Federal Court  Cour fédérale

Date: 20100219

Docket: T-1567-08

Citation: 2010 FC 188

Ottawa, Ontario, February 19, 2010

Present: the Honourable Mr. Justice Mandamin

BETWEEN:

OCEAN SERVICES LIMITED

Applicant

and

MARCEL GUENETTE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ocean Services Limited applies for judicial review of a September 10, 2008 decision made on a preliminary motion by John B. Malone (the Adjudicator) that he had jurisdiction to hear a labour complaint by Marcel Guenette.

[2] The Respondent was a ship crewman employed as a deck engineer/pump man. He filed a complaint for unjust dismissal under section 240 of the *Canada Labour Code* R.S.C, 1985, c. L-

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2, (the *Code*) against the Applicant after being laid off. The Adjudicator was appointed by the Minister of Labour pursuant to section 242 of the *Code* to hear the complaint.

[3] The Applicant supplies crewmen to ocean vessels and employed the Respondent. It raised a preliminary objection arguing the Adjudicator did not have jurisdiction to hear the matter because section 242(3.1)(a) of the *Code* prevents the Adjudicator from hearing labour complaints over lay-offs due to a lack of work or the discontinuance of a function.

[4] The Adjudicator found the Applicant provided no evidence demonstrating a *bona fide* lay-off. The Adjudicator also found two of the Applicant's client ships were replaced by four, showing the Respondent's dismissal was not due to a lack of work or discontinuance of a function.

[5] The Applicant applies for judicial review of the Adjudicator's decision. It contends the evidence before the Adjudicator proves the Respondent was laid off because of a lack of work and discontinuance of a function. The Applicant seeks:

a. an Order removing the impugned Decision into the Court and quashing the same;
b. a Declaration that the Adjudicator does not have jurisdiction to hear the Respondent's complaint or unjust dismissal under section 240 of the *Code* by virtue of section 242(3.1)(a) of the *Code*;
c. a Declaration the Adjudicator violated the rules of procedural fairness and natural justice, resulting in a loss of jurisdiction;

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d. an Order for the costs of this Application in favour of the Applicant as against the Respondent; and

e. such further or other order(s) and/or relief as the Applicant may request or the Court considers and deems appropriate and/or just in the circumstances.

BACKGROUND

[6] The Applicant is a New Brunswick corporation that provides Canadian crewmen to ocean vessels. The Applicant hired the Respondent in 1983. He was a deck engineer/pump man on a ship, the M.V. Irving Canada.

[7] Irving Oil Ltd. (Irving) was phasing out two single hull tankers, the M.V. Irving Eskimo in October 2005 and the M.V. Irving Canada in August 2006. During 2005/2006 Irving leased four vessels from a Dutch company, Vroon B.V., one vessel sailed under the Canadian flag while the other three sailed under foreign flags. The Canadian flagged vessel was the M.T. Acadian and the three foreign flagged vessels were the M.V. Nor'Easter, M.V. Great Eastern, and M.V. New England.

[8] The Applicant supplies the crew for the M.T. Acadian. Two other companies, Hanza Marine Ltd., and Marine Dolphin Ltd. supplied the crew for the three foreign flagged ships. Hanza supplied Russian and Latvian crewmen and Marine Dolphin Ltd. supplied Filipino crewmen.

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[9] The companies operating the ships and supplying their crews are related. The Applicant was sold to a Bermuda based company called Norbulk Shipping Company Ltd. (“Norbulk”) on December 31, 2003 . Norbulk also owned 60 percent of the shares in Hanza. In addition, Norbulk owned Norbulk Shipping U.K. Ltd. which operates (as compared to crewing) vessels, including the four Vroon B.V ships. Finally, Norbulk owns Norbulk Shipping N.B. Ltd., a New Brunswick Company.

[10] One of the Norbulk companies, the Norbulk Shipping U.K. Ltd., interviewed the Respondent in October of 2003 for a crew position on one of the replacement vessels. The Respondent was unsuccessful in the interview. The Applicant gave him notice of termination/layoff of employment on June 26, 2006 effective when the M.V. Irving Canada was to be sold. His employment ended September 22, 2006. He filed his complaint of wrongful dismissal on August 9, 2006.

PRELIMINARY MATTER

[11] The Respondent disputes the issues raised by the Applicant and argues this is not the time to consider the interlocutory decision by the Adjudicator’s finding with respect to section 242(3.1)(a). He argues this preliminary matter would be more appropriately dealt with on appeal.

