



T-1530-96

BETWEEN:

THE CANADIAN SHIPOWNERS ASSOCIATION
UPPER LAKES SHIPPING LIMITED
ALGOMA CENTRAL CORPORATION
SEAWAY SELF UNLOADERS
SEAWAY BULK CARRIERS

and

N.M. PATERSON & SONS LIMITED

Applicants

AND:

HER MAJESTY IN RIGHT OF CANADA

and

THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER

ROULEAU, J.

This is an application for declaratory judgment setting aside and declaring null, illegal and *ultra vires*, Order in Council PC1996-764 and the *Manne Navigation Service Fees Regulations* SOR/96-282, which introduced user fees for marine navigation aids provided by the Canadian Coast Guard.

The Canadian Coast Guard (CCG) provides many services throughout Canadian waters including navigation systems, safety and public correspondence, dredging, icebreaking, flood control, Arctic supply and Rescue and Environment Response. Those services are offered to many clients, including but not limited to commercial shipping, recreational boating,

state and military, and the commercial fishing industry. In order to implement the policy of cost recovery instituted by the Government of Canada, the Coast Guard was required to commence recovering costs for the services provided to its different clients

Accordingly, on June 1, 1996, the *Marine Navigation Service Fees Regulations*, were implemented pursuant to section 19 of the *Financial Administration Act*, R S , 1985, c F-11. The Regulations, which require ships to pay fees for marine navigation services, was designed to recover the cost of navigational services provided by the CCG to commercial shipping. As such, the Regulations introduced user fees for marine navigation aids and other marine navigation services provided by the Canadian Coast Guard to commercial shipping, such as buoys, beacons, lighthouses, LORAN-C, racons and traffic services. For Canadian ships, the fee is payable annually. Non-Canadian ships pay the fee on a periodic basis when entering or navigating Canadian waters in the Western Region and on loading or unloading cargo in other regions. The mode of imposition of the fees vary according to ships' flag, type of vessels or the condition under which the vessel entered into Canada. It also varies by Western, Central and Atlantic region.

The applicants maintain that the *Marine Navigation Services Fees Regulations* are *ultra vires* section 19 of the *Financial Administration Act*. It is their submission that the fees must relate to actual use of a service or facility and that all users must therefore pay the same fee for a service or use of a facility. It is further alleged that the Regulations are discriminatory; that the fees imposed by the Regulations are in fact a tax; and, that the Regulations were adopted without proper consultation with the shipping industry.

After having carefully considered the written and oral submissions of the parties, I am satisfied that the application must be dismissed.

First, the approach to be taken in cases of this nature has recently been set out by the Federal Court of Appeal in *St Lawrence Cruise Lines Inc v Her Majesty the Queen* (A-151-96, June 20, 1997) at pp 11-12 as follows

The first thing that must be done when the validity of a regulation has been challenged is to construe the enabling statute. We must be careful not to apply the principles of interpretation laid down in the case law to the regulations without first considering the scope of the specific grant of regulatory power made by the legislation in question. As Lord Reid observed in *Padfield et al v Minister of Agriculture, Fisheries and Foods et al* [1968] A C 997 at p 1030,

Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

In *Roncarelli v Duplessis*, Rand J wrote

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator, no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. [T]here is always a perspective within which a statute is intended to operate, and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted

As well, in *Montreal v Arcade Amusements Inc*, Beetz J adopted the following observation by Louis-Philippe Pigeon in *Redaction et interpretation des lois*

[Translation]

Another important observation has to be made regarding the regulatory power. It is the following: the power to make regulations does not include a power to adopt discriminatory provisions. In other words, unless the legislation authorizing it states the contrary a regulation must apply to everyone in the same way. If the intent is to make a distinction, this must be stated

(emphasis added)

Accordingly, the question which must be answered in the present case is whether the *Financial Administration Act* permits the enactment of the impugned Regulations.

Section 19 of the Act, pursuant to which the *Marine Navigation Services Fees Regulations* were adopted, reads as follows

19 (1) The Governor in Council may, on the recommendation of the Treasury Board,

(a) by regulation prescribe the fees or charges to be paid for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada by the users or classes of users of the service or facility, or

(b) authorize the appropriate Minister to prescribe by order those fees or charges, subject to such terms and conditions as may be specified by the Governor in Council

(2) Fees and charges for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada that are prescribed under subsection (1) or the amount of which is adjusted under section 19.2 may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility to the users or class of users

(3) For greater certainty, "users" includes

(a) Her Majesty in right of Canada, other than a department, and

(b) Her Majesty in right of a province

19.1 The Governor in Council may, on the recommendation of the Treasury Board,

(a) by regulation prescribe the fees or charges to be paid for a right or privilege conferred by or on behalf of Her Majesty in right of Canada, by means of a licence, permit or other authorization, by the persons or classes of persons on whom the right or privilege is conferred, or

(b) authorize the appropriate Minister to prescribe by order those fees or charges, subject to such terms and conditions as may be specified by the Governor in Council

19.2 (1) A regulation or order under section 19 or 19.1 may prescribe rules for the adjustment, by such amounts or ratios as are referred to in the regulation or order, of the amount of the fee or charge, for such period as is specified in the regulation or order, but no such rules may provide for the consideration of any factors of adjustment that are not specified in the rules

