Federal Court  Cour fédérale

Date: 20110218

Docket: T-738-10

Citation: 2011 FC 195

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 18, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

AÉROPORT DE QUÉBEC INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application, in accordance with section 33.1 of the *Pension Benefits Standards Act, 1985*, R.S., 1985, c. 32 (2nd Supp.) (PBSA), and Rule 300 *et seq.* of the *Federal Courts Rules*, SOR/98-106, for the enforcement of a direction made on February 12, 2010, by the Superintendent of Financial Institutions (SFI), who is represented by the Attorney General of Canada (Attorney General). The Attorney General is applying to the Court for an order requiring Aéroport de

Québec inc. (Aéroport de Québec or the respondent) to comply with the direction made by the SFI and to pay $263,000, plus interest from October 15, 2008, to the pension plan fund of the general management of Aéroport de Québec inc. (pension plan or pension plan in question).

[2] For the following reasons, the application is allowed.

I. Context

[3] Aéroport de Québec is a company incorporated in accordance with the *Canada Corporations Act*, R.S., 1970, c. C-32, which leases the airport facilities of the Québec City Jean Lesage International Airport and manages the air operations that take place there. It is the employer and administrator of the pension plan in question. This pension plan, which had only one member, was registered on June 29, 2007, and was terminated on October 15, 2008.

[4] In February 2004, Aéroport de Québec hired Ghislaine Collard as director general and she became a member of the pension plan. Ms. Collard's employment relationship was terminated on June 5, 2006. At that time, Aéroport de Québec and Ms. Collard signed an acquittance and transaction containing certain provisions in relation to the pension plan. The purpose of these provisions was to allow for the transfer of the actuarial present value of the obligations of the pension plan of which Ms. Collard had been a member before being hired by Aéroport de Québec to the pension plan in question and to allow for a second transfer into the plan of any future employer of Ms. Collard. The parties' respective obligations were governed by time limits.

[5] On August 29, 2008, Aéroport de Québec informed Ms. Collard that the deadline for transferring the pension plan assets to a plan of her choice was October 15, 2008, and that it intended to initiate the termination process for the plan. On September 22, 2008, the respondent's actuary informed the SFI that the pension plan would be terminated on October 15, 2008.

[6] On May 14, 2009, the Office of the Superintendent of Financial Institutions (OSFI) informed Aéroport de Québec that it was examining the request for approval of the plan's termination report. In this letter, the OSFI also indicated that, according to its examination of the documents provided on the termination of the plan, Aéroport de Québec had not exercised due diligence and care with respect to investing the plan's assets. In a letter dated June 26, 2009, addressed to the OSFI, Aéroport de Québec denied the OSFI's allegations and stated its position as to the quality of its administration of the plan.

[7] On January 15, 2010, the SFI submitted to Aéroport de Québec a notice of intention to make a direction. This notice specified that the SFI was of the view that the administration of the pension plan in question had been deficient and that it intended to order Aéroport de Québec to pay $263,000, plus interest from October 15, 2008, to the pension plan fund. This notice also informed Aéroport de Québec of its right to submit representations before the SFI made a direction. On February 4, 2010, Aéroport de Québec replied to this notice stating its general disagreement with the SFI's observations.

[8] On February 12, 2010, the SFI made the direction in question. The SFI indicated that he believed that Aéroport de Québec had not complied with the PBSA or the plan and that its conduct

went against the practices of due diligence and care with respect to the investment of the plan's assets. The SFI instructed Aéroport de Québec to pay $263,000, plus interest from October 15, 2008, to the pension plan in question by March 5, 2010.

[9] On May 13, 2010, the Attorney General served and filed an application for the enforcement of a direction by the Superintendent of Financial Institutions in accordance with section 33.1 of the PBSA as well as an affidavit by the senior supervisor of the OSFI attesting to Aéroport de Québec's failure to comply with the direction.

