Federal Court  Cour fédérale

**Date: 20160203**

**Docket: T-2056-13**

**Citation: 2016 FC 120**

**Ottawa, Ontario, February 3, 2016**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**CANADIAN UNION OF PUBLIC EMPLOYEES**

**Applicant**

**and**

**CANADA (MINISTER OF TRANSPORT)**
**SUNWING AIRLINES INC.**

**Respondents**

# JUDGMENT AND REASONS

## I. Introduction and Summary of Findings

[1] This is an application by the Canadian Union of Public Employees [CUPE or the Applicant] for judicial review of two decisions made by a delegate of the Minister of Transport [Transport Canada or Minister] acting under the *Aeronautics Act*, R.S.C. 1985, c A-2 [*Aeronautics Act*]. The first decision verbally approved an amendment to the Respondent

Sunwing Airlines Inc.'s [Sunwing] Flight Attendant Manual [FAM] concerning emergency evacuation procedures, made on November 27, 2013. The second decision gave written approval to the same amendment two days later on November 29, 2013.

[2] Because this case involves an amendment to Sunwing's FAM, I will set out the relationship between Transport Canada and Sunwing and the regulatory context relating to the FAM amendment process. An amendment to a FAM must be made in accordance with the *Flight Attendant Manual Standards* [FAMS], under section 705.139 of the *Canadian Aviation Regulations*, SOR/96-433 [CAR], which regulations are issued under the *Aeronautics Act*. The FAMS set out topics that must be addressed in a FAM amendment; however, the FAMS do not specify what should be said in regard to any particular topic. The operator, in this case Sunwing, must submit a proposed FAM amendment to Transport Canada for approval; note that Transport Canada's approval is required pursuant to subsection 705.139(3) of the CAR which states:

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| 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. | 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. |

[3] In addition to satisfying the requirements of the FAMS, a FAM amendment must also go through a Document Review process outlined in Transport Canada's Cabin Safety Inspector

Manual [CSIM]. The CSIM requires that both a "preliminary review" and a "comprehensive review" be conducted by a Cabin Safety Officer, i.e., an employee of Transport Canada.

[4] I accept counsel for the Minister's description of the relationship between operator and regulator: "[a]s a regulator, Transport Canada's role is to notify and attempt to work with the operator to address ineffective procedures, whenever such procedures become apparent. Air operators have the responsibility to revise their procedures whenever necessary, either to improve an already-effective process or to correct a flawed one. As soon as an operator becomes aware that its former procedures are ineffective, it should address the inefficiency."

[5] The essence of the FAM amendment in this proceeding is to require that a command shouted by flight attendants at the start of an emergency evacuation be based on a situational analysis, instead of being mandatory in all cases as was previously the case. Prior to the amendment, Sunwing's flight attendants were directed by Sunwing's FAM - at the start of any emergency evacuation and before assessing the doors - to always use an oral shouted command or "blocking signal" command. The shouted blocking signal command had to be directed to an "able-bodied person". The blocking signal command required flight attendants to identify relevant passengers and then shout the words: "you and you hold people back". Before the challenged FAM amendment, this blocking signal command was the first thing flight attendants had to do in an emergency, whether or not it was necessary to hold people back.

[6] The amendment to Sunwing's FAM changed the mandatory nature of the blocking signal command. After the amendment, the blocking signal command would be used only on an "as

required" basis, to be determined given the situation actually at hand in the aircraft at the time. The effect of the amendment changed the blocking signal command into a context or situationally-based command, from its previous mandatory nature.

[7] The FAM amendment in this case was requested by Sunwing, but the request was made at the suggestion of Transport Canada. The amendment to Sunwing's FAM was approved because both Sunwing's and Transport Canada's safety officials decided that giving the blocking signal command in all cases, i.e., whether needed or not, resulted in inefficiencies in carrying out emergency aircraft evacuations.

[8] All parties agree that giving the blocking signal command took extra time, and to that extent did or might slow down an emergency evacuation. They all agree that in an emergency evacuation, time was critical and could save lives. The time lost by giving the blocking signal command was between 0.5 and 1.5 seconds, according to the Applicant. To emphasize, the parties agreed that time counted; the faster the slides were ready for passengers to exit the plane, the less time the emergency evacuation would take, and the faster passengers would get off the plane to safety.

[9] While CUPE agreed that eliminating the mandatory nature of the blocking signal would save time, it raised a number of objections to the manner in which the amendment to the FAM was effected.

A. *Specific Context in which the FAM Amendment was Requested and Made*

[10] Before summarizing the procedural history of this matter, and discussing the record and my findings, I wish to outline further context in which the impugned decisions were made.

[11] Sunwing applied to Transport Canada for an exemption from a general regulatory requirement then in place to the effect that the ratio of passengers per flight attendant must be at least 40:1. Sunwing asked that its own ratio be 50:1; instead of having one flight attendant for every 40 passengers, Sunwing asked to have one flight attendant for every 50 passengers. The exemption would reduce the required number of flight attendants (represented by the Applicant CUPE) from 5 to 4 per aircraft, given there are 189 passengers/seats on the Boeing 737-800 aircraft deployed in Sunwing's fleet.

[12] On October 18, 2013, Transport Canada granted Sunwing the ratio exemption to 50:1. However the exemption was granted provided Sunwing satisfy a number of conditions. One such condition (Condition 11) was that Sunwing conduct and pass a partial demonstration of a simulated evacuation using its normal and emergency operating procedures. Essentially, this condition required Sunwing's flight attendants to open 50% of its aircraft's doors, deploy slides, and complete other tasks within 15 seconds; if it succeeded, the partial demonstration would be deemed a success and the exemption condition satisfied.

