Federal Court  Cour fédérale

Date: 20180516

Docket: T-1175-15

Citation: 2018 FC 518

Ottawa, Ontario, May 16, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES

Applicant

and

CANADA (ATTORNEY GENERAL), CANADA (MINISTER OF TRANSPORT), AIR CANADA, AIR CANADA ROUGE, AIR TRANSAT, CANADIAN NORTH, AND SUNWING AIRLINES INC.

Respondents

JUDGMENT AND REASONS

[1] The Applicant, the Canadian Union of Public Employees [CUPE or the Applicant], challenges purported decisions made by the Minister of Transport related to the *Regulations Amending the Canadian Aviation Regulations (Part I, VI and VII – Flight Attendants and Emergency Evacuation)*, SOR/2015-217 [the challenged regulations] and the decision of the

Governor in Council to promulgate the challenged regulations. The challenged regulations establish the minimum number of flight attendants required on passenger airplanes in proportion to passenger seats. CUPE, a union which represents over 10,000 flight attendants, argues that the challenged regulations were passed in a manner which was contrary to basic norms of procedural fairness, and in particular, in breach of CUPE's legitimate expectation to be meaningfully consulted, and should therefore be quashed.

[2] The Respondent, the Attorney General of Canada [AGC] argues that procedural rights do not attach to the legislative process, which includes the making and amendment of regulations. In the alternative, the Respondent argues that the Applicant was not denied any procedural fairness, noting, among other things, that no promises were made to CUPE and that CUPE did participate in the consultation process leading up to the promulgation of the challenged regulations. The Respondents, Air Canada & Air Canada Rouge, Air Transat, and Sunwing Airlines, all of whom operate passenger airlines in Canada, and who are affected by the challenged regulations, support the position of the Attorney General. Canada North is also a Respondent on this application, but did not file submissions.

[3] For the reasons that follow, the Application is dismissed. There is no duty of procedural fairness owed by the Governor in Council in exercising its authority to promulgate regulations. Even if there were such a duty, it was not breached in this case. CUPE cannot establish that it had a legitimate expectation of consultation, nor can it establish that it was denied procedural fairness. CUPE had the opportunity to participate in focussed consultations regarding the challenged regulations and its input was acknowledged.

I. Background

A. *General*

[4] This Application for Judicial Review focuses on amendments to the *Canadian Aviation Regulations*, (SOR/96-433) [*CAR*s], made under the *Aeronautics Act*, RSC 1985, c A2 [*Aeronautics Act*].

[5] The first regulations addressing the ratio of flight attendants to passengers were enacted in 1996. These required aircraft operated by Canadian airlines with more than 50 seats to have a ratio of one flight attendant for every 40 passengers (the 1:40 ratio). This reflected the on-going policy dating back to at least 1968. Other jurisdictions, including the United States and the European Union, require one flight attendant for every 50 seats (the 1:50 ratio). The 1:50 ratio used in these jurisdictions applies to seats, regardless of whether a passenger is in them. The challenged regulations, enacted on an industry-wide basis in 2015, bring the Canadian regulations in line with other jurisdictions. The challenged regulations permit Canadian airline operators to elect the 1:50 flight attendant-seats ratio, as long as certain safety-related criteria are met. Alternatively, they can choose to maintain the 1:40 ratio. The election is done on an aircraft-by-aircraft basis.

B. *The Key Players*

[6] The regulation of aeronautics in Canada involves several key players in Government and industry, including:

- The Governor in Council has the authority to make regulations under the *Aeronautics Act*, including the regulations at issue (section 4.9, *Aeronautics Act).*
- The Minister of Transport is responsible for the administration of the *Aeronautics Act* (section 4.2). Transport Canada is the Minister's Department.
- The Canadian Aviation Regulation Advisory Council (CARAC), with representation from government and industry, is the main consultative body for Transport Canada's civil aviation rule-making process. CARAC's prime objective is to assess and recommend potential regulatory changes. The procedure by which Transport Canada conducts consultations with CARAC is set out in the CARAC Charter. It has over 550 members, including CUPE.
- CARAC has several committees, including the Civil Aviation Regulatory Committee (CARC). CARC is composed of senior executives in Transport Canada's civil aviation division. CARC makes recommendations for regulations and amendments to the Minister. CARC also identifies regulatory issues, and considers the recommendations of other CARAC subcommittees.
- The Parliamentary Standing Committee on Transport (SCOT), now known as the Standing Committee on Transport, Infrastructure and Communities (SCOTIC), is a committee of Members of Parliament responsible for considering transportation-related issues.

C. *The History of the Challenged Regulations*

[7] In or around 2000, individual airlines and industry lobbying organizations began advocating for the adoption of the 1:50 ratio. CUPE has consistently been opposed to this change.

[8] In 2000, the Air Transport Industry Association (ATAC), an industry lobbying organization, proposed a change to the ratio. This proposal was reviewed, but ultimately rejected by the CARC due to safety concerns.

[9] In 2002, ATAC submitted a more detailed proposal for the 1:50 ratio. CARC asked Transport Canada to conduct a risk assessment of the proposal. Stakeholders, including CUPE, were consulted. The assessment, completed in 2003, revealed that the 1:40 ratio was safer, but that the 1:50 ratio was acceptable from a safety perspective, provided that certain mitigation measures were implemented.

[10] CARC then directed that Notices of Proposed Amendments (NPAs) be prepared to advise stakeholders that the 1:50 ratio was being considered. This led to further consultation, including with CUPE. CUPE submitted written "dissents" in 2004, opposing the amendments.

[11] Transport Canada submitted its Report setting out the Staff Position and Recommendations (Staff Position) to CARC in November 2004, which noted that the issue needed further study, and that the proposed amendments could not be recommended without the mitigation measures that had been proposed in the 2002 risk assessment.

[12] In March 2005, CARC met to consider the responses to the NPAs, and the Staff Position from Transport Canada. CARC directed that the proposals be forwarded to the Department of Justice for legal drafting.

[13] This decision was communicated to CUPE by letter dated December 9, 2005 from the Chief of Regulatory Affairs at Transport Canada, stating:

> The NPAs…were forwarded to the Department of Justice for legal drafting. Once the drafting of the regulations is complete, you will have another opportunity to comment once the proposed rule is pre-published in the Canada Gazette, Part I. In accordance with the

> CARAC Charter…members will receive a copy as soon as it becomes available.

[14] Transport Canada officials, as well as the Deputy Minister and Minister of Transport, made similar statements before the SCOT between 2005-2006(i.e., that the regulations would not be finalized until draft regulations had been submitted to the SCOT for consideration, and that the regulations would be pre-published in Part I of the *Gazette* and subject to the resulting consultation process).

[15] On January 23, 2006, as a result of the Canadian General Election, a new Government was elected. On September 22, 2006, the Minister of Transport, Mr Lawrence Cannon, announced in the House of Commons that the proposed amendments to the *CAR*s would not be pursued at that time. (Going forward, this process will be referred to as the "2000-2006 regulatory process".)

[16] In 2013, WestJet airlines sought and was granted a Ministerial exemption to the 1:40 requirement, which allowed it to operate under the 1:50 ratio. Other airlines began to seek similar exemptions. This eventually led to a further proposal to adopt the 1:50 ratio on an industry-wide basis. Transport Canada recommenced consideration of the proposed regulatory changes, including any necessary mitigation measures.

[17] In February 2014, stakeholders received a Preliminary Issue and Consultation Assessment (PICA) outlining the changes. An NPA was posted online for comments in March 2014, followed by an amended NPA in May 2014, which invited comments up to

June 22, 2014. Five components of CUPE submitted comments in response to the NPAs. Transport Canada held a meeting with stakeholders on May 22, 2014, which CUPE attended. CUPE subsequently submitted further written dissents. Following the May 22, 2014 meeting, drafting of the amendments commenced

[18] On June 17, 2015, the challenged regulations were published in Part II of the Canada Gazette, without having been pre-published in Part I. It appears from the Regulatory Impact Analysis Statement (RIAS), which was published with the regulations, that Transport Canada was of the view that there had been extensive consultations in the past (when the 1:50 ratio was being considered during the 2000-2006 regulatory process) and that the issues were well-understood by both Transport Canada and external stakeholders. However, there is no explanation regarding why the regulations were not pre-published in Part I of the Gazette, which is the usual approach, although exemptions from pre-publication may be granted.

[19] Although the issue in this Application for Judicial Review is only whether the challenged regulations were promulgated in breach of a duty of procedural fairness owed to CUPE, CUPE also submits that the safety implications of the new ratio were not fully considered by the Governor in Council and that the data relied on was insufficient. CUPE submits that it is uncontested that the 1:50 ratio is less safe. Although CUPE acknowledges that this Application is not about deciding which ratio is safer or better, CUPE's submissions are peppered with references to their safety concerns.

[20] For example, CUPE submits that the challenged regulations do not contain several of the mitigation measures which had been described in 2005 as essential to ensuring safety. CUPE also disputes the information included in the RIAS, published in the *Canada Gazette* Part II with the challenged regulations. In describing the consultation process carried out in 2013-2014, the RIAS states that "no new data would have become available" that had not been collected during earlier consultations, and captured in earlier risk assessments. CUPE contests this, pointing out that the new regulations were not subject to a risk assessment, that the old risk assessment conducted in 2003 was not a quantitative risk assessment, and was based on outdated passenger load factors (noting that in the early 2000s, planes were typically only 70-75% full). The RIAS states that the new ratio will save $30 million per year, however CUPE notes that there is no evidence to support this assertion.

[21] CUPE also provided an expert report from Dr. Edwin Galea. Dr. Galea argues that, under modern-day passenger load factors and considering other evidence which Transport Canada did not examine, the challenged regulations pose safety concerns.

