

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20170804**

**Docket: A-74-16**

**Citation: 2017 FCA 164**

**CORAM: NEAR J.A.  
RENNIE J.A.  
GLEASON J.A.**

**BETWEEN:**

**CANADA (MINISTER OF TRANSPORT)**

**Appellant**

**and**

**CANADIAN UNION OF PUBLIC  
EMPLOYEES and SUNWING AIRLINES INC.**

**Respondents**

Heard at Toronto, Ontario, on March 30, 2017.

Judgment delivered at Ottawa, Ontario, on August 4, 2017.

**REASONS FOR JUDGMENT BY:**

**GLEASON J.A.**

**CONCURRED IN BY:**

**NEAR J.A.  
RENNIE J.A.**

Federal Court of Appeal



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BETWEEN:

CANADA (MINISTER OF TRANSPORT)

Appellant

and

CANADIAN UNION OF PUBLIC  
EMPLOYEES and SUNWING AIRLINES INC.

Respondents

**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] The Minister of Transport appeals from the judgment of the Federal Court (per Brown, J.) in *Canadian Union of Public Employees v. Canada (Transport)*, 2016 FC 120 [Reasons] in which the Federal Court granted, in part, the judicial review application brought by the respondent, the Canadian Union of Public Employees (CUPE).

[2] In its application, CUPE sought to set aside what it characterizes as two decisions, one verbal and the other in writing, granting ministerial approval to the respondent, Sunwing Airlines Inc., for a change to its flight attendant manual (FAM). The change in question made certain steps to be taken by flight attendants in carrying-out emergency evacuation procedures optional as opposed to mandatory. The Transport Canada Cabin Safety Inspector who granted the approval advised Sunwing to undertake a risk assessment before making the change to the FAM, but did not review that assessment before he approved the FAM amendment and provided no reasons for his decision authorizing the change.

[3] The Federal Court set aside the Canada Cabin Safety Inspector's written decision, finding it to be unreasonable but dismissed the application in respect of the Inspector's earlier verbal decision. While I do not agree with all of the Federal Court's reasoning as I believe that the Inspector made only one decision in this case, I concur that the decision in question is unreasonable as there is no way to determine if or why the Inspector was satisfied that the change in procedure would not compromise the safety of passengers and crew members in the event of an emergency evacuation. I would therefore dismiss this appeal with costs payable by the Minister in favour of CUPE in the amount agreed to by the parties.

#### I. Background

[4] It is useful to begin by reviewing the relevant factual background.

[5] Prior to the circumstances giving rise to this appeal, Sunwing staffed its fleet of 737-800 aircraft with one flight attendant for every 40 passengers. At the time, this was the applicable

minimum staffing threshold required for these aircraft under section 705.104 of the *Canadian Aviation Regulations*, SOR/96-433 (CARs) in the absence of a ministerial exemption, authorizing fewer flight attendants. (The CARs were subsequently amended to set a 1:50 threshold as the minimum ratio of flight attendants to passengers on aircraft with a capacity of 50 passengers or more.)

[6] In June 2013, Sunwing applied for an exemption from the minimum staffing requirements, seeking authorization to have only one flight attendant for every 50 passengers. On October 18, 2013, the Minister granted Sunwing a conditional exemption from section 705.104 of the CARs. One of the conditions for the exemption required that Sunwing demonstrate it was able to complete a partial evacuation simulation within 15 seconds.

[7] Sunwing conducted partial evacuation simulations on November 22 and 27, 2013, which Transport Canada observed. The first three demonstrations were conducted in accordance with the procedures contained in Sunwing's FAM. One of these procedures called for the mandatory issuance by the flight attendants of a "blocking command" to get passengers to assist in crowd control during evacuation procedures. The command involved shouting to passengers something like, "You there in the yellow shirt, block the aisle" or something similar to direct passengers to not block exit doors and thereby allow the flight attendants to open the doors and deploy the evacuation slides as quickly as possible.