[13] To this end, Sunwing conducted four partial demonstrations of its emergency evacuation using normal operating procedures. The tests were carried out over two days. These tests were

carefully monitored by numerous officials from both Transport Canada and Sunwing. Video recordings were also made both from inside and outside the aircraft.

[14] Sunwing failed the first two tests because Sunwing took more than 15 seconds to complete the various tasks.

[15] The third and fourth tests were conducted on November 27, 2013. While there was a dispute, the video footage for the third attempt indicates Sunwing may have succeeded at the third attempt, although Transport Canada decided at the time that Sunwing had not met the requirements in its third attempt.

[16] Having observed the first three tests, and between the third and fourth tests, Transport Canada suggested, and Sunwing agreed, that shouting the blocking signal command should no longer be mandatory but rather carried out on an "as required" basis.

[17] This change required an amendment to Sunwing's FAM. Therefore, on November 27, 2013, between the third and fourth tests, at Sunwing's request and Transport Canada's suggestion, Transport Canada verbally approved an amendment to Sunwing's FAM such that the blocking signal command was no longer mandatory. This is the first decision under review in this application.

[18] The fourth test was then conducted on November 27, 2013, without use of the blocking signal command. Sunwing completed all required tasks within the 15 seconds allotted. As a result, Transport Canada decided this condition of its exemption was satisfied.

[19] Transport Canada then asked Sunwing to conduct a risk assessment concerning the FAM amendment as verbally approved. Officers of Sunwing met the next day and completed a formal Risk Assessment.

[20] On November 29, 2013, two days after the last test, Sunwing applied in writing for Transport Canada's approval of an amendment to its FAM to remove the mandatory nature of the blocking signal commands in its FAM, such that they "will be used as required." Sunwing appended a draft Cabin Safety Bulletin to its written request, but it was not sent to, nor requested nor reviewed by Transport Canada, which approved Sunwing's FAM amendment the same day by letter dated November 29, 2013. CUPE initiated two separate judicial review applications in respect of these decisions.

[21] First, CUPE moved to set aside Transport Canada's conditional exemption to the ratio requirement granted on October 18, 2013, and did so in Court File Number T-1950-13. Justice Bell heard that judicial review on May 13, 2015, and agreed with the parties that the application was moot. Further, the Court declined to exercise its discretion to hear the matter notwithstanding its mootness. Mootness had been alleged by reason of the fact that effective June 15, 2015, the regulation requiring a 40:1 ratio was amended to require a ratio 50:1: see *Canadian Union of Public Employees v Canada (Transport)* 2015 FC 1421, which was decided

after the hearing in this case. That is, as a result of the June 15, 2015 amendment, the 50:1 ratio the Applicant obtained from the Minister by exemption became the regulatory norm for operators in Sunwing's position. Sunwing advises it relies on these new regulations as the basis for operating on a 50:1 ratio, and that it continues to rely on the partial evacuation demonstration test to benefit from the changed regulations.

[22] CUPE's second judicial review proceeding is the one at bar commenced December 17, 2013. In this proceeding, CUPE originally requested that the following three decisions be set aside: (1) Transport Canada's verbal decision of November 27, 2013, to approve the amendment to Sunwing's FAM, (2) Transport Canada's decision that Sunwing satisfied Condition 11, i.e., that Sunwing passed the required partial demonstration evacuation test, and (3) Transport Canada's written decision of November 29, 2013, to approve the amendment to Sunwing's FAM.

[23] However, at the hearing (having advised opposing counsel shortly beforehand) counsel for CUPE advised CUPE no longer took issue with the decision by Transport Canada that Sunwing had satisfied Condition 11; i.e., issue (2) above was no longer in issue. Therefore, the issues before this Court are issues (1) and (3) above, namely the verbal and written approvals to amend Sunwing's FAM.

B. *The Record*

[24] As a further preliminary matter, I turn to the record. The decisions in issue were made by front-line decision-makers representing Sunwing as the aircraft operator and the regulated party,

and Transport Canada as the regulator. Because there is virtually no written record, both parties filed affidavit material including exhibits. Cross-examinations were conducted. While CUPE moved to strike certain evidence filed by the Respondents (the Dann Affidavit), Prothonotary Aronovitch dismissed CUPE's motion on January 29, 2015. CUPE did not appeal that decision; additionally in its factum CUPE advises it has "no issue" with the Dann Affidavit, now describing it as "marginally relevant background evidence". There was no objection taken to the other affidavits and exhibits filed. While the position of the parties is not determinative, in my opinion, the material filed by all parties should be considered on judicial review because it is useful background evidence. It was known to the parties, provided under oath and is credible in that it has been tested by cross-examination as determined by the parties. It is both relevant and helpful; indeed and notwithstanding the differences between judicial review and a *de novo* review, in my view, no meaningful judicial review could be conducted in this case without this additional material: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22.

