Court File No. A-245-24

FEDERAL COURT OF APPEAL

B E T W E E N

JEWISH NATIONAL FUND OF CANADA INC. / FONDS NATIONAL JUIF DU CANADA INC.

Appellant

– and –

MINISTER OF NATIONAL REVENUE

Respondent

WRITTEN REPLY REPRESENTATIONS OF THE APPELLANT

HAMEED LAW
43 Florence Street,
Ottawa, Ontario K2P 0W6

Nicholas Pope
T: 613-656-6917
F: 613-232-2680
E: npope@hameedlaw.ca

MOVING PARTIES:
INDEPENDENT JEWISH VOICES CANADA INC., DAVID MIVASAIR, and ISMAIL ZAYID

Counsel for the Moving Parties

KPMG Law LLP
150 Elgin Street
Suite 1800
Ottawa ON K2P 2P8

Adam Aptowitzer
T: 613-350-1413
F: 613-212-2896
E: aaptowitzer@kpmg.ca

GOWLING WLG (Canada) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5

David Stevens
Neil McCormick
T: +1 416 862 3556
F: +1 416 862 7661
E: david.stevens@gowlingwlg.com

Counsels for the Appellant

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
NCR - Tax Litigation Section
Justice Canada
99 Bank Street, 11th Floor
Ottawa ON K1A 0H8

Linsey Rains
T: 343-550-1670
F : 613-941-2293
E: Linsey.Rains@justice.gc.ca

Alex Nguyen
T: 343-549-5938
F: 613-941-2293
E:Alex.Nguyen@justice.gc.ca

Mengjiao Liu
T: 438-341-6864
F: 613-941-2293
E: Mengjiao.Liu@justice.gc.ca

Counsel for the Respondent

TABLE OF CONTENTS

Tab	Document	Page
1.	Written Reply Representations of the Appellant	01-06
2.	Affidavit of Jordan Narod - Audit of Registered Charity Letter – May 2, 2014. - Identification of Non-Compliances Letter – May 12, 2016 - Notice of Intent to revoke – August 20, 2019	07-29
3.	Authorities	30
	I. Legislation	
A	Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 172(3)(a.1)	31-33
	II. Jurisprudence	
A	Israelite Church of Christ Canada v. Minister of National Revenue, 2010 FCA 93	34-37
B	Many Mansions Spiritual Center, Inc. v. Canada (National Revenue), 2019 FCA 189	38-46
C	T.W.U. v. Canadian Radio-Television & Telecommunications Commission, [1995] 2 S.C.R. 781	47-67
D	Menzies v. McLeod (1915), 34 O.L.R. 572	68-70

Court File No. A-245-24.

FEDERAL COURT OF APPEAL

B E T W E E N

JEWISH NATIONAL FUND OF CANADA INC. / FONDS NATIONAL JUIF DU CANADA INC.

Appellant

– and –

MINISTER OF NATIONAL REVENUE

Respondent

WRITTEN REPLY REPRESENTATIONS OF THE APPELLANT

PART I – INTRODUCTION AND OVERVIEW OF SUBMISSIONS

1. These written representations of the Appellant are in reply to the written submissions of the Independent Jewish Voices Canada Inc., David Mivasair, and Ismail Zayid (the "**Moving Parties**") (Motion to amend Appeal to include the Moving Parties as respondents) dated August 15, 2024 (the "**Moving Parties' Submission**").

2. On July 25, 2024, the Appellant initiated a statutory appeal under paragraph 172(3)(a.1) to appeal the Minister of National Revenue's (the "**Minister**") confirmation of the Canada Revenue Agency's ("**CRA**") Notice of Intention to revoke the Appellant's charitable status dated June 26, 2024.

3. On August 8, 2024, the Moving Parties wrote to the Appellant demanding to be added as a respondent to the appeal. On August 13, 2024, the Appellant refused to provide consent to the Moving Parties' request.

4. In response to the Appellant's refusal to consent, the Moving Parties filed a motion to amend the Appeal in which the Moving Parties submitted the following:

a. On October 17, 2017, Rabbi Mivasair and Dr. Zayid submitted a complaint to the CRA alleging that the Jewish National Fund of Canada Inc. ("**JNF**") did not meet the requirements for registration as a charity.

b. The Moving Parties contend that this complaint began the process that led to the Appellant's charitable registration revocation.

c. The Moving Parties should have been included as respondents in this appeal because the[y] were adverse in interest to the Appellant in the proceedings before the CRA that resulted in the Revocation.

d. The Moving Parties sought an order, pursuant to Rules 75 and 4 of the Federal Courts Rules, SOR/98-106, that the style of cause in this appeal be amended to include Independent Jewish Voices Canada Inc., David Mivasair, and Ismail Zayid as respondents.

PART II – APPELLANT'S SUBMISSIONS

5. The Appellant submits that the appeal should not be amended to include the Moving Parties as respondents to the appeal for the following reasons:

a. The appeal is a statutory appeal against the Minster's decision to revoke the Appellant's charitable status;

b. The Moving Parties are not adverse in interest as that term is understood in law; and

c. At any rate the CRA audit began prior to the Moving Parties' submissions to the CRA.

A. STATUTORY APPEAL AGAINST THE MINISTER'S DECISION

6. The appeal before this court is a statutory appeal under para. 172(3)(a.1) of the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) ("**ITA**"). Subsection 172(3) provides that, where the Minister has confirmed an intention to revoke an organization as a charitable

organization, public foundation, private foundation or Canadian amateur athletic association, the applicant may appeal the decision to the Federal Court of Appeal.[1]

7. The nature of a para. 172(3)(a.1) appeal, as it is set up by the ITA, is that it is an appeal against the Minister's decision and is not an appeal against a third party complainant who may have written to the Minister. Which could theoretically be a practically unlimited list. It is an appeal that can only be brought up after the Minister issues a confirmation of the notice of intent to revoke charitable registration or fails to confirm the notice within 90 days after service of a notice of objection by the charity[2] and can only be brought up as an appeal against the Minister's conclusions on questions of fact or mixed fact and law subject to review on administrative law principles.[3]

8. Para. 172(3)(a.1) appeal is entirely a creature of the statute, i.e., the ITA. If the preconditions in the ITA for appealing the revocation of charitable status, such as serving a notice of objection, have not been met, an appeal is not available.

9. The only correct respondent to an appeal against the exercise of Ministerial discretion to revoke a charitable registration, as envisaged by the ITA, is the Minister.

B. NO ADVERSE INTERESTS:

10. The Moving Parties have no interests in this appeal let alone an adverse interest.

11. In T.W.U. v. Canadian Radio-Television & Telecommunications Commission, [1995] 2 S.C.R. 781, [1995] S.C.J. No. 55 (S.C.C.) (QL), L'Heureux-Dubé J. cited with approval the decision in Canadian Transit Co. v. Canada (Public Service Staff Relations Board), [1989] F.C.J. No. 527 (Fed. C.A.) (QL), at p. 614::

> . . . to be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the *audi alteram partem* principle, an individual must be directly and necessarily affected by the decision to be made. His interest must not be merely indirect or contingent, as it is when

---

[1] Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 172(3)(a.1)

[2] Israelite Church of Christ Canada v. Minister of National Revenue, 2010 FCA 93, at paras 4 and 5

[3] Many Mansions Spiritual Center, Inc. v. Canada (National Revenue), 2019 FCA 189, at para 3

> the decision may reach him only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved.

12. In commenting upon the expression "adverse in interest" [contained in Rule 326 of the Ontario Rules of Civil Procedure], Chancellor Boyd in Menzies v. McLeod (1915), 34 O.L.R. 572 at p. 574 ... said:

> When the expression was first used in 1850 and afterwards, the word "interest" in connection with parties and witnesses had a well-defined meaning. It meant direct pecuniary or other legal, as distinct from moral, interest in the matters and in the results involved in the litigation.

Not Directly Affected

13. The Moving Parties are not directly affected by the Minister's decision. None of their financial interests or legal interests are affected the Minister's decision to revoke the Appellant's charitable status. They are entirely independent of the Appellant.

No Pecuniary Interests

14. The ITA, and not the Moving Parties, exempts registered charities and non-profit organizations from the payment of income tax. Additionally, in the calculation of federal income tax, corporations and individuals are entitled to deductions for gifts to charities. These are tax benefits are extended to charities by Canada and not the Moving Parties.

15. The revocation of the Appellant's charitable status, therefore, has only two interested parties: the Minister and, in this case, the Appellant. The Moving Parties have no pecuniary interest in the appeal. Their interests are merely ideological and moral – which are not grounds to be added in as respondents. They are not the decision makers.

No Chain of Events

16. The Moving Parties cite North Brewing Company Ltd v Canada (Registrar of Trademarks), 2022 CanLII 94943 (FC), to argue that as the party that started "the chain of events that led to the decision under appeal", the Moving Parties should be added as parties to the Appeal. They further argue that because their complaints to the CRA

starting in 2017 led to the revocation of the Appellant's charitable status, they must be added as respondents in this appeal.

17. The Moving Parties assertions are wrong in fact.

18. The Moving Parties first complaint to the Minister was presented on October 17, 2017. The Minister's audit resulting of the Appellant's books in the revocation of the Appellant's charitable status began on May 2, 2014 – more than three years before the Moving Parties first wrote the Minister. Regardless of whether the Moving Parties' complaints had any effect on the Minister's decision, the "chain of events" resulting in the decision under appeal long predate the Moving Parties complaints.

19. Further, if the Moving Parties have any information to add which may be of benefit to the Court it is open to them to apply for leave to act as intervenors. The present motion is an inappropriate 'end run' around the rules for intervenors.

PART III - CONCLUSIONS

20. Based on the above, the Moving Parties should not be added as Respondents.

21. In view of the foregoing, the Appellant seeks the following:

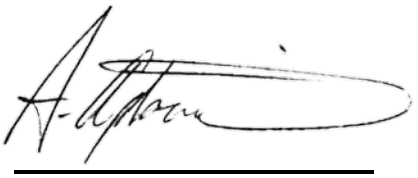
    The Appellant respectfully submits that the Moving Parties' motion to amend the appeal to include the Moving Parties as respondents to this appeal should be dismissed with costs on a solicitor client basis.

THE FOLLOWING DOCUMENTARY MATERIAL will be used at the hearing of the motion**:**

1. The affidavit of Jordan Narod; and
2. Such further and other material as counsel may advise and this Court may deem just.

[Signatures Continued in the Next Page]

DATED at the City of Toronto, in the Province of Ontario, on August 30, 2024.



Adam Aptowitzer

KPMG Law LLP
150 Elgin Street
Suite 1800
Ottawa, Ontario
K2P 2P8

Adam Aptowitzer
t. 613.350.1413
e. aaptowitzer@kpmg.ca
f. 613.212.2896

Gowling WLG (Canada) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5

David Stevens
Neil McCormick
t. 416 862 3556
f. 416 862 7661
e. david.stevens@gowlingwlg.com

Solicitors for the Appellant

Court File No. A-245-24.

FEDERAL COURT OF APPEAL

BETWEEN

JEWISH NATIONAL FUND OF CANADA INC. / FONDS NATIONAL JUIF DU CANADA INC.

Appellant

– and –

MINISTER OF NATIONAL REVENUE

Respondent

AFFIDAVIT OF JORDAN NAROD

I, Jordan Narod, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am employed as an Associate Lawyer at Gowling WLG, Ottawa. Gowling WLG, Ottawa filed the *Access to Information and privacy* request and received the disclosures relating to the revocation of Appellant's charitable status. As such, I have personal knowledge of the matters referred to in this affidavit, except where my knowledge is stated to be on information and belief, in which case I believe such information to be true.

2. On May 2, 2014, the Jewish National Fund of Canada Inc. was selected for an audit for its 2011 and 2012 fiscal years as a registered charity. A copy of the May 2, 2014 letter, which was received as a request to the Appellant's *Access to Information and privacy* request, is attached herein as "**Exhibit A**".

3. On May 12, 2014, the CRA completed its audit and identified a list of non-compliances with respect to its 2011 and 2012 fiscal years.. A copy of the May 12, 2016 letter, which was received as a request to the Appellant's *Access to Information and privacy* request, is attached herein as "**Exhibit B**".

4. On August 20, 2019, the CRA issued its notice of intent to revoke ("**NITR**") noting that the Appellant's responses did not alleviate the CRA's concerns. A copy of the NITR, which was received as a request to the Appellant's *Access to Information and privacy* request, is attached herein as "**Exhibit C**".

5. I make this affidavit in support of the Appellant's response to the motion by Independent Jewish Voices Canada Inc., Rabbi David Mivasair, and Dr. Ismail Zayid to be added as Respondents to the Appeal, and for no other or improper purpose.

AFFIRMED remotely by Jordan Narod of the City of Ottawa, in the Province of Ontario, on August 29, 2024, in accordance with O. Reg 431/20, *Administering Oath or Declaration Remotely.*

AFFIRMED before me at the City of Toronto, in the Province of Ontario, this August 29, 2024.	)	AFFIRMED at the City of Ottawa, in the Province of Ontario, this August 29, 2024.
A Commissioner for taking Affidavits Chandrasekar (Ceekay) Venkataraman LSO Number: 87760E	)	Jordan Narod

DATED at the City of Toronto, in the Province of Ontario, on August 29, 2024.

EXHIBIT A

May 2, 2014

Jewish National Fund of Canada
(Keren Kayemeth Le'Israel) Inc.
5757 Cavendish Blvd.
Room 550
Côte Saint-Luc, Qc
H4W 2W8

Attention: Mr. Fred Schacter (director of finance)

Re: Audit of Registered Charity Information Returns
For the Fiscal Periods Ending December 31, 2011 and 2012
Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc.
Registration Number: 107534877RR0001

Dear Sir:

We wish to advise that your Charitable Organization has been selected for an audit as a registered charity under the *Income Tax Act*.

Further to our telephone conversation on May 1, 2014, I am waiting for your phone call to confirm a date for my visit at your Organization.

We attached is a list of information/documents that is required for the audit. In order to complete our review, we require that you also complete the enclosed questionnaire. Your written responses to the questionnaire should be provided to the auditor at the commencement of the review.

Should you have any concerns or questions, please contact the undersigned at (514) 229-0604 or by fax at (514) 283-8208.

Thank you for your assistance and cooperation.

Yours sincerely,

Pierre Thibodeau
Audit Division
TSO - Montréal
Address : 305 René-Lévesque Blvd. West
Montréal, Qc H2Z 1A6

Canada

CHARITY AUDIT
PRE-AUDIT LIST

Name of Charity: **Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc.**

Years to be audited: **Fiscal Periods Ending December 31, 2011 and 2012**

In order to expedite the audit, please have available the following documentation at the commencement of the audit:

1. The Charity's books and records (including general ledger, cash receipts/disbursements journals, bank statements, cancelled cheques, deposit books, all adjusting journal entries and reconciliation) for the above-noted fiscal periods.

2. For cash gifts, a listing of donation receipts issued in the format (receipt #, donor, and amount) for the above-noted fiscal periods with the total reconciled to the financial statements and the T-3010 (Line 4500 of the Information Return). Also all duplicate donation receipts issued and a reconciliation of total donation receipts issued to bank deposits.

3. For gifts in kind, a listing of donation receipts issued for the above-noted fiscal periods, providing a description of the gift, name and address of appraiser of the property/gift if an appraisal of the property/gift was completed. If an appraisal of the property/gift was not completed, please provide details as to how the fair market value of the gift was determined. Also all duplicate donation receipts issued by the Charity for gifts in kind.

4. Reconciliation and breakdown of Expenditures reported by the Charity in carrying out its activities and charity work (Line 5000 of the Information Return).

5. Copies of contracts, invoices, and cancelled cheques for the following expenditures reported in the statement of operations and/or T3010 Information Return for the above-noted fiscal periods.
    i. Expenditures on charitable work the charity itself carried out (line 5000)
    ii. Management and general administration (line 5010)
    iii. List of payments made, beneficiaries, invoices for the "administration and secretary" heading in the financial statements.
    iv. Fund-raising (line 5020)

6. Details of the Charity's activities supported by copies of brochures, pamphlets, publications, membership and fundraising correspondence, newsletters, press releases, media-related materials, and other related literature. Include copies of Governing documents. Box #1

Included in 1ST Package (BOX #1)

7. Current listing of Directors/Trustees, positions within the organization and occupation. Copies of all minutes of board meetings to date. Copies of all the minutes recording the decisions of the trustees.

8. Lists and details including copies of contracts, invoices, and cancelled cheques for all capital asset (long term investments) additions , disposition and/or inventories for the above-noted fiscal periods.

9. The charity's resources provided for programs outside Canada under any kind of an arrangement including a contract, agency agreement, or joint venture to any other individual or entity (excluding gifts to qualified donees).

10. List of the bank accounts. Included in BOX #1

EXHIBIT B

Canada Revenue Agency / Agence du revenu du Canada

REGISTERED MAIL

Jewish National Fund of Canada
(Keren Kayemeth Le'Israel) Inc
1000 Finch Avenue West
Suite 700
Toronto, Ontario
M3J 2V5

Attention: Mrs. Karen Belinsky (Director of Finance and Administration)

BN : 107534877RR0001
File # : 0246231

May 12, 2016

Subject: Audit of Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc

Dear Madam,

This letter is further to the audit of the books and records of the Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc (the Organization) conducted by the Canada Revenue Agency (CRA). The audit related to the operations of the Organization for the fiscal periods ending December 31, 2011 and 2012.

