48 million. Yet, the Federal Court of Appeal concluded that the Agency ought to have waited until it had the Schrum report before ordering corrective measures. This appears to be based in part on the assumption that the Schrum report provided an accurate estimate of the costs in issue. It reasoned that "before costs of the magnitude envisioned by the Schrum report are incurred" (para. 76), the Agency must be required to reconsider its decision. Yet, the conclusions reached by Mr. Schrum were untested by the Agency because the report was introduced after the Agency's proceedings were over. It is, in fact, difficult to determine the basis for the admissibility of Mr. Schrum's report as "fresh evidence".

242 The timing of the Schrum report and its untested conclusions render it an inappropriate basis for interfering with the Agency's factual findings and remedial responses. To question the reasonableness of the Agency's decision on the basis of evidence VIA could, and ought, to have submitted to the Agency in a timely way is to render the Agency process vulnerable to cavalier attitudes before it, leaving the "real" case to unfold before the Federal Court of Appeal.

243 This misconstrues the relationship between the Agency and the court. The Agency has the expertise and specialized knowledge. That is why it is the body charged with balancing all the competing interests, including cost and the public interest. The court is a reviewing body, not a court of first instance. And it should not be permitted to be transformed into a body of first instance, or entitled to second-guess the responsibilities of the Agency, through the mechanism of evidence produced after the fact which could have been produced for the Agency proceedings.

244 The Agency provided VIA with adequate time and opportunity to comply with its directions. Though VIA clearly could have commissioned the Schrum report and provided it to the Agency within the time allotted, it did not. The Agency had the procedural power to grant extensions of time or reopen decisions at its disposal if it was of the view that VIA was attempting to comply but could not. No such extensions or reconsiderations were requested by VIA.

245 The Agency, following its multi-year dealings with the parties, was in the best position to control its own process with a view to the *bona fides* and strategic choices of the parties. There are no grounds for a reviewing court to interfere with the Agency's discretion to release its final decision without waiting for VIA to produce the cost estimates it had repeatedly and explicitly refused to provide. In the circumstances, VIA was not a victim of procedural unfairness.

**IV. Conclusion**

246 For the foregoing reasons, therefore, I would allow the appeal and restore the Agency's decisions with costs throughout to CCD.

***Deschamps, Rothstein JJ.* (dissenting):**

247 Accommodation is an issue arising in many contexts and it is the duty of this Court to give clear guidance on what legal principles must be adhered to by those adjudicating accommodation claims. It is not helpful to rely on nothing more than a judgment call to determine what is practicable. Parliament has set forth in the *Canada Transportation Act*, S.C. 1996, c. 10 ("Act"), a national transportation policy which consists of a number of objectives including human rights objectives. The Act also contains a statutory framework for determining human rights applications. This Court should have regard to the policy and the framework established by Parliament and common law principles developed by this Court in determining the requirements of reasonable accommodation. It is troubling that the majority would uphold an administrative tribunal's decision by finding that it applied the common law principles when the tribunal expressly rejected them. It is also problematic that the majority would uphold the tribunal's decision when a basic element, namely the estimated cost of accommodation, was not determined. The majority would forego both the proper legal analysis and ignore the lacking element of cost determination on the basis of deference to the tribunal. With respect, deference is not a proper justification for ignoring such errors.

248 The litigation originates from a decision by VIA Rail Canada Inc. ("VIA") to purchase 139 passenger rail cars. The

Council of Canadians with Disabilities ("CCD") claims these cars present "undue obstacles" affecting the mobility of persons with disabilities using wheelchairs. CCD made an application to the Canadian Transportation Agency ("Agency") which subsequently ordered VIA to make modifications to the rail cars. The Federal Court of Appeal allowed VIA's appeal and remitted the matter to the Agency for redetermination, taking account of VIA's network and cost considerations.

249 We agree with the conclusion reached by the Federal Court of Appeal and would remit the matter to the Agency for redetermination having regard to these reasons.

## I. Factual Background

### *A. The Parties*

250 CCD was founded in 1976 and is a national advocacy organization for persons with disabilities. CCD is a coalition of representatives from provincial disability organizations, in addition to other major national disability organizations. In past cases before this Court, CCD has appeared as an intervener on a number of occasions on matters relating to human rights and equality issues under the *Canadian Charter of Rights and Freedoms*.

251 VIA was established in 1977 and became a Crown corporation in 1978 with responsibility for passenger rail transportation in Canada. The Government of Canada ("Government") is VIA's sole shareholder. Since its inception, VIA has been dependent on subsidies from the Government to supplement the revenue it receives from passengers. VIA's government funding requirements, including defined capital expenditures, must be approved annually by the Treasury Board under the *Financial Administration Act*, R.S.C. 1985, c. F-11.

252 The Agency, which was an intervener before this Court, is a federal, administrative tribunal that is mandated under the Act. The statutory mandate of the Agency deals mainly with the economic regulation of carriers and modes of transportation. Among its responsibilities, the Agency is granted regulatory and adjudicative powers to deal with "undue obstacles" to the mobility of persons with disabilities in rail passenger transportation.

### *B. Purchase of the Renaissance Rail Cars*

253 In June 1998, the House of Commons Standing Committee on Transport issued a report entitled *The Renaissance of Passenger Rail in Canada* which stated that "almost every witness that appeared before us said that VIA Rail could not continue in its present state" (p. 17) and that "every time a train leaves the station, VIA Rail loses money" (p. 4). The Standing Committee reported that all services and segments of VIA's network operate at a deficit, for a total loss of $196 million in 1997.

254 The Standing Committee found that the cost of maintaining and operating VIA's aging rail cars, with current levels of funding, was a "death spiral" that would lead to "the inevitable demise of VIA Rail" (p. 5). The Standing Committee's report indicated that VIA needed to increase train frequency for its operations in the Quebec City-Windsor corridor. To enable VIA to renew and sustain its rail cars on a timely basis simply to maintain existing service levels, the Standing Committee found that the Government would need to allocate an additional $800 million over the next few years for capital expenditures to VIA. The Government did not elect to do so.

255 In 2000, the Treasury Board granted a total of $401.9 million for all of VIA's capital expenditures, including infrastructure improvements, station repairs, purchase of locomotives and rail cars, operations, safety and signalling. This was considerably less than VIA had requested. Of the $401.9 million, approximately $130 million was allocated to the purchase of rail cars.

256 On September 28, 2000, VIA entered into a contract, effective on December 1, 2000, to purchase 139 rail cars. The initial cost of the purchase and commissioning into service of these cars was $130 million. VIA states that the purchase of the rail cars was "a unique, one-time opportunity" on account of their low cost and given that they were readily available. According to VIA, the replacement cost of these rail cars was $400 million and it would take four years to design and obtain delivery of alternative rail cars.

257 Designed by a British, French, German, Dutch and Belgian consortium that was formed in 1990, the rail cars were originally called the "Channel Tunnel Nightstock Cars" because they had been designed for service between continental Europe and the northern regions of the United Kingdom. According to VIA, one of the main reasons they became available for purchase was deregulation in the European airline industry which resulted in a drop in airfares to a level at which overnight rail trips were no longer cost competitive. VIA made a successful bid to purchase the rail cars. These cars became known as the Renaissance cars, an apparent reference to the title of the Report of the Standing Committee on Transport that alerted the Government to the need to address VIA's financial and operational difficulties.

258 VIA states that the Renaissance rail cars reflected European and British Rail regulations at the time of their design which included mandatory requirements for persons with disabilities. While VIA concedes that the Renaissance rail cars may not meet all desires of all persons with disabilities, they are an addition to its existing fleet within its budgetary constraints to deal with the urgent situation that it then faced. VIA submitted that it made improvements to the features of the Renaissance rail cars through its Accessibility Program. The features of the rail cars include: use of braille signage for visually impaired passengers, training for on-board personnel in providing assistance to persons with disabilities, handrails and grab bars, space to accommodate service animals, visual displays for communication of announcements for persons with a hearing impairment, washrooms with various accessibility features, auditory and visual smoke alarms, storage space for personal wheelchairs and provision of on-board wheelchairs where required, four moveable armrests in each car, as well as a wheelchair sleeping accommodation, and tie-downs and washrooms to accommodate wheelchair users.

### *C. CCD's Application to the Agency*

259 On December 4, 2000, CCD filed an application with the Agency objecting to the purchase of the Renaissance rail cars. It alleged that numerous aspects of these rail cars would constitute "undue obstacles" to the mobility of persons with disabilities, mainly those using wheelchairs.

260 When CCD was advised that VIA had already purchased the Renaissance rail cars before the application was made, CCD sought: (i) an interim order from the Agency to stop the delivery of the Renaissance rail cars to VIA, pending the Agency's final determination of the application; and (ii) an order that VIA not enter into any contracts for the modification of the Renaissance rail cars, or take any additional steps furthering the purchase of these rail cars. The Agency declined to make these orders on the grounds that they would cause VIA substantial harm.

261 At this stage, CCD's application was pursued through an inquiry by the Agency into specific claims that aspects of the Renaissance rail cars were "undue obstacles" to the mobility of persons with disabilities, mainly those using wheelchairs.

## II. Summary of Decisions Below

262 The proceedings in this matter have been lengthy, technical, and at times acrimonious. From the time CCD filed its initial application to the rendering of the Agency's final determination, some two years and ten months passed during which over 70 decision and orders were issued by the Agency.

### *A. Position of the Parties During the Inquiry*

263 In the course of the Agency's inquiry, CCD took the position that "[p]ersons with disabilities had been waiting decades for VIA Rail's next generation of passenger trains." CCD's position was that these rail cars should be considered "newly manufactured" and subject to higher accessibility standards. CCD was of the view that the Renaissance rail cars should never have been purchased.

264 For its part, from very early on in the Agency's inquiry, VIA objected to the Agency's jurisdiction in this matter. As the scope of the Agency's inquiry grew larger, VIA consistently put to the Agency that it was exceeding its mandate, and was taking a monitoring role in VIA's affairs that was improper. VIA maintained that the Agency was interfering in the carrier's management, and in the decision that VIA made to purchase the Renaissance rail cars with the limited capital funds approved by the Government. VIA took the position that these rail cars could not be considered "newly manufactured", and that they offered reasonable accessibility to passengers with disabilities.

*B. Preliminary Decision of Agency (No. 175-AT-R-2003)*

265 On March 27, 2003, the Agency delivered its preliminary findings on the 46 accessibility concerns raised by CCD ("Preliminary Decision"). The majority opinion of the Agency determined that the Renaissance rail cars were "newly manufactured" cars and should meet the higher level of accessibility for new cars that is set out in the Agency's *Code of Practice — Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* ("Rail Code").

