Federal Court  Cour fédérale

Date: 20110623

Docket: T-1131-10

Citation: 2011 FC 765

Ottawa, Ontario, June 23, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

QUEBEC NORTH SHORE & LABRADOR RAILWAY COMPANY, INC.

Applicant

and

NEW MILLENNIUM CAPITAL CORP.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and Background Facts

[1] Quebec North Shore & Labrador Railway Company (QNS or the Carrier) is a railway under federal jurisdiction operating a railway line between points in Labrador and points in and around Sept Isle Quebec (the Line). Its main traffic is iron ore, the product of four mines in the Schefferville area including that of Iron Ore of Canada (IOC) which owns 100% of QNS. In turn the majority of IOC's shares are owned by Rio Tinto Limited.

[2] New Millennium Capital Corp. (NMC) is a new mining company developing an iron ore mine near Emeril Labrador and needs to ship its iron ore on QNS. It is conceded that NMC has no alternative but to use QNS to carry its freight; the Line is the only main railway line in the area save some transfer lines at origins or destinations connecting to the Line. NMC is what is known as a captive shipper.

[3] After rate and conditions of carriage negotiations, which began in late 2008, broke down between the parties, NMC invoked the Final Offer Arbitration (FOA) provisions contained in the *Canada Transportation Act* (S.C. 1996, c. 10) (the *Act*). The mandate of the arbitrator is limited; he or she, in an FOA, must choose between the final offer of the Shipper or the final offer of the Carrier. The arbitrator has no ability to strike a different or middle rate. The arbitrator, in this case, chose the final offer submitted by NMC.

[4] QNS seeks judicial review of that decision rendered on the 18th day of June, 2010. It raises three grounds. As a first ground, it submits the FOA provisions in the *Act* violate subsection 2(e) of the *Canadian Bill of Rights* (S.C. 1960, c. 44) which reads:

Construction of law	Interprétation de la législation
2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of	2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des

the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to	libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
….	…
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; [Emphasis added]	e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations; [Notre soulignement]

[5] QNS contends the mandatory statutory process set out in the *Act* governing the conduct of an FOA deprives it of a fair hearing in accordance with the principles of fundamental justice. In particular, it argues that the timeframes set out in the *Act* did not allow QNS to properly respond to the case levelled at it by NMC. Two specific instances are invoked; (1) the fact that voluminous answers by NMR to interrogatories asked of QNS, as prescribed in subsection 163(4) of the *Act*, were received by QNS on Friday May 28, 2010 late in the evening with the hearing commencing the following Monday and the deadline for decision then set for June 7, 2010; (2) the statutory procedure did not contemplate QNS having the right to present rebuttal evidence.

[6] The second ground of attack on the statutory process relates to subsection 165(4) and (5) of the *Act* which state that no reasons shall be set out in the arbitrator's decision but the arbitrator shall, if requested by all parties, within 30 days of the arbitration decision, give written reasons. NMC did not so request, and as a result, there are no written reasons for the decision now being judicially reviewed. Moreover, there are no transcripts of the hearing before the arbitrator. QNS argues that its right to written reasons, being dependant upon the consent of the proposed shipper, is contrary to

fundamental justice as it thwarts its ability to know why the arbitrator decided as he did and to have the matter properly considered on judicial review.

[7] The third ground of attack by QNS relates to the arbitrator's conduct which, in the particular circumstances of this case, it submits give rises to a reasonable apprehension of bias. The basis for this allegation arises from the fact the arbitrator, a senior lawyer with a large Vancouver firm, appointed as a single arbitrator by the Canadian Transportation Agency (the Agency) on April 21, 2010, was then acting personally and concurrently as the solicitor of record for the plaintiff in an action commenced on March 1, 2010**,** in the Supreme Court of British Columbia in which the defendant is Rio Tinto Alcan Inc., a Rio Tinto Limited controlled company, as also are IOC and QNS.

[8] This judicial review application has a unique feature in that my colleague, Justice Kelen decided the case of *Canadian National Railway Company* (CN) *v Western Canadian Coal Corporation*, 2007 FC 371 (*Western Canadian Coal*) in which CN challenged an FOA decision based on subsection 2(e) of the *Bill of Rights* on the grounds namely (1) the accelerated timeframes for filing materials and responding to a notice of arbitration did not allow CN sufficient time to prepare its case or to know the case it had to meet; (2) the FOA provisions did not provide intelligible legal criteria to guide the arbitrator in making his decision; and (3) those provisions denied CN the right of access to the arbitrator's reasons.

[9] Justice Kelen determined the *Bill of Rights* applied to the FOA's arbitration decision-making process but that such process was not incompatible with its subsection 2(e). In his view, (1) CN had

adequate time to prepare its case and to know the case it has to meet; (2) its provisions relating to no reasons unless all parties requested did not breach applicable administrative law principles set out in the Supreme Court of Canada's (SCC) decision in *Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 SCR 817 (*Baker*); (3) The enunciation of the National Transportation Policy set out in section 5 of the *Act* provided sufficient legal criteria to guide an FOA arbitral decision. No appeal was taken from Justice Kelen's decision.

[10] Justice Kelen's decision in the *Western Canada Coal* case raises an issue of judicial comity whose principles I summarized in *Almrei v Canada (Citizenship and Immigration)* 2007 FC 1025, (*Almrei*) at paras 61-62.

> The principle of judicial comity is well-recognized by the judiciary in Canada. Applied to decisions rendered by judges of the Federal Court, the principle is to the effect that a substantially similar decision rendered by a judge of this Court should be followed in the interest of advancing certainty in the law. I cite the following cases:
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> - *Haghighi* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 272;
> - *Benitez* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 461;
> - *Pfizer Canada Inc*. v. *Canada (Minister of Health)*, 2007 FC 446;
> - *Aventis Pharma Inc*. v. *Apotex Inc*., 2005 FC 1283;
> - *Singh* v. *Canada (Minister Citizenship and Immigration)* [1999] F.C.J. No. 1008;
> - *Ahani* v. *Canada(Minister Citizenship and Immigration)*, [1999] F.C.J. No. 1005;
> - *Eli Lilly & Co.* v. *Novopharm Ltd.*, (1996), 67 C.P.R. (3d) 377;

- *Bell* v. *Cessma Aircraft Co*. 1983 CanLII 303 (BC C.A.), [1983] 149 DLR (3d) 509 (B.C.S.C.)