[12] The rule with respect to judicial review of interlocutory motions is set out by the Federal Court of Appeal in *Szezecka v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No 934 para. 3. In that case the Court held a court should not hear applications for judicial

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review of interlocutory decisions where they may delay hearings on the merits except in special circumstances. In *Canada v. Schnurer Estate* [1997] 2 F.C. 545, the Federal Court of Appeal confirmed the decision in *Szezrcka* but decided to proceed with the judicial review because the impugned decision was determinative of the substantive rights of a party.

[13] The question of whether or not the Adjudicator has jurisdiction to hear this matter is determinative of the substantive rights of both parties. As such, I will hear this application for judicial review.

ISSUES

[14] The Applicant raises the following issues:

a. the Adjudicator acted beyond his jurisdiction by concluding he had jurisdiction to hear the Respondent's complaint under section 240 of the *Code* because the Respondent had been laid off as a result of the discontinuance of a function and/or lack of work pursuant to section 242(3.1)(a) of the Code;

b. the Adjudicator erred in law by concluding that he is not denied jurisdiction to hear the Respondent's complaint of unjust dismissal under section 240 of the *Code* by virtue of section 242(3.1)(a) of the *Code*;

c. the Adjudicator based his decision that he had jurisdiction to hear the Respondent's complaint of alleged unjust dismissal under section 240 of the *Code* on an erroneous

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finding of fact that was made in a perverse or capricious manner and/or without regard to the material before him; and

d. the Adjudicator failed to observe the principles of natural justice and/or procedural fairness in that after completion of the Applicant and Respondent's presentation of the respective evidence:

i. he adjourned the hearing and ordered the Applicant to disclose documentary evidence; and

ii. he reconvened the hearing in order to hear further *viva voce* evidence.

[15] I find the first issue in this case is a question of law that limits the Adjudicator's jurisdiction. Section 242(3.1)(a) of the *Code* would prevent the Adjudicator from considering the cases of complainants who are laid off for a lack of work or whose functions are discontinued. The Adjudicator must first make a finding of law then apply it to his findings of fact. He must interpret the meaning of "lay-off for lack of work" and the "discontinuance of a function". Then he must decide if the facts before him constitute one of those things. The answers to these questions will determine whether or not the Adjudicator hears the complaint. Therefore, I find the issue is in the following question:

a. *Did the Adjudicator make an error of law with respect to his conclusion regarding s. 242(3.1)(a) of the Canada Labour Code?*

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If the answer is “yes”, and the correct conclusion is the Respondent was laid off or his function is discontinued, then the Adjudicator is without jurisdiction to hear the matter. If the answer is “no”, then he has jurisdiction.

[16] The next issue concern findings of facts. The Applicant alleges the Adjudicator made a series of errors in his findings of fact. This is the Applicant’s issue ‘c’ and I take the question to be:

> b. *Did the Adjudicator base his decision that he had jurisdiction to hear the Respondent’s complaint under section 240 of the Canada Labour Code on an erroneous finding of fact that was made in a perverse or capricious manner and/or without regard to the material before him?*

[17] The Applicant presents the third issue as a question of procedural fairness and natural justice. These are areas of the common law. However, the hearing was conducted pursuant to procedural provisions in the *Code.* The heart of the matter is how the Adjudicator conducted the hearing in light of those provisions. This is a pure question of law. I find the following question must be answered:

> c. *Did the Adjudicator err in his interpretation and application of section 242(2)(b) of the Canada Labour Code in conducting the hearing of this complaint?*

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) held there are now two standards of review: correctness and reasonableness. Questions of law

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will generally be reviewed on a standard of correctness. The more deferential standard of reasonableness will be used to review questions of fact and, in general, mixed fact and law.

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney general) v. Mossop*, [1993] 1 S.C.R. 554 at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same stand must apply to the review of questions where legal and factual issues are intertwined with and cannot be readily separated. *Dunsmuir* para. 53

[19] On questions of jurisdiction, the standard is necessarily correctness.

[20] The Supreme Court of Canada has held that a standard of review analysis need not be conducted in every application for judicial review. Where the standard of review applicable to the particular question before the Court is well settled by past jurisprudence, the reviewing court may apply that standard of review. *Dunsmuir* para. 57.

[21] The issues in this case attract different standards of review.