[10] On May 21, 2010, Aéroport de Québec served and filed a notice of appearance indicating that it intended to contest the application. On June 30, 2010, it also served and filed three affidavits dated June 28, 2010, in which the authors, the Vice-President of Finance of Aéroport de Québec and two actuaries, declared that the respondent administered the plan in a prudent, diligent and appropriate manner given the circumstances.

II. Issue

[11] At issue is the jurisdiction of the Court in accordance with section 33.1 of the PBSA and the respondent's right to collaterally attack the validity of the direction.

[12] Section 33.1 of the PBSA states the following:

33.1 (1) If an administrator, employer or other person has omitted to do any thing under this Act that is required to be	**33.1** (1) En cas de manquement soit à une de ses directives, soit à une disposition de la présente loi ou des règlements —

done by them or on their part, or contravenes a direction of the Superintendent or a provision of this Act or the regulations, the Superintendent may, in addition to any other action that the Superintendent may take, apply to the Federal Court for an order requiring the administrator, employer or other person to cease the contravention or do any thing that is required to be done, and on such application the Federal Court may so order and make any other order it thinks fit.	notamment une obligation —, le surintendant peut, en plus de toute autre mesure qu'il peut prendre, demander à la Cour fédérale de rendre une ordonnance obligeant l'administrateur, l'employeur ou toute autre personne en faute à mettre fin ou à remédier au manquement, ou toute autre ordonnance qu'il juge indiquée en l'espèce.
Appeal	Appel
(2) An appeal from an order made under subsection (1) lies in the same manner as an appeal from any other order of the Federal Court.	(2) L'ordonnance rendue peut être portée en appel.

III. Positions of the parties

A. *Applicant's position*

[13] The Attorney General emphasized that Parliament gave the SFI the authority to make directions, but not to order their enforcement, and that it entrusted this responsibility to the Federal Court pursuant to section 33.1 of the PBSA. Moreover, he is claiming that even without enabling legislation, the Court would have the authority to issue the order sought by virtue of its inherent authority recognized under section 44 of the *Federal Courts Act*, R.S., 1985, c. F-7 (FCA).

[14] The Attorney General maintains that the evidence demonstrates that Aéroport de Québec did not comply with the direction made in its regard by the SFI and that it did not contest its validity using an application for judicial review. Consequently, the Court should order the respondent to comply with the direction since all of the conditions required by section 33.1 of the PBSA enabling the Court to exercise its authority to compel are satisfied.

[15] The Attorney General also claims that this proceeding cannot be an opportunity for Aéroport de Québec to challenge the validity of the direction because it chose not to do so by way of an application for judicial review. Consequently, in accordance with the rule prohibiting collateral attacks, the respondent cannot contest the direction in the context of this application for legal enforcement. The only appropriate means for challenging the validity of the direction would have been an application for judicial review pursuant to section 18.1 of the FCA.

B. *Respondent's position*

[16] Aéroport de Québec has a different understanding of the Court's jurisdiction in accordance with section 33.1 of the PBSA. It submits that this section gives the Court discretionary authority to assess the evidence and all of the circumstances of a case, including the validity of the direction, to decide whether it considers it appropriate to issue an order requiring a party to comply with it. Aéroport de Québec therefore maintains that it may raise the inappropriateness of the direction in question as a defence and that the evidence it submitted, which the Attorney General chose to not rebut, clearly demonstrates that the direction made by the SFI was inappropriate, given the context of the plan and the market conditions.

[17] Aéroport de Québec is also rejecting the Attorney General's position with respect to the collateral attack rule. In its opinion, the fact that there was no application for judicial review to have the direction set aside in no way affects the jurisdiction of the Court by virtue of section 33.1 of the PBSA to accept or refuse to issue an order. The jurisdiction conferred on the Court in accordance with section 33.1 of the PBSA is not conditional on or subject to an application for judicial review; it is independent from it. While the purpose of a judicial review is to analyze the legality of a direction, the Court, upon an application for enforcement, must determine whether or not it must issue an enforcement order. Aéroport de Québec also specifies that it is not asking for the direction to be set aside, but rather that its effects on the company be negated.