- *Glaxco Group Ltd. et al*. v. *Minister of National Health and Welfare et al.* 64 C.P.R. (3d) 65;

- *Steamship Lines Ltd*. v. *M.N.R.*, [1966] Ex. CR 972.

There are a number of exceptions to the principle of judicial comity as expressed above they are:

1. The existence of a different factual matrix or evidentiary basis between the two cases;
2. Where the issue to be decided is different;
3. Where the previous condition failed to consider legislation or binding authorities that would have produced a different result, i.e., was manifestly wrong; and
4. The decision it followed would create an injustice.

[11] Unless the parties to an FOA agree otherwise, paragraph 165(1)(c) of the *Act* limits the life of an arbitral decision to one year or less. The start date of an award is prescribed by paragraph 165(6) of the *Act*. It is the date the submission was received by the Agency which, in this case was April 7, 2010. The end date is therefore April 7, 2011. The decision under review is therefore spent. In actual fact, no iron ore was shipped by NMC either in unit trains or in single car lots during the time the award was in force.

II. The Statutory FOA Procedural Process

[12] The provisions of the *Act* dealing with FOA are contained in its sections 161 to 170.

[13] In chronological order, as applied to this case, I set out below the statutory process in those provisions:

i. NMC's notice to QNS that it intended to submit the matter to the Agency for a FOA must be given at least five days before the making its FOA submission.

Notice was provided by NMC to QNS on March 19, 2010 [Subsection 161(3)] which is considerably more lead time than statutorily required.

ii. NMC's submission to the Agency containing its final offer but without a dollar figure for the freight rate. NMC's submission was made April 7, 2010 [Subsection 161(2)].

iii. Submission of final offers by both shipper and carrier, including the freight rate dollar amount, must be within 10 days of NML's submission under subsection 161(2). This occurred on April 16, 2010.

iv. QNS's application to the Agency pursuant to section 162.1 must be made within five days of Step 3. QNS made an application to the Agency on April 19, 2010. In that application, the Carrier argued the Agency should not refer the matter to FOA arbitration because; (1) the FOA process set out in the *Act* violates paragraph 2(e) of the *Bill of Rights*; (2) NMC's submission is theoretical and premature because it was not in a position to ship its iron ore as the mine was still being developed; (3) NMC is not a shipper within the meaning of the *Act*; and (4) NMC's submission is invalid because of subsection 161(2) non-compliance. The Agency, on October 14, 2010, after the FOA decision had been released on June 18, 2010, decided all points against QNS. QNS did not seek leave to appeal to the Federal Court of Appeal.

v. Referral to the arbitrator must take place within five days of Step 3. This occurred on April 21, 2010 [Subsection 162(1)].

vi. A pre-hearing conference was held between the arbitrator and the parties, on the 29th day of April, 2010. It was agreed the hearing would be held between May 31

and June 4, 2010 and the 60-day limit for the arbitrator's rendering his decision provided for in subsection 165(1)(b) was June 7, 2010 unless the parties agreed otherwise. The parties agreed the arbitrator's decision would be rendered by June 8, 2010, because June 7, 2010 was a Sunday. As will be seen, the parties subsequently agreed to a further extension to June 18, 2010 as the date by which the arbitral decision was to be made. The hearing started on Monday, May 31, 2010 lasting 4 days. The second set of hearings were held between June 14 and June 17, 2010.

vii. Exchange by the parties of the information that they intend to submit to the arbitrator in support of their final offers must take place within 15 days of Step 5. Simultaneous exchange of such information occurred on May 6, 2010. [Subsection 163(3)]

viii. Within seven days of Step 7, each party may direct interrogatories to the other party which must be answered within 15 days of their receipt. Interrogatories were directed by each party on May 13, 2010 [Subsection 163(4)].

ix. The exchange of answers to interrogatories occurred on May 28, 2010 late in the evening.

x. The hearing before the arbitrator started on Monday, May 31, 2010 lasting 4 days. The hearing continued on June 14, 2010 for another 4 days, ending on June 17, 2010.

xi. The arbitrator rendered his decision on June 18, 2010, a period of 72 days from NMC's submission of March 19, 2010.

III. Additional Statutory References

[14] Reference to a number of other statutory provisions of the *Act* is useful to round out the FOA scheme under the *Act*:

- As noted, the decision of the arbitrator, which shall be in writing, is the selection of the final offer of either the shipper or the carrier [165(1)].

- Unless the parties agree otherwise, the decision of the arbitrator shall be rendered so as to apply for a period of one year or such lesser period as may be appropriate having regard to the negotiations between the parties that preceded the arbitration with subsection 165(6) providing that unless the parties both agree otherwise the arbitrator decision shall be final and binding and be applicable to the parties as of the date on which the submission for arbitration was received by the Agency, i.e. April 7, 2010. The arbitral decision was limited to one year and, as noted, expired on April 7, 2011.

- As also noted, in subsection 165(4), "No reasons shall be set out in the decision, of the arbitrator with subsection 165(5) providing the arbitrator if requested by all of the parties to the arbitration within 30 days of the decision shall provide written reasons."

- Subsection 165(3) provides the carrier, without delay after the arbitrator's decision shall set out the rate or rates selected and associated conditions of carriage in a public tariff unless the provisions of a confidential contract apply.

- Subsection 164(1) states "the arbitrator shall, in conducting the FOA, have regard to the information provided by the parties in support of their final offers and, unless the parties agree to limit the amount of information to be provided, have regard to any additional information that is provided by the parties at the arbitrator's request."

- Subsection 164(2) states that "unless the parties agree otherwise, in rendering a decision, the arbitrator shall have regard to whether there is available to the shipper an alternative effective, adequate means of transporting the shipper's goods and to all considerations that appear to the arbitrator to be relevant to the matter."

