Federal Court of Appeal  Cour d'appel fédérale

Date: 20180613

Docket: A-29-17

Citation: 2018 FCA 117

[ENGLISH TRANSLATION]

CORAM: **NOËL C.J.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY

Appellant

and

CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.

Respondent

Heard at Montréal, Quebec, on March 20, 2018.

Judgment delivered at Ottawa, Ontario, on June 13, 2018.

REASONS FOR JUDGMENT: GLEASON J.A.

CONCURRED IN BY: NOËL C.J.
BOIVIN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant is a public body established under the *Pilotage Act*, R.S.C. 1985, c. P-14. To partially paraphrase section 18 of that Act, it is charged with establishing, operating, maintaining and administering, in the interests of safety, efficient pilotage service in designated areas of the St. Lawrence and Saguenay Rivers. The respondent is the corporation through which pilots provide their services to the appellant on the St. Lawrence River.

[2] The regulatory scheme established under the *Pilotage Act* and the *Laurentian Pilotage Authority Regulations*, C.R.C., c. 1268 (the Regulations) sets out the circumstances in which vessels in the St. Lawrence and Saguenay Rivers are required to use the services of a pilot. The *Pilotage Act* in addition provides a framework for engagement of pilots by the appellant through a regime akin to a collective bargaining regime. Under this regime, the respondent and the appellant are required to negotiate service agreements, which set out the terms and conditions of engagement for pilots. These agreements are subject to periodic renegotiation, and the *Pilotage Act* provides for final offer selection arbitration in the event parties cannot renegotiate their service agreement on a consensual basis.

[3] During the last round of negotiations, the parties to this appeal were required to resort to interest arbitration to settle their 2015-2020 agreement and selected the Honourable Pierre A. Michaud to act as the final selection arbitrator. He issued his award on February 17, 2016 and selected the respondent's final offer. The appellant sought judicial review of Arbitrator Michaud's award, and in a judgment dated December 29, 2016 in *Laurentian Pilotage Authority v. Corporation des Pilotes du Saint-Laurent central inc.*, 2016 CF 1413, the Federal Court (per Bell, J.) overturned the arbitral award in part, ordered that a portion of the respondent's final offer be deleted and remitted the matter to Arbitrator Michaud for redetermination based on an amended offer from the respondent.

[4] The appellant appealed and the respondent cross-appealed from the Federal Court's judgment, but the parties subsequently settled the cross-appeal, which has been discontinued. Thus, we have before us only the appellant's appeal. In it, the appellant seeks to overturn the

Federal Court's determination that the respondent's offer was not *ultra vires* by reason of its incorporation of a provision dealing with the notice of night departure that the appellant is required to give to pilots. The appellant says that as this portion of the respondent's offer conflicts with the requirements of the *Pilotage Act* and the Regulations, it was thus *ultra vires* and could not be accepted by the Arbitrator.

[5] For the reasons set out below, I disagree and would therefore conclude that the Federal Court was correct in rejecting the appellant's *vires* argument. However, given the judgment rendered by the Federal Court, to give effect to this conclusion, it is necessary that this appeal be granted, that the Federal Court's judgment be set aside and that this Court order that the appellant's application for judicial review of Arbitrator Michaud's award be dismissed. I would accordingly so order. I would also award the respondent its costs before this Court and the Federal Court as it was entirely successful before this Court and ought to have likewise succeeded on all points before the Federal Court.

I. The Applicable Statutory and Regulatory Regime

[6] In discussing these issues, it is useful to commence by setting out the provisions in the *Pilotage Act* and the Regulations that are relevant to this appeal.

[7] Turning first to the *Pilotage Act*, section 15 of that Act provides for corporations like the respondent and grants them the exclusive authority to negotiate service contracts on behalf of pilots working in all or part of the geographical area in respect of which a pilotage authority has jurisdiction. Sections 15.1 to 15.3 of the *Pilotage Act* govern renewal of service agreements and

prevent the pilots from withdrawing their services after the expiry of a service agreement. They state:

Renewal of contract	Renouvellement du contrat
15.1 (1) Where a contract for services referred to in subsection 15(2) does not provide a mechanism for the resolution of disputes in the contract renewal process, fifty days before the contract expires, the parties to the contract shall jointly choose a mediator and an arbitrator and shall refer to the mediator all issues related to the renewal of the contract that remain unresolved.	15.1 (1) Cinquante jours avant l'expiration d'un contrat de louage de services mentionné au paragraphe 15(2) qui ne comporte aucune disposition sur le règlement des différends à survenir au cours des négociations en vue de son renouvellement, les parties au contrat sont tenues de choisir d'un commun accord un médiateur et un arbitre, et de soumettre au médiateur toutes les questions liées au renouvellement du contrat qui demeurent en litige.
No agreement	Absence d'accord
(2) The Minister shall choose the mediator or arbitrator if the parties cannot agree on one or if the one they choose is unavailable.	(2) Le ministre désigne un médiateur ou un arbitre lorsque les parties ne peuvent s'entendre sur leur choix ou lorsque le médiateur ou l'arbitre qu'elles ont choisi n'est pas disponible.
Mediation	Médiation
(3) The mediator has thirty days in which to bring the parties to agreement on the outstanding issues, at the end of which time the parties to the contract shall refer all of the remaining outstanding issues to the arbitrator.	(3) Le médiateur dispose d'un délai de trente jours pour amener les parties à s'entendre sur les questions qui lui ont été soumises; une fois ce délai expiré, les parties au contrat soumettent les questions qui demeurent en litige à l'arbitre.
Final offers	Dernières offres
15.2 (1) The parties to the contract shall each submit a final offer in respect of the outstanding issues to each other and to the arbitrator within five days after the date on which those issues are referred to the	15.2 (1) Chaque partie au contrat est tenue de faire parvenir à l'arbitre — ainsi qu'à la partie adverse — sa dernière offre sur toutes les questions qui demeurent en litige, dans les cinq jours suivant la date à laquelle il en

arbitrator	est saisi.
Decision of arbitrator	Décision de l’arbitre
(2) Within fifteen days, the arbitrator shall choose one or other of the final offers in its entirety.	(2) L’arbitre dispose d’un délai de quinze jours à compter de la date à laquelle elles lui sont soumises pour choisir l’une ou l’autre des dernières offres dans son intégralité.
Effect of decision	Conséquence de la décision
(3) The final offer chosen by the arbitrator is final and binding and becomes part of the new contract for services that is effective on the day after the former contract expires.	(3) La dernière offre choisie par l’arbitre est définitive et obligatoire et est incorporée au contrat de louage de services renouvelé, lequel prend effet à la date d’expiration du contrat précédent.
Sharing of costs	Partage des honoraires
(4) The parties to the contract shall share equally the cost of the fees of the mediator or arbitrator.	(4) Les honoraires du médiateur ou de l’arbitre sont à la charge des parties au contrat en parts égales.
Continuation of services	Maintien des activités
15.3 A body corporate with which an Authority has contracted for services under subsection 15(2) and the members and shareholders of the body corporate are prohibited from refusing to provide pilotage services while a contract for services is in effect or being negotiated.	15.3 Il est interdit à la personne morale qui a conclu un contrat de louage de services en vertu du paragraphe 15(2) de même qu’à ses membres ou actionnaires de refuser de fournir des services de pilotage pendant la durée de validité d’un contrat ou au cours des négociations en vue du renouvellement d’un contrat.

[8] Section 20 sets out the regulation-making power of a pilotage authority. Subsection 20(1) provides in relevant part as follows:

Regulations	Règlements généraux
20 (1) An Authority may, with the approval of the Governor in Council,	20 (1) Une Administration peut, avec l’approbation du gouverneur en

make regulations necessary for the attainment of its objects, including, without restricting the generality of the foregoing, regulations	conseil, prendre les règlements généraux nécessaires à l'exécution de sa mission et, notamment :
(*a*) establishing compulsory pilotage areas;	*a*) établir des zones de pilotage obligatoire;
(*b*) prescribing the ships or classes of ships that are subject to compulsory pilotage;	*b*) déterminer les navires ou catégories de navires assujettis au pilotage obligatoire;
[…]	[…]
(*d*) prescribing the notice, if any, to be given by a ship, of its estimated time of arrival in a compulsory pilotage area or its estimated time of departure from a place in a compulsory pilotage area and the manner of giving the notice;	*d*) fixer, le cas échéant, le préavis que doit donner un navire de son heure d'arrivée prévue dans une zone de pilotage obligatoire ou de son heure de départ prévue d'un endroit situé dans une zone de pilotage obligatoire, ainsi que la forme du préavis;
[…]	[…]
(*k*) prescribing the conditions, in addition to anything provided by subsection 25(1), under which a ship shall have a licensed pilot or holder of a pilotage certificate on board;	*k*) imposer, outre l'exigence prévue au paragraphe 25(1), les circonstances dans lesquelles un navire doit avoir à son bord un pilote breveté ou le titulaire d'un certificat de pilotage;
(*l*) prescribing the minimum number of licensed pilots or holders of pilotage certificates that shall be on board ship at any time; and	*l*) fixer le nombre minimal de pilotes brevetés ou de titulaires de certificats de pilotage qui doivent se trouver à bord d'un navire;