[8] The Sunwing flight attendants assigned to perform the partial evacuation simulation initially participated in two simulation attempts on November 22, 2013 and in a third attempt on

November 27, 2013. In all three, they failed to carry-out the required procedures within 15 seconds. At a debriefing meeting held after the third failed attempt, the Transport Canada Cabin Safety Inspector suggested making the blocking command discretionary as a strategy for shaving seconds off of Sunwing's testing time. He noted that the issuance of the command might be slowing things down and that when he was a flight attendant he had been able to get to the doors to open them before any passenger blocked his passage.

[9] Sunwing conducted a final test later that same day, during which the flight attendants did not issue a blocking command. This time, without the command, they were able to complete all requirements for a partial evacuation within the 15 second time limit. Following this successful test, the Transport Canada Cabin Safety Inspector advised Sunwing management that Sunwing should make a formal application for approval of the change to its FAM and that it should conduct an internal risk assessment as part of that process.

[10] In response, Sunwing did two things. First, on November 29, 2013, it completed a risk assessment using a standard template form. In it, Sunwing concluded that any risk to safety from making the blocking command non-mandatory would be mitigated by the fact that it would be unlikely for passengers to be blocking the doors that an attendant needed to access during an evacuation. The assessment is cursory and provides no indication of how this conclusion was reached. Moreover, it appears from the cross-examination of Sunwing representatives that no reliable testing was conducted to verify the accuracy of the conclusions drawn in the risk assessment.

[11] Second, also on November 29, 2013, Sunwing sent the Transport Canada Cabin Safety Inspector a written request for approval of the amendment to the FAM regarding the change to the blocking command protocol. This request took the form of a “Cabin Safety Bulletin” outlining the change for which Sunwing sought approval from Transport Canada. Although this bulletin mentions that a risk assessment had been conducted in relation to the change, the assessment was not attached to the bulletin, described in the bulletin or detailed in the letter to Transport Canada.

[12] On the same day (November 29, 2013), Transport Canada approved Sunwing’s Cabin Safety Bulletin and the amendment to Sunwing’s FAM. The decision, authored by the Transport Canada Cabin Safety Inspector, simply states:

Sunwing Airlines Inc.’s Cabin Crew Safety Bulletin No. 2013-10 meets the requirements of the Flight Attendant Manual Standard (TP12295) and therefore, in accordance with Subsection 705.139(3) of the *Canadian Aviation Regulations* is hereby approved.

[13] Another Transport Canada inspector determined that Sunwing met the outstanding condition for approval of the staffing exemption and granted it an exemption to allow for a 1:50 flight attendant to passenger staffing ratio. That decision was judicially reviewed by CUPE, the flight attendants’ bargaining agent, but that application was dismissed for mootness after the CARs were amended to provide for a 1:50 threshold as the minimum ratio of flight attendants to passengers on aircraft with a capacity of 50 passengers or more: *Canadian Union of Public Employees v. Canada (Transport)*, 2015 FC 1421.

[14] CUPE also applied for judicial review of both the verbal approval of the FAM amendment on November 27, 2013 and of the follow-up written approval dated November 29, 2013. This application is the subject of the present appeal.

## II. The Relevant Statutory and Regulatory Framework

[15] Prior to reviewing the Federal Court's reasons, it is necessary to briefly detail the relevant statutory and regulatory backdrop to the Cabin Safety Inspector's decision.

[16] The CARs were enacted in 1996 pursuant to a number of provisions in the *Aeronautics Act*, R.S.C. 1985, c. A-2 (the Act). One of these enabling provisions was section 4.7(2) of the Act, which at the time stated:

<p>4.7(2) For the purposes of protecting passengers, crew members, aircraft and aerodromes and other aviation facilities, preventing unlawful interference with civil aviation and ensuring that appropriate action is taken where that interference occurs or is likely to occur, the Governor in Council may make regulations respecting aviation security.</p>	<p>4.7(2) Pour la protection des aéronefs, de leurs passagers et équipages, des aéroports et autres installations aéronautiques, ainsi que pour la prévention des atteintes illicites à l'aviation civile et la prise de mesures efficaces lorsque de telles atteintes surviennent ou risquent de survenir, le gouverneur en conseil peut, par règlement, régir la sûreté aérienne.</p>
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The current iteration of this provision is paragraph 4.71(2)(a):

### **Aviation security regulations**

4.71 (1) The Governor in Council may make regulations respecting aviation security.

