Federal Court  Cour fédérale

Date: 20121217

Docket: T-503-12

Citation: 2012 FC 1484

Ottawa, Ontario, December 17, 2012

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CUPE, AIR CANADA COMPONENT

Applicant

and

CANADA (MINISTER OF LABOUR) and AIR CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] The respondents, Canada (Minister of Labour) and Air Canada, have brought this motion seeking an Order to strike the applicant's application for judicial review of the Minister of Labour's decision not to issue a direction in response to a complaint that Air Canada violated Part II of the *Canada Labour Code*, RSC 1985, c L-2 [the Code] and Part XX of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 [*COHSR*]. The application for judicial review seeks *mandamus* to compel the issue of a direction and to compel the Minister to prosecute Air Canada

for a violation of the Code. The respondent submits that the *mandamus* application should fail because it seeks a remedy not available at law.

Background

[2] On October 21, 2010, the applicant, the Canadian Union of Public Employees – Air Canada Component [CUPE] and two other unions, the Air Canada Pilots Association [ACPA] and the National Automobile, Transportation and General Workers Union of Canada [CAW][1], filed a complaint with Human Resources and Skills Development Canada [HRSDC] alleging that Air Canada was in violation of Section 125.1 (z.08) and (z.16) of the *Canada Labour Code* and *COHSR* Part XX. The complaint alleged that: Air Canada did not include the ACPA early enough in the process; that Air Canada's choice of an officer from the Corporate Security department as the "competent person" to investigate workplace violence was not acceptable as that person was not considered to be impartial by the unions; and, mere consultation with the Policy Committee did not constitute active participation, as required by the *COHSR*. The complaint requested "that the presiding HRSDC officer in Toronto, Ontario intervene and exercise their jurisdiction in this matter".

[3] Health and Safety Officer [HSO] Véronique Morin investigated the complaint. By letter dated March 9, 2012, she addressed the three issues and concluded with respect to each that the employer was not in violation of the Code ["HSO Morin's Decision"].

[1] CAW was granted leave to intervene in the present proceedings by Order of Justice Rennie dated May 28, 2012.

[4] That same day, the applicant filed an application for judicial review of the decision. The applicant, CUPE, sought the following relief (in addition to costs):

- An order for *mandamus* requiring the Minister or another HSO to issue a direction pursuant to subsection 145(1) that Air Canada terminate its alleged violations of the Code and the *COHSR*;
- An order for *mandamus* requiring the Minister or her designate to prosecute the matter; or alternatively to grant consent to the applicant to prosecute the matter;
- An order requiring the Minister to apply or cause an application to be made to a superior court judge for an order enjoining Air Canada from contravention of the Code and the *COHSR*.

The Current Motion

[5] The respondents now seek the following relief:

a. An Order striking out the applicant's notice of application, or portions thereof;

b. An Order dismissing the applicant's application for judicial review;

c. In the alternative, an Order to stay or place in abeyance the applicant's notice of application pending the rendering of a decision of Justice Rennie of the respondent's motion in *CUPE v Canada (Minister of Labour) and Canada (Minister of Transport) and Air Canada*, court file T-1072-10 and the final disposition of the *mandamus* issue in that application;

d. Costs of this motion; and

e. Such further relief as this Honourable Court may consider just.

[6] It should be noted that Justice Rennie issued a decision on June 7, 2012 [the June 7, 2012 Order] in *CUPE v Canada (Minister of Labour) and Canada (Minister of Transport) and Air Canada*, court file T-1072-10. In that application, the unions sought *mandamus* to require the Minister to prosecute an alleged violation of the Code and to require the Minister to apply for an order enjoining Air Canada from contravening a Direction previously issued. The respondents sought an order removing them as respondents and an order dismissing the application for judicial review seeking *mandamus* to compel them to prosecute Air Canada and to seek an order enjoining Air Canada from contravening the Code. Justice Rennie's Order removed the respondents and dismissed the application insofar as it sought *mandamus*.

[7] A stay, as proposed in paragraph c), above, is no longer an option. However, while the factual issues are not identical in the current application, the legal issues are the same.