[22] The AGC submits that safety concerns were not ignored, and among other things, points out that Transport Canada's 2003 risk assessment cited several reports authored by Dr. Galea. The AGC also points to the many simulations and tests conducted that led to the mitigation measures included in the challenged regulations. The Respondents submit that safety has not been compromised. However, safety is not the issue on this Application for Judicial Review.

D. *The Order of the Case Management Judge*

[23] In its original Notice of Application, CUPE alleged that: the promulgation of the challenged regulations breached procedural fairness; the regulations were void as *ultra vires* and also violated section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1867*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]*;* and, decisions made the Minister of Transport and Transport Canada officials leading up to the making of challenged regulations were unreasonable.

[24] CUPE requested documents from the Respondent, AGC, pursuant to Rule 317 of the *Federal Courts Rules*, (SOR/98-106) [*Federal Courts Rules*], with respect to all material used in making the decision not to pre-publish the challenged regulations and in making the regulations. The Assistant Clerk of the Privy Council responded that all materials other than the Order in Council were Cabinet confidences which could not be disclosed.

[25] CUPE then brought a further motion pursuant to Rule 317 for, among other things, production of relevant material in the possession of Transport Canada and other departments. CUPE accepted that the documents provided to the Governor in Council were Cabinet confidences, but argued that it was also challenging the "many decisions made and the process adopted by the Minister of Transport" in the lead-up to the promulgation of the challenged regulations. The AGC opposed the motion and argued that the Application simply challenged the regulation, and that all the relevant documents were Cabinet confidences pursuant to section 39 of the *Canada Evidence Act*, RSC 1985, c C5 [*CEA*].

[26] Prothonotary Tabib dismissed CUPE's motion on November 22, 2016, making several findings, including that this Application is "primarily" for judicial review of the challenged regulations or the decision to adopt them, for which the decision-maker is the Governor in Council.

[27] The Prothonotary also found that Transport Canada's process of consulting, drafting regulations and making a recommendation to the Governor in Council (i.e. the lead up to the approval by the Governor in Council) was not part of the same "course of conduct" as the adoption of the Regulations by the Governor in Council, and therefore it could not be reviewed as part of the Application pursuant to Rule 302, which limits judicial reviews to a single Order. The Prothonotary also found that in exercising the regulation making power, the Governor in Council was not bound by the Minister or his department.

[28] The Prothonotary noted that, in addition to challenging the impugned regulations, CUPE also challenged the decision not to pre-publish the regulations and the decision not to consult. The Prothonotary found that the decision not to pre-publish the challenged regulations was made by the Treasury Board. This decision was also not part of a course of conduct and could not be addressed in this Application, as it contravened Rule 302. The Prothonotary added that, in any event, material before the Treasury Board would also have been Cabinet Confidences.

[29] The Prothonotary also found that the challenge to the failure to consult was about the process leading up to the approval of the Regulations by the Governor in Council for which there

was no identifiable record. Moreover, given the finding that the challenged decision was made by the Governor in Council, any documents in possession of the Minister of Transport about a decision not to consult did not need to be included in the record.

[30] CUPE did not appeal the Prothonotary's Order. CUPE subsequently amended its Notice of Application to withdraw its challenge to the *vires* of the Regulation, and its *Charter* challenge. While the Notice of Application still alleges that decisions made in relation to the making of the Challenged Regulations were unreasonable, CUPE has not pursued this.

II. The Issues

[31] The Applicants argue that the challenged regulations must be quashed because the regulations were promulgated in breach of procedural fairness, and in breach of CUPE's legitimate expectations that it would be meaningfully consulted.

[32] This entails consideration of:

- Whether the Governor in Council owes a duty of procedural fairness in exercising its authority to promulgate regulations, including whether the doctrine of legitimate expectations applies; and,
- If so, whether CUPE had a legitimate expectation that was breached, and more generally whether CUPE was denied procedural fairness.

[33] All parties agree that the standard of review on this application is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

III. The Applicant's, CUPE's, submissions

[34] CUPE submits that it was promised − in clear and unequivocal language − an extensive consultation process regarding proposed changes to the *CAR*s. Specifically, it argues that it was promised the challenged regulations would be subject to a "full hearing" at the SCOT, and pre-publication in Part I of the *Canada Gazette*. CUPE argues that this promise was made in 2004, 2005 and 2006. Although the membership of the SCOT changed, as did the government, CUPE argues that the Minister never rescinded the promise. CUPE suggests that its concerns are in the interest of safety, which is a non-partisan issue; therefore, the Government of the day would share the concerns of the previous government.

[35] CUPE submits that a duty of procedural fairness exists in the regulation-making process and that CUPE had a legitimate expectation of consultation, which is a key aspect of procedural fairness. CUPE argues that the law has developed to the point that such a promise of consultation should be enforceable on judicial review.

[36] CUPE adds that, in addition to this Court's constitutional duty to review the exercise of public authority, it is good policy to recognize that procedural fairness may attach to the making of regulations because otherwise, individuals or groups who are negatively impacted have no opportunity to influence the process.

[37] CUPE submits that the facts are, for the most part, not disputed. The points of contention between CUPE and the Respondents relate to the strength of the promises made to CUPE and,

relatedly, whether the 5th or 6th edition of the CARAC Charter governed the process for the challenged regulations in the 2013-2015 period.

A. *The Promises Relied On*

[38] CUPE recounts the history of the development of the regulations from 2000-2006. CUPE points to the transcript of the meeting of the SCOT on March 11, 2004 where the CUPE representative advised the SCOT that CUPE wanted a full debate on the 1:40 ratio. CUPE submits that this request triggered appearances before the SCOT from Transport Canada officials. The Deputy Minister of Transport advised the SCOT that the Minister intended to be "very strict on process", and to employ the "full gazetting process" before the regulations were passed. In addition, the Minister of Transport appeared at the SCOT on March 25, 2004 indicating that no final decision to change the flight attendant ratio had been made, and that there would be a consultative process.

[39] The Assistant Deputy Minister of Transport also appeared before the SCOT on April 22, 2004 and reiterated the Minister's undertaking to present the text of any proposed new regulations to the SCOT before publication in the *Canada Gazette*, Part I. CUPE submits that this statement was made on behalf of the Minister of Transport and reflects the promise to return to the SCOT with the draft regulations and to pre-publish the regulations. The Assistant Deputy Minister of Transport made similar comments when he appeared before the SCOT in June 2006.

[40] CUPE also relies on promises made directly to CUPE. First, on May 21, 2004, a Special Assistant to the then Minister of Transport, Mr. Tony Valeri, wrote to the president of CUPE

advising that Transport Canada would return to the SCOT with the proposed regulations. Second, CUPE points to a response to an inquiry by a CUPE member to the Minister of Transport. The reply, sent by email from a Special Assistant to the Minister, noted that CARAC would be consulted, the SCOT would be advised, and the regulations would be pre-published in the *Canada Gazette*. Third, CUPE points to the December 9, 2005 letter from Transport Canada's Chief of Regulatory Affairs to CUPE indicating that CUPE would have another opportunity to comment on the proposed regulations via pre-publication in Part I of the *Canada Gazette.* CUPE submits that these are strong promises made directly to CUPE by the Minister of Transport and those speaking on his behalf.

[41] CUPE notes that the proposed regulations were "shelved" in 2006. Regardless, CUPE submits that the promises made during this period were never rescinded, and therefore bound the new government when it revisited the 1:50 ratio, beginning in 2013. CUPE points to the 2014 Notice of Proposed Amendments (NPAs), which relied on the developmental work that had been done in 2000-2006, and stated that the 2006 file was "reactivated". CUPE submits that the developmental work in 2000-2006 highlighted the gaps regarding the necessary mitigation measures, anticipated that there would be further consultation and promised pre-publication of the regulations. CUPE also refers to the 2014 PICA, which was purportedly used to determine the scope of consultation required or recommended and which based its assessment in part on the consultations which had come before.

[42] CUPE also submits that the new government made the same promises. CUPE points to a May 2013 assessment paper prepared in response to Sunwing's request for an exemption from

the 1:40 ratio, which was made in the lead-up to the change being made on an industry-wide basis via the challenged regulations. This assessment paper discussed the forthcoming challenged regulations, indicating that they were "awaiting the Minister's approval for further promotion leading to pre-publication in Part I of the *Canada Gazette*."

[43] CUPE asks the Court to infer that the promises made to CUPE of meaningful consultation and prepublication of the regulations in 2004-2006 remained alive, given that Transport Canada simply reactivated the file, which included the promises.

[44] CUPE submits that the consultations that were conducted regarding the challenged regulations in 2013-2015 fell far short of what was necessary or promised. The regulations were not pre-published, nor were they submitted to the SCOT before their promulgation. CUPE submits that they never saw the draft regulations. Further, CUPE argues that the NPAs differed significantly from the regulations which were ultimately promulgated. CUPE notes that the AGC has not explained why the regulations were not pre-published. Further, CUPE submits that the consultations did not reflect the process outlined in the 5th edition of the CARAC Charter − which CUPE submits states that all regulations will be pre-published − and did not reflect the process set out in the *Guide to Making Federal Acts and Regulations*, 2nd ed. (Ottawa: Her Majesty the Queen in Right of Canada, 2001) [*Guide to Making Federal Acts and Regulations*].

[45] In response to the Respondent's submission that the 6th edition of the CARAC Charter governed at the time, CUPE argues that regardless of which edition governed, it expected both a hearing before the SCOT and pre-publication of the regulations.

[46] CUPE asserts that the report by Professor Galea of his simulations to assess the safety implications was ignored. CUPE suggests that Transport Canada only conducted qualitative assessments and cannot explain how it arrived at the mitigation measures included in the regulations. CUPE suggests that the Court should infer or assume that Transport Canada did nothing to justify its policy choice.