### **Contents of regulations**

(2) Without limiting the generality of

### **Règlements sur la sûreté aérienne**

4.71 (1) Le gouverneur en conseil peut, par règlement, régir la sûreté aérienne.

### **Teneur des règlements**

(2) Les règlements visés au

subsection (1), regulations may be made under that subsection

(a) respecting the safety of the public, passengers, crew members, aircraft and aerodromes and other aviation facilities.

paragraphe (1) peuvent notamment :

a) régir la sécurité du public, des aéronefs et de leurs passagers et équipages ainsi que des aéroports et autres installations aéronautiques.

[17] The impugned decision in this matter was made pursuant to section 705.139 of the CARs.

It provides:

### **Flight Attendant Manual**

705.139 (1) Every air operator, other than an air operator that is authorized solely for the transport of cargo in its air operator certificate, shall establish and maintain, as part of its company operations manual, a flight attendant manual for the use and guidance of flight attendants in the operation of its aircraft.

(2) A flight attendant manual shall contain the instructions and information necessary to enable flight attendants to perform their duties safely and shall contain the information required by the *Flight Attendant Manual Standard*.

(3) The Minister shall, where the *Flight Attendant Manual Standard* is met, approve those parts of a flight attendant manual, and any amendments to those parts, that relate to the safety and emergency information contained in Part A of the *Flight Attendant Manual Standard*.

(4) An air operator shall provide a

### **Manuel de l'agent de bord**

705.139 (1) L'exploitant aérien, autre que l'exploitant aérien qui est autorisé aux termes de son certificat d'exploitation aérienne à transporter uniquement du fret, doit établir et tenir à jour un manuel de l'agent de bord, qui fait partie du manuel d'exploitation de la compagnie, pour aider les agents de bord dans l'utilisation de ses aéronefs.

(2) Le manuel de l'agent de bord doit contenir les instructions et les renseignements permettant aux agents de bord d'exercer leurs fonctions en toute sécurité, ainsi que les renseignements qu'exige la *Norme relative au manuel des agents de bord*.

(3) Lorsque la *Norme relative au manuel des agents de bord* est satisfaite, le ministre approuve les parties du manuel de l'agent de bord portant sur les renseignements visant les procédures de sécurité et les procédures d'urgence contenues dans la partie A de cette norme et toutes les modifications qui sont apportées au manuel.

(4) L'exploitant aérien doit fournir à



copy of its flight attendant manual, including any amendments to that manual, to each of its flight attendants.

(5) Every flight attendant who has been provided with a copy of a flight attendant manual pursuant to subsection (4) shall keep it up to date with the amendments provided and shall ensure that the appropriate parts are accessible when the flight attendant is performing assigned duties on board an aircraft.

chacun de ses agents de bord un exemplaire du manuel de l'agent de bord et toutes les modifications qui y sont apportées.

(5) L'agent de bord qui a reçu un exemplaire du manuel de l'agent de bord en application du paragraphe (4) doit le tenir à jour en y insérant les modifications qui lui sont fournies et s'assurer que les parties applicables sont à portée de la main durant l'exercice des fonctions qui lui sont assignées à bord d'un aéronef.

[18] The *Flight Attendant Manual Standard* is published by Transport Canada. It is a standardized template that forms the basis for a commercial airline's FAM. Part A of the *Flight Attendant Manual Standard* outlines topics pertaining to safety measures and emergency information that must be included in an airline's FAM. Part A must be accessible to flight attendants while they are working. Part B allows space for an airline to include other non-mandatory information. Part A is divided into six sections, and each section includes a number of headings and sub-headings that must be included by an airline in its FAM.