Positions of the Parties

Respondent (Moving Party): Canada (Minister of Labour)

[8] The respondent submits that the merits of the HSO's decision are not at issue. The HSO conducted an investigation which included the scheduling of several meetings to discuss the complaint and consideration of the submissions made by the unions. The HSO reviewed the three elements of the complaint, provided reasons, and concluded that there was no violation of the Code by Air Canada. The decision was first communicated to the parties orally, followed by a written decision on March 9, 2010.

[9] The respondent agrees that the decision may be judicially reviewed: *Sachs v Air Canada*, 2007 FCA 279, [2007] FCJ No 1166 [*Sachs*], but that the appropriate remedy is *certiorari*.

[10] The respondent submits that the test for *mandamus* established by the Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)* (1993), [1994] 1 FC 742, [1993] FCJ No 1098 at para 45 (FCA) [*Apotex*], aff'd [1994] 3 SCR 1100, [1994] SCJ No 113 (and adopted in *St Brieux (Town) v Canada (Minister of Fisheries and Oceans)*, 2010 FC 427, [2010] FCJ No 491 [*St Brieux*]) governs and that the applicant fails to meet the test.

[11] The respondent submits that Justice Rennie's decision addressed the same legal issues and should be followed.

[12] The respondent, Canada (Minister of Labour), submits that the application seeks remedies that are not available at law and have no possibility of success. The applicant unions are seeking to force the Minister of Labour to exercise her discretion in a particular way; to prosecute Air Canada for violations of the Code or to delegate the prosecutorial discretion to a member of the public.

[13] The respondent agrees that the Court is not prohibited from reviewing prosecutorial discretion, but submits that a very high standard must be met to do so. This case does not involve conduct which "shocks the conscience of the community" nor is this a case of flagrant impropriety established by proof of misconduct bordering on corruption, violation of the law, or bias against or for a particular individual: *Ochapowace First Nation (Indian Band No 71) v Canada (Attorney General*, 2007 FC 920, [2007] FCJ No 1195 at paras 47-48.

[14] Moreover, the respondent submits that while the Minister of Labour must consent to prosecutions, it is the Director of Public Prosecutions that decides whether a prosecution will proceed, and therefore, it would have no practical effect to compel the Minister of Labour to consent to prosecute.

[15] With respect to the injunctive relief requested, the respondent submits that the issue is not justiciable: *Friends of the Earth v Canada (Governor in Council*), 2008 FC 1183, [2008] FCJ No 1464. The respondent reiterates that *mandamus* is not available to compel the Minister to exercise her discretion in a particular way, specifically to compel her to seek an injunction.

[16] In summary, the respondent's position is that, based on the test in *Apotex* and *St Brieux*, *mandamus* is not available. There is another adequate remedy available; *certiorari*

Respondent (Moving Party): Air Canada

[17] Air Canada agrees with the Minister of Labour and submits that the judicial review application should be struck because *mandamus* is not available at law.

[18] Air Canada agrees that the decision not to prosecute or issue a direction cannot be appealed and that the proper approach is to seek judicial review of the decision: *Sachs*, above. However, the appropriate remedy would be *certiorari*, which would permit the reasonableness of the decision to be addressed and would permit a redetermination of the complaint if allowed. *Certiorari* would address the applicant's allegations regarding bias, bad faith, jurisdiction or insufficiency of reasons.

[19] Air Canada supports Canada's position that the test for *mandamus* as set out in *Apotex* and *St Brieux* was not met. In addition, they submit that a direct request to the Minister to prosecute is a condition precedent pursuant to that test and that *mandamus* cannot issue as there has never been such a request; HRSDC was only asked to investigate a violation of the Code.

[20] In addition, Air Canada notes that the Director of Public Prosecutions exercises the discretion to prosecute and, while the consent of the Minister of Labour would be required, compelling the consent of the Minister would not determine whether to prosecute. Even if the Minister had been asked to prosecute, she would have had no basis to do so, given that her own officer had investigated the complaint and found that there was no violation.

[21] With respect to the request for *mandamus* to issue a direction, Air Canada adds that the Court could only issue a specific order capable of being enforced. A direction to simply take action would be too vague.

Applicant (Responding Party): CUPE

[22] CUPE submits that its application is necessary to compel Canada to enforce the Code either by issuance of a direction to terminate contraventions of the Code, or by way of an injunction, and prosecution is necessary to hold the employer responsible for violating the Code. CUPE emphasised the importance of the context of the complaint, which is workplace violence and that the problems continue.

