Federal Court  Cour fédérale

Date: 20200501

Docket: T-1138-18

Citation: 2020 FC 578

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 1, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GAÉTAN HOULE

Applicant

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF TRANSPORT OF CANADA

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [the Commission] dated May 9, 2018, dismissing the complaint filed by the applicant under the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act], on the grounds that

referral of that complaint to the Canadian Human Rights Tribunal for consideration is not warranted.

[2] The applicant, who has been living with a diagnosis of residual schizophrenia for several years now and who aspires to be able to perform the duties of a master of a vessel, submits that the Department of Transport Canada [Transport Canada] engaged in a discriminatory practice against him on a prohibited ground of discrimination—disability—by placing limitations on his marine medical certificate which prevent him, in particular, from exercising such functions. These limitations, he states, are not justified since, by assiduously taking the medication that is prescribed to him and being regularly followed by his attending psychiatrist, he has been asymptomatic for more than 25 years, does not suffer from any specific work limitations and therefore poses no danger to the safety of the ships on which he is called to work.

[3] He criticizes the Commission for having carried out a stereotypical and inflexible analysis of the situation, instead of relying on an assessment taking due account of his specific situation. In doing so, he argues, the Commission erred in its application of the third branch of the test set out in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*], which test seeks to determine, as required by paragraph 15(1)(g) and subsection 15(2) of the Act, whether the limitations accompanying the marine medical certificate issued to him are based on a *bona fide* justification.

II. Background

A. *Diagnosis of paranoid schizophrenia*

[4] After completing a diploma in marine navigation in the late 1970s, the applicant pursued a career in the merchant marine. At the very beginning of the 1990s, he was the victim of a robbery, which then triggered the paranoid schizophrenia disorder in him and required his hospitalization. He was then plagued by hallucinations: he heard voices and saw spirits. Having accepted the medication he was offered, he was discharged from the hospital and returned to work.

[5] In 1994, he stopped taking his medication and relapsed. Since then, the applicant states that he has never stopped taking said medication and specifies that he has been regularly monitored, every three or four months, by his attending psychiatrist, Dr. Claude Girard. He also claims to have obtained, in 1995, a Master Mariner certificate of competency and to have worked as second and third officer on various ships, without incident.

B. *Renewal of 2002 marine medical certificate*

[6] The applicant's disputes with Transport Canada began in 2002, when he had to renew his marine medical certificate, which must be done every two years. He was then judged, on the basis of his diagnosis of paranoid schizophrenia, unfit for service at sea. The applicant unsuccessfully requested an administrative review of this decision, but in June 2005 the Appeal Board established under section 73 of the *Crewing Regulations*, SOR/97-390, overturned that

decision, finding that the applicant was not suffering from a disability related to an active psychiatric disorder rendering him totally incapacitated or unfit for service at sea. The Appeal Board therefore reissued a marine medical certificate to the applicant, subject to three conditions: (i) the applicant could only perform the duties of watchkeeping mate for limited contiguous voyages; (ii) he had to continue to take his medication daily; and (iii) he had to continue, every four months, the follow-up with his attending psychiatrist.

[7] Being of the opinion that the initial decision declaring the applicant unfit for service at sea should have been upheld, Transport Canada applied for judicial review of the Appeal Board decision, but without success, as the Court found that the decision was reasonable (*Canada (Attorney General) v Houle*, 2006 FC 497 [*Houle*]).

[8] In addition to the procedures before the Appeal Board, the applicant filed a complaint with the Commission. After agreeing to go to mediation, the parties settled the matter under an agreement protected by a confidentiality clause.

[9] Also discouraged by the fact that his marine medical certificate remained subject to limitations, the applicant abandoned the field of navigation for a few years.

C. *2012 application for marine medical certificate*

[10] In 2012, he decided to return to service and obtained a first provisional medical certificate from a “marine medical examiner”, in accordance with the *Marine Personnel*

Regulations, SOR/2007-115 [Regulations]. This certificate had no limitations and was valid for the period from May 16 to November 16, 2012.

[11] However, a few months later, in September 2012, the Minister of Transport, through the Marine Medicine Unit of Transport Canada [MMU], objected, as permitted under paragraph 278(4)(b) of the Regulations, to the issuance of a marine medical certificate to the applicant, who was deemed unfit for service at sea because of his diagnosis of paranoid schizophrenia.

[12] The applicant did not stop there. He contacted the MMU's Senior Marine Medical Officer, Dr. Irma-Nancy Sully, in the days following this decision and convinced her to re-evaluate his file on the basis of, among other things, a medical information supplement that he undertook to provide. On October 26, 2012, Dr. Girard sent a letter to Dr. Sully in which he informed her, in particular, of the following:

a. He had been providing clinical follow-up to the applicant since 1995, with meetings every three to four months.

b. The applicant had presented symptoms of psychotic decompensation from schizophrenia between 1991 and 1994, which had apparently required hospitalization on one or two occasions.

c. Since then, the applicant had never been hospitalized, nor had he experienced any periods of disability caused by his symptoms.

d. In his case, we were no longer speaking of a diagnosis of paranoid schizophrenia, but rather one of residual schizophrenia.

e. The applicant was taking his medication regularly, the same one he was prescribed in the 1990s, but on a preventive basis and at half-dose to ensure that he would not miss any in case he had to navigate.

f. In terms of symptoms, the applicant had no active psychotic symptoms, nor did he have any specific limitations or restrictions when working.

g. The psychiatric follow-up he was diligently following, was essentially a preventive measure.

h. The prognosis for the applicant [TRANSLATION] "is very good, given the absence of relapse for more than 15 years, good self-criticism, normal functioning and regular taking of medication" (Applicant's Complete Record, Exhibit P-4, p. 41-42).

[13] As part of the process to reconsider the decision of September 2012 deeming him unfit for work at sea, the applicant informed the MMU, at the latter's request, of his future career plans, which consisted of taking refresher courses in order to revalidate his Master Mariner certificate.

[14] On December 20, 2012, the MMU, after re-examining the file and [TRANSLATION] "in accordance with the [*Houle*] decision", reversed its decision, found the applicant fit for work at sea, but issued him a marine medical certificate with limitations that were for all practical purposes identical to those imposed by the Appeal Board in June 2005, which limited the duties he could perform on a ship to those of a watchkeeping mate for limited contiguous voyages and obliged him to provide an annual report from his psychiatrist confirming both that he was complying with his pharmacological treatment and the clinical follow-ups, and that his condition was stable (Respondent's Record, Attorney General of Canada, tab C, pp 41–42).

D. *Complaint to Commission relating to December 2012 marine medical certificate with limitations*

[15] On January 29, 2013, the applicant filed a complaint with the Commission. He submitted that the limitations imposed by the MMU prevented him from being a master or even first officer whereas the international standards governing medical fitness examinations for seafarers do not provide for limitations in a case like his, that is, in the case of a person who has not had a recurrence for more than 19 years. He stated that it was unreasonable to fear that he might suddenly become ill when he had not been sick during this entire period.