266 For the 46 concerns raised by CCD, the Agency first considered whether each constituted an "obstacle" to the mobility of persons with disabilities. The Agency largely relied on the dimensions of a "Personal Wheelchair", defined in the Canadian Standards Association (CSA), CAN/CSA — B651-95, *Barrier-Free Design Standards* and referred to in the Rail Code, to make its technical findings based on centimetre-by-centimetre physical inspections it made of the Renaissance rail cars.

267 In determining whether an "obstacle" that it found to exist was "undue", the Agency rejected, in the context of Part V of the Act, the applicability of the undue hardship test found in human rights legislation and jurisprudence: "[w]hile the Agency rejects the applicability of the undue hardship test in the context of Part V of the CTA, the Agency recognizes that some of the factors identified by CCD concerning undue hardship may be applicable to an undue obstacle determination" (p. 36).

268 Of the 46 features of the Renaissance rail cars raised by CCD, the majority opinion of the Agency made a preliminary finding that 14 features constituted "undue obstacles". The Agency ordered VIA to show cause why these preliminary findings should not be made final.

269 One of the three members of the Agency's panel issued a dissenting opinion. Member Richard Cashin found that "there is no evidence that th[e] obstacles [found undue by the majority] will not be accommodated by VIA's network" and that "the carrier can and will accommodate the needs of persons with disabilities within its network" (pp. 162-63). However, Mr. Cashin's term expired on June 30, 2003, so he did not participate in the subsequent final decision by the Agency.

*C. Final Decision of Agency (No. 620-AT-R-2003)*

270 On October 29, 2003, the Agency delivered its final decision ("Final Decision"). The Agency found 14 "undue obstacles" (although not precisely the same 14 as in its Preliminary Decision) and ordered VIA to make specific modifications to the Renaissance rail cars to eliminate the obstacles.

*D. Federal Court of Appeal, [2005] 4 F.C.R. 473, 2005 FCA 79 (F.C.A.)*

271 The Federal Court of Appeal allowed VIA's appeal on March 2, 2005. Sexton J.A., writing for the majority, held at para. 43 that the Agency's decisions were patently unreasonable because "it confined itself to considering only alterations to the Renaissance rail cars rather than considering whether VIA's network could be flexible enough to accommodate these disabilities". Sexton J.A. added that the Agency "failed to conduct the necessary balancing" required by the Act, including the interests of persons without disabilities, the cost of the modifications ordered, and the interests of other persons with disabilities not using wheelchairs (para. 43).

272 The Federal Court of Appeal pointed to evidence filed in that court for the first time by VIA, estimating the total cost of the modifications determined in the Agency's Final Decision. This evaluation (the Schrum report) sets the cost between $48 and $92 million, and was described by Sexton J.A. as "the only objective third-party report which comprehensively estimates the costs of all the changes ordered by the Agency" (para. 69).

273 Evans J.A. concurred in allowing the appeal, finding that the Agency acted in breach of the duty of procedural fairness. He found that the Agency's preliminary decision should have specifically invited VIA to submit evidence demonstrating how it proposed to mitigate the obstacles in the Renaissance rail cars through its network. He also found that, given VIA's submission that providing cost evidence in response to the Agency's Preliminary Decision was unduly onerous, the Agency should have afforded VIA an opportunity to submit a third-party cost estimate *after* the Agency's "final" order

specifying the modifications that it required VIA to make to the Renaissance rail cars.

## III. Issues

274 CCD states the issues as follows:

(1) the correct interpretation of Part V of the Act;
(2) the fairness of the process; and
(3) the reasonableness of the Agency's decision.

In addition, VIA raises jurisdictional questions.

275 The jurisdictional questions will be addressed before dealing with the interpretation of the Act. In view of our conclusion on the interpretation of the Act — a question of law — it will not be necessary to deal with the questions of fairness of the process or reasonableness of the Agency's decision.

## IV. Analysis

276 Given that the issues under review arose from a decision of an administrative tribunal, we begin by identifying the appropriate standard of review. We then provide a brief contextual overview of the governing legislation, with a focus on the declaration of the National Transportation Policy in s. 5 of the Act, and the framework in Part V of the Act to remove undue obstacles to the mobility of persons with disabilities. This is followed by an analysis that reconciles Part V of the Act with the applicable principles of human rights law. We then set out the legal framework for analysis of applications heard by the Agency under s. 172. Finally, we evaluate the Agency's decision on the issues raised in this appeal.

### *A. Standard of Review*

#### *(1) Segmentation and Terminology*

277 The majority finds that the Agency "made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review" (para. 100). We are unable to agree with this approach.

278 The standard of review jurisprudence recognizes that segmentation of a decision is appropriate in order to ascertain the nature of the questions before the tribunal and the degree of deference to be accorded to the tribunal's decisions on those questions. In *Deputy Minister of National Revenue v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36 (S.C.C.), at para. 27, Major J. stated:

> In general, different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

In *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), although there were no legal questions to be examined separately in that case, Iacobucci J. clearly indicated that there are situations in which extrication is appropriate (para. 41). See also *Mattel U.S.A. Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, 2006 SCC 22 (S.C.C.), at para. 39. Subjecting all aspects of a decision to a single standard of review does not account for the diversity of questions under review and either insulates the decision from a more exacting review where the pragmatic and functional considerations call for greater intensity in the review of specific legal questions, or subjects questions of fact to a standard that is too exacting. A tribunal's decision must therefore be subject to segmentation to enable a reviewing court to apply the appropriate degree of scrutiny to the various aspects of the decision which call for greater or lesser deference.

279 Moreover, in her reasons, Abella J. introduces a new term — "demonstrably unreasonable" (para. 102). We must respectfully express reservations about introducing another term to an already complex area of the law which can only lead to ambiguity. We agree with the majority that it is difficult to determine the degrees of differences as between what is unreasonable and what is patently unreasonable. In an appropriate case, of which this is not one, the Court may engage in a review of the standards of unreasonableness and patent unreasonableness. Until that occurs, we do not see the need to add to the lexicon of standard of review terminology.

*(2) Pragmatic and Functional Approach*

280 Although the arguments were wide-ranging in this appeal, our reasons will only address the issues of the Agency's jurisdiction to adjudicate CCD's application and the Agency's determination of the applicable human rights law principles in the federal transportation context.

281 The factors to be considered in the pragmatic and functional approach were set out in *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at paras. 26ff. In our view, consideration of all of the factors points to no deference being accorded to the Agency's decision.

282 The Agency's jurisdiction and the determination of the applicable human rights law principles in the federal transportation context are pure questions of law. Although in *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), [2001] 2 F.C. 25 (Fed. C.A.), the Federal Court of Appeal was seized of a case that concerned the undueness of an obstacle, the question was whether the reasons given by the Agency were sufficient. The jurisdiction of the Agency and the applicable human rights principles were not at issue. Thus, this being the first opportunity that a court has had to interpret these questions, the resolution of this case will have an important precedential value. This calls for an exacting standard of review. See *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at paras. 36-37, and *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3 (S.C.C.), at para. 23.

283 Furthermore, the Agency is not protected by a privative clause in respect of questions of law or jurisdiction. Rather, there is a statutory appeal procedure on such questions under s. 41(1) of the Act. This contrasts with the Agency's factual determinations which are "binding and conclusive", under s. 31 of the Act.

284 On questions of jurisdiction and the determination of the applicable human rights law principles, the Agency does not have greater relative expertise than a court. The Agency is required to resort to human rights principles which are not comprehensively set out in its home statute and in respect of which the Agency, whose prime function is economic regulation of transportation in a largely deregulated environment, does not have specific expertise. This factor points to a standard of review that will be less deferential.

285 Finally, the purpose of s. 172 of the Act is to grant the Agency an adjudicative role to consider applications from persons with disabilities who allege the existence of undue obstacles to their mobility in respect of a federal transportation carrier. The issues generally involve a dispute between an aggrieved party and the transportation carrier. While the Agency's ultimate analysis, in those cases, involves a balancing of interests, the questions of the Agency's jurisdiction and the determination of the applicable human rights law, do not.

286 Considering all of these factors, the questions of the Agency's jurisdiction and the determination of the applicable human rights law principles in the federal transportation context are both to be reviewed on the standard of correctness.

***B. The National Transportation Policy***

287 We commence with a discussion of the National Transportation Policy as declared in s. 5 of the Act. This provision gives context for the entire Act, including s. 172. All relevant sections of the Act are reproduced in the Appendix.

288 Section 5 is a declaratory provision which states Canada's National Transportation Policy. Section 5 contains a number of objectives, amongst which are:

> 5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities....

289 The objective of accessible transportation to persons with disabilities is an issue of human rights. It is critical to enabling persons with disabilities to gain employment, pursue educational opportunities, enjoy recreation, and live

independently in the community. Recognizing this, Parliament included the accessibility of the federal transportation network to persons with disabilities among the objectives of the National Transportation Policy, and expressly granted the Agency jurisdiction to deal with undue obstacles to the mobility of persons with disabilities in Part V of the Act.

290 There is therefore no doubt that accessibility is an important policy objective of the legislation. However, several of the objectives set out in s. 5, including accessibility, are to be pursued "as far as is practicable" — a term that appears three times in s. 5, indicating that the objectives are not expected to be achieved to the level of perfection. Thus, s. 5(*g*)(ii) provides that each "carrier or mode of transportation, as far as is practicable, carries traffic" under "conditions that do not constitute an undue obstacle to the mobility of persons, including persons with disabilities". Further, the words of s. 5(*g*)(ii) recognize that the mobility of persons may be subject to obstacles, but the objective of the Policy is that mobility not be impeded by *undue* obstacles.

***C. Part V of the Act: Dealing with Undue Obstacles to the Mobility of Persons with Disabilities***

291 Under Part V of the Act, Parliament granted the Agency jurisdiction to deal with undue obstacles to the mobility of persons with disabilities through two avenues. First, s. 170 of the Act grants certain regulatory powers to the Agency:

> 170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting
>
> (a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;
>
> (b) the training of personnel employed at or in those facilities or premises or by carriers;
>
> (c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and
>
> (d) the communication of information to persons with disabilities.
>
> . . . . .

292 Second, s. 172 of the Act sets out the adjudicative jurisdiction of the Agency:

> 172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.
>
> (2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.
>
> (3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

293 As we have said, accessibility for persons with disabilities is a human rights issue. Therefore, the determination of the applicable human rights principles governing the Agency's adjudication of applications under s. 172 is at issue in the present appeal. These human rights principles do not operate in a vacuum. A body of case law has developed in Canada dealing with human rights adjudication. Therefore, it is useful to review prevailing human rights jurisprudence to understand how Part V of the Act is reconciled with it in a coherent framework.

***D. Reconciling Human Rights Law and Part V of the Canada Transportation Act***

294 In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("*Meiorin*"), this Court laid down the approach to human rights claims. The framework in *Meiorin* was described in language specific to the employment context. However, it has been applied to other fields such as the licensing of motorists in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.).