Following our audit, the CRA has identified specific areas of non-compliance with the provisions of the *Income Tax Act* and/or its *Regulations* in the following areas.

AREAS OF NON-COMPLIANCE		
	Issue	**Reference**
1.	Failure to be constituted and operated for exclusively charitable purposes	149.1(1), 168(1)(b)
2.	Failure to devote resources to charitable activities carried on by the Organization itself: 2.1 Lack of direction and control over the use of resources / gifting to non-qualified donees 2.2 Failure to devote resources to charitable activities	149.1(1), 149.1(2), 168(1)(b).
3.	Failure to maintain adequate books and records	168(1)(e), 230(2).

Canada

The purpose of this letter is to describe the areas of non-compliance identified by the CRA during the course of the audit as they relate to the legislative and common law requirements applicable to registered charities, and to provide the Organization with the opportunity to make additional representations or present additional information. Registered charities must comply with the law, failing which the Organization's registered status may be revoked in the manner described in section 168 of the *Act*.

The balance of this letter describes the identified areas of non-compliance in further detail.

Identified areas of non-compliance

1. **Failure to be constituted and operated for exclusively charitable purposes**

In order for an organization to be recognized as a charity, it must be constituted exclusively for charitable purposes, and devote its resources to charitable activities in furtherance thereof. In the Supreme Court decision of *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*[1], Iacobucci J. speaking for the majority, summarized the requirements for charitable registration at paragraph 159, as follows:

> *"In conclusion, on the basis of the Canadian jurisprudence, the requirements for registration under s. 248(1) come down to two:*
>
> *(1) the purposes of the organization must be charitable, and must define the scope of the activities engaged in by the organization; and*
>
> *(2) all of the organization's resources must be devoted to these activities..."*

The term "charitable" is not defined in the *Act*; therefore it is necessary to rely on the jurisprudence in the common law. The courts have recognized four general categories of charitable purposes: (1) the relief of poverty; (2) the advancement of religion; (3) the advancement of education; and (4) other purposes beneficial to the community as a whole (or a sufficient section thereof) in a way that the law regards as charitable. This last category identifies an additional group of purposes that have been held charitable at law rather than qualifying any and all purposes that provide a public benefit as charitable.

Whether or not an organization is constituted exclusively for charitable purposes is determined based on its stated objects as contained in its governing documents, and on

[1] *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10 (*Vancouver Society*)

the activities in which it engages.[2] An organization with a mixture of charitable and non-charitable purposes and/or activities does not qualify for registration.

The Organization was registered as a charitable organization effective January 1, 1967. According to its Letters Patent, the objects of the Organization are:

- To create, provide, enlarge and administer a fund to be made up of voluntary contributions from the Jewish community and others to be used for charitable purposes.
- The operations on the Corporation may be carried on throughout Canada and elsewhere.

Notwithstanding that they were broad and vague, the Organization's purposes were accepted when it was originally granted registration under the understanding that it would restrict itself to charitable activities. The Organization was cautioned at the time in regards to what constitutes charitable activities and the requirements of the *Act* to maintain its registration.

The audit revealed that the only activity the Organization is currently engaged in is paying the salaries of workers in Israel. It is our view that this activity does not further the Organization's formal purposes (or a charitable purpose per se as contemplated by the first object) and it appears the Organization is not undertaking any other activities that would further charitable purposes. Rather, the Organization appears to be furthering unstated non-charitable purposes. In fact, according to the information obtained in the interview questionnaire received from Mr. Fred Schacter, former director of finance of the Organization, on September 11, 2014, the mission statement of the Organization is:

- To provide funds to Keren Kayemeth Le'Israel (KKL) to redeem the land of Israel.
- To connect Canadian Jewry to their national homeland and to their partnership in its development.
- To emphasize the centrality of Israel to Jewish life.

It is therefore our understanding that the Organization is no longer devoting its resources to activities in support of charitable purposes, but is rather furthering unstated non-charitable purposes.

As such, it is our view that the Organization is currently not established for **exclusively** charitable purposes as required by subsection 149.1(1) of the *Act*. As a result, it appears there may be grounds for revocation of the Organization's status under paragraph 168(1)(b) of the *Act*.

[2] *Vancouver Society*, supra note 1, at para. 194

2. Failure to devote resources to charitable activities carried on by the Organization itself

The *Act* permits a registered charity to carry out its charitable purposes, both inside and outside Canada, in only two ways:

- It can make gifts to other organizations that are "qualified donees" as defined by the *Act*.
- It can carry out its own charitable activities. These are activities carried out by persons under the registered charity's immediate control (for example - members, employees, or volunteers), or by its intermediaries (for example - agents or contractors). In contrast to the relatively passive transfer of money or other resources involved in making gifts to qualified donees, carrying on one's own activities implies that the Canadian charity is an active and controlling participant in a program or project that directly achieves a charitable purpose.

Whether it is carrying out activities directly or through an intermediary, a charity must maintain a record of steps taken to direct and control the use of its resources, as part of its books and records, to allow the CRA to verify that all of the charity's resources have been used for its own activities.

We refer to the comments of the court in *The Canadian Committee for the Tel Aviv Foundation vs. Her Majesty the Queen*[3]:

> "Pursuant to subsection 149.1 (1) of the [*Income Tax Act*], a charity must devote all its resources to charitable activities carried on by the organization itself. While a charity may carry on its charitable activities through an agent, the charity must be prepared to satisfy the Minister that it is at all times both in control of the agent, and in a position to report on the agent's activities..."

And

> "Under the scheme of the *Act*, it is open to a charity to conduct its overseas activities either using its own personnel or through an agent. However, it cannot merely be a conduit to funnel donations overseas".

As reiterated by the Federal Court of Appeal, it is not enough for a charity to fund an agent that carries on certain activities.[4] The *Act* requires that the agent actually conduct those activities *on the organization's behalf*:

> "...A charity that chooses to carry out its activities in a foreign country through an agent or otherwise must be in a position to establish that any acts that purport to

[3] *2002 FCA 72 at paragraphs 40 and 30*
[4] *Bayit Lepletot v. Minister of National Revenue*, [2006] FCA 128

be those of the charity are effectively authorized, controlled and monitored by the charity."[5]

2.1 Lack of direction and control over the use of resources / gifting to non-qualified donees

Based on our findings, we are of the view that the Organization did not operate in accordance with the aforesaid requirements during the audit period.

Again, we refer to the Organization's mission statement:

- To provide funds to Keren Kayemeth Le'Israel (KKL) to redeem the land of Israel.
- To connect Canadian Jewry to their national homeland and to their partnership in its development.
- To emphasize the centrality of Israel to Jewish life.

The information provided during the audit indicates that KKL is an organization in Israel that acts as a general contractor responsible for the construction of infrastructure. Additionally, it seems that KKL acts as the Organization's agent in Israel. We would note that even if KKL is considered to be a charitable organization in Israel, it is not recognized as a qualified donee under the *Act*.

The Organization provided us with a contract signed by both parties in December 2009 that states that KKL is contracted by the Organization "to provide work for laborers (new immigrants, refugees, etc.) who would ordinarily be unemployable". However, the contract does not provide further details regarding the roles and responsibilities of all parties involved. Furthermore, it does not include a detailed description of how the activity will be conducted on the Organization's behalf or how it furthers the Organization's charitable purposes. The contract does not contain sufficient information to establish adequate, continuous direction and control by the Organization over the use of its funds by KKL for specified projects. For example, the contract does not include: time frames or deadlines for the project; a provision for regular written financial and progress reports supporting the agent's receipt and disbursement of funds; a provision to update the Organization on the progress of activities undertaken; a provision for the Organization's funds to be segregated from those of its agent; or any other specific details about the funded activities.

The contract also indicates that the Jewish National Fund of Canada – Israel Committee (CANISCOM) was established as the Organization's representative in Israel to oversee the day-to-day operations of KKL. The information provided during the audit shows that CANISCOM is made up of volunteers who are mostly Canadians now living in Israel. It

[5] *Canadian Magen David Adom for Israel v. Minister of National Revenue*, [2002] FCA 323 at paragraph 66

seems that the Organization is using these volunteers as a second board of directors to oversee the projects in Israel and take meeting minutes which are reported to the board in Canada.

The audit revealed that the total expenditures for charitable programs were $3,818,018 for 2011 and $5,296,184 for 2012. Mr. Fred Schacter stated that all these expenses were incurred to carry out the Organization's charitable programs in Israel. As per the information gathered during the audit, the funds were transferred directly to KKL by the Organization to employ indigent workers, namely hard-to-hire or unemployable and who are needy immigrants, for the construction of public infrastructure in Israel. After inquiring about the details of those transfers, Mr. Fred Schacter stated, during our telephone conversation on May 7, 2015, that when the Organization has funds available, it transfers such funds to KKL in Israel. It appears from that conversation that the Organization does not inquire about the progress of the work done or provide any instructions with respect to how the funds should be used prior to making those transfers.

In order to further determine if the Organization attempted to direct and control the use of funds transferred to KKL, we requested additional information regarding the projects conducted in Israel. In our written request of October 14, 2014, we asked for communications between the Organization, CANISCOM and KKL regarding the discussion, acceptance and achievement of the charitable projects in Israel for 2011 and 2012, including reports of the meetings from CANISCOM sent to the Organization. Mr. Fred Schacter provided the CRA only with the minutes of CANISCOM following their meetings held on July 3, 2011 and on June 4, 2012 at the KKL headquarters in Jerusalem, Israel. The minutes provided the following information in relation to the $9,114,202 of funds transferred to KKL in Israel for 2011 and 2012:

- For the minutes of July 3, 2011:

  A field trip then took place to view some of the new projects being developed in Israel. The visit included the following areas around Jerusalem. The Committee was informed of the background and rational of each site as well as the progress of each project – Restorers of Jerusalem, Rabin Park, Ramot Forest and Mount Scopus. Explanation was provided concerning the projects undertaken in Canada by donors. Projects are used in order to let the donors know where their dollars are being developed, however the money raised is allocated to pay indigent workers who work on these projects.

- For the minutes of June 14, 2012:

  Avi Dickstein provided some background on the field trip that they were to partake in which included projects in the area of Sederot, a water reservoir, the new forest and of course the new park being established. He pointed out that

although JNF sells projects in Canada, the money raised goes to pay the salaries of indigent workers that work on these projects.

No further details were provided to the CRA regarding the projects mentioned in those minutes. It appears that CANISCOM did not provide the Organization with details regarding the projects conducted such as: the place, the address, the discussions, the informal communications via telephone or email, the plans, decisions regarding the choice of projects, the visits, the photographs, the progress reports, the work in progress, the achievements, the on-site inspections by the Organization's staff members, the receipts for expenses and financial statements or any documents related to these projects that would help us determine that they were, in fact, authorized, controlled and monitored by the Organization.

Despite the fact that the Organization received some documents from CANISCOM and KKL, it does not appear that the Organization has had an active role in carrying out the activities in Israel. Rather, the Organization appears to have given full authority to KKL to use its funds in the accomplishment of KKL's own programs, more specifically to pay the salaries of workers. Therefore, we are of the view that the Organization failed to maintain effective direction and control over the use of its resources such that it can't be determined that all of its resources were devoted to its own charitable activities. In fact, it appears the Organization was merely transferring funds directly to KKL, a non-qualified donee, without direction and control. Gifting resources to support the activities of an organization that is not a qualified donee is a contravention of subsection 149.1(1) of the *Act*.

Under paragraph 149.1 (2) of the *Act*, the Minister may revoke the registration of a charity because it has failed, as described at paragraph 168(1)(b), to comply with the requirements of the *Act* for its registration.

2.2 Failure to devote resources to charitable activities

As previously mentioned, the results of the audit indicated that amounts totaling $3,818,018 for 2011 and $5,296,184 for 2012 were transferred by the Organization to KKL in order to employ indigent workers, namely hard-to-hire or unemployable and who are needy immigrants, for the construction of public infrastructure in Israel. The information gathered during the audit suggests that providing employment (by merely paying salaries) to these workers to build infrastructures in Israel is the sole purpose of the Organization. In fact, the audit revealed that the funds transferred by the Organization to KKL were used to pay the salaries of those indigent workers. Following our written requests of October 14, 2014 and of February 13, 2015, Mr. Fred Schacter provided the CRA with documents such as: KKL deposits for transfers received from the Organization, the monthly payroll of indigent workers employed, the summary of hours worked for each of the indigent workers, the numbers and project names that indigent workers worked on, the selection criteria, and three evaluation grids of indigent workers.

We would advise that simply paying the salaries of workers is not a charitable purpose in itself, nor does it further any charitable purpose. Also, the courts have not recognized "providing employment" or "helping people find employment" as charitable purposes in and of themselves when the beneficiary group is the general public. However, either providing employment, or helping individuals find employment, could be a charitable activity if it directly furthers one of the following charitable purposes:

- Relieving poverty by relieving unemployment of the poor;
- Advancing education by providing employment-related training; and
- Benefiting the community in a way the law regards as charitable by:
    - Relieving unemployment of individuals who are unemployed or facing a real prospect of imminent unemployment and are shown to need assistance;
    - Relieving conditions associated with disability;
    - Improving socio-economic conditions in areas of social and economic deprivation; and
    - Promoting commerce or industry.

For more information on the subject, please consult CRA Guidance CG-014, *Community Economic Development Activities and Charitable Registration* at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cmtycnmcdvpmt-eng.html.

Relating the above to the Organization's purported activities in Israel, we have examined whether paying salaries to indigent workers could be considered to be relieving unemployment of individuals who are in need. In order to be recognized as charitable, in this respect, activities considered to relieve unemployment must be aimed toward enhancing an individual's employability, which would generally include some or all of the following:

- Providing employment-related training;
- Providing career counseling;
- Providing assistance with résumés or preparing for job interviews; and
- Establishing lists of available jobs.

The focus must be placed on providing training as opposed to providing an individual with employment or supplying an employer with staff. However, the audit showed that the Organization is solely financing the employment of individuals that are poor and paying their salaries by providing funds to a non-qualified donee. As mentioned above, neither providing employment, nor financing the salaries of such individuals is a charitable endeavour. The only exception would be when operating social businesses for persons with a disability, which has not been established in this case. Furthermore, when the emphasis is on helping employers recruit employees, this does not further a charitable purpose due to the potential delivery of a more than incidental private benefit to the employers. Considering the above, the Organization did not demonstrate that

these activities enhance employability of the workers. Therefore, it would not qualify as relieving unemployment.

We would also advise that even if the programs were designed to comply with the requirement for registration, the Organization failed to show that it was carrying on its own charitable activities. As the documentation submitted during the audit in support of these programs did not allow the CRA to determine that the Organization had ongoing direction and control over the use of funds transferred to KKL and that KKL was clearly acting on its behalf, we are of the view that these programs were not the Organization's own activities. Consequently, it appears that the Organization did not conduct any charitable activities in Israel.

By failing to demonstrate that it devoted all of its resources to its own charitable activities, it appears that there may be grounds for revocation of the Organization's registration under paragraph 168(1)(b) of the *Act*.

3. Failure to maintain adequate books and records

In order to comply with the obligations of registration, it is a fundamental requirement that all registered charities maintain proper books and records to enable the CRA to determine whether all its resources are devoted to charitable activities as required by the *Act*.

Specifically, subsection 230(2) of the *Act* requires that every registered charity maintain adequate books and records, and books of account, at an address in Canada recorded with the Minister. In addition to retaining copies of donation receipts as explicitly required by subsection 230(2), the subsection 230(4) provides that:

"every person required by this section to keep records and books of account shall retain:

(a) the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as prescribed; and

(b) all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate."

The audit revealed that the Organization failed to maintain adequate books and records for the activities it purported to carry out in Israel. The meeting minutes provided by

CANISCOM, the Organization's representative in Israel, were only a page long and did not include details regarding the funded programs. Following our requests for additional information during the course of the audit to justify transfers of funds from the Organization to KKL, the Organization provided us with a monthly payroll of indigent workers employed, a summary of hours worked for each of the indigent workers, the numbers and project names that indigent workers worked, the selection criteria and three evaluation grids of indigent workers. However, the audit did not reveal any evidence to show that these payments constituted charitable expenditures by the Organization towards its own programs. The audit findings seem to suggest that these payments were simply unregulated payments to KKL. The Organization failed to request or maintain detailed reports of the use of funds by its agent including reports about the progress of the work conducted in Israel. It failed to provide evidence of its input into the programs, evidence as to how those programs were charitable in nature, segregate books and records, processes and approval to support the reported expenses by KKL. As a result, we are of the view that the Organization did not maintain adequate books and records to substantiate that its resources were devoted to its own charitable programs.