- Subsection 163(1) provides that in the absence of an agreement by the arbitrator and the parties to the procedure to be followed, a final offer arbitration shall be governed by the rules of procedure made by the Agency. Those rules applied in this case. They are, however, subject to the statutorily prescribed time frames.

- Subsection 163(5) provides that if a party unreasonably withholds information that the arbitrator subsequently deems to be relevant, that withholding, shall be taken into account by the arbitrator in making his decision. [My emphasis]

IV. Some Insight on the Actual Procedure Followed

[15] As noted, NMC did not give QNS the short 5 day notice it was triggering the FOA process. It actually gave QNS an extended notice of 19 days before having to make its Phase I FOA offer.

[16] The arbitrator was appointed by the Agency on April 21, 2010. He held a pre-hearing conference on April 29, 2010, whose results may be summarized as follows:

- An oral hearing into the matter would be held.

- The statutory time limits were confirmed.

- It was agreed that both parties would be calling experts and that expert reports are usually part of the information to be exchanged on May 6, 2010.

- With respect to the interrogatories, it was agreed that neither the interrogatories nor the answers would be provided to the arbitrator before the hearing and that each party was free to select those answers to interrogatories which they wish to read-in as part of their case.

- The parties are to discuss a date for the exchange of witness lists and the exchange of witness summaries, and to advise whether witnesses would be testifying in a panel or individually.

- A schedule was established for submissions on the question whether pre-FOA negotiations between the parties were admissible given the fact they were conducted pursuant to a confidentiality agreement. QNS objected to NMC proposed evidence on this point. The arbitrator ruled in QNS's favour.

- The issue of confidentiality was raised by NMC who insisted that all documents be maintained as confidential according to section 167 of the *Act*, especially because IOC was the 100% owner of QNS and Rio Tinto Limited was the controlling IOC shareholder. NMC wanted confidentiality to be maintained *qua* these two entities because NMC would be in competition with IOC in supplying the world-wide iron ore market. QNS indicated this was not possible as some of the personnel involved in the arbitration are employed with IOC.

- The issue of rebuttal evidence was raised as to whether either party was free to adduce additional information subsequent to their May 6th exchange. The arbitrator ruled that either party could apply to the arbitrator for an order permitting such additional information if such evidence could not have been reasonably anticipated. On May 25, 2010 QNS applied for leave to adduce additional documentary evidence by way of rebuttal. NMC's counsel objected. Submissions were made to the arbitrator. The arbitrator denied QNS's request for

rebuttal evidence on BC Rail's Open Gateway Rates (OGR). He denied, as well, QNS's request for additional evidence on benchmarking with Metallic Ore Data from the Public Use Waybill Sample (PUWS) in the United States which NMC's expert had commented on. The reasons he gave was that both issues could have been reasonably anticipated and that both issues could reasonably be addressed on cross-examination. He did allow QNS to adduce rebuttal evidence on the use of Wabush Mines, which is a Shipper on the QNS, as a benchmark.

[17] The scope of information exchanged between the parties on May 6, 2010 warrants comment. Each party provided extensive information which included an overview of why its final offer should be selected by the arbitrator.

[18] NMC's overview totalled 35 pages and the documents it sent to QNS had 35 tabs including a copy of all of its expert reports. Five of NMC's expert reports relate to feasibility studies for three iron ore projects in which that company was currently engaged in the Labrador/Schefferville area including the mining project known as the Direct Shipping Iron Ore Project (DSO), the NMC mine which would feed the iron ore to which the FOA relates. Three other expert reports were tangential. They were a study of the economic impact of the DSO Project and two studies by an expert on the First Nations in the affected area and on environmental issues. NMR's main expert reports were:

a. A capacity analysis of the QNS to carry the proposed DSO traffic.

b. A QNS train operations management report.

c. A rail costing study upon which NMC's final rate offer was calculated.

d. A report on economic issues related to the establishment of rates to be paid by QNS for moving the DSO project iron ore.

e. An analysis of benchmark rail rates for the transportation of iron ore.

f. Cost estimates for hauling iron ore over the QNS between Emeril and Arnaud Junctions.

[19] QNS information also contains lengthy submissions on what its case was all about. Its submission was over 25 pages with 99 paragraphs supported by 3 volumes of information sent to NMC including expert reports from Oliver Wyman Inc. on benchmarking rate-making and from Dr. Tretheway on the appropriate rate methodology for QNS to transport NMC's iron ore. He advocated the abandonment, in this case, of a rate set on "the basis of railway long run variable costs in favour of rates for QNS based on the business case project costing approach". He was of the view the regulatory costing methodology would understate QNS' true costs of transporting NMC's traffic. Conversely, he indicates his approach gathers all costs that will be incurred by QNS including costs of new investment, costs to maintain service levels to existing shippers and a higher risk allowance in the cost of capital.

[20] The next major step in the FOA process occurred on May 13, 2010 when the parties directed written interrogations to each other. NMC asked some 140 questions to QNS covering such matters as questions on the expert reports, QNS costs, expenditures, resources, railway operations, common employees or directors at IOC, QNS and Rio Tinto Limited, capacity studies, rates charged to other customers on QNS's line, queries on the FOA arbitration awards in the FOA cases between QNS and Wabush Mines and on the negotiations between NMC and QNS.

[21] QNS directed to NMC 562 interrogatories, some of which were multiple questions covering every part of NML's information disclosure focussing, in particular, on NMC expert reports relating to rate making, costing, main line capacity and economics.

[22] May 28, 2010 was the day the parties gave to each other their answers to the interrogatories. From the record before me, I note that QNS refused to answer the interrogatories put to it on issues such as its long run variable costs, profit and loss statements, capital expenditures, *pro forma* budget, fuel consumption, productivity increases, rates charged to other customers on the Line, results of previous FOA arbitrations with Wabush Mines for the shipment of iron ore and details of the negotiations it conducted with NMC.