[23] CUPE submits that the test to strike the application is that there is no possibility of success. As this is a debatable issue, the application should proceed.

[24] CUPE submits that when an HSO fails to issue a Direction, the effective remedy is *mandamus* as this could result in a direction to Air Canada to act or could result in a prosecution for violation of the Code.

[25] *Certiorari* would not be an effective remedy as it could only result in a redetermination of the complaint and, in the meantime, the offending conduct would continue. The unions could bring new complaints rather than seeking *certiorari*, but neither would ameliorate the problems.

[26] CUPE submits that the respondent's application is not about the reasons for the HSO's failure to act, nor is it about whether Air Canada was in contravention of the Code. These issues must be determined at a hearing on the merits. Although the respondent sought to address the merits, asserting that the HSO had conducted an investigation, CUPE submits that there is no evidence that the HSO did so or that she considered the submissions of the unions. These are issues to be addressed on judicial review.

[27] CUPE agrees that the test for granting *mandamus* is that established in *Apotex* and *St Brieux* and that it has met all parts of the test with respect to compelling prosecution and the issuance of a direction.

[28] CUPE submits that *mandamus* is available to review the failure of an HSO to issue a direction where there is a breach of the Code and the *COHSR*. CUPE also submits that *mandamus* is available for the prosecutorial and injunctive remedies sought and that there is an arguable case that prosecutorial discretion is reviewable in the circumstances of this case.

[29] CUPE claims that its request "that HRSDC officer exercise their jurisdiction" is a clear request to the Minister through the designated HSO to take whatever remedial measures are available under the Code. Therefore any necessary condition precedent was met.

[30] CUPE further submits that Justice Rennie's June 7, 2012 Order which struck the *mandamus* portions of the judicial review was wrong and CUPE has sought to appeal that Order.

Intervenor: CAW-Canada

[31] CAW also opposes Canada and Air Canada's application to strike the application. In addition, CAW alleges unfairness on the part of both HSO Morin and the Minister and bias against the unions. CAW contends that the Minister did not consider exercising her discretion in response to the complaint and did not give any other person authority to consent to the prosecution, thereby leaving Air Canada immune from prosecution. According to CAW, this suggests that the Minister is biased in Air Canada's favour.

Relevant Legislation

[32] *Canada Labour Code*, RSC 1985, c L-2 :

125. (1) Without restricting the generality of section 124,	**125.** (1) Dans le cadre de l'obligation générale définie à

every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

l'article 124, l'employeur est tenu, en ce qui concerne tout lieu de travail placé sous son entière autorité ainsi que toute tâche accomplie par un employé dans un lieu de travail ne relevant pas de son autorité, dans la mesure où cette tâche, elle, en relève :

[…]

[…]

(*z.08*) cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part;

z.08) de collaborer avec le comité d'orientation et le comité local ou le représentant pour l'exécution des responsabilités qui leur incombent sous le régime de la présente partie;

[…]

[…]

(*z.16*) take the prescribed steps to prevent and protect against violence in the work place;

z.16) de prendre les mesures prévues par les règlements pour prévenir et réprimer la violence dans le lieu de travail;

145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

145. (1) S'il est d'avis qu'une contravention à la présente partie vient d'être commise ou est en train de l'être, l'agent de santé et de sécurité peut donner à l'employeur ou à l'employé en cause l'instruction :

(*a*) terminate the contravention within the time that the officer may specify; and

a) d'y mettre fin dans le délai qu'il précise;

(*b*) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

b) de prendre, dans les délais précisés, les mesures qu'il précise pour empêcher la continuation de la contravention ou sa répétition.

[…]	[…]
Minister's consent required	Consentement du ministre
149. (1) No proceeding in respect of an offence under this Part may be instituted except with the consent of the Minister or a person designated by the Minister.	**149.** (1) Les poursuites des infractions à la présente partie sont subordonnées au consentement du ministre ou de toute personne que désigne celui-ci.
[…]	[…]
Injunction proceedings	Procédure d'injonction
152. The Minister may apply or cause an application to be made to a judge of a superior court for an order enjoining any person from contravening a provision of this Part, whether or not a prosecution has been instituted for an offence under this Part, or enjoining any person from continuing any act or default for which the person was convicted of an offence under this Part.	**152.** Le ministre peut demander ou faire demander à un juge d'une juridiction supérieure une ordonnance interdisant toute contravention à la présente partie — que des poursuites aient été engagées ou non sous le régime de celle-ci — ou visant à faire cesser l'acte ou le défaut ayant donné lieu à l'infraction pour laquelle il y a eu déclaration de culpabilité en application de la présente partie.

