Federal Courts Reports
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A-185-21

2022 FCA 25

Commissioner of Competition (*Appellant*)

v.

Secure Energy Services Inc. and **Tervita Corporation** (*Respondents*)

INDEXED AS: CANADA (COMMISSIONER OF COMPETITION) V. SECURE ENERGY SERVICES INC.

Federal Court of Appeal, Pelletier, Locke and LeBlanc JJ.A.—By videoconference, January 19; Ottawa, February 9, 2022.

Competition — Appeal from Competition Tribunal decision dismissing appellant's request for short-term relief (Application in Issue) pending hearing of application under Competition Act, s. 104 — Application under s. 104 (Section 104 Application) was application for interim relief pending hearing of application under Act, s. 92 (Section 92 Application) — Section 92 Application that prompted Section 104 Application, then Application in Issue sought to enjoin proposed transaction through which respondents would merge (Proposed Transaction) — Section 104 Application sought interim order prohibiting proposed merger until Section 92 Application could be heard, decided — Application in Issue sought "interim interim relief" to prevent merger pending hearing of Section 104 Application — Tribunal finding it lacked jurisdiction to grant appellant's requested relief — In present appeal, appellant seeking reversal of Tribunal`s finding that it lacked jurisdiction ever to grant interim interim relief — Given closing of Proposed Transaction, absence of live controversy on Application in Issue, present appeal moot — Discretion exercised to hear, decide appeal despite mootness — Main issue was whether Tribunal having jurisdiction to grant requested relief — Appellant arguing that Act, s. 104 providing jurisdiction necessary to grant requested relief or that such jurisdiction existing by necessary implication — Text, context, purpose of s. 104 examined — Act, s. 104(1) indicating it applies when application pursuant to s. 92 has been filed, which was case in present appeal — Since s. 104(1) applying in present situation, text not to be read more narrowly than plain textual reading suggested — Reference in s. 104(1) to "any interim order" encompassing both "interlocutory", "interim" relief as terms used in superior courts — Also, Parliament provided detailed, specific tools to appellant, related powers to Tribunal, to intervene in transactions of concern under Act — Concerning purpose of s. 104, intent of merger review scheme to ensure that proposed mergers could be reviewed, challenged before they close — Nothing in goal of encouraging completion of merger review before closing suggesting narrow interpretation of term "any interim order" — Therefore, Act, s. 104 providing that Tribunal having jurisdiction, in proper circumstances, to grant both interlocutory relief pending decision on application under s. 92, interim relief pending decision on whether to grant interlocutory relief — Accordingly, Tribunal erring in concluding that it lacked jurisdiction necessary to grant relief requested in Application in Issue — Appeal allowed.

Practice — Mootness — Whether appeal should be heard despite its mootness — Question arising in context of appeal from Competition Tribunal decision dismissing appellant's request for short-term relief (Application in Issue) pending hearing of application under Competition Act, s. 104 seeking interim order prohibiting proposed merger — Given closing of proposed transaction (i.e. merger), absence of live controversy on Application in Issue, present appeal moot — Courts having discretion to hear appeal despite its mootness — In deciding whether to exercise such discretion, court should consider factors discussed by Supreme Court of Canada in Borowski v. Canada (Attorney General) — Factors are (i) whether adversarial context remains; (ii) concern for judicial economy; (iii) respect for proper law-making function of Court — Question in issue in present appeal likely to recur — All three factors listed in Borowski favouring hearing appeal –- Therefore, discretion exercised to hear, decide present appeal.

Practice — Appeals and New Trials — Whether appellant raised new issue on appeal —Question arising in context of appeal from Competition Tribunal decision dismissing appellant's request for short-term relief (Application in Issue) pending hearing of application under Competition Act, s. 104 — Appeal raising no new issue that should not be considered — While appellant's argument before Tribunal not directed explicitly to interpretation of s. 104, Tribunal clearly considered that section when it concluded that it lacked jurisdiction to grant requested relief — Appellant entitled to appeal its consideration on this point — Thus, appellant made new argument on existing issue but not raising new issue.

This was an appeal from a decision of the Competition Tribunal dismissing the appellant's request for short-term relief (Application in Issue) pending the hearing of an application under section 104 of the *Competition Act*. The application under section 104 (Section 104 Application) was an application for interim relief pending the hearing of an application under section 92 of the Act (Section 92 Application). The Section 92 Application that prompted the Section 104 Application and then the Application in Issue sought to enjoin a proposed transaction through which the respondents would merge (the Proposed Transaction). The Section 104 Application sought an interim order prohibiting the proposed merger until the Section 92 Application could be heard and decided. Citing the imminent date of the proposed merger, the Application in Issue sought "interim interim relief" to prevent the merger pending the hearing of the Section 104 Application.

In March, 2021, the respondents submitted to the appellant a pre-merger notification pursuant to subsection 114(1) of the Act. A month later, the appellant issued a Supplementary Information Request (SIR) pursuant to subsection 114(2) to which the respondents responded. In June 2021, the respondents undertook to provide 72 hours' notice of their intention to close the proposed transaction. They then provided that notice late in the evening on June 28, 2021, thus opening the possibility that the respondents would effect their merger as early as July 1, 2021 in the late evening. The appellant responded by filing the Section 92 Application and then the Section 104 Application on June 29, 2021. Upon notice from the respondents later that day that they would not voluntarily delay the merger until a ruling on the Section 104 Application, the appellant requested an emergency case management conference to address the Application in Issue. That application was heard by the Competition Tribunal the next day (June 30, 2021). The Tribunal's Decision dismissed the Application in Issue on July 1, 2021, just minutes before the possible merger. The appellant immediately appealed the decision and made a motion "on an emergency basis for an interim interim order prohibiting closing the Proposed Transaction pending a hearing on a later motion for an interim injunction." The emergency motion was dismissed and the respondents closed the Proposed Transaction a few minutes later, merging the respondents. They continue now as a single entity with the same name as one of the merging entities: SECURE Energy Services Inc. (respondent). Since then, the Section 104 Application was amended to recognize the merger and to seek different relief. That Application was heard and dismissed. The Section 92 Application was also amended to reflect the fact that the merger occurred and to seek to dissolve it rather than block it.