[22] The first issue is a question of law. It concerns a provision of the *Code* restricting an adjudicator's jurisdiction to complainants who have neither been laid of for a lack of work, nor for the discontinuance of their function. Courts have found many errors of law are reviewable on a standard of reasonableness where there is a strong privative clause as is the case here. However there is only one standard of review for provisions which concern jurisdictional constraints - correctness. *Aziz v. Telesat Canada*, [1995] F.C.J. No. 1603 at paras. 14-19. (*Aziz*)

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[23] In *Aziz*, Mr. Justice Darrel Heald discussed the relationship between fact finding and jurisdiction. To the extent that an adjudicator is applying the law to the facts, the standard of review for a finding of mixed fact and law is reasonableness:

> 18 In the case of Canada v. Davis11, Mr. Justice Muldoon discussed the standard of review applicable to judicial review of the decision of an adjudicator appointed pursuant to the Labour Code. In that case, the same privative clause was under review as in the case at bar. Muldoon J. concluded, in such circumstances, that the standard of review with respect to errors within jurisdiction was that of patent unreasonableness whereas with respect to the question of jurisdiction, the standard is one of correctness. Muldoon J. relied particularly on the decision of the Supreme Court of Canada in Paccar of Canada Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers, Local 14.12
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> 19 To summarize, the relevant jurisprudence clearly establishes that the standard of review relating to errors of fact and law is the high or strict test of patent unreasonableness. It also establishes that the lower standard of correctness applies where the errors relate to provisions defining the jurisdiction of an adjudicator.

[24] The second issue concerns questions of fact. In *Kassab v. Bell Canada* 2008 FC 1181, Justice Pinard reviewed an adjudicator's a decision not to hear a dismissal complaint pursuant to s. 242(3.1)(a) of the *Code*. Justice Pinard reviewed findings of fact on a standard of reasonableness based upon his reading of *Dunsmuir* para. 53. I agree with Justice Pinard's conclusion that the appropriate standard of review of an adjudicator's findings of fact is reasonableness.

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[25] The final procedural issue is question of law. Since *Dunsmuir*, courts must choose between two standards of review when reviewing the decisions of administrative tribunals: reasonableness and correctness. The Supreme Court teaches the following:

> As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (Toronto (City) v. C.U.P.E., at para. 62, per LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers.

I find the interpretation of procedural provisions in the *Code* is a question of "general law". This Court has much more expertise in assessing the measures and procedures which make a hearing fair. I therefore find this issue must be reviewed on a standard of correctness.

LEGISLATION

[26] The *Canada Labour Code* provides:

242. (2) An adjudicator to whom a complaint has been referred under subsection (1) (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe; (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the	242. (2) Pour l'examen du cas dont il est saisi, l'arbitre : a) dispose du délai fixé par règlement du gouverneur en conseil; b) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier… (3.1) L'arbitre ne peut

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complaint;…	procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	
(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or	a) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;

[27] *The Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court* (SOR/98-106) (the *Rules*) provide:

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

ANALYSIS

Did the Adjudicator make an error of law with respect to his conclusion regarding s. 242(3.1)(a) of the Canada Labour Code?

[28] In this matter the Adjudicator set out the test for section 242(3.1)(a) relying on a reference in Howard Levitt's text, the Law of Dismissal in Canada, 3rd Edition 2-37, 38 and directing himself as follows:

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> S. 242(3.1) recognizes an employer's inherent right and discretionary power to make organizational decisions and efficiency determinations during restructuring. Having said this, the law is well settled that the onus of proof is upon the employer to prove that the employee was, in fact, laid off. And in so doing, the employer must introduce evidence that the lay-off was bona-fide by showing that either there was "lack of work" or "the discontinuance of a function". Furthermore, the "lack of work" or "discontinuance of a function" can not be just one reason for the lay off but the "real, essential, operative reason" or the "actual and dominant reason" for the termination.

[29] The Applicant does not challenge this statement. Much of the Applicant's argument emphasizes separation of employment on the Canadian Flag ship from employment on the foreign flag ships. It argues two Canadian ships are being replaced by one Canadian ship. The Applicant states that it only has responsibility for providing a crew on the Canadian ship. Hence, it argues, the jurisdictional issue in subsection 242(3.1)(a) comes into play.

[30] The Applicant submits that a lack of work arises with the reduction in the Canadian fleet. The Applicant further contends a discontinuance of Respondent's pump man function on the replacement Canadian ship.

[31] The Applicant's position contrasts with the Adjudicator's conclusion. The Adjudicator found four vessels were replacing two decommissioned vessels and that the "real, essential, operative reason" or the "actual and dominant reason" for the Respondent's dismissal was not for a lack of work or the discontinuance of a function.

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[32] The Adjudicator correctly stated the law to form the basis of his interpretation of section 242(3.1)(a) of the *Code*. Now I must consider whether his findings of fact support his conclusion he was not prevented from hearing the complaint.