C. *Summary of Conclusions*

[25] For the reasons that follow, I find Transport Canada's written decision to allow Sunwing's proposed FAM amendment was not reasonable. I make this finding in part because the written decision was made without a "comprehensive review" required by Transport Canada's CSIM; what took place in this case cannot reasonably be said to have constituted a "comprehensive review", particularly in that Transport Canada neither asked for nor reviewed the Risk Assessment prepared by Sunwing in support of its proposed FAM amendment. In addition, the written decision unreasonably relied on deficient and irrelevant anecdotal evidence

of Transport Canada's Cabin Safety Officer and was marred by other unreasonable aspects discussed below. Stepping back and reviewing the decision as an organic whole, the written decision lacked justification and does not fall within the permitted range of outcomes on judicial review. Therefore, judicial review is granted for the reasons that follow.

## II. Facts

[26] The following is a more detailed outline of the facts.

[27] The Applicant is a large national union that represents flight attendants at Sunwing in this application. For added context, the Applicant also represents flight attendants with other airlines, though not in this proceeding.

[28] The Respondents are the Minister who is the regulator, and the subject of the regulator, namely the aircraft operator, Sunwing.

[29] The events leading up to the application for judicial review began when Sunwing applied for an exemption to section 705.104 of the CAR. This exemption, if granted under subsection 5.9(2) of the *Aeronautics Act*, would permit Sunwing to operate with a ratio of one (1) flight attendant for every fifty (50) passenger seats, instead of the one (1) to forty (40) ratio otherwise required by section 705.104 of the CAR as it read at that time. At that time, Canada was virtually alone in the world in requiring a ratio of 1:40; most other countries required a ratio of 1:50. Transport Canada had long supported moving to a 1:50 ratio. More recently the ratio has been changed to 1:50 for all such aircraft operators. The exemption was granted by Transport Canada

to Sunwing on October 18, 2013, subject to conditions, including Condition 11 which was to complete a partial demonstration emergency evacuation using Sunwing's normal and emergency operating procedures.

[30] In order to pass Condition 11 of the test for exemption, Sunwing had to successfully complete a partial demonstration emergency evacuation within 15 seconds, a usual standard per international norms. Sunwing failed its first and second attempts on tests that took place November 22, 2013. Sunwing ran overtime on the first attempt due to slowness to respond to a command, to identify a blocked door, and to open a blurry/foggy window door. The second attempt actually succeeded within time but an incorrect door was readied.

[31] In my view and based on the evidence, the shouted blocking signal command did not slow down the second attempt and had little relevance regarding the first.

[32] After each attempt, Sunwing representatives present during the test and Transport Canada safety staff debriefed the failed attempt to identify why the attempt failed and how to improve on safety measures.

[33] The next round of tests was conducted on November 27, 2013. While Transport Canada officials ruled Sunwing failed its third test, Sunwing disagreed suggesting there had been a stopwatch error. It pointed to video recordings showing Sunwing had successfully completed the test within 15 seconds. However, there was a technological issue that prevented Transport

Canada representatives from sending the video to Ottawa for review. It appears the third test was completed within 15 seconds.

[34] I conclude that the shouted blocking signal command did not affect the result in the third test any more than it did the outcomes on the first and second tests.

[35] As usual, a debriefing was held after the third test. During this debriefing, one of the four Transport Canada Cabin Safety Inspectors present, Inspector Luc Mayne, said that the oral shouted blocking signal command "you and you hold people back" was unnecessary, and was slowing down the emergency landing evacuation partial demonstration procedure. This, he said, made the procedure less safe instead of safer, given that precious seconds could be saved in times of emergency if the command were not mandatory. He told of a situation in which he personally had been able to reach cabin doors quickly and efficiently to open them in an emergency evacuation, before the passengers had had time to get out of their seats, without having given a blocking command.

[36] Also present at the tests was Transport Canada's Team Lead, Inspector Darlene MacLachlan, a Transport Canada Cabin Safety Inspector herself.

[37] At that time, Inspector Mayne said he would verbally approve a change of oral shouted blocking command signal procedure in Sunwing's FAM to make it non-mandatory. Sunwing requested and Transport Canada then verbally approved Sunwing's request to amend its FAM to make the shouted blocking command non-mandatory. It was Transport Canada's evidence that in

these actions Inspector Mayne represented all Transport Canada Safety Officers present at the tests. This decision is the first of the two being challenged in this application.

[38] Then the fourth partial demonstration test took place without the shouted blocking signal command. It was successful. All tasks were completed within 15 seconds. Transport Canada's team leader, Inspector MacLachlan, decided Sunwing had satisfied Condition 11 of the exemption. This decision was challenged by CUPE in this application, but it is no longer in issue.

[39] Also on November 27, 2013, Inspector Mayne told Sunwing staff to conduct a risk assessment of its proposed FAM amendment as part of Sunwing's normal amending procedures. The next day, November 28, 2013, Sunwing staff met and completed a Risk Assessment concerning the proposed amendment to its FAM. Sunwing's Risk Assessment showed there was no change in risk as a result of the amendment.

[40] While Sunwing did no further testing although Sunwing had conducted a brief exercise to see how long it would take a *flight attendant* to go from the jump seat to a door; although no stopwatch was used, this took between an estimated three and four seconds. Sunwing did not test the time it would take for a *passenger* to get from his or her seat in the aircraft to a door. On the basis of this one-time test, Sunwing proceeded with the fourth test without the oral shouted command; Sunwing also apparently relied on this exercise in support of its request for the FAM amendment.

[41] There is no express statutory or regulatory requirement for Sunwing to give its Risk Assessment to Transport Canada before obtaining approval of a FAM amendment.