295 It is useful to set forth the *Meiorin* approach verbatim as found at para. 54 of the reasons of McLachlin J. (as she then

was) in that case:

> Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR [*bona fide* occupational requirement]. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> > (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> > (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> > (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool*, *supra*, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

296 The approach in *Meiorin* has guided this Court's subsequent analyses in human rights cases and in our view it should be the guide in the federal transportation context. Human rights in respect of transportation of persons with disabilities are specifically provided for in the Act. Section 171 of the Act provides that the Agency and the Canadian Human Rights Commission are to coordinate their activities and foster complementary policies and practices in relation to the transportation of persons with disabilities. Both s. 5 and Part V of the Act, as discussed, identify the objective of removing "undue obstacles to the mobility of persons with disabilities" — a human rights objective. It follows that the transportation of persons with disabilities should be guided by human rights principles as established in *Meiorin*.

297 Having regard to these considerations, applying *Meiorin* in the federal transportation context, the Agency's adjudication of applications under s. 172 of the Act requires that the following analysis be conducted:

> (1) The applicant must satisfy the Agency of the existence of a *prima facie* obstacle to the mobility of persons with disabilities.
> (2) The burden then shifts to the carrier to demonstrate, on a balance of probabilities, that the obstacle is not undue because:
>
> > (i) it is rationally connected to a legitimate objective;
> > (ii) the carrier has opted not to eliminate the obstacle based on an honest and good faith belief that it was necessary for the fulfilment of that legitimate objective; and,
> > (iii) not eliminating the obstacle is reasonably necessary for the accomplishment of that legitimate objective.

We will elaborate on the components of this test in the course of the analysis which follows in order to provide guidance to the Agency and reviewing courts on the correct approach in law to interpreting s. 172 of the Act.

### *E. The Obstacle Analysis*

298 In the transportation context, the *prima facie* obstacle analysis must commence by assessing the alleged obstacle. For the Agency to conclude that an obstacle exists, it must be of more than minor significance to the mobility of persons with disabilities. Perfection is not the standard. The reference to "practicability" in the National Transportation Policy means that not every obstacle must be removed. Where the Agency finds that the alleged obstacle is not of sufficient significance, the analysis performed by the Agency is at an end, and the application should be dismissed.

### *F. The Undueness Analysis*

299 Once the Agency determines that an obstacle is of sufficient significance, it must then determine if it constitutes an undue obstacle to the mobility of persons with disabilities.

300 The first stage is to determine whether the obstacle exists owing to a rationally connected legitimate purpose. Section 5 of the Act declares that a number of objectives and purposes are associated with what is "essential to serve the transportation needs of ... travellers, including persons with disabilities". These objectives or purposes are intimately tied to the Canadian transportation context and are specifically crafted by Parliament as goals to be achieved by a carrier. When there is evidence that a carrier has pursued one or more of the purposes in s. 5 of the Act, the Agency must consider them to be legitimate in its analysis. This, of course, does not preclude a carrier from advancing other objectives, or the Agency from deciding whether, in the context, such objectives constitute a legitimate purpose in a human rights analysis. Legitimate purposes contained in the National Transportation Policy that are relevant to rail passenger transportation include:

(a) safety objectives;
(b) efficiency objectives;
(c) the opportunity to compete;
(d) economic viability; and
(e) competitive fares.

In pursuing the goals of safety, efficiency, economic viability, or any other legitimate purpose, obstacles to the mobility of persons with disabilities may be created, knowingly or otherwise. However, as long as these obstacles exist owing to a rationally connected legitimate purpose, the first stage of the undueness analysis will be satisfied.

301 Several of the Policy's objectives involve economic considerations. With respect to the objective of economic viability, VIA is not economically viable because it requires subsidization. In such a situation, the objective of economic viability must be interpreted as a policy of minimizing, to the extent reasonably possible, reliance on government subsidies. Where revenues do not cover a carrier's expenses, assuming the carrier is being operated efficiently and is maximizing passenger revenue, costs it would have to incur to eliminate an obstacle must be recovered by reducing other expenses through cutbacks in services or from the taxpayer through increased subsidies. Therefore, the continuing existence of obstacles due to financial cost may be rationally connected to a legitimate purpose.

302 Once a carrier has established that the obstacle is rationally connected to a legitimate purpose, the Agency must, at the second stage, consider whether the continuing existence of the obstacle is based on an honest and good faith belief that it is necessary for that legitimate purpose.

303 Finally, the third stage of the undueness analysis involves an assessment of whether the carrier's refusal to eliminate obstacles is reasonably necessary to achieve the legitimate purpose relied upon. Whether the existence of an obstacle is reasonably necessary requires an objective assessment of: (a) reasonable alternatives made available by the carrier to persons with disabilities affected by the obstacle; and, (b) constraints that may prevent the removal of the obstacle in question.

304 Where there are reasonable alternatives made available by the carrier to persons with disabilities, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue. A reasonable alternative must respect the dignity of the person with disabilities. It may be a functional alternative, not necessarily an identical service, and the alternative need not be the same for all routes. There may be remedies to an obstacle found on an individual car that do not involve eliminating the obstacle, but rather provide an alternative which enables the obstacle to be circumvented. The search for reasonable alternatives will vary with the circumstances of individual obstacle assessments. It will be for the Agency to determine what may constitute a reasonable alternative in specific cases.

305 In the present case, VIA submitted evidence that reasonable alternatives existed through its "network" to accommodate persons with disabilities. VIA said that its network design "includes the reservation system, the alternative transportation policy, ground services, special handling services, train accommodation, employee training and special service requests". Indeed, as a defence that could be raised by a carrier, the Canadian Human Rights Commission took the position in its factum, at para. 25, that:

> ...there is nothing inherently problematic with the suggestion that in some circumstances it will be appropriate ... to look at the respondent's entire network before concluding that an obstacle is "undue".

306 We have referred to VIA's "network" because that is the term used in s. 5 of the Act. It has been used by the parties, the Agency and the Federal Court of Appeal. However, to avoid ambiguity, we would emphasize that an obstacle in the passenger equipment on one route is not circumvented by accessible equipment on another route. In other words, a reasonable alternative must be a relevant alternative for the passenger. Rail passengers may be travelling for business or pleasure. But practically, they intend to travel from an origin to a destination. When considering the mobility of persons with disabilities, it is the transportation of passengers between specific origins and destinations that is considered. For instance, undue obstacles on the service between Winnipeg and Saskatoon are not remedied by accessible travel between Ottawa and Toronto.

307 If there are no reasonable alternatives that enable persons with disabilities to circumvent an obstacle, then the Agency must continue with its analysis with respect to constraints that may stand in the way of removing the obstacle.

308 Where there are structural constraints that make it impossible to remedy the obstacle, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue. However, where modifications are possible from an engineering perspective, then the Agency must continue with its analysis into the other constraints associated with such accommodation.

309 In *VIA Rail Canada Inc. v. Canada (National Transportation Agency)*, the Federal Court of Appeal referred to factors that were relevant to accommodating persons with disabilities requiring the assistance of an escort, e.g., availability of personnel, time required for providing assistance and ability to contract occasional workers. The factors will be dependent on the circumstances of each case. However, almost any accommodation can be evaluated in terms of cost, such as that associated with personnel or modifications to equipment. Consequently, in almost every case, the remaining constraint to the removal of an obstacle will be the cost involved. At this stage, the Agency must engage in balancing the significance of the obstacle with the cost involved in removing the obstacle. Where the cost of removing the obstacle is disproportionate to the significance of the obstacle to the mobility of persons with disabilities, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue.

310 The consideration of cost in human rights case law is well established. In *Meiorin*, McLachlin J. stated at para. 63 that the financial cost of the method of accommodation is a relevant factor. In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.), at pp. 520-21, "financial cost" is the first factor to which Wilson J. refers as being relevant to undue hardship. Similarly, in *Chambly (Commission scolaire régionale) c. Bergevin*, [1994] 2 S.C.R. 525 (S.C.C.), at p. 546, Cory J. observed: "What may be eminently reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession." Therefore, the cost required to remedy an obstacle must be considered by the Agency before it orders that the obstacle be removed.

311 The scope of the Agency's inquiry into cost will necessarily vary with the nature of the application. Cases under s. 172 have ranged from those involving a single obstacle to the present case in which 46 obstacles were alleged by CCD. The Agency's approach in each case must be tailored to meet the circumstances. In a case in which many obstacles are alleged, the difficulty of the Agency's work is compounded. Where a number of obstacles are involved, the Agency will have to consider the overall cost associated with their elimination and the impact on the carrier if such cost is imposed. Not only will the Agency be required to consider the global cost, but it must also consider whether the elimination of some obstacles may be justified in relation to the cost involved while the elimination of others may not.

312 Where an applicant seeks recourse to the Agency to order the removal of an obstacle, the burden of funding the required modifications by the carrier, especially a subsidized carrier, may result in a finding that in all the circumstances, the obstacle cannot be said to be undue. This is not to say that the obstacle may not be a serious matter for persons with disabilities. However, if there is to be recourse in such a case, it involves a policy decision that lies with the Government and is not within the adjudicative role of the Agency.

313 In summary, we can say that the human rights principles that apply in the federal transportation context are essentially the same as those applicable in other human rights cases.

### *G. Analysis of the Agency's Decisions*

314 Two questions must be dealt with: the correctness of the Agency's assertion of jurisdiction, and its determination of the applicable human rights law principles in the federal transportation context.

*(1) Jurisdictional Questions*

315 CCD argued that VIA had improperly raised jurisdictional issues before this Court, because the Federal Court of Appeal found that the Agency did have jurisdiction, and VIA failed to cross-appeal. Rule 29(3) of the *Rules of the Supreme Court of Canada*, SOR/2002-156, provides that a respondent who seeks to uphold the judgment appealed from on a ground not relied on in the reasons for that judgment, may do so in its factum without applying for leave to cross-appeal. Citing *Shell Canada Ltd. v. R.* (1998), [1999] 3 S.C.R. 616 (S.C.C.), CCD argued that Rule 29(3) did not apply in this case because VIA, in its jurisdictional argument, was not simply asking the Court to uphold the Federal Court of Appeal's judgment which remitted the matter to the Agency for redetermination. Rather, VIA was asking this Court to order that the CCD application be definitely dismissed. We do not find it necessary to decide on the application of Rule 29(3) because we find that the Agency did not exceed its jurisdiction.

*(a) Must an Applicant Have Actually Encountered an Undue Obstacle?*

316 There has been much debate in these proceedings over whether the Agency has jurisdiction where an applicant has not "actually encountered" an alleged undue obstacle.

317 The language of s. 172(1) of the Act indicates that Parliament intended the Agency to have jurisdiction where an "application" is made to it, and its inquiry is to be directed to "determine whether there *is* an undue obstacle". There is nothing to prevent the Agency from initiating an inquiry based on an application from a public interest group such as CCD and no indication that an applicant need have actually encountered an obstacle, as long as the alleged obstacle exists. In this case the Renaissance rail cars had already been acquired by VIA and the inquiry into alleged obstacles in those cars was not beyond the jurisdiction of the Agency.