[19] Section 2 of Part A deals with "Emergency Procedures" and includes 27 headings. There are a number of headings covering topics related to evacuations and emergency landings, including headings 2A.18 and 2A.19, which cover "Emergency Evacuation Commands" and "Emergency Evacuation Commands – Application" respectively. However, the *Flight Attendant Manual Standard* is only prescriptive insofar as topics to be covered in a FAM are concerned. With some exceptions (none of which are pertinent here), the *Flight Attendant Manual Standard*

only identifies what issues must be addressed in a FAM (e.g. “blocked/jammed exit commands” under subsection 2A.19) without providing any sort of compliance standards.

[20] As noted in subsection 705.139(1), an airline’s FAM forms part of the airline’s company operations manual, which is described in sections 705.134 and 705.135 of the CARs:

#### **Requirements relating to Company Operations Manual**

705.134 (1) Every air operator shall establish and maintain a company operations manual that meets the requirements of section 705.135.

(2) An air operator shall submit its company operations manual, and any amendments to that manual, to the Minister.

(3) Where there is a change in any aspect of an air operator’s operation or where the company operations manual no longer meets the *Commercial Air Service Standards*, the air operator shall amend its company operations manual.

(4) The Minister shall, where the *Commercial Air Service Standards* are met, approve those parts of a company operations manual, and any amendments to those parts, that relate to the information required by section 705.135.

#### **Contents of Company Operations Manual**

705.135 (1) A company operations manual, which may be issued in separate parts corresponding to specific aspects of an operation, shall

#### **Exigences relatives au manuel d’exploitation de la compagnie**

705.134 (1) L’exploitant aérien doit établir et tenir à jour un manuel d’exploitation de la compagnie conforme aux exigences de l’article 705.135.

(2) L’exploitant aérien doit soumettre au ministre le manuel d’exploitation de la compagnie et toutes les modifications qui y sont apportées.

(3) L’exploitant aérien doit modifier le manuel d’exploitation de la compagnie lorsque des changements sont apportés à tout élément de son exploitation ou que le manuel n’est plus conforme aux *Normes de service aérien commercial*.

(3) L’exploitant aérien doit modifier le manuel d’exploitation de la compagnie lorsque des changements sont apportés à tout élément de son exploitation ou que le manuel n’est plus conforme aux *Normes de service aérien commercial*.

#### **Contenu du manuel d’exploitation de la compagnie**

705.135 (1) Le manuel d’exploitation de la compagnie, qui peut être publié en parties distinctes portant sur des éléments particuliers de l’exploitation,

include the instructions and information necessary to enable the personnel concerned to perform their duties safely and shall contain the information required by the *Commercial Air Service Standards*.

doit comprendre les instructions et les renseignements permettant au personnel concerné d'exercer ses fonctions en toute sécurité et doit contenir les renseignements qu'exigent les *Normes de service aérien commercial*.

(2) A company operations manual shall be such that

(2) Le manuel d'exploitation de la compagnie doit :

(a) all parts of the manual are consistent and compatible in form and content;

a) d'une partie à l'autre, être uniforme et compatible sur les plans de la forme et du contenu;

(b) the manual can be readily amended;

b) être facile à modifier;

(c) the manual contains an amendment control page and a list of the pages that are in effect; and

c) contenir une liste des modifications et une liste des pages en vigueur;

(d) the manual has the date of the last amendment to each page specified on that page.

d) porter, sur chaque page modifiée, la date de la dernière modification apportée à la page.

[21] The *Commercial Air Service Standards* that must inform an operator's company operations manual provide various standards that track the specific regulatory requirements described in the CARs. Similar to the *Flight Attendant Manual Standard*, this document does not provide specific compliance standards for each mandatory topic.

[22] Transport Canada has developed a Cabin Safety Inspector Manual (CSIM) that outlines the roles and responsibilities of the department's Cabin Safety Inspectors. These inspectors are responsible for ensuring airlines' compliance with various requirements as well as the CARs. Many of the Minister's functions under the CARs are delegated to Cabin Safety Inspectors.

[23] Under section 4.7 of the CSIM, Cabin Safety Inspectors are specifically identified as being responsible for assessing whether FAMs (or amendments to FAMs) will be approved under subsection 705.139(3) of the CARs. A Cabin Safety Inspector's general role with respect to such verifications is described under section 4.12 "Documentation Review", which states:

When reviewing [...] the Flight Attendant Manual and [...] Company Operations Manual [...], the Cabin Safety Inspector should be familiar with the aircraft type(s) in the air operator's fleet.