The Tribunal saw two issues before it. The first was whether it had the jurisdiction to grant the "interim interim" relief sought in the Application in Issue. The second was whether, if the Tribunal had jurisdiction, it should grant said relief. In the end, the Tribunal concluded that there was no need to address the second issue because it found that it lacked the jurisdiction to grant the requested

relief.

The present appeal was no longer concerned with whether the “interim interim” relief sought in the Application in Issue should have been granted on the facts of this case. Rather, the appellant limited himself to seeking a reversal of the Tribunal’s finding that it lacked jurisdiction ever to grant such relief. Because the Proposed Transaction was now closed and the respondents merged to continue as SECURE, there was no longer a live controversy on the Application in Issue and the present appeal was moot. Also, the respondent argued that the appellant’s submission that the Tribunal’s jurisdiction to grant the requested relief came from section 104 of the Act was not made to the Tribunal and thus it raised a new issue for the first time on appeal. Therefore, there were preliminary issues that needed to be addressed.

The two preliminary issues were whether the appeal should be heard despite its mootness and whether the appellant raised a new issue on appeal. The main issue was whether the Tribunal has jurisdiction to grant the requested relief.

Held, the appeal should be allowed.

Courts have discretion to hear an appeal despite its mootness. In deciding whether to exercise such discretion, a court should consider the factors discussed by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*. The factors are (i) whether an adversarial context remains, (ii) the concern for judicial economy, and (iii) respect for the proper law-making function of the Court. There was an adversarial context in the present appeal. Both sides of the debate were well and vigorously argued by parties who had an ongoing dispute. Regarding judicial economy, the Court’s decision on this appeal would have no practical effects on the rights of the parties. However, judicial economy nevertheless favoured hearing the appeal because the absence of practical effects for the parties was outweighed by the other considerations. The question of the Tribunal’s jurisdiction to grant the relief that was sought by the appellant was evasive of appeal since the need for such short-term relief is fleeting and will typically not last beyond the hearing of the original application for interim relief under section 104. Also, although there is no inconsistent case law on the question in issue, and little judicial consideration of the relevant statutory provisions, this was a weak basis for concluding that the question was unlikely to recur. The dearth of judicial consideration does not necessarily indicate any particular commonly held understanding of the scope of the Tribunal’s jurisdiction on the question. Therefore the question in issue in the present appeal was likely to recur. With respect to the proper law-making function of the Court, the respondent argued that this factor favoured refusing to hear the moot appeal, in particular since the appellant sought an interpretation of section 104 of the Act that was not put in issue before the Tribunal. Despite the fact that the appellant’s argument before the Tribunal did not appear to have focused explicitly on the interpretation of section 104 itself, the Tribunal clearly reached a conclusion that it lacked jurisdiction to grant the requested relief, and it indicated clearly that it considered section 104 among other provisions. The present appeal sought a different interpretation of section 104 than that reached by the Tribunal. Statutory interpretation is clearly part of the proper law-making function of the courts. Thus, this factor favoured the exercise of discretion to hear the appeal in the present matter. Therefore, all three of the factors listed in *Borowski* favoured hearing the appeal. Discretion was therefore exercised to hear and decide the present appeal.

As to the second preliminary issue, the appeal raised no new issue that should not be considered. The respondent argued that the present appeal raised a new issue that was not argued before the Tribunal (the Tribunal’s jurisdiction under section 104 to grant the relief requested in the Application in Issue), which issue should not be heard for the first time by the Court. This argument involved some of the same considerations in relation to the proper law-making function of the Court: though the appellant’s argument before the Tribunal was not directed explicitly to the interpretation of section 104, the Tribunal clearly considered section 104 when it concluded that it lacked jurisdiction to grant the requested relief. Regardless of the arguments that were made before the Tribunal, the appellant was entitled to appeal its conclusion on this point. Essentially, the appellant was making a new argument on an existing issue but was not raising a new issue.

Regarding the jurisdiction of the Competition Tribunal to grant the requested relief [heading C above para. 46], the appellant relied on two separate grounds for the Tribunal's jurisdiction. First, the appellant argued that section 104 of the Act, properly interpreted, provides the jurisdiction necessary to grant the requested relief. Second, even if section 104 itself does not provide the necessary jurisdiction, such jurisdiction exists by necessary implication. The text, context and purpose of section 104 of the Act were examined. The key provision of section 104 is subsection 104(1), which provides that, where a certain condition has been met ("an application has been made for an order under this Part, other than an interim order under section 100 or 103.3"), the Tribunal "may issue any interim order that it considers appropriate", subject to the restriction set out in the concluding words of the subsection ("having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief"). The text of subsection 104(1) indicates that it applies when an application pursuant to section 92 of the Act has been filed, and that was the case here. Since subsection 104(1) applied in the present situation, there was no reason in the text thereof to read it as being limited in the way the respondent urged. Subsection 104(1) contemplates "any interim order" that the Tribunal considers appropriate, and this broad scope is limited only by reference to "principles ordinarily considered by superior courts when granting interlocutory or injunctive relief." However, the wording of subsection 104(1) does not preclude the type of "interim interim" relief that the appellant sought before the Tribunal. Subject to the context and the purpose of section 104, the reference therein to "any interim order" in the text of subsection 104(1) appears to encompass, at least in the technical sense, both "interlocutory" and "interim" relief, as these terms are typically used in superior courts. A reading of subsection 104(1) is that the Section 92 Application could be the application that supported both the Section 104 Application and the Application in Issue. As to the context of section 104, Parliament has provided detailed and specific tools to the appellant, and related powers to the Tribunal, to intervene in transactions that are of concern under the Act, and has decided not to grant other such tools and powers. However, there was nothing in the context of section 104, including section 100, that suggested that the broad power of the Tribunal to issue "any interim order that it considers appropriate" should be read more narrowly than a plain textual reading suggested, so as to exclude the relief sought in the Application in Issue. Concerning the purpose of section 104 of the Act, the appellant rightly provided a review of the intent of the merger review scheme provided for in the Act, including in section 104 thereof. He explained that the goal of the scheme was to ensure that proposed mergers could be reviewed and, if necessary, challenged before they close. This is because Parliament recognized that it can be very difficult to reverse or offset anti-competitive effects of a merger after it has been completed. Contrary to the respondent's argument, there was nothing in the goal of encouraging completion of merger review before closing that would suggest a narrow interpretation of the term "any interim order".