[23] On May 20, 2010 counsel for QNS had written to counsel for NMC referring to the remaining time-table, namely, answers to interrogatories due May 28, 2010 and the hearing to start May 31, 2010 with the arbitrator's decision due June 8, 2010. He submitted the previous milestones of May 6 (exchange of information) and May 13 (exchange of interrogatories) did not provide QNS with sufficient time to prepare and file its information package and the remaining schedule was insufficient to analyse the information and prepare its case. He suggested the parties extend the statutory deadlines "so we can adequately prepare and present our defence and case."

[24] He asked for an immediate response and sent a copy of the letter to the arbitrator. No immediate response was forthcoming from NMC but the landscape changed when respective counsel responded to the arbitrator's May 25, 2010 suggestion they should be discussing their

respective witness lists and raising the issue of possible time allocation. Written and oral comments were filed or delivered by both parties.

[25] On May 28, 2010, the arbitrator noted the time estimates by the parties for their witnesses totalled 18.5 hours. He suggested the solution was either to reduce witness time or extend the hearing into the week of June 7, 2010. He suggested expert reports on direct examination be taken as read. Numerous discussions took place on that and subsequent days between both counsel and the arbitrator. Focus was on extending the statutory deadline for the arbitrator to render his decision. In particular, on May 29, 2010 the arbitrator raised issues of relevance. He expressed his view that the core issues related to tabs 20 to 25 of NML's submission and tabs 5 and 6 of QNS's submissions and that the hearing time should concentrate on them. He doubted background information was contentious and questioned the need for the parties to call the principals of companies.

[26] As noted, the hearing began on May 31, 2010 continuing to June 4, 2010. Seeing that it could not be completed and QNS counsel was not available the week of June 7, 2010, the parties agreed the hearing would resume on June 12, 2010 and the arbitrator could render his decision on June 18, 2010. Written and oral closing submissions were delivered on June 17, 2010 by both parties.

V. Analysis

(a) The Standard of Review

[27] Both parties agreed questions of natural justice and procedural fairness are not subject to a standard of review analysis. In this area, the court reviews decisions of administrative tribunals on correctness.

[28] Counsel for QNS argues the issue whether the statutory process relating to a FOA violates subsection 2(e) of the *Bill of Rights* also raises an issue of procedural fairness for which correctness applies. Counsel for NMC argues this issue is not properly before this Court because the arbitrator was not asked to decide the question, but that if it was properly before me, it should also be reviewed on a correctness standard. Justice Kelen applied that standard in *Western Canadian Coal* (see his paragraph 16). Should I decide to deal with the issue whether the FOA statutory scheme violates subsection 2(e) of the *Bill of Rights*, I agree the correctness standard is the appropriate standard of review.

(b) The Preliminary Issues

[29] First, counsel for NMC argued whether the *Canada Transportation Act*'s FOA provisions were inoperative was not properly before the Court. NMC did not argue that the *Bill of Rights* had no application to QNS in the sense the FOA process was not a determination of QNS's "rights and obligations", a condition precedent to the application of subsection 2(e).

[30] Counsel for NMC argued QNS had led no evidence or argument before the arbitrator on this point. It is also true QNS put that issue to the Agency on April 19, 2010 and the Agency only

decided the question on October 14, 2010 dismissing it on the ground it had been decided by Justice Kelen in the *Western Canadian Coal* case. I also note QNS did not seek to appeal the Agency's decision to the Federal Court of Appeal pursuant to section 28 of the *Federal Courts Act* (R.S.C., 1985, c. F-7).

[31] I will deal with the issue whether the FOA scheme is inoperative on the grounds it deprives a person of the right to a fair hearing in accordance with the principles of fundamental justice. The Federal Attorney General and all Provincial Attorneys General had been served under section 57 of the *Federal Courts Act*; none chose to intervene unlike the interventions of some of them in the *Western Canadian Coal* case. The evidentiary record put forward by QNS was the evidence of how the time limits in the FOA process did not adequately enable it to put its case forward and meet the evidence which was leveled at it. This test is well known at common-law and could have been asserted in any event by QNS without reference to the *Bill of Rights*. Moreover, it is settled law that section 7 of the *Charter of Rights and Freedoms* or subsection 2(e) of the *Bill of Rights* finds its source in the common-law (See *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177). I have a sufficient evidentiary base to decide the issue. Finally, the point was fully argued before me.

[32] Mootness is the second issue that arises. That question arises because the FOA binding QNS and NMC expired n April 7, 2011 shortly after this Court took the matter under reserve.

[33] This Court has a discretion to decide a case which is moot in certain circumstances. One circumstance is when the underlying issue between the parties will likely remain alive. The rate

dispute between QNS and NMC falls in this category in terms of QNS's attack based on the *Bill of Rights*, in terms of a fair hearing as well as the denial of a right to reasons. Practically speaking, unless the parties come to a negotiated settlement for the period after April 7, 2011, NMC will have no option but to file for a fresh FOA.

[34] However, the third issue, namely bias on the part of the arbitrator on the basis he was acting at the same time as the solicitor for a plaintiff against Rio Tinto Limited's subsidiary Rio Tinto Alcan gives rise to different considerations. The remedy on a finding of bias is to quash the decision – the grant of an FOA to NMC in this case. Since the FOA has expired, there is nothing to quash.

[35] Moreover, there is no residual remedy which could nourish a finding of bias because no iron ore was shipped by NMC on the QNS Line during the period the FOA was effective. I also note the arbitrator discontinued acting for the plaintiff in the B.C. Supreme Court case before he rendered his decision in this FOA. In the circumstances, there is no useful purpose served in deciding the bias issue. Any decision on the point would be purely theoretical. The bias issue is dismissed on grounds of mootness.

(c) The *Bill of Rights* Issue

[36] Is the prescribed statutory process leading to a FOA decision, which is simply the selection by the arbitrator of either the shipper's or the carrier's final offer on rates and conditions of carriage, incompatible with subsection 2(e) of the *Bill of Rights* and therefore inoperative *qua* the parties.

Context

[37] The context in which the FOA process, applicable between a specific Shipper and a specific Carrier, was introduced in federal railway law is important.