[9] Section 17 of the *Pilotage Act* affords pilotage authorities the power to enact by-laws governing their internal affairs. Subparagraphs 17(1)(*b*)(i) and (ii) state that such by-laws may provide for the delegation of the powers of the authority to any other person, with the exception of the power to make a by-law or regulation. Thus, by virtue of this provision, a pilotage authority is prohibited from sub-delegating its regulation-making authority.

[10] Section 25 of the *Pilotage Act* prohibits the operation of vessels within a compulsory pilotage area without a licensed pilot. Violation of this provision is an offence and, under section 47 of the Act, is punishable on summary conviction to a fine not exceeding five thousand dollars.

[11] Under section 26 of the *Pilotage Act*, ships' masters are afforded authority to dispense with the services of a pilot and to conduct a vessel themselves within a compulsory pilotage area if they reasonably believe that the actions of the pilot are endangering the safety of the ship.

[12] The Regulations set out the compulsory pilotage areas in the St. Lawrence and Saguenay Rivers and prescribe the sorts of vessels that are required to use a pilot within these areas as well as the number of pilots required.

[13] Sections 8 and 10 of the Regulations govern the types of notices of departure that vessels are required to give within a compulsory pilotage area. They provide:

8 The owner, master or agent of a ship that is to depart from a berth in the compulsory pilotage area for any purpose, other than making a movage, shall, by calling a pilot despatch centre,	8 Le propriétaire, le capitaine ou l'agent d'un navire qui doit quitter un poste dans la zone de pilotage obligatoire pour une raison quelconque, sauf pour effectuer un déplacement, doit, en appelant un centre d'affectation des pilotes,
(*a*) give a first notice of its estimated time of departure 12 hours before its estimated time of departure; and	*a*) donner un premier préavis de 12 heures de l'heure prévue du départ du navire; et
(*b*) give a final notice confirming or correcting its estimated time of departure at least four hours before the estimated time.	*b*) donner un dernier préavis d'au moins quatre heures pour confirmer ou corriger l'heure de départ prévue.

[…]	[…]
10 (1) Notwithstanding sections 8 and 9, the owner, master or agent of a ship that is to depart or make a movage may within eight hours after having given the first notice referred to in paragraph 8(*a*) or subparagraph 9(1)(*a*)(i), give a second notice confirming or correcting the estimated time of departure from or movage in any compulsory pilotage area.	10 (1) Nonobstant les articles 8 et 9, le propriétaire, le capitaine ou l'agent d'un navire qui doit quitter un port ou y effectuer un déplacement peut, dans les huit heures qui suivent le moment où il a donné le premier préavis visé à l'alinéa 8*a*) ou au sous-alinéa 9(1)*a*)(i), donner un deuxième préavis pour confirmer ou corriger l'heure prévue du départ du navire d'une zone de pilotage obligatoire ou du déplacement du navire dans une telle zone.
(2) Where a second notice has been given in respect of a ship pursuant to subsection (1), the time of departure or movage of that ship shall not be later than 12 hours from the time that notice was given.	(2) Lorsqu'un deuxième préavis a été donné à l'égard d'un navire conformément au paragraphe (1), le départ ou le déplacement du navire doit avoir lieu dans les 12 heures qui suivent le moment où ce préavis a été donné.

II. Background to the Interest Arbitration

[14] With this framework in mind, I turn now to the issues that were in play before Arbitrator Michaud. One of these involved the notice of night departure that the appellant must give to pilots. This issue is related to concerns about safety and maximum hours of work that have been of interest to the parties for some time.