Having considered the text, context and purpose of section 104 of the Act, that section provides that the Tribunal has jurisdiction, in the proper circumstances, to grant both interlocutory relief (as that term is typically used in superior courts) pending a decision on application under section 92, and interim relief (as that term is typically used in superior courts) pending a decision on whether to grant interlocutory relief. Accordingly, the Tribunal erred in concluding that it lacked the jurisdiction necessary to grant the relief requested in the Application in Issue. The Tribunal might well have been justified in refusing to grant such relief in this case based on the facts, but that was not the basis for the decision.

STATUTES AND REGULATIONS CITED

Competition Act, R.S.C., 1985, c. C-34, ss. 1.1, 75 to 107, 92, 100, 103.3, 104, 114(1),(2), 123.

Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, ss. 8(2), 9(2), 13(1).

Competition Tribunal Rules, SOR/2008-141, rr. 2, 34(1).

Federal Courts Rules, SOR/98-106, r. 372(1).

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653, 44 D.L.R. (4th) 1; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231; *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598 *Nova Chemicals Corporation v. Dow Chemicals Company*, 2020 FCA 141, [2021] 1 F.C.R. 551, 452 D.L.R. (4th) 318.

CONSIDERED:

Canada (Commissioner of Competition) v. Secure Energy Services Inc., 2021 Comp. Trib. 7, 2021 CanLII 76988; *Canadian Standard Travel Agent Registry v. International Air Transport Association*, 2008 Comp. Trib. 12, 2008 CarswellNat 2589 (WL Can.); *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202.

REFERRED TO:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Commissioner of Competition) v. Labatt Brewing Company Limited*, 2008 FCA 22, 289 D.L.R. (4th) 500; *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, (1994), 111 D.L.R. (4th) 385; *The Commissioner of Competition v. Parkland Industries Ltd.*, 2015 Comp. Trib. 4, 2015 CanLII 154097.

APPEAL from a decision of the Competition Tribunal (2021 Comp. Trib. 4, 2021 CanLII 56985) dismissing the appellant's request for short-term relief pending the hearing of an application under section 104 of the *Competition Act* for interim relief pending the hearing of an application under section 92 of the Act. Appeal allowed.

APPEARANCES

Paul Klippenstein and *Alexander Gay* for appellant.

Elder C. Marques and *Liam Kelley* for respondent Secure Energy Services Inc.

No one appearing for respondent Tervita Corporation.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Blake, *Cassels & Graydon LLP*, Toronto, for respondent Secure Energy Services Inc.

Bennett Jones LLP, Washington D.C., for respondent Tervita Corporation.

The following are the reasons for judgment rendered in English by

LOCKE J.A.:

I. Overview

[1] The appellant, the Commissioner of Competition (the Commissioner), appeals from a decision of the Competition Tribunal (2021 Comp. Trib. 4, 2021 CanLII 56985,

per Crampton C.J., the Decision) that dismissed the Commissioner's request for short-term relief pending the hearing of an application under section 104 of the *Competition Act*, R.S.C., 1985, c. C-34 (the Act). That application under section 104 was an application for interim relief pending the hearing of an application under section 92 of the Act. For ease of reference, the request for short-term relief is hereinafter referred to as the "Application in Issue", and the other applications are referred to, respectively, as the "Section 104 Application" and the "Section 92 Application".

[2] The Section 92 Application that prompted the Section 104 Application and then the Application in Issue sought to enjoin a proposed transaction through which the respondents would merge (the Proposed Transaction). The Section 104 Application sought an interim order prohibiting the proposed merger until the Section 92 Application could be heard and decided. Citing the imminent date of the proposed merger, the Application in Issue sought what was called "interim interim relief" to prevent the merger pending the hearing of the Section 104 Application. Presumably, this inelegant phrase was intended to capture the idea of short-term interim relief in the course of an interlocutory proceeding such as the Section 104 Application.

[3] A brief description of some of the relevant facts will help to understand the issues. On March 12, 2021, the respondents submitted to the Commissioner a pre-merger notification pursuant to subsection 114(1) of the Act. On April 9, 2021, the Commissioner issued a Supplementary Information Request (SIR) pursuant to subsection 114(2). The respondents responded to the SIR on May 31, 2021 with the production of some 396,000 documents. Pursuant to section 123 of the Act, the respondents could close the Proposed Transaction 30 days later.

[4] On June 25, 2021, the respondents undertook to provide 72 hours' notice of their intention to close the Proposed Transaction. They then provided that notice at 11:15 pm ET on June 28, 2021, thus opening the possibility that the respondents would effect their merger as early as 11:15 pm on July 1, 2021.

[5] The Commissioner responded by filing the Section 92 Application and then the Section 104 Application on June 29, 2021. Upon notice from the respondents later that day that they would not voluntarily delay the merger until a ruling on the Section 104 Application, the Commissioner requested an emergency case management conference to address the Application in Issue. That application was heard by the Competition Tribunal (the Tribunal) the next day (June 30, 2021).