[38] The Federal Court of Appeal's decision in *Canadian National Railway Co. v Canada (National Transportation Agency)* [1996] 1 FC 355 provides insight.

[39] In that case, CN argued the FOA provisions violated the division of powers under the Constitution because the federal Parliament encroached on subsection 92(13), Property and Civil Rights, a matter reserved exclusively for the provinces.

[40] Justice Marceau wrote the Court's reasons. He stated FOA was introduced in the *National Transportation Act* of 1987 "in furtherance of new aims and policies for the transportation system." Those new aims and policies were freight rate deregulation for most commodities including iron ore.

[41] He made these points about the new FOA provisions:

- It is true that the impugned provisions are aimed at contractual relations of a commercial nature between shippers and carriers, that they introduce a remedy to a dispute between private parties without any public interest issue being engaged and that they create a scheme which give the Agency a direct role at the outset, the decision of the arbitrators being final and binding.

- But it is trite law, absent colourability, that legislation on a subject-matter within federal jurisdiction can affect matters within provincial jurisdiction, including property and civil rights.

> - The final offer arbitration provisions of the NTA 1987 establish a method of determining rates in special instances and, as such, are an integral part of the whole legislative scheme chosen by Parliament to regulate freight rates in the new economic and commercial context now prevailing in Canada.
>
> - They are specifically addressed to disputes relating to rates or conditions associated with the movement of goods, issues that are integral to the operation of the railways.
>
> - The quick, simple and out-of-court settlement of those disputes, with indirect involvement of the Agency, is no doubt a means, and an important one, to achieve the object and purpose of the new *National Transportation Act, 1987* which, as stated in more detail in section 3 thereof, is aimed, in effect, at rendering the railway industry, in particular, more efficient and more competitive, and the transportation system, generally, more economical. [Emphasis added]

[42] The Federal Court of Appeal in a previous case**,** *Canadian National Railway Co. (CNR) v Canada (National Transportation Act, 1987, Arbitrator)* [1994] FCJ No 859 (*Handyside*) had made the same point at paragraph 9 on Parliament's intent that the FOA arbitration process be "workable and expeditious", and not be easily frustrated.

[43] In *Canadian National Railway Co. v Moffatt*, 2001 FCA 281 Justice Rothstein, then a member of the Federal Court of Appeal, wrote:

> Final offer arbitration is intended as a last resort when a railway company and a shipper are unable to agree on rates or terms and conditions of carriage. Indeed, under paragraphs 161(2)(a) and (b), the final offer of the shipper and the last offer received by the shipper from the carrier are to be submitted to the Agency for reference to final offer arbitration. It would be incongruous for the final offer and last offer to cover a through movement, be referred for final offer arbitration, but then the arbitrator be restricted only to consider the rail portion of the movement. [Emphasis added]

[44] In the *Western Canadian Coal*, case, Justice Kelen described the FOA provisions of the *Canada Transportation Act* in the following terms:

> Final offer arbitration has been described as "an intentionally high risk form of arbitration" that encourages settlement and tempers final positions. The arbitration resolves isolated disputes over rates to be charged by a carrier for a period of one year when the parties are unable to agree. The arbitrator's task is to select the more reasonable of the two offers submitted. As is indicated in paragraph 165(6)(a) of the Act, the arbitrator's decision is intended to bring finality to the dispute. The limited duration of the decision's binding effect on the parties is closely linked to the limited timeframe within which the arbitration process occurs. The issue raised by the applicant is whether, by virtue of this limited timeframe, the arbitration regime unlawfully deprives the applicant of an adequate opportunity to prepare and present its case. [Emphasis added]

Principles

[45] In *Singh*, Madame Justice Wilson decided the issue of procedural fairness to a refugee claimant under the former *Immigration Act* on the basis of section 7 of the *Charter*. She said that all counsel were agreed at a minimum the concept of "fundamental justice" in its section 7 included the notion of procedural fairness articulated by Chief Justice Fauteux in *R. v Duke* [1972] S.C.R. 917 a decision under subsection 2(e) of the *Bill of Rights* quoting him:

> Under s. 2 (*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in judicial temper, and must give to him the opportunity adequately to state his case. [Emphasis added]

[46] She said the question the SCC had to answer, in the case before her, was:

> Do the procedures set out in the Act for the adjudication of refugee status claims meet this test of procedural fairness? Do they provide

> an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? [Emphasis added]

[47] She concluded a refugee claimant, under the *Immigration Act* as it then stood, was not given either opportunity.

[48] In *Singh*, Justice Beetz reached the same result applying subsection 2(e) of the *Charter* "which grants a fair hearing in accordance with the principles of fundamental justice", adding;

> These principles do not impose an oral hearing in all cases. The procedural content required by fundamental justice in any given case depends on the nature of the legal rights at issue and on the severity of the consequences to the individuals concerned. With respect to the type of hearing warranted in the circumstances, threats to life or liberty by a foreign power are relevant. [Emphasis added]

[49] He was of the view the appellant had been denied refugee status without being afforded a full oral hearing at a single stage of the refugee examination process. He was also of the view the right of a Convention refugee "are of a vital importance to the appellants" adding:

> Moreover, where life or liberty may depend on findings of fact and credibility, the opportunity to make written submissions, even if coupled with an opportunity to reply in writing to allegations of fact and law against interest, is not sufficient. [Emphasis added]

[50] In *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, 2002 SCC 1 (*Suresh*) a case decided under section 7 of the *Charter*, the issue before the SCC was whether the procedures for deportation set out in the *Immigration Act* were constitutionally valid. *Suresh* had been recognized as a Convention refugee by Canada. The Minister proposed to deport him to Sri Lanka, a country in respect of which he had satisfied the Refugee Board he had a well-founded fear of persecution by its government.

[51] The issue before the Court was one related to the procedural protections available to Mr. Suresh. The Court "found helpful to consider the common law approach to procedural fairness articulated by Madam Justice L'Heureux-Dubé in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 (*Baker*) not as an end in themselves because "the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case."