Did the Adjudicator base his decision that he had jurisdiction to hear the Respondent's complaint under section 240 of the Canada Labour Code on an erroneous finding of fact that was made in a perverse or capricious manner and/or without regard to the material before him?

[33] The Applicant submits the Adjudicator erred in stating that its witness, Ms. Belinda McQuade, became the Manager and Director of Norbulk Shipping Company Ltd. The evidence of both the Applicant and the Respondent shows several companies share the name Norbulk: Norbulk Shipping Company Ltd., Norbulk Shipping UK Ltd. and Norbulk Shipping (NB) Ltd. The Respondent notes that the Applicant's witness declares she was not a director or manager of Norbulk Shipping Ltd. or Norbulk Shipping UK Ltd. but avoids any reference to Norbulk Shipping (NB) Ltd. The Respondent suggests the latter was the corporation referred to and misnamed by the witness in testimony, a simple error that was tracked by the Adjudicator. In my view, the error complained of by the Applicant is immaterial to the Adjudicator's conclusion.

[34] The Applicant submits the Adjudicator erred in finding it was a shipping crew service company that provided seafarers/crewman to vessels without specifying it only provided this service to Canadian vessels. Since the Adjudicator identified the Canadian replacement vessel as the M.T. Acadian and later stated the Applicant crewed the M.T. Acadian while the three foreign flagged ships were crewed by another Norbulk company, I do not agree the Adjudicator erred.

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[35] The remaining factual errors alleged by the Applicant all relate to whether the Respondent was interviewed for a position on the M.T. Acadian only or for a position on one of the four ships coming in to service. The Applicant submits the Adjudicator made the following findings of fact not supported by the evidence:

a. That in October, 2003 Norbulk gave the Complainant a half hour interview to see if the Complainant was qualified to crew one of the four (4) replacement vessels, whereas the Complainant was only interviewed for open positions on the one Canadian vessel, the *Acadian*;

b. That Ocean Services was required to sufficiently interview the Complainant for open positions on other vessels; and

c. That open positions on the new vessels should have been filled on the basis of seniority; and

d. That the Employer's documents clearly sets out that there were to be four (4) vessels replacing the two (2) vessels being decommissioned, without reference to the fact that Ocean Services was to provide seafarers/crewman to only one of these four new vessels.

[36] The Applicant insists the evidence shows the Respondent was only interviewed for a position on the M.T. Acadian. The Adjudicator found otherwise, stating:

> A number of crew lists in evidence were shown to be on Norbulk let (paper) head. The Employer managed the crew of the M.T. Acadian while the (3) new foreign vessels were crewed by another crewing company known as Hanza, with Russian and Latvian crew. In October, Norbulk gave the Complainant, what appeared to be a half hour interview to see if the Complainant was qualified to crew one of the four (4) replacement vessels.

[37] I have reviewed the evidence the Adjudicator had before him and I find his assertion is reasonable. First, the Applicant's witness, Ms. McQuade, testified:

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> On October 1, 2003, Guenette was interviewed for 30 minutes for open positions on the new vessel Acadian to be provided by Vroon B.V. by the Ship Managers, Norbulk Shipping UK Ltd. Guenette was not interviewed for the Nor"Easter, Great Eastern or New England as these ships were being manned by foreign seafarers and crewman by foreign manning companies. He was not successful in obtaining a position.

Ms. McQuade was not present at the time of the interviews and her information about the interviews and the scope of those interviews would only be based on information and belief. As such, her evidence is not to be given any weight. *Rules* 81(1), *Kassab* paras. 20, 21.

[38] The documentary evidence is not as explicit as Ms. McQuade's assertion. In Exhibit A of Ms. McQuade's affidavit, Product Tanker Replacement Project Presentation to Officers and Crew – September 22, 200,3 there is the statement:

> Manpower requirements –
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> - The manning requirements for the Canadian Flag vessel will be for two full complements of approximately – 38 persons
> - The manning requirements for the Foreign Flag vessels would be for Captains and Chief Engineers and could be, subject to suitability and agreed terms and conditions, - 12 persons
> - Shore Staff requirements are possibly a Technical Manager, Marine Superintendant and an Administrative Assistant
>
> Current Manpower Notification Schedule –
>
> - In the month of October 2003, the Ship Managers, Norbulk will carry out interviews for open positions in the manning of the new tankers.