[33] *Canada Occupational Health and Safety Regulations*, SOR/86-304:

20.1 The employer shall carry out its obligations under this Part in consultation with and the participation of the policy committee or, if there is no policy committee, the work place committee or the health and safety representative.	**20.1** L'employeur qui s'acquitte des obligations qui lui sont imposées par la présente partie consulte le comité d'orientation ou, à défaut, le comité local ou le représentant, avec la participation du comité ou du représentant en cause.
20.9 (1) In this section, "competent person" means a person who	**20.9** (1) Au présent article, « personne compétente » s'entend de toute personne qui, à la fois :

(*a*) is impartial and is seen by the parties to be impartial;	*a*) est impartiale et est considérée comme telle par les parties;
(*b*) has knowledge, training and experience in issues relating to work place violence; and	*b*) a des connaissances, une formation et de l'expérience dans le domaine de la violence dans le lieu de travail;
(*c*) has knowledge of relevant legislation.	*c*) connaît les textes législatifs applicables.
[…]	[…]

The Issues

[34] The parties agree that the decision not to issue a direction can be judicially reviewed, but disagree on whether the remedy is *mandamus* or *certiorari*.

[35] The parties also agree that the eight-part test for issuing a *mandamus* order, as recently reiterated in *St Brieux*, applies. However, while the applicant submits that it has met all parts of the test, the respondents submit that the applicant has failed to meet the test (in particular parts 3, 4, 5 and 6). The test is:

1. There must be a public legal duty to act;

2. The duty must be owed to the applicant;

3. There is a clear right to performance of that duty, in particular:

    a. The applicant has satisfied all conditions precedent giving rise to the duty;

    b. There was (i) a prior demand for performance of that duty; (ii) a reasonable time tocomply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

4. Where the duty sought to be enforced is discretionary, the following rules must apply:

   a. in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

   b. *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

   c. in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

   d. *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

   e. *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty;

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought; and

8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[36] As noted above, the respondents argue that the Minister's delegate, the HSO, investigated the complaint and exercised her discretion not to issue a direction or to prosecute. *Mandamus* is not available to compel the exercise of discretion in a particular way. Moreover, compelling the Minister to consent to prosecution would yield no practical result because the discretion to prosecute rests with the Director of Public Prosecutions. In addition, *certiorari* is an alternative and adequate remedy. The respondents also assert that a condition precedent of requesting the Minister to

prosecute was not satisfied and that the complaint, which merely called upon HRSDC to investigate and exercise its jurisdiction, is not sufficient to satisfy this requirement.

[37] The applicant submits that the test has been met and that there is an arguable case that *mandamus* is available to compel prosecution or to compel a Direction to be issued. The applicant submits that while the threshold to review the exercise of prosecutorial discretion is very high, prosecutorial discretion is not absolute. The Minister's discretion is not unfettered. The applicant submits that *certiorari* is not an adequate alternative remedy as a redetermination of the complaint will not yield any practical result or effective relief. The applicant argues that judicial review should proceed and that the merits of the request for *mandamus* should be considered with the benefit of a complete record.

[38] As noted above, in *CUPE v Canada (Minister of Labour) and Canada (Minister of Transport) and Air Canada*, court file T-1072-10, the applicant sought *mandamus* to compel prosecution and an order to require the Minister to seek an injunction against Air Canada with respect to the alleged contraventions of a Direction. Justice Rennie issued his Order on June 7, 2012. The key difference in the present application is that the applicant seeks to have a Direction issued, rather than enforced. The facts are different but the legal issues are the same.

[39] I agree with the reasons of Justice Rennie that *mandamus* is not available as a matter of law to compel the Minister of Labour or her delegate to prosecute for an alleged violation of the Code.

[40] Prosecutorial discretion is reviewable only in exceptional cases and the circumstances of this case do not meet the threshold. There is no evidence that there are improper motives or bad faith or that failure to prosecute would shock the conscience of the community or bring the administration of justice into disrepute. There is no evidence of a policy of non-enforcement of the Code or a consistent pattern or practice amounting to a policy decision not to investigate.