[47] CUPE acknowledges that it participated in the May 22, 2014 meeting with other stakeholders and Transport Canada, but submits that it was thwarted in its efforts to present or circulate its power point presentation. CUPE submitted a dissent to the NPA but argues that there is no evidence that its dissent was considered.

[48] CUPE submits that as a key stakeholder, it should have had further input, but had none apart from the May 2014 meeting. CUPE adds that there was no consultation on the claimed cost savings, the safety impact or the mitigation measures.

B. *A Duty of Procedural Fairness Should Be Recognized*

[49] CUPE argues that the nature of judicial review requires that Courts have the power to strike down regulations. CUPE submits that the Court has a constitutional duty to supervise the executive to ensure that it does not overstep its legal authority and that this duty extends to virtually all aspects of executive decision-making (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28, [2008] 1 SCR 190) including the making of a regulation. As explained below, CUPE characterizes regulation-making as an executive function rather than as a legislative function.

[50] CUPE adds that the Courts have a role to play in ensuring public safety and in ensuring that executive decision making is lawful. In order for Courts to discharge these duties, Courts must have the power to quash regulations that negatively impact public safety.

[51] CUPE argues that judicial review of the lawfulness of executive decision-making includes ensuring that the executive respects the duty of procedural fairness. CUPE acknowledges that the content of this duty varies with the circumstances. However, it argues that all public authorities − including the Governor in Council − have an implied duty to act fairly, absent clear statutory language to the contrary (citing *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 38-39, [2011] 2 SCR 504 [*Mavi*]).

[52] CUPE acknowledges that *legislation* cannot be attacked on procedural fairness grounds (*Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40). However, CUPE makes a distinction between regulations and legislation. CUPE argues that regulations should be considered as executive acts of officials which are reviewable for procedural fairness like any other administrative act. CUPE submits that its interpretation is consistent with the *Guide to Making Federal Acts and Regulations*, which describes regulations as the acts of executive officials acting on delegated authority

[53] CUPE acknowledges that to date, Courts have only quashed regulations where they are *ultra vires* a statute, or were made in bad faith (*Thorne's Hardware Ltd et al v The Queen et al*, [1983] 1 SCR 106 at 111, 143 DLR (3d) 577 [*Thorne's Hardware*]). CUPE argues that, despite this, there is no definitive Canadian jurisprudence that states that regulations cannot be judicially

reviewed for procedural fairness. CUPE argues that administrative law principles and trends in the UK jurisprudence, upon which key Canadian jurisprudence is based, support its position.

[54] CUPE submits that the UK law is relevant and can be relied on to fill in gaps in Canadian law. The UK jurisprudence has developed to apply the doctrine of legitimate expectations to the regulation making process. More specifically, CUPE submits that the UK jurisprudence establishes that representations from public authorities, past practice, and past involvement of stakeholders can all give rise to a legitimate expectation by the stakeholder that a certain process will be followed in the making of regulations. This, in turn, may impose certain procedural fairness obligations on the public authority that makes the regulations (*R v Liverpool, ex parte Liverpool Taxi Fleet Operators Association*, [1972] 2 QB 299 (CA)).

[55] CUPE further submits that if this Application were brought in the UK, CUPE would succeed because the prevailing law in the UK recognizes that the Government's clear, unequivocal and direct statements about the intended procedure for regulation-making should be enforceable.

[56] CUPE notes that *Apotex v Canada (Attorney General)*, [2000] 4 FCR 264, 188 DLR (4th) 145 (CA) [*Apotex*] is the only Canadian case that directly addresses the issue raised in this Application. CUPE relies on the reasons of Justice Evans, where he held that the doctrine of legitimate expectations could be invoked to create certain procedural obligations in the making of regulations. Justice Evans suggested that if a Minister acting in the scope of his or her authority makes a "specific assurance of prior consultation" to a party with respect to a

contemplated regulation, the passage of that regulation without the promised consultation may constitute a breach of that party's legitimate expectations, and therefore a breach of procedural fairness (para 105). Although Justice Evans ultimately concluded on the facts before him that there was no ability to judicially review the decision of the Governor in Council for procedural fairness because the Governor in Council had not made the promises at issue, CUPE argues that subsequent jurisprudence shows an openness to revisit the issue.

C. *Breach of Procedural Fairness and Legitimate Expectations*

[57] CUPE argues that, whether the issue is framed as one of legitimate expectations specifically, or procedural fairness more generally, the challenged regulations were made in breach of procedural fairness and the clear promises made to CUPE.

[58] CUPE submits that a duty of procedural fairness is owed with respect to all executive decision making, and the scope of the duty is determined in accordance with the factors established by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*]. CUPE submits that the application of the relevant *Baker* factors supports a duty of procedural fairness at the higher end of the spectrum.

[59] CUPE notes that there is no appeal of the regulation, the decision is of high importance to CUPE and to the safety of the flying public, the 1:40 ratio will result in some flight attendants losing their jobs, and that the promised consultations did not occur and the usual process of pre-publication of the regulations was not followed.

[60] CUPE argues that the *Baker* factors point to a requirement of significant consultation, or at least more consultation than was provided in the present case. CUPE adds that even a minimal duty of procedural fairness would require that CUPE be provided with the draft regulation and some type of hearing to permit it to make submissions.

D. *Legitimate Expectations Were Not Met*

[61] CUPE notes that the doctrine of legitimate expectations is an aspect of procedural fairness. The doctrine of legitimate expectations applies where a clear promise is made, with some particulars, by a person in authority. In such circumstances, the promise will be enforced. CUPE submits that the promises made to it were unequivocal; it had a legitimate expectation of a process that did not occur.

[62] As noted above, CUPE asserts that the Minister of Transport made two clear representations. First, between 2004 and 2006, the Minister and his Deputies promised the SCOT that the proposed amendments would be provided to the SCOT for a full, informed, public debate. Second, in letters, emails to CUPE and statements to the SCOT, the Minister of Transport promised that the proposed changes to the regulations would be pre-published in Part I of the *Canada Gazette* to ensure a full debate and to fill data gaps that had not been addressed earlier. CUPE also relies on the 5th edition of the CARAC Charter, which it submits promised prepublication. In addition, CUPE points to Transport Canada's evaluation of Sunwing's exemption application in 2013, which CUPE submits included an undertaking to pre-publish the proposed regulations.

[63] CUPE also reiterates that the 2015 RIAS states that the 2000-2006 regulatory process was “reactivated”. Therefore, CUPS submits that the promises made during that period were also reactivated.

[64] CUPE argues that, based on existing administrative law principles, and based on UK jurisprudence, the Minister of Transport’s failure to honour these promises should result in the regulations being quashed as a violation of the legitimate expectations doctrine.

[65] CUPE acknowledges that no promise of consultation was made by the Governor in Council. However, CUPE suggests that the decision to make the regulations was really made by Transport Canada officials, who did promise to consult with CUPE and should be held accountable.

[66] CUPE submits that secret decision-making is not fair and asks the Court to draw an adverse inference from the Government’s choice to invoke Cabinet Confidences in this case. CUPE notes that the Supreme Court of Canada addressed the issue of Cabinet Confidences in *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 [*Babcock*] and cautioned against selective disclosure of information, noting that adverse inferences could be drawn (at para 36). CUPE argues that the Court should infer that the Governor in Council knew of the promise made to consult and to pre-publish the regulations, yet enacted the regulations regardless, and further that the Governor in Council enacted the regulations without adequately considering the submissions of stakeholders and simply “rubber stamped” them.

[67] CUPE reluctantly acknowledges that the RIAS was part of the material submitted to the Governor in Council, but suggests that it is a "mystery" what was actually considered. CUPE discounts the summary of the views of stakeholders included in the RIAS as not comprehensive. In particular, CUPE submits that its dissents are not specifically noted. Overall, according to CUPE the RIAS presented a "false picture" to the Governor in Council.

[68] Overall, CUPE submits that the challenged regulations were promulgated without the promised debate at the SCOT, without prepublication in the Canada Gazette and without adhering to the other promises. CUPE submits that, as a result, their legitimate expectations were breached, and/or they were denied procedural fairness. CUPE asks that the challenged regulations be struck down as a result.

IV. The Respondents' Submissions

A. *The AGC*

[69] The AGC submits that there is no duty of procedural fairness owed by the Governor in Council in the regulation-making process. The AGC adds that even if a duty of procedural fairness could be found, CUPE cannot establish that there was a breach of procedural fairness or that it had a legitimate expectation of the consultation it seeks. The AGC also notes that CUPE did participate in the 2013-2015 consultations, as the RIAS reflects, and that CUPE's input was noted.

[70] The AGC also highlights that the issue is not about whether public safety was compromised; noting that it has not been compromised.

[71] With respect to CUPE's argument that the regulations were made in a manner which violated procedural fairness, the AGC argues that any general duty of procedural fairness does not apply to purely legislative functions (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44 [*Cardinal*]).

[72] The AGC submits that the making of regulations constitutes legislative decision-making, not executive acts. Judicial review of legislative-decision making is limited to challenges to the constitutional validity or *vires* of a regulation *(Canadian Council for Refugees v Canada*, 2008 FCA 229 at para 53, [2009] 3 FCR 136 [*Canadian Council for Refugees*]).

[73] The AGC notes that section 35 of the *Interpretation Act,* RSC 1985, c I-21, defines Governor General in Council or Governor in Council as "the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada". In other words, it acts on the advice of Cabinet and serves a legislative function.

[74] The AGC notes that the present challenge to the regulations is not about their constitutional validity or the jurisdiction of the Governor in Council to make the regulations – i.e., *vires*. AGC points out that CUPE withdrew its challenge to the *vires* of the regulation, as

well as its *Charter* challenge. The challenge is about whether there is a duty of procedural fairness, and if so, whether it was breached vis-à-vis CUPE.