*(b) Does the Agency Lose Jurisdiction When its Inquiry Extends Past the 120-Day Deadline in Section 29 of the Act?*

318 The breadth of the Agency's inquiry in this case was exceptionally broad. Sexton J.A. noted that the language of s. 172 gives the Agency authority to inquire into a matter in relation to which a regulation could be made under s. 170(1), which includes the design, construction and modification of rail cars. The question is whether the type of inquiry required in this case fits within the Agency's jurisdiction under s. 172.

319 Under s. 29 of the Act, adjudicative decisions are to be made as "expeditiously as possible" and within 120 days unless the parties consent to an extension. Therefore, VIA argued that the Agency was without jurisdiction under s. 172 to embark upon a lengthy inquiry such as this.

320 Given the requirement in s. 29(1) to make adjudicative rulings within 120 days, Parliament appears to have intended that adjudicative proceedings be more limited than when the Agency engages in a general regulatory function under s. 170. Nonetheless, there is no express limitation on the scope or nature of an adjudicative inquiry.

321 In *Canadian National Railway v. Ferroequus Railway*, [2002] F.C.J. No. 762, 2002 FCA 193 (Fed. C.A.), Décary J.A. found that the 120-day deadline in s. 29(1) was directory and not mandatory. We adopt his reasoning and agree that s. 29(1) is directory when applied to proceedings under s. 172 of the Act. Where a relatively limited adjudicative investigation is being conducted by the Agency, the Agency will gear its process towards rendering a decision within 120 days. On the other hand, where an adjudicative proceeding is broad in scope and has far-reaching implications, the Agency will have to adjust its process to take account of these conditions. The 120-day period in s. 29 does not preclude it from doing so or cause the Agency to lose jurisdiction if the 120-day period is exceeded. Although the inquiry in this case was extensive, it was not beyond the jurisdiction of the Agency under s. 172.

*(c) Regulatory Burden*

322 VIA argues that the "onerous regulatory burden" imposed upon it in this case demonstrates that the Agency's adjudicative jurisdiction under s. 172 was not intended to apply where the impacts on a carrier would be broad and far-reaching. Rather, when such impacts are involved, it is the Agency's regulatory power under s. 170 that is applicable.

323 The Agency's exercise of its regulatory power is subject to more stringent oversight than that of its adjudicative power. Under s. 36 of the Act, Governor in Council oversight of regulations made by the Agency under s. 170 is mandatory. By contrast, under s. 40 of the Act, the Governor in Council may on petition or of its own motion vary or rescind any decision or order made by the Agency under s. 172. Here the oversight by the Governor in Council is discretionary. The rationale for mandatory oversight of regulations developed by the Agency under s. 170 would appear to be that regulations are legislative in nature and of general application. Adjudicative decisions of the Agency, including those under s. 172, will depend on the circumstances of a specific case.

324 We are mindful that the National Transportation Policy is to minimize the economic regulation of transportation undertakings. Nevertheless, the text of the Act governs and, in the case of Part V, the Agency is given broad and pervasive jurisdiction. It may not have been Parliament's expectation that broad inquiries would be conducted under s. 172, but the words used do not preclude such adjudications. There are no words that suggest that adjudications, once they reach a certain magnitude, are beyond the Agency's jurisdiction under s. 172, even though they impose a significant burden on the carrier.

*(d) Can the Agency Conduct a Review and Overhaul of a Carrier's Entire Infrastructure and System of Services?*

325 VIA also argues that the Agency's adjudicative jurisdiction under s. 172 cannot extend to a review and overhaul of a carrier's entire infrastructure and system of services. We would agree, but that is not what happened here. CCD's request to the Agency that it enjoin VIA from acquiring the Renaissance cars had been dismissed at an early stage. The decision to acquire the Renaissance cars, no matter their advantages or disadvantages, is not under review. Moreover, unfocussed applications under s. 172 cannot be entertained. However, the CCD application here, while it was certainly broad, alleged specific obstacles in the Renaissance cars. Section 172 is engaged once an application alleging specific and existing undue obstacles is filed with the Agency.

*(e) Other Jurisdictional Arguments*

326 In arguing that the Agency exceeded its jurisdiction, VIA made some arguments which we find are more properly considered as questions of law. For example, in its jurisdictional argument, VIA alleged that the Agency elevated the Rail Code's voluntary terms to *de facto* mandatory statutory requirements. In doing so, VIA maintained that the Agency improperly evaded Cabinet approval of the Agency's regulation-making power. We find that the issue of the Agency's use of the Rail Code is not a jurisdictional issue but rather a legal question. Similarly, VIA argued that the Agency was without jurisdiction because it had found obstacles to be undue without knowing the cost of remedying the obstacles (cost being an element of undueness). The Agency's consideration of economic constraints goes to whether the Agency adhered to the applicable human rights principles in the transportation context. These questions will be dealt with as questions of law.

*(2) Review of the Agency's Determination of the Human Rights Principles Applicable in the Federal Transportation Context*

327 The outcome of the appeal turns on whether the Agency erred in law with respect to the test for determining the undueness of an obstacle. As mentioned earlier, the question at issue comes for the first time before this Court and consequently, the proper test has not yet been settled. We find that the Agency erred in law. It did not determine the correct principles and did not take into account the relevant considerations on material elements of the analysis.

328 The Agency recognized that it is subject to the *Charter* (Preliminary Decision, at p. 30). It specifically mentioned that it is directed to apply economic and commercial principles in the execution of its mandate and, particularly, that the notion of practicability has to be taken into account when considering whether the needs of persons with disabilities have been accommodated. Despite its elaboration of some of the principles in the abstract, the analysis conducted by the Agency reveals that most of the applicable principles were excluded from its reasoning.

329 The fact that the allegations in this case did not rest on obstacles actually encountered by persons with disabilities, and that the alleged obstacles were numerous, made the factual inquiry highly complex. The Agency elected to use

predetermined fixed criteria when determining the existence of obstacles. For example, the Agency stated the criterion for accessibility of persons with disabilities was that an on-board wheelchair (as opposed to the individual's own wheelchair) "should only be provided as an option to those who can and wish to use it" (Preliminary Decision, at p. 19). Even if the use of predetermined fixed criteria was initially acceptable, the Agency should have been careful to leave itself room to re-evaluate the criteria in its undueness analysis to ensure that these predetermined measurements did not overtake the broader contextual inquiry that is required. Instead, at this latter stage, the Agency adhered to the predetermined fixed criteria that it had initially established.

*(a) Prima facie Obstacle*

330 The Agency appears to have taken a broad view of the term "obstacle". This view is consistent with the generous approach to be taken at the initial stage of a human rights application. However, as discussed in the section concerning the determination of the applicable principles, an alleged obstacle of insufficient significance will not be considered an obstacle. Although the Agency did not formally use the expression "sufficient significance", it appears to have applied such a nuanced standard in some instances. Five of the obstacles alleged by CCD were found not to be obstacles warranting consideration at the undueness stage. Since the correctness of the legal standard is at issue rather than the factual determination, it is not our intention to examine the findings of the Agency on individual alleged obstacles.

331 The undueness analysis is the stage where the problems arose in this case and it is not necessary to dwell further on the obstacle analysis.

*(b) Undueness Analysis*

332 Although the Agency's view of the undueness analysis captures some of the elements of the *Meiorin* framework, it overlooks material segments, namely the identification of the objective, the rational connection between the obstacle and the objective, the honest and good faith belief of the carrier, the assessment of reasonable alternatives and finally the balancing of the significance of the obstacle with the economic impact of the corrective measures, having regard to the objective pursued by the carrier.

333 In order to explain the errors, we review the Agency's decision against the applicable principles.

*(i) First Stage: Identifying the Legitimate Objective and the Rational Connection*

334 At the first stage of the analysis, the Agency must assess whether the obstacle is related to a legitimate purpose.

335 What the Agency had to determine in this case is the goal that VIA was pursuing and whether its resistance to improving the accessibility of the Renaissance cars to persons with disabilities was rationally connected to its objective.

336 The Agency explicitly noted VIA's position that (1) it required "the Renaissance cars to augment its rolling stock to meet its obligations to provide an efficient, viable and effective passenger rail network"; and (2) "that the Renaissance Cars were within the capital budget ... only because they were so advantageously purchased and retrofitted. VIA did not have sufficient money to meet its needs for 124 new cars from conventional purchases in North America" (Preliminary Decision, at p. 32).

337 VIA led evidence that it would have taken four years and some $400 million to acquire newly designed cars. The subsidy allocated for purchase of the rail cars was only $130 million. The Standing Committee report that VIA's network needed to be improved at the same time as it was found that VIA lost money "every time a train leaves the station" (p. 4) was evidence of the goals VIA was pursuing in purchasing the Renaissance cars. Efficiency and economic viability are objectives of the National Transportation Policy under s. 5 of the Act and must be considered to be legitimate. Operating within the subsidy allocated to VIA by the Government is consistent with those objectives. Nonetheless, the Agency does not acknowledge that it was required to identify the goals pursued by VIA in purchasing the cars; nor did it make a finding of whether it accepted VIA's argument and evidence that the acquisition of the cars was rationally connected to a legitimate purpose.

338 The majority of our colleagues do not engage in an analysis of whether the Agency considered VIA's purpose. In our view, this sidestepping of an important aspect of the *Meiorin* approach can have a broad impact in other human rights cases. The stage of the identification of legitimate purposes and whether the continued existence of obstacles is rationally connected to that purpose may appear perfunctory. However, it remains an indispensable stage of the undueness analysis. Only when the goals are clarified is it possible to assess the rational connection and, at later stages of the analysis, to evaluate the carrier's good faith belief and to conduct the appropriate balancing exercise. The goals pursued by VIA were the source from which the rest of the undueness analysis flowed. The Agency's error of law began at the first stage of the undueness analysis.

*(ii) Second Stage: Honest and Good Faith Belief of Carrier*

339 The Agency, not having identified the goals pursued by VIA did not examine whether VIA acted in good faith in doing so. It is not for this Court to conduct an evaluation of the evidence. However, here again, it is worth noting that there was evidence on the subject of good faith belief.

340 For example, VIA appears to have made a presentation to the Agency of an overview of its business and strategic case for the cars preceding their physical inspection on September 20, 2001. Further, as referred to above, VIA submitted evidence of its Accessibility Program and the steps it was taking to eliminate certain obstacles. The Agency, not having identified the good faith belief element of the undueness analysis, did not assess this evidence. The error of law of the Agency at the first stage of the undueness analysis was compounded at the second stage when it failed to identify and assess the motives pursued by VIA.