[16] The complaint was based on section 5 of the Act, according to which it is a discriminatory practice in the provision of services customarily available to the general public to deny any such service to any individual, or to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

E. *Suspension of complaint and appeal to Transportation Appeal Tribunal*

[17] Since he had an appeal against the MMU's decision before the Transportation Appeal Tribunal of Canada [Tribunal] (formerly the Appeal Board), the Commission suspended the consideration of the applicant's complaint as permitted by paragraph 41(1)(b) of the Act.

[18] Before the Tribunal, the applicant contested both the MMU's decision declaring him unfit for work at sea and the one declaring him fit for this work, but with limitations. In a

decision dated June 11, 2014, the Tribunal, consisting of one review member, dismissed the applicant's request for review. He essentially found, based on the evidence before him:

a. that schizophrenia is a condition that cannot be cured;

b. that the possibility of a relapse, which can be relatively sudden, cannot be ruled out, even after years of remission;

c. that it is likely that a person dealing with this condition will not have access, on the high seas, to adequate and timely medical care; and

d. that while it is conceivable that the applicant could work on board a ship under the limitations imposed by the marine medical certificate issued by the MMU, it would be dangerous for his own safety and that of the ship, its crew and the general public to work as a master, given the critical role and the stressful and demanding nature of the function.

(Respondent's Record, Attorney General of Canada, Tab D, pp 46–60)

[19] The applicant appealed this decision before a three-member panel of the Tribunal. He considered that a fundamental error had been made by the Tribunal's review member, and before that by the MMU, regarding the determination of the medical standards applicable to his situation and regarding the consideration given to the relevant facts related to these standards. On February 18, 2016, the appeal was dismissed, the panel being of the opinion that the right standards—those to which the Regulations refer—were applied and that the review member's assessment of the facts of the case in light of these standards was reasonable.

[20] Since, as we will see, the MMU, when exercising the Minister of Transport's power to review the issuance of a provisional medical certificate, must take into account any relevant considerations relating to human rights, as set out in the *Constitution Act, 1982* (UK), being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11 [Charter] and the *Canadian Bill of Rights*, SC, 1960, c 44 [Bill of Rights], the Tribunal was satisfied that the decision to issue a restricted marine medical certificate to the applicant infringed as little as possible on his rights, considering the circumstances of the case (Applicant's Complete Record, pp 94–109).

[21] This decision of February 18, 2016, was not subject to judicial review.

F. *Reactivation of complaint before Commission and investigation report*

[22] On February 25, 2016, the applicant asked the Commission to reactivate his file. Being satisfied that the applicant had exhausted the procedures available to him and that the Tribunal did not have to consider the procedure before it from a human rights perspective, the Commission appointed an investigator in accordance with section 43 of the Act.

[23] On January 8, 2018, the investigator produced the report [Report]. She described the applicant's complaint and the issue she had to resolve as follows:

> [TRANSLATION]
>
> The [applicant] has been diagnosed with paranoid schizophrenia but has had no current symptoms since 1995. He alleges that [Transport Canada] discriminated against him by imposing limitations on his marine medical certificate because of his diagnosis of schizophrenia, without taking into account the current absence of symptoms or work-related limitations.

> The issue in this complaint is whether [Transport Canada] discriminated against the [applicant] in the provision of services because of his disability by differentiating adversely in relation to him and by applying discriminatory guidelines.
>
> (Respondent's Record, Attorney General of Canada, p 10)

[24] After stating she was satisfied that the issuance of marine medical certificates constitutes a service available to the general public within the meaning of section 5 of the Act and that the applicant was the victim of adverse differentiation in the provision of this service since he can only hold a limited certificate, because of a standard which renders unfit for service at sea any person suffering from schizophrenia, the investigator considered whether this standard was justified (Respondent's Record, Attorney General of Canada, pp 10–12).

[25] To determine whether this standard was justified, the investigator applied the following test:

a. Was the standard in question adopted [TRANSLATION] "for a goal or objective rationally connected to the functions performed by [Transport Canada]"?

b. If so, was it adopted by Transport Canada [TRANSLATION] "with the sincere belief that it was necessary to achieve this goal or objective"?

c. If so, is this standard [TRANSLATION] "reasonably necessary to achieve the goal or objective"?

(Respondent's Record, the Attorney General of Canada, p. 11)

[26] Being of the opinion that there was nothing in the file to conclude that the first two parts of this test were not satisfied, the investigator focused on the third part of the test. In this regard,

she clarified that in order to demonstrate that the standard in question is reasonably necessary to achieve the goal or objective underlying it, Transport Canada must demonstrate that [TRANSLATION] "it is impossible to accommodate employees who have the same characteristics as the [applicant] without imposing undue hardship on the employer" (Respondent's Record, Attorney General of Canada, p 13).

[27] After reviewing the evidence on the record and Transport Canada's claims that the standard applied to the applicant was reasonably necessary, the investigator offered the following conclusions:

> [TRANSLATION]
>
> 32. [Transport Canada] states that the [applicant] has schizophrenia. The fact that he is in "remission" is partly due to the fact that he is taking his medication. Despite this apparent stability, experts in the field all agree that acute psychotic episodes can occur despite years of stability, and even with regular medication. This risk of recurrence (which will be present throughout the life of the [applicant]) is the most important criterion in determining the security risk posed by the diagnosis of schizophrenia, both in terms of international and Canadian regulations. An individual with schizophrenia who becomes psychotic on board a ship could undoubtedly compromise the safety of the ship's crew, the ship and the environment. Safety must prevail over the desire of the [applicant] to work in a marine environment.
>
> Conclusion
>
> 33. The evidence indicates that, based on the medical information provided by [the applicant's] psychiatrist, the [Transport Canada] medical specialist is of the opinion that the [applicant] is at risk of relapse and that the risk is too great for him to be master of a vessel. This confirms that he does not meet the professional requirements [of Transport Canada].
>
> 34. The evidence shows that granting an unrestricted medical certificate to [the applicant] would constitute undue hardship for [Transport Canada]. [Transport Canada] has shown that although

> the [applicant] is in remission, the risk of the disease recurring is far too high. Safety might be compromised.
>
> 35. The [applicant] is, moreover, accommodated by [Transport Canada] since he has been declared fit for work since December 20, 2012, and holds a certificate with certain limitations.
>
> (Respondent's Record, the Attorney General of Canada, p. 15)

[28] Both parties were given an opportunity to respond to the Report. In a letter dated March 10, 2018, the applicant criticized the investigator:

a. for having disregarded section 15 of the Charter since claiming that schizophrenics are unfit for service at sea is discriminatory;

b. for having disregarded article 8 of the "Medical Examination (Seafarers) Convention, 1946" according to which Transport Canada was not allowed to declare that schizophrenics are unfit for service at sea in the absence of expert opinions from independent specialists;

c. for having applied the *Medical Examination of Seafarers: Physician's Guide* (TP 1134E) [Physician's Guide], which declares people with schizophrenia unfit for service at sea, in lieu of the *Guidelines for Conducting Pre-sea and Periodic Medical Fitness Examination for Seafarers* (now the *Guidelines on the medical examinations of seafarers*) published by the International Labour Organization and the World Health Organization [ILO/WHO Guidelines], to which the Regulations refer, and the International Convention on Standards of Training, Certification and Watchkeeping (STCW) [STCW Convention], which do not declare seafarers unfit if they, like him, have become schizophrenic following a single episode associated with provoking factors;

d. for having preferred the opinion of the physicians of the MMU and of a psychiatrist with no expertise in occupational medicine—Dr. Jonathan Pullman—to the detriment of the opinion of his own attending psychiatrist, who has been following him for almost 25 years, and, above all, those of the marine medical examiners who, between 2012 and 2016, issued him provisional marine medical certificates without limitations; and

e. for having referred to the Tribunal's two judgments when those judgments were not valid since his rights of representation had been violated.