[18] Aéroport de Québec claims that the SFI is criticizing it for having been negligent in administering the pension plan and that it must be able to defend itself against this allegation, even more so since the SFI never responded to the arguments it raised in response to the notice of intention to make a direction. It claims that judicial review would not offer an appropriate forum for this type of argument, namely because of the deference the Court would likely exercise with respect to the SFI's decisions.

[19] Aéroport de Québec also believes that the Attorney General's position is overly formalistic. It is relying on, *inter alia*, the recent decisions by the Supreme Court in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 (available on CanLII) (*TeleZone*), and *Manuge v. Canada*, 2010 SCC 67 (available on CanLII). It submits that these decisions changed the state of the law and that the principles applied by the Court, including that of access to justice, should apply in this case

to allow it to raise the invalidity of the direction so as to constrain the Court from issuing the order sought.

[20] Aéroport de Québec also submitted that the order application is irregular because the SFI made his direction in accordance with subsection 11(2) of the PBSA, while the order application is based on subsection 11(1) of the PBSA.

IV. Analysis

[21] First, it appears indisputable to me that the Court has the authority to issue the order sought under section 33.1 of the PBSA and that it is unnecessary to use its inherent authority to rule on this application.

[22] Second, I believe that the defence used by Aéroport de Québec to challenge the order application directly challenges the validity of the direction made by the SFI: Aéroport de Québec did not comply with the direction because it believes that, given the circumstances, it was not appropriate for the SFI to make this direction. It is therefore asking the Court to acknowledge the inappropriateness or unreasonableness of the direction as one of the circumstances it will consider in exercising its discretionary authority. Even though Aéroport de Québec submits that it is not seeking to have the direction set aside, it is seeking to negate its effects and render it inoperative. I therefore consider that this is a case in which the very essence of the defence raised challenges the validity of the direction. It would therefore be appropriate to assess whether, even though the respondent did not apply for a judicial review of the direction, it may collaterally attack it.

[23] To rebut the defence of Aéroport de Québec, the Attorney General is raising the rule that prohibits a collateral attack. This rule was established in a criminal context. It was described as follows by the Supreme Court in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, at page 599:

> . . . It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. . . .

[24] In *R. v. Litchfield*, [1993] 4 S.C.R. 333, at page 349, the Supreme Court reiterated the following with respect to the rationale behind the rule prohibiting collateral attacks:

> . . . The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro*, *supra*, at p. 497). . . .

[25] However, this rule is not absolute and does not apply only to decisions rendered by the courts. In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, 158 D.L.R. (4th) 193 (*Maybrun*), the Supreme Court applied the rule prohibiting collateral attacks to an order issued in accordance with the Ontario *Environmental Protection Act*, R.S.O. 1980, c. 141 (EPA). This matter involved a company that operated a gold and copper mine. The Ontario Ministry of the Environment had issued an order against it in accordance with the EPA instructing it to take remedial action and carry out specific work. The EPA provided for the possibility of an appeal, but

the appellant did not appeal the order. It also did not attempt to obtain judicial review of the order. The failure to comply with an order was a criminal offence and criminal charges were filed against the appellant company and its manager. In defence, they raised the invalidity of the order.

[26] The Court found that the question of whether a penal court may determine the validity of an administrative order depended on the legislature's intention as to the appropriate forum. The Court stated the following in this respect, at paragraph 52:

> In summary, the question whether a penal court may determine the validity of an administrative order on a collateral basis depends on the statute under which the order was made and must be answered in light of the legislature's intention as to the appropriate forum. In doing this, it must be presumed that the legislature did not intend to deprive a person to whom an order is directed of an opportunity to assert his or her rights. For this purpose, the five factors suggested by the Court of Appeal, as reformulated here, constitute important clues for determining the legislature's intention as to the appropriate forum for raising the validity of an administrative order.

[27] The five factors adopted by the Court are the following:

(1) the wording of the statute from which the power to issue the order derives;

(2) the purpose of the legislation;

(3) the availability of an appeal;

(4) the nature of the collateral attack taking into account the appeal tribunal's expertise and *raison d'être*;

(5) the penalty on a conviction for failing to comply with the order.