*(iii) Third Stage: Reasonably Necessary to Accomplish Purpose*

341 At the third stage, the Agency was required to consider whether the failure to eliminate obstacles was reasonably necessary in view of legitimate objectives being pursued by VIA. This entailed an analysis of reasonable alternatives and, if necessary, of constraints to eliminating the alleged undue obstacles.

*1. Reasonable Alternatives*

342 The Agency made an important statement in outlining the relevant principles of accessibility:

> Insofar as transportation service providers are aware of the needs of persons with disabilities and are prepared to accommodate those needs, it can be said that persons with disabilities may have equivalent access to the network. Implicit in the use of the term "equivalent access" is the notion that, in order to provide equal access to persons with disabilities, transportation service providers may have to provide different access — xmore or different services, different facilities or features, all designed to meet the needs of persons with disabilities to ensure that they, too, can access the network. (Preliminary Decision, at p. 19)

343 This extract points, albeit with a different terminology, to reasonable alternatives. However, when it came to evaluate the alternatives, the Agency failed to address how alleged undue obstacles might be circumvented by network alternatives which could accommodate persons with disabilities. The Agency focussed only on an centimeter-by-centimeter approach to measuring physical dimensions of the Renaissance cars, without regard to the possibility of accommodation through alternative services.

344 In fact, the Agency, after having, in effect, said reasonable alternatives were relevant, eventually completely dismissed the network as part of the analysis. It focussed only on the Renaissance cars themselves. The basis of the Agency's rejection of the network argument was the requirement that the Renaissance cars be accessible for persons using a Personal Wheelchair as provided for in the Rail Code. Therefore, it is necessary to examine the Agency's use of the Rail Code in this matter.

345 No regulations have been promulgated under s. 170 of the Act to govern the design, construction or modification of rail cars with respect to their accessibility for persons with disabilities. Rather than legally binding regulations, a policy choice has been made to encourage carriers to enhance accessibility to persons with disabilities within the federal transportation network through voluntary codes of practice such as the Rail Code. In its factum, the Agency states at para. 6:

> Following a change in government policy to deregulation in the mid-1990's, all further regulatory work has been achieved by means of voluntary consensual codes of practice and currently there are four codes of practice in effect [for aircraft, rail, ferries, and for removing communications barriers for all federal modes of transportation].

346 The Rail Code and other voluntary codes of practice cannot be elevated to the status of laws as if they were legally binding regulations. To do so is to improperly circumvent the policy choice of favouring adjudication over regulation; the Agency has been conferred the power to adjudicate and charged with the duty to exercise its discretion in assessing whether a given obstacle is undue. Applying the Rail Code as a binding instrument also sidesteps the requirement in s. 36 of the Act that the Minister of Transport be given notice of regulations, which the Governor in Council must then approve or reject.

347 As Doherty J.A. of the Ontario Court of Appeal held in *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.), at p. 109, a case dealing with a policy directive issued by the Ontario Securities Commission:

> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of [a] contradictory statutory provision or regulation: *Capital Cities Communications Inc., supra*, at p. 629; H. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" in *Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace* (1989), at p. 107. Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd., supra*, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines. Iacobucci J. put it this way in *Pezim* at p. 596:
>
> > However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment. [Emphasis added.]

348 Upon reading the Agency's decisions in this case, despite its statement mentioning the Rail Code's voluntary nature, it appears that the Agency effectively applied the Rail Code as if it were a regulation establishing minimum standards to be met by a rail carrier for the accessibility of rail cars to persons with disabilities. The Rail Code was the basis for the Agency assessing the accessibility of the Renaissance cars using the standard of the "Personal Wheelchair" as defined in the Rail Code. In its Preliminary Decision, the Agency stated:

> In this regard, it should be noted that the Rail Code sets out minimum standards that the Agency expects rail carriers to meet.
>
> . . . . .
>
> In fact, the Rail Code is the result of a consensus-building exercise, between the community of persons with disabilities in industry, and represents, in many ways, compromises to which rail carriers are expected to adhere.
> In summary, the Rail Code was not developed in isolation by the Agency; rather, it was the product of consultations with both the rail industry and the community of persons with disabilities. As such, although the Rail Code is voluntary, it is an important reference tool which sets out clearly defined expectations regarding accessibility standards to be met by rail carriers such as VIA.
> In light of the above, the Agency is of the opinion that the appropriate standard to be applied in its determination of whether certain features of the Renaissance Cars present undue obstacles to the mobility of persons using wheelchairs, is the Personal Wheelchair as set out in the Rail Code.
> Rather, as set out in the "framework of the decision" section of this Decision, the Rail Code is a voluntary guideline on minimum accessibility standard developed by consensus by industry and the community of persons with disabilities. In recognition of this, the Agency is not precluded from finding undue obstacles in the Renaissance cars even it if finds apparent compliance with the Code. [Emphasis added; pp. 20, 21, 23, 27 and 31]

It is apparent that the Agency's approach was that the Rail Code set minimum standards but did not preclude it from finding an obstacle to be undue even if the minimum standards of the Rail Code had been met. In other words, the Agency was of the view that it could impose a standard more demanding than the Rail Code but not less demanding.

349 While some Renaissance cars were not complete or were being retrofitted by VIA, the fact is that they were not ordered from the manufacturer according to specifications established by VIA. Nonetheless, the Agency, applying the Rail Code formula, determined that they were "newly manufactured and, as such, the Rail Code accessibility standards applicable are those for newly manufactured cars" (Preliminary Decision, at p. 31).

350 We have no doubt of the desirability of rail cars meeting or exceeding the Rail Code standards. However, in the absence of regulations enacted pursuant to s. 170, the Agency cannot treat the Personal Wheelchair as a legally binding standard, because to do so results in a failure by the Agency to exercise the discretion vested in it when it adjudicates under s. 172 of the Act.

351 It is apparent that the Agency did not consider alternatives that did not meet the Personal Wheelchair accessibility standards of the Rail Code. The Agency's show cause order in its Preliminary Decision confirms that this was the Agency's approach. Every item on the show cause order pertained to modifying the Renaissance rail cars to meet the Rail Code and Personal Wheelchair standard. While the order contained a basket clause inviting VIA to make any other submissions it considered relevant, the Agency's exclusive focus on modifying the rail cars in accordance with these requirements implied that other submissions were not invited or would not be entertained. It effectively adopted the Rail Code and Personal Wheelchair accessibility standard as if they were regulatory requirements. In doing so, the Agency failed to consider the full range of reasonable alternatives offered through the network to address the obstacles identified in the Renaissance cars and thereby erred in law.

*2. Constraints*

352 At this stage, the Agency's analysis involved a balancing of the significance of the obstacles to the mobility of persons with disabilities against other constraints such as structural constraints and the total estimated cost to remedy the obstacles, having regard to the objective of economic viability.

353 With respect to structural constraints, the Agency appears not to have been satisfied with evidence advanced by VIA as to practical structural problems. However, the third-party Schrum report filed as evidence in the Federal Court of Appeal found that "[t]he re-construction of the cars, as directed by the Agency, make[s] no engineering or production sense". Furthermore, Mr. Schrum stated, "I am of the view that some of the changes may not be feasible from an engineering point of view". On the issue of structural constraints, we can say no more than that the onus is on VIA to produce relevant evidence and that the Agency must carefully evaluate that evidence.

354 Economic constraints were a significant issue before the Agency. The Agency did make certain cost findings with respect to some of the obstacles. However, its reasoning reveals a dismissive way of addressing the cost issue. Furthermore, the Agency did not identify its total cost estimate. In an undueness analysis, when cost constraints are an issue, it is an error of law for the Agency not to determine a total cost estimate for the corrective measures it orders.

355 In response to the Agency's show cause order in its Preliminary Decision, VIA had provided an estimate of some $35 million as the total cost and lost revenue of completing the corrective measures identified in the show cause order. The Agency found this to be overstated. In particular, it did not accept VIA's estimate of $24.2 million in foregone passenger revenue as a result of removing some seats to accommodate persons with disabilities. The Agency calculated its own range for this lost revenue, finding a best case scenario of approximately $700,000 and a worst case scenario of some $1.7 million. The Agency also rejected VIA's estimate of the cost of implementing certain corrective measures finding, for example, that such cost would be incurred by VIA in making required safety changes in any event. However, despite a number of figures and calculations by the Agency in respect of certain corrective measures, the Agency never provided its best estimate of VIA's total cost of the corrective measures it was ordering. Without a total cost estimate, the Agency could not conduct the undueness analysis required by s. 172, that is, balancing the significance of the obstacles to persons with disabilities with the cost of the corrective measures, having regard to the objective of economic viability.

356 The Agency was also dismissive in its consideration of VIA's ability to fund the corrective measures. For example, the Agency did not consider the removal of some obstacles and the retention of others based on cost considerations. It treated VIA's resources as virtually unlimited, stating that costs for accessibility "should always be budgeted for" (Preliminary

Decision, at p. 45). The Agency noted that "VIA receives significant funding from the Government of Canada" (p. 46) as if VIA was entitled to such funding as a matter of right. The Agency also disregarded funding limitations when it stated that the "fundamental importance of accessible travel by rail to persons with disabilities cannot be set aside" in favour of reduced capital costs and flexibility in VIA's network (p. 46).

357 The Agency made reference to a contingency fund for the 2003- 2007 period of some $25 million for "unplanned events such as market downturns, potential accidents and other operational liabilities" (Final Decision, at p. 23). However, there is no indication that the fund is available for major reconstruction of the Renaissance cars and, in any event, without providing a cost estimate, the reference to the contingency fund is premature.

358 Under s. 172 the Agency has the power to order a carrier to take corrective measures in respect of an undue obstacle to the mobility of persons with disabilities. In cases in which the required funding may be significant, and, as in VIA's case, where the carrier operates on an annual deficit such that it is reliant on government subsidization for its ongoing operations and capital requirements, the Agency must be especially attentive to the cost it proposes to impose.

359 The Agency's reasons do not demonstrate the attention that is required for a case where the cost of the measures is potentially very substantial. For example, the Agency made a questionable comparison in its Preliminary Decision (p. 46) when it compared remedying obstacles to the mobility of persons with disabilities with station upgrades and retrofitting the lounge in the Renaissance cars. The Agency stated that each of these expenditures "will have the effect of increasing the company's operating loss", apparently missing the fact that station and lounge upgrades are made for economic objectives, intended to yield increased revenues over time (p. 46).