(1) Prepublication in the *Canada Gazette* is not required

[75] With respect to CUPE's allegations that it was promised that the regulations would be pre-published in the *Canada Gazette* Part I, the AGC disputes that this was a promise or that it was made to CUPE. Although regulations are usually pre-published in the *Canada Gazette*, this is not a requirement imposed by statute. The AGC also notes that the Federal Government's policy (the *Guide to Making Federal Acts and Regulations)* permits exemptions to pre-publication of regulations on a case-by-case basis. The AGC also points to subsection 11(2) of the *Statutory Instruments Act*, RSC 1985, c S-22, which states that "no regulation is invalid by reason only that it was not published in the *Canada Gazette*."

[76] The AGC also points to the *Aeronautics Act*, which requires specific regulations to be pre-published, for example, those dealing with land use (section 5.5) but does not require prepublication of the type of regulations being challenged. In other words, there is no statutory duty to pre-publish the challenged regulations.

[77] The AGC adds that the *Aeronautics Act* does not include any statutory duty to consult with respect to its general regulation making authority, although it does impose a duty to consult on certain other matters addressed in the Act.

(2) UK jurisprudence does not support a change in the Canadian law

[78] The AGC submits that UK jurisprudence also recognizes that the duty of procedural fairness does not extend to legislative decisions. The AGC notes that in *Bates v Lord Hailsham of St. Marylebone*, [1972] 1 WLR 1373 (Eng Ch Div) [*Bates*], the Court found that there is no duty to consult or general duty of fairness with respect to legislative matters, "whether primary or delegated" (1378). The AGC notes the more recent decision in *Mosley v London Borough of Haringey* [2014] UKSC 56, [*Mosley*] where the principle in *Bates* was reiterated. The AGC also submits that several of the UK cases relied on by CUPE were about statutory duties, i.e., the statute imposed the duty to consult, which the Courts gave meaning to.

[79] The AGC submits that regardless of whether *Bates* remains authoritative in the UK, the principle in *Bates* was adopted in *Inuit Tapirisat of Canada v Canada (Attorney General)*, [1980] 2 SCR 735, [1980] 2 FC 735 [*Inuit Tapirisat*] by the Supreme Court of Canada, and the Canadian law is settled. The AGC also cautions that the regulation-making regimes in the UK differ.

(3) Apotex does not support CUPE's position

[80] The AGC submits that *Apotex* does not support CUPE's position. Rather, *Apotex* confirms the Respondents' position that regulations made by the Governor in Council cannot be reviewed for procedural fairness. The AGC emphasizes that CUPE's argument that regulations can be judicially reviewed is based only on the *obiter* comments of Justice Evans, which were not supported by the majority.

[81] The AGC notes that there were four issues addressed by the Court of Appeal in *Apotex* and all justices agreed on the result. The only issue of relevance to this Application is the Court of Appeal's comments regarding the Applicant's claim that their legitimate expectations were violated. The AGC emphasizes that Justice Evans' comments, which CUPE relies on to support its position that the doctrine of legitimate expectations could apply, were made in *obiter* and were strongly rejected by the majority. The AGC suggests that it is a leap for CUPE to submit that Justice Evans left the issue of the application of legitimate expectations in the regulation-making process "open".

[82] The AGC points to the majority decision of Justice Décary, which found that the "promise" relied on by Apotex was only a political comment made in passing, which lacked sufficient detail. Moreover, Justice Décary recognized that any such statement by the Minister could not bind the Governor in Council in the exercise of its regulation-making power.

[83] The AGC notes that the statements relied on in *Apotex* were much more direct and clear than the statements now relied on by CUPE. In the present case, the only statement made by the Minister of Transport made was to the SCOT, and not to CUPE. All other statements were made by government officials, none of whom can bind the Governor in Council.

[84] The ACG also notes that *Apotex* was applied in *Association des Pilotes de Lignes Internationales v Urbino*, 2004 FC 1387, 21 Admin LR (4th) 93 [*Association des Pilotes*]. In *Association des Pilotes*, the Court addressed, among other issues, whether particular regulations were invalid due to the doctrine of legitimate expectations, because the Government failed to

consult the applicant on the amendments contrary to the Federal Regulatory Plan and the CARAC Charter. The Court reviewed the relevant jurisprudence and concluded, at para 23, that *Apotex* had not changed the law with respect to the doctrine of legitimate expectations to the regulation making power − i.e. it does not apply. The Court noted the serious reservations expressed by Justices Décary and Sexton regarding Justice Evans' *obiter* comments (at paras 20-22).

[85] In *Association des Pilotes.* The Court added, at para 24, that there is no statutory duty to consult in the *Aeronautics Act* and that the CARAC Charter is unenforceable by members of the public.

[86] The AGC submits that the law is clear; the doctrine of legitimate expectations does not apply to the legislative and regulation-making functions.

(4) CUPE has not established a legitimate expectation

[87] The AGC submits that no promises were made to CUPE by the Minister or those speaking on his behalf that would support a legitimate expectation of a particular consultation process with CUPE. Moreover, the Minister of Transport is not the decision maker. Rather, the decision was made by the Governor in Council, which made no promises at all.

[88] The promises asserted by CUPE in emails, letters and statements made to the SCOT do not give rise to a legitimate expectation of a consultation process and, therefore, cannot establish a breach of procedural fairness. The AGC points out that the alleged representations were made

in the context of the 2006 regulatory process, which did not lead to any adoption of regulatory amendments.

[89] The AGC argues that the alleged representations do not give rise to any obligation in respect of the 2015 regulatory amendments. They also deny that representations from officials at Transport Canada could bind the Minister of Transport. The claimed representations were simply meant to describe the expected regulatory path. Similarly, the comments made to the SCOT in respect of the 2006 process cannot be taken to reflect any promise from the Minister, let alone the Governor in Council, in respect of the 2015 regulatory amendments. Moreover, the AGC submits that CUPE could not enforce any "promises" made to the SCOT, which were not made to CUPE itself.

[90] With respect to the letter sent to the President of CUPE in December 2005, which indicates that CUPE would have another opportunity to comment once the drafting of the regulations was completed, the AGC submits that the Chief of Regulatory Affairs was simply conveying the regular process, which was contemplated at that time. This does not create a promise.

[91] With respect to an email response from the Special Assistant sent to a CUPE member who had written to their Member of Parliament, the AGC acknowledges that the response refers to the Minister's commitment to the SCOT to submit draft regulations and to contemplated pre-publication. The AGC submits that at that time, and with respect to the regulations then under development, pre-publication was contemplated. However, this does not constitute a

specific promise to CUPE. Moreover, the regulations under development at that time did not proceed. As noted, the Minister reported to the House in December 2006 that no regulations would be pursued at that time. The AGC submits that CUPE cannot seek to enforce promises made during a regulatory process which was terminated. Further, the AGC submits that CUPE cannot enforce commitments made by a Minister to the House of Commons Committee, which were not made to CUPE itself.

[92] The AGC also emphasizes that one Parliament cannot bind the subsequent Parliament, as noted in *Canada (Attorney General) v Friends of Canadian Wheat Board,)* 2012 FCA 183 at para 82- 83 [2014] 1 FCR 518 [*Friends of the Canadian Wheat Board*].

[93] With respect to CUPE's reliance on the CARAC Charter as a promise of pre-publication of the regulations, the AGC submits that it makes no difference whether the CARAC Charter 5th or 6th edition governed the 2013-2015 regulatory development process. The 5th edition of the CARAC Charter includes an Information Note which clarifies that the Charter does not replace the official regulation-making requirements currently in place. Although the 5th edition notes that pre-publication in the *Canada Gazette* would occur, this is not a guarantee of pre-publication. Transport Canada's policy cannot bind the Government to a process that is not statutorily required. A similar caveat is included in the 6th edition, but without a reference to the *Canada Gazette.*

[94] The AGC submits that given that the CARAC Charter – whether the 5th or 6th edition − is a policy document that cannot impose statutory requirements and that there is no statutory

requirement in the *Aeronautics Act* to consult, CUPE cannot rely on any statutory requirements for prepublication in the Canada Gazette or other consultation on the challenged regulations. The CARAC Charter cannot support the legitimate expectation of prepublication asserted by CUPE.

(5) No adverse inferences are appropriate

[95] The AGC notes that in response to CUPE's request pursuant to Rule 317 for documents considered by the Governor in Council, the Assistant Clerk of the Privy Council responded that in accordance with section 39 of the *Canada Evidence Act*, the documents were Cabinet confidences. The AGC notes that CUPE did not seek judicial review of this decision; rather it brought a motion for further production, which was dismissed.

[96] The AGC submits that there is no reason for the Court to draw any adverse inferences from the assertion of section 39. The AGC notes that in *Babcock*, at para 36, the Supreme Court of Canada noted the important role of section 39 to governance and acknowledged the competing interests at play. Although an adverse inference could be drawn in some circumstances, the present circumstances are not at all analogous to the examples noted in *Babcock*.

(6) There is no general duty of procedural fairness

[97] The AGC notes that no Canadian court has found procedural rights with respect to the making of regulations. The AGC disputes that *Baker* applies to establish a duty of procedural fairness; rather *Baker* sets out factors to determine the scope and content of a duty where such a duty exists.

(7) CUPE was consulted

[98] The AGC adds that although there is no duty of procedural fairness owed, there have been significant consultations over the last 20 years which have involved CUPE. The AGC also disputes CUPE's suggestion that the Governor in Council based its decision to approve the regulations on false information or on no information, or alternatively that it was aware of the alleged promises to consult CUPE and chose to ignore them.

[99] The AGC submits that CUPE was heavily consulted during the first regulatory process from 2000-2006. The AGC further notes that, when a change to the flight-attendant ratio was considered again in 2013, the government decided that consultations need not be extensive. Nonetheless, CUPE was involved. For example, CUPE participated at the May 22, 2014 CARAC meeting, received the PICA and NPAs, and submitted dissents and online comments. The RIAS reflects the comments received at that meeting as well as the other submissions made online and otherwise, and acknowledges input from five components of CUPE.