[15] During the round of bargaining that culminated in the 2012-2015 service agreement, the parties incorporated Letter of Understanding No. 1 (the Letter) into their agreement. It dealt with the maximum trip length that may safely be undertaken by a single pilot. In the Letter, the parties agreed to form a joint committee, comprised of two representatives from each party and a neutral

chair. The committee was tasked with engaging an expert consultant, studying and making recommendations in respect of maximum trip length and related issues. The Letter provided that in the event the consultant recommended that the maximum trip length should be reduced from its then 11 hours, the committee would make recommendations on the modalities for assigning a second pilot. The Letter further stated:

> [TRANSLATION]
>
> 7. Should the Parties fail to reach an agreement on how to proceed with regard to the findings of the majority of committee members, such matters will be the subject of negotiation during the renewal of the service agreement, before or with the mediator. In such case, the final offer selection arbitrator must take the committee's findings into account in his or her decision.
>
> (Affidavit of Fulvio Fracassi, Exhibit FF-37, Pilotage Service Contract, Appeal Book (A.B.), Volume 8, p. 1460)

[16] The joint committee made several recommendations following receipt of the expert consultant's report. One of them was that notice of night departure be given to pilots by 6:00 p.m. and another that changes to departure times be circumscribed to ensure that at least 12 hours' advance notice of a night departure would be given. The parties were not able to agree to implement these recommendations in their 2015-2020 service agreement, and the issue remained outstanding before Arbitrator Michaud. During the arbitration, the parties called expert evidence on issues related to fatigue, safety and circadian rhythms. Both parties' experts endorsed the joint committee's recommendations.

[17] The respondent's final offer contained a provision designed to partially implement the above-mentioned recommendations of the joint committee. Its offer provided as follows:

[TRANSLATION]

> 2. With the exception of movages in the Port of Montréal and the Port of Québec, the Authority shall implement, no later than January 1, 2017, an assignment process for pilots in accordance with the Committee's decision on Recommendation #2A of the Risk Analysis, to the effect that pilots cannot be assigned to depart from a berth (with the exception of the Saint-Lambert Lock) between 10:00 p.m. and 8:59 a.m. if the estimated boarding time has not been confirmed before 6:00 p.m., unless a special arrangement has been made or in a navigation-related emergency.
>
> 3. The estimated boarding time provided for in paragraph 2 may be extended once by a maximum of two (2) hours, at least (4) hours prior to the estimated boarding time.
>
> (Affidavit of Fulvio Fracassi, Exhibit FF-27, Document of final offers submitted by the Corporation des pilotes du Saint-Laurent central inc., Letter of Understanding No. 13, A.B., Volume 6, p. 1210)

[18] The appellant, for its part, took the position that the two recommendations of the joint committee could not be incorporated into the service agreement because they would conflict with sections 8 and 10 of the Regulations. In its offer, the appellant therefore proposed merely to seek to modify the Regulations to give effect in part to the joint committee's recommendations. The appellant's final offer provided as follows:

[TRANSLATION]

> 1. The Authority will propose, submit and present to the Governor in Council, with the objective of obtaining approval, a proposed amendment to the *Laurentian Pilotage Authority Regulations*:
>
> a) that clarifies the Regulations so as to reflect the current general practice with respect to notice of departure;
>
> b) that provides that the owner, master or agent of a ship that is to depart from a berth in District No. 1 between 10:00 p.m. and 7:00 a.m., for a pilotage mission other than making a movage in the Port of Montréal, in addition to the current requirements under these Regulations, shall confirm or correct its estimated time of departure by 6:00 p.m.,

subject to being changed once, no later than four (4) hours prior to the estimated departure time; and

c) that provides for additional criteria to be applied to the Authority's exercise of its power to refuse abusive or needlessly repetitive 12-hour notices;

(Affidavit of Fulvio Fracassi, Exhibit FF-1, Final offer submitted by the Laurentian Pilotage Authority, A. B., Volume 1, pp. 77-78)

[19] Another issue at play before the Arbitrator concerned the misuse by certain ship-owners of the authority under section 26 of the *Pilotage Act*. The parties called evidence about some owners who systematically had their ships' masters take conduct of the vessels and dispense with the services of a pilot whenever the vessels were docking or undocking, even if there was no concern for safety. To address this issue, the respondent's final offer contained the following provisions:

[TRANSLATION]

Appendix B

11.02 The pilot must remain on board until the pilotage assignment has been completed and until all applicable safeguards are in place or until the pilot has been replaced by another pilot. In cases in which the master relieves the pilot pursuant to subsection 26(1) of the Act, the pilot must remain on board the ship until one of the circumstances set out in section 11.01 of this Appendix occurs, but is not responsible for the safety of the ship. In such cases, the report provided under section 26 of the Act shall be filed with the Authority, which shall provide a copy to the Corporation without delay. Where the Authority has been notified that a master has relieved a pilot on grounds other than those set out at subsection 26(1) of the Act, it will take the necessary measures, where appropriate, to have the practice cease immediately and to prevent a recurrence on the part of the master and/or ship owner.