A. *Cabin Safety Inspector Manual [CSIM]*

[42] Transport Canada has in place a document entitled Cabin Safety Inspector Manual [CSIM]. The CSIM was designed to guide Transport Canada Cabin Safety Inspectors (such as those involved in these tests) in dealing with "any Cabin Safety documents". In my view, documents filed in support of Sunwing's proposed FAM amendment are "Cabin Safety documents" for the purposes of the CSIM.

[43] CSIM outlines a two stage review for FAM amendments, a "preliminary review" followed by a "comprehensive review" at para 4.12:

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| 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. | Il convient d'entreprendre, rapidement après l'avoir reçue de l'exploitant aérien et avant d'en entreprendre un examen approfondi, un examen préliminaire de la documentation de Sécurité des cabines soumise. Si cet examen préliminaire révèle que cette documentation est complète et d'une qualité jugée acceptable ou que ses lacunes, mineures, peuvent être rapidement corrigées, son examen approfondi peut alors commencer. |
| [emphasis added] | [soulignement ajouté] |

[44] On September 29, 2013, Sunwing sent a letter to Transport Canada requesting approval to amend its FAM to make blocking signal commands situational or "as required", and no longer mandatory. Sunwing attached a draft Cabin Safety Bulletin to be issued to its flight attendants and others outlining the change in oral shouted command procedures. Later that day, Sunwing received a letter from Transport Canada approving its requested FAM amendment. Transport Canada neither asked for, nor received, nor reviewed Sunwing's Risk Assessment before approving the FAM amendment. The approval was given in writing by Inspector Mayne, a Transport Canada Cabin Safety Inspector.

## III. Decisions

[45] The decisions subject to judicial review are (1) Transport Canada's November 27, 2013, verbal decision to approve Sunwing's FAM as outlined above, and (2) Transport Canada's subsequent written decision approving the FAM amendment in detail on November 29, 2013.

## IV. Issues

[46] CUPE says that the verbal and written approvals of the amendment to Sunwing's FAM are unreasonable. CUPE says that while reasonableness is the test, because of the passenger safety context, serious scrutiny is required. It says the amendments were allowed by Transport Canada based on anecdotal and unverified assumptions. It says the "comprehensive review" required by Transport Canada's CSIM did not take place, and that there were other flaws in the analysis of and rationale for the amended FAM rendering them unreasonable.

[47] In opposition, the Respondents, the Minister of Transport and Sunwing, submit that the onus is on the Applicant to demonstrate reviewable error, that there is no reason to adopt a different or more exacting standard of review because the impugned decision is binary, that Transport Canada officials acted within their statutory authority, their decisions are reasonable, and CUPE acted vexatiously in brining two separate applications for judicial review.

[48] I would express the issues as:

1. What is the standard of review for the impugned decisions?
2. Were the decisions to amend Sunwing's FAM reasonable?
3. Is the Applicant's application for judicial review vexatious?

## V. Relevant Provisions

[49] The *Canadian Aviation Regulations*, SOR/96-433 [CAR] state:

| Flight Attendant Manual | Manuel de l'agent de bord |
|---|---|
| 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. | 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) A flight attendant manual shall contain the instructions and information necessary to enable flight attendants to | (2) Le manuel de l'agent de bord doit contenir les instructions et les renseignements permettant aux |

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| perform their duties safely and shall contain the information required by the Flight Attendant Manual Standard. | 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) 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. | (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) An air operator shall provide a copy of its flight attendant manual, including any amendments to that manual, to each of its flight attendants. | (4) L'exploitant aérien doit fournir à chacun de ses agents de bord un exemplaire du manuel de l'agent de bord et toutes les modifications qui y sont apportées. |
| [emphasis added] | [soulignement ajouté] |

[50] The FAMS is a skeletal document with little prose except the "NOTE" at the end. Instead, it lists subject headings which are to be covered in operator FAMS. The relevant provisions are:

| | |
|---|---|
| **2A.18 Emergency Evacuation Commands** | **2A.18 Ordres d'évacuation d'urgence - Généralités** |
| •General | •Généralités |
| ◦Purpose | ◦Objet |
| ◦Technique | ◦Technique |
| ◦Correct use | ◦Utilisation correcte |
| ◦Pacing | |

◦Régulation

| | |
|---|---|
| **2A.19 Emergency Evacuation Commands - Applications** | **2A.19 Ordres d'évacuation d'urgence - Applications** |
| •General commands - land; inadvertent water contact; and ditching | •Ordres généraux - évacuation au sol; amerrissage imprévu; amerrissage forcé |
| •Blocked/jammed exit commands | •Ordres issues bloquées ou coincées |
| •ABP commands | •Ordres aux personnes bien portantes |
| … | … |
| **2A.24 Evacuation Signals** | **2A.24 Signaux d'évacuation** |
| •Descriptions | •Descriptions |
| •Primary signal/variations | •Signal primaire et variantes |
| •Alternate signal/variations | •Signal de rechange et variantes |
| •Crew member responsibilities at the evacuation signal | •Responsabilités des membres de l'équipage au signal d'évacuation |
| •Evacuation cancellation | •Annulation de l'évacuation |
| **2A.25 Prepared Emergency Landing/Ditching - Procedures** (Cabin Safety Technical Directive No. 201 SUPPORT MODULE P - Emergency Preparation/Support Module-Ditching) | **2A.25 Atterrissage ou amerrissage d'urgence préparé - Procédures** (Directive technique de sécurité cabine n° 201 - MODULE DE SUPPORT P - Préparation d'urgence/Module de support - Amerrissage forcé) |
| **NOTE:** The carrier must develop procedures in a format that crew members may use when preparing for an | **NOTA :** L'exploitant aérien doit préparer les procédures dans un format que les membres d'équipage pourront |