360 In justifying its order that VIA remove seats for accessibility purposes, the Agency compared this to VIA's removal of seats to provide space for coat storage:

> ...if VIA is prepared to remove up to 47 seats to accommodate passengers'coats and forego the revenues associated with this, it must be prepared to forego the revenues associated with removing up to 33 seats ... in order to implement Option 3. (Final Decision, at p. 53)

Again this was a flawed comparison. Providing space for coat storage is obviously not an objective of its own. It is an economic decision to maximize revenue. The revenue connected with the seats removed to create a coat valet will be foregone, but VIA must have determined that coat storage facilities were necessary in order to attract and retain passengers and maximize revenue from its remaining seats. Thus it does not follow, as the Agency concluded, that:

> ...it would appear that VIA can afford the revenue associated with one-passenger seat for the above-noted 13 or 33 economy coach cars, given that it is prepared to forego the revenue in respect of up to 47 coach seats to provide coat storage. (Final Decision, at p. 53)

361 The Agency's flawed reasoning on this point may have owed something to its process. On September 17, 2003, the Agency wrote to VIA directing that VIA advise whether any passenger seats had been removed from the Renaissance cars, thereby causing an impact on VIA's passenger seat revenue. VIA responded in writing the following day, explaining that it had removed seats to install coat valets, a change that was necessary because there was no other facility appropriate for the storage of coats. VIA noted that the Agency had given VIA less than 26 hours to file its reply to the Agency's question and that "VIA Rail does not understand the context of the question." In its Final Decision the Agency used the information to make the coat storage comparison. Furthermore, the Agency stated that VIA did not indicate "why the existing storage or even some of the 'future valet/storage' is not sufficient for this purpose" (p. 53). But the Agency had not afforded VIA an opportunity to explain.

362 Once the Agency ordered corrective measures in its Final Decision, VIA says it was able to obtain a third-party estimate of the cost associated with these modifications. VIA claims that obtaining a third-party cost estimate was more feasible at this point because it pertained to a specific order of the Agency, rather than to an unlimited series of alternatives. Even though the order had narrowed the scope of the estimate, Bombardier train expert Peter Schrum stated that the directions of the Agency were laden with a number of complex and unknown structural, engineering, production and timing risks, such that his cost conclusions must be qualified.

363 The Federal Court of Appeal allowed the Schrum evidence to be added to the record. His report indicated that the modifications ordered by the Agency would cost some $48 million and possibly up to $92 million. This represented between 37 percent and 71 percent of the cost of purchasing and commissioning into service the Renaissance rail cars.

364 In its reasons, the majority implies the Schrum report should not have been admitted in evidence in the Federal Court of Appeal. However, the admission of this evidence is not an issue before this Court. This Court should not, on its own motion, disregard filed evidence in the absence of argument by the parties on the issue. Both parties filed extensive evidence and conducted cross-examinations on affidavits. In the end, over 2000 pages of evidence were filed in the Federal Court of Appeal. This is part of the record before this Court and cannot be ignored.

365 The majority questions the validity of the Schrum report and says that its "untested conclusions render it an inappropriate basis for interfering with the Agency's factual findings and remedial responses" (majority reasons at para. 242). It is not for this Court to assess and weigh the evidence. In any event, Mr. Schrum was cross-examined on his affidavit. Therefore, his report did not go untested. Moreover, the Federal Court of Appeal used the Schrum evidence not to make a decision with respect to the merits, but only as a basis for remitting the matter to the Agency for its reconsideration. In the circumstances, that was the correct approach. Where the cost is potentially significant and where the Agency adopted a dismissive approach to cost and funding of corrective measures, it is apparent that relevant considerations were not taken into account.

366 It should be for the Agency, on the basis of new evidence adduced before it (or if it considers it adequate, the evidence filed in the Federal Court of Appeal) to determine the cost of the corrective measures and VIA's ability to fund them and to carry out the balancing exercise required of it at the third stage of the undueness analysis.

367 In the name of deference, the majority would cut short the assessment of the Agency's decisions on the basis that it applied the *Meiorin* principles. This is problematic for two reasons. First, the Agency distanced itself from these human rights principles (Preliminary Decision, at p. 36). It takes an overly generous recrafting of the Agency's decision to characterize it as reflecting the correct approach. Second the majority is not clear as to how the *Meiorin* principles are to be applied and to what extent. Tests and frameworks are created to provide guidance to decision makers in the exercise of their discretion. Making them ambiguous is counterproductive.

**V. Conclusion**

368 On the one hand, Parliament's intention is to deregulate, to the extent possible, transportation subject to federal jurisdiction. That is the environment in which VIA may expect to operate. On the other, the Agency has been given broad powers in Part V of the Act in respect of human rights matters. In this context, the Agency's role as an adjudicative body necessarily requires it to place procedural obligations on the parties participating in proceedings. The Agency must be attuned to the feasibility of the orders it issues to the parties and the intrusiveness of its process into the management of the carrier. In turn, the parties must respect the Agency's role and conduct themselves accordingly. We observe from a review of the record that VIA's conduct during the proceedings did not always appear to be productive. Notwithstanding the fact that a s. 172 application creates an adversarial process in which VIA, as any regulated enterprise, is entitled to vigorously defend its interests, VIA must recognize and respect the role of the Agency.

369 With respect to costs, CCD is a non-profit organization that does not seek a pecuniary or proprietary benefit, and its application has raised important issues with a human rights dimension. VIA does not seek costs against CCD.

370 For these reasons, we would dismiss this appeal without costs. The decision of the majority of the Federal Court of Appeal should be affirmed, and the matter remitted to the Agency for redetermination having regard to these reasons.

*Appeal allowed.*
*Pourvoi accueilli.*

**Appendix**

*Canada Transportation Act*, S.C. 1996, c. 10

**National transportation policy**

5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

(a) the national transportation system meets the highest practicable safety standards,
(b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,
(c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,
(d) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,
(e) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,
(f) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,
(g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
(i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,
(ii) an undue obstacle to the mobility of persons, including persons with disabilities,
(iii) an undue obstacle to the interchange of commodities between points in Canada, or
(iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and
(h) each mode of transportation is economically viable,
and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation.

. . . . .

20. [Technical experts] The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

. . . . .

25. [Agency powers in general] The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

. . . . .

29. [Time for making decisions] (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.
(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

. . . . .

31. [Fact finding is conclusive] The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

. . . . .

33. [Enforcement of decision or order] (1) A decision or an order of the Agency may be made an order of any superior court and is enforceable in the same manner as such an order.

. . . . .

36. [Approval of regulations required] (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

. . . . .

***Review and appeal***

40. The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

. . . . .

**Part V**

**Transportation of Persons with Disabilities**

170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

(b) the training of personnel employed at or in those facilities or premises or by carriers;

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(d) the communication of information to persons with disabilities.

. . . . .

171. The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

Footnotes

A corrigendum issued by the Court on April 5, 2007 has been incorporated herein.

170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

(b) the training of personnel employed at or in those facilities or premises or by carriers;

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(d) the communication of information to persons with disabilities.

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TAB 14

2011 SCC 62
Supreme Court of Canada

N.L.N.U. v. Newfoundland & Labrador (Treasury Board)

2011 CarswellNfld 414, 2011 CarswellNfld 415, 2011 SCC 62, [2011] 3 S.C.R. 708, [2011] S.C.J. No. 62, 2011 C.L.L.C. 220-008, 208 A.C.W.S. (3d) 435, 213 L.A.C. (4th) 95, 317 Nfld. & P.E.I.R. 340, 340 D.L.R. (4th) 17, 38 Admin. L.R. (5th) 255, 424 N.R. 220, 97 C.C.E.L. (3d) 199, 986 A.P.R. 340, D.T.E. 2012T-7

# Newfoundland and Labrador Nurses' Union (Appellant) and Her Majesty The Queen in Right of Newfoundland and Labrador, represented by Treasury Board and Newfoundland and Labrador Health Boards Association, on behalf of Labrador-Grenfell Regional Health Authority (Respondents)

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell JJ.

Heard: October 14, 2011
Judgment: December 15, 2011
Docket: 33659

Proceedings: affirming *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2010), (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 294 Nfld. & P.E.I.R. 161, (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 908 A.P.R. 161, (sub nom. *Newfoundland & Labrador v. NLNU*) 2010 C.L.L.C. 220-017, 2010 NLCA 13, 2010 CarswellNfld 49, 190 L.A.C. (4th) 385 (N.L. C.A.); reversing *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2008), 2008 NLTD 200, 2008 CarswellNfld 332, (sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*) 873 A.P.R. 170, (sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*) 283 Nfld. & P.E.I.R. 170 (N.L. T.D.)

Counsel: David G. Conway, Tracey L. Trahey for Appellant
Stephen F. Penney, Jeffrey Beedell for Respondents

Subject: Labour; Public

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

**Labour and employment law --- Labour law — Collective agreement — Vacations and holidays — Entitlement**

Arbitrator interpreted nurses' collective agreement (CA) as excluding years of casual service from calculation of vacation entitlement after nurses became permanent, temporary or part-time — On review, trial judge set aside arbitrator's award on basis that his reasons were not sufficiently supported, and remitted grievance to new arbitrator — Court of Appeal allowed employer's appeal, concluding that trial judge erred in focusing on "how" rather than "why"

arbitrator reached conclusion he did, and holding that arbitrator's reasons indicated why conclusion was reached, fell within range of possible, acceptable outcomes defensible in respect of facts and law, and satisfied Dunsmuir criteria of justification, transparency and intelligibility — Union appealed — Appeal dismissed — Arbitrator outlined relevant facts, arguments, interpretive principles, and CA provisions, and came to conclusion well within range of reasonable outcomes — When Court in Dunsmuir called for justification, transparency and intelligibility in decision-maker's reasons, it recognized that specialized decision-makers render decisions in areas of expertise, often using unique concepts and language, rendering decisions counterintuitive to generalist — Dunsmuir did not stand for proposition that adequacy of reasons was stand-alone basis for quashing decision — Courts should not expect decision-maker to include every argument, statutory provision, decision or other detail in reasons or to make explicit findings on each constituent element leading to conclusion, provided reviewing court could understand why decision was made and whether it was within range of acceptable outcomes — On reasonableness review, guiding principle was deference — Court's 1999 decision in Baker did not stand for proposition that reasons were always required, or that quality of those reasons was question of procedural fairness, and it was not helpful to suggest that decision meant alleged deficiencies or flaws in reasons constituted breach of duty of procedural fairness triggering correctness review — Finding that tribunal's reasoning process was inadequately revealed was not same as disagreement over tribunal's conclusions — Arbitrator provided reasons and did not breach duty of procedural fairness, so review was to be made within reasonableness analysis — Simple interpretive exercise before arbitrator was classic fare for labour arbitrators, and to expect him to respond to every possible argument or line of analysis would paralyse arbitration process directed at speedy resolution of disputes with knowledge that review and negotiation of new CA were possible.