(Respondent's Record, the Attorney General of Canada, pp 17–26)

[29] In a letter addressed to the investigator on April 9, 2018, Transport Canada reacted to the applicant's response by referring the investigator to the information produced by its representatives during the investigation and by providing her with additional details on its understanding of the standards applicable to the medical examination of seafarers (Respondent's Record, Attorney General of Canada, pp 28–29).

G. Commission's decision

[30] As indicated at the outset, the Commission found that examination of the applicant's complaint by the Canadian Human Rights Tribunal was not justified and that the complaint should therefore be dismissed. More specifically, it expressed the view that the imposition of limitations on the applicant's marine medical certificate was reasonable [TRANSLATION] "having regard, on the one hand, to [Transport Canada's] domestic and international obligations regarding the attribution of this type of medical certificate and, on the other hand, the

information provided by the psychiatrist of the [applicant]" (Applicant's Complete Record, p 19).

[31] As such, it noted that Canada is a signatory to a number of international conventions governing work at sea, including the STCW Convention and the *Maritime Labour Convention, 2006* [MLC], and that Canada has committed to giving them effect. In particular, it stated, Canada, in doing so, has explicitly incorporated into domestic law, via subsection 270(1) of the Regulations, the ILO/WHO Guidelines, which aim to harmonize the conditions for granting marine medical certificates around the world (Applicant's Complete Record, p. 19).

[32] Referring more particularly to Appendix E to the ILO/WHO Guidelines, which provides medical practitioners with the criteria for determining fitness for service at sea for common medical conditions, and acknowledging that these criteria were designed "to allow some flexibility", the Commission noted that for mental and behavioural disorders, the criteria, which are listed under diagnostic code F-20-31 in that Appendix, and more specifically for a disorder characterized by "more than one episode with or without provoking factors", it was appropriate, according to these criteria, to make a "[c]ase-by-case assessment to exclude likelihood of recurrence at least five years since end of episode, if no further episodes; no residual symptoms; and no medication needed during last two years" (Applicant's Complete Record, p. 20).

[33] The Commission was satisfied, based on the evidence in the file, which shows that the applicant has residual schizophrenia and must continue to take medication to control his symptoms, that the limitations imposed by Transport Canada on the applicant's marine medical

certificate were in compliance with the ILO/WHO Guidelines, taking into account the applicant's current state of health. It also stated that the opinion of the applicant's attending psychiatrist, according to which the applicant suffered from no limitations or restrictions [TRANSLATION] "on a psychological level", had little weight since nothing in the file demonstrated that he [TRANSLATION] "is a qualified marine doctor, or has assessed the [applicant] in light of the law applicable to the issuance of marine medical certificates" (Applicant's Complete Record, p. 21).

[34] The Commission also expressed satisfaction that an individual assessment of the applicant's situation had been carried out by the MMU, as evidenced by the reconsideration of the decision on September 4, 2012, declaring the applicant unfit for work at sea, which led to the issuance of the certificate of December 2012 declaring him fit for this kind of work, subject to certain limitations (Applicant's Complete Record, p. 21).

[35] Finally, it expressed the view that it was [TRANSLATION] "reasonable and even necessary for [Transport Canada] to adopt courses of action respecting Canada's international obligations regarding safety at sea". It concluded that [TRANSLATION] "to require [Transport Canada] to contravene these obligations in order to grant the [applicant] an unrestricted marine medical certificate would constitute undue hardship" (Applicant's Complete Record, p. 21).

H. *Applicant's complaints against Commission's decision*

[36] The applicant submits that the Commission made four errors justifying Court intervention.

[37] First, the applicant submits that the Commission erred in its application of the third branch of the test set out in *Meorin* and *Grismer*. In particular, he criticizes it for having failed to analyze whether Transport Canada had met his needs to the point where it would have resulted in undue hardship, not only by disregarding the opinion of his attending psychiatrist for the past 25 years, but also by not even taking note of the opinion of the medical marine examiners who issued him provisional medical certificates without limitations between 2012 and 2016.

[38] Second, the applicant criticizes the Commission for failing to apply the test in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*], in its analysis. In particular, it had to ask itself, according to the applicant, whether it was arbitrary, unfair or irrational to deprive him of a right when he has been asymptomatic for 25 years, which it did not do. It also had to make sure that the limitations on his marine medical certificate infringed his rights as little as possible, which it did not do either. Finally, he argued, it had to ensure that the standards set out in diagnostic code F-20-31 of Appendix E to the ILO/WHO Guidelines were not themselves arbitrary, unfair or based on irrational considerations.

[39] Third, the applicant considers that the Commission should have concluded that Transport Canada had not shown all the flexibility required in applying the criteria for determining fitness for service at sea contained in Appendix E to the ILO/WHO Guidelines in connection with diagnostic code F-20-31. This stems, he insists, from the fact that he had been classified in the more restrictive category of victims of a single episode of schizophrenia without provoking factors or more than one episode with or without provoking factors, rather than in the non-limiting category, supported more by the medical evidence on the record, of victims of a single

episode of schizophrenia associated with provoking factors, which category would make him "[a]ble to perform all duties worldwide within designated department".

[40] Finally, the applicant argues that the Commission failed to carry out an individual assessment of his situation. This is evidenced by the Commission's failure to consider the opinion of his attending psychiatrist that, since his relapse in 1994, he has had no active psychotic symptoms or any particular limitations or restrictions when working, or to even mention the opinions of the marine medical examiners who granted him provisional marine medical certificates without limitations. His evidence also points to the fact that the Commission ultimately relied on the opinion of doctors who never met him.

III. Issue and standard of review

[41] In my view, this case raises only one issue, and that is whether, in concluding as it did in applying the third branch of the test set out in *Meiorin* and *Grismer*, the Commission erred so as to justify the intervention of the Court within the parameters set by section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[42] At the time the parties produced their respective memorandums for the Court's file, there was no doubt, in the absence of complaints based on the principles of procedural fairness, that the standard of review applicable to this issue, as I had the opportunity to say in *Walsh v Canada (Attorney General)*, 2017 FC 451 [*Walsh*], to which the applicant has referred extensively, was that of reasonableness (*Walsh* at paras 22–23; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364 at paras 21 and 25 [*Halifax Regional*]; *Bell*

Canada v Communications, Energy and Paperworkers Union of Canada, [1999] 1 FC 113 (CA) at para 38 [*Bell Canada*]).

[43] This meant that the Court would not normally interfere with the decisions of the Commission unless "unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence" (*Walsh* at para 23; *Tutty v Canada (Attorney General)*, 2011 FC 57, at para 14; *Keith v Canada (Correctional Service)*, 2012 FCA 117, at para 43; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 47; *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

[44] When the present case was argued, however, the Supreme Court of Canada had just rendered its judgment in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], a case which provided the Supreme Court with an "opportunity to re-examine its approach to judicial review of administrative decisions" (*Vavilov* at para 1) and to which the applicant has also made extensive reference.