[41] A decision to prosecute is not taken lightly; it would be based on a thorough investigation and would likely be a last resort if other measures to bring about compliance failed. While the consent of the Minister of Labour to prosecute is required, the decision to prosecute rests with the Director of Public Prosecution [DPP]. The DPP would carefully consider the results of an investigation when determining whether a prosecution should be pursued. The HSO is responsible for such investigations. To compel a prosecution where the investigation has concluded that it is not warranted would render the role of the HSO meaningless and could lead to prosecutions with no reasonable chance of success.

[42] The parties disagreed about whether the requirement to request a prosecution is a condition precedent and part of the test for *mandamus*. The Minister of Labour and Air Canada submitted that a prior request directly to the Minister was a condition precedent. CUPE and CAW submitted that this request was implicit in their complaint and also that a request to the HSO as the Minister's delegate was sufficient. In my view, this issue is not determinative. However, given the scope of the Minister's responsibilities, a requirement for complainants to directly request that the Minister prosecute an alleged violation would not be practical. Moreover, the Code does not appear to require such a direct request.

[43] Justice Rennie considered the same issues and the same jurisprudence cited by the parties and concluded that the exercise of prosecutorial discretion is not subject to judicial review, except in very rare circumstances. The *Apotex* and *St Brieux* test was considered and applied. The relevant parts of the Order (paras 21-29) are set out below:

> The exercise of prosecutorial discretion is, with rare and limited exception, not subject to judicial review. This is not the place to revisit the legal policy rationale which underlies the principle that the exercise of prosecutorial discretion will not be reviewed. The jurisprudence was thoroughly canvassed in *Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920, [2008] 3 FCR 571 by Justice Yves de Montigny. It is sufficient to note that the principle is well established and derives its antecedence in part, from the respective roles played by the different branches of government under our constitution: *R v Power*, [1994] 1 SCR 601; *DPP v Humphrys*, [1976] 2 All ER 497 per Viscount Dilhorne.
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> In *Power* at p 615-616 the Supreme Court of Canada (SCC) noted that the courts do have a residual discretion to review the exercise of discretion, but only in "the clearest of cases" where the conduct "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention."
>
> While not immune from review, the bar that must be crossed before prosecutorial discretion will be reviewed is very high. Much more is required than a mere surmise or argument from the counsel table to the effect that the discretion was abused; rather, according to the Court (*Power*, p 616):
>
> > To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. As will be developed in more detail further in these reasons, the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the

> public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

In *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372, the SCC delineated the core elements of prosecutorial discretion to include the decision to prosecute, to stay a charge, to accept a plea to a lesser charge and to withdraw a charge. What is sought here is an order compelling a decision to prosecute. This is a core element of prosecutorial discretion. Moreover, the applicant here seeks to expand the scope of judicial review into previously uncharted territory. To date, most jurisprudence addresses the potential abuse of process arising from a decision to prosecute an individual; no case law was put before this Court which would support the use of public law remedies to compel the prosecution of a third person.

As noted earlier, the investigation of violations of the *Code* and the *Aviation Occupational Safety and Health Regulations* are carried out by Health and Safety Officers acting under the dual authority of the Ministers of Labour and Transport. This investigatory function is analogous to that of police investigations, which the Courts have consistently declined to subject to judicial review, subject to the rare circumstances noted: *Zhang v Canada (Attorney General)*, 2007 FCA 201. The point was made by Laskin JA in *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649 (ON CA) at para 113.

Prosecutorial discretion is vested in the Attorney General but, under the *Director of Public Prosecutions Act* SC 2006, c 9, s 121, delegated to the Director of Public Prosecutions. Parliament has nonetheless required that the consent to prosecute of other ministers, in this case, the Minister of Labour be obtained. Other examples of this threshold consent to prosecute can be found in other federal statutes; *Parliamentary Employment and Staff Relations Act* (RSC, 1985, c 33 (2nd Supp.)); *Royal Canadian Mounted Police Act* (RSC, 1985, c R-10), section 49.