[100] The AGC also notes that although CUPE says the issue is not about safety, CUPE makes several submissions asserting that the regulations compromise safety or that safety implications were not considered. The AGC points to the record and the affidavit of Mr. Christopher Dann, which outlines the new requirements and the tests conducted.

[101] The AGC disputes CUPE's bald statement that Transport Canada failed to consider the expertise of Professor Galea. The AGC notes that Transport Canada cited several articles and reports by Professor Galea in its 2003 Risk Assessment of the proposed changes to the ratio.

B. *Sunwing's Submissions*

[102] Sunwing submits that to succeed on this Application, CUPE must establish that the doctrine of legitimate expectations applies in Canada to the Governor in Council's authority to make regulations, and that CUPE actually had a legitimate expectation in this case. Sunwing argues that CUPE cannot establish either.

[103] Sunwing highlights the limited scope of judicial review with respect to regulations. Sunwing notes that in *Katz Group v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 24, [2013] 3 SCR 810, the Supreme Court stated that "a successful challenge to the *vires* of regulations requires they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate". This is not CUPE's challenge in the present case.

[104] Sunwing acknowledges that a legitimate expectation may give rise to procedural rights in certain circumstances, but not in the legislative process. Sunwing argues that Canadian law does not recognize the breach of legitimate expectations as a ground for judicial review of regulations. No consultation is required by statute or by the common law. Sunwing emphasizes that regulations may be challenged but only with respect to their validity – i.e. *vires* and constitutionality. Moreover, no duty of fairness is owed by the government in the exercise of its legislative functions (*Authorson* at paras 37-39))

[105] Sunwing notes that Justice Evans' obiter views in *Apotex* have never been accepted in Canada.

[106] Sunwing emphasizes that there is no Canadian jurisprudence which has found a duty of procedural fairness in the context of making regulations. They assert that Canadian case law has never applied the doctrine of legitimate expectations to set aside a regulation. Moreover, the facts of the present case do not establish a basis for the relief requested by CUPE.

[107] Sunwing submits that the trends in the UK jurisprudence which CUPE relies on are irrelevant. Sunwing notes that if a party relies on foreign law it must provide the proper context, and CUPE has not provided this context. Sunwing submits that there are both similarities and differences in the UK process to enact regulations. However, there is no gap in the Canadian law; the law in Canada has settled the issue, and there is no need to resort to UK law.

[108] Sunwing submits that even if the doctrine of legitimate expectations did apply, CUPE cannot meet the criteria set out in *Mavi.* No representations were made to CUPE by the decision-maker, which is the Governor in Council. Further, the only "representations" CUPE can point to were made with respect to a different regulatory process and for different proposed regulations, and these were not sufficiently "clear, unambiguous, or unqualified", as required by the jurisprudence. Just as in *Apotex*, on the facts, there is no basis for the relief sought by CUPE.

[109] Sunwing submits that CUPE's reliance on representations made to the SCOT or others, rather than to CUPE itself, cannot be a basis on which to raise the doctrine of legitimate expectations.

[110] Sunwing also submits that CUPE's request for relief is confusing. Sunwing points to CUPE's oral submissions that it should have a "full hearing", noting that the Governor in Council does not conduct hearings and that a hearing was not part of CUPE's claimed legitimate expectation. Although CUPE submits that a promise was made to the SCOT to provide the draft regulations to it for consideration, it is not for a Court to direct a Parliamentary Committee's business.

C. *The Respondent, Air Transat's, Submissions*

[111] Air Transat submits that there is no authority to support CUPE's view that regulations can be judicially reviewed on procedural fairness grounds, including for breach of legitimate expectations. In addition, CUPE cannot meet the criteria to assert a legitimate expectation.

[112] Among other arguments, Air Transat argues that Justice Evans *obiter* comments in Apotex do not assist CUPE, because even Justice Evans acknowledged that a Minister's representations could not invalidate regulations made by the Governor in Council once they were promulgated. Although Justice Evans suggested that a legitimate expectation of consultation may give rise to a right to seek judicial review to prevent the Minister from taking the proposed regulations to Cabinet, it could not affect the validity of the regulations once they had been made by the Cabinet, assuming that the Governor in Council has the full authority to make them.

[113] Air Transat also emphasizes that the majority in *Apotex* held that a Minister's representations "cannot bind the Governor in Council in the exercise of its regulation-making power", absent express statutory authority. In this case, Air Transat points out that the Minister has no such express authority.

[114] With respect to CUPE's reliance on the CARAC Charter, Air Transat submits that this and other governmental documents do not create a legitimate expectation of consultation, and are unenforceable by members of the public (*Association des Pilotes* at para 24).

[115] With respect to CUPE's reliance on a statement in Transport Canada's evaluation of Sunwing's exemption application, Air Transat submits that this does not create a legitimate expectation, because: it does not make any promise; it is not from the Minister or from the Governor in Council; it is not addressed to CUPE; and, it is qualified in nature.

[116] Air Transat argues that the few representations made to CUPE are not sufficient to base a legitimate expectation. These statements simply acknowledge CUPE's participation to date, and state that a proposal would be provided to the SCOT before pre-publication. Air Transat submits that these statements simply reiterate what was said to the SCOT.

[117] Air Transat also notes that the *Aeronautics Act* does not impose a statutory duty to consult with respect to the making of regulations.

[118] Air Transat points out that CUPE was consulted with respect to the challenged regulations, at the face-to-face meeting on May 22, 2014, and that mitigation measures were adopted subsequent to these consultations.

V. The Governor in Council Does Not Owe a Duty of Procedural Fairness With Respect to the Promulgation of Regulations

[119] CUPE's position, which attempts to revisit established principles in Canadian jurisprudence by relying on trends in administrative law, as well as jurisprudence from the UK, to argue that a duty of procedural fairness is owed by decision-makers who promulgate regulations, cannot succeed. Their argument boils down to this: Courts may judicially review decisions of the executive branch, including with respect to procedural fairness; the making of regulations is not a legislative act, rather it is, in practice, an act of the executive; and, therefore, the making of regulations by the Governor in Council, which is reviewable for *vires* and constitutional validity, should also be reviewable for procedural fairness, including on the basis of the doctrine of legitimate expectations (a sub-category of procedural fairness). CUPE submits that it had a legitimate expectation of a particular consultation process, which was breached, and therefore the challenged regulations should be struck.

[120] CUPE cannot succeed. Among other reasons, their premise is wrong. The promulgation of regulations by the Governor in Council is a legislative act, for which no duty of procedural fairness is owed.

A. *The Governing Canadian Law*

[121] In *Canadian Council for Refugees* at para 53, the Court of Appeal stated that it is the "generally accepted view that the 'decision' of the [Governor in Council] to promulgate regulations, just like the 'decision' by members of Parliament to enact legislation, is not subject to review by the Courts".

[122] The limits of judicial review of regulations were well explained at paras 53-54;

> [53] This response with which the respondents do not take issue (Notice of Application, Appeal Book, Vol. I, pp. 133 to 135) conforms with the generally accepted view that the "decision" of the GIC to promulgate regulations, just like the "decision" by members of Parliament to enact legislation, is not subject to review by the courts (as to the later, note subsection 2(2) of the *Federal Courts Act* (originally introduced by S.C. 1990, c.8, s.1) which provides that "For greater certainty", the House of Commons is not a Federal Board and therefore not subject to judicial review). That said, the legality or *vires* of a regulation promulgated under the authority of Parliament has always been open to challenge before the courts and to that extent, the actions of the GIC are subject to judicial review. This distinction between what can be reviewed and what falls outside the purview of the courts is highlighted by the Supreme Court in *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at page 111:
>
> > The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at p. 533. Decisions made by the Governor in

> Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.
>
> [54] The dividing line was succinctly identified by Strayer J.A. in *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 at page 602:
>
> > It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. The essential question for the court always is: does the statutory grant of authority permit this particular delegated legislation? [Footnote omitted]

[123] As noted by the Respondents, regulations are not immune from review, but that review is limited to *vires* and constitutional validity. The Canadian jurisprudence is clear and leaves no room for CUPE's position. No party is entitled to procedural fairness in the legislative process, which includes the making of regulations.

[124] CUPE admits that its argument has never been accepted by a Canadian court, but argues that administrative law principles support finding the duty, as do the more recent UK authorities.

[125] CUPE submits that *Bates*, relied on by the AGC for the proposition that there is no general duty of procedural fairness in legislative matters, "whether primary or delegated", is no longer the prevailing view in the UK. Although *Bates* was followed in Canadian jurisprudence, CUPE submits that it should not be followed now. This argument cannot succeed. *Bates* was adopted in Canada in *Inuit Tapirisat* and subsequent cases have not resiled from it.

[126] In *Bates*, the plaintiff sought an *ex parte* injunction from the Chancery Division of the High Court, arguing that a change to regulations which removed a provision regarding solicitor's fees should not have been made without consultation. The Court disagreed, and found that the general duty of fairness owed by the executive did not affect the process of legislation, "whether primary or delegated". The Court added, "I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given" (at 1378).

[127] In *Inuit Tapirisat,* the Supreme Court of Canada adopted the principle from *Bates*. The Inuit Tapirisat had objected to a rate increase approved by the Canadian Radio-Television and Telecommunications Commission (CRTC) and appealed the CRTC decision to the Governor in Council, pursuant to a statutory provision. The Governor in Council rejected the appeal and approved the CRTC's rate increase, without hearing from the objectors. The Inuit Tapirisat argued that by not giving them a hearing the Governor breached a duty of fairness owed to them. The Supreme Court of Canada found no such duty. Justice Estey quoting *Bates*, noted that procedural fairness concerns "do not…affect the process of legislation, whether primary or delegated" (at page 757).