[6] The Tribunal's Decision dismissed the Application in Issue at 10:49 pm ET on July 1, 2021, just minutes before the possible merger. The Commissioner immediately appealed the Decision to this Court and made a motion "on an emergency basis for an interim interim order prohibiting closing the Proposed Transaction pending a hearing on a later motion for an interim injunction." The emergency motion was heard by Justice David Stratas beginning at 12:15 am on July 2, 2021, and was dismissed shortly before 2:00 am. The respondents closed the Proposed Transaction a few minutes later, merging the respondents. They continue now as a single entity with the same name as one of the merging entities: SECURE Energy Services Inc. (SECURE).

[7] Since then, the Section 104 Application was amended to recognize the merger and to seek different relief. The Section 104 Application was heard on August 4, 2021, and dismissed on August 16, 2021 (see 2021 Comp. Trib. 7, 2021 CanLII 76988).

[8] The Section 92 Application has likewise been amended to reflect the fact that the merger has occurred, and to seek to dissolve it rather than block it. The Section 92 Application is scheduled to be heard in May and June of this year.

II. The Tribunal's Decision

[9] The Tribunal saw two issues before it. The first was whether it had the jurisdiction to grant the "interim interim" relief sought in the Application in Issue. The second was whether, if the Tribunal had jurisdiction, it should grant said relief. In the end, the Tribunal concluded that there was no need to address the second issue because it found that it lacked the jurisdiction to grant the requested relief.

[10] The Tribunal began its analysis by summarizing the parties' respective positions. It noted that the Commissioner argued in favour of the Tribunal's jurisdiction based on subrule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 (the Rules). Sometimes called the "gap rule", this provision permits the Tribunal to follow the *Federal Courts Rules*, SOR/98-106, for questions not provided for by the Rules. The Commissioner cited the decision in *Canadian Standard Travel Agent Registry v. International Air Transport Association*, 2008 Comp. Trib. 12, 2008 CarswellNat 2589 (WLNext Can.) (*CSTAR*), and its reliance on subrule 372(1) of the *Federal Courts Rules*, as authority for finding that the Tribunal had jurisdiction to grant interim relief, though it declined to do so in that case. In addition to the gap rule, the Commissioner cited rule 2 of the Rules, which provides as follows:

> **Dispensing with Compliance**
>
> **Variation**
>
> **2 (1)** The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit.
>
> **Urgent matters**
>
> **(2)** If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.

[11] Finally, the Commissioner cited subsection 9(2) of the *Competition Tribunal Act*, R.S.C., 1985 (2nd Supp.), c. 19 (CTA), which provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."

[12] Despite these arguments, the Tribunal agreed with the essence of the respondents' contrary position. The respondents argued that there was no gap to be filled by resort to the *Federal Courts Rules*. They argued that section 104 of the Act, and related provisions, are specific and detailed, providing a complete code, and do not provide for the "interim interim" relief requested in the Application in Issue. The respondents distinguished *CSTAR* on the basis that that case concerned a situation that had not been contemplated in the Act. The respondents argued that the Commissioner in this case could have sought more time under section 100 of the Act, but that this provision became unavailable when he filed the Section 92 Application. Section 100

empowers the Tribunal, among other things, to give the Commissioner more time to complete an inquiry into whether grounds exist for making an order under section 92.

[13] The Tribunal noted that it has only the jurisdiction that is accorded to it by Parliament, together with plenary powers "necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record" (per subsection 8(2) of the CTA). The Tribunal concluded [at paragraphs 50–55] as follows:

> Given the detailed nature of the merger review scheme set forth in the Act and the Rules, Parliament can be taken to have addressed its mind to the specific types of relief it wished to make available to the Commissioner and the different points in time at which such relief is available pursuant to sections 100, 104 and 92, respectively. In not providing for the type of relief that the Commissioner is now seeking, it can be inferred that Parliament decided not to grant the Tribunal the jurisdiction to provide such relief.
>
> That relief would constitute a new, third type of interim relief that would seriously curtail respondents' rights to procedural fairness. Indeed, this was demonstrated during the hearing yesterday, when the Respondents stated that they were unable to address the three-prong test applicable to injunctive relief because they had only received the Commissioner's very lengthy application record late the prior day.
>
> Although Parliament is free to curtail the procedural fairness rights of parties who appear before the Tribunal, it cannot be understood to have done so in the absence of express language or by necessary implication: *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105, at 1113; *P. & S. Holdings Ltd. v Canada*, 2017 FCA 41, at para 39. No such express language is present in the Act, nor can it be said that the "interim interim" relief being sought by the Commissioner is contemplated by necessary implication.
>
> That relief would also undermine the predictability, certainty and transparency that is achieved by the existing scheme of the Act. Among other things, that scheme clearly informs merging parties of what their obligations are in the merger review process, how long they must wait before they can close their merger, and the potential remedies that are available to the Commissioner to prevent them from doing so.
>
> Although Rule 2 and section 9(2) of the CTA provides the Tribunal with considerable flexibility to deal with matters, including urgent matters, as informally and expeditiously as the circumstances and considerations of fairness permit, they do not assist the Commissioner to the extent that he would like in the present circumstances. This is because they do not contemplate the type of substantial curtailment of procedural fairness rights that resulted from the manner in which he proceeded. In any event, Rule 2 and subsection 9(2) are procedural provisions. They cannot be relied upon as a source for substantive remedies that are not contemplated by the Act.
>
> Based on the foregoing, I conclude that the Tribunal does not have the jurisdiction to grant the interim relief pending the hearing of the Section 104 Application that is being sought by the Commissioner.

[14] As indicated, the Tribunal found it unnecessary to decide the merits of the Commissioner's request in the Application in Issue, based on the conclusion that it had no jurisdiction to grant the request. However, the Tribunal added that, if it had been necessary to decide whether to grant the requested relief, it would have been in an untenable position since the respondents did not have an opportunity to address the issue, and the Tribunal did not have sufficient time to properly review the record.