[45] However, in my opinion, that judgment does not change anything with regard to the standard of review applicable to the examination of the issue in this case. Indeed, for the purpose of clarifying and simplifying the applicable law with regard to determining the standard of review applicable in a given case, the Supreme Court has adopted an "analysis begin[ning] with a presumption that reasonableness is the applicable standard in all cases" (*Vavilov* at paras 10 and 25). This analytical framework takes for granted, as the conceptual basis for this

presumption, the expertise of the administrative decision maker, considered inherent in its specialized functions (*Vavilov* at paras 26–28).

[46] According to *Vavilov*, this presumption can be rebutted in only two types of situations. The first concerns cases where the legislature has clearly indicated that it intends a different standard from the reasonableness standard to apply. This is the case when the legislature explicitly prescribes the applicable standard of review or has provided a statutory appeal mechanism from an administrative decision to a court. In that case, it is a matter of complying with the legislature's intent.

[47] The second situation in which the presumption of the reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case with questions of a constitutional nature, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[48] In my opinion, the present case does not have any of the characteristics allowing for a departure from the presumption that reasonableness is the applicable standard, and I did not understand, during the representations by the applicant's counsel at the hearing, that he continued to argue, as he did in his memorandum, that the questions of whether the Commission had correctly applied the third branch of the test set out in *Meiorin* and *Grismer* and whether it should have conducted, in this case, an analysis based on *Oakes*, should have been reviewed by this Court according to the standard of correctness.

[49] As to the content of the reasonableness standard, it will suffice for me to add, for the purposes of this case, as noted by the Supreme Court of Canada, that "a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem". The Court will consider only "whether the decision made by the administrative decision maker—including both the rationale for the decision and the outcome to which it led—was unreasonable" (*Vavilov* at para 83).

IV. Analysis

A. *Preliminary objections*

[50] Before embarking on the analysis of the question in dispute, I must address two preliminary objections raised by the Attorney General.

[51] The first objection relates to the style of cause, the Attorney General being of the opinion that he should be the only one named as a respondent. In my view, having two respondents in this case is redundant, but not necessarily improper. In fact, the Minister of Transport—the other respondent—clearly has a direct interest in the outcome of this litigation since, ultimately, he is the one who issues marine medical certificates. He is not, moreover, the administrative decision maker whose decision is being reviewed by the Court. It would have been otherwise had the applicant designated the Commission or the Department of Transport as respondents, in which case those designations would have been improper (*Forest Ethics Advocacy Association v*

Canada (National Energy Board), 2013 FCA 236 at paras 16–21; *Drew v Canada (Attorney General)*, 2018 FC 553 at para 12; *Gravel v Canada (Attorney General)*, 2011 FC 832 at paras 5–6) [emphasis added]. However, he failed to do so.

[52] The designation of the Minister of Transport as the respondent in the proceedings will therefore be maintained.

[53] The second objection raised by the Attorney General relates to some of the evidence presented by the applicant before this Court. These are exhibits P-3, P-5 and P-12 appended to the affidavit he signed in support of his application for judicial review and paragraphs 1, 3, 7, 9, 20, 21 and 22 of that affidavit.

[54] The Attorney General submits that this evidence constitutes new evidence, that is, evidence that was not before the Commission when it rendered its decision. Accordingly, he argues, this evidence should not, according to the principles laid down by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*], be considered by the Court.

[55] In principle, an application for judicial review must be assessed on the basis of the record that was before the administrative decision maker, such that evidence that was not there should be considered inadmissible before the reviewing court (*Access Copyright* at para 19). However, this rule does tolerate certain exceptions, including one permitting the production, on judicial review, of general information that may assist the Court in understanding the issues relevant to

the dispute, even if the decision maker has not had access to it,. This type of information is admissible provided that "[c]are [is] taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Access Copyright* at para 20).

[56] Exhibit P-3 essentially contains, in a bundle, the provisional medical certificates issued to the applicant, every two years, between 2012 and 2018. Aside from the 2018 certificate and the preceding medical note, issued only a few weeks before the Commission made its decision, these certificates are mentioned in the file that was before the Commission. In particular, it is mentioned in the letter the applicant sent it in March 2018, in response to the Report (Respondent's Record, Attorney General of Canada, p 23). I therefore see no reason to exclude the certificates of 2012, 2014 and 2016, especially since they consist only of simple half-page forms which add no substantial information to what the file that was before the investigator and the Commission already contained. Paragraph 22 of the applicant's affidavit, which only repeats this information, does not have to be struck out either, except, of course, the reference to the 2018 provisional certificate.

[57] For its part, Exhibit P-5 consists of a series of documents aimed at establishing the training and technical skills acquired by the applicant in the maritime domain as well as his experience at sea. Nothing in this case really hinges on such matters. In my opinion, this exhibit helps to lay out the general context of the present dispute, nothing more. It is therefore admitted, since the applicant has referred to it in a general way in the representations he submitted to the

investigator. The same is true of paragraphs 1, 3, 7, 9, 20 and 21 of the applicant's affidavit, which, once again, merely repeat this general contextual information.

[58] Exhibit P-12, for its part, is made up of extracts from testimony heard by the Tribunal's review counsellor, that of Dr. Sully, Dr. Pullman and Cédric Baumelle, an expert in marine safety. I cannot understand this objection to the admissibility of these extracts from testimony since, in a letter dated April 10, 2017, which purported to be Transport Canada's response to the applicant's complaint, counsel from this department's legal services, responsible for issuing that response, submitted to the investigator, via the Commission's Investigation Division, what appears to be a complete copy of the transcript of that testimony (Respondent's Record, Attorney General of Canada, Tab F, p 70). At first glance, therefore, the transcript of these testimonies, of which Exhibit P-12 reproduces extracts, was before the investigator.

[59] The applicant was, therefore, fully entitled to file them in the Court record since these extracts were, in all likelihood, part of the record that was before the decision maker, even if they were not reproduced in the Certified Tribunal Record transmitted to the Registry of the Court by the Commission under rule 318 of the *Federal Courts Rules*, SOR/98-106, which, as seems to be the case most of the time with records from the Commission, can be summed up to the bare minimum (*François-Jumelle v Canada Post Corporation*, 2019 FC 1601, at paras 36–39). I was not persuaded, nor did anyone even try to persuade me, that the situation was different in this case.

[60] This second preliminary objection is therefore also rejected.

B. *Commission's decision unreasonable*

(1) Role of Commission

[61] We should begin by clearly defining the role that the Commission is called upon to play in terms of the powers conferred on it by section 44 of the Act. It is not its job to determine if the complaint is made out; rather, its duty is to decide if an inquiry by the Canadian Human Rights Tribunal is warranted having regard to all the facts of the case (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*] at para 53).

[62] In that sense, the Commission is not an adjudicative body; that role belongs to the Tribunal under the Act. Its primary mandate, at this stage, is more analogous to that of a judge at a preliminary inquiry. In other words, it is tasked with carrying out a "screening analysis" of the matter (*Cooper* at paras 52–53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at pp 898-99; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 16). In exercising this mandate, the Commission has broad discretion (*Halifax Regional* at paras 21 and 25).