When it comes to expenses incurred in Canada, the audit revealed that the Organization had expense accounts for administrators and employees of $207,795 for 2011 and $196,449 for 2012. These expenses represent reimbursement of travel expenses including the cost of accommodation, meals, parking, and other similar expenses for business purposes. The administrators and employees used their personal vehicles to conduct the affairs of the Organization. As such, they provided expense reports for the kilometers traveled for business purposes and were reimbursed by the Organization for these expenses. However, the expense reports did not provide sufficient details to demonstrate the claimed travels were conducted in pursuit of the Organization's charitable purposes. Specially, the reports did not indicate the date of the travel, its purpose in relation to the Organization's objects, the departure address, the destination address, or the total distance traveled, in order to substantiate the claims or amounts paid.

By failing to maintain adequate books and records, we are of the view that there may be grounds to revoke the Organization's registration under paragraph 168(1)(e) of the *Act*.

The Organization's options:

a) **No response**

You may choose not to respond. In that case, the Director General of the Charities Directorate may give notice of its intention to revoke the registration of the Organization by issuing a notice of intention in the manner described in subsection 168(1) of the *Act*.

106-10

b) Response

Should you choose to respond, please provide your written representations and any additional information regarding the findings outlined above **within 30 days** from the date of this letter. After considering the representations submitted by the Organization, the Director General of the Charities Directorate will decide on the appropriate course of action, which may include:

- no compliance action necessary;
- the issuance of an educational letter;
- resolving these issues through the implementation of a Compliance Agreement;
- the application of penalties and/or suspensions provided for in sections 188.1 and/or 188.2 of the *Act*; or
- giving notice of its intention to revoke the registration of the Organization by issuing a notice of intention to revoke in the manner described in subsection 168(1) of the *Act*.

If you appoint a third party to represent you in this matter, please send us a written authorization naming the individual and explicitly authorizing that individual to discuss your file with us.

If you have any questions or require further information or clarification, please do not hesitate to contact me at the numbers indicated below. My team leader, Mr. Sylvie Côté, may also be reached at (514) 229-5890.

Yours sincerely,

Pierre Thibodeau
Audit Division
Montréal District Office

Telephone: (514) 229-0604
Toll free: 1-888-892-5667 (bilingual)
Facsimile: (514) 283-8208
Address: 305 René-Lévesque Blvd. West
7th floor Section 445-1-3
Montréal, QC H2Z 1A6

c.c.: Mr. Jeffrey R. Greenberg, CPA, CA, Partner at Collins Barrow Montréal LLP (Chartered Professional Accountants), 606 Cathcart Street, Suite 200, Montréal, QC, H3B 1K9

EXHIBIT C

August 20, 2019

REGISTERED MAIL

David P. Stevens
Gowling WLG
Suite 1600
100 King Street W
Toronto ON M5X 1G5

BN: 10753 4877 RR0001
File #: 0246231

Dear David Stevens:

Subject: Notice of intention to revoke
Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc. / Fonds National Juif du Canada (Keren Kayemeth Le'Israel) Inc.

We are writing with respect to our letters dated May 12, 2016, and April 19, 2018 (copies enclosed), in which the Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc./Fonds National Juif du Canada (Keren Kayemeth Le'Israel) Inc. (the Organization) was invited to respond to the findings of the audit conducted by the Canada Revenue Agency (CRA) for the period from January 1, 2011 to December 31, 2012. Specifically, the Organization was asked to explain why its registration should not be revoked in accordance with subsection 168(1) of the Income Tax Act.

We have reviewed and considered your respective written responses dated September 12, 2016, May 17, 2018, and October 5, 2018 (copies enclosed). Your replies have not alleviated all of our concerns with respect to the audit findings concerning the Organization's non-compliance with the requirements of the Act for registration as a charity. Our outstanding concerns are explained in Appendix A attached.

Conclusion

The audit by the CRA found that the Organization is not complying with the requirements set out in the Act. In particular, it was found that the Organization was not constituted and operated for exclusively charitable purposes, failed to devote resources to charitable activities carried on by the Organization itself, and failed to maintain adequate books and records. For all of these reasons, and for each reason alone, it is the position of the CRA that the Organization no longer meets the requirements for charitable registration and should be revoked in the manner described in subsection 168(1) of the Act.

For the reasons mentioned in Appendix A, pursuant to subsections 168(1), 149.1(1) and 149.1(2) of the Act, we propose to revoke the registration of the Organization. By virtue

of subsection 168(2) of the Act, revocation will be effective on the date of publication of the following notice in the Canada Gazette:

> Notice is hereby given, pursuant to paragraphs 168(1)(b), 168(1)(e), and subsection 149.1(2), of the Income Tax Act, that I propose to revoke the registration of the charity listed below and that by virtue of paragraph 168(2)(b) thereof, the revocation of registration is effective on the date of publication of this notice in the Canada Gazette.

Business number	**Name**
10753 4877 RR0001	Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc. / Fonds National Juif du Canada (Keren Kayemeth Le'Israel) Inc. Montreal QC

Should the Organization choose to object to this notice of intention to revoke the Organization's registration in accordance with subsection 168(4) of the Act, a written notice of objection, with the reasons for objection and all relevant facts, must be filed within **90 days** from the day this letter was mailed. The notice of objection should be sent to:

Tax and Charities Appeals Directorate
Appeals Branch
Canada Revenue Agency
250 Albert Street
Ottawa ON K1A 0L5

A copy of the revocation notice, described above, will be published in the Canada Gazette after the expiration of 90 days from the date this letter was mailed. As such, the Organization's registration will be revoked on the date of publication, unless the CRA receives an objection to this notice of intention to revoke within this timeframe.

A copy of the relevant provisions of the Act concerning revocation of registration, including appeals from a notice of intention to revoke registration, can be found in Appendix B, attached.

Consequences of revocation

As of the effective date of revocation:

a) the Organization will no longer be exempt from Part I tax as a registered charity and **will no longer be permitted to issue official donation receipts**. This means that gifts made to the Organization would not be allowable as tax credits to individual donors or as allowable deductions to corporate donors under subsection 118.1(3) and paragraph 110.1(1)(a) of the Act respectively;

b) by virtue of section 188 of the Act, the Organization will be required to pay a tax within one year from the date of the notice of intention to revoke. This revocation tax is calculated on Form T2046, Tax Return Where Registration of a Charity is Revoked (the Return). The Return must be filed, and the tax paid, on or before the day that is one year from the date of the notice of intention to revoke. The relevant provisions of the Act concerning the tax applicable to revoked charities can also be found in Appendix B. Form T2046 and the related Guide RC4424, Completing the Tax Return Where Registration of a Charity is Revoked, are available on our website at **canada.ca/charities-giving**;

c) the Organization will no longer qualify as a charity for purposes of subsection 123(1) of the Excise Tax Act. As a result, the Organization may be subject to obligations and entitlements under the Excise Tax Act that apply to organizations other than charities. If you have any questions about your Goods and Services Tax/Harmonized Sales Tax (GST/HST) obligations and entitlements, please call GST/HST Rulings at 1-888-830-7747 (Quebec) or 1-800-959-8287 (rest of Canada).

Finally, we advise that subsection 150(1) of the Act requires that every corporation (other than a corporation that was a registered charity throughout the year) file a return of income with the Minister in the prescribed form, containing prescribed information, for each taxation year. The return of income must be filed without notice or demand.

Yours sincerely,

Tony Manconi
Director General
Charities Directorate

Enclosures
- CRA letter dated May 12, 2016
- CRA letter dated April 19, 2018
- Organization's response dated September 12, 2016
- Organization's response dated May 17, 2018
- Organization's response dated October 5, 2018
- Appendix A, Comments on Representations
- Appendix B, Relevant provisions of the Act

c.c.: Karen Belinsky
Director of Finance
Jewish National Fund of Canada (Keren Kayemeth Le'Israel) Inc.
Suite 700
1000 Finch Avenue W
Toronto ON M3J 2V5

AUTHORITIES

CANADA

CONSOLIDATION

CODIFICATION

Income Tax Act

Loi de l'impôt sur le revenu

R.S.C. 1985, c. 1 (5th Supp.)

S.R.C. 1985, ch. 1 (5e suppl.)

NOTE

Application provisions are not included in the consolidated text; see relevant amending Acts.

NOTE

Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.

Current to June 19, 2024

Last amended on January 22, 2024

À jour au 19 juin 2024

Dernière modification le 22 janvier 2024

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Appeal to Federal Court of Appeal

(4) If the Tax Court of Canada has disposed of a particular issue under subsection (2), the parties to the appeal may, in accordance with the provisions of the *Tax Court of Canada Act* or the *Federal Courts Act*, as they relate to appeals from decisions of the Tax Court of Canada, appeal the disposition to the Federal Court of Appeal as if it were a final judgment of the Tax Court of Canada.

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; R.S., 1985, c. 1 (5th Supp.), s. 171; 1994, c. 7, Sch. IX, s. 215; 2001, c. 17, s. 159; 2013, c. 33, s. 18.

Appel à la Cour d'appel fédérale

(4) Si la Cour canadienne de l'impôt a statué sur une question donnée en vertu du paragraphe (2), les parties à l'appel peuvent, conformément aux dispositions de la *Loi sur la Cour canadienne de l'impôt* ou de la *Loi sur les Cours fédérales* applicables aux appels de décisions de la Cour canadienne de l'impôt, interjeter appel de la décision devant la Cour d'appel fédérale comme s'il s'agissait d'un jugement définitif de la Cour canadienne de l'impôt.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; L.R. (1985), ch. 1 (5e suppl.), art. 171; 1994, ch. 7, ann. IX, art. 215; 2001, ch. 17, art. 159; 2013, ch. 33, art. 18.

Appeal from refusal to register, revocation of registration, etc.

172 (3) Where the Minister

(a) confirms a proposal or decision in respect of which a notice was issued under any of subsections 149.1(4.2) and (22) and 168(1) by the Minister, to a person that is or was registered as a registered Canadian amateur athletic association or is an applicant for registration as a registered Canadian amateur athletic association, or does not confirm or vacate that proposal or decision within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal or decision,

(a.1) confirms a proposal, decision or designation in respect of which a notice was issued by the Minister to a person that is or was registered as a registered charity, or is an applicant for registration as a registered charity, under any of subsections 149.1(2) to (4.1), (6.3), (22) and (23) and 168(1), or does not confirm or vacate that proposal, decision or designation within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal, decision or designation,

(a.2) confirms a proposal or decision in respect of which a notice was issued under any of subsections 149.1(4.3) and (22) and 168(1) by the Minister, to a person that is a person described in any of subparagraphs (a)(i) to (v) and paragraph (b.1) of the definition *qualified donee* in subsection 149.1(1) that is or was registered by the Minister as a qualified donee or is an applicant for such registration, or does not confirm or vacate that proposal or decision within 90 days after service of a notice of objection by the person under subsection 168(4) in respect of that proposal or decision,

(b) refuses to accept for registration for the purposes of this Act any retirement savings plan,

Appel relatif à un refus d'enregistrement, à une révocation d'enregistrement, etc.

172 (3) Lorsque le ministre :

a) soit confirme une proposition ou une décision à l'égard de laquelle le ministre a délivré, en vertu des paragraphes 149.1(4.2) ou (22) ou 168(1), un avis à une personne qui est ou a été enregistrée à titre d'association canadienne enregistrée de sport amateur ou qui a présenté une demande d'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette proposition ou décision dans les quatre-vingt-dix jours suivant la signification par la personne, en vertu du paragraphe 168(4), d'un avis d'opposition à cette proposition ou décision;

a.1) soit confirme toute intention, décision ou désignation à l'égard de laquelle le ministre a délivré, en vertu de l'un des paragraphes 149.1(2) à (4.1), (6.3), (22) et (23) et 168(1), un avis à une personne qui est ou était enregistrée à titre d'organisme de bienfaisance enregistré ou qui a demandé l'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette intention, décision ou désignation dans les 90 jours suivant la signification, par la personne en vertu du paragraphe 168(4), d'un avis d'opposition concernant cette intention, décision ou désignation;

a.2) soit confirme une proposition ou une décision à l'égard de laquelle le ministre a délivré, en vertu des paragraphes 149.1(4.3) ou (22) ou 168(1), un avis à une personne visée à l'un des sous-alinéas a)(i) à (v) ou à l'alinéa b.1) de la définition de *donataire reconnu* au paragraphe 149.1(1) qui est ou a été enregistrée par le ministre à titre de donataire reconnu ou qui a présenté une demande d'enregistrement à ce titre, soit omet de confirmer ou d'annuler cette proposition ou décision dans les quatre-vingt-dix jours suivant la signification par la personne, en vertu du paragraphe 168(4), d'un avis d'opposition à cette proposition ou décision;

b) refuse de procéder à l'enregistrement, en vertu de la présente loi, d'un régime d'épargne-retraite;

Federal Court of Appeal		Cour d'appel fédérale

Date: 20100412

Docket: A-29-10

Citation: 2010 FCA 93

Coram: **NADON J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

ISRAELITE CHURCH OF CHRIST CANADA

Appellant

and

THE MINISTER OF NATIONAL REVENUE and HER MAJESTY THE QUEEN

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 12, 2010.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
SHARLOW J.A.

Date: 20100412

Docket: A-29-10

Citation: 2010 FCA 93

Coram: **NADON J.A.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

ISRAELITE CHURCH OF CHRIST CANADA

Appellant

and

THE MINISTER OF NATIONAL REVENUE and HER MAJESTY THE QUEEN

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The appellant is a registered charity under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[2] The respondent, the Minister of National Revenue, has issued to the appellant a notice of intention to revoke the appellant's registration as a charity.

[3] The appellant responded by commencing an appeal in this Court. The respondents have brought a motion to quash the appeal for want of jurisdiction.

[4] Paragraph 172(3)(*a.1*) of the Act provides that an appeal to this Court can only be brought after:

(a) the Minister confirms the notice referred to in paragraph 2, above; or

(b) the Minister has not confirmed the notice within 90 days after service of a notice of objection by the charity.

[5] Neither pre-condition is present in this case. Therefore, this Court does not have jurisdiction to hear the appeal. Therefore, I would grant the respondents' motion and would quash the appeal, with costs of this motion to the respondents.

"David Stratas"
J.A.

"I agree
M. Nadon J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-29-10
STYLE OF CAUSE:	Israelite Church of Christ Canada v. The Minister of National Revenue, Her Majesty The Queen

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	April 12, 2010

WRITTEN REPRESENTATIONS BY:

Jide Oladejo	FOR THE APPELLANT
Carol Calabrese	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jide Oladejo Barrister & Solicitor Toronto, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190624

Docket: A-307-16

Citation: 2019 FCA 189

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

MANY MANSIONS SPIRITUAL CENTER, INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on June 24, 2019.
Judgment delivered from the Bench at Toronto, Ontario, on June 24, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: LASKIN J.A.

Date: 20190624

Docket: A-307-16

Citation: 2019 FCA 189

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

MANY MANSIONS SPIRITUAL CENTER, INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 24, 2019).

LASKIN J.A.

[1] Many Mansions Spiritual Centre, Inc. appeals under paragraph 172(3)(*a.1*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), from a decision of the Minister of National Revenue to confirm her proposal to revoke Many Mansions' registration as a charity. The Minister's decision followed an audit of Many Mansions' 2011 and 2012 fiscal periods, the issuance of a notice of proposed revocation under subsections 168(1) and 149.1(2), an objection

by Many Mansions under subsection 168(4), and reconsideration of the proposed revocation by the Tax and Charities Appeals Directorate of the Canada Revenue Agency under subsection 165(3).

[2] The Minister's confirmation decision cited several of the grounds for revocation listed in subsection 168(1). She concluded that Many Mansions had ceased to comply with the requirements of the Act by failing to devote all its resources to charitable activities, engaging in activities inconsistent with its registered objects, and providing private benefits to its members (s. 168(1)(*b*)); had failed to file information returns as required, and had issued a donation receipt that was not at fair market value (s. 168(1)(*c*) and (*d*)); and had failed to keep adequate records and books of account (s. 168(1)(*e*)). These grounds had also appeared in the notice of intention to revoke, which stated that "[f]or all of these reasons, and for each reason alone, it is the position of the CRA that [Many Mansions] no longer meets the requirements necessary for charitable registration and should be revoked": Appeal Book, 12.

[3] Although this proceeding is characterized as an appeal, the Minister's decision is subject to review on administrative law principles. The Minister's conclusions on questions of fact or mixed fact and law, with respect to both whether grounds for revocation are established, and whether revocation is an appropriate sanction, are reviewable for reasonableness: see *Opportunities for the Disabled Foundation v. Canada (National Revenue)*, 2016 FCA 94 at para. 33, 2016 D.T.C. 5043. As a result, they will be upheld unless they are shown not to be justified, transparent and intelligible, or not to fall within a range of possible, acceptable

outcomes defensible in fact and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. In a fact-based case like this, the threshold is high.

[4] It is well established that each of the grounds listed in subsection 168(1) can afford a basis for revocation: *Opportunities for the Disabled Foundation* \ at para. 33; *Humane Society of Canada for the Protection of Animals and the Environment v. Canada (National Revenue)*, 2015 FCA 178 at para. 64, 2015 D.T.C. 5091, leave to appeal to S.C.C. refused, [2016] 1 S.C.R. xi. In this case, the record demonstrates that the Minister considered each ground asserted to be independently sufficient to justify revocation: see *Lord's Evangelical Church of Deliverance and Prayer of Toronto v. Canada*, 2004 FCA 397 at para. 18, 2004 D.T.C. 6746. Many Mansions accepts that to succeed on this appeal, it must show unreasonableness on all of the grounds asserted by the Minister.