A preliminary review should be performed prior to a comprehensive review of any Cabin Safety documents and should be conducted promptly after receipt of the operator's submission. If after preliminary review, the submission appears to be complete and of acceptable quality, or if the deficiencies are minor and can be quickly resolved, then a comprehensive review of the submission may begin.

If the submission is incomplete, unacceptable or obviously cannot be approved, the process is terminated and the Cabin Safety Inspector should return the submission with an explanation of the deficiencies. This should be completed promptly to alleviate any misconceptions the air operator may have on the progress of the submission.

[24] The overall purpose of the CSIM is provided in section 1.1:

The Cabin Safety Inspector Manual (CSIM) has been prepared for use by Cabin Safety Inspectors.

The content of the manual directs the activities of Cabin Safety Inspectors and provides procedural guidance regarding routine cabin safety tasks.

Each Cabin Safety Inspector must have a thorough knowledge of the contents of this manual and adhere to the policies and procedures contained herein.

Consistent application of the procedures and guidelines will enable cabin safety matters to be conducted in a uniform manner on a national basis.

Cabin Safety Inspectors may encounter new or unique issues and situations for which no specific guidance has been provided. Consultation with Cabin Safety Standards is recommended in such circumstances. This process will increase awareness by all Cabin Safety Inspectors and achieve consistency nationally.

### III. The Federal Court's Decision

[25] The Federal Court accepted CUPE's contention that, in the instant case, the Cabin Safety Inspector made two decisions: a verbal one on November 27, 2013 and a subsequent written decision on November 29, 2013. The Court determined that the reasonableness standard applied to the review of both decisions. Noting that subsection 705.139(3) of the CARs and its application had not been discussed in the jurisprudence, the Federal Court held that the applicable standard of review is reasonableness because "the Minister of Transport and his delegates at Transport Canadas are engaged in a discrete and special administrative regime [where the] decision-makers [...] have special expertise" (Reasons at para. 54). Given the factual nature of the decisions being challenged in this matter, the Federal Court noted that Cabin Safety Inspectors' decisions should be "afforded a wide range of appreciation" (Reasons at para. 55). Although rejecting the notion that the presence of safety concerns narrows the range of what would be considered reasonable as a matter of law, the Federal Court nevertheless recognized that safety was an important contextual factor.

[26] With this in mind, the Federal Court determined that the verbal approval was reasonable while the written approval was not. In terms of the former, the Federal Court's determination turned in part on the fact that the verbal approval was preliminary in nature.

[27] In concluding that the written approval was unreasonable, the Federal Court came to four sequential determinations. The Court first held that the CSIM, a Transport Canada guideline aimed at ensuring safety, provides a benchmark for the process that should be undertaken by

Cabin Safety Inspectors when they are asked to make approvals under the CARs. Second, the Federal Court concluded that ministerial approvals under the CARs (at least where safety is implicated) require a substantive review of the safety implications of a request. The Federal Court noted that the comprehensive review process identified in the CSIM would provide the necessary substantive administrative review required to make a decision under subsection 705.139(3) presumptively reasonable. Third, the Court determined that no comprehensive review took place in this case. Fourth, the Court concluded that the decision approving the change to Sunwing's FAM was unreasonable as no comprehensive review had taken place. The Court concluded at paragraph 75 of the Reasons that:

[...] The failure to conduct the required "comprehensive review" casts doubt on the integrity of the ultimate decision and has the potential to undermine confidence in the application of Transport Canada's air passenger safety mandate. Specifically, this failure could jeopardize passenger and crew safety in an emergency evacuation, as outlined below. Therefore in my view the failure to conduct a "comprehensive review" was in this case unreasonable, in particular because the Risk Assessment Transport Canada requested was neither reviewed nor considered by Transport Canada itself.