[28] Moreover, the Court indicated that these factors were not independent and absolute criteria, but that they constituted important clues, among others, for determining the legislature's intention.

[29] The context of this matter is different from that in *Maybrun* because the Court does not hear criminal matters, but I believe that we can still be guided by the principles adopted by the Court in attempting to determine the legislature's intention.

[30] It is useful to examine the context of the SFI's authority to make directions and that of the Court to order their enforcement. The purpose of the PBSA is to regulate and oversee the establishment and administration of pension plans for the benefit of employees of federal works or undertakings. It is a statute of a preventive and remedial nature with the purpose of protecting the rights of pension plan members and beneficiaries. In this respect, the PBSA provides a very strict plan administration framework and imposes significant responsibility on employers and plan administrators.

[31] Among other things, the administrator of a plan must ensure that it adequately administers the plan. Section 8 states the administrator's obligations in administering the plan, namely:

Administration of pension plan and fund	Gestion du régime et du fonds
(3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.	(3) L'administrateur d'un régime de pension gère le régime et le fonds de pension en qualité de fiduciaire de l'employeur, des participants actuels ou anciens et de toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime.
Standard of care	Qualité de gestion

(4) In the administration of the pension plan and pension fund, the administrator shall exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person.	(4) L'administrateur doit agir, dans sa gestion, avec autant de prudence que le ferait une personne normale relativement aux biens d'autrui.
Manner of investing assets	Gestion en matière de placement de l'actif
(4.1) The administrator shall invest the assets of a pension fund in accordance with the regulations and in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments of a pension fund.	(4.1) L'administrateur doit se conformer, en matière de placement de l'actif d'un fonds de pension, au règlement et adopter la pratique qu'une personne prudente suivrait dans la gestion d'un portefeuille de placements de fonds de pension.

[32] Moreover, the PBSA confers significant authority on the SFI, who has the control and supervision of the administration of the Act (section 5). The SFI's powers include registering pension plans and cancelling registrations, and the SFI exercises, with respect to plan administrators and employers, significant control and supervision authority.

[33] Section 11 of the PBSA confers on the SFI the authority to make directions when the SFI feels that the administration of a plan is deficient or that acts are committed in contravention of the PBSA or its regulations:

Superintendent's directions to administrators

11. (1) If, in the opinion of the Superintendent, an administrator, an employer or any person is, in respect of a pension plan, committing or about to commit an act, or pursuing or about to pursue any course of conduct, that is contrary to safe and sound financial or business practices, the Superintendent may direct the administrator, employer or other person to

(*a*) cease or refrain from committing the act or pursuing the course of conduct; and

(*b*) perform such acts as in the opinion of the Superintendent are necessary to remedy the situation.

Directions in the case of non-compliance

(2) If, in the opinion of the Superintendent, a pension plan does not comply with this Act or the regulations or is not being administered in accordance with this Act, the regulations or the plan, the Superintendent may direct the administrator, the employer or any person to

(*a*) cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance; and

Pratiques douteuses

11. (1) S'il est d'avis qu'un administrateur, un employeur ou toute autre personne est en train ou sur le point, relativement à un régime de pension, de commettre un acte ou d'adopter une attitude contraires aux bonnes pratiques du commerce, le surintendant peut lui enjoindre d'y mettre un terme, de s'en abstenir ou de prendre les mesures qui, selon lui, s'imposent pour remédier à la situation.

Non-conformité

(2) S'il estime qu'un régime de pension ou la gestion de celui-ci n'est pas conforme à la présente loi ou aux règlements, ou que cette gestion n'est pas conforme au régime, le surintendant peut enjoindre à l'administrateur, à l'employeur ou à toute autre personne de prendre les mesures visées au paragraphe (1) pour en assurer la conformité.

(*b*) perform such acts as in the opinion of the Superintendent are necessary to remedy the situation.

Opportunity for representations

(3) Subject to subsection (4), no direction shall be issued under subsection (1) or (2) unless the Superintendent gives the administrator, employer or other person a reasonable opportunity to make written representations.