**Labour and employment law --- Labour law — Labour arbitrations — Judicial review — Standard of review — Reasonableness**

Arbitrator interpreted nurses' collective agreement (CA) as excluding years of casual service from calculation of vacation entitlement after nurses became permanent, temporary or part-time — On review, trial judge set aside arbitrator's award on basis that his reasons were not sufficiently supported, and remitted grievance to new arbitrator — Court of Appeal allowed employer's appeal, concluding that trial judge erred in focusing on "how" rather than "why" arbitrator reached conclusion he did, and holding that arbitrator's reasons indicated why conclusion was reached, fell within range of possible, acceptable outcomes defensible in respect of facts and law, and satisfied Dunsmuir criteria of justification, transparency and intelligibility — Union appealed — Appeal dismissed — Arbitrator outlined relevant facts, arguments, interpretive principles, and CA provisions, and came to conclusion well within range of reasonable outcomes — When Court in Dunsmuir called for justification, transparency and intelligibility in decision-maker's reasons, it recognized that specialized decision-makers render decisions in areas of expertise, often using unique concepts and language, rendering decisions counterintuitive to generalist — Dunsmuir did not stand for proposition that adequacy of reasons was stand-alone basis for quashing decision — Courts should not expect decision-maker to include every argument, statutory provision, decision or other detail in reasons or to make explicit findings on each constituent element leading to conclusion, provided reviewing court could understand why decision was made and whether it was within range of acceptable outcomes — On reasonableness review, guiding principle was deference — Court's 1999 decision in Baker did not stand for proposition that reasons were always required, or that quality of those reasons was question of procedural fairness, and it was not helpful to suggest that decision meant alleged deficiencies or flaws in reasons constituted breach of duty of procedural fairness triggering correctness review — Finding that tribunal's reasoning process was inadequately revealed was not same as disagreement over tribunal's conclusions — Arbitrator provided reasons and did not breach duty of procedural fairness, so review was to be made within reasonableness analysis — Simple interpretive exercise before arbitrator was classic fare for labour arbitrators, and to expect him to respond to every possible argument or line of analysis would paralyse arbitration process directed at speedy resolution of disputes with knowledge that review and negotiation of new CA were possible.

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

Arbitrator interpreted nurses' collective agreement (CA) as excluding years of casual service from calculation of vacation entitlement after nurses became permanent, temporary or part-time — On review, trial judge set aside arbitrator's award on basis that his reasons were not sufficiently supported, and remitted grievance to new arbitrator — Court of Appeal allowed employer's appeal, concluding that trial judge erred in focusing on "how" rather than "why" arbitrator reached conclusion he did, and holding that arbitrator's reasons indicated why conclusion was reached, fell within range of possible, acceptable outcomes defensible in respect of facts and law, and satisfied Dunsmuir criteria of

justification, transparency and intelligibility — Union appealed — Appeal dismissed — Arbitrator outlined relevant facts, arguments, interpretive principles, and CA provisions, and came to conclusion well within range of reasonable outcomes — When Court in Dunsmuir called for justification, transparency and intelligibility in decision-maker's reasons, it recognized that specialized decision-makers render decisions in areas of expertise, often using unique concepts and language, rendering decisions counterintuitive to generalist — Dunsmuir did not stand for proposition that adequacy of reasons was stand-alone basis for quashing decision — Courts should not expect decision-maker to include every argument, statutory provision, decision or other detail in reasons or to make explicit findings on each constituent element leading to conclusion, provided reviewing court could understand why decision was made and whether it was within range of acceptable outcomes — On reasonableness review, guiding principle was deference — Court's 1999 decision in Baker did not stand for proposition that reasons were always required, or that quality of those reasons was question of procedural fairness, and it was not helpful to suggest that decision meant alleged deficiencies or flaws in reasons constituted breach of duty of procedural fairness triggering correctness review — Finding that tribunal's reasoning process was inadequately revealed was not same as disagreement over tribunal's conclusions — Arbitrator provided reasons and did not breach duty of procedural fairness, so review was to be made within reasonableness analysis — Simple interpretive exercise before arbitrator was classic fare for labour arbitrators, and to expect him to respond to every possible argument or line of analysis would paralyse arbitration process directed at speedy resolution of disputes with knowledge that review and negotiation of new CA were possible.

**Droit du travail et de l'emploi --- Droit du travail — Convention collective — Vacances et congés — Droit**

Arbitre a conclu qu'en vertu de la convention collective (CC), les infirmières ne pouvaient pas inclure leurs années de service à titre d'employées occasionnelles dans le calcul servant à déterminer leur droit aux congés lorsqu'elles atteignaient le statut d'employée permanente, temporaire ou à temps partiel — Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient pas suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre — Cour d'appel a accueilli l'appel interjeté par l'employeur et a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions, plutôt que de se demander « pourquoi », et a estimé que les motifs de l'arbitre exposaient le fondement de sa décision, laquelle faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et satisfaisait aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel — Syndicat a formé un pourvoi — Pourvoi rejeté — Arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la CC et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables — Lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste — Arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision — Tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail ou tire une conclusion explicite sur chaque élément constitutif du raisonnement qui a mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables — Dans le cadre d'un examen portant sur la norme de la décision raisonnable, la déférence est le principe directeur — Décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte — Conclusion que le raisonnement du tribunal n'était pas adéquatement exposé n'équivalait pas à un désaccord au sujet des conclusions tirées par celui-ci — Arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable — Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce que l'arbitre réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle CC sont possibles.

**Droit du travail et de l'emploi --- Droit du travail — Sentences arbitrales — Contrôle judiciaire — Norme de**

  

**contrôle — Décision raisonnable**

Arbitre a conclu qu'en vertu de la convention collective (CC), les infirmières ne pouvaient pas inclure leurs années de service à titre d'employées occasionnelles dans le calcul servant à déterminer leur droit aux congés lorsqu'elles atteignaient le statut d'employée permanente, temporaire ou à temps partiel — Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient pas suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre — Cour d'appel a accueilli l'appel interjeté par l'employeur et a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions, plutôt que de se demander « pourquoi », et a estimé que les motifs de l'arbitre exposaient le fondement de sa décision, laquelle faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et satisfaisait aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel — Syndicat a formé un pourvoi — Pourvoi rejeté — Arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la CC et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables — Lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste — Arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision — Tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail ou tire une conclusion explicite sur chaque élément constitutif du raisonnement qui a mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables — Dans le cadre d'un examen portant sur la norme de la décision raisonnable, la déférence est le principe directeur — Décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte — Conclusion que le raisonnement du tribunal n'était pas adéquatement exposé n'équivalait pas à un désaccord au sujet des conclusions tirées par celui-ci — Arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable — Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce que l'arbitre réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle CC sont possibles.

**Droit administratif --- Exigences de justice naturelle — Droit à l'audition — Droits procéduraux lors de l'audition — Motifs de la décision**

Arbitre a conclu qu'en vertu de la convention collective (CC), les infirmières ne pouvaient pas inclure leurs années de service à titre d'employées occasionnelles dans le calcul servant à déterminer leur droit aux congés lorsqu'elles atteignaient le statut d'employée permanente, temporaire ou à temps partiel — Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient pas suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre — Cour d'appel a accueilli l'appel interjeté par l'employeur et a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions, plutôt que de se demander « pourquoi », et a estimé que les motifs de l'arbitre exposaient le fondement de sa décision, laquelle faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et satisfaisait aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel — Syndicat a formé un pourvoi — Pourvoi rejeté — Arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la CC et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables — Lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste — Arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision — Tribunaux ne devraient pas s'attendre à ce que les décideurs

prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail ou tire une conclusion explicite sur chaque élément constitutif du raisonnement qui a mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables — Dans le cadre d'un examen portant sur la norme de la décision raisonnable, la déférence est le principe directeur — Décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte — Conclusion que le raisonnement du tribunal n'était pas adéquatement exposé n'équivalait pas à un désaccord au sujet des conclusions tirées par celui-ci — Arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable — Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce que l'arbitre réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle CC sont possibles.

Under the nurses' union collective agreement, casual nurses received a twenty percent wage premium in lieu of specified employment benefits from which they were excluded. One of those benefits was entitlement to vacation with pay. An arbitrator concluded that, under the collective agreement, members of the union could not use their years of service as casual employees for the purposes of calculating vacation entitlement when their employment status changed to permanent, temporary or part-time. On judicial review, the trial division judge set aside the arbitrator's award on the basis that the arbitrator's reasons were not sufficiently supported, and remitted the grievance to a new arbitrator. The trial division judge's decision was overturned by a majority of the Court of Appeal, which held that the arbitrator's minimal explanation indicated why the arbitrator reached the conclusion he did and satisfied the Dunsmuir criteria of justification, transparency and intelligibility. The Court of Appeal was of the opinion that the arbitrator's decision as a whole led to the reasonable conclusion that calculations to determine vacation entitlement for a permanent employee would not include service when the nurse was a casual employee because the employee was already compensated for that service and was explicitly excluded from the benefit of accruing time for the purposes of calculating his or her vacation entitlement under the collective agreement. The Court of Appeal concluded that the trial division judge erred in focusing on "how" the arbitrator reached his conclusion and failed to consider whether the arbitrator, at least minimally, explained "why" he had reached the conclusion he did. The Court of Appeal found that the arbitrator's decision fell within the range of possible, acceptable outcomes defensible in respect of the facts and the law, and that the trial division judge failed to read the arbitrator's decision as a whole and in context. The union appealed to the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Per Abella J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Rothstein, Cromwell JJ. concurring): The arbitrator in this case outlined the relevant facts, arguments, interpretive principles, and collective agreement provisions, and came to a conclusion that was well within the range of reasonable outcomes. It was important to understand that, when the Court in Dunsmuir called for justification, transparency and intelligibility in a decision-maker's reasons, it was recognizing that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, often using unique concepts and language and rendering decisions that were counterintuitive to a generalist. Read as a whole, Dunsmuir did not stand for the proposition that the adequacy of reasons was a stand-alone basis for quashing a decision, or that a reviewing court should undertake two discrete analyses of the decision and the result. The reasons under review were to be read together with the outcome to determine whether the result fell within a range of possible outcomes. Although courts may, if necessary, look to the record to assess the reasonableness of the outcome, courts should not substitute their own reasons. Courts should not expect a decision-maker to include every argument, statutory provision, decision or other detail in their reasons, and a decision-maker was not required to make explicit findings on each constituent element leading to its final conclusion, provided the reasons allowed the reviewing court to understand why the decision was made and whether the decision was within the range of acceptable outcomes. Nor did the existence of an alternative interpretation of an agreement inevitably mean an arbitrator's decision should be set aside. When reviewing an administrative body's decision on the reasonableness standard, the guiding principle was deference.

  

The Court's 1999 decision in Baker did not stand for the proposition that reasons were always required, or that the quality of those reasons was a question of procedural fairness, and it was not helpful to suggest that, based on that decision, alleged deficiencies or flaws in reasons constituted a breach of the duty of procedural fairness triggering a correctness review. A finding that a tribunal's reasoning process was inadequately revealed was not to be confused with a disagreement over the tribunal's conclusions. The arbitrator in this case provided reasons and there was no breach of the duty of procedural fairness, so any challenge to the arbitrator's reasoning or result was to be made within the reasonableness analysis. The simple interpretive exercise before the arbitrator in this case was classic fare for labour arbitrators, and to expect an arbitrator in such circumstances to respond to every possible argument or line of analysis would paralyse the arbitration process which was directed at the speedy resolution of disputes with the knowledge that judicial review and negotiation of a new collective agreement were possible.