Appendix C

9.02 The pilot must remain on board until the pilotage assignment has been completed and until all applicable safeguards are in place or until the pilot has

> been replaced by another pilot. In cases in which the master relieves the pilot pursuant to subsection 26(1) of the Act, the pilot must remain on board the ship until one of the circumstances set out in section 9.01 of this Appendix occurs, but assumes no responsibility for the safety of the ship. In such cases, the report provided for under section 26 of the Act shall be filed with the Authority which shall provide a copy to the Corporation without delay. Where the Authority has been notified that a master has relieved a pilot on grounds other than those set out at subsection 26(1) of the Act, it will take the necessary measures, where appropriate, to have the practice cease immediately and to prevent a recurrence on the part of the master and/or ship owner.
>
> (Affidavit of Fulvio Fracassi, Exhibit FF-27, Document of final offers submitted by the Corporation des pilotes du Saint-Laurent central inc., Appendix B, s. 1102, and Appendix C, s. 9.02, A.B., Volume 6, pp. 1201-1202)

[20] Before the Arbitrator, the appellant took the position that these provisions were likewise ones the Arbitrator could not accept as the appellant claimed they conflicted with its discretion to evaluate and address violations of the *Pilotage Act.*

III. The Decision of Arbitrator Michaud

[21] As noted, Arbitrator Michaud selected the respondent's final offer. In his reasons, he considered and dismissed the appellant's *vires* arguments, relying on the decisions in *Pilotes du Saint-Laurent Central Inc. v. Laurentian Pilotage Authority*, [2002] F.C.J. No. 1118, 246 F.T.R. 161 (*Pilotes FC*) and *Corporation des pilotes du Bas Saint-Laurent c. Administration de pilotage des Laurentides*, [1999] J.Q. no. 5368, no. 500-05-012157-991 (*Pilotes CS*) in which similar arguments had previously been rejected.

[22] More specifically, in the *Pilotes FC* case, Pelletier, J. (as he then was) held that a decision of a rights arbitrator could be homologated and enforced by the Federal Court even though it was predicated on a provision in the service agreement that stated that two pilots would be assigned

to a vessel whenever navigation safety warranted. In that case, the parties disagreed as to whether two pilots were required for certain types of vessels, and their dispute was referred to a rights arbitrator under the arbitration clause in the service agreement. The arbitrator sided with the pilots' corporation, finding that in the circumstances two pilots were warranted.

[23] There, like here, the appellant argued that the provision in question was one that could not be enforced as a matter of public order as the appellant claimed it usurped the discretion it possessed under the Regulations to ascertain when two pilots were required to address safety concerns. The Federal Court rejected this contention, noting that there was not necessarily a conflict between the provisions of the Regulations and the service agreement on this issue and that the legislative scheme established under the *Pilotage Act* was one that contemplated that the appellant would act by contract but could also act by regulation. The Federal Court in addition looked with disfavour on the conflicting positions taken by the appellant, in signing and then seeking to resile from a provision in the service agreement. The Federal Court stated in this regard:

> [48] It negotiated a contract which contains an arbitration clause giving the arbitrator the power to resolve any dispute or disagreement resulting from the implementation or interpretation of the contract. It must be assumed that the Authority negotiated the terms of this contract in good faith. It cannot then subsequently argue that it did not have the capacity to enter into the contract which it negotiated.

[24] In a somewhat similar fashion, in the *Pilotes CS* case, the Quebec Superior Court upheld the jurisdiction of a rights arbitrator to enforce a contractual provision that defined the characteristics of the winter navigation season during which two pilots are required. There, as well, the appellant had argued that the contractual provision in question could not be enforced as

a matter of public order as according to the appellant the provision violated the discretion it is afforded under the Regulations to set the bounds of the winter navigation season. It also argued that the arbitral decision affected third party ship-owners' rights and for that reason as well was contrary to public order. The Quebec Superior Court rejected these arguments.

[25] In the award before us, Arbitrator Michaud reviewed both these precedents and held that [TRANSLATION] "[t]hese two decisions [appear] to properly dispose of the matter and lead me to dismiss the [appellant]'s argument as to the inadmisibility of the [respondent]'s offers" (at para. 33). He also noted that the provisions in the Regulations in issue had not prevented the parties from negotiating multiple amendments to their service agreement in respect of the work assignments [TRANSLATION] "given that the assignment of pilots is contractual" (also at para. 33).