III. Issues

[15] It is important to note that the present appeal is no longer concerned with whether the “interim interim” relief sought in the Application in Issue should have been granted on the facts of this case. Rather, the Commissioner limits himself to seeking a reversal of the Tribunal’s finding that it lacked jurisdiction ever to grant such relief. Before addressing this substantive issue, however, it is necessary to address two preliminary issues.

[16] Firstly, because the Proposed Transaction has now closed and the respondents have merged to continue as SECURE, there is no longer a live controversy on the Application in Issue, and the present appeal is moot. The Commissioner recognizes this, but requests that the appeal be heard and decided despite its mootness. SECURE opposes hearing this moot appeal.

[17] The second preliminary issue concerns an argument by SECURE that part of the Commissioner’s appeal on the question of the Tribunal’s jurisdiction to grant “interim interim” relief should not be considered because it raises a new issue for the first time on appeal. Specifically, SECURE argues that the Commissioner’s submission that the Tribunal’s jurisdiction to grant the requested relief comes from section 104 of the Act was not made to the Tribunal.

[18] These issues are analysed below as follows:

A. Mootness

B. New Issue Raised on Appeal

C. Jurisdiction of the Competition Tribunal to Grant the Requested Relief

IV. Standard of Review

[19] As noted by the appellant, this is a statutory appeal pursuant to subsection 13(1) of the CTA. Accordingly, the appellate standards of review apply: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, 44 D.L.R. (4th) 1 (*Vavilov*), at paragraph 37.

[20] The only substantive issue in this appeal being the Tribunal’s conclusion that it lacked jurisdiction to grant the relief requested by the Commissioner in the Application in Issue (a pure question of law), the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8. On this, the parties agree.

V. Analysis

A. *Mootness*

[21] As noted at paragraph 16 above, the present appeal is moot because there is no longer a live controversy between the parties. Generally speaking, a court will not hear a moot appeal. However, courts have discretion to hear an appeal despite its mootness. The parties agree that, in deciding whether to exercise such discretion, a court should consider the factors discussed by the Supreme Court of Canada in *Borowski v. Canada*

(Attorney General), [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231 (*Borowski*), at pages 358–363 . The factors are (i) whether an adversarial context remains, (ii) the concern for judicial economy, and (iii) respect for the proper law-making function of the Court. These factors are considered below.

(1) July 2, 2021 Order by Justice Stratas

[22] Before addressing the factors in *Borowski*, SECURE argues that the Court should not hear this moot appeal based on the following recital in Justice Stratas's July 2, 2021 order: "AND WHEREAS, if the practical effect of this Order is to render this appeal moot, the Court directs the appellant to file a notice of discontinuance." In its memorandum of fact and law, SECURE argues that this passage is binding on the Commissioner, and now operates to order him to discontinue the appeal. In oral argument, SECURE backs away somewhat from this firm position. Now, SECURE concedes that Justice Stratas's order is not determinative of the issue of whether the Court should exercise its discretion, but rather should be a consideration.

[23] In my view, the passage in question cannot even be persuasive on the question of the exercise of discretion since Justice Stratas gave no consideration to, and apparently heard no argument on, the factors from *Borowski* to be considered. Justice Stratas was not weighing how Court's discretion should be exercised. Rather, it appears that he was simply attempting to ensure that, in the likely event that the appeal became moot, the Commissioner would take some action to deal with it rather than simply allowing it to languish, thereby prompting the Court at some point to devote resources to issuing a notice of status review and thereafter acting on any response (or lack of response) thereto.

(2) Adversarial Context

[24] I turn now to the first of the factors identified in *Borowski*. The Commissioner argues that there is an adversarial context by virtue of the fact that the Section 92 Application remains in dispute between the parties, and further that the parties have energetically argued the present appeal.

[25] For its part, SECURE notes that the Section 92 Application raises different issues, and is irrelevant to the present appeal. It also notes that the record in the present appeal is one-sided and time did not permit a proper review of it by either the Tribunal or SECURE.

[26] In my view, there is an adversarial context in the present appeal. Both sides of the debate were well and vigorously argued by parties who have an ongoing dispute. These arguments have been of great assistance to this Court. SECURE's argument concerning the limited review of the record before the Tribunal is of marginal importance because the Commissioner is no longer seeking the relief he sought before the Tribunal. The only substantive issue before this Court is the legal question of the jurisdiction of the Tribunal to grant such relief.

(3) Judicial Economy

[27] *Borowski* describes several considerations related to the second factor of judicial economy. One concerns whether the Court's decision will have some practical effect on

the rights of the parties. Another concerns whether the issues in dispute are of a recurring nature but brief duration, which may be evasive of review. Finally, we should consider the public importance of resolving the debate between the parties.

[28] The Commissioner argues that the nature of the relief at issue in this appeal makes it evasive of review because it is of short duration, such that the debate will generally be moot before an appeal can be heard. The Commissioner also argues that a decision on this appeal is of public importance. Firstly, the Commissioner asserts that the question of the Tribunal's power to grant the relief at issue is likely to recur. Moreover, the scope of the Tribunal's power to grant relief is of considerable importance to the Commissioner's ability to take action to support the purpose of the Act "to maintain and encourage competition in Canada" (per section 1.1), especially in conditions of urgency involving parties who insist on proceeding with a merger despite a pending application by the Commissioner to prevent it. The Commissioner relies on the decisions in *Canada (Commissioner of Competition) v. Labatt Brewing Company Limited*, 2008 FCA 22, 289 D.L.R. (4th) 500, and *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598 (*Air Canada*), two cases in which this Court decided to hear appeals from the Tribunal despite their mootness.