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| emergency landing or ditching that will serve as a checklist. The selected format must include responsibilities of each crew member for the purpose of cabin; passenger; galley; and self preparation. All passenger advisory announcements must be included. | utiliser pour préparer un atterrissage d'urgence ou un amerrissage forcé et qui pourra servir de liste de vérifications. Le format choisi doit comprendre une liste des responsabilités de chaque membre d'équipage relativement à la préparation de la cabine, des passagers, de l'office et pour leur propre préparation. Toutes les annonces à faire aux passagers doivent être incluses dans le format retenu. |

## VI. Submissions and Analysis

*Issue 1: What is the standard of review for the impugned decisions?*

[51] To determine the standard of review, I follow *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*], which states:

> [52] *Dunsmuir* states that "[c]ourts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27).
>
> [53] The process of judicial review involves two steps. First, *Dunsmuir* says that "[a]n exhaustive review is not required in every case to determine the proper standard of review" (para. 57). As between correctness and reasonableness, the "existing jurisprudence may be helpful" (para. 57). And so it is in this case. *Dunsmuir* renders moot the dispute in the lower courts between patent unreasonableness and reasonableness. No authority was cited to us that suggests a "correctness" standard of review is appropriate for IAD decisions under s. 67(1)(c) of the IRPA." Accordingly, "existing jurisprudence" points to adoption of a "reasonableness" standard.

> [54] This conclusion is reinforced by the second step of the analysis when jurisprudential categories are not conclusive. Factors then to be considered include: (1) the presence or absence of a privative clause; (2) the purpose of the IAD as determined by its enabling legislation; (3) the nature of the question at issue before the IAD; and (4) the expertise of the IAD in dealing with immigration policy (*Dunsmuir*, at para. 64). Those factors have to be considered as a whole, bearing in mind that not all factors will necessarily be relevant for every single case. A contextualized approach is required. Factors should not be taken as items on a check list of criteria that need to be individually analyzed, categorized and balanced in each case to determine whether deference is appropriate or not. What is required is an overall evaluation. Nevertheless, having regard to the argument made before us, I propose to comment on the different factors identified in *Dunsmuir*, all of which in my view point to a reasonableness standard.

[52] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada stated:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system … and outside the … specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> [56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It

> simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.
>
> […]
>
> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[53] In this case, neither party identified existing jurisprudence to establish the appropriate standard of review. There is no privative clause, and no question of law central to our legal system arises in this case. In my view, the starting point for the standard of review is reasonableness.

[54] What is most material in the contextualized analysis required to establish the standard of review is that the Minister of Transport and his delegates at Transport Canada are engaged in a discrete and special administrative regime. The decision-makers, Transport Canada's Cabin Safety Inspectors, have special expertise in the area of passenger safety in aircraft evacuations. In my view, the purpose of the FAM and FAMS is in part to ensure passenger safety; one of the primary purposes of the FAM amendment in this case was to best ensure passenger safety in aircraft evacuations.

[55] As a consequence, I conclude that these decisions by Transport Canada should be judicially reviewed on a standard of reasonableness. Such decisions are entitled to deference. I

appreciate there are different margins of appreciation in this context, and in my view, Transport Canada officials acting in this connection should be afforded a wide range of appreciation given that passenger-safety decisions in this context involve elements of factual appreciation, specialization and expertise.

[56] The Applicant CUPE argued that judicial review should be conducted through the lens of strict scrutiny. I do not accept this is the law. It is enough for this Court to judicially review this decision on the reasonableness standard, keeping in mind that the context, namely that the impugned decision directly impacts the safety of the travelling public in emergency evacuations of passenger aircraft.

[57] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

*Issue 2: Were the two decisions to amend Sunwing's FAM reasonable?*

A. *The Regulatory Framework: CAR, FAM, FAMS*

[58] The central issue in this case is whether the decisions of Transport Canada are reasonable. In my view, the verbal decision was reasonable. However, the subsequent written decision was not reasonable. My reasons follow.

[59] First, there is no dispute that the amendment to Sunwing's FAM needed to respect and comply with the FAMS by virtue of subsection 705.139(3) of the CAR which states:

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| 705.139(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. | 705.139(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. |
| [emphasis added] | [soulignement ajouté] |

[60] In my view, the amended FAM complies with this paragraph of the FAMS. This is because, as noted, the FAMS is almost entirely skeletal. Almost without prose, the FAMS simply lists topics that a FAM amendment must cover. The FAMS does not say what language should be included under a topic. The supporting regulation, subsection 705.139(3) of the CAR only requires that requirements of the FAMS be "met" before approval is given. Therefore one might

argue that the process followed in this case complied with subsection 705.139(3) of the CAR because the amendment addressed one of the topics listed in the FAMS.

[61] However, in my respectful view, the FAMS is not the only relevant provision governing an aircraft operator wishing to amend its FAM in relation to safe emergency evacuation procedures. In my view, before a Transport Canada Cabin Safety Inspector may approve this FAM amendment, he or she must also follow the provisions of the CSIM. The CSIM sets out the roles and responsibilities of a Cabin Safety Inspector; it is in effect his or her job description as written and approved by the Minister.