[52] Before embarking on its analysis of the factors set out in *Baker*, the SCC emphasized "in cases of this kind our proposals should be applied in a manner sensitive to the context of the specific factual situations." [Emphasis added]

[53] The SCC then looked at the factors discussed in *Baker* in determining not only whether the common law duty of fairness had been met, but also in deciding the safeguard provided satisfied the demands of section 7 of the *Charter*.

[54] At paragraph 115 of the SCC's decision, it asked the question: "What is required by the duty of fairness – and therefore the principles of fundamental justice – is that the issue at hand be decided in the context of the statute involved and the rights affected." Adding:

> More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27. This is not to say that other factors or

> considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker, supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice. [Emphasis added]

[55] The SCC was of the view; (1) the nature of the decision being of a serious nature, involving the evaluation and weighing of risks, was one to which discretion attached in the evaluation of past actions, present dangers and future behaviour leading to a conclusion that the decision neither militated to particularly strong or weak procedural safeguards.

[56] It was a different matter with respect to the nature of the statutory scheme which called for strong procedural safeguards because "there is a disturbing lack of parity" between the protections accorded when reviewing a Ministerial certificate and the lack of protection under subsection 53(1)(b) since there was no provision for a hearing, no requirement for written or oral reasons, no right of appeal – no procedures at all in fact.

[57] The importance of the right affected favoured heightened protections because the greater the effect on the life of the individual by the decision the greater "the need for procedural protections to meet the common law duty of fairness…". The final factor – the choice of procedure – was one left by Parliament to the Minister but was a factor which had to be reconciled with the other factors.

[58] The SCC concluded at paragraph 121:

> Weighing these factors together with all the circumstances, we are of the opinion that the procedural protections required by s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the Act under s. 53(1)(*b*)

> – that is, none – and they require more than Suresh received. [Emphasis added]

[59] Specifically, the SCC found that a person facing deportation to torture under subsection 53(1)(b):

> Must be informed of the case to be met which means, subject to claims for reduced disclosure, …"that the material on which the Minister is basing her decision must be provided to the individual including any recommendations made to the Minister." [Emphasis added]

[60] Second, fundamental justice required Mr. Suresh have an opportunity to respond to the case presented to the Minister including material she had received from her staff. Absent this material, the Court said at paragraph 122:

> Suresh and his counsel had not knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff. [Emphasis added]

[61] Third, the Minister must provide written reasons for decision, reasons which "must articulate and rationally sustain a finding that there is not substantial grounds to believe the individual will be subject to torture, execution or other cruel or unusual treatment so long as the person under consideration has raised those arguments. The reasons must also articulate why the Minister believes the person is a danger to the security of Canada as required by the statute."

[62] *Baker* was a case where the appellant, a citizen of Jamaica, who came here as a visitor in 1981 and remained here ever since. She never received permanent resident status but supported herself illegally as a live-in domestic worker for 11 years. She has four children born in Canada.

[63] She was ordered deported in 1992 after it was determined she had worked illegally in Canada and had overstayed her visa.

[64] In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside of Canada invoking humanitarian and compassionate (H&C) considerations. She made submissions supported by a letter from her doctor, from a social worker and from the Children's Aid; she stated she was the sole caregiver for two of her Canadian born children. She was refused the exemption in April 1994 on the basis there were insufficient humanitarian and compassionate considerations. She was unsuccessful at the Federal Court and the Federal Court of Appeal but was granted leave to appeal by the Supreme Court of Canada who reversed the decisions below. One of the grounds advanced to quash the decision of the Immigration Officer was on the basis of procedural fairness; the procedures under the *Act* were inadequate, she argued. In particular, she identified the following defects: (1) no oral interview before the decision maker; (2) no written reasons provided; and (3) reasonable apprehension of bias on the part of the decision maker. There was no dispute between the parties a duty of procedural fairness applied to H&C decisions because that decision, albeit an administrative one, affects "the rights, privileges or interests of an individual."

[65] Justice L'Heureux-Dubé made the point "the existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances" [Emphasis added]. She wrote:

> As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. [Emphasis added]

[66] She added that although the duty of fairness is flexible and variable, various factors have been identified in the jurisprudence to determine what procedural rights the duty of fairness requires in a given set of circumstances [Emphasis added], stressing:

> I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added]

[67] She then identified the factors which have been analyzed in *Suresh* above. Given the nature of the decision was very different from a judicial decision in that it involved the exercise of considerable discretion requiring, a consideration of multiple factors, an exception to the normal rules of the statutory scheme of making applications for permanent residence outside Canada, balanced with the fact there was no appeal procedure and the *Immigration Act* left the Minister choices as to how to handle H&C applications, she was of the view while some factors suggest more relaxed requirements than a judicial process, the duty of fairness calls for more than minimal

protection. In her view "the circumstances require a full and fair consideration of the issues such that Ms. Baker must have a meaningful opportunity to present various types of evidence relevant to their case and have it fully and fairly considered."

[68] No oral hearing was required in these circumstances. An interview was also not required. An opportunity to present written submissions were satisfactory.

Conclusions on this Issue

[69] The components of a fair hearing in accordance with the principles of fundamental justice require a certain level of procedural protections. The question in this case is whether the *Act* in its FOA provisions prevented QNS from having an adequate opportunity to state its case and to know the case it had to meet.

[70] It is settled law the concept of procedural fairness or the necessary statutory procedural protections is eminently variable and its content (or actual requirements) is to be decided in the specific context of each case which requires that all relevant circumstances must be considered.

[71] Subsection 163(1) of the *Act* provides that "in the absence of an agreement by the arbitrator and the parties as to the procedures to be followed, a final offer arbitration shall be governed by the rules of procedure made by the Agency."

[72] The Agency has in place a document entitled "Procedures for the Conduct of Final Offer Arbitration pursuant to Part IV of the *Act*". The purpose of that document is to provide procedural

guidelines to guide arbitrators and the parties. They can be considered and adopted by an arbitrator when the parties do not otherwise agree on how the arbitration is to be conducted.