[29] SECURE argues that considering this appeal would be a waste of judicial resources. SECURE argues that the appeal would have no practical effects on the rights of the parties, and such an appeal should be heard only in "exceptionally rare cases": *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202, at paragraph 16. SECURE notes that there is no inconsistent jurisprudence on the question of the Tribunal's jurisdiction to grant the requested relief. Further, SECURE argues that, based on the 20-year history of the statutory provisions in issue and the dearth of jurisprudence thereunder, the question is not likely to recur.

[30] Finally, SECURE argues that the Commissioner's own actions in this case created the urgency, which could have been avoided. Specifically, having received notice of the Proposed Transaction on March 12, 2021, and having received the documents responsive to the SIR on May 31, 2021, he did not file the Section 92 Application and the Section 104 Application until June 29, 2021, just two days before the respondents intended to merge. SECURE also notes that the Commissioner failed to seek additional time pursuant to section 100 of the Act, which was open to him until the Section 92 Application was filed. An order under section 100 could have gained the Commissioner an additional 30, or even 60, days. The Tribunal also discussed this option not pursued by the Commissioner.

[31] With regard to the argument based on section 100, the Commissioner responds that the additional time he needed was to have his Section 104 Application heard and decided, not to complete an inquiry into whether to file the Section 92 Application. Accordingly, he argues, section 100 was of no assistance.

[32] I accept that this Court's decision on this appeal will have no practical effects on the rights of the parties. However, I find that judicial economy nevertheless favours hearing this appeal because the absence of practical effects for the parties is outweighed by the other considerations.

[33] First, the question of the Tribunal's jurisdiction to grant the relief that was sought by the Commissioner is evasive of appeal since the need for such short-term relief is

fleeting and will typically not last beyond the hearing of the original application for interim relief under section 104.

[34] Also, though there is no inconsistent jurisprudence on the question in issue, and little judicial consideration of the relevant statutory provisions, this is a weak basis for concluding that the question is unlikely to recur. The dearth of judicial consideration does not necessarily indicate any particular commonly-held understanding of the scope of the Tribunal's jurisdiction on the question. As argued by the Commissioner, the rarity of his resort to section 104 of the Act suggests that parties whose transactions are being scrutinized typically cooperate with the Commissioner such that an order from the Tribunal is not needed, and therefore not sought. The most likely reason for such cooperation would seem to be that parties understand that the Act gives the Commissioner the tools he needs to review and address proposed transactions even if they do not cooperate. If the Tribunal's conclusion concerning the limits of its jurisdiction remains in place, the incentive of parties to cooperate with the Commissioner seems likely to be reduced, thus increasing the likelihood that the question of the Tribunal's jurisdiction will arise again in the future. Further, parties facing the Commissioner's scrutiny would be encouraged by the respondents' experience before the Tribunal to exploit its jurisdictional limits by moving to close a proposed transaction before the Commissioner has completed his work. For these reasons, I am of the view that the question in issue in the present appeal is likely to recur.

[35] A related consideration is that the question of the tools available to the Commissioner to address proposed transactions that may have anti-competitive effects is of public importance. SECURE does not really dispute this point. In fact, SECURE acknowledges that its involvement in this appeal is to represent the interests of others who could face scrutiny from the Tribunal.

[36] Finally, I find that the debate over whether the Commissioner should have made an application under section 100 prior to filing the Section 92 Application is not central to the question of the Tribunal's jurisdiction to grant the requested relief after the Section 92 Application was filed. In any case, I am also mindful of this Court's guidance in *Air Canada*, at paragraph 28 that "the benefits of clarifying the law is a prudent use of judicial resources with respect to issues that are not confined to the particular facts of this appeal and to the evidence before the Tribunal."

(4) The Proper Law-Making Function of the Court

[37] SECURE argues that the factor of the proper law-making function of the Court favours refusing to hear this moot appeal. SECURE notes that the Commissioner seeks an interpretation of section 104 of the Act that was not put in issue before the Tribunal. In particular, the argument before the Tribunal was that it had jurisdiction to grant the Application in Issue by virtue of the gap rule and other related legislative provisions. The argument before the Tribunal was not based on the interpretation of section 104.

[38] Despite the fact that the Commissioner's argument before the Tribunal does not appear to have focused explicitly on the interpretation of section 104 itself, the Tribunal clearly reached a conclusion that it lacked jurisdiction to grant the requested relief, and it indicated clearly that it considered section 104 among other provisions. The extract from the Decision quoted in paragraph 13 above demonstrates this.

[39] The present appeal seeks a different interpretation of section 104 than that reached, albeit implicitly, by the Tribunal. Statutory interpretation is clearly part of the proper law-making function of the courts. In my view, this factor favours the exercise of the Court's discretion to hear this appeal.

(5) Conclusion on Mootness

[40] I conclude that all three of the factors listed in *Borowski* favour hearing this appeal. I would exercise the Court's discretion to hear and decide it.

B. *New Issue Raised on Appeal*

[41] As noted at paragraph 17 above, SECURE argues that the present appeal raises a new issue that was not argued before the Tribunal (the Tribunal's jurisdiction under section 104 to grant the relief requested in the Application in Issue), which issue should not be heard for the first time by this Court.

[42] This argument involves some of the same considerations as discussed above in relation to the proper law-making function of the Court: though the Commissioner's argument before the Tribunal was not directed explicitly to the interpretation of section 104, the Tribunal clearly considered section 104 when it concluded that it lacked jurisdiction to grant the requested relief. Regardless of the arguments that were made before the Tribunal, the Commissioner is entitled to appeal its conclusion on this point.

[43] Essentially, the Commissioner is making a new argument on an existing issue, but does not raise a new issue. As stated in *Nova Chemicals Corporation v. Dow Chemicals Company*, 2020 FCA 141, [2021] 1 F.C.R. 551, 452 D.L.R. (4th) 318, at paragraph 87:

> This is not a problem. The law is always at large. A party can always raise new law and new legal arguments in this Court concerning issues that were before the first-instance court provided that the opposing party has had fair notice of them and has had an opportunity to respond to them.