[62] In my view, the CSIM requires Cabin Safety Inspectors to engage in a two-stage review process as a precondition to approving an amendment to Sunwing's FAM. First, there should be a "preliminary review". Secondly, the Cabin Safety Inspector should conduct a "comprehensive review", see CSIM pages 4-6 at para 4.12:

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| 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. | Il convient d'entreprendre, rapidement après l'avoir reçue de l'exploitant aérien et avant d'en entreprendre un examen approfondi, un examen préliminaire de la documentation de Sécurité des cabines soumise. Si cet examen préliminaire révèle que cette documentation est complète et d'une qualité jugée acceptable ou que ses lacunes, mineures, peuvent être rapidement corrigées, son examen approfondi peut alors commencer. |
| [emphasis added] | [soulignement ajouté] |

[63] The CSIM applies to reviews of operator submissions concerning "any Cabin Safety documents". In my view, documents in support of an amendment to a FAM are "Cabin Safety documents"; such an amendment directs cabin flight attendants how to conduct safe emergency aircraft evacuations.

[64] In my view, CSIM is a Transport Canada-imposed guideline; Cabin Safety Inspectors are generally obliged to and should follow CSIM in relation to amendments to a FAM. In my view, the preliminary and "comprehensive review" requirements of the CSIM, are safety-related and mandatory. The use of the word "should" does not detract from this conclusion where passenger safety is concerned. In my view, the requirements of CSIM are designed to enhance passenger safety; passenger safety could be compromised if the CSIMs is ignored or discounted by a Cabin Safety Inspector in this case, as will be seen below.

B. *Verbal Approval of November 27, 2013*

[65] In this case, Transport Canada's verbal decision to grant the requested FAM amendment was reasonable. I appreciate the need in this case to make changes in a timely way, when an efficiency and safety issue is identified. The preliminary and "comprehensive reviews" were compressed while the aircraft was on the ground pending completion of the four tests. The verbal amendment decision was reasonable in that it efficiently facilitated the test process, which resulted in reasonable confirmation of the inefficiencies identified in giving the oral shouted blocking signal command in all cases. The verbal approval was not unreasonable in the circumstances; it was done on a short term basis only and was directly connected with and strictly limited to the ongoing tests being carried out. It was not intended to be and was not

implemented on aircraft actually carrying passengers. It was a reasonable decision and the request to set it aside is dismissed.

C. *Written Decision of November 29, 2013*

No "Comprehensive Review" Per CSIM

[66] However, I am unable to conclude that what took place after the fourth test and leading to the written decision of November 29, 2013, constituted a "comprehensive review" required by Transport Canada's CSIM. In this connection, I note that Sunwing officials met and drew up a Risk Assessment on November 28, 2013, the day after passing their fourth partial demonstration evacuation test. Further, Transport Canada knew the Risk Assessment had been completed: Transport Canada itself had requested the Risk Assessment. Moreover, the Risk Assessment is referred to in the draft Cabin Safety Bulletin which Sunwing submitted:

> The clarification of the use of this oral command was subject to an internal Risk Assessment and has been deemed to provide an equivalent level of safety.

[67] I cannot agree Transport Canada's Cabin Safety Inspector, to whom the CSIM's requirement to conduct a "comprehensive review" was directed, reasonably discharged his obligations under CSIM in part because Transport Canada granted the FAM amendment without reviewing the very Risk Assessment Sunwing prepared at Transport Canada's request.

[68] In answer, it is said that (as it happened) the Risk Assessment concluded there was no change in risk before and after the amendment. I do not see that as an answer on judicial review. It is for Transport Canada not this Court to complete the "comprehensive review" required. That

means it is for Transport Canada and not the Court to assess Sunwing's Risk Assessment: see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at paras 10-11. Here, Transport Canada's Cabin Safety Inspector should have considered the Risk Assessment as part of the required "comprehensive review" but unreasonably did not.

[69] It is also argued there is no legal requirement on Sunwing to forward the Risk Assessment to Transport Canada's Cabin Safety Inspector. While no one could point to such an obligation, in my respectful view, this objection is without merit because the duty to conduct a "comprehensive review" lies on Transport Canada not Sunwing. Having asked Sunwing to conduct a Risk Assessment, and knowing that such Risk Assessment had been conducted, Transport Canada acting reasonably and with passenger safety in mind, should have asked Sunwing to provide it. Transport Canada should then have reviewed it before approving Sunwing's FAM amendment. I would add that Transport Canada may have other matters to consider as part of a "comprehensive review". Those other matters are also for Transport Canada to determine.

[70] It is suggested that the Minister (Transport Canada) has only a minimal role in approving FAM amendments; he or she need only see that, as provided by subsection 705.139(3) of the CAR, the Flight Attendant Manual Standard is "met". This provision states:

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| 705.139(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 | 705.139(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 |

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| contained in Part A of the Flight Attendant Manual Standard.<br><br>[emphasis added] | d'urgence contenues dans la partie A de cette norme et toutes les modifications qui sont apportées au manuel.<br><br>[soulignement ajouté] |

[71] I agree the word "shall" is generally mandatory. And I also agree, as noted already, that the FAMS is simply a list of topics every FAM amendment must address. And I agree that the FAMS does not specify what any particular aircraft operator should or should not put into a FAM on any point.