[5] Though Many Mansions contests all of these grounds, many of its submissions are directed to the Minister's conclusion that it was engaged in activities inconsistent with its registered object of "advanc[ing] and teach[ing] the religious tenets, doctrines, observances and culture associated with the Christian faith": Appeal Book, 1019, 53.

[6] Many Mansions submits that judgments on matters of religious doctrine or theology have no place in government, relying on *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. But while the Supreme Court observed in *Highwood* (at para. 39) that "religious groups are free to determine their own membership and rules," it also recognized that courts may intervene in such matters "where it is necessary to

resolve an underlying legal dispute." In the case of a charity registered for the purpose of furthering a religious object, it may be necessary to determine the scope of that object and the extent to which the charity's activities come within it: see, for example, *Fuaran Foundation v. Canada (Customs and Revenue Agency)*, 2004 FCA 181, 2004 D.T.C. 6399. Registration as a charity confers exceptional statutory privileges. Whether an organization is operating within its registered object is relevant to its continued enjoyment of those privileges. We do not agree that by inquiring into these matters the Minister acted unreasonably or exhibited bias.

[7] However, we need not determine whether the Minister's conclusions in respect of this ground were reasonable. The Minister's findings on two other grounds – Many Mansions' inadequate recordkeeping and its provision of private benefits – were reasonable and therefore dispositive of this appeal.

[8] In addressing the ground of inadequate recordkeeping, Many Mansions stresses that, during the audit period, it was in its infancy and run primarily by volunteers, that the deficiencies identified were minor, and that it has since retained professional services to maintain its books and records.

[9] But it was open to the Minister to conclude on the record that these deficiencies were serious. Among other things, documentation of expenditures was lacking. Many Mansions' books and records also showed inconsistencies in the amounts stated to be due to its pastor; substantiated through receipts only a minor portion of the amount listed as paid to him; failed to document the rent said to be payable for his and his son's use of offices; and failed to document

a loan from the pastor's late wife. While the auditor acknowledged the "positive step" of Many Mansions' intention to maintain its books and records according to professional standards, he also indicated a concern with Many Mansions' capacity for and commitment to improvement: Appeal Book, 254. The auditor noted in this regard Many Mansions' historical non-compliance, the fact that its responses had been limited and lacking in detail, and its position that its books and records were in fact adequate.

[10] In *Humane Society* (at para. 80), this Court held that a charitable organization's obligation to maintain adequate books and records is "foundational": significant privileges flow from registration, and the Minister "must be able to monitor the continuing entitlement of the charitable organization to those privileges." It was therefore open to the Minister in this case to conclude that Many Mansions' non-compliance was serious and justified revocation, even in light of Many Mansions' status as a new charity and its subsequent improvement efforts: see the discussion in *Jaamiah Al Uloom Al Islamiyyah Ontario v. Canada (National Revenue)*, 2016 FCA 49 at paras. 6-7, 11, 2016 D.T.C. 5027, leave to appeal to S.C.C. refused, [2016] 1 S.C.R. xii.

[11] The Minister's conclusions in respect of the provision of private benefits were also reasonable. The definition of "charitable organization" in subsection 149.1(1) requires a registered charity to devote all its resources to "charitable activities carried on by the organization itself," and precludes it from making any part of its income available for the personal benefit of a member.

[12] The Minister in this case concluded that Many Mansions furnished its pastor with an office and permitted him on three occasions during the audit period to use meeting rooms on Many Mansions' premises in operating a private business. Many Mansions submits on appeal that its pastor's use of the office and meeting rooms was permissible because it was merely ancillary or incidental to the fulfilment of Many Mansions' charitable purposes. While paragraph 149.1(6)(*a*) permits a charitable organization itself to carry on a related business without contravening the requirement to devote all its resources to charitable activities, the pastor's private business does not come within this exception. Moreover, the CRA had warned Many Mansions when it applied for charitable status that any use of charitable funds for personal benefit would disqualify an organization as a registered charity: Appeal Book, 1069.

[13] Many Mansions submits that the Minister's decision to revoke its charitable status was unreasonable because it was too severe. In our view, the Minister's conclusions on Many Mansions' non-compliance on the grounds of inadequate books and records and private benefits, which were largely factual in nature, were sufficient to permit the Minister to regard this non-compliance as serious or aggravated within the applicable CRA guidelines, and as warranting revocation.

[14] As a result, there is no basis to interfere with the Minister's findings in relation to Many Mansions' inadequate books and records and its provision of private benefits, or her exercise of authority to revoke registration on these grounds. There is therefore no need to consider the other grounds relied on by the Minister. The appeal will accordingly be dismissed. The Minister does not seek costs.

"J.B. Laskin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-307-16
STYLE OF CAUSE:	MANY MANSIONS SPIRITUAL CENTER, INC. v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 24, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. STRATAS J.A. LASKIN J.A.
DELIVERED FROM THE BENCH BY:	LASKIN J.A.

APPEARANCES:

Keith M. Trussler Sean C. Flaherty	FOR THE APPELLANT
Joanna Hill Alexander Nguyen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McKenzie Lake Lawyers LLP London, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT

Telecommunications Workers Union *Appellant*

v.

Canadian Radio-television and Telecommunications Commission, Shaw Cable Systems (B.C.) Ltd. and British Columbia Telephone Company *Respondents*

INDEXED AS: TELECOMMUNICATIONS WORKERS UNION *v.* CANADA (RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION)

File No.: 23778.

1995: January 23; 1995: June 22.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Audi alteram partem — Failure to give notice — CRTC deciding who could perform installation work on telephone company's support structures — CRTC decision affecting rights of employees of telephone company — Whether CRTC exceeded its jurisdiction in failing to provide union with notice of CRTC hearing — National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20, ss. 66, 72, 74.

This appeal, which was heard at the same time as *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 ("*BC Tel*"), and arises out of the same factual circumstances, concerns TWU's application for judicial review of the same CRTC decision challenged in *BC Tel*. The Federal Court of Appeal dismissed the application in light of its judgment in *BC Tel*. Two issues are raised in this appeal: (1) whether the CRTC exceeded its jurisdiction in failing to provide notice to TWU of the application and proceedings which led to the CRTC decision; and (2) whether the CRTC erred in law and exceeded its jurisdiction in issuing the decision in question by allegedly failing to follow an established policy of deferring to decisions of arbitration boards constituted by BC Tel and the TWU with respect to the work jurisdiction of BC Tel employees.

Telecommunications Workers Union *Appelant*

c.

Conseil de la radiodiffusion et des télécommunications canadiennes, Shaw Cable Systems (B.C.) Ltd. et British Columbia Telephone Company *Intimés*

RÉPERTORIÉ: TELECOMMUNICATIONS WORKERS UNION *c.* CANADA (CONSEIL DE LA RADIODIFFUSION ET DES TÉLÉCOMMUNICATIONS)

N° du greffe: 23778.

1995: 23 janvier; 1995: 22 juin.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Audi alteram partem — Omission de donner avis — Décision du CRTC déterminant qui pouvait effectuer les travaux d'installation sur les structures de soutènement de la compagnie de téléphone — Droits des employés de la compagnie de téléphone compromis par la décision du CRTC — Le CRTC a-t-il excédé sa compétence en omettant d'aviser le syndicat de la tenue de son audience? — Loi nationale sur les attributions en matière de télécommunications, L.R.C. (1985), ch. N-20, art. 66, 72, 74.

Ce pourvoi, qui a été entendu en même temps que le pourvoi connexe *British Columbia Telephone Co. c. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 R.C.S. 739 (*«BC Tel»*), et procède des mêmes faits, concerne une demande de contrôle judiciaire de la part du TWU relativement à la même décision du CRTC que celle qui était contestée dans *BC Tel*. La Cour d'appel fédérale a rejeté la demande du fait de sa décision dans *BC Tel*. Le pourvoi soulève deux questions, à savoir: (1) si le CRTC a excédé sa compétence en omettant de donner avis au TWU de la demande et de la procédure à l'origine de la décision du CRTC, et (2) si le CRTC a commis une erreur de droit et excédé sa compétence en rendant la décision en question du fait qu'il n'aurait pas suivi une politique établie de retenue à l'égard des décisions des conseils d'arbitrage constitués par BC Tel et le TWU relativement à l'aire de travail des employés de BC Tel.

Held (Lamer C.J. and Sopinka and Cory JJ. dissenting): The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, Iacobucci, McLachlin and Major JJ.: The *audi alteram partem* rule did not require that the TWU be provided with notice of the CRTC hearing. The TWU was not a party nor did it have a direct interest in the proceedings before the tribunal. The CRTC decision concerned questions of telecommunications policy, not labour relations, and a consideration of the "work jurisdiction" of the TWU would have been irrelevant to that decision. The *audi alteram partem* rule should not be interpreted as requiring that notice be provided to parties indirectly affected by regulatory proceedings. In any event, even if that rule would normally have required the CRTC to notify the TWU of the proceedings, s. 72 of the *National Telecommunications Powers and Procedures Act* relieves the CRTC of this obligation and places the responsibility of notifying TWU on BC Tel. This provision should be read as shielding CRTC decisions from challenge on the grounds that a regulatee failed to notify its employees of the proceedings. In such circumstances, the appropriate remedy would be for the employees to apply to the CRTC for a re-hearing under s. 66 of the Act. Finally, the CRTC did not err in law or exceed its jurisdiction by failing to follow a policy of deferring to the decisions of arbitration boards. The CRTC has never adopted such a policy and it would be improper for it to adopt one as this would be an improper delegation or fettering of its discretionary powers.

Per Lamer C.J. and Sopinka and Cory JJ. (dissenting): In the special circumstances of this case, the failure to provide TWU with notice of the proceedings before the CRTC breached the requirements of natural justice. The collective agreement between TWU and BC Tel stipulates that any maintenance, repair or construction of BC Tel's support structures must be performed exclusively by members of TWU. Although, in accordance with its mandate, the CRTC was specifically concerned with telecommunications policy, it was well aware that its decision, on the very question of who had the right to perform the work on BC Tel's support structures, would have a substantial impact on TWU's work jurisdiction, thereby directly affecting the rights of the union and its members. While it would potentially be unduly onerous on regulatory agencies if notice had to be provided to all individuals having contractual relations with a regulated party, notice should be given where, as here, the admin-

Arrêt (le juge en chef Lamer et les juges Sopinka et Cory sont dissidents): Le pourvoi est rejeté.

Les juges La Forest, L'Heureux-Dubé, Gonthier, Iacobucci, McLachlin et Major: La règle *audi alteram partem* ne commandait pas que le TWU soit avisé de l'audience du CRTC. Le TWU n'était pas une partie, ni n'avait-il un intérêt direct dans l'affaire soumise au tribunal. La décision du CRTC concernait une politique en matière de télécommunications, non de relations du travail, et la considération de «l'aire de travail» du TWU n'aurait pas été pertinente quant à cette décision. La règle *audi alteram partem* ne devrait pas être interprétée de façon à exiger qu'un avis soit donné aux parties indirectement touchées par des procédures en matière de réglementation. Quoi qu'il en soit, même si, normalement, le CRTC aurait dû, en conformité avec cette règle, aviser le TWU de la procédure, l'art. 72 de la *Loi nationale sur les attributions en matière de télécommunications* dispense le CRTC de cette obligation et impose à BC Tel l'obligation d'aviser le TWU. Cette disposition devrait être interprétée comme mettant les décisions du CRTC à l'abri de toute contestation fondée sur le motif qu'une personne visée par un règlement a omis d'aviser ses employés de la procédure. Dans un tel cas, il conviendrait de permettre aux employés de demander une nouvelle audience au CRTC comme le permet l'art. 66 de la Loi. Enfin, le CRTC n'a pas commis d'erreur de droit ni excédé sa compétence en faisant défaut de respecter une politique de déférence à l'égard des décisions des conseils d'arbitrage. Le CRTC n'a jamais adopté pareille politique et il ne serait pas approprié qu'il en adopte une puisqu'il s'agirait alors d'une délégation irrégulière de ses pouvoirs discrétionnaires ou d'une entrave à ceux-ci.

Le juge en chef Lamer et les juges Sopinka et Cory (dissidents): Compte tenu des circonstances uniques de la présente affaire, l'omission de donner au TWU un avis de la procédure soumise au CRTC a entraîné un déni de justice naturelle. Aux termes de la convention collective conclue entre le TWU et BC Tel, tout travail ayant trait à l'entretien, à la réparation ou à la construction de la structure de soutènement de BC Tel est confié exclusivement aux membres du TWU. Bien que le CRTC s'intéresse particulièrement à la politique en matière de télécommunications, conformément à son mandat, il savait très bien que, quant à la question même de savoir qui avait le droit d'effectuer le travail sur la structure de soutènement de BC Tel, sa décision était susceptible d'avoir un impact sévère sur l'aire de travail réservée aux membres du TWU et de toucher ainsi directement les droits du syndicat et de ses membres. S'il est vrai que ce serait imposer un fardeau peut-être

istrative tribunal must actually address a key aspect of the contract directly pertaining to the rights of a third party. The CRTC decision would have a direct bearing on the viability of a specific provision in the collective agreement. In such a situation, it cannot be contended that the interest was indirect merely because it is derived from the contract. Furthermore, the practical problems that might be associated with any duty to notify individuals in a contractual relation with a regulated party are absent in this case. Given that TWU was a party to previous proceedings of the CRTC where essentially the same question was considered, the CRTC was aware that the interests of the union were substantially and equally at stake in the application leading to the impugned decision. There would thus have been no practical hardship in requiring the CRTC to give notice to TWU.

Nothing in the *National Telecommunications Powers and Procedures Act* relieves the CRTC of its duty to provide notice to TWU in accordance with the *audi alteram partem* rule. Section 72, which obliges a party to a proceeding to provide notice to its officers and servants, does not absolve an administrative tribunal from its duty to comply with the dictates of natural justice. Although, generally, the employer is in the best situation to know whether the employees' interests are at stake, where, to the knowledge of the CRTC, the officers or servants of a party will be directly affected by the proceedings, the rules of natural justice require the CRTC to ensure notice is given, regardless of the employer's obligations under the Act. Section 66 of the Act does not provide an appropriate remedy for employees who have not been given notice. Where natural justice requires that a party be given notice and a tribunal fails to provide such notice, the aggrieved party is entitled to judicial review of the decision. It is not an adequate alternative remedy to request that the tribunal, in its discretion, rehear the application after it has already decided it. Section 74 of the Act applies only in situations where the CRTC decides to proceed without notice based on any "ground of urgency, or for other reason". This did not occur in the present case. Thus, s. 74 is inapplicable.

trop lourd aux organismes de réglementation que d'exiger qu'ils avisent tout individu ayant un lien contractuel avec une partie visée par un règlement, un avis doit être donné dans les cas où, comme en l'espèce, le tribunal administratif doit, en fait, se pencher sur un aspect clé du contrat qui se rapporte directement aux droits d'un tiers. La décision du CRTC aurait une conséquence directe sur la viabilité d'une disposition donnée de la convention collective. Dans pareil cas, on ne saurait soutenir que l'intérêt était indirect uniquement parce qu'il procédait d'un contrat. Du reste, les problèmes que pourrait en pratique provoquer l'obligation d'aviser les individus qui ont un lien contractuel avec une partie assujettie à la réglementation ne se posent pas en l'espèce. Comme le TWU était partie à une procédure soumise antérieurement au CRTC, où la question posée était essentiellement identique, le CRTC savait que le syndicat avait un intérêt tout aussi important dans la demande ayant abouti à la décision contestée. Contraindre le CRTC à aviser le TWU n'aurait donc engendré aucune difficulté d'ordre pratique.

Rien dans la *Loi nationale sur les attributions en matière de télécommunications* ne dispense le CRTC de son obligation d'aviser le TWU conformément à la règle *audi alteram partem*. L'article 72, suivant lequel toute partie intéressée par une procédure est tenue d'en aviser les membres de son personnel, ne dégage pas un tribunal administratif de son obligation de respecter les principes de justice naturelle. Bien qu'en général, l'employeur soit le mieux placé pour déterminer si les intérêts de ses employés sont en jeu, dans les cas où le CRTC sait que les membres du personnel d'une partie seront directement touchés par la procédure, les règles de justice naturelle le contraignent à faire en sorte qu'un avis soit donné, quelles que soient les obligations de l'employeur sous le régime de la Loi. L'article 66 de la Loi ne prévoit pas la réparation qu'il convient d'accorder aux employés qui n'ont pas été avisés. Lorsque la justice naturelle commande qu'une partie soit avisée et que le tribunal ne respecte pas cette obligation, la partie lésée peut demander le contrôle judiciaire de la décision. Il ne convient pas de demander subsidiairement que le tribunal, à sa discrétion, entende à nouveau la demande après qu'il se soit prononcé à cet égard. L'article 74 de la Loi ne s'applique que lorsque, «pour cause d'urgence ou pour toute autre raison», le CRTC décide d'aller de l'avant dans une affaire sans qu'avis soit donné. Ce n'était pas le cas en l'espèce. Aussi, l'art. 74 n'a-t-il aucune application.