[73] The centerpiece of that document is a pre-hearing conference. Here, the arbitrator conducted a pre-hearing conference in accordance with the Agency rules of procedure.

[74] Overlaying the Agency's rules of procedure are the statutory time limits for the performance of procedural steps. They may not be varied by the parties or the arbitrator. The only flexibility provided is at the beginning of the process. As noted, NMC did not give its notice of intent to invoke the FOA process simply 5 days before making its submission. It gave QNS ample time. There is also flexibility in terms of when the process must be completed. Statutorily, the process must end no later than sixty days after the Shipper's submission. Any extension beyond this time limit needs the agreement of both parties. Agreement was given by both NMC and QNS to extend the time since the completion of the hearing and final submissions would not be possible.

[75] In my view, the statutorily prescribed steps are sufficient to ensure that a fair hearing in accordance with principles of fundamental justice. Those statutorily prescribed steps include notice of the sole issue of the case, i.e. which offer is most reasonable. Exchange of information including expert reports and interrogatories on that information (a form of discovery) read-in of that discovery and finally, a hearing, oral testimony and cross-examination and final submissions.

[76] This prescribed procedure is at the high end of the requirements of procedural fairness.

[77] As I see it the real and only question before me is whether the short times frames transform what is a fair statutory process into an unfair one. This constraint in this case did not prevent the parties from fully advancing their case and knowing the case they had to meet. Several factors drive this conclusion. The parties had been engaged in negotiations on rates and conditions of service for a substantial amount of time; the conditions of service were not controversial, QNS had been the shipper in two previous FOAs; the voluminous information exchanged including expert reports and interrogatories is indicative that the parties well knew the issues to be addressed; a reading of the final submissions shows the parties had a full and fair consideration of the issues and a meaningful opportunity to address them; the front end and the back end flexibility to extend time was reasonably exercised by both parties; this is not a case where one of the parties unreasonably refused to extend time prejudicing the right of a party to make its case; both parties are sophisticated litigants with considerable resources at hand. In short, the tight timeframes reflecting Parliament's statutory objective of a speedy resolution of an FOA, which has a short lifespan, unless the parties agree otherwise, did not prevent either party from mounting complete and thorough cases to the arbitrator for his selection of one or the other final offer. I conclude the statutory scheme did not violate subsection 2(e) of the *Bill of Rights*. QNS got a fair hearing in this case.

(d) The No Reasons Provision Issue

[78] Section 165 of the *Canada Transportation Act* provides, in part:

1. The decision of the arbitrator in conducting an FOA shall be the selection of the final offer of either the shipper or the carrier.	5. L'arbitre rend sa décision en choisissant la dernière offre de l'expéditeur ou celle du transporteur.
2. Shall be in writing.	6. Sera rendue par écrit.
3. No reasons shall be set out in the decision of the arbitrator.	7. La décision de l'arbitre n'énonce pas les motifs.

4. If requested by all the parties to the arbitrations… the arbitrator shall give reasons for decision.	8. Sur demande de toutes les parties à l'arbitrage… l'arbitre donne par écrit les motifs de sa décision.
[Emphasis added]	[Notre soulignement]

[79] As noted, QNS requested reasons but NMC did not. Hence, no reasons for this arbitration were issued.

[80] QNS submits the duty of fairness, in the circumstances of this case, requires that reasons for decision be given by the decision maker.

[81] Justice Kelen in the *Western Canadian Coal* case considered the same point in the same context as is before me now. He concluded that the absence of reasons for the arbitrator's decision in the context of an FOA did not violate paragraph 2(e) of the *Bill of Rights*. He discussed the matter at paragraphs 48 to 55 of his reasons which I cite:

> [48] In *Baker*, above, Justice L'Heureux-Dubé commented on the contextual nature of the inquiry into whether reasons are required in a given set of circumstances:
>
> > ¶43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. [Emphasis in original]
>
> [49] In this case, at issue is a form of interest arbitration operating under a statutory framework that expressly states that no reasons are to be provided except where both parties consent. At stake are purely commercial interests, rather than fundamental personal liberties.

There is no right of appeal from the arbitrator's decision. It is final and binding. Moreover, time is of the essence. The arbitrator is not bound by precedent, and accordingly the issues to be decided by the arbitrator do not transcend the interests of the parties involved. For the Court to impose a requirement of reasons in the context of an arbitration conducted under the Act, the applicant must demonstrate that there are some "other circumstances" that require it.

[50] While there is no opportunity under the Act to appeal the arbitrator's decision, as an administrative decision the decision is subject to judicial review. The applicant argues that the absence of reasons renders nugatory its opportunity to seek judicial review.

[51] It is evident to the Court that there are several reasons why the FOA regime dictates "no reasons". First, the delivery of reasons may delay the decision, which under the Act must be rendered expeditiously. The purpose of the FOA is to resolve a contract dispute and impose binding conditions on the parties for a limited time period not exceeding one year.

[52] The FOA process is intended to bring certainty and finality to a contract dispute. Reasons invite applications for judicial review, which create uncertainty for a period of one year or more. The Court is satisfied that Parliament has provided for no reasons because:

1. the FOA process is intended to be expeditious, inexpensive, final and binding;
2. since the arbitrator cannot select a "reasonable" middle ground between the two offers or a compromise position, the arbitrator does not have to rationalize his decision. His decision is obvious, namely that the offer selected by the arbitrator is considered more reasonable than the other offer taking into account the relevant factors; and
3. the lack of reasons further encourages the parties to reach a negotiated contract settlement before FOA or at least to discipline the parties to temper their respective offers. The parties realize they have to make their offers as "reasonable" as possible in order to be selected.