En vertu de la convention collective du syndicat des infirmières, les infirmières occasionnelles recevaient une somme équivalant à 20 pour cent de leur salaire de base plutôt que des avantages sociaux spécifiques auxquels elles n'avaient pas droit. Un de ces avantages était le droit à des vacances payées. Un arbitre a conclu qu'en vertu de la convention collective, les membres du syndicat ne pouvaient pas inclure leurs années de service à titre d'employés occasionnels dans le calcul servant à déterminer le droit aux congés lorsqu'ils atteignaient le statut d'employé permanent, temporaire ou à temps partiel. Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre. La décision du juge de première instance a été infirmée par les juges majoritaires de la Cour d'appel, lesquels ont conclu que les explications sommaires de l'arbitre permettaient de comprendre le fondement de sa décision et satisfaisaient aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel. La Cour d'appel était d'avis que la décision de l'arbitre prise dans son ensemble permettait de parvenir à la conclusion raisonnable qu'on ne pourrait pas inclure dans le calcul servant à déterminer si un employé permanent avait droit aux congés ses années de service à titre d'employé occasionnel puisque l'employé était d'ores et déjà compensé pour ce type de service et était explicitement exclu du programme d'avantages sociaux permettant de prendre en compte le temps couru pour déterminer s'il avait droit aux congés en vertu de la convention collective. La Cour d'appel a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions et a négligé de se demander si l'arbitre avait expliqué, même sommairement, « pourquoi » il était parvenu à de telles conclusions. La Cour d'appel a conclu que la décision de l'arbitre faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et que le juge de première instance n'avait pas pris la décision de l'arbitre dans son ensemble et dans son contexte. Le syndicat a formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

Abella, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Dans sa décision, l'arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la convention collective et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables. Ce qui était important de retenir, lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, c'était qu'elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste. Pris dans son ensemble, l'arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision, ou que les cours de révision doivent effectuer deux analyses distinctes, l'une portant sur les motifs et l'autre, sur le résultat. Les motifs faisant l'objet du contrôle judiciaire devaient être examinés en corrélation avec le résultat afin de savoir si ce dernier faisait partie des issues possibles. Bien que les tribunaux puissent, s'ils le jugent nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat, ils ne devraient pas substituer leurs propres motifs à ceux de la décision sous examen. Les tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail dans leurs motifs, et un décideur n'est pas tenu de tirer une conclusion explicite sur chaque élément constitutif du raisonnement ayant mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables. Pas plus que le fait que l'existence d'une interprétation différente puisse être donnée à une convention doive nécessairement entraîner l'annulation d'une décision d'un arbitre. La déférence est le principe directeur qui régit

  

le contrôle de la décision d'un tribunal administratif selon la norme de la décision raisonnable.

La décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte. Il faut se garder de confondre la conclusion que le raisonnement du tribunal n'est pas adéquatement exposé et le désaccord au sujet des conclusions tirées par le tribunal. En l'espèce, l'arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable. Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce qu'un arbitre placé dans de telles circonstances réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle convention collective sont possibles.

## Table of Authorities

**Cases considered by *Abella J.*:**

*Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — followed

*C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

*Khosa v. Canada (Minister of Citizenship & Immigration)* (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa*) [2009] 1 S.C.R. 339 (S.C.C.) — referred to

*New Brunswick (Board of Management) v. Dunsmuir* (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

*P.S.A.C. v. Canada Post Corp.* (2010), (sub nom. *Canada Post Corp. v. PSAC*) [2011] 2 F.C.R. 221, 2010 CAF 56, 2010 CarswellNat 3242, (sub nom. *PSAC v. Canada Post Corp.*) 2010 C.C.L.C. 230-015, 2010 CarswellNat 416, 2010 FCA 56, 15 Admin. L.R. (5th) 157, (sub nom. *Canada Post Corp. v. Public Service Alliance of Canada*) 399 N.R. 127 (Fed. C.A.) — considered

*P.S.A.C. v. Canada Post Corp.* (2011), 2011 CarswellNat 4581, 2011 CarswellNat 4582, 2011 SCC 57 (S.C.C.) — referred to

*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), 73 C.L.L.C. 14,193, [1974] 1 W.W.R. 653, 1973

  

CarswellSask 120, 41 D.L.R. (3d) 6, (sub nom. *U.I.E.S., local 333 c. Nipawin District Staff Nurses Assn.*) [1975] 1 S.C.R. 382, 1973 CarswellSask 145 (S.C.C.) — referred to

APPEAL by union from judgment reported at *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2010), (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 294 Nfld. & P.E.I.R. 161, (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 908 A.P.R. 161, (sub nom. *Newfoundland & Labrador v. NLNU)* 2010 C.L.L.C. 220-017, 2010 NLCA 13, 2010 CarswellNfld 49, 190 L.A.C. (4th) 385 (N.L. C.A.).

POURVOI formé par le syndicat à l'encontre d'une décision publiée à *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2010), (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 294 Nfld. & P.E.I.R. 161, (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 908 A.P.R. 161, (sub nom. *Newfoundland & Labrador v. NLNU)* 2010 C.L.L.C. 220-017, 2010 NLCA 13, 2010 CarswellNfld 49, 190 L.A.C. (4th) 385 (N.L. C.A.).

***Abella J.:***

1 The transformative decision of this Court in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), explained that the purpose of reasons, when they are required, is to demonstrate "justification, transparency and intelligibility" (para. 47). The issues in this appeal are whether the arbitrator's reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness.

2 The dispute underlying the arbitrator's award involved the calculation of vacation benefits. The arbitrator concluded that under the collective agreement, the grievors' time as casual employees was not to be included in calculating the length of their vacation entitlement when they became permanent employees.

3 The definition of "Employee" in the collective agreement includes all paid employees, including casual employees. Casual employees are defined in Article 2.01(b) as employees who work on an "occasional or intermittent basis". They are under "no obligation ... to come [to work] when they are called" and the Employer, in turn, has "no obligation" to call them.

4 Notably, that definitional provision states that while casual employees are generally entitled to the benefits of the collective agreement, they are *expressly excluded* from a number of benefits, including the vacation entitlement calculations applicable to permanent employees under Article 17. Instead, they receive 20 percent of their basic salary in lieu.

5 The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In the 12 page decision, the arbitrator outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, a number of applicable interpretive principles, and ultimately agreed with the Employer that the time an employee spent as a casual could not be used in calculating that employee's length of service towards vacation entitlement when he or she became a permanent, temporary or part-time employee.

  

6 The arbitrator reasoned that casual employees, defined in Article 2.01(b), work on an occasional, intermittent basis, and are not required to come to work even when called. Article 2.01(b) also sets out a list of benefits to which casual employees are *not* entitled. In lieu of those benefits, casual employees receive the benefit of 20 percent of their basic salary. One of the benefits from which they are expressly excluded and for which they receive the additional 20 percent is Article 17, which determines the length of vacation time to which an employee is entitled.

7 These points, it seems to me, provided a reasonable basis for the arbitrator's conclusion, based on a plain reading of the agreement itself.

8 On judicial review, the parties acknowledged that the standard of review was reasonableness. The chambers judge was of the view that such a review is based not only on whether the outcome falls within the range of possible outcomes, in accordance with *Dunsmuir*, but also requires that the reasons set out a line of analysis that reasonably supports the conclusion reached. The chambers judge concluded that the arbitrator's reasons required "more cogency" and that his conclusion was "unsupported by any chain of reasoning that could be considered reasonable". They were, in short, insufficient. As a result, the chambers judge found the result to be unreasonable and set it aside.

9 The majority in the Court of Appeal overturned the decision of the chambers judge, concluding that while "a more comprehensive explanation" would have been preferable, the reasons were "sufficient to satisfy the *Dunsmuir* criteria" of "justification, transparency and intelligibility". In their words:

> ... reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.

10 The dissenting judge agreed with the chambers judge. In her view, the arbitrator's reasons disclosed no line of reasoning which could lead to his conclusion. As a result, there were "no reasons" to review.

**Analysis**

11 It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decisionmaking process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> ... What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making

> process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers".... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision".
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> ... [Emphasis added; citations omitted; paras. 47-48.]

12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
>
> [Emphasis added.]
>
> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

See also David Mullan, "*New Brunswick (Board of Management) v. Dunsmuir*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2004), at p. 380; and *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 63.

13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counterintuitive to a generalist. That was the basis for this Court's new direction in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 12:5330 and 12:5510). It is a more organic exercise — 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. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for

  

the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.), at p. 391). In other words, 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.

17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

18 Evans J.A. in *P.S.A.C. v. Canada Post Corp.*, 2010 FCA 56, [2011] 2 F.C.R. 221 (Fed. C.A.), explained in reasons upheld by this Court (2011 SCC 57 (S.C.C.)) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

19 The Union acknowledged that an arbitrator's interpretation of a collective agreement is subject to reasonableness. As I understand it, however, its argument before us was that since the arbitrator's reasons amounted to "no reasons", and since the duty to provide reasons is, according to *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), a question of procedural fairness, a correctness standard applies.

20 Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).

21 It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review

 

and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).

22 It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

23 The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, *under the collective agreement*, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. They are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible.

24 As George W. Adams noted:

> The hallmarks of grievance arbitration are speed, economy and informality. Speedy dispute resolution is important to the maintenance of industrial peace and the ongoing economic needs of an enterprise. Adjudication that is too expensive contributes to industrial unrest by preventing the pursuit of meritorious grievances that individually involve small monetary values but collectively constitute a weathervane of employee satisfaction with the rules negotiated. The relative informality of grievance arbitration is facilitated by much less stringent procedural and evidentiary rules than those applicable to court proceedings. Informality permits direct participation by laymen, enhances the parties' understanding of the system and minimizes potential points of contention permitting everyone to focus on the merits of a dispute and any underlying problem....
>
> ... appeal to a higher authority by way of judicial review may be needed to correct egregious errors, to prevent undue extension of arbitral power and to integrate the narrow expertise of arbitrators into the general values of the legal system. The very existence of judicial review can be a healthy check on the improper exercise of arbitral responsibility and discretion.
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> (*Canadian Labour Law* (2nd ed. (loose-leaf)), at §§ 4.1100 to 4.1110)

25 Arbitration allows the parties to the agreement to resolve disputes as quickly as possible knowing that there is the relieving prospect not of judicial review, but of negotiating a new collective agreement with different terms at the end of two or three years. This process would be paralyzed if arbitrators were expected to respond to every argument or line of possible analysis.

26 In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. I would dismiss the appeal with costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

  