[128] Justice Estey acknowledged the general duty of fairness with respect to *executive* decision-making (citing *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, 88 DLR (3d) 671), but found that the order in question was *legislative*. Justice Estey explained at page 758-759:

> Where…the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject matter is not an individual concern or a right unique to the petitioner or the appellant, different considerations may be thought to arise…In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role…to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant.

[129] In other words, with respect to the regulation making power, the role of the Court on judicial review is limited to ensuring the *vires* of the statute, and not to reviewing the decision-making process for procedural fairness.

[130] In *Martineau v Matsqui Institution (No. 2)*, [1980] 1 SCR 602, 106 DLR (3d) 385 [*Matsqui No 2*] the Supreme Court reiterated the same principle, at page 628,

> The authorities, in my view, support the following conclusion…A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.

[131] Since *Inuit Tapirisat,* the Canadian position has been that procedural fairness does not apply to the process of making regulations

[132] These principles were applied specifically to the doctrine of legitimate expectations in *Reference re Canada Assistance Plan*, [1991] 2 SCR 525, 83 DLR (4^{th}) 927 [*Canada Assistance Plan*]. Legislation was enacted to reflect an agreement between Canada and British Columbia for cost-sharing of welfare expenditures in British Columbia. The legislation stated that it could only be amended by mutual consent. In 1990, amendments were introduced without the consent of

British Columbia. British Columbia argued, among other things, that the agreement gave rise to a legitimate expectation that Canada would seek its consent before amending the agreement, and that Canada acted unlawfully by ignoring this. The Supreme Court disagreed, citing both *Bates* and *Inuit Tapirisat*, noting at para 68, "…the rules governing procedural fairness do not apply to a body exercising purely legislative functions. Justice Megarry said so in *Bates*, and this was approved by Justice Estey for the Court in *Inuit Tapirisat*" (citations omitted).

[133] In *Canada Assistance Plan,* Justice Sopinka found that imposing the doctrine of legitimate expectations would stall the business of government, and improperly "place a fetter on the sovereignty of Parliament itself". He also held that such a doctrine would undermine the principle that "a government is not bound by the undertakings of its predecessor" (at paras 72-73).

[134] Although CUPE contends that this principle only applies to primary legislation − which was in issue in *Canada Assistance Plan* − and not to regulations, the jurisprudence does not support such a distinction, nor has CUPE offered a rationale for creating one.

B. *Apotex Does Not Support CUPE's Position*

[135] *Apotex* does not support CUPE's position. Rather, it confirms the prevailing Canadian law: there is no duty of procedural fairness owed by the Governor in Council in the regulation-making process, and the doctrine of legitimate expectations is not applicable.

[136] The facts of *Apotex* are similar to the facts in the present case. The applicants were members of the Canadian Drug Manufacturers Association (CDMA), which opposed potential amendments to regulations under the *Patent Act*, RSC 1985, c P4 [*Patent Act*]. The Government introduced a bill to, among other things, authorize the Governor in Council to enact the regulations opposed by the CDMA. The responsible Deputy Minister held a meeting with the CDMA, and indicated that the Government intended to consult with the industry before any such regulations were finalized. The responsible Minister later wrote to the CDMA, explaining the rationale for the Bill and stating "[r]est assured that you will be consulted before any such regulations are established". The regulations were promulgated without the promised consultation. The applicants argued, among other things, that the regulations were promulgated in violation of their legitimate expectation to be consulted, and should be struck down.

[137] The Court of Appeal agreed in the overall result, and also agreed in finding that, on the facts of this case, there was no breach of a duty of procedural fairness or a legitimate expectation. However, in separate concurring reasons, Justice Evans opined at length on the potential application of the doctrine of legitimate expectations to the Governor in Council's exercise of power in promulgating regulations. The majority (Justices Décary and Sexton) expressed serious reservations with Justice Evans' comments.

[138] Given CUPE's reliance on Justice Evans concurring views in *Apotex*, some further exploration of the decision and how it fits with other jurisprudence is warranted. In *Apotex*, Justice Evans reviewed the jurisprudence and agreed that it was "settled law in Canada that the duty of fairness does not apply to the exercise of powers of a legislative nature" (para 104),

which included the regulations at issue. However, he added that:"[i]t does not necessarily follow that subordinate legislation can lawfully be made in breach of a categorical and specific assurance of prior consultation given to an individual by a responsible minister of the Crown in the course of discharging departmental business" (para 105). In other words, Justice Evans recognized that a real promise made by a Minister regarding matters within the Minister's responsibility could be the basis for review where that promise was breached. Justice Evans suggested that *Canada Assistance Plan* could be distinguished on the basis that it dealt with primary rather than delegated legislation. He noted that the Supreme Court of Canada had indicated a willingness to apply the legitimate expectations doctrine in the municipal bylaw context (citing *Old St. Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170, 75 DLR (4^{th}) 385). Justice Evans also noted that other common law jurisdictions have been willing to apply the doctrine in the regulation-making context and that there was support in the academic literature for this approach.

[139] Justice Evans found that a general duty to afford a right to participate is separate and distinct from a legitimate expectation base on a "procedural undertaking" (at para 121). He characterized the legitimate expectations doctrine as more than part of the duty of fairness, noting that it exists to protect individuals from abusive state action (i.e. government breaking its promises) and is, therefore, within the "domain of judicial review" (at paras 123-124). In his view, the doctrine could be applied to regulation-making to create participatory rights and that regulations made in breach of a duty to consult could be declared invalid. Justice Evans found that the letter from the Minister to the applicant was "specific and categorical", and capable of creating a legitimate expectation.

[140] However, despite Justice Evans' view that the letter from the Minister could have created a legitimate expectation, Justice Evans noted that the Governor in Council had already passed the regulations in question. While he suggested that the applicants could have sought judicial review to "prevent the minister from taking proposed regulations to Cabinet until the promised consultation has occurred" (para 133), there was little that could be done once the regulations were passed. He noted that there was no way of knowing whether the Cabinet, which had full statutory authority to pass the regulations in question, had any knowledge of the promises made by the Minister, at para 134;

> The Cabinet has already approved the regulations, and the question is whether their validity can be impugned because they were enacted in the absence of consultation that the Minister promised. In my view, they cannot. If the Cabinet enacts regulations in ignorance of an undertaking of consultation given by a minister, it would not seem to me to have abused its statutory power. And, given the legal protection afforded by the law to the confidentiality of cabinet proceedings…it would be impermissible for a Court to enquire into the state of knowledge possessed by members of the Cabinet about prior procedural assurances given by a minister in order to determine whether otherwise valid regulations were knowingly enacted in breach of a Ministerial undertaking.

[141] CUPE argues, relying on the above passage, that the Governor in Council did not act in ignorance of the promises made by the Minister and officials to consult, and therefore, the regulations should be reviewable. CUPE asks the Court to draw an adverse inference from the refusal of the Assistant Clerk of the Privy Council, based on Cabinet Confidence privilege, to provide the documents submitted to the Governor in Council. CUPE argues that the Court should infer that the Governor in Council was aware of the promise made to consult and knowingly enacted the regulations in breach of that promise.

[142] First, no such adverse inference will be drawn. The Government is entitled to assert a Cabinet Confidence where appropriate and there is no evidence that this assertion was not justified in the present circumstances. Second, the views of Justice Evans on this issue are not the law in Canada, even if CUPE could squeeze the circumstances into this proposed exception. Third, as discussed below, there were no unequivocal promises made by the responsible Minister to consult with CUPE. Fourth, the RIAS provides a great deal of information about the regulatory development process that was put before the Governor in Council, and includes a summary of the issues and the consultations in the 2000-2006 period and the more focused consultations in 2013-2015, which notes that CUPE and others made submissions.

[143] As repeatedly noted, Justice Evans was in the minority in *Apotex*. While his ultimate finding − that judicial review is not available − was shared by Justices Décary and Sexton, very different reasons were given by the majority.

[144] Justice Décary, joined by Justice Sexton, expressed serious reservations about the application of the legitimate expectations doctrine as proposed by Justice Evans. In the majority's view, it would be inappropriate for the Court, rather than Parliament, to "impose procedural restrictions of its own creation on the process leading to the making of regulations". While acknowledging that *Canada Assistance Plan* dealt with legislation rather than regulations, Justice Décary noted that it would be extraordinary remedy to strike down regulations made by the Governor in Council only because of a failure of a Ministers to fulfill a promise to consult "given on behalf of Cabinet" (para 24).

[145] With respect to the specific claims that promises were made by the Minister, Justice Décary regarded the undertaking by the Minister as a "brief assurance made in passing by a minister wearing his political hat", which contained no specifics "as to the form and timetable of the consultation" and, therefore, was not sufficient to be "enforceable against the Minister" (para 11). Justice Décary noted that the relevant statutory provision did not require any consultation before the regulations were passed, whereas other sections of the *Patent Act* did (paras 3-7).

[146] Further, Justice Décary clearly found that statements made by the Minister, even if clear and unequivocal, could not bind the Governor in Council, noting, at paras 17-19;

> … even if the alleged undertaking was such as to bind the Minister... it would not, in the circumstances, have bound the Governor in Council who is, after all, the decision maker.
>
> A Minister can make an undertaking having some legal consequences only with respect to a decision which is his and his alone to make…
>
> …even if the alleged undertaking by the Minister were found to attract judicial attention, it could not be invoked in the case at bar against the Governor in Council"

[147] It is the majority's decision in *Apotex* which is binding on this Court. The majority seriously doubted whether the doctrine of legitimate expectations should apply in the regulation-making process. They commented that the promises which the applicants attempted to rely on were "brief assurances" by a Minister wearing his "political hat", and which only the naïve would think enforceable in a court of law. Regardless of the character of the promises made by the Minister, the majority found that they could not bind the Governor in Council, which was the actual entity responsible for promulgating the regulations.