[44] Nothing leads me to believe that SECURE has not had fair notice and an opportunity to respond to the question of the interpretation of section 104. As indicated above, this issue has been well and vigorously argued. In preparing its argument, SECURE had the benefit of reading and responding to the Commissioner's memorandum of fact and law, which deals with the issue head-on. SECURE expresses concern about the fact that, by virtue of the Commissioner's late introduction of its interpretation of section 104, the Tribunal will have been denied an opportunity to weigh in. In my view, this concern should not be determinative. Even if the Commissioner had made all the arguments it makes here before the Tribunal, and the Tribunal had provided its analysis thereof, this Court would be considering this appeal on a standard of correctness.

[45] In my view, this appeal raises no new issue that should not be considered.

C. *Jurisdiction of the Competition Tribunal to Grant the Requested Relief*

[46] Now, I turn to the only substantive issue in this appeal: whether the Tribunal has the jurisdiction to grant "interim interim" relief to delay a proposed merger until an

application for interim relief under section 104 of the Act can be heard and decided. As indicated above, the Tribunal found that section 104 contemplates interim relief to give time for a decision on an application under section 92, but does not contemplate more immediate relief to give time for a decision on a separate application under section 104.

[47] The key facts underlying this appeal are not in dispute, but they are also of limited relevance to what is essentially an exercise in statutory interpretation.

[48] The Commissioner relies on two separate grounds for the Tribunal's jurisdiction. First, the Commissioner argues that section 104, properly interpreted, provides the jurisdiction necessary to grant the requested relief. Second, even if section 104 itself does not provide the necessary jurisdiction, such jurisdiction exists by necessary implication.

[49] In order to address the first ground asserted by the Commissioner, it is necessary to conduct a formal statutory interpretation analysis. The parties do not disagree on the proper approach. A majority of the Supreme Court of Canada provided the following guidance in *Vavilov*,at paragraphs 117–118:

> A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.
>
> This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan [R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014)], at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker….

[50] The majority in *Vavilov* went on at paragraph 120 to direct that:

> … the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10….

[51] The tribunal did not conduct a formal statutory interpretation analysis as contemplated in *Vavilov*. There are at least two likely reasons for this. Firstly, it appears that the Commissioner's argument before the Tribunal was not based on a particular interpretation of section 104 itself. Secondly, the tight time constraints involved in the Application in Issue would have made it difficult to provide such an analysis. In any case, as the standard of review in this case is correctness, there is no question of

deference to the Tribunal, and the absence of more formal analysis is of marginal importance.

[52] The following sections address the text, context and purpose of section 104 in turn.

(1) Text of Section 104

[53] The text of section 104 of the Act is as follows:

> **Interim order**
>
> **104 (1)** If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75, 76 or 77, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.
>
> **Terms of interim order**
>
> **(2)** An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.
>
> **Duty of Commissioner**
>
> **(3)** Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

[54] The key provision is subsection 104(1). It provides that, where a certain condition has been met ("an application has been made for an order under this Part, other than an interim order under section 100 or 103.3"), the Tribunal "may issue any interim order that it considers appropriate", subject to the restriction set out in the concluding words of the subsection ("having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief").

[55] The parties agree that the Section 92 Application meets the condition of an application "under this Part" (Part VIII of the Act, covering sections 75 to 107). However, SECURE argues that the Application in Issue did not meet this condition because it was based on the Section 104 Application rather than the Section 92 Application—the Application in Issue sought "interim interim" relief pending a decision on the Section 104 Application. SECURE argues that the requirement for an application "under this Part" does not contemplate a separate application under the same section 104. SECURE notes first that the condition requires that the underlying application be for an "order", not an interim order. SECURE also notes that all other possible applications for interim orders in this Part are excluded (sections 100 and 103.3). According to SECURE, this buttresses the argument that the application that underlies an application under section 104 cannot be for an "interim interim" order.

[56] The text of subsection 104(1) indicates that it applies when an application pursuant to section 92 of the Act has been filed, and that is the case here. Having concluded that subsection 104(1) applies in the present situation, I see no reason in the

text thereof to read it as being limited in the way SECURE urges. Subsection 104(1) contemplates “any interim order” that the Tribunal considers appropriate, and this broad scope is limited only by reference to “principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.” It is not necessary to determine precisely what limitations are contemplated by this wording, but I expect that it includes at least the test for granting interlocutory or injunctive relief as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, (1994), 111 D.L.R. (4th) 385 (see *The Commissioner of Competition v. Parkland Industries Ltd.*, 2015 Comp. Trib. 4, 2015 CanLII 154097, at paragraph 26). However, the wording of subsection 104(1) does not preclude the type of “interim interim” relief that the Commissioner sought before the Tribunal. It is well-understood that superior courts may grant “interlocutory” relief pending a decision on the merits of the substantive dispute before the court. But it is also well understood that superior courts may grant what is typically called “interim” relief pending a decision on a request for interlocutory relief. Moreover, as noted by Justice Stratas in his July 2, 2021 order in this appeal, this Court has the power to grant even shorter term relief pending a decision on a request for interim relief.

[57] Subject to consideration below of the context and the purpose of section 104, the reference therein to “any interim order” in the text of subsection 104(1) appears to encompass, at least in the technical sense, both “interlocutory” and “interim” relief, as these terms are typically used in superior courts. SECURE’s alternative interpretation would have us conclude that the term “interim order” refers to what are typically called “interlocutory orders”, and excludes what are called “interim orders”. Parliament’s use of the word “interim” makes such an interpretation particularly difficult to accept.