[72] That said, I do not accept that the Minister has only a minimal role in approving FAM amendments under subsection 705.139(3) of the CAR beyond ensuring some commentary addresses each FAMS topic. Transport Canada's role is not simply to check and see if each topic is covered, indifferent as to what a particular aircraft operator actually says under each point. That would be an unsafe and therefore unreasonable approach for the regulator of aircraft safety to take.

[73] In my view, subsection 705.139(3) of the CAR obliges the Minister and or his or her delegates to review the substance of a proposed FAM amendment. To my mind, the Minister and his or her officials acting reasonable should be looking for language that intelligently and reasonably deals with safe emergency passenger evacuation. It is in this context that in my viewTransport Canada acted unreasonably in failing to review Sunwing's Risk Assessment. In particular, the Cabin Safety Inspector should have conducted a "comprehensive review" as required by the CSIM. In my view, the FAMS, FAM and CSIM dovetail and harmonize with

subsection 705.139(3) of the CAR; in combination they obliged Transport Canada to conduct a safety-related "comprehensive review" of Sunwing's proposed FAM amendment.

[74] Also, as noted, the CSIM sets out the "job description" of Cabin Safety Inspectors, in accordance with policies and procedures for Transport Canada. These officers are authorized to approve or reject proposed FAM amendments. In my view, it was the job of the Cabin Safety Inspector seized of the FAM amendment to apply both subsection 705.139(3) of the CAR and the CSIM, and therefore to conduct the required safety-related "comprehensive review".

[75] In this case, a step was missing in the decision-making process because there was no "comprehensive review". In my respectful view a "comprehensive review" is reasonably required for good reason: however salutary this proposed FAM amendment was when verbally approved for the purposes of the fourth test, the written FAM amendment would deal with the *actual* safety of both passengers and crew in an *actual* emergency aircraft evacuation. 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.

D. *Other Issues with the Reasonableness of the Decision*

[76] In addition to unreasonableness based on failure to conduct a "comprehensive review" just discussed, CUPE had other issues with Transport Canada's decision to approve the amended FAM.

The Anecdote

[77] First, whether he was speaking for the Transport Canada team or for himself, Cabin Safety Inspector Mayne said that making the shouted blocking signal command non-mandatory would shorten the time to complete the partial demonstration. This suggestion followed his anecdote; he told Sunwing about when an aircraft he was working on underwent an emergency landing, he was able to get from the back of the plane to the front door before any passenger had gotten out of their seats, without having given a shouted blocking command signal. In my respectful view, for Transport Canada to rely on this anecdote in approving the FAM amendment was problematic by reason of the fact that nothing is known of the size or type of aircraft Inspector Mayne was working on at the time. It is not known if that aircraft was large or small, whether it had many exits or only a few, whether the exits were a long way from the most distant passenger or closer, and whether his experience was recent or not. It would be unreasonable to rely on the anecdote without assessing these variables because the issue was not how fast an attendant could get to a door and open it in general, but how fast that could be done on one of the Boeing 737-800 class passenger jets at issue in this case. On the other hand I appreciate these variables would have been known to Cabin Inspector Mayne who told the anecdote to Sunwing, and who granted the verbal FAM amendment. On balance I am not inclined to hold this aspect of

the decision to be unreasonable *per se* even though the record is less that fully transparent on this point because of the deference owed to this specialized decision maker.

Time Savings "Discovery"

[78] Secondly, CUPE disputes the passage in the draft Cabin Safety Bulletin referring to the time required to open cabin doors where Sunwing says it "discovered" less time was required if there were no shouted blocking signal commands:

> We discovered cabin crews are able to open an armed door in less time than it would take for a passenger to remove their seatbelt and make their way to an exit. The response time for opening the exits will be improved by assessing the conditions outside your door and opening it immediately.

[79] I agree that to the extent this assertion suggests the discovery arose as a result of the four tests, it is problematic because the shouted blocking signal commands had little if anything to do with Sunwing's failing to pass the first three demonstrations. However, the fourth partial demonstration did proceed faster than the others and it did not utilize shouted blocking signal commands. On balance, this finding by the safety officials of Sunwing and Transport Canada is reasonable.

Time Exercise Test – Time for Flight Attendant Versus Time for Passenger

[80] Third, CUPE disputes the relevance of Sunwing's test exercise to see how long a *flight attendant* would take to go from a *jump seat* to a door. In my view, reliance on this test is very problematic because the test was not timed with a stopwatch, and moreover the time estimates (three to four seconds or more) appear to be guesswork. In addition, that test is of little to no

relevance because it did not actually address the point in issue, namely how long it would take a *passenger* to undo his or her *seatbelt, leave his or her seat* and get to a door. That might have been quite different from the time taken by a *flight attendant* to move from a *jump seat* to a door. Reliance on this exercise also casts doubt on the reasonableness of Transport Canada relying upon this aspect of the claimed discovery of time saved.

No Additional Documentation was Supplied

[81] CUPE takes issue with the fact that more generally, Sunwing provided Transport Canada with no additional documentation to supplement its letter of request and the draft Cabin Safety Bulletin. I agree there was no measurable or verifiable data to support the requested FAM amendment. The submissions filed by Sunwing were almost entirely based on the experience of the Sunwing test participants supplemented with the input from Transport Canada over the two days testing that took place. That said, I do not find these concerns unreasonable on their own because of the experience of the decision makers and the fact-based nature of the safety-related inquiry. However this issue underscores difficulties arising because there was no "comprehensive review", which I have already found unreasonable in this case.