[148] Justice Evans' comments on the application of the doctrine of legitimate expectations to regulation making, which CUPE argues provide an opening for its argument, have not been relied on by any subsequent authorities.

[149] Although CUPE seeks to bolster its argument by relying on "trends" in Canadian administrative law, and jurisprudence from the UK, it is not persuasive.

[150] CUPE points to comments made by Justice Binnie in *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services*), 2001 SCC 41, [2001] 2 SCR 281 [*Mount Sinai*], where he acknowledged (at para 34) that "[t]here may be difficulty in other contexts in distinguishing when the legislative exception applies and where it does not, as debated in the Federal Court of Appeal in *Apotex*…that issue remains open for another day." These comments, which were taken from Justice Binnie's *concurring* opinion, were made in *obiter*, and simply noted the differing views expressed in *Apotex.* As with many issues, the Courts can revisit the law in appropriate circumstances, but there is no reason to do so here.

[151] More recently, in *Canadian Society of Immigration Consultants v Canada (Citizenship and Immigration)*, 2011 FC 1435, 402 FTR 168, Justice Martineau considered the applicants' argument that the regulations at issue breached their legitimate expectations for consultations. Justice Martineau cited *Apotex* and *Canada Assistance Plan*, noting that it was "debatable whether subordinate legislation can lawfully be made in breach of <u>categorical and specific assurance of prior consultation</u>", but found that on the facts, there had been no breach of a legitimate expectation (paras 113, 150-151, emphasis added). The Court of Appeal upheld the

decision, but did not decide whether the doctrine of legitimate expectations even applied (*Canadian Society of Immigration Consultants v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 194 at para 7).

[152] In *Association des Pilotes*, the Court noted that *Inuit Tapirisat* had adopted the principle in *Bates*, stating at para 20,

> In *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735 at 757, the Supreme Court of Canada adopted the following comments made by Justice Megarry in *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 at 1378:
>
> > Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy . . . I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.
> >
> > [Emphasis in original]

[153] The Court relied on *Apotex*, noting that the views of Justice Evans were not shared by the majority and were *obiter*, at para 21,

> … In *Apotex*, Décary J.A. and Sexton J.A., even though concurring with the Reasons for Judgment of Evans J.A., disagreed with respect to the issue of the breach of the undertaking to consult the CDMA before the enactment of regulations. The concurring justices expressed serious reservations as to the applicability of the doctrine of legitimate expectations to Cabinet in the exercise of its

> regulation-making power, considering the judiciary should be reluctant to move in and impose procedural restrictions of its own creation on the process leading to the making of regulations by the Governor in Council. In any event, Evans J.A.'s comments on this point appear to be obiter dicta. Leave to appeal that decision to the Supreme Court of Canada was denied.

[154] The Court added, at para 24, that, just as in the present case, there is no statutory duty to consult in the *Aeronautics Act* and that the CARAC Charter is unenforceable by members of the public.

[155] While CUPE seeks to distinguish *Association des Pilots* by arguing that it was decided on the basis that the Association had been consulted in accordance with the CARAC Charter, that fact does not change the determination of the Court regarding *Apotex*.

[156] Support for the majority view in *Apotex* has also been reflected in decisions of other Courts. For example, in *The Cash Store Financial Services Inc. v Ontario (Consumer Services)*, 2013 ONSC 6440, 117 OR (3d) 786 (Div Ct) [*Cash Store Financial*], the applicants challenged a regulation regarding payday loans on the basis that the regulation was not posted for the mandatory period of 45 days, as required by the Ontario Regulatory Policy (ORP), which the applicants argued breached their legitimate expectation of consultation. The Ontario Divisional Court noted that it was not necessary to resolve "whether the doctrine of legitimate expectations can ever be applied to subordinate legislation" (para 24). It noted the disagreement in *Apotex*, and found that the majority's decision "is certainly the dominant one in the case law, which has never applied the doctrine to set aside a regulation that had been passed by Cabinet" (paras 24-25). The Court went on to find that the ORP did not qualify as a representation for the

purposes of the doctrine, because it was not made directly to the applicant, and it was not "clear, unambiguous and unqualified" (para 26).

[157] *Apotex* remains the prevailing law on the issue of legitimate expectations and procedural fairness in the regulation-making context. There is no duty of procedural fairness owed, nor is the doctrine of legitimate expectations − whether viewed as a stand-alone doctrine or an element of the duty of procedural fairness − applicable in the regulation-making context. The legislative process, including delegated legislation, is exempt from the requirements of procedural fairness. Even Justice Evans recognized that regulations were part of the legislative process (contrary to CUPEs submissions that these are executive acts).

[158] As noted above, *Inuit Tapirisat*, (which relied on *Bates*) establishes that legislative processes are exempt from the duty of fairness, whether the legislation is "primary or delegated". *Canada Assistance Plan* extends this principle to the doctrine of legitimate expectations, and although it does not explicitly address delegated legislation, it cites both *Bates* and *Inuit Tapirisat* in reaching its conclusion. In *Canada Assistance Plan,* the Court noted the reasons for this, including the need for Courts to avoid "paralyzing" the business of government. The same rationale was echoed by the majority in *Apotex*, with respect to regulations, who expressed reservations about the judiciary interfering with the "process leading to the making of regulations by the Governor in Council".

C. *There is no Need to Resort to UK Jurisprudence*

[159] As CUPE notes, the UK jurisprudence has addressed the doctrine of legitimate expectations in the context of making certain rules and "regulations". The UK jurisprudence reflects that legislative acts are not subject to the duty of fairness, however, the doctrine of legitimate expectations may be an exception to this general principle in certain circumstances.

[160] Although CUPE places a great deal of reliance on trends in the UK law and submits that *Bates* is no longer authoritative in the UK, CUPE does not acknowledge the distinctions in the UK jurisprudence between statutory duties to consult − where the UK courts have been more willing to find a breach of procedural fairness where the statute is breached − and circumstances where there was no statutory duty to consult. I also note that there is no evidence before the Court regarding the regulation making process in the UK and whether it bears any of the hallmarks of the process at issue in the present application.

[161] As noted by the AGC, in *Regina v Secretary of State for Health*, [1992] QB 353, the legitimate expectation to be consulted was accepted because there was a statutory duty to consult with interest groups. Similarly, in *Mosley*, the issue was the local council's compliance with its own statutory requirement to consult. The Court agreed that there is no general common law duty to consult. The Court also agreed that a duty of consultation may exist where there is a legitimate expectation arising from some promise or past practice of consultations.

[162] In CUPE's reliance on the UK jurisprudence, CUPE appears to discount the potential differences in the regulation − making process in the UK, the type of regulations at issue and the distinction between statutory and non-statutory duties to consult.

[163] Regardless of the trends in the UK law, and whether the cases relied on by CUPE are analogous to the regulation-making process in Canada, the Canadian law is clear. The principle from *Bates* − that there is no general duty of procedural fairness in a legislative matter, "whether primary or delegated" − was adopted by the Supreme Court in *Inuit Tapirisat*, and remains the law. *Canada Assistance Plan* clarified that this principle includes the doctrine of legitimate expectations. Further, jurisprudence from the lower courts has suggested that this principle applies equally to *both* primary and delegated legislation. Simply put, there is no gap in the Canadian law which requires this Court to adopt UK jurisprudence.

VI. CUPE Was Not Denied Procedural Fairness

[164] In the event that the doctrine of legitimate expectations could apply to the Governor in Council's promulgation of regulations, the issue would turn to whether CUPE's legitimate expectation of consultation was breached and more generally, whether CUPE was denied procedural fairness. I find that CUPE did not have a legitimate expectation of consultation and CUPE was not owed a general duty of procedural fairness. Further, despite that there was no duty owed, CUPE was afforded basic procedural fairness. It was aware of the proposed regulations and their overall content, and it participated in the focussed consultation process.

A. *CUPE Cannot Establish a Legitimate Expectation of Consultation*

[165] CUPE cannot establish the criteria for the doctrine of legitimate expectations to apply in these circumstances.

[166] CUPE points to its Amended Notice of Application which requests a Declaration that the process breached CUPE's rights to procedural fairness and its legitimate expectations of a full, fair and reasonable process of consultation which included, but was not limited to, the delivery of the proposed regulations to and consultation with the SCOT, and pre-publication in the Canada Gazette. CUPE also made repeated references to its expectation that the regulations would be provided to the SCOT, where hearings would be held that would include CUPE. However, hearings are not held by the Governor in Council, and if the regulations had been sent to the SCOT, there would be no obligation on the Committee to invite CUPE to a hearing or to appear as a witness before the Committee.

[167] With respect to the alleged promises of consultation, CUPE relies on: statements made to the SCOT by the Minister of Transport, the Deputy Minister of Transport and the Assistant Deputy Minister of Transport; letters and emails to CUPE and its members from the officials within Transport Canada; the 5th edition of the CARAC Charter; and, Transport Canada's evaluation of Sunwing's application for an exemption, which includes a reference to the pending approval of contemplated industry wide exemption and pre-publication of those regulations.

[168] The doctrine of legitimate expectations is generally viewed as an element of procedural fairness. I note that in *Apotex,* Justice Evans proposed that the doctrine of legitimate expectations was a distinct concept, noting that the jurisprudence had considered it as both part of procedural fairness and as a stand-alone doctrine. It is not necessary to determine which is the appropriate characterization. The doctrine of legitimate expectations was described by the Supreme Court of Canada in *Mavi* at para 68:

> Where a government official makes representations within the scope of his or her authority to an individual about the administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous, and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.