Observations

(3) Sous réserve du paragraphe (4), le surintendant ne peut prendre la directive visée au paragraphe (1) ou (2) sans donner à l'administrateur, à l'employeur ou à toute autre personne la possibilité de présenter par écrit ses observations à cet égard.

Temporary direction

(4) If, in the opinion of the Superintendent, the length of time required for representations to be made under subsection (3) might be prejudicial to the interests of the members, former members or any other persons entitled to pension benefits or refunds under the pension plan, the Superintendent may make a temporary direction with respect to the matters referred to in subsection (1) or (2) that has effect for a period of not more than fifteen days.

Directive provisoire

(4) Lorsque, à son avis, le délai pour la présentation des observations pourrait être préjudiciable à l'intérêt des participants, actuels ou anciens, et de toute autre personne qui a droit à une prestation de pension ou à un remboursement au titre du régime, le surintendant peut prendre la directive visée au paragraphe (1) ou (2) pour une période d'au plus quinze jours.

Continued effect

(5) A temporary direction under subsection (4) continues to have effect after the expiry of the fifteen day period referred to in that subsection if no representations are made to the Superintendent within that period or, if representations

Directive reste en vigueur

(5) La directive ainsi prise reste en vigueur après l'expiration des quinze jours si aucune observation n'a été présentée dans ce délai ou si le surintendant avise l'administrateur, l'employeur ou toute autre personne qu'il

have been made, the Superintendent notifies the administrator, employer or other person that the Superintendent is not satisfied that there are sufficient grounds for revoking the direction.	n'est pas convaincu que les observations présentées justifient la révocation de la directive.
Revocation of registration	Révocation
11.1 The Superintendent may revoke the registration and cancel the certificate of registration in respect of a pension plan if the administrator of the plan does not comply with a direction under section 11 within sixty days, or such longer period as the Superintendent may determine, after being informed by the Superintendent of the failure to comply. The Superintendent shall notify the administrator of the measures taken, including the date of the revocation and cancellation.	**11.1** Le surintendant peut révoquer l'agrément du régime et annuler le certificat correspondant si l'administrateur ne se conforme pas aux directives dans les soixante jours suivant la notification du défaut ou dans tout délai supérieur qu'il peut accorder; il l'informe, le cas échéant, des mesures prises ainsi que de la date de la révocation et de l'annulation.

[34] When a person who is issued a direction does not comply with it, the SFI has various alternatives available. The SFI may decide to revoke the plan's registration (section 11.1). The SFI may also lay an information so that criminal proceedings are commenced against the plan's administrator (subsection 38(6) and paragraph 38(1)(*a*) of the PBSA). The third option available to the SFI is to do what the SFI did in this case, that is, to apply to the Court for an order requiring the persons concerned by the direction to comply with it.

[35] It is clearly apparent in these provisions and in the general framework of the PBSA that Parliament expects plan administrators and employers to rigorously comply with the statutory and

regulatory framework and with directions made by the SFI. The importance of compliance with directions made by the SFI is notably evident in the tools available to the SFI and the criminal consequences stemming from a failure to comply with such a direction.

[36] It is interesting to note that a decision by the SFI to make a direction cannot be appealed from, but that a decision by the SFI to revoke a registration under the PBSA because a plan administrator did not comply with one of his directions can be appealed from. I see in this an indication that Parliament intended to bring finality to the SFI's decisions to make directions, which is within the SFI's area of expertise, without assigning this same finality to the SFI's decisions to impose the ultimate sanction of cancelling the registration of a pension plan due to a failure to comply with one of the SFI's directions.

[37] It also appears to me, by the means made available to the SFI, that Parliament intended for the SFI to be able to effectively and expeditiously act to prevent or correct any action that could compromise the financial interests of the members and other beneficiaries of a pension plan. One need only consider the SFI's authority to make an urgent temporary direction in certain circumstances even before giving the person concerned the opportunity to make his or her representations (subsection 11(4)). The various means at the SFI's disposal are consistent with the logic of the PBSA and respect the purpose of the Act to preserve and safeguard the interests of plan members. It is also from this perspective that, in my understanding, Parliament chose not to grant the right to appeal directions.