Cases Cited

By L'Heureux-Dubé J.

Referred to: *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739; *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611.

By Sopinka J. (dissenting)

British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd., [1995] 2 S.C.R. 739; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Old St. Boniface Residents Assn. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611; *Alliance des professeurs catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161.

Statutes and Regulations Cited

National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [rep. 1993, c. 38, s. 130], ss. 66, 72, 74.

APPEAL from a judgment of the Federal Court of Appeal, [1993] F.C.J. No. 444 (QL), dismissing appellant's application for judicial review of a decision of the Canadian Radio-television and Telecommunications Commission. Appeal dismissed, Lamer C.J. and Sopinka and Cory JJ. dissenting.

Morley D. Shortt, Q.C., and *Donald Bobert*, for the appellant.

Thomas G. Heintzman, Q.C., and *Susan L. Gratton*, for the respondent Shaw Cable Systems (B.C.) Ltd.

Avrum Cohen, Allan Rosenzveig and *Carolyn Pinsky*, for the respondent the CRTC.

Jack Giles, Q.C., Judy Jansen and *Alison Narod*, for the respondent British Columbia Telephone Co.

Jurisprudence

Citée par le juge L'Heureux-Dubé

Arrêts mentionnés: *British Columbia Telephone Co. c. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 R.C.S. 739; *Canadian Transit Co. c. Canada (Commission des relations de travail dans la Fonction publique)*, [1989] 3 C.F. 611.

Citée par le juge Sopinka (dissident)

British Columbia Telephone Co. c. Shaw Cable Systems (B.C.) Ltd., [1995] 2 R.C.S. 739; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Canadian Transit Co. c. Canada (Commission des relations de travail dans la Fonction publique)*, [1989] 3 C.F. 611; *Alliance des professeurs catholiques de Montréal c. Quebec Labour Relations Board*, [1953] 2 R.C.S. 140.

Lois et règlements cités

Loi nationale sur les attributions en matière de télécommunications, L.R.C. (1985), ch. N-20 [abr. 1993, ch. 38, art. 130], art. 66, 72, 74.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1993] A.C.F. nº 444 (QL), qui a rejeté la demande de l'appelant visant le contrôle judiciaire d'une décision du Conseil de la radiodiffusion et des télécommunications canadiennes. Pourvoi rejeté, le juge en chef Lamer et les juges Sopinka et Cory sont dissidents.

Morley D. Shortt, c.r., et *Donald Bobert*, pour l'appelant.

Thomas G. Heintzman, c.r., et *Susan L. Gratton*, pour l'intimée Shaw Cable Systems (B.C.) Ltd.

Avrum Cohen, Allan Rosenzveig et *Carolyn Pinsky*, pour l'intimé le CRTC.

Jack Giles, c.r., Judy Jansen et *Alison Narod*, pour l'intimée British Columbia Telephone Co.

The reasons of Lamer C.J. and Sopinka and Cory JJ. were delivered by

SOPINKA J. (dissenting) — The issue raised on this appeal is whether the Canadian Radio-television and Telecommunications Commission ("CRTC") violated the principles of natural justice by failing to provide formal notice to the Telecommunications Workers Union ("TWU") regarding the application which resulted in Telecom Letter Decision CRTC 92-4 ("Decision 92-4"). Those proceedings involved a dispute between Shaw Cable Systems (B.C.) Ltd. ("Shaw Cable") and the British Columbia Telephone Company ("BC Tel") concerning who was entitled to perform the installation work on the support structures belonging to BC Tel.

TWU represents the bargaining unit for approximately 12,000 employees of BC Tel. The collective agreement between TWU and BC Tel stipulates that any maintenance, repair or construction of the support structure must be performed exclusively by members of TWU. Therefore, it is apparent that Decision 92-4 would necessarily impact upon the work jurisdiction of the employees represented by TWU. In my view, in light of the unique circumstances of this case, the failure to provide TWU with notice of the proceedings before the CRTC breached the requirements of natural justice.

As L'Heureux-Dubé J. has noted, the factual context and the history of the proceedings which gave rise to the present appeal have been fully set out in her reasons in the companion case, *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739. I do not find it necessary to repeat them here. However, in light of the fact that the principles of natural justice, including the *audi alteram partem* rule, are dependent on the particular circumstances of the case, it will be necessary to emphasize certain facts in the course of my reasons, in order to explain my conclusion that TWU was entitled to notice of the proceedings between Shaw Cable and BC Tel.

Version française des motifs du juge en chef Lamer et des juges Sopinka et Cory rendus par

LE JUGE SOPINKA (dissident) — Il s'agit en l'espèce de déterminer si le Conseil de la radiodiffusion et des télécommunications canadiennes («CRTC») a violé les principes de justice naturelle en omettant de remettre au Telecommunications Workers Union («TWU») un avis formel de la demande qui est à l'origine de la lettre-décision Télécom CRTC 92-4 («décision 92-4»). Les procédures, qui opposaient Shaw Cable Systems (B.C.) Ltd. («Shaw Cable») et British Columbia Telephone Company («BC Tel»), visaient à déterminer qui avait le droit d'effectuer les travaux d'installation sur les structures de soutènement appartenant à BC Tel.

Le TWU représente une unité de négociation qui regroupe environ 12 000 employés de BC Tel. Aux termes de la convention collective conclue entre le TWU et BC Tel, tout travail ayant trait à l'entretien, à la réparation ou à la construction de la structure de soutènement est confié exclusivement aux membres du TWU. De toute évidence, donc, la décision 92-4 aurait nécessairement un effet sur l'aire de travail des employés représentés par le TWU. À mon avis, compte tenu des circonstances uniques de la présente affaire, l'omission de donner au TWU un avis de la procédure soumise au CRTC a entraîné un déni de justice naturelle.

Comme le juge L'Heureux-Dubé l'a signalé, dans l'arrêt connexe *British Columbia Telephone Co. c. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 R.C.S. 739, elle a décrit de façon détaillée les faits et l'historique des procédures qui ont abouti au présent pourvoi. Il n'est donc pas nécessaire d'y revenir ici. Toutefois, étant donné que les principes de justice naturelle, dont la règle *audi alteram partem*, sont déterminés suivant les circonstances particulières d'une affaire, je devrai faire ressortir certains faits dans le cours de mes motifs pour expliquer ma conclusion que le TWU avait le droit de recevoir un avis de la procédure opposant Shaw Cable et BC Tel.

I. Relevant Statutory Provisions

4 For convenience, I set out the relevant statutory provisions below:

National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20

66. The Commission may review, rescind, change, alter or vary any order or decision made by it or may rehear any application before deciding it.

72. Every company shall, as soon as possible after receiving or being served with any regulation, order, direction, decision, notice, report or other document of the Minister or the Commission, or the inspecting engineer, notify each of its officers and servants performing duties that are or may be affected thereby by delivering a copy to them or by posting a copy in some place where their work or duties, or some of them, are to be performed.

74. (1) Subject to this Act, when the Commission is authorized to hear an application, complaint or dispute, or make any order, on notice to the parties interested, it may, on the ground of urgency, or for other reason appearing to the Commission to be sufficient, notwithstanding any want of or insufficiency in the notice, make the like order or decision in the matter as if due notice had been given to all parties, and the order or decision is as valid and takes effect in all respects as if made on due notice.

(2) Any company or person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of an order or decision made under subsection (1), or within such further time as the Commission may allow, apply to the Commission to vary, amend or rescind the order or decision, and the Commission shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear the application, and either amend, alter or rescind the order or decision, or dismiss the application, as may seem to it just and right.

I. Dispositions législatives pertinentes

Pour plus de commodité, je reproduirai les dispositions législatives pertinentes:

Loi nationale sur les attributions en matière de télécommunications, L.R.C. (1985), ch. N-20

66. La Commission peut réviser, abroger ou modifier ses ordonnances ou décisions, ou peut entendre à nouveau une demande qui lui est faite, avant de rendre sa décision.

72. Aussitôt que possible après qu'elle a reçu ou qu'il lui a été signifié un règlement, une ordonnance, des instructions, une décision, un avis, un rapport ou quelque autre document de la part du ministre, de la Commission, ou de l'ingénieur-inspecteur, toute compagnie doit les porter à la connaissance de chacun des membres de son personnel qui remplissent des fonctions que ces pièces concernent ou peuvent concerner, soit en leur remettant une copie, soit en en affichant une copie là où ils doivent accomplir leurs travaux ou leurs fonctions, ou une partie de leurs travaux ou fonctions.

74. (1) Sous réserve des autres dispositions de la présente loi, lorsque la Commission est autorisée à entendre une requête, plainte ou contestation, ou à prendre une ordonnance, après avoir donné avis aux parties intéressées, elle peut, pour cause d'urgence ou pour toute autre raison qui lui paraît suffisante, nonobstant le défaut ou l'insuffisance de cet avis, prendre une ordonnance ou une décision dans l'affaire comme si l'avis eût été régulièrement donné à toutes les parties; cette ordonnance ou décision est à tous égards aussi valable et exécutoire que si l'avis eût été régulier.

(2) Toute compagnie ou personne qui a droit à un avis et à laquelle un avis suffisant n'a pas été donné peut, à toute époque dans les dix jours qui suivent le moment où elle a eu connaissance de cette ordonnance ou décision, ou dans tel délai plus long que la Commission peut lui accorder, demander à la Commission de modifier ou abroger cette ordonnance ou décision; la Commission doit alors, après tel avis aux autres parties intéressées qu'elle juge à propos de donner, entendre cette demande et modifier ou abroger cette ordonnance ou décision, ou renvoyer cette demande, suivant qu'il lui paraît juste et équitable.

II. Issue

Did the CRTC exceed its jurisdiction in failing to provide notice to TWU of the application and proceedings which resulted in Decision 92-4?

III. Analysis

A. *The Requirements of Natural Justice*

The jurisprudence of this Court has made it clear that the requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the subject matter being dealt with and the statutory provisions under which the tribunal is acting: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, and *Old St. Boniface Residents Assn. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at pp. 1191-92. In each case it must be determined whether the party claiming the right to have been given notice and an opportunity to be heard had a sufficient interest in the proceedings such that notice was required by the *audi alteram partem* principle.

In her reasons, my colleague suggests that TWU's interest in the proceedings before the CRTC was merely indirect as Decision 92-4 was addressing telecommunications policy and not labour relations. With respect, the fact that the CRTC was specifically concerned with telecommunications policy in accordance with its mandate does not detract from the fact that its decision would have a substantial impact on the work jurisdiction of TWU, thereby directly affecting the rights of the union and its members. The very question before the CRTC concerned who had the right to perform the work on the support structures belonging to BC Tel. The CRTC was well aware of the impact that its decision would have on TWU. Although the purpose behind Decision 92-4 may not have been related to the "work jurisdiction" of TWU and the CRTC may have been seeking to avoid entering the realm of labour relations, this is no answer to a violation of natural justice where a decision could potentially override the union's rights.

II. Question en litige

Le CRTC a-t-il excédé sa compétence en omettant de donner avis au TWU de la demande et de la procédure à l'origine de la décision 92-4?

III. Analyse

A. *Les exigences de la justice naturelle*

Notre Cour a indiqué de façon explicite dans le passé que les exigences de la justice naturelle procèdent des circonstances d'une affaire, de la nature de l'examen, de la question en cause et des dispositions législatives en vertu desquelles le tribunal administratif agit: *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735, et *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, aux pp. 1191 et 1192. Dans chaque cas, il faut déterminer si la partie qui se réclame du droit de recevoir un avis et d'être entendue a un intérêt suffisamment important dans la procédure pour que la règle *audi alteram partem* commande qu'un avis soit donné.

Dans ses motifs, ma collègue conclut que l'intérêt du TWU dans la procédure soumise au CRTC était purement indirect puisque la décision 92-4 concernait non pas les relations du travail, mais la politique en matière de télécommunications. En toute déférence, le fait que le CRTC s'intéresse particulièrement à la politique en matière de télécommunications, conformément à son mandat, ne diminue en rien le fait que sa décision était susceptible d'avoir un impact sévère sur l'aire de travail réservée aux membres du TWU et de toucher ainsi directement les droits du syndicat et de ses membres. Le CRTC devait en fait déterminer qui avait le droit d'effectuer le travail sur les structures de soutènement appartenant à BC Tel. Il savait très bien quel effet sa décision aurait pour le TWU. Bien que l'idée sous-jacente à la décision 92-4 ait pu être étrangère à l'«aire de travail» réservée aux membres du TWU et que le CRTC ait pu chercher à éviter le domaine des relations du travail, cela ne justifie pas une violation de la justice naturelle lorsqu'une décision est susceptible de contrevenir aux droits du syndicat.

7 The principal, if not the sole, reason for BC Tel's application to the CRTC was to determine who could do the work in light of the arbitration award of July 19, 1991 (the "Glass Award") involving TWU. This is what prompted BC Tel to submit a revised Support Structure Agreement to the CRTC for approval, in October 1991. Before the CRTC, BC Tel argued that the Glass Award made it impossible for the company to allow anyone other than its own employees to attach equipment on its support structures. Shaw Cable opposed this position. In my view, it was clearly unfair not to provide notice of the proceedings in these circumstances.

8 To support her conclusion, L'Heureux-Dubé J. relies on the decision in *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611 (C.A.), for the proposition that, in order to be entitled to notice, one's interest must not merely be affected by virtue of a contractual relationship with one of the regulated parties immediately involved in the proceedings. Generally, I am in agreement that it would potentially be unduly onerous on regulatory agencies if notice had to be provided to all individuals having contractual relations with a regulated party. As my colleague observes, there are a myriad of decisions of a regulatory agency which could have an indirect impact on individuals simply because they are privy to a contract with the regulated party. For example, any decision of the CRTC which impacts on the financial status of a party falling within its regulatory jurisdiction will likely also incidentally affect those with whom that party contracts. Surely, this alone is an insufficient contingent interest to warrant the existence of a duty to provide notice of the proceedings before the administrative tribunal.

9 However, in my view, there are special circumstances which arise in this case such that the *audi alteram partem* rule mandates that formal notice be given to TWU. The central focus of the ruling

BC Tel a saisi le CRTC de sa demande afin, principalement, sinon uniquement, qu'il détermine qui avait le droit d'effectuer le travail compte tenu de la sentence arbitrale rendue le 19 juillet 1991 (le «jugement Glass»), mettant en cause le TWU. C'est ce qui a incité BC Tel à soumettre à l'approbation du CRTC en octobre 1991 un accord révisé relatif aux structures de soutènement. Devant le CRTC, BC Tel a fait valoir que, vu le jugement Glass, la compagnie était dans l'impossibilité de permettre à des personnes autres que ses propres employés d'installer des câbles sur sa structure de soutènement. Shaw Cable a exprimé son opposition à cet égard. À mon avis, l'omission de donner avis de la procédure était, dans les circonstances, manifestement injuste.

À l'appui de sa conclusion, le juge L'Heureux-Dubé s'appuie sur l'arrêt *Canadian Transit Co. c. Canada (Commission des relations de travail dans la Fonction publique)*, [1989] 3 C.F. 611 (C.A.), pour soutenir que, pour qu'une personne ait droit à un avis, son intérêt ne doit pas découler simplement d'un lien contractuel avec l'une des parties assujetties à la réglementation et directement concernées. De façon générale, je conviens que ce serait imposer un fardeau peut-être trop lourd aux organismes de réglementation que d'exiger qu'ils avisent tout individu ayant un lien contractuel avec une partie visée par un règlement. Ainsi que ma collègue le signale, une multitude de décisions rendues par un organisme de réglementation sont susceptibles de toucher indirectement des individus du seul fait que ceux-ci sont partie à un contrat avec la partie assujettie à la réglementation. Ainsi, selon toute vraisemblance, la décision du CRTC dont l'effet se fait sentir sur la situation financière d'une partie assujettie à sa compétence en matière de réglementation touchera également, de façon indirecte, les personnes liées par contrat à cette partie. Indiscutablement, ce seul intérêt éventuel ne justifie pas l'obligation de donner avis de la procédure soumise au tribunal administratif.

À mon avis, toutefois, étant donné les circonstances particulières de la présente affaire, la règle *audi alteram partem* commande que le TWU soit formellement avisé. La nœud de la décision du

of the CRTC specifically concerns the very subject matter of the contract between the BC Tel and TWU. Thus, the interest at stake is not simply a contingent one flowing solely from the effect of the decision on BC Tel. As I have stated, the question the CRTC had to address was whether Shaw Cable and other cable companies were entitled to do the work on BC Tel's support structures. This is precisely what the Glass Award precluded as a result of the interpretation of article 3(1) of the collective agreement. In my view, the passage cited by L'Heureux-Dubé J. from the *Canadian Transit* case was not intended to apply to situations where the administrative tribunal must actually address a key aspect of the contract directly pertaining to the rights of a third party. The CRTC was well aware of BC Tel's position that the arbitration award prevented it from allowing anyone other than members of the TWU to attach equipment to its facilities. The decision of the CRTC would have a direct bearing on the viability of a specific provision in the collective agreement. In my view, in such a situation it cannot be contended that the interest was indirect merely because it is derived from the contract.