Risk to Crew not Assessed

[82] Fifth, CUPE suggests the absence of the shouted blocking signal command could result in a flight attendant being trampled or perhaps pushed out a door during an evacuation, and that there was a possibility that in certain circumstances passengers might die in the absence of a mandatory command. In this connection, CUPE attacks the actual Risk Assessment produced by

Sunwing, even though it was neither shared with nor reviewed by Transport Canada. Transport Canada agreed that multiple deaths were possible in certain circumstances without the shouted blocking signal command. However, Sunwing's Risk Assessment makes no mention of multiple deaths; the most severe risk described is "serious injuries". I agree with CUPE that the Risk Assessment may be flawed by its failure to recognize multiple deaths as a risk reasonably requiring assessment. However, I agree with the Respondents that multiple deaths may occur with or without mandatory shouted commands. Once again, the resolution of this conflict emphasizes what I have already found, namely the unreasonableness of Transport Canada making a decision related to passenger and crew safety without considering as part of the required "comprehensive review", the very the Risk Assessment it had requested. Indeed it is far from apparent to me that any "comprehensive review" was conducted at all.

[83] That said, it is not for this Court on judicial review to decide whether or not the details of Sunwing's Risk Assessment supports Sunwing's request for a FAM amendment. That assessment is for a Transport Canada Cabin Safety Inspector to make. He or she has the necessary expertise to determine if the Risk Assessment adequately recognized and assessed the risk of multiple deaths in addition to serious injuries. No such assessment took place in this case.

## VII. Conclusion

[84] The reviewing court must consider the decision as an organic whole; judicial review is not a line by line treasure hunt for errors. There are many components and considerations in Transport Canada's decision to approve the FAM amendment. The assessment of the overall

reasonableness of the decision does not simply involve adding up the positives and subtracting the negatives of individual components and considerations as I have outlined them above.

[85] Standing back and looking at the two decisions as a whole, I have come to the conclusion that the decision to grant written approval to Sunwing's request to amend its FAM was unreasonable. The failure to conduct a "comprehensive review" that considered the Risk Assessment, together with the other shortcomings noted, deprived the decision of its necessary justification. These also place this decision outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law, as required by the Supreme Court of Canada in *Dunsmuir*. Therefore, judicial review is granted and the written decision of November 29, 2013 is set aside.

[86] Taken as an organic whole, I am unable to find that the verbal decision was unreasonable. It was a temporary and preliminary decision. Transport Canada gave verbal approval to enable the fourth test to be conducted. After the fourth test was completed, in my view that verbal decision was spent; Sunwing could not make a formal change to its FAM based on the verbal approval. At that point, Sunwing was in the position where if it wanted to amend its FAM going forward, it was required to make a formal request for a FAM amendment; Sunwing could no longer rely on the verbal approval decision. Therefore the request to set aside the verbal approval decision to amend the FAM is dismissed.

VIII. Stay

[87] It is apparent from the above and I understand that the FAM amendment Sunwing sought and received cannot be repealed, or repealed and replaced overnight given the FAM must be physically amended and staff retrained and other contingencies which may not have been addressed. It is apparent to me that setting aside the written FAM amendment decision should be stayed for some reasonable but short period of time within which Sunwing may revert to its previous FAM wording on an orderly basis or perhaps undertake a fresh FAM amendment process with Transport Canada.

[88] Therefore, I will stay setting aside the written decision of November 29, 2013, for a period of 30 days from the date of this Judgment.

[89] In the event any party disagrees with this stay or its duration, it may make submissions on how long this stay should last or whether it should be lifted.

*Issue 3: Is the Applicant's application for judicial review vexatious?*

[90] While Sunwing's two applications might have been heard together with some greater efficiency, I cannot find the Applicant was vexatious. Therefore, I reject this argument.

## IX. Costs

[91] I requested submissions on an award of all-inclusive costs. The parties agreed that, in the event the Applicant is successful, the Applicant is to be paid $8,000 in costs, with each Respondent paying $4,000 to the Applicant, and, in the event the Respondents are successful, the Applicant will pay each of the Respondents $5,000 in costs. In either event, the reference to "costs" means a single, all-inclusive payment, inclusive of fees, disbursements and tax.

[92] Because the Applicant was successful, and because its cost submissions are reasonable, I award costs to the Applicant in the amount of $8,000, with each Respondent paying $4,000 to the Applicant. The reference to "costs" means a single, all-inclusive payment, inclusive of fees, disbursements and tax. Had I held for the Respondents, I would have accepted their proposal as reasonable and made an award accordingly.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. Judicial review is granted.

2. The Minister's decision communicated by letter dated November 29, 2013 is set aside and remanded to a different decision-maker for re-determination.

3. The request to set aside the Minister's verbal decision communicated November 27, 2013 is dismissed.

4. Costs in the amount of $8,000 are awarded to the Applicant, with each Respondent paying $4,000 to the Applicant; "costs" means a single, all-inclusive payment, inclusive of fees, disbursements and tax.

5. This Judgment is stayed for a period of thirty (30) days from the date hereof, with each party being at liberty to make written submissions within fourteen days hereof should they be of the view that the length of this stay should be varied or that the stay should be lifted.

"Henry S. Brown"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2056-13 |
| **STYLE OF CAUSE:** | CANADIAN UNION OF PUBLIC EMPLOYEES v CANADA (MINISTER OF TRANSPORT) SUNWING AIRLINES INC. |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 22, 2015 |
| **JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | FEBRUARY 3, 2016 |

**APPEARANCES:**

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