[38] The Attorney General maintains that it would not be in the interest of a proper administration of justice to allow Aéroport de Québec to challenge the merits of the direction in the context of an enforcement proceeding. He believes that Aéroport de Québec's position would allow pension plan administrators to ignore directions made by the SFI and require the SFI to justify each direction before the Court before it can have any effect. I share this opinion: permitting a direction to be "appealed" collaterally in the course of an application for legal enforcement would compromise the effectiveness of the protection and supervision plan put in place by the PBSA and would undermine the powers conferred on the SFI.

[39] Even though a right to appeal does not exist for a direction made by the SFI, the person concerned by a direction is not without recourse if that person would like to contest its validity. A direction by the SFI can be the subject of an application for judicial review as it is a decision of a federal board, commission or other tribunal within the meaning of section 2 of the FCA, which can be appealed from under section 18.1 of the FCA. Upon judicial review, the direction in question, which falls within the expertise of the SFI, would probably be subject to the standard of reasonableness (*Cousins v. Canada (Attorney General)*, 2008 FCA 226, [2009] 2 F.C.R. 553, and *Rogers Communications Inc. v. Buschau*, 2009 FCA 258 (available on CanLII)). Aéroport de Québec's position invites the Court to rule on the appropriateness of the direction made by the SFI without deference to the SFI's decision. Accepting Aéroport de Québec's proposal would entitle the Court to rule on the validity of the direction according to the standard of correctness in the course of an enforcement order application even though Parliament did not provide for a right to appeal the direction and the decision would be owed deference in a judicial review. I do not believe that the scheme and provisions of the PBSA support such a position.

[40] It should be observed that the marginal note in the French version of section 33.1 of the PBSA indicates “exécution judiciaire”. This is, in my opinion, an additional clue that Parliament’s intention was not to require the SFI to have his directions approved by the Court, but rather that the SFI call upon the Court to assist him in rendering them fully enforceable.

[41] The last factor listed in *Maybrun*, that is, the penalty on a conviction for failing to comply with the order, cannot apply in this case because the Court is not sitting as a criminal court. The importance of the sanctions associated with criminal offences, namely those regarding the contravention of a direction made by the SFI (a fine not exceeding $100,000 and a maximum term of imprisonment of one year for a natural person, and a fine not exceeding $500,000 for a legal person), is, however, an additional clue as to the importance Parliament places on complying with directions made by the SFI.

[42] My analysis of the provisions of the PBSA therefore leads me to find that Parliament did not intend for an order application in accordance with section 33.1 of the PBSA to be an opportunity to challenge the validity of a direction made by the SFI.

[43] Aéroport de Québec submits that this position denies the Court any right to make an assessment and would be tantamount to concluding that Parliament conferred on it an authority subordinate to that of the SFI. In its opinion, when Parliament intended that the Court enforce decisions by administrative tribunals without any further formality, it did so by virtue of a procedure of filing the decision in the Court, as is the case, for example, in accordance with sections 23 and 66

of the *Canada Labour Code*, R.S., 1985, c. L-2, with respect to orders made by the Canada Industrial Relations Board and arbitrators.

[44] I do not share the respondent's opinion because section 33.1 of the PBSA confers a certain discretionary authority on the Court. According to section 33.1, the Court must determine, according to the circumstances of each case, whether the respondent contravened a direction made by the SFI or a provision of the Act or the regulations. The SFI has the burden of proving a contravention of one of the SFI's directions, the Act or the regulatory provisions, as the case may be. When the Court is of the view that the SFI has discharged his burden of proving a contravention, it must assess whether it is appropriate to order the non-compliant person to cease the contravention or omission or whether it is more appropriate to issue another order. The Court may, in its assessment, consider the circumstances of each case, even though, in a situation like this, the circumstances raised by the respondent cannot cause the very validity of the direction to be challenged.