> Assuming, however, for the purpose of argument, that this "consent" bears some equivalence to prosecutorial discretion, in *Quebec North Shore & Labrador Railway Co. v Canada (Minister of Labour)*, [1996] FCJ No 545 the Federal Court of Appeal cited with approval the Ontario Superior Court decision in *R v Brinks Canada Ltd.*, [1994] OJ No 346 at para. 11:
>
> > "there is no reason why the exercise of prosecutorial discretion, when confided by Parliament to a different Minister of the Crown, should be held to be reviewable in courts on any different basis."
>
> This threshold consent to prosecute does not, in my view, replicate or pre-determine whether the Director of Public Prosecutions will in fact, in exercising his independent discretion, conclude that there is a reasonable prospect of a conviction and that it is in the public interest to prosecute.
>
> In sum, as a practical matter, as the prosecutorial discretion will ultimately be exercised by the Director of Public Prosecutions, the fact that the Minister of Labour may consent does not, in effect, guarantee a prosecution. *Mandamus* against the Ministers would be of no effect, given that prosecutorial discretion rests with the Director of Public Prosecutions.

[44] With respect to the applicant's request for *mandamus* to require the Minister or HSO to issue a direction to terminate the alleged violations of the Code and regulations, the test for *mandamus* has not been satisfied. *Mandamus* cannot order the exercise of discretion in a particular way. In this case, the HSO conducted an investigation and concluded that there was no violation. Although the applicant is not satisfied with this conclusion, the appropriate remedy is *certiorari* to review the reasonableness of that decision. The court cannot take it upon itself to determine whether a direction should be issued and what the direction should be, and a direction simply to act lacks sufficient precision to be enforceable or effective. This is the role of the HSO as delegated by the Code.

[45] With respect to the request for an Order requiring the Minister to seek an Order enjoining Air Canada from contravention of the Code and the *COHSR*, I adopt the reasons of Justice Rennie and agree that the test for *mandamus* is not met and the issue is not justiciable. As he noted at para 30:

> There remains the question whether *mandamus* can be obtained ordering the Minister to commence injunction proceedings forcing Air Canada to comply with the 2006 Direction. This relief is dismissed for two reasons. First, the subject matter of this request is not justiciable. The subject matter is not appropriate in judicial intervention and in any event the Court lacks the capacity to enforce the matter: *Friends of the Earth v Canada (Environment)*, 2009 FCA 297 at para 25. Second, even if the subject matter were justiciable, the criteria for *mandamus* are not met: *Apotex*. The Ministers are under a clear and weighty duty to enforce the law, but absent bad faith or exceptional circumstances, it is not a duty which the Court will enforce**:** *R v Police Commissioner of The Metropolis Ex parte Blackburn*, [1968] 1 All ER 763; *Northern Lights Fitness Products Inc. v Canada (Minister of National Health and Welfare)* [1994] FCJ No 319. It is imperative however, not to overstate the principle. In *Blackburn*, the Court of Appeal would have issued *mandamus* to compel the investigation and prosecution, as would the Federal Court in *Distribution Canada Inc. v Canada (Minister of National Revenue - M.N.R.)*, [1993] FCJ No 9, had there been an evidentiary finding of either a policy of non-enforcement or a consistent pattern or practice amounting to a policy decision not to investigate.

[46] While the applicant does not agree that the complaints were thoroughly investigated, the decision includes reasons indicating that each aspect was considered and that something was done. Whether the decision is reasonable is not for this Court to determine at this time.

[47] While mindful that an application for judicial review should be determined on its merits, for the reasons noted above, the relief sought is not available as a matter of law and the respondent's

motion to strike the application for judicial review is granted. Again, adopting the words of Justice Rennie in his June 7, 2012 Order, at para 17:

> The presumptive rule is that an application for judicial review is to be determined on its merits, after a hearing: *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, [1995] 1 FC 588 at pp 596-597 (CA). This is consistent with the sound legal policy objective of disposing of applications expeditiously. Nevertheless, the Court will dismiss, on an interlocutory basis, an originating application where there is no chance of success: *Torres Victoria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 857.

[48] For the reasons noted above, this application has no chance of success insofar as it seeks *mandamus*.

ORDER

THIS COURT ORDERS that:

1. The relief sought by way of *mandamus* is dismissed from the Notice of Application.

2. This Order is without prejudice to the applicants' judicial review seeking *certiorari*.

3. No order as to costs.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-503-12
STYLE OF CAUSE:	CUPE, AIR CANADA COMPONENT v. CANADA (MINISTER OF LABOUR) ET AL
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	December 17, 2012

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