Furthermore, the practical problems that might be associated with any duty to notify individuals in a contractual relation with a regulated party are absent in this case. In fact, following the arbitration award of January 25, 1983 (the "Williams Award"), when the Canadian Cable Television Association ("CCTA") applied to the CRTC, in 1987, for an order requiring BC Tel to permit cable licensees, including Shaw Cable, to install their own coaxial cables on BC Tel's support structures, the CRTC permitted TWU to participate. The CRTC knew that TWU's contributions could be very helpful. In a letter decision dated July 28, 1987, the CRTC wrote the following:

On 2 April 1987, the TWU wrote to the Commission advising of its interest in the CCTA's application. By letter dated 27 April 1987, the Commission indicated that it could benefit from the views of the TWU and set

CRTC se rapporte particulièrement au contrat même qui lie BC Tel et le TWU. Aussi, l'intérêt qui est en jeu n'est pas qu'un intérêt éventuel qui naît uniquement de la décision relative à BC Tel. Comme je l'ai mentionné, le CRTC devait déterminer si Shaw Cable et d'autres entreprises de télédistribution pouvaient effectuer le travail sur les structures de soutènement de BC Tel. C'est exactement ce que le jugement Glass a interdit suivant son interprétation de l'article 3(1) de la convention collective. À mon avis, le passage de l'arrêt *Canadian Transit* cité par le juge L'Heureux-Dubé ne visait pas les cas où le tribunal administratif doit, en fait, se pencher sur un aspect clé du contrat qui se rapporte directement aux droits d'un tiers. Le CRTC connaissait fort bien la position de BC Tel, suivant laquelle la sentence arbitrale lui interdisait de permettre à des personnes autres que les membres du TWU d'installer des câbles sur son équipement. La décision du CRTC aurait une conséquence directe sur la viabilité d'une disposition donnée de la convention collective. À mon avis, dans pareil cas, on ne saurait soutenir que l'intérêt était indirect uniquement parce qu'il procédait d'un contrat.

Du reste, les problèmes que pourrait en pratique provoquer l'obligation d'aviser les individus qui ont un lien contractuel avec une partie assujettie à la réglementation ne se posent pas en l'espèce. En fait, suivant la sentence arbitrale rendue le 25 janvier 1983 (le «jugement Williams»), lorsque l'Association canadienne de télévision par câble («l'ACTC») a demandé au CRTC en 1987 de rendre une ordonnance contraignant BC Tel à permettre aux entreprises de télédistribution, y compris Shaw Cable, d'installer leurs propres câbles coaxiaux sur les structures de soutènement de BC Tel, le CRTC a permis au TWU de prendre part à la procédure. Le CRTC savait que l'apport du TWU pourrait se révéler des plus utile. Dans une lettre-décision datée du 28 juillet 1987, le CRTC a écrit ce qui suit:

[TRADUCTION] Le 2 avril 1987, le TWU a informé le Conseil de son intérêt dans la demande soumise par l'ACTC. Dans une lettre du 27 avril 1987, le Conseil a indiqué qu'il pourrait tirer profit des opinions du TWU

out the procedure to be followed by the TWU, B.C. Tel and the CCTA in addressing the issues. [Emphasis added.]

11 Given the fact that TWU was a party to the proceedings in 1987, the CRTC would have been aware that the interests of the union were substantially and equally at stake in the application leading to Decision 92-4 since the question to be considered was essentially identical. The only difference was that, in the interim, TWU had succeeded in obtaining a second arbitration award in its favour, which effectively rendered it impossible for BC Tel to comply with the CRTC's previous order in 1987. As an aside, it should be noted that Shaw Cable was given notice of the Glass arbitration proceedings and was invited to participate, although they declined. This is also indicative of the interrelation between the issues and interests at stake in the proceedings before the labour arbitration panels and the CRTC.

12 It was readily apparent that any order the CRTC made which conflicted with the Glass Award would directly affect the union's rights. The whole basis for BC Tel's application (and therefore Shaw Cable's application in response) was the arbitration awards. Thus, in my opinion, there would have been no practical hardship created whatsoever in requiring the CRTC to give notice to TWU in the present circumstances.

13 The decision of the Federal Court of Appeal in *Canadian Transit*, *supra*, supports my conclusion that formal notice was appropriate and necessary in these circumstances. In that case, customs employees requested an enquiry by the Public Service Staff Relations Board in order to determine whether working conditions on a bridge between Windsor, Ontario, and Detroit, Michigan, were unsafe. The bridge was owned and operated by the Canadian Transit Co. Pursuant to the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), the owner of the bridge would be responsible for the cost of any repairs that had to be effected in order to ensure that safety requirements were met. The Board held that the conditions on the bridge were unsafe and ordered the government employer to make the nec-

et a exposé la procédure à suivre par le TWU, B.C. Tel et l'ACTC relativement à ces questions. [Je souligne.]

Comme le TWU était partie à la procédure de 1987, le CRTC devait savoir que le syndicat avait un intérêt tout aussi important dans la demande ayant abouti à la décision 92-4 puisque la question posée était essentiellement identique. La seule différence réside dans le fait que, dans l'intervalle, le TWU a réussi à obtenir une seconde sentence arbitrale en sa faveur, laquelle empêchait effectivement BC Tel de respecter l'ordonnance antérieure du CRTC rendue en 1987. En passant, il y a lieu de remarquer que Shaw Cable a été avisée de la procédure d'arbitrage devant Glass et invitée à y participer, invitation qu'elle a toutefois déclinée. Cela illustre également la corrélation entre les questions soulevées et les intérêts qui sont en jeu dans les procédures soumises aux conseils d'arbitrage et au CRTC.

Il était évident que toute ordonnance du CRTC rendue en contradiction avec le jugement Glass toucherait directement les droits du syndicat. La demande de BC Tel (et donc la demande de Shaw Cable en réponse) était fondée uniquement sur les sentences arbitrales. Aussi, suis-je d'avis que contraindre le CRTC à aviser le TWU n'aurait dans les circonstances actuelles engendré aucune difficulté d'ordre pratique.

La décision rendue par la Cour d'appel fédérale dans *Canadian Transit*, précitée, vient appuyer ma conclusion que l'avis formel était aussi opportun que nécessaire dans les circonstances. Dans cette affaire, des employés des douanes ont demandé à la Commission des relations de travail dans la Fonction publique d'enquêter sur la sécurité des conditions de travail sur le pont reliant Windsor (Ontario) et Detroit (Michigan). Canadian Transit Co. était la propriétaire et l'exploitante du pont. Selon la *Loi sur les douanes*, L.R.C. (1985), ch. 1 (2e suppl.), le propriétaire du pont doit assumer le coût des réparations nécessaires au respect des exigences en matière de sécurité. Ayant conclu que les conditions sur le pont étaient dangereuses, la Commission a ordonné à l'employeur, le gouverne-

essary safety changes. As a result, Canadian Transit Co. would be responsible for these costs.

Canadian Transit Co. sought judicial review of the Board's decision on the ground that it did not receive notice of the proceedings and was not afforded an opportunity to participate. The Federal Court of Appeal unanimously allowed the application and remitted the matter back for a re-hearing at which Canadian Transit Co. would be allowed standing. Marceau J.A., writing the majority reasons, observed that the Board had no authority over Canadian Transit Co. since it was not the employer in the context of those proceedings. Nonetheless, the implementation of the Board's decision would directly and necessarily affect the rights of the company. Similarly, in concurring reasons, MacGuigan J.A. stated that, although the Board's order was directed only to the employer, "the consequences for the applicant were immediate" (p. 618).

In the case at bar, just as in the *Canadian Transit* case, the administrative body was clearly aware of the applicant's interest. To borrow the words of MacGuigan J.A., "this real interest of the applicant was in a sufficiently direct relationship to the subject-matter before the Board that the applicant was entitled to notice of the hearing . . . and an adequate opportunity to present its case" (p. 624).

In my view, all of the foregoing suggests that the rules of natural justice required TWU to be notified and provided with an opportunity to be heard. However, it remains to be examined whether there are any provisions within the statutory scheme governing the powers of the CRTC which would alter this conclusion.

B. *The Effect of the Statutory Scheme*

In my colleague's reasons, L'Heureux-Dubé J. argues that even if the rules of natural justice would normally have required the CRTC to furnish notice of the proceedings to TWU, s. 72 of the

ment, d'apporter les modifications nécessaires à cet égard. Canadian Transit Co. devrait en assumer les coûts.

Canadian Transit Co. a demandé le contrôle judiciaire de la décision de la Commission, soutenant ne pas avoir reçu avis de la procédure ni avoir été invitée à y participer. La Cour d'appel fédérale à l'unanimité a accueilli la demande et renvoyé l'affaire afin que soit tenue une nouvelle audience, dans le cadre de laquelle Canadian Transit Co. aurait qualité pour agir. Le juge Marceau, se prononçant au nom de la majorité, a noté que la Commission n'avait aucune autorité à l'égard de Canadian Transit Co., puisque cette dernière n'était pas l'employeur dans le cadre de cette procédure. Néanmoins, la mise en application de la décision de la Commission toucherait directement et nécessairement les droits de la compagnie. De même, dans des motifs concordants, le juge MacGuigan a indiqué que, bien que l'ordonnance de la Commission ne s'adresse qu'à l'employeur, «elle avait des conséquences immédiates pour la requérante» (p. 618). 14

En l'espèce, tout comme dans l'affaire *Canadian Transit*, l'organisme administratif était parfaitement conscient de l'intérêt de la requérante. Pour emprunter les propos du juge MacGuigan, «cet intérêt réel avait un lien suffisamment direct avec la question dont était saisie la Commission pour donner droit à la requérante à un avis de l'audience [. . .] et à la possibilité suffisante d'y exposer son point de vue» (p. 624). 15

À mon avis, on peut inférer de tout ce qui précède que les règles de justice naturelle commandaient que le TWU soit avisé et ait la possibilité d'être entendu. Reste toutefois à savoir s'il existe dans le régime législatif des dispositions régissant les pouvoirs du CRTC qui pourraient modifier ma conclusion. 16

B. *L'effet du régime législatif*

Dans ses motifs, ma collègue le juge L'Heureux-Dubé soutient que même si les règles de justice naturelle avaient normalement exigé que le CRTC avise le TWU de la procédure, l'art. 72 17

National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 ("*NTPPA*"), relieves the CRTC of that obligation. That provision places a duty on every company subject to a proceeding before the CRTC to notify any of its officers and servants that may be affected by the outcome of the hearing. Therefore, in this case, BC Tel had a duty under s. 72 to notify TWU. With respect, I cannot agree that a provision which obliges a party to a proceeding to provide notice can absolve an administrative tribunal from its duty to comply with the dictates of natural justice. The effect of this would be that a failure on the part of a regulated party to give notice to another interested party in accordance with s. 72 could result in a denial of natural justice without recourse. This is an extraordinary proposition. Rules of procedure frequently leave it to the parties to give notice, but failure to do so is a defect in the proceedings which entitles an aggrieved party to relief irrespective of the origin of responsibility for the default.

de la *Loi nationale sur les attributions en matière de télécommunications*, L.R.C. (1985), ch. N-20 («*LNAT*»), l'en dispense. Suivant cette disposition, toute compagnie intéressée par une procédure soumise au CRTC est tenue d'en aviser les membres de son personnel susceptibles d'être concernés par l'issue de l'audition. Par conséquent, en l'espèce, BC Tel était tenue, conformément à l'art. 72, d'aviser le TWU. Avec égards, je ne puis convenir qu'une disposition qui oblige une partie à une procédure à donner un avis puisse dégager un tribunal administratif de son obligation de respecter les principes de justice naturelle. Autrement, l'omission de la part d'une partie visée par un règlement de donner avis à une autre partie intéressée conformément à l'art. 72 risquerait d'entraîner un déni de justice naturelle à l'égard duquel aucun recours ne serait offert. Il s'agit là d'une proposition étonnante. Il arrive fréquemment que les règles de procédure laissent à la discrétion des parties la décision de donner un avis, mais l'omission de le faire est un vice de procédure qui autorise la partie lésée à demander réparation, peu importe qui est fautif.

18 It is true that, generally, the employer is in the best situation to know whether the employees' interests are at stake. However, in circumstances where, to the knowledge of the CRTC, the officers or servants of a party will be directly affected by the proceedings, nothing in s. 72 abrogates the CRTC's duty to fulfil the requirements of natural justice. Therefore, in the special circumstances of this case, where TWU had been a participant in the 1987 proceedings and the principal reason for the application was to consider who was to perform the work on the support structures in light of article 3(1) of the collective agreement, the rules of natural justice required the CRTC to ensure notice was given, regardless of the employer's obligations under the *NTPPA*. Procedural fairness is the right of the interested parties and the duty of the administrative tribunal. This does not change where an additional notice obligation is placed on one of the regulated parties.

Certes, en général, l'employeur est le mieux placé pour déterminer si les intérêts de ses employés sont en jeu. Toutefois, dans les cas où le CRTC sait que les membres du personnel d'une partie seront directement touchés par la procédure, rien dans l'art. 72 ne vient annuler son obligation de respecter les exigences de justice naturelle. Par conséquent, compte tenu des circonstances particulières de la présente affaire, à savoir que le TWU avait pris part à la procédure en 1987 et que la demande visait principalement à déterminer qui devait effectuer le travail sur les structures de soutènement suivant l'article 3(1) de la convention collective, les règles de justice naturelle contraignaient le CRTC à faire en sorte qu'un avis soit donné, quelles que soient les obligations de l'employeur sous le régime de la *LNAT*. L'équité procédurale est un droit pour les parties intéressées et une obligation pour le tribunal administratif. Cette situation ne change pas lorsque une obligation additionnelle de donner avis est imposée à l'une des parties assujetties à la réglementation.

My colleague also refers to s. 66 *NTPPA* as providing the appropriate remedy for employees who have not been given notice. That section grants the CRTC the power to vary any order or re-hear any application. However, it must be observed that the language used in s. 66 is permissive. In other words, the CRTC has the discretion to vary or re-hear the application. The provision does not provide a right of appeal nor a right to have the decision of the CRTC reviewed on the grounds of a denial of natural justice. Where natural justice requires that a party be given notice and a tribunal fails to provide such notice, the aggrieved party is entitled to judicial review of the decision. It is not an adequate alternative remedy to request that the tribunal, in its discretion, re-hear the application after it has already decided it.

Ma collègue signale également que l'art. 66 *LNAT* prescrit la réparation qu'il convient d'accorder aux employés qui n'ont pas été avisés. Cette disposition confère au CRTC le pouvoir de modifier toute ordonnance ou d'entendre à nouveau une demande. Il y a cependant lieu de remarquer que le libellé de l'art. 66 accorde une faculté. En d'autres termes, le CRTC a le pouvoir discrétionnaire de modifier l'ordonnance ou d'entendre à nouveau la demande. La disposition ne prévoit aucun droit d'appel, ni aucun contrôle judiciaire de la décision du CRTC qui soit fondé sur un déni de justice naturelle. Lorsque la justice naturelle commande qu'une partie soit avisée et que le tribunal ne respecte pas cette obligation, la partie lésée peut demander le contrôle judiciaire de la décision. Il ne convient pas de demander subsidiairement que le tribunal, à sa discrétion, entende à nouveau la demande après qu'il se soit prononcé à cet égard.

19

Similarly, contrary to Shaw Cable's argument, I do not believe that s. 74 *NTPPA* is of any assistance in the present appeal. Clearly, that provision applies where, for reasons of urgency or other sufficient reason, the CRTC decides to proceed with a matter without notice. In that case, pursuant to s. 74(2), a party otherwise normally entitled to notice may apply to the CRTC to have the decision varied or amended. However, it is apparent that s. 74 contemplates a situation where natural justice entitles a party to notice and the CRTC, having addressed its mind to the issue, proceeds without notice, in any event, for reasons it deems sufficient. This did not occur in the present case. The CRTC simply neglected to provide any notice to TWU, apparently believing that it was not required. There is absolutely no indication that the CRTC actually decided to proceed with the application without notifying TWU based on any "ground of urgency, or for other reason". Thus, in my view, s. 74 is inapplicable in the instant case.

De même, contrairement à l'argument avancé par Shaw Cable, je ne crois pas que l'art. 74 *LNAT* soit de quelque assistance dans le présent pourvoi. De toute évidence, cette disposition s'applique lorsque, pour cause d'urgence ou pour toute autre raison suffisante, le CRTC décide d'aller de l'avant dans une affaire sans qu'avis soit donné. Dans ce cas, conformément au par. 74(2), une partie qui aurait normalement droit à l'avis peut demander au CRTC de modifier sa décision. Or, l'art. 74 vise plutôt le cas où la justice naturelle commande qu'une partie soit avisée et où, après s'être penché sur la question, le CRTC agit quand même sans avoir donné avis, pour une raison qu'il juge suffisante. Ce n'est pas ce qui s'est produit en l'espèce. Le CRTC a simplement négligé de donner avis au TWU, estimant apparemment qu'il n'avait pas à le faire. Il n'y a pas la moindre indication que le CRTC a effectivement décidé d'entendre la demande sans aviser le TWU «pour cause d'urgence ou pour toute autre raison». Aussi, suis-je d'avis que l'art. 74 n'a aucune application en l'espèce.