[58] In my view, it is not necessary to reach a conclusion on SECURE’s argument that the application for an “order under this Part” near the beginning of subsection 104(1) cannot be a separate application under section 104. My reading of subsection 104(1) is that the Section 92 Application could be the application that supports both the Section 104 Application and the Application in Issue. It is also interesting to note subsection 104(3), which applies when an interim order is issued under subsection 104(1). This provision requires the Commissioner to “proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.” The “conduct in respect of which the order was issued” in this case would be SECURE’s refusal to suspend the merger in order to permit the Section 104 Application to be heard.

(2) Context of Section 104

[59] The focus of SECURE’s argument concerning the context of section 104, both before this Court and before the Tribunal, is section 100. SECURE argues, and the Commissioner does not dispute, that Parliament has balanced the interests of the Commissioner (and the public on behalf of whom he acts) to review proposed mergers of companies and intervene if appropriate, and such companies’ competing interests in arranging their affairs as they see fit and acting without interference. SECURE argues that the existing legislative provisions in the Act are a complete code of the tools made available to the Commissioner in that regard.

[60] The Act provides that notice of proposed transactions meeting certain criteria must be provided to the Commissioner (subsection 114(1)). The Act also prohibits

parties from closing such transactions for 30 days thereafter (paragraph 123(1)(a)). During that period, the Commissioner may issue an SIR seeking further information (subsection 114(2)), and in such a case, the Act provides that the parties may not close the proposed transaction until 30 days after providing a certified response thereto (paragraph 123(1)(b)). The purpose of both of these waiting periods is to give the Commissioner time to review the proposed transaction before it closes. If that time proves insufficient to complete his review, the Commissioner may seek an order under section 100 to obtain an additional 30 days (extendable to 60 days). If, after his review, the Commissioner files an application for relief under section 92, he may make a further application for an interim order under section 104.

[61] SECURE argues that these provisions are both comprehensive and specific, and that further measures that could delay a proposed transaction should not be read into the Act. It notes in particular that section 104 does not state that the single term "any interim order" contemplates two separate kinds of relief—"interim" (typically called "interlocutory" in superior courts) and "interim interim" (typically called "interim"). SECURE also notes that, prior to filing the Section 92 Application on June 29, 2021, the Commissioner could have sought an order under section 100 to provide the additional time that would be required to file the Section 92 Application and to seek and obtain interim relief under section 104. SECURE argues that Parliament has provided the tools needed to address the Commissioner's concerns about the Proposed Transaction in a timely fashion, and that the current situation resulted from his failure to use those tools.

[62] The Commissioner argues that section 100, as compared to section 104, has a different purpose—it applies at a different stage of the merger review, has a different test, and provides different relief. The Commissioner notes that it applies only to give additional time to complete his review of the proposed transaction, and then only if that transaction is likely to "substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [section 92] because that action would be difficult to reverse."

[63] I accept SECURE's argument that Parliament has provided detailed and specific tools to the Commissioner, and related powers to the Tribunal, to intervene in transactions that are of concern under the Act, and has decided not to grant other such tools and powers. However, I see nothing in the context of section 104, including section 100, that suggests that the broad power of the Tribunal to issue "any interim order that it considers appropriate" should be read more narrowly than a plain textual reading suggests, so as to exclude the relief sought in the Application in Issue.

(3) Purpose of Section 104

[64] At paragraphs 54 to 62 of his memorandum of fact and law, the Commissioner provides a review of the intent of the merger review scheme provided for in the Act, including in section 104 thereof. He explains that the goal of the scheme was to ensure that proposed mergers could be reviewed and, if necessary, challenged before they close. This is because Parliament recognized that it can be very difficult to reverse or offset anti-competitive effects of a merger after it has been completed.

[65] SECURE does not dispute this description of the purpose of the scheme, but urges that this Court focus on the specific measures provided for in the Act to achieve it. I have discussed in the previous section concerning the context of section 104 why I do

not accept that these specific measures have the effect of narrowing the broad scope of the term “any interim order”. Likewise, there is nothing in the goal of encouraging completion of merger review before closing that would suggest a narrow interpretation of that term.

[66] SECURE also argues that interpreting section 104 to permit “interim interim” relief pending determination of a separate application under section 104 for interim relief would curtail procedural fairness. I do not accept this argument. It is based on the specific facts in this case, in which the timelines were extremely tight, and there was insufficient opportunity for either the respondents (as they were at the time) or the Tribunal to adequately review and consider the supporting material submitted by the Commissioner. The question before this Court is not whether “interim interim” relief was appropriate in this case. Rather, it is whether the Tribunal may ever grant such relief. It should be understood that, even if this question is answered in the affirmative, the Tribunal will maintain the role of deciding in each case whether such relief is fair and appropriate in the circumstances, and may refuse to grant relief where it is not. The question is really whether the Tribunal has the jurisdiction to grant relief in cases where it is fair. Notably, subrule 2(2) of the Rules (reproduced at paragraph 10 above) provides that the Tribunal may give directions about how to proceed in urgent cases. This would include directions to ensure procedural fairness in the particular circumstances.

(4) Conclusion on Jurisdiction

[67] Having considered the text, context and purpose of section 104, I conclude that it provides that the Tribunal has jurisdiction, in the proper circumstances, to grant both interlocutory relief (as that term is typically used in superior courts) pending a decision on application under section 92, and interim relief (again, as that term is typically used in superior courts) pending a decision on whether to grant interlocutory relief. Accordingly, I find that the Tribunal erred in concluding that it lacked the jurisdiction necessary to grant the relief requested in the Application in Issue. The Tribunal might well have been justified in refusing to grant such relief in this case based on the facts, but that was not the basis for the Decision.

[68] Having reached this conclusion, it is not necessary for me to consider the Commissioner’s alternative argument that the Tribunal’s jurisdiction to grant the requested “interim interim” relief exists by necessary implication.

VI. Conclusion

[69] For the reasons discussed above, I would allow the appeal with costs, and set aside the Tribunal’s order.

PELLETIER J.A.: I agree.

LEBLANC J.A.: I agree.”