[63] However, despite all of the Commission's discretion and deference to the Court, its decisions to dismiss a complaint or refer it to the Canadian Human Rights Tribunal for consideration must nevertheless meet the requirements of reasonableness, that is, they "must be based on an internally coherent and rational chain of analysis and [be] justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[64] As will be seen, though, this is not the case here.

(2) Legal framework

[65] It is useful, as a first step, to outline the normative framework applicable to the granting of marine medical certificates in Canada.

[66] This framework essentially stems from the Regulations, adopted under the *Canada Shipping Act, 2001*, SC 2001, c 26 [CSA], which aims, in particular, to (i) protect the health and well-being of individuals, including the crews of vessels, who participate in marine transportation and commerce; (ii) promote safety in marine transportation and recreational boating; (iii) ensure that Canada can meet its international obligations under bilateral and multilateral agreements with respect to navigation and shipping; and (iv) encourage the harmonization of maritime practices.

[67] The ILO/WHO Guidelines, by virtue of subsections 1(7) and 270(1) of the Regulations, form part of the body of medical standards intended to guide the issuing of such certificates. They are intended to provide "complementary advice to competent authorities" aimed at harmonizing the standards of physical fitness applicable to seafarers enacted under the *Medical Examination (Seafarers) Convention, 1946*, later incorporated into the MLC, and the STCW Convention. They became necessary due to the increasing internationalization of shipping and the considerable variation in physical fitness standards that could be applied from country to country (Respondent's Record, Attorney General of Canada, Tab H, p 167).

[68] The rules governing the issuance of marine medical certificates are set out in sections 268 to 281 of the Regulations. This system provides for the issuance of two types of certificates: the “provisional medical certificate”, issued, under section 275 of the Regulations, by a “marine medical examiner” following a medical examination governed by the medical standards set out in the ILO/WHO Guidelines and those provided for in section 270 of the Regulations; and the “medical certificate”, issued upon review of the provisional medical certificate by the Minister of Transport, as permitted by section 278 of the Regulations.

[69] According to section 269 of the Regulations, these certificates attest to the holder’s ability to perform the duties for which they are to be employed and to complete the voyages to be engaged on by the ship on board which they are to be employed.

[70] With respect to the provisional medical certificate more specifically, subsections 270(1) and 275(1) of the Regulations state that when issued, with or without limitations, it is evidence that the holder has (i) adequate muscle strength to lift and carry a weight of 22 kilograms; (ii) the physical capacity to wear breathing apparatus and personal life-saving equipment while climbing ladders; (iii) the agility and strength to carry out the duties that may be assigned to them regarding fire-fighting and vessel abandonment in an emergency; and (iv) the physical and mental fitness to meet the occupational and operational requirements of the position that they occupy or seek to occupy.

[71] The marine medical examiner, when issuing a provisional medical certificate, must, pursuant to paragraph 275(1)(a) of the Regulations, provide the Minister of Transport with a

copy of the provisional medical certificate, the original copy of the duly completed medical examination report form, and a copy of any other relevant medical report. Furthermore, according to paragraph 275(2)(b) of the Regulations, when this doctor, after having issued such a certificate, remains uncertain of the holder's medical fitness, the doctor must return the file to the Minister of Transport so that the Minister can exercise his or her powers under section 278 of the Regulations.

[72] A seafarer to whom the issuance of a provisional medical certificate has been refused, or accepted but with limitations, may, under section 277 of the Regulations, contest the decision of the marine medical examiner before the Minister of Transport by submitting a memorandum to the Minister in accordance with subsection 278(1) of the Regulations. The same right to contest extends to the seafarer's current or prospective employer.

[73] Pursuant to subsection 278(3), the Minister of Transport may also reconsider said certificate on his or her own initiative if there is reason to believe, for example, that the copy of the provisional medical certificate received from the marine medical examiner is incomplete or erroneous. In doing so, the Minister may take one or more of the measures provided for in subsection 278(2) of the Regulations, namely:

a. direct that further medical examinations or tests be carried out and, if the Minister wishes, stipulate the nature of the examinations or tests required and the persons or organizations to carry them out;

b. consult any expert on the medical fitness of the seafarer or the occupational and operational requirements of the position that the seafarer occupies or could occupy if the seafarer had the required medical certificate; and

c. name a medical reconsideration committee composed of a physician independent of the shipowner, a marine occupational expert who holds a certificate of competency, and a member of the marine industry who is acceptable to the seafarer, that will function in accordance with the procedures set out in section 279 of the Regulations and that will be responsible for giving its recommendations concerning the provisional medical certificate under consideration.

[74] Following the reconsideration of the provisional medical certificate, the Minister of Transport may, as provided in subsection 278(4) of the Regulations, refuse to issue the requested medical certificate or issue it with or without limitations. Pursuant to subsection 278(5), the Minister's decision will be based on the following criteria:

a. the occupational and operational requirements of the position that the seafarer occupies or seeks to occupy;

b. the level of risk involved in the position with regard to the seafarer, other seafarers, the passengers on board the vessel on which the position exists, if any, the ship itself, and the health and the safety of the general public; and

c. any relevant consideration linked to human rights as set out in the Charter and the Bill of Rights.

[75] When the Minister of Transport, pursuant to his or her power to reconsider, issues a limited medical certificate, the seafarer, in accordance with section 280 of the Regulations, may request a review of that certificate by the Tribunal, as was the case here.

[76] The affidavit that the Attorney General produced in support of this judicial review, that of Dr. Marie Goulet, Senior Officer with the MMU, indicates that this unit is responsible for [TRANSLATION] "reviewing seafarers' medical examination reports submitted by marine medical examiners (with a view to said seafarers obtaining a marine medical certificate)" (Respondent's Record, Attorney General of Canada, p 30).

[77] Dr. Goulet did not, however, specify where the MMU's mandate falls in relation to the "actions", specified in subsection 278(2) of the Regulations, that the Minister of Transport can take when he or she has reason to believe that the provisional medical certificate issued by a marine medical examiner is incomplete or erroneous.

[78] A word now on the ILO/WHO Guidelines, to complete this overview of the normative framework applicable to the issuance of marine medical certificates.

[79] The purpose of these guidelines is, in particular:

a. "to provide maritime administrations with an internationally recognized set of criteria for use by competent authorities either directly or as the basis for framing national medical examination standards that will be compatible with international requirements"; and

b. to “help administrations establish criteria that will lead to equitable decisions about who can safely and effectively perform their routine and emergency duties at sea, provided these are compatible with their individual health-related capabilities” (Respondent’s Record, Attorney General of Canada, Tab H, p 171)

[80] In that regard, they deal with the purpose and content of the medical certificate issued to seafarers, set out the qualifications expected of medical practitioners authorized to conduct the medical examination associated with the issuance of such certificates, and lay down, for those medical practitioners, instructions relating to the conduct of such examinations and the issuance of such certificates (Respondent’s Record, Attorney General of Canada, Tab H, pp 176–85).