20

While it is true that the rules of natural justice are dependent on the statutory scheme governing the administrative tribunal, there must be clear statutory language in order to detract from the

Si les règles de justice naturelle sont déterminées suivant le régime législatif qui régit le tribunal administratif, il faut un libellé clair pour déroger aux principes ordinaires d'équité procédurale.

21

ordinary principles of procedural fairness. I find the words of Rinfret C.J. in *Alliance des professeurs catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161, at p. 174 D.L.R., to be apposite in the present context:

> [TRANSLATION] The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be put at stake, is of a universal equity and it is not the silence of the law that should be invoked in order to deprive anyone of it. In my opinion, nothing less would be necessary than an express declaration of the Legislature in order to put aside this requirement which applies to all Courts and to all the bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual. [Emphasis added.]

This principle applies not only to the entitlement to natural justice but to the right to judicial review when natural justice is denied.

22 In this case, it cannot be said that any of the statutory language employed relieves the CRTC of its duty to provide notice to TWU in accordance with the principle of *audi alteram partem*. Nor does the *NTPPA* remove recourse to the courts when there is a failure to comply with the dictates of procedural fairness.

23 It is also worth pointing out that in the companion case, this Court has concluded that, in the event of a conflict, the decision of the CRTC must take precedence over that of the arbitration board. For this reason, it becomes all the more important for TWU to be afforded an opportunity to be heard by the CRTC in order to attempt to preserve its rights.

24 As a result, I am of the view that the failure to notify TWU of the proceedings before the CRTC amounted to a denial of natural justice. While notice need not be given to every union which has a collective agreement with a company that is regulated by the CRTC, I believe that the unique circumstances of this case, which I have discussed above, required that notice be furnished to TWU.

Les propos du juge en chef Rinfret dans *Alliance des professeurs catholiques de Montréal c. Quebec Labour Relations Board*, [1953] 2 R.C.S. 140, à la p. 154, sont à mon avis fort à propos dans le présent contexte:

> Le principe que nul ne doit être condamné ou privé de ses droits sans être entendu, et surtout sans avoir même reçu avis que ses droits seraient mis en jeu est d'une équité universelle et ce n'est pas le silence de la loi qui devrait être invoqué pour en priver quelqu'un. À mon avis, il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu. [Je souligne.]

Ce principe vaut non seulement pour le droit à la justice naturelle, mais également pour le droit à un contrôle judiciaire en cas de déni de justice naturelle.

Dans la présente affaire, on ne saurait prétendre que le libellé législatif dispense le CRTC de son obligation d'aviser le TWU conformément à la règle *audi alteram partem*. Ni que la *LNAT* exclut tout recours aux tribunaux en cas de non-respect des principes d'équité procédurale.

Il convient également de signaler que, dans l'arrêt connexe, notre Cour a conclu qu'en cas de conflit, la décision du CRTC doit avoir priorité sur celle d'un conseil arbitral. Il devient donc d'autant plus important pour le TWU de pouvoir se faire entendre par le CRTC afin de tenter de défendre ses droits.

En conclusion, je suis d'avis que l'omission d'aviser le TWU de la procédure soumise au CRTC a engendré un déni de justice naturelle. Bien qu'il ne soit pas nécessaire d'aviser chaque syndicat lié par une convention collective à la compagnie assujettie à la réglementation du CRTC, j'estime que les circonstances uniques de la présente affaire, exposées ci-dessus, commandaient qu'avis soit donné au TWU.

IV. Disposition

For all of the foregoing reasons, I would allow the appeal and order the CRTC to re-consider its decision after affording TWU an opportunity to be heard.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Major JJ. was delivered by

L'HEUREUX-DUBÉ J. — This case was heard at the same time as the companion case of *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, and arises out of the same factual circumstances. *British Columbia Telephone* concerns a statutory appeal by the British Columbia Telephone Company ("BC Tel") of Telecom Letter Decision CRTC 92-4 ("Decision 92-4"). This appeal, on the other hand, concerns an application for judicial review by the Telecommunications Workers Union ("TWU") of the same letter decision. Decision 92-4 and the factual circumstances giving rise to this appeal are both described in detail in my reasons in *British Columbia Telephone*.

As regards the procedural history of the case at hand, the TWU's application for judicial review was first heard by the Federal Court of Appeal and was rejected: [1993] F.C.J. No. 444 (QL). In brief reasons, Mahoney J.A., writing on behalf of a unanimous Court of Appeal, noted that the issues raised by the TWU's application for judicial review were, with one exception, substantially identical to those raised by BC Tel in its statutory appeal from Decision 92-4 (which forms the subject matter of *British Columbia Telephone*). Mahoney J.A. then went on to state:

The ground for this application that is different from those raised on the [statutory] appeal is that TWU was denied natural justice by the CRTC [Canadian Radio-television and Telecommunications Commission] because it was not given notice of the applications which led to decision 92-4.

IV. Dispositif

Pour tous ces motifs, je suis d'avis d'accueillir le pourvoi et d'ordonner au CRTC de reconsidérer sa décision après avoir accordé au TWU la possibilité d'être entendu. 25

Le jugement des juges La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci et Major a été rendu par

LE JUGE L'HEUREUX-DUBÉ — Ce pourvoi a été entendu en même temps que le pourvoi connexe *British Columbia Telephone Co. c. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 R.C.S. 739, et origine des mêmes faits. L'affaire *British Columbia Telephone* concerne un appel interjeté par la British Columbia Telephone Company («BC Tel») à l'encontre de la lettre-décision Télécom CRTC 92-4 («décision 92-4») tel que prévu à la loi. Le présent pourvoi, par contre, concerne une demande de contrôle judiciaire de la part de Telecommunications Workers Union («TWU») relativement à la même lettre-décision. La décision 92-4 et les faits qui ont donné naissance à ce pourvoi sont décrits de façon détaillée dans les motifs que j'ai rédigés dans *British Columbia Telephone*. 26

En ce qui concerne l'historique des procédures dans le cas qui nous occupe, la demande de contrôle judiciaire de TWU a d'abord été soumise à la Cour d'appel fédérale, qui l'a rejetée: [1993] A.C.F. nº 444 (QL). Dans des motifs succincts, le juge Mahoney, s'exprimant au nom de la Cour d'appel à l'unanimité, a signalé que les moyens invoqués à l'appui de la demande de contrôle judiciaire de TWU étaient, à une exception près, essentiellement les mêmes que ceux invoqués par BC Tel dans son appel formé en vertu de la loi à l'encontre de la décision 92-4 (sur laquelle porte l'arrêt *British Columbia Telephone*). Le juge Mahoney a ajouté: 27

Le motif sous-jacent à la présente demande et qui diffère de ceux soulevés en appel [en vertu de la loi] est que le CRTC [Conseil de la radiodiffusion et des télécommunications canadiennes] n'a pas respecté les principes de la justice naturelle à l'égard de TWU en ne donnant pas à celui-ci un avis des demandes qui sont à l'origine de la décision 92-4.

In the [statutory] appeal, it has been decided that the CRTC had not the jurisdiction to order BC Tel to violate the collective agreement by doing again that which had been conclusively determined to be a violation by an arbitration board constituted as required by the *Canada Labour Code*. It seems to me that the corollary is that TWU was not entitled to notice of the applications since the CRTC had not the jurisdiction to deprive TWU or its members of any rights they had under the collective agreement. I would, for that reason, and because allowing the [statutory] appeal has rendered it otherwise moot, dismiss this application for judicial review.

Il a été statué en appel [prévu dans la loi] que le CRTC n'avait pas le pouvoir d'enjoindre à BC Tel de violer la convention collective en accomplissant à nouveau un acte qu'un conseil d'arbitrage constitué conformément au *Code canadien du travail* avait assimilé, de manière définitive, à une violation. Il me semble s'ensuivre que TWU n'avait pas droit à un avis relatif aux demandes puisque le CRTC n'avait pas le pouvoir de priver TWU ou ses membres des droits que leur conférait la convention collective. Pour cette raison, et parce que le fait d'accueillir l'appel [prévu dans la loi] l'a privée par ailleurs de tout objet, je suis d'avis de rejeter la présente demande de contrôle judiciaire.

It is from this decision that the appellant appeals to this Court.

L'appelant se pourvoit contre cette décision devant notre Cour.

28 While the appellant raised several grounds in its initial application for judicial review before the Federal Court of Appeal, only two of these grounds are pursued in the appeal to this Court of the Federal Court of Appeal's decision. First, the TWU argues that the CRTC's failure to provide it with notice of the proceedings which resulted in Decision 92-4 deprived the CRTC of its jurisdiction and that as such Decision 92-4 is invalid. Second, the TWU claims that Decision 92-4 should be overturned on the ground that the CRTC erred in law and exceeded its jurisdiction by allegedly failing to follow its established policy of deferring to decisions of arbitration boards constituted by BC Tel and the TWU with respect to the work jurisdiction of BC Tel employees.

Quoique l'appelant ait invoqué plusieurs moyens dans sa requête initiale de contrôle judiciaire devant la Cour d'appel fédérale, il en reprend seulement deux dans le pourvoi formé devant notre Cour contre la décision de la Cour d'appel fédérale. D'une part, TWU fait valoir que l'omission du CRTC de lui avoir donné avis de la procédure qui a abouti à la décision 92-4 a privé le CRTC de sa compétence et, pour cette raison, cette décision est invalide. TWU soutient, d'autre part, que la décision 92-4 devrait être infirmée pour le motif que le CRTC a commis une erreur de droit et excédé sa compétence du fait qu'il n'aurait pas suivi sa politique de déférence à l'égard des décisions des conseils d'arbitrage constitués par BC Tel et TWU relativement à l'aire de travail des employés de BC Tel.

Failure to Provide Notice

Omission de donner avis

29 The *audi alteram partem* rule, which is a component of the principles of natural justice and of procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal.

La règle *audi alteram partem*, qui est une composante des principes de justice naturelle et d'équité procédurale, requiert qu'une partie à une procédure devant un tribunal en soit informée et ait la possibilité d'être entendue par le tribunal.

30 The appellant TWU argues that it has an interest in Decision 92-4 and that consequently it was entitled to the aforementioned procedural protections as regards that decision. Specifically, the TWU argues that Decision 92-4 will have an effect on the work jurisdiction given to members of the

L'appelant TWU fait valoir qu'il a un intérêt dans la décision 92-4 et qu'à ce titre, il doit bénéficier des protections procédurales mentionnées précédemment relativement à cette décision. Plus précisément, TWU soutient que la décision 92-4 aura des répercussions sur l'aire de travail réservée à

TWU. Consequently, the TWU argues that it was entitled to notice of the proceedings leading to the decision and that in the absence thereof the decision is invalid.

The respondent Shaw Cable Systems (B.C.) Ltd., on the other hand, contends that the TWU was not entitled to notice because its interest in the CRTC proceedings in question was purely indirect. In this respect, the respondent referred to the comments of Marceau J.A. in *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] 3 F.C. 611 (C.A.), at p. 614:

> It is clear to me that mere interest in the eventual outcome of a proceeding before a tribunal, whether financial or otherwise, is not in itself sufficient to give an individual a right to participate therein. The demands of natural justice and procedural fairness certainly do not require so much and in any event it would be impossible in practice to go that far. In my judgment, to be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the *audi alteram partem* principle, an individual must be directly and necessarily affected by the decision to be made. His interest must not be merely indirect or contingent, as it is when the decision may reach him only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved. [Emphasis added.]

In general, I agree with the submissions of the respondent. In my view, the TWU's interest in the proceedings before the CRTC was purely indirect. The CRTC decision concerned questions of telecommunication policy. The CRTC was required to decide on the best way to regulate a monopoly telephone company in order to preserve the public interest. The purpose behind the CRTC decision was totally unrelated to the "work jurisdiction" of the TWU. In fact, such a consideration would have been irrelevant to the CRTC decision. Consequently, the TWU had no relevant interest to represent before the CRTC. While the TWU may have been affected by the CRTC decision, the effect of this decision on the TWU was purely indirect. Accordingly, I conclude that *audi alteram*

ses membres. Par conséquent, TWU soutient qu'il avait le droit d'être avisé de la procédure qui a mené à la décision, à défaut de quoi cette dernière est invalide.

Pour sa part, l'intimée Shaw Cable Systems (B.C.) Ltd. prétend que TWU n'était pas en droit de recevoir tel avis puisque son intérêt dans la procédure soumise au CRTC était purement indirect. À cet égard, l'intimée s'est référée aux commentaires du juge Marceau dans *Canadian Transit Co. c. Canada (Commission des relations de travail dans la Fonction publique)*, [1989] 3 C.F. 611 (C.A.), à la p. 614: 31

> Il me semble clair que le seul intérêt dans l'issue éventuelle d'une affaire soumise à un tribunal, qu'il soit pécuniaire ou autre, ne suffit pas en lui-même à conférer à un particulier qualité pour agir. Les exigences de la justice naturelle et de l'équité dans la procédure n'en demandent certainement pas tant, et en tout état de cause, il serait impossible en pratique d'aller jusque là. À mon sens, pour compter au nombre des parties intéressées auxquelles un tribunal doit accorder qualité pour agir dans une affaire dont il est saisi afin de satisfaire aux exigences de la règle *audi alteram partem*, un particulier doit être touché directement et nécessairement par la décision à rendre. Son intérêt ne doit pas être simplement indirect ou éventuel, comme c'est le cas lorsqu'une décision peut l'atteindre par un intermédiaire étranger aux préoccupations du tribunal, tel un rapport contractuel avec une des parties directement concernées. [Je souligne.]

De façon générale, je souscris aux prétentions de l'intimée. À mon avis, l'intérêt de TWU dans l'affaire soumise au CRTC était purement indirect. La décision du CRTC en était une de politique en matière de télécommunications. Le CRTC devait décider de la meilleure façon de réglementer une compagnie de téléphone monopoliste afin de protéger l'intérêt public. L'objectif sous-jacent à la décision du CRTC n'avait absolument rien à voir avec «l'aire de travail» de TWU. En fait, une telle considération n'aurait pas été pertinente quant à la décision du CRTC. TWU n'avait donc aucun intérêt pertinent à faire valoir devant le CRTC. Si TWU risquait d'être touché par la décision du CRTC, ce ne pouvait être que de façon purement indirecte. Pour ce motif, je conclus que la règle 32

partem did not require that the TWU be provided with notice of the CRTC hearing. The TWU was not a party nor did it have a direct interest in the proceedings before the tribunal.

33 In this respect, it is important to note that a finding in the case at hand that the TWU was entitled to notice would have grave consequences that could paralyse regulatory agencies. Effectively, it would mean that all individuals with contractual relations with a regulatee would have to be given notice of regulatory proceedings concerning that regulatee if such proceedings were likely to effect, even indirectly, the person in question. Given the wide scope of many regulatory agencies, their decisions are likely to have an indirect effect on a large number of individuals in contractual relations with the regulatee. As a result, all such parties would have to be provided with notice of the regulatory proceedings. This is particularly problematic in light of the extreme difficulty of ascertaining exactly who these parties are in advance of the hearing and the possibility that, in the absence of notice, these parties would be able to challenge the legality of the regulatory decision. This could result in an endless series of challenges that would effectively paralyse regulatory agencies. Accordingly, the *audi alteram partem* rule should not be interpreted as requiring that notice be provided to parties indirectly affected by regulatory proceedings.

34 However, even if I am wrong and the *audi alteram partem* rule would normally have required the CRTC to notify the TWU of the proceedings in question, in my view, s. 72 of the *National Telecommunications Powers and Procedures Act*, R.S.C., 1985, c. N-20 ("*NTPPA*"), effectively relieves the CRTC of this obligation. Section 72 *NTPPA* read as follows at the time of the issuance of Decision 92-4:

72. Every company shall, as soon as possible after receiving or being served with any regulation, order, direction, decision, notice, report or other document of the Minister or the Commission, or the inspecting engi-

audi alteram partem ne commandait pas que TWU soit avisé de l'audience du CRTC. TWU n'était pas une partie, ni n'avait-il un intérêt direct dans l'affaire soumise au tribunal.

À cet égard, il importe de signaler que conclure ici que TWU avait droit à un avis aurait des conséquences sérieuses susceptibles de paralyser les organismes de réglementation. En effet, il en découlerait que tout individu ayant un lien contractuel avec une personne visée par un règlement devrait recevoir avis de la procédure de réglementation visant cette personne si une telle procédure était susceptible de le toucher, même indirectement. Étant donné l'étendue des attributions de nombreux organismes de réglementation, leurs décisions sont susceptibles de toucher indirectement un grand nombre d'individus ayant un lien contractuel avec une personne visée par un règlement. Ainsi, toutes ces parties devraient recevoir avis de la procédure de réglementation. Ceci est particulièrement problématique étant donné la très grande difficulté de déterminer avec exactitude avant l'audition qui sont ces parties et vu la possibilité qu'en l'absence de tel avis, ces dernières pourraient contester la légalité de la décision de l'organisme de réglementation. Cela serait susceptible d'entraîner un nombre infini de contestations qui paralyseraient effectivement les organismes de réglementation. Par conséquent, la règle *audi alteram partem* ne devrait pas être interprétée de façon à exiger qu'un avis soit donné aux parties indirectement touchées par des procédures en matière de réglementation.