#### IV. Analysis

[28] As this is an appeal from a judicial review decision of the Federal Court, this Court is required to determine if the Federal Court selected the appropriate standard of review and, if so, whether the Federal Court applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. Thus, this Court is required to step into the shoes of the Federal Court and re-conduct the requisite analysis.

[29] In terms of that analysis, as noted, I believe that only a single reviewable decision was made in this case, namely, the Cabin Safety Inspector's November 29th approval of Sunwing's

proposed change to its FAM. The approval given on that date was the one that was required by subsection 705.139(3) of the CARs. All that transpired two days earlier in the debriefing session is that the Cabin Safety Inspector indicated that he would approve an amendment to make the blocking command optional. However, the actual application for approval of that change was not made until November 29th and the decision in respect of it was made later that same day.

[30] I concur with the Federal Court that the reasonableness standard applies to the review of this decision as the matters at issue involve the application of the CARs, the specialized regulations governing aeronautics promulgated under the Act. In addition, the matters at issue are largely, if not entirely, factual in nature and engage the expertise of the Cabin Safety Inspector in assessing the safety implications of the proposed changes to Sunwing's FAM. These factors all point to the selection of reasonableness as being the applicable standard of review: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 53-56, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras. 22-24, [2016] 2 S.C.R. 293 [*City of Edmonton*].

[31] As noted by the Supreme Court of Canada in *Dunsmuir* at paragraph 47, the hallmarks of a reasonable decision are that the decision is transparent, intelligible and justifiable as a possible outcome that is defensible in light of the relevant law and the facts in issue before the administrative decision-maker.

[32] In assessing whether a decision meets the tripartite requirements of transparency, intelligibility and justification, a reviewing court must have regard to both the reasons given by

the decision-maker (where it gives reasons) and the record before the decision-maker. Where necessary, the reviewing court may use the record to supplement the reasons if it finds in the record support for the decision under review: *City of Edmonton*, at paras. 36-38; *Dunsmuir* at para. 48; *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 56, [2011] 3 S.C.R. 654 [*Alberta Teachers*]. Indeed, for a decision to be upheld as being reasonable, it may not even be necessary for the decision-maker to have provided any reasons at all if the record allows the reviewing court to discern how and why the decision was reached and the decision-maker's conclusion is defensible in light of the facts and applicable law: *City of Edmonton* at paras. 36-38; *Alberta Teachers* at para. 55.

[33] Here, I agree with CUPE that in making the decision at issue, the Transport Canada Cabin Safety Inspector was required to be satisfied that the proposed change to Sunwing's FAM would not compromise the safety of passengers or crew on a Sunwing flight in the event of an emergency evacuation. Although the Minister of Transport contended otherwise in its memorandum of fact and law, during the hearing counsel for the Minister conceded that, for the decision to be reasonable, it was necessary for the Inspector to have concluded that the proposed FAM amendment did not compromise safety.

[34] This concession was appropriate as it seems to me that it is incontrovertible that the role of an inspector under subsection 705.139(3) of the CARs is to assess the safety of the proposed amendments to an operator's FAM as opposed to engaging in a sterile exercise of merely ensuring that a proposed FAM amendment meets the requirements of the *Flight Attendant*



*Manual Standard* by simply saying something about one of the topics that must be covered in a FAM. Were it otherwise, the role of the inspector would be superfluous.

[35] Moreover, one of the enabling provisions under which the CARs were promulgated provides that the purpose of these regulations is aviation safety. In addition, fostering flight safety is specifically recognized as being a key requirement for the contents of an operator's operations manual, of which a FAM is a part, as subsection 705.135(1) of the CARs provides that the manual, in addition to covering the mandatory topics, "shall include the instructions and information necessary to enable the personnel concerned to perform their duties safely [...]".