[53] In *Hudson's Bay Company v. British Columbia (Labour Relations Board)*, (1996), 31 B.C.L.R. (3d) 317, the Supreme Court of British Columbia recognized that dispute settlement arbitration can take many forms. With respect to "interest arbitration" where the arbitrator functions as a surrogate for collective bargaining and the arbitral awards take the form of and serve the same purpose as collective agreements, the Court said the arbitrator's decision does

> not normally contain reasons for the decision: see paragraph 20 citing J. M. Brown and David M. Beady, *Canadian Labour Arbitration*, 3rd Edition (Agincourt, Ontario: Canada Law Book, 1988) at page 1-1.
>
> [54] The Court was referred by the Attorney General of Canada to *Williams v. Canada (Minister of Citizenship and Immigration)*, [1977] 2 F.C. 646 per Strayer J.A., who held that:
>
> 1. the principles of fundamental justice never imposed a duty on tribunals to give reasons where a statute has not specifically so provided (paragraph 39);
> 2. the Court can judicially review a decision in the absence of reasons where the decision, on its face, is perverse or where there is evidence of facts being before the tribunal which manifestly required a different result or which were irrelevant yet apparently determinative of the result;
> 3. the decision was based on an obvious error of law (paragraph 40);
> 4. reasons are not necessary to show that a decision is unlawful where it can be shown that the decision is patently perverse, patently unlawful or explicable only on the assumption of bad faith (paragraph 43);
> 5. while paragraph 2(*e*) of the *Canadian Bill of Rights* requires a "fair hearing", the absence of reasons for decision does not affect the "hearing".
>
> [55] In addition, the two Attorneys General argue that the absence of reasons does not prevent the Court from quashing decisions that constitute an excess of jurisdiction. If, for example, the arbitrator determines the conditions of transportation on his own, rather than selecting one of the two offers, the decision would be erroneous on its face and subject to intervention by the Court. With respect to breaches of procedural fairness in the course of the arbitration process, affidavit evidence would likely be more probative than written reasons for the arbitrator's decision.

[82] Counsel for the applicant argues that I should not follow my colleague's decision for the following reasons:

a. Justice Kelen's reliance on the *Williams* case was not appropriate because it was decided in a different context and was a pre-*Baker* case. He sited Justice Campbell's

decision in *Gonzalez v Canada (Minister of Citizenship and Immigration)* [2000] FCJ 888.

b. The Court in the *Western Canadian Coal* case incorrectly concluded that the absence of reasons was justified because "the intent was to bring finality to a contract dispute." Counsel for QNS argues "such intention is not a valid reason to bar access to judicial review and shield the FOA award from the Court's legitimate oversight."

c. The Court erred in that case in that it misdirected its inquiry in stating since the arbitrator cannot select a middle ground between the two offers he does not have to rationalize the decision. Counsel argues the FOA arbitrator is faced with highly specialized information and expertise such that the parties are entitled to know if the arbitrator understood the rationale underlying the respective offers and the evidence submitted to him.

d. Counsel for QNS points out there are legal criteria which must be considered and applied by the arbitrator such as compliance with the National Transportation Policy and the considerations set out in subsection 164(2) or whether he drew a negative inference from its withholding of information and if this was correctly done pursuant to the reasonableness criteria set out at paragraph 163(5) of the *Act*. He concluded by submitting that the absence of reasons practically nullifies the parties' possibility to challenge the decision as it is impossible for it to assess the rationality of the arbitrator's decision.

Conclusion on this Point

[83] For the reasons that follow QNS argument that the statutory requirement that both parties request reasons before such reasons are issued and its resulting application in this case contravenes section 2(e) of the *Bill of Rights* and the requirements of procedural fairness must be discussed for the following reasons. I note at the very beginning that section 165(5) makes it a statutory obligation for the arbitrator to give written reasons for decision on condition however that all parties to the FOA request reasons. This is not a case where the statute prohibits written reasons. Moreover, in this case, QNS did not identify any errors which the arbitrator made when selecting NMC' final offer. In other words, it seems to this Court that QNS' argument was highly theoretical making it impossible as a practical matter to assess why without reasons QNS could not by way of judicial review challenge specific errors made by the arbitrator. The arbitrator did provide reasons why he would not give the parties carte blanche for the admission of rebuttal evidence and he did provide reasons for denying QNS' recusal motion. He told the parties the critical evidence they should concentrate on.

[84] I am in substantial agreement with Justice Kelen's analysis. He was correct to hold that *Baker* did not say that fairness required reasons in any circumstances. The Supreme Court of Canada, in *Baker*, emphasized that the reasons requirement depended on the circumstances. Justice L'Heureux-Dubé identified two specific factors: the importance the decision has on the individual and where there is a statutory right of appeal. She identified a third factor "other circumstances" where fairness dictated the necessity for written reasons. The issue then becomes, whether in the specific context of an FOA, fairness requires reasons.

[85] I share Justice Kelen's reasoning that because of an FOA's unique characteristics, fairness does not compel written reasons unless all parties request reasons. Those unique features are (1) the limited time an FOA is in force – a maximum period of one year unless all parties agree; (2) the nature of the restricted subject matter of an FOA – to settle a freight rate dispute between a specific shipper by rail and a specific rail carrier where the only interests are the two parties involved and where the arbitrator has only two choices based on the evidence submitted by the parties – the final offer of the shipper and the final offer of the carrier – Justice Kelen was correct to say this was interest arbitration and not a rights arbitration; (3) Parliament's intent that the FOA process be quick, simple and workable; (4) In this specific case the admitted captivity of NMC to QNS rail service and the radical departure from railway costing advocated by QNS to price its service to NMC which the arbitrator obviously rejected. These objectives were recognized by the Federal Court of Appeal in the 1996 CN case and, in the *Handyside* and in the *Moffat* cases.

[86] I do not agree that his reliance on *Williams* was misplaced and that, on general principles, it was overtaken by *Baker*. The Federal Court of Appeal's decision in *Williams,* particularly on the vitality of the judicial review process, holds true today (see Justice Strayer's paragraphs 15, 20 and 21).

[87] I do not share QNS' counsel's view that the recent decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, by implication, imposed a reasons requirement in judicial review cases. This Court had the benefit of the full record before the

arbitrator including lengthy closing arguments and, with the benefit of affidavit evidence, could reasonably gauge the parameters of the arbitrator's decision.

[88] For these reasons this judicial review application must be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application is dismissed with costs to be assessed at the highest level of units in Column IV of the Federal Courts Tariffs.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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