[39] In Exhibit B, in the Product Tanker Replacement Project – [sic] Itenerary for Nobulk Vist October 1 – 3, there is the statement:

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> Norbulk personnel will be visiting Saint John to meet with Senior Management of Kent Line Limited to discuss OSL and Ship Management and thereafter conduct interviews with Office Staff.
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> Meetings and interviews will then be carried out with ship's personnel on leave and residing in Saint John and also with those ship's personnel onboard the vessel Irving Canada, which is expected to be at Saint John at that time.

[40] The Respondent's name is on the list of ships' personnel for interview on October 1, 2003. The documentary evidence records that another individual on the Irving Canada crew list, Kirk Taylor, subsequently became a member of the crew on the foreign flagged M.T. Nor'Easter.

[41] I note the Applicant did not interview the Respondent. His interview was conducted by Norbulk Shipping UK Ltd. which had operations responsibility for all four ships. The submissions by the parties do not go into the role of Norbulk Shipping UK Ltd. in conducting these interviews. I would have thought the evidence should clarify whether Norbulk Shipping UK Ltd. was conducting interviews for its own purposes or acting as agent for either the Applicant or all of the crewing companies. That is not in evidence and may have been addressed in oral testimony before the Adjudicator but there is no transcript of the oral evidence.

[42] The onus is on the Applicant to establish the evidence does not rationally support the Adjudicator's findings. The Adjudicator is not required to refer to every piece of evidence that is contrary to his finding. *Cepeda-Gutierrez v. Canada* (Minister of Citizenship and Immigration) [1998] F.C.J. No. 1425 paras. 14 - 16.

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[43] In this case, it is not so clear that evidence before the Adjudicator establishes that the Respondent was only interviewed for a berth on the M.T. Acadian. There was evidence before the Adjudicator that could support his finding. I cannot say that the Adjudicator erred in making findings of fact unsupported by the evidence before him.

[44] The Adjudicator having identified the correct legal test for consideration of subsection 242(3.1)(a) and applied the same to facts not unreasonably found, I cannot say the Adjudicator's finding on the question of mixed fact and law that the Respondent was not laid off due to a lack of work or discontinuance of a function is unreasonable.

Did the Adjudicator err in his interpretation and application of section 242(2)(b) of the Canada Labour Code in conducting the hearing of this complaint?

[45] The Applicant submits the Adjudicator failed to observe the principles of natural justice and/or procedural fairness. At the close of the Applicant's evidence, the Adjudicator adjourned the hearing, ordered the Applicant to disclose further documentary evidence over its objection and, after further disclosure, reconvened the hearing to hear further *viva voce* evidence.

[46] Section 242(2)(b) of the *Code* provides that the Adjudicator shall determine the procedure to be followed providing that he gives full opportunity to the parties to present evidence and make submissions.

[47] The Applicant's evidence is that its witness, Belinda McQuade, Director and Manager of the Applicant, testified on September 20, 2007. She was examined by Applicant's counsel, cross-

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examined by Respondent's counsel, and re-examined by Applicant's counsel. Respondent's counsel did not propose to call evidence on the preliminary motion. After a short adjournment, the Applicant's counsel commenced closing argument but was interrupted by Respondent's counsel who requested an adjournment for disclosure of further information and more opportunity to cross examine the Applicant's witness. After hearing the objection by Applicant's counsel, the Adjudicator granted the adjournment and ordered further disclosure.

[48] After the Applicant provided disclosure, the hearing resumed on September 4, 2008. The Adjudicator questioned the Applicant's witness who was then examined by Applicant's counsel and cross examination by Respondent's counsel. The Applicant had opportunity to re-examine its witness and both counsel made closing submissions. The Adjudicator's decision was issued on September 10, 2008.

[49] Other than the initial interruption for adjournment and further disclosure, the Applicant does not suggest it was denied opportunity to make its submissions. Given the forgoing evidence, I cannot conclude that the Adjudicator denied the Applicant full opportunity to present evidence or to make submissions as required by the *Code.*

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CONCLUSION

[50] I find the Adjudicator applied the correct legal test to facts he found. I cannot say the Adjudicator's decision is unreasonable with respect to questions of fact and mixed fact and law. The conduct of his hearing conformed to the procedural requirements of the *Code*.

[51] The application for judicial review will be dismissed.

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JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. Costs are in the cause.

Leonard S. Mandamin”
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1567-08
STYLE OF CAUSE:	OCEAN SERVICES LIMITED and MARCEL GUENETTE
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	JULY 14, 2009
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DATED:	FEBRUARY 19, 2010

APPEARANCES:

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Peter H. MacPhail	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Gorman Nason Saint John, New Brunswick	FOR THE RESPONDENT

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