[36] In several cases, in examining other provisions in the CARs or in the Act, several courts (including this one) have noted that at least one of the purposes of the Act and the CARs and one of the roles of the Minister or his delegates in making decisions under them, is fostering aviation safety: see, for example, *R. v. 264544 Alberta Ltd.*, [1986] 1 W.W.R. 365 at para. 11, 65 A.R. 217 (A.B.C.A.); *Aztec Aviation Consulting Ltd. v. Canada*, [1990] B.C.W.L.D. 1707 at paras. 5 and 20, 33 F.T.R. 210 (F.C.T.D.); *Swanson Estate v. Canada*, [1992] 1 F.C. 408 at para. 27, 80 D.L.R. (4th) 741; *Bahlsen v. Canada (Minister of Transport)*, [1997] 1 F.C. 800 at para. 75, 141 D.L.R. (4th) 712 (F.C.A.); *R. v. Biller*, [1999] 8 W.W.R. 629 at para. 41, 174 D.L.R. (4th) 721 (S.K.C.A.); *Gill v. Canada (Minister of Transport)*, 2015 BCCA 344 at paras. 26-31, 388 D.L.R. (4th) 593; *Sierra Fox Inc. v. Canada (Federal Minister of Transport)*, 2007 FC 129 at para. 6, 308 F.T.R. 219.

[37] In the instant case, the need for the Transport Canada Cabin Safety Inspector to have been satisfied that the proposed amendment to the FAM did not compromise safety is underscored by the requirements of Transport Canada's CSIM, providing for a substantive review of proposed FAM amendments. This contemplates that an inspector will undertake a review of the contents and implications of proposed amendments.

[38] Thus, to approve Sunwing's proposed change to its FAM to make the blocking command optional as opposed to mandatory, the Cabin Safety Inspector was required to be satisfied that the amendment did not compromise the safety of passengers or crew on board Sunwing's flights. And, for the Inspector's decision to be upheld under the reasonableness standard of review, this Court must be able to ascertain whether the Inspector made such a determination, and, if so, whether there was a reasonable basis for it. In the present case, in the absence of reasons for the decision, the Court must have regard to the record to assess the reasonableness of the Inspector's decision.

[39] In light of the record, I cannot conclude that the requisite analysis was undertaken by the Inspector or discern how he could have concluded that the proposed FAM amendment did not compromise safety. In detailing the steps to be undertaken by Sunwing in making the change to its FAM, the Inspector reminded Sunwing that it was required to undertake a risk assessment, yet that assessment was never reviewed by the Inspector. Moreover, the assessment was cursory and there appears to have been little or no evidence to support the conclusions reached in the assessment.

[40] In light of these facts and of the importance of ensuring that changes to aircraft emergency evacuation procedures are safe, I do not believe that the Inspector's decision can be upheld as being reasonable. The decision cannot be said to be transparent, intelligible or justifiable as we simply do not know if, how or why the Inspector could have concluded that the proposed change did not compromise safety. Not only did the inspector fail to review Sunwing's risk assessment, there is in addition no evidentiary basis to substantiate the assumption that passengers would not likely block a Sunwing flight attendant who needs to open an emergency exit to evacuate the aircraft. Thus, it is impossible to see how the Inspector could have been satisfied that the proposed amendment to the FAM did not compromise safety. In short, the record reveals that a mandatory safety requirement was abrogated without there being evidence to support the assumption that it was not required. The Inspector's decision therefore cannot stand.

[41] Thus, I concur with the Federal Court that the Cabin Safety Inspector's November 29, 2013 decision should be set aside and would accordingly dismiss this appeal, with costs. The parties jointly submitted that costs should be payable only by the Minister in the event that CUPE were successful and that they should be fixed in the all-inclusive amount of \$3,000.00. I concur that this is appropriate and would therefore order the Minister to pay costs to CUPE in the amount of \$3,000.00, all-inclusive.

“Mary J.L. Gleason”

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J.A.

“I agree.

D. G. Near J.A.”

“I agree.

Donald J. Rennie J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-74-16

**STYLE OF CAUSE:** CANADA (MINISTER OF TRANSPORT) v. CANADIAN UNION OF PUBLIC EMPLOYEES and SUNWING AIRLINES INC.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 30, 2017

**REASONS FOR JUDGMENT BY:** GLEASON J.A.

**CONCURRED IN BY:** NEAR J.A.  
RENNIE J.A.

**DATED:** AUGUST 4, 2017

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