[81] In particular, the ILO/WHO Guidelines establish medical standards to guide the work of those practitioners. The standards are set out in appendices A to E to those guidelines. Appendix A deals with vision standards; Appendix B, with hearing standards; Appendix C, with physical capability requirements; and Appendix D, with fitness criteria for medication use.

[82] As I have already mentioned, it is Appendix E on which both parties rely in the present case. This appendix sets out the criteria for determining the fitness of a seafarer for work at sea where that seafarer has one or more “common medical conditions”. It is based on the premise that it is not possible for the medical practitioner to “develop a comprehensive list of fitness criteria covering all possible conditions and the variations in their presentation and prognosis” (Respondent’s Record, Attorney General of Canada, Tab H, p 198).

[83] To this end, Appendix E lays out, in the form of a table, "recommendations . . . intended to allow some flexibility of interpretation while being compatible with consistent decision-making that aims to maintain safety at sea" (Respondent's Record, Attorney General of Canada, Tab H, p 198). This table has five columns, each containing the following type of information:

- Column 1: Codes from the "WHO International Classification of Diseases, 10th revision", which are listed "as an aid to analysis and, in particular, international compilation of data";
- Column 2: "The common name of the condition or group of conditions considered, with a brief statement on its relevance to work at sea";
- Column 3: "The guideline recommending when work at sea is unlikely to be indicated, either temporarily or permanently. This column should be consulted first when the table is being used to aid decisions about fitness";
- Column 4: "The guideline recommending when work at sea may be appropriate but when restriction of duties or monitoring at intervals of less than two years is likely to be appropriate. This column should be consulted if the seafarer does not fit the criteria in column 3"; and
- Column 5: "The guideline recommending when work at sea within a seafarer's designated department is likely to be appropriate. This column should be consulted when the person concerned does not meet the criteria set out in columns 3 or 4".

  (Respondent's Record, the Attorney General of Canada, Tab H, p 198)

[84] The international classification code of diseases which was applied to the applicant, I remind you, is code F-20-31 (column 1), and the nature of the common medical condition considered in his case is that of "*Psychosis (acute) – whether organic, schizophrenic or other category listed in the ICD. Bipolar (manic depressive disorders) Recurrence leading to changes to perception/cognition, accidents, erratic and unsafe behaviour*" (column 2) (Respondent's Record, Attorney General of Canada, Tab H, p 198). Columns 3 to 5 of the table have the following titles:

- Column 3: "Incompatible with reliable performance of routine and emergency duties safely or effectively – expected to be temporary (T) – expected to be permanent (P)";
- Column 4: "Able to perform some but not all duties or to work in some but not all waters (R). Increased frequency of surveillance needed (L)"; and
- Column 5: "Able to perform all duties worldwide within designated department".

[85] For ease of reference, the table corresponding to this diagnostic code [Table] is reproduced below:

ICD-10 (diagnostic codes)	**Condition (justification for criteria)**	**Incompatible with reliable performance of routine and emergency duties safely or effectively – expected to be temporary (T) – expected to be permanent (P)**	**Able to perform some but not all duties or to work in some but not all waters (R) Increased frequency of surveillance needed (L)**	**Able to perform all duties worldwide within designated department**
F20-31	**Psychosis** (acute) – whether organic, schizophrenic or other category listed in the ICD. Bipolar (manic depressive disorders) *Recurrence leading to changes to perception/cognition, accidents, erratic and unsafe behaviour*	*Following single episode with provoking factors:* T – Until investigated and stabilized and conditions for fitness met. At least three months after episode	R, L – Time limited, restricted to near coastal waters and not to work as master in charge of vessel or without close supervision and continuing medical monitoring, provided that: – seafarer has insight; – is compliant with treatment; and – has no adverse effects from medication:	Case-by-case assessment at least one year after the episode, provided that provoking factors can and will always be avoided.
		Following single episode without provoking factors or more than one episode with or without provoking	R, L – Time limited, restricted to near coastal waters and not to work as master in charge of vessel or without	Case-by-case assessment to exclude likelihood of recurrence at least five years since end of episode if no

		factor. T – Until investigated and stabilized and conditions for fitness met. At least two years since last episode. P – More than three episodes or continuing likelihood of recurrence. Criteria for fitness with or without restrictions are not met.	close supervision and continuing medical monitoring providing that: - the seafarer has insight; - is compliant with treatment; and - has no impairing adverse effects from medication	further episodes; no residual symptoms; and no medication needed during last two years.

[86] Upon examining the Table, we can see that the assessment of the seafarer's ability to exercise his or her functions is carried out according to two scenarios: one where the mental or behavioural disorder results from a "*single episode with provoking factors"* or that where it results from a "*single episode without provoking factors or [from] more than one episode with or without provoking factor"*.

[87] Although it is not, strictly speaking, part of the normative framework applicable to the issuance of marine medical certificates in Canada, since it does not have the force of law, Transport Canada makes available to marine medical examiners the Physician's Guide, which aims to standardize the medical examination of seafarers and is [TRANSLATION] "largely" based on the ILO/WHO Guidelines (Respondent's Record, Attorney General of Canada, Tab G, p 78).

[88] Finally, in terms of the Act, the provisions relevant to this appeal, at least with regard to the merits of the case, are, I note, sections 5 and 15. I would also point out, in this regard, no one here disputes the fact that the issuance of marine medical certificates is a service customarily available to the public within the meaning of section 5 of the Act and that the applicant was,

again within the meaning of this section, a victim of adverse differentiation in the provision of this service when he was issued a certificate subject to limitations due to a standard which renders unfit for service at sea any person suffering from schizophrenia.

[89] Rather, what is at issue is whether these limitations qualify as exceptions under section 15 of the Act. For the purposes of this case, the relevant paragraphs of section 15 of the Act read as follows:

Exceptions	**Exceptions**
15(1) It is not a discriminatory practice if	15 (1) Ne constituent pas des actes discriminatoires:
(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.	g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.
Accommodation of needs	**Besoins des individus**
(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of	(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en

individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	matière de coûts, de santé et de sécurité.

[90] As we have seen, the implementation of these provisions is guided by the test set out in *Meiorin* and *Grismer*, which requires, in order for a *prima facie* discriminatory standard to have a *bona fide* justification within the meaning of paragraph 15(1)(g), that it be demonstrated that said standard was adopted for a purpose rationally connected to the functions beings performed; that it was adopted in good faith, in the belief that it was necessary for achieving that purpose; and that it is reasonably necessary to accomplish the purpose, in the sense that people sharing the same characteristics as the applicant cannot be accommodated without this imposing undue hardship in terms of cost, health or safety on those who adopted the standard.

(3) Commission's application of third part of test in *Meiorin* and *Grismer* suffers from major omission

[91] The applicant, I once again note, argues that the Commission erred in its application of the test set out in *Meiorin* and *Grismer*. To be more precise, he criticizes it, first, for failing to apply this test by not asking itself whether Transport Canada had met his needs to the point where it would have resulted in undue hardship.

[92] This omission, according to the applicant, stems from the fact that the Commission ignored the favourable medical evaluations from his attending psychiatrist and the marine medical examiners who issued him provisional medical certificates without limitations in 2012,

2014 and 2016. The Commission, he argues, could not be satisfied, at the risk of not fully exercising its jurisdiction, with only the opinion of the MMU physicians without going further in its analysis.