En revanche, même si j'ai tort et que le CRTC aurait normalement dû, en conformité avec la règle *audi alteram partem*, aviser TWU de la procédure en question, à mon avis, l'art. 72 de la *Loi nationale sur les attributions en matière de télécommunications*, L.R.C. (1985), ch. N-20 («*LNAT*»), dispense effectivement le CRTC de cette obligation. L'article 72 *LNAT* se lisait ainsi au moment où la décision 92-4 a été rendue:

72. Aussitôt que possible après qu'elle a reçu ou qu'il lui a été signifié un règlement, une ordonnance, des instructions, une décision, un avis, un rapport ou quelque autre document de la part du ministre, de la Commis-

neer, notify each of its officers and servants performing duties that are or may be affected thereby by delivering a copy to them or by posting a copy in some place where their work or duties, or some of them are to be performed.

The effect of this section is to relieve the CRTC of any responsibility to notify the TWU of the proceedings in question. Instead, s. 72 places this responsibility on BC Tel. However, this shift of responsibility would be meaningless if a CRTC decision could still be challenged on the grounds that the TWU was not notified of the proceedings. In my view, s. 72 should therefore be read as shielding CRTC decisions from challenge on the grounds that a regulatee (i.e. BC Tel) failed to notify its employees of the proceedings. Instead, in such circumstances, the appropriate remedy would be for the employees to apply to the CRTC for a re-hearing as permitted by the then applicable s. 66 *NTPPA*:

66. The Commission may review, rescind, change, alter or vary any order or decision made by it or may rehear any application before deciding it.

As a result, the remedy available to employees would be equivalent to that available to a party provided with inadequate notice by the CRTC under s. 74 *NTPPA*. At the time of the events giving rise to this proceeding, s. 74 *NTPPA* read as follows:

74. (1) Subject to this Act, when the Commission is authorized to hear an application, complaint or dispute, or make any order, on notice to the parties interested, it may, on the ground of urgency, or for other reason appearing to the Commission to be sufficient, notwithstanding any want of or insufficiency in the notice, make the like order or decision in the matter as if due notice had been given to all parties, and the order or decision is as valid and takes effect in all respects as if made on due notice.

(2) Any company or person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of an order or decision made under subsection (1), or within such further time as the

sion, ou de l'ingénieur-inspecteur, toute compagnie doit les porter à la connaissance de chacun des membres de son personnel qui remplissent des fonctions que ces pièces concernent ou peuvent concerner, soit en leur remettant une copie, soit en en affichant une copie là où ils doivent accomplir leurs travaux ou leurs fonctions, ou une partie de leurs travaux ou fonctions.

Cet article a pour effet de dégager le CRTC de toute responsabilité d'aviser TWU de la procédure en question. L'article 72 impose plutôt cette obligation à BC Tel. Or, ce transfert de responsabilité serait dénué de sens si une décision du CRTC pouvait tout de même être contestée pour le motif que TWU n'a pas été notifié de la procédure. À mon sens, l'art. 72 devrait être interprété comme mettant les décisions du CRTC à l'abri de toute contestation fondée sur le motif qu'une personne visée par un règlement (soit BC Tel) a omis d'aviser ses employés de la procédure. Dans un tel cas, il conviendrait plutôt de permettre aux employés de demander une nouvelle audition au CRTC comme le permet l'art. 66 *LNAT* qui s'appliquait alors:

66. La Commission peut réviser, abroger ou modifier ses ordonnances ou décisions, ou peut entendre à nouveau une demande qui lui est faite, avant de rendre sa décision.

En conséquence, la réparation ouverte aux employés serait équivalente à celle qui s'offre à la partie ayant reçu un avis insuffisant de la part du CRTC en application de l'art. 74 *LNAT*. Au moment où les événements donnant naissance à la présente procédure se sont déroulés, l'art. 74 *LNAT* se lisait comme suit:

74. (1) Sous réserve des autres dispositions de la présente loi, lorsque la Commission est autorisée à entendre une requête, plainte ou contestation, ou à prendre une ordonnance, après avoir donné avis aux parties intéressées, elle peut, pour cause d'urgence ou pour toute autre raison qui lui paraît suffisante, nonobstant le défaut ou l'insuffisance de cet avis, prendre une ordonnance ou une décision dans l'affaire comme si l'avis eût été régulièrement donné à toutes les parties; cette ordonnance ou décision est à tous égards aussi valable et exécutoire que si l'avis eût été régulier.

(2) Toute compagnie ou personne qui a droit à un avis et à laquelle un avis suffisant n'a pas été donné peut, à toute époque dans les dix jours qui suivent le moment où elle a eu connaissance de cette ordonnance ou déci-

Commission may allow, apply to the Commission to vary, amend or rescind the order or decision, and the Commission shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear the application, and either amend, alter or rescind the order or decision, or dismiss the application, as may seem to it just and right.

35 For all of the above reasons, I reject this ground of appeal.

Failure to Follow CRTC Policy

36 The TWU's second ground of appeal is that the CRTC erred in law and exceeded its jurisdiction by failing to follow an alleged policy of deferring to the decisions of arbitration boards constituted by the parties in respect of this matter.

37 In my view, this ground of appeal is entirely without merit. First, the CRTC has never adopted a policy of deferring to such arbitration board decisions. The TWU refers to passages such as the following as supporting the existence of such a policy:

B.C. Tel argued that Article XXI of its collective agreement with the Telecommunications Workers Union precluded it from contracting this work out, but the clause in question does not appear to prohibit the Company from permitting third parties from installing their own facilities at their own expense. [Telecom Decision CRTC 78-6, July 28, 1978, at p. 27.]

In the absence of an arbitration board ruling that the collective agreement would not permit the work contemplated in those Decisions [Telecom Decisions CRTC 78-6 and 79-22], there seems to be no reason to alter the status quo. The Commission therefore orders B.C. Tel to permit cable licensees to do the spinning work required to install their coaxial cable on B.C. Tel support structures in accordance with the terms of the Agreement. [CRTC Letter Decision, July 28, 1987, at p. 5.]

These passages, however, do not actually establish a policy of deference to arbitration boards. I agree with the respondent Shaw Cable Systems (B.C.) Ltd. that such comments were merely *obiter* com-

sion, ou dans tel délai plus long que la Commission peut lui accorder, demander à la Commission de modifier ou abroger cette ordonnance ou décision; la Commission doit alors, après tel avis aux autres parties intéressées qu'elle juge à propos de donner, entendre cette demande et modifier ou abroger cette ordonnance ou décision, ou renvoyer cette demande, suivant qu'il lui paraît juste et équitable.

Pour tous ces motifs, ce moyen d'appel doit être rejeté.

Omission de respecter la politique du CRTC

TWU soutient, dans un deuxième temps, que le CRTC a commis une erreur de droit et excédé sa compétence en faisant défaut de respecter une présumée politique de déférence à l'égard des décisions des conseils d'arbitrage constitués par les parties relativement à l'affaire.

À mon avis, ce moyen d'appel est sans aucun fondement. Premièrement, le CRTC n'a jamais adopté de politique de déférence à l'égard des décisions de ces conseils d'arbitrage. TWU invoque des passages comme ceux qui suivent à l'appui de l'existence d'une telle politique:

B.C. Tel a prétendu que l'article XXI de sa convention collective avec la Union Telecommunications Workers (*sic*) l'empêchait de faire effectuer des travaux par contrat à l'extérieur, mais la clause en question ne semble pas l'empêcher de permettre à une tierce partie d'installer son propre matériel à ses frais. [Décision Télécom CRTC 78-6, 28 juillet 1978, à la p. 27.]

[TRADUCTION] Comme le conseil d'arbitrage n'a pas dit que la convention collective ne permettrait pas le travail envisagé dans ces décisions [Décisions Télécom CRTC 78-6 et 79-22], il ne semble y avoir aucun motif de changer le statu quo. Le Conseil ordonne en conséquence à BC Tel de permettre aux entreprises de télédistribution de faire le travail de bobinage nécessaire à l'installation de leur câble coaxial sur les structures de soutènement de B.C. Tel conformément aux termes de l'Accord. [Lettre-décision du CRTC, 28 juillet 1987, à la p. 5.]

Ces passages n'établissent toutefois pas véritablement l'existence d'une politique de déférence à l'égard des conseils d'arbitrage. J'estime, comme l'intimée Shaw Cable Systems (B.C.) Ltd., que ces

ments designed to respond to the submissions of BC Tel and the TWU. Second, it would be improper for the CRTC to adopt a general policy of deference to an arbitration board as this would be an improper delegation or fettering of the CRTC's discretionary powers.

commentaires étaient simplement incidents et destinés à répondre aux prétentions de BC Tel et de TWU. Deuxièmement, il ne serait pas approprié que le CRTC adopte une politique générale de déférence à l'égard d'un conseil d'arbitrage puisqu'il s'agirait alors d'une délégation irrégulière des pouvoirs discrétionnaires du CRTC ou d'une entrave à ceux-ci.

Disposition

For the reasons outlined above, I would dismiss this appeal with costs throughout.

Appeal dismissed with costs, LAMER C.J. *and* SOPINKA *and* CORY JJ. *dissenting.*

Solicitors for the appellant: Shortt, Moore & Arsenault, Vancouver.

Solicitor for the respondent the CRTC: The CRTC Legal Directorate, Hull.

Solicitors for the respondent Shaw Cable Systems (B.C.) Ltd.: McCarthy Tétrault, Toronto.

Solicitors for the respondent British Columbia Telephone Co.: Farris, Vaughan, Wills & Murphy, Vancouver.

Dispositif

Pour ces motifs, je rejetterais le pourvoi, avec dépens dans toutes les cours.

Pourvoi rejeté avec dépens, le juge en chef LAMER *et les juges* SOPINKA *et* CORY *sont dissidents.*

Procureurs de l'appelant: Shortt, Moore & Arsenault, Vancouver.

Procureur de l'intimé le CRTC: Le contentieux du CRTC, Hull.

Procureurs de l'intimée Shaw Cable Systems (B.C.) Ltd.: McCarthy Tétrault, Toronto.

Procureurs de l'intimée British Columbia Telephone Co.: Farris, Vaughan, Wills & Murphy, Vancouver.

ONT.

S. C.

MENZIES v. McLEOD.

Ontario Supreme Court, Boyd, C. November 9, 1915.

W. Lawr, for the applicants.

A. W. Langmuir, for the defendant Martha McGuire.

BOYD, C.:—The constitution of the Court of Chancery in this Province was altered by 12 Vict. ch. 64, and in the 11th section, referring to the report of the Chancery Commission before appointed, which recommended certain changes in the procedure, it was declared desirable to give effect thereto in regard to enabling the plaintiff to obtain discovery through the medium of a *vivâ voce* examination of the defendant, and by extending a like privilege to the defendant in relation to the *vivâ voce* examination of the plaintiff. Under that power, the Judges framed and issued Order L. (1850), which begins: "Any party to a suit may be examined as a witness by the party adverse in point of interest without any special order for that purpose." See Cooper's Rules, 1851. This Order of 1850 appears to be the first wherein the phrase "adverse in point of interest" is used, and thence it has passed into current usage in subsequent Orders, to the present day. It is carried into the Orders of 1863 as No. XXII. (1).

By the Administration of Justice Act, R.S.O. 1877, ch. 50, sec. 156, the Legislature carried the equity practice into actions at law in almost identical words: "Any party to an action at law, whether plaintiff or defendant, may at any time after . . . issue obtain an order for the oral examination . . . of any party adverse in point of interest . . . touching the matters in question in the action." The only practical difference was that at law an order was required, but it was issued as of course.

Then the two lines of practice were blended together in the

ONT.
S. C.

Consolidated Rules of 1887. These sections were left out of the Judicature Act of that date, but were declared to be of statutory force by 51 Vict. ch. 2, sec. 4. In this consolidation the rule appears as Rule 487. The same rule is reproduced as No. 439 in the Consolidated Rules of 1897, and it is now found in the Rules of 1913 as No. 327. The meaning and language are identical with that of the earliest Order—except that, for the sake of conciseness, "adverse in point of interest" appears as "adverse in interest." When the expression was first used in 1850 and afterwards, the word "interest" in connection with parties and witnesses had a well-defined meaning. It meant direct pecuniary or other legal, as distinguished from moral, interest in the matters and in the results involved in the litigation. The word is of frequent recurrence in the legislation on evidence in the middle of last century in this Province: 12 Vict. ch. 70; 14 & 15 Vict. ch. 66; and 16 Vict. ch. 19.

The object of this action is to establish the will of Margaret Menzies. The judgment will operate *in rem* and conclude the rights of all parties interested. The executor sues alone, and makes the beneficiaries and next of kin defendants. Some of the latter, who are also beneficiaries, contest the validity of the will on the ground of undue influence and incapacity. The will was executed at Daytona, Florida, U.S.A., where, it is alleged, the textatrix, an old and diseased woman, was in the hands of the executor and one of the defendants, Martha McGuire, who was the nurse in waiting on the deceased, and who gets a legacy of $10,000. The estate is a large one, and, after the legacy to the nurse and pecuniary legacies of $1,000 each to eleven next of kin, the residue goes to the executor. The defendant McGuire has entered no defence, and the pleadings against her are closed. It is stated on affidavit that the plaintiff and the defendant McGuire are in the same interest, and are neither of them of the next of kin of the testatrix.

A notice was given by the contestants to McGuire to attend for examination under Rule 327 (1), but she made default on the ground that she was not compellable; and to test this question the matter has been argued before me.

Counsel for McGuire relies on a Manitoba decision of Mr. Justice Mathers in 1909, *Fonseca* v. *Jones*, 19 Man. R. 334, in which, declining to regard *Moore* v. *Boyd* (1881), 8 P.R. 413, as

well decided, he follows English cases and holds that a defendant is not a party adverse in point of interest to another party on the same side of the record within the meaning of the Rule (apparently corresponding to ours) unless there are some rights to be adjusted between them in the action.

This testamentary action discloses really two sets of litigants who are adverse—those who seek to uphold the will and those who seek to invalidate it. No doubt as to which side McGuire is on; if the will stands, she gains $10,000; if it falls, she loses all. She might well have been made a co-plaintiff: her whole interest in the litigation is with the executor and in his success. An actual issue in tangible form spread upon the record is not essential, so long as there is a manifest adverse interest in one defendant as against another defendant. "Adverse interest" is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject-matter of litigation.

Moore v. *Boyd*, 8 P.R. 413, was decided by the Master in Ordinary in 1881, and has been referred to with approval subsequently (*Bank of Ottawa* v. *Harty* (1906), 12 O.L.R. 218, 220), though not as to the particular point in question. But on that point his interpretation of what is meant by a party adverse in interest accords with that expressed by Mowat, V.-C., in *Forsyth* v. *Johnson* (1868), 14 Gr. 639, at p. 643.

Having regard to the genesis of the Ontario Rule now in force, Rule 327, and the practice which has obtained, it is not competent to introduce the limitations as to examination of co-defendants which are found in the English practice, under Rules differently framed and expressed. The characteristic English phrase is "opposite party," and ours is "party adverse in interest." The very point of difference is noted by Cotton, L.J., in *Molloy* v. *Kilby* (1880), 15 Ch. D. 162, at p. 164: "'Opposite party or parties,'" he says, "does not mean a party or parties having an adverse interest, but a party or parties between whom and the applicant an issue is joined." The English decisions which Mr. Justice Mathers has followed decide that as between co-defendants one cannot examine the other for discovery unless between the two there be some right to be adjudicated (Lord Esher) or some community of interest (Lindley, L.J.), or some question in conflict in the action (Lopes, L.J.) This is the summary of the expressions used in *Shaw* v. *Smith* (1886), 18 Q.B.D. 193, as given

ONT.
S. C.

by A. L. Smith, L.J., in *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q.B. 124, 127.

Another case under English practice which would conclude the present applicants' right to examine is *Marshall* v. *Langley*, [1889] W.N. 222: where the defendant admits the plaintiff's case and puts in no defence and claims no relief, there is no issue raised, and he cannot be treated as an opposite party by a co-defendant who wishes to examine. The last English case is *Birchal* v. *Birch Crisp & Co.*, [1913] 2 Ch. 375.

I am by no means sure that even under the English limitations there is not something to be adjudicated here between the co-defendants—there is a community of interest in the disposal of the estate, though one claim as against the other is adverse.

In my judgment, *Moore* v. *Boyd* is to be preferred to *Fonseca* v. *Jones*. Within the meaning of the Rule, the defendant McGuire is a party to the action adverse in interest to her co-defendants who seek to gain discovery from her as to the execution of the will and the condition of the testatrix. The Court favours an early disclosure of all matters surrounding the execution of an impeached will from those who know, that an opportunity may be given in a proper case to withdraw from hopeless or unnecessary litigation.

It is to be remarked also that in probate actions especially the Court exercises a wider latitude in ordering discovery than in other actions not *in rem*, owing to the nature of the issues raised. It is the duty of the Court not only to do justice between the parties, but also to do justice to the deceased: Tristam and Coote's Probate Practice, 14th ed., p. 506.

In all likelihood this nurse knows more about the physical and mental condition of the testatrix than any other available person.

The defendant McGuire should, on due notice of time and place, attend at her own expense and submit to be examined under Rule 327.