[26] After concluding that he possessed jurisdiction to consider the respondent's offer, Arbitrator Michaud then moved on to address why he felt it ought to be selected, and as is typically done in cases of this nature, provided brief reasons for why he preferred the respondent's offer. On the points relevant to this appeal, he noted the provisions in the Letter in the 2012-2015 service agreement that required he take account of the joint committee's recommendations as well as the fact that the parties, through their joint committee, had agreed to the recommendations after having devoted considerable resources to the consultants they engaged. He also found the respondent's position on how to deal with night departures more reasonable as the result under the appellant's offer was uncertain and dependent on the outcome of the regulatory process. As concerns the issue of ships' masters relieving pilots, Arbitrator

Michaud indicated that the respondent's offer was preferable since it addressed a problem that was highlighted by the evidence both parties called.

IV. The Decision of the Federal Court

[27] As noted, before the Federal Court the appellant argued that the Arbitrator could not accept the respondent's offer as the provisions regarding notice of night departure and dispensing with the services of a pilot conflicted with the Regulations and constituted an improper sub-delegation of the regulation-making authority afforded to the appellant and the Governor in Council under the *Pilotage Act.*

[28] In addressing these issues, the Federal Court first considered the applicable standard of review and determined that the reasonableness standard should be applied to the review of Arbitrator Michaud's award in its entirety.

[29] As concerns the reasonableness of the Arbitrator's determination that he could award the provisions in the respondent's offer on notice of night departure, the Federal Court concluded that this determination was open to the Arbitrator for several reasons. First, the Federal Court noted that the appellant, in the course of its negotiations with the respondent that culminated in the Letter in the 2012-2015 service agreement, must have been fully aware that this issue might be referred to arbitration. Second, the Federal Court held that, as was determined by Pelletier, J. in *Pilotes FC*, the appellant could act in furtherance of its statutory obligations either by contract or by regulation. Third, the Federal Court found that there was no conflict between the provisions in the respondent's offer and in the Regulations on the notice of night departure as the

provisions in the offer were no different from existing provisions in the service agreement that likewise circumscribed when pilots would be assigned. The Federal Court thus concluded that it would not interfere with this portion of the arbitral award.

[30] However, the Federal Court reached the opposite conclusion in respect of the provisions in the respondent's offer dealing with ship-owners improperly dispensing with the services of a pilot. The Federal Court held that the respondent's offer on these points was *ultra vires* because it usurped the discretionary authority of the appellant to choose how and when to seek to enforce section 26 of the *Pilotage Act*.

[31] In result, the Federal Court allowed the judicial review application in part, declared the portions of the respondent's offer that dealt with dispensing with pilot services to be *ultra vires*, set aside the arbitral award and remitted the arbitration to Arbitrator Michaud with instructions to again choose between the final offers, with the proviso that the respondent's final offer would need to be amended to eliminate the portions that were found by the Court to be *ultra vires*.

[32] The parties have agreed not to give effect to the Federal Court's judgment pending the disposition of this appeal.

V. The Parties' Positions before this Court

[33] In its appeal, the appellant asserts that the Federal Court erred in failing to order that its offer ought to have been selected as it says that the Federal Court erroneously concluded that the respondent's offer was not *ultra vires*.

[34] In its written and oral submissions, the appellant largely glossed over the standard of review that the Federal Court and this Court should apply to Arbitrator Michaud's award and instead focused its submissions on the circumstances where a statutory body with regulation-making authority may validly contract about issues that may be the subject of regulation. The appellant relies on several doctrinal excerpts as well as the judgments of the Quebec Court of Appeal and Superior Court in *Carleton-sur-Mer (Ville de) c. Lacroix & Fils ltée*, 2014 QCCA 1345; *Giroux c. Centre hospitalier régional de Trois-Rivières (CHRTR)*, 2014 QCCA 1405; *Centre hospitalier régional de Trois-Rivières (CHRTR) c. Giroux*, 2012 QCCA 613, [2012] R.J.Q. 679; *Association des radiologistes du Québec c. Rochon, ès qualités Ministre de la Santé et des Services sociaux*, [1997] R.J.Q. 1642, EYB 1997-00454 (QC C.S.), aff'd, 500-09-004803-979, EYB 1999-11398 (QC C.A.); *Produits alimentaires Jacques et Fils Inc. c. Québec (Régie des marchés agricoles et alimentaires)*, [2004] J.Q. no. 13205, REJB 2004-81157 (QC C.A.); *Syndicat canadien de la fonction publique, section locale 2718 c. Lavoie*, 2006 QCCS 1384, in support of the following arguments: (1) a public authority cannot bind itself via contract in respect of a matter that it is required to decide or has decided by regulation; (2) it cannot by contract agree to in future exercise its regulatory power in any particular fashion; and, (3) it cannot, without the requisite statutory authority, sub-delegate its regulation-making authority.