[93] It should be noted, first, that the Commission did not ignore the opinion of Dr. Girard. It indeed used the diagnosis he made—that of residual schizophrenia—and the accompanying treatment plan—daily medication and quarterly follow-up—to support its general conclusion that it was reasonable for Transport Canada to impose limitations on the applicant's marine medical certificate.

[94] On the other hand, it distanced itself from the view of the limitations or restrictions that such a diagnosis could generate in connection with fitness for work. In this latter respect, it preferred the opinion of the physicians at the MMU to that of Dr. Girard on the basis that the file before it contained [TRANSLATION] "no evidence demonstrating that the [applicant's] psychiatrist is a qualified marine doctor, or that he has assessed the [applicant] in light of the legislation applicable to the issuance of marine medical certificates" (Applicant's Complete Record, p 21).

[95] However, where the problem lies, in my opinion, is in the Commission's complete silence on the provisional medical certificates issued to the applicant in 2012 but also in 2014 and 2016, after the issuance of the limited medical certificate which is the subject of this dispute. These provisional certificates were however issued by two different doctors, both of whom had the qualifications which, according to the Commission, Dr. Girard lacked, and who assessed the applicant, contrary to what Dr. Girard did, again according to the Commission, in light of the

legislation applicable to the issuance of marine medical certificates, as required of them by the Regulations (Applicant's complete Record, Exhibit P-3, pp 33–35).

[96] As we have seen, this specific qualification and the specific medical standards, which attest to the seafarer's fitness to perform the duties for which they are to be employed and to complete the voyages on the ship on board which they are to be employed, are central elements of the system for issuing marine medical certificates established by the Regulations. This certificate must come from a physician who, according to section 268 of the Regulations, meets the requirements of the ILO/WHO Guidelines and has been designated by the Minister of Transport to perform this type of task.

[97] Furthermore, the ILO/WHO Guidelines teach us that it is "critical" that the physicians called upon to carry out these types of certifications have "a clear understanding of the special requirements of seafaring life" (Respondent's Record, Attorney General of Canada, Tab H, p 167). More specifically, these physicians should have "knowledge of the living and working conditions on board ships and the job demands on seafarers in so far as they relate to the effects of health problems on fitness for work", and that knowledge is to be gained "wherever possible through special instruction and through knowledge based on personal experience of seafaring" (Respondent's Record, Attorney General of Canada, Tab H, p 178).

[98] These certificates, issued by physicians certified by Transport Canada because they are supposed to have a "clear understanding of the special requirements of seafaring life" and "knowledge of the living and working conditions on board ships and the job demands on

seafarers" which may have an impact on "fitness for work", attest that in 2014 and 2016, the applicant was fit to work at sea, without limitations. There is also no indication on the record that these marine medical examiners, as permitted by paragraph 275(2)(b), referred the file to the Minister of Transport because they remained uncertain, after having issued these certificates, of the applicant's physical and mental fitness.

[99] In a context where the Commission had to be satisfied that Transport Canada had accommodated the applicant to the point where it would have resulted in undue hardship, there is, in my view, a situation requiring, at the very least, an explanation of why these provisional certificates, which were nevertheless brought to the attention of the Commission (Respondent's Record, Attorney General of Canada, p 23), did not deserve consideration or, if they deserved it, why no weight was given to them or why, despite these certificates and Dr. Girard's opinion being in the file, the MMU's opinion nevertheless prevailed.

[100] It is true, as the Attorney General points out, that the Commission is presumed to have considered all of the evidence submitted (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 60 [*Gosal*]) and that it is not required, in its decisions, to refer to "all the arguments, statutory provisions, jurisprudence or other details that the reviewing judge would have preferred" (*Vavilov* at para 91).

[101] However, it is also well established that the Court can intervene if the Commission fails to consider "obviously crucial evidence", particularly when that evidence contradicts the findings it made (*Walsh* at para 23). According to the jurisprudence of this Court, evidence is "obviously

crucial" if it is "obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal* at para 54). I find that this is the situation in this case.

[102] The Attorney General maintains that the provisional certificates issued in 2014 and 2016 are irrelevant and not determinative for settling the dispute. I do not see it the same way. In the particular context of this case, the relevance of these certificates is due to the fact that marine medical examiners approved by the Minister of Transport continued to judge the applicant fit for service at sea, without limitations, despite the decision of December 2012 to issue him a limited medical certificate. In other words, the marine medical examiners who have so far had to rule on the applicant's physical and mental fitness to perform the duties for which he is to be employed and to complete the voyages to be engaged on by the ship on board which he is to be employed, are adamant in their opinion: he is fit without limitations.

[103] Unless the issuance of provisional certificates under the Regulations is completely redundant, which I do not consider to be the case when examining the applicable regulatory framework, the continued issuance of these provisional certificates to the applicant could not be ignored by the Commission.

[104] I would point out that when it comes to the application of Appendix E to the ILO/WHO Guidelines, that is, the appendix concerning the fitness criteria for common medical conditions, the decision taken in this regard by the marine medical examiner depends on a "careful clinical assessment" that takes into account a number of points. Among those, there is the fact, as we

have seen, that the recommendations in this appendix "are intended to allow some flexibility of interpretation while being compatible with consistent decision-making that aims to maintain safety at sea" and that the criteria developed therein should not replace the marine medical examiner's sound medical judgement. There is also the fact that "[k]nowledge about the condition and an assessment of its features in the [seafarer] being examined should be used to reach a decision on fitness" (Respondent's Record, Attorney General of Canada, Tab H, p 198).

[105] This, at first glance, is by no means a superficial examination and decision regarding the seafarer's fitness for work at sea.

[106] If, in such a context, the provisional certificates issued to the applicant in 2014 and in 2016 are irrelevant, as the Attorney General claims, it was for the Commission to demand an explanation and to decide the question. It did not.

[107] *Vavilov* reminds us that the reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. This means that even if the outcome of the decision may seem reasonable, the Court can nevertheless intervene if the analysis leading to this outcome was itself unreasonable (*Vavilov* at paras 83 and 87).

[108] In this latter regard, it is not for me to provide reasons that were not given by the Commission, nor is it licence to guess or to speculate what findings might have been made (*Vavilov* at para 97). Here, I find that the Commission has remained silent on an important point

and that this silence undermines the intelligibility and transparency of its conclusion that Transport Canada could not accommodate the applicant further without this reaching the point of undue hardship.

[109] But there is more, in my opinion. The problem with the Commission's silence on the provisional certificates issued to the applicant in 2014 and 2016 is exacerbated by its conclusion that issuing an unrestricted marine medical certificate to the applicant would contravene Canada's international obligations and would thus constitute undue hardship (Applicant's Complete Record, p. 21).