(2) Notwithstanding that a regulation or order provides for the adjustment of the amount of a fee or charge for a period, its amount for the period is equal to its amount for the immediately preceding period unless the appropriate Minister, before the beginning of the period, publishes a notice in the *Canada Gazette* specifying the adjusted amount and the manner in which it was determined

19.3 Regulations and orders under sections 19 and 19.1 are subject to the provisions of any Act of Parliament relating to the service or the use of the facility, or to the right or privilege, but for greater certainty, may be made even though an Act of Parliament requires the provision of the service or facility or the conferral of the right or privilege

From the unequivocal language used in that section, two things are clear. First, the Governor in Council has full discretion to create and delimit classes of users, so long as the purpose of section 19 of the Act is respected and the classes are created for valid considerations. Second, the overall objective of the section is to recover, from users or classes of users, the costs incurred by the Government in providing them with a benefit. Subsection 19(1) provides that the benefit can either take the form of a service or the use of a facility; in the French version "mise a la disposition d'installations". Subsection 19(2) of the Act requires that any fees or charges for a service or use of a facility prescribed under subsection (1) must not exceed the cost to Her Majesty of providing the services or use of the facility to the users or class of users.

The *Marine Navigation Services Fees Regulations* prescribes fees for one class of users, namely, commercial shipping. The fact that the Regulations prescribe different fee structures and modes of imposition of those fees to reflect different operations within the commercial shipping industry, does not create new classes of users nor does it constitute discrimination as alleged by the applicants. The fee structure for the West Coast, after extensive consultation between the shipping industry and the Canadian Coast Guard, is based on vessels' Gross Registered Tonnage, which is applicable to both Domestic and Foreign ships. The fees for Canadian Flag Vessels are structured on an annual basis because the Canadian Coast Guard does not have access to domestic activity on a trip by trip basis. The data for domestic activity is available on an annual basis for the purpose of developing and structuring a fee.

In the Atlantic and Central Regions, the fee for foreign vessels are based on cargo tonnage, reflecting the feedback received from the marine industry that indicated a preference for cargo based fees. The fees for Canadian Flag vessels are structured on an annual basis because the Coast Guard does not have access to domestic activity such as movements and cargo loaded/unloaded on a trip by trip bases. The data for domestic activity is available on an annual basis for the purpose of developing and structuring a fee. The fee for Other Foreign flags non-cargo is a rate per vessel Gross Registered Tonnage since they do not load or unload cargo. The fee for foreign Flag Cruise ships is a flat fee per visit to a Canadian port because they do not load or unload cargo and as well, it reflects the preference of the Cruise industry. The Coasting trade vessels are foreign vessels (cargo and non-cargo) that must obtain a licence to operate in the domestic industry. The fee is based on the length of the licence.

Furthermore, impliedly contained within legislation's discretionary power to create classes of uses, is the Governor in Council's power to include or exclude certain types of ships from payment of fees. Here, all the ships to which the Regulation does not apply were excluded from the payment of fees for valid considerations:

- a) Ships North of 60. The cost of providing marine navigational service North of 60 has not been included in the \$97.8 million cost base,
- b) Vessels transiting Canadian Waters The ships crossing Canadian waters without stopping at a Canadian Port are exempt because the imposition of fees would be the subject of bilateral discussions with the United States of America,
- c) Ferries in the province of Newfoundland cannot be required to pay fees in order to conform to the terms of the Union;
- d) Barges in the West are excluded as the amount paid by the tugs hauling the barges includes the barge portion

I am satisfied therefore that the evidence does not support any allegation of discrimination concerning the fee structure and mode of imposition contained in the Regulations. In all cases, it is clear that the Regulations were made for valid reasons and in good faith.

Nor can I agree with the applicants' contention that the fees imposed by the Regulations are a tax. The fees that will be actually paid by the commercial ships for the aids to navigation provided by her Majesty will not exceed the total cost incurred by Her Majesty. In fact, only 20% of the total costs incurred by the Government are recovered for 1996-1997. As such, it is impossible to consider that the revenue generated by the Regulation constitutes a tax.

Finally, the evidence is clear that the Government, the Minister, the Canadian Coast Guard and members of Parliament (namely the Standing Committee on Fisheries) engaged in extensive consultation with the marine industry for over a year prior to the enactment of the Regulations.

In summary therefore, section 19 of the *Financial Administration Act* explicitly authorizes the imposition of fees or charges for the services provided by Her Majesty on users or classes of users. The class of users towards which the *Marine Navigation Services Fees Regulations* are aimed is the commercial shipping industry operating in Canadian waters. The rationale for the different fee structure prescribed by the Regulations is based on the reality behind the operation of ships in Canada by the commercial shipping industry and were designed after extensive consultation between the Canadian Coast Guard and the industry.

For these reasons, the application is dismissed.

"P. ROULEAU"

JUDGE

OTTAWA, Ontario
July 18, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE NO. T-1530-96

STYLE OF CAUSE The Canadian Shipowners Association et al.
v Her Majesty in Right of Canada et al

PLACE OF HEARING Montréal, Québec

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REASONS FOR ORDER BY: The Honourable Mr Justice Rouleau

DATED July 18, 1997

APPEARANCES.

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