[169] A key requirement is that the "representations" relied on must be made "to an individual" – i.e., to the individual seeking to enforce the promise. Policies of general application are not sufficient to give rise to a legitimate expectation (see *Cash Store Financial* at para 26, see also *Amalorpavanathan v Ontario (Minister of Health and Long-Term Care),* 2013 ONSC 5415 at para 26, 64 Admin LR (5th) 164 (Div Ct)). The 5th edition CARAC Charter (even if it were the governing document), relied on by CUPE as promising pre-publication (even if it could be interpreted as making such a promise) is not sufficient to base a legitimate expectation. The same can be said about the *Guide to Making Federal Laws and Regulations*. As noted by the Respondents, there is no statutory requirement of pre-publication, and the CARAC Charter is simply a policy document, which cannot impose binding obligations on the Minister of Transport and certainly cannot impose such obligations on the Governor in Council. Moreover, the

CARAC Charter's reference to pre-publication reflects the usual process, but as noted in the *Guide to Making Federal Laws and Regulations,* exemptions from pre-publication are possible.

[170] Similarly, the statements made to the SCOT – which were not even about the regulations at issue, but rather about regulations developed in the 2000-2006 period that were not promulgated – were not made to CUPE, but to the Parliamentary Committee. The Minister of Transport reported to Parliament on their status in December 2006, and as CUPE acknowledged, those regulations were "shelved".

[171] The few representations which were made directly to CUPE were made in 2004-2005 and were with respect to the previous regulatory process that ended with the Minister's report to the House of Commons in 2006. These include a letter from a Special Assistant to the Minister of Transport to the President of the Air Canada component of CUPE, dated May 21, 2004; a letter from Transport Canada's Chief of Regulatory Affairs to a CUPE Official, dated December 9, 2005; and an email from a Special Assistant to a member of CUPE, sent on July 15, 2004.

[172] Even if the statements made in 2004-2006 were "clear, unambiguous and unqualified", they were made about a different process and different regulations. Moreover, they were not made by the Governor in Council – and not even by a Minister, but by Transport Canada officials. These statements cannot support CUPE's claim of a legitimate expectation of consultation with CUPE regarding the challenged regulations.

[173] With respect to CUPE's argument that the Minister of Transport never rescinded the promises made during the earlier process, this ignores the principle that one Government (or Minister) cannot bind future Governments (*Friends of the Canadian Wheat Board*). It is unrealistic and contrary to our democratic process to hold Ministers of the current government to undertakings or statements made by their predecessors in a differently composed Parliament. Contrary to CUPE's argument, although the Court in *Friends of the Canadian Wheat Board* was referring to primary legislation, in my view the principle is not so limited and equally applies to regulations as delegated legislation and an act of the Governor in Council (i.e., a legislative function).

[174] As the Court of Appeal stated in *Friends of the Canadian Wheat Board* at paras 82-83:

> [82] It is undisputed that one Parliament cannot bind another Parliament not to do something in the future. As noted in Hogg P., *Constitutional Law of Canada* (5th ed. Supp, vol. 1. looseleaf), at 12.3(a):
>
> > If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues. In other words, a government while in office could frustrate in advance the policies urged by the opposition
>
> [83] There is also little doubt that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle": *Reference Re Canada Assistance Plan (B.C)*, above at p. 559, and that"[a] restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself": *Ibid.* at p. 560.

[175] The only statement relied on by CUPE that relates to the challenged regulations in the relevant period is included in the 2013 Transport Canada evaluation of Sunwing's exemption application. The statement at issue reads, "[t]he proposed regulatory package is awaiting the Minister's approval for further promotion leading to pre-publication in Part I of the *Canada Gazette*." This is not a promise of the procedure to be followed. It is simply a status report, noting that the industry-wide regulations were moving forward and that Ministerial approval was pending. *Mavi* requires that the government official making the representations be acting "within the scope of his or her authority", in order for that representation to be binding. As recognized by the majority in *Apotex*, the Minister has no authority to dictate the process followed when the Governor in Council enacts regulations. Even if the Minister had made representations which were "clear, unambiguous and unqualified", they cannot bind the Governor in Council or the Treasury Board, and therefore cannot give rise to a legitimate expectation. Of note, the statement relied on regarding Sunwing's exemption was made by a Transport Canada official, not by the Minister, and it was not made to CUPE.

B. *There is no general duty of procedural fairness and there was no breach of procedural fairness*

[176] Separate from CUPE's arguments regarding the doctrine of legitimate expectations, CUPE submits that a general duty of procedural fairness is owed in all contexts. CUPE's reliance on *Baker* in support of its proposition is misplaced. The *Baker* factors determine the content of a duty of fairness. However, in order to apply the *Baker* factors, a duty of procedural fairness must first be found exist *(Mavi*). As noted in *Apotex,* at para 104, "it is settled law in Canada that the

duty of fairness does not apply to the exercise of powers of a legislative nature, which would include the Regulations impugned in this case".

[177] Even if the duty existed, the application of the *Baker* factors would not result in a higher duty of procedural fairness than what has already been provided to CUPE.

[178] CUPE was not denied procedural fairness. While CUPE may have hoped for more extensive consultations, CUPE was provided with an opportunity to convey its views and did so.

[179] CUPE cannot claim to have been surprised by the regulatory change. The possible move toward the adoption of the 1:50 ratio was known to CUPE since 2000 and it was engaged in consultations up to 2006. CUPE was also aware of the reactivation of the issue in 2013, as a result of the several requests from individual airlines for exemptions. Although CUPE may not have been provided with a copy of the draft regulations, CUPE was aware of the likely content and the mitigation measures contemplated. The NPAs were made available in 2014, and interested parties could submit comments online. CUPE participated in the May 22, 2014 meeting regarding the change to the ratio and the regulations. In addition, CUPE submitted a 57 slide power point presentation and the Air Canada component of CUPE filed a 103 page written dissent which raises many of the arguments CUPE has raised in its submissions to the Court. The RIAS notes that CUPE made submissions.

[180] Counsel for CUPE portrays the Governor in Council process as a "mystery" and suggests that it is a "rubber stamp" process where the Governor in Council decides to approve regulations

without any careful consideration. There is no mystery to the process. The process is set out in several publicly available documents including the *Guide to Making Federal Acts and Regulations* and the *Guide to the Federal Regulatory Development Process.* The Governor in Council acts on the advice of Cabinet − specifically the Treasury Board (which is a Cabinet Committee). Despite this advice and recommendation of the Treasury Board, the Governor in Council does not simply "rubber stamp" the regulations. As described in the *Guide*, the Governor in Council receives a package of material, which includes, among other material, the RIAS, and informs itself based on the information provided and the advice of the Treasury Board, whether to approve and promulgate the regulations.

[181] CUPE also submits that it is "a mystery" what was known by the Governor in Council and that the Court should infer that the Governor in Council knew that consultations with CUPE had been promised. CUPE suggests that the Court should draw this inference (and other adverse inferences) because the AGC refused to produce the documents provided to the Governor in Council citing Cabinet Confidence, and that in such cases, an adverse inference should be drawn. As noted above, I do not agree that any inferences, adverse or otherwise, are appropriate. The Respondent was entitled to raise Cabinet confidence. This is not a mechanism to thwart the Applicant or to perpetuate the alleged mystery, but a legitimate privilege that can be asserted to protect information considered in the Cabinet process. CUPE alternatively suggests that the Court should infer that the Governor in Council promulgated the regulations in the absence of any information. Contrary to CUPE's submissions, the Governor in Council did not approve the regulations without essential information.

[182] The Governor in Council may have had additional material, but at minimum, it had the RIAS, which provided a summary of the impact of the regulations on stakeholders. The RIAS set out, among other information, the history of the flight attendant ratio and the regulations dating back to 2000, the consultations that were undertaken in 2000-2006, the views of the stakeholders at that time and the views of stakeholders in the more recent consultations (the online consultations and face to face meeting) in 2014-2015. The RIAS indicates that at least five components of CUPE made submissions in some manner.

[183] Although the decision to exempt the regulations from pre-publication is not part of this Application for Judicial Review and the Court is not drawing any inferences from this or suggesting that the exemption was inappropriate, pre-publication is the customary approach (according to the publicly available *Guides*). Pre-publication serves an important function to alert stakeholders to pending regulations and to permit submissions to be made and considered before the regulations are finalized and submitted for approval by the Governor in Council. If the challenged regulations had been pre-published, one of CUPE's key "promises" would have been addressed and this Application for Judicial Review may not have been CUPE's choice of approach to raise its issues. In any event, CUPE's Application cannot succeed. There is no duty of procedural fairness owed by the Governor in Council in the regulation making process and, even if there were, CUPE cannot establish any such breach or any breach of a legitimate expectation.

[184] The Application for Judicial Review is dismissed and the Respondents are entitled to their costs.

[185] In accordance with the agreement between the parties , CUPE shall pay to the Respondents the following amounts, which are all inclusive in total and all-inclusive of fees, disbursements and tax:

- To the Attorney General of Canada and Minister of Transport, $4600.
- To Air Transat, $1500
- To Sunwing, $1500
- To Air Canada and Air Canada Rouge, $1000
- To Canada North, $1000

JUDGMENT in T-1175-15

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. The Applicant shall pay costs as follows:

   - To the Attorney General of Canada and Minister of Transport, $4600.
   - To Air Transat, $1500
   - To Sunwing, $1500
   - To Air Canada and Air Canada Rouge, $1000
   - To Canada North, $1000

"Catherine Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1175-15
STYLE OF CAUSE:	CANADIAN UNION OF PUBLIC EMPLOYEES v CANADA (ATTORNEY GENERAL), CANADA (MINISTER OF TRANSPORT), AIR CANADA, AIR CANADA ROUGE, AIR TRANSAT, CANADIAN NORTH, SUNWING AIRLINES INC
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 21, 2018
JUDGMENT AND REASONS:	KANE J.
DATED:	MAY 16, 2018

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