[110] Here, I think, we must return to the position taken by Transport Canada in response to the applicant's complaint (Respondent's Record, Attorney General of Canada, Tab F, pp 66–71). What is striking, at first glance, is the emphasis placed on the Physician's Guide, which makes schizophrenia and schizoaffective disorders a cause of complete unfitness for work at sea (Respondent's Record, Attorney General of Canada, Tab F, p 66, and Tab G, p 118). Transport Canada's response shoes that had it not been, for all intents and purposes, for the *Houle* judgment, the limited medical certificate of December 2012 would never have been issued to the applicant and the decision of September 2012 declaring him unfit for service at sea would have been maintained. In complying with this judgment, Transport Canada indicated that it had [TRANSLATION] "given [the applicant] different treatment from what would normally have been given to another candidate with the same medical record as [the applicant] after applying the legislation for which the Minister of Transport is responsible" (Respondent's Record, Attorney General of Canada, Tab F, p 69).

[111] Commenting on the applicant's allegation that he is able to "perform all duties worldwide within [the] designated department", in accordance with column 5 of the Table, taking into account that he has been asymptomatic for 25 years, Transport Canada stated that the criteria for fitness "with or without restriction" could not apply to him and that, in his case, only the "expected to be permanent" incompatibility criteria, specified in column 3 of the Table, could apply since he continued to present a "continuing likelihood of recurrence" because he must take his medication daily to prevent the resurgence of symptoms of paranoia (Respondent's Record, Attorney General of Canada, Tab F, pp 68–69). He would therefore only appear to have achieved stability (Respondent's Record, Attorney General of Canada, Tab J, p 244).

[112] This approach, mainly focused on the general unfitness for work at sea of people who, like the applicant, are suffering from mental or behavioral disorders, contrasts with the standards of the normative framework which is required at Transport Canada. These standards, while being focused, as they should be, on maintaining safety at sea, allow, as we have seen, for a degree of flexibility in their interpretation, provide guidance for physicians called upon to interpret them and make the "individual features" of the common medical condition of the seafarer being examined the heart of the assessment of his or her fitness for working at sea. Also, and above all, these standards, unlike the Physician's Guide, recognize that a seafarer afflicted with mental or behavioural disorders may still be fit, with or without limitations, for service at sea.

[113] Being informed that unlimited provisional medical certificates from marine medical examiners had been issued to the claimant in 2012, 2014 and 2016 according to medical standards which Canada has incorporated into its domestic law, and having in its possession the

opinion of Dr. Girard, who has been ensuring the applicant's clinical follow-up since 1995 and who concluded that there were no constraints or limitations regarding work, it became imperative, in my opinion, that the Commission, faced with the approach advocated by Transport Canada, explain, on the basis of the more flexible normative framework required for the issuance of marine medical certificates, how the granting the applicant a medical certificate without limitations went against, in such a context, Canada's international obligations and constituted undue hardship with regard to the duty to accommodate under subsection 15(2) of the Act.

[114] This duty was even more necessary, in my view, given that Transport Canada's position in this case is largely based on the opinion of Dr. Pullman, a psychiatrist who, according to the applicant, has admitted that he is not a specialist in occupational medicine (Respondent's Record, Attorney General of Canada, p 23). However, according to Transport Canada, only such a specialist can comment on the specific limitations or restrictions related to work. This was Transport Canada's criticism of Dr. Girard's opinion: it did not come from an expert in occupational medicine (Respondent's Record, Attorney General of Canada, Tab F, p 67). The Commission said nothing about this apparent contradiction.

[115] In sum, the Commission's decision suffers, in my view, from significant shortcomings in this regard which vitiate its reasonableness. In other words, because of these shortcomings, it fails to meet the requisite standard of justification and intelligibility that one should expect from a reasonable decision. Even though the reasons provided by an administrative decision maker are not to be assessed against a standard of perfection, they must nevertheless allow the reviewing court develop an understanding of the reasoning process which led to the impugned decision

(*Vavilov* at paras 85 and 91). That is not the case here. Therefore, the Commission's decision is set aside.

[116] In the circumstances, it will not be necessary for me to determine whether, in addition to the test in *Meiorin* and *Grismer*, the Commission also had to apply the *Oakes* test, as the applicant claims.

[117] As relief, the applicant asks me to order that his complaint be heard by the Canadian Human Rights Tribunal. He also requires that Transport Canada be ordered to issue him an unlimited marine medical certificate.

[118] Obviously, the applicant cannot obtain either remedy since ordering Transport Canada to issue him an unlimited marine medical certificate would have the effect of making the referral of his complaint to the Canadian Human Rights Tribunal moot for all intents and purposes.

[119] But beyond this consideration, I am of the opinion that the applicant is not entitled to either of these remedies because they are regarded as directed verdicts (*Canada (Citizenship and Immigration) v Tenant*, 2018 FCA 132 at para 28; *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 44). Indeed, although the Court's power of relief in the context of judicial review is discretionary, the choice of relief, when the decision of an administrative decision maker is deemed unreasonable, must be "guided by the rationale for applying that standard", which includes "the recognition by the reviewing court that the legislature has entrusted the matter to

the administrative decision maker, and not to the court" (*Vavilov* at para 140; *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at para 31 [*Delta Air Lines*]).

[120] Normally, therefore, when the reasonableness of a decision cannot be upheld by the Court, the appropriate relief will most often be to remit the matter to the decision maker, this time with the benefit of the Court's reasons. (*Vavilov* at para 141; *Delta Air Lines* at para 30). The decision maker may arrive at the same, or a different, outcome (*Vavilov* at para 141).

[121] However, considerations such as the proper administration of justice, the need to ensure access to justice and the goal of an expedient and cost-efficient decision-making process can play a role in the exercise of the Court's remedial power and justify a departure from the usual relief (*Vavilov* at para 140; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55). This will be the case when the referral of the case to the administrative decision maker would "stymie the timely and effective resolution of matters in a manner that no legislature could have intended", as, for example, when it "becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (citations omitted)". These situations where it would be appropriate to depart from the usual relief will, however, be limited (*Vavilov* at paras 140–42).

[122] Here, the applicant did not make any representations or submit any authorities to persuade me to depart from the general rule that the matter be returned to the Commission for review in light of these reasons. In any event, I see no reason to depart from this general rule in

the circumstances of this case. It is therefore necessary to respect the will of Parliament and to return the case to the Commission so that members other than those who made the decision under review can reconsider it.

[123] The applicant claims his costs. Given the outcome of this judicial review, he will be entitled to them. Following the hearing in this case, counsel for both parties informed the Court that they had agreed on the quantum of costs, whichever party would be entitled to them, if costs were to be awarded. This quantum is $3,500 and seems reasonable to me in the circumstances of this case.

JUDGMENT in T-1138-18

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The decision of the Canadian Human Rights Commission, dated May 9, 2018, dismissing the complaint lodged by the applicant, is set aside, and the matter is remitted to the Commission, differently constituted, for reconsideration;
3. With costs to the applicant fixed at an amount of $3,500;

"René LeBlanc"
Judge

Certified true translation
This 19th day of June 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1138-18
STYLE OF CAUSE:	GAÉTAN HOULE v ATTORNEY GENERAL OF CANADA, MINISTER OF TRANSPORT OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	FEBRUARY 27, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	LEBLANC J.
DATED:	MAY 1, 2020

APPEARANCES:

Jean-François Labadie	FOR THE APPLICANT
Chantal Labonté	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Lévesque Labadie Avocats Québec, Quebec	FOR THE APPLICANT
Attorney General of Canada Québec, Quebec	FOR THE RESPONDENTS