[35] The appellant says that all these prohibitions were breached in the present case as the respondent's offer conflicts with sections 8 and 10 of the Regulations by requiring vessels to provide longer notices of night departure than the Regulations require. While the appellant concedes that the respondent's proposed amendments to the service agreement do not directly apply to ship-owners, the appellant says that this Court must nonetheless have regard to the

practical implications of the offer. The appellant asserts that if the respondent's offer becomes part of the service agreement, ship-owners will in fact be required to provide such longer notices of night departure to ensure vessels will be assigned pilots in the mandatory pilotage area where the respondent's proposed changes are to apply. The appellant attempts to distinguish the judgments in *Pilotes FC* and *Pilotes CS* by asserting that in those cases, unlike the present, there was not a direct contradiction between the requirements of the Regulations and the contractual provisions in issue.

[36] According to the appellant, the Regulations must take priority over the provisions in a service agreement because, otherwise, the regulation-making authority of the appellant is improperly sub-delegated to the respondent and an arbitrator. In support of this line of argument, in addition to the above-mentioned authorities, the appellant also relies on the following caution from the Canadian Transportation Agency (CTA) in its Decision No. 645-W-2002 of November 29, 2002, where the CTA stated:

> […] the Minister of Transport has indicated clearly that the Authority should not include any provisions in service contracts that relate to the regulatory powers of the Authority under the *Pilotage Act*.
>
> The Authority should conduct a thorough review of all contract provisions to ensure that all clauses relating to regulatory powers are removed in accordance with the Ministerial directive. The inclusion of such clauses in the service contracts is an improper delegation of the Authority's powers to the pilot corporations. In so doing, the Authority has limited itself as to actions or changes that it can make through regulatory amendments which it is mandated to do under the *Pilotage Act*.

[37] The appellant also says that the fact that ship-owners did not participate in the arbitration and were denied the right to judicially review the Arbitrator's award (in *Canadian Shipowners Association v. Laurentian Pilotage Authority*, 2016 FC 1007) provides further support for its

assertion that the Arbitrator's award was unreasonable as it impacts the ship-owners and they have no way of being heard on the issues the Arbitrator decided.

[38] In result, the appellant asks this Court to set aside the judgment of the Federal Court and the award of the Arbitrator and to determine that the appellant's offer will be incorporated into the parties' 2015-2020 service agreement.

[39] The respondent concurs with the appellant that the Federal Court's judgment should be overturned but for entirely different reasons. It says that the Federal Court ought to have dismissed the application for judicial review in respect of the one issue that is still in play and that the application for judicial review accordingly ought to have been dismissed. In support of this position, the respondent submits that the applicable standard of review we are to apply is reasonableness.

[40] It further says that Arbitrator Michaud's award is reasonable as there is no conflict between its offer and the Regulations, which deal with inter-related but different subjects. It also points to several other provisions in the existing offers and the parties' previous service agreements that it says are on all fours with the impugned portion of its offer as it claims they also enshrine additional requirements beyond those contemplated by the Regulations.

[41] The respondent further submits that it was entirely reasonable for Arbitrator Michaud to have relied on the judgments in *Pilotes FC* and *Pilotes CS*, which are similar to this case. It also argues that the various authorities relied on by the appellant are beside the point as they deal with

distinguishable statutory provisions and situations where there was an actual conflict between a contractual provision and the requirements of a regulation or an impermissible sub-delegation of regulation-making authority. The respondent asserts that none of this happened in this case, given the statutory context, which requires negotiation of a service agreement that may be settled through a final offer selection process and that may contain provisions about issues that are also the subject of regulation.

VI. Analysis

[42] In addressing the foregoing arguments, the analysis we are to apply is that mandated by the Supreme Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47 (*Agraira)*, namely, we must ascertain whether the Federal Court selected the appropriate standard of review and, if so, must then ascertain whether it applied that standard correctly. Thus, contrary to the appellant's approach, we must start by determining the standard of review to be applied to Arbitrator Michaud's decision.

A. *The Standard of Review*

[43] As we indicated to the parties during the hearing, the applicable standard of review in this case is reasonableness. That is so for several reasons.

[44] First, the applicable case law has settled the issue. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) and several subsequent decisions of the Supreme

Court provide that if the case law has satisfactorily settled the standard of review, that is the standard that should be selected and there is no need to conduct a full-blown standard of review analysis: *Dunsmuir*, at paras. 57, 62; *Agraira*, at paras. 48-49; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at paras. 21-22.