[45] Aéroport de Québec is also claiming that the decision rendered by the Supreme Court in *TeleZone* changed the state of the law and that the principles stated by the Supreme Court should apply in this case. With respect for the contrary view, I do not believe that the principles stated in *TeleZone* are applicable to this case. In *TeleZone*, the Court had to determine whether a person claiming to be injured by an order by an administrative decision-maker could bring a damages claim against the Crown before the Federal Court or a provincial superior court without first having the decision set aside by way of judicial review before our Court. In this case, the Attorney General relied namely on the jurisprudence of the Federal Court of Appeal in *Canada v. Grenier*, 2005 FCA

348, [2006] 2 F.C.R. 287, and *Tremblay v. Canada*, 2004 FCA 172, [2004] 4 F.C.R. 165. According to this case law, the right to bring a damages claim against the Crown was contingent upon first obtaining an order by the Federal Court setting aside the decision of the administrative decision-maker in question. The Court based its reasoning on the provisions of the FCA, which grants the Federal Court exclusive jurisdiction in the judicial review of decisions by a federal board, commission or other tribunal, and the rule prohibiting collateral attacks.

[46] The Supreme Court stated that a person claiming to have been injured as a result of an order by an administrative decision-maker could seek damages without having to first proceed by way of judicial review of the decision in question. The Court found that the principle of access to justice was at issue and that it required barring the litigant from a multiplicity of proceedings. The Court also believed that the Federal Court's position of exclusive authority was not consistent with provisions in the FCA and the *Crown Liability and Proceedings Act*, R.S., 1985, c. C-50, which allow for a remedy in damages. Moreover, the Court specified that these principles applied insofar as the purpose of the action brought was not to set aside the order or deprive it of its effects. The Court stated the following in this respect:

> **18** This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.
>
> **19** If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, <u>if the claimant is content to let the order stand</u> and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its

> chosen remedy directly and, to the greatest extent possible, without procedural detours.
>
> (Emphasis added.)

[47] This situation is very different from that in *TeleZone*. Although Aéroport de Québec stated that it was not asking for the SFI's direction to be set aside, it is clear that the defence it is raising is intended to deprive the direction of its legal effects by rendering it unenforceable. The validity and merits of the direction are therefore at the very heart of the defence raised. This is precisely the type of case in which, according to my understanding of the teachings of the Supreme Court in *TeleZone*, a direction can only be challenged through judicial review.

[48] Furthermore, in *TeleZone*, the Court ruled that the rule prohibiting collateral attacks could not justify the approach taken by the Federal Court of Appeal regarding the jurisdictional monopoly of the Federal Court. It did not, however, reject the rule prohibiting collateral attacks or challenge the jurisprudence in this respect, namely *Maybrun*. On the contrary, the Court recognized the qualified nature of the approach adopted in *Maybrun* and indicated that the Crown could raise the rule prohibiting collateral attacks as a defence before the superior court.

[49] Therefore, I find that Aéroport de Québec cannot challenge the validity of the direction made by the SFI in the context of this application for enforcement and that, in this case, the Court should order its enforcement.

[50] I will finish by specifying that the argument on the irregularity of the order application, which is allegedly based on a subsection of the PBSA that is different from that raised in the

direction, is without merit. The notice of intention refers to subsection 11(2) of the PBSA. The direction refers to section 11 of the PBSA without any other specification. Moreover, it appears from the wording of the direction that the complaint refers to subsection (2) of section 11. I see nothing irregular in this manner of proceeding.

JUDGMENT

THE COURT ALLOWS this application and **ORDERS** the respondent, Aéroport de Québec, to comply with the direction of the Superintendent of Financial Institutions dated February 12, 2010, and to pay $263,000, plus interest from October 15, 2008, to the pension plan fund of the general management of Aéroport de Québec Inc.

WITH COSTS.

"Marie-Josée Bédard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Québec, Quebec
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REASONS FOR JUDGMENT AND JUDGMENT:	Bédard J.
DATED:	February 18, 2011

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