[45] The award of Arbitrator Michaud is a labour relations decision as it settles the terms of the service agreement between the parties and the service agreement is akin to a collective agreement. The case law firmly establishes and, indeed, it is axiomatic that decisions of labour adjudicators are to be afforded deference and are thus reviewable under the reasonableness standard: *Dunsmuir*, at para. 68; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 42; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 15.

[46] This deference extends to determinations by labour adjudicators as to the extent of their own jurisdiction as the Supreme Court of Canada held in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at paras. 16-17, and this Court held in *Amos v. Canada (Attorney General)*, 2011 FCA 38, 417 N.R. 74, at paras. 28-33 and *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223, 392 N.R. 128, at paras. 50-52. (*Canadian Federal Pilots Assn*). In addition, in *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at paras. 31-34 (*Guérin*), the Supreme Court recently confirmed that the reasonableness standard likewise applies to rulings of other types of statutory arbitrators as to the extent of their jurisdiction.

[47] Perhaps even more relevant, several cases have applied the reasonableness standard to determinations of interest arbitrators as to their jurisdiction to accept a party's offer due to its alleged non-compliance with provisions in the tribunal's governing legislation – precisely the issue that arises here.

[48] For example, in *Public Service Alliance of Canada. v. Senate of Canada*, 2011 FCA 214, 423 N.R. 200 (*P.S.A.C. v. The Senate*), a case that is indistinguishable from the present on this issue, this Court applied the reasonableness standard to the review of an arbitral award rendered under the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (*PESRA*). The award in question rejected the union's proposal to incorporate into the collective agreement a provision requiring the Senate of Canada to post bargaining unit vacancies. The Public Service Labour Relations Board had found that it did not have jurisdiction to consider such a proposal in light of subsection 55(2) of the *PESRA*, which prohibits arbitral awards from dealing with the appointment, promotion or transfer of employees. Observing that there was no controlling jurisprudence on the standard of review applicable in this context, Justice Mainville, who wrote for the panel, conducted a full standard of review analysis, determined that reasonableness applied and rejected the applicant's argument that the issue involved a so-called "true question of jurisdiction" (at paras. 18-31).

[49] To similar effect, in *Ontario Refrigeration and Air Conditioning Contractors Assn. v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787*, 2016 ONCA 460, 402 D.L.R. (4th) 63, at paras. 44-62 and in *National Gypsum (Canada) Ltd. v. Canadian National Railway Company*, 2014 FC 869,

[2014] F.C.J. No. 1293, at paras. 31-50, the Ontario Court of Appeal and the Federal Court, respectively, applied the reasonableness standard to review determinations made by interest arbitrators as to the scope of their jurisdiction. The Quebec Court of Appeal has also applied the reasonableness standard to review awards of interest arbitrators: *Shawinigan (Ville de) c. Association des policiers-pompiers de Shawinigan-Sud*, 2011 QCCA 1089, [2011] J.Q. no. 6896.

[50] In light of the foregoing – and particularly in light of this Court's prior decision in *P.S.A.C. v. The Senate* which is binding on us – the applicable standard of review in this case is reasonableness.

[51] Alternatively, if it were necessary to conduct a standard of review analysis, the same result would obtain. Under the current framework for determining the standard of review in administrative law cases mandated by *Dunsmuir* and the subsequent administrative law decisions from the Supreme Court of Canada, the reasonableness standard presumptively applies to a decision of an administrative decision-maker that interprets its constituent legislation or legislation or regulations closely related to its function. The presumptive application of the reasonableness standard of review may be rebutted in two ways.

[52] On one hand, it may be rebutted if the issue under review falls into one of the four categories of questions to which correctness applies. These categories are where the issue under review involves: (1) a constitutional question (other than an issue of whether the exercise of discretion violates the *Charter* or does not respect *Charter* values); (2) a question of general importance to the legal system that is outside the decision-maker's specialized expertise; (3) the

determination of the respective jurisdiction of two or more administrative decision-makers; or (4) a so-called "true" question of jurisdiction: *Dunsmuir*, at paras. 58-61; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22 (*McLean*); *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 24 (*Edmonton East (Capilano)*).

[53] On the other hand, if the issue does not fall into one of these four categories, the presumption may also be rebutted by looking at contextual factors, including the purpose of the statutory decision-maker, the nature of the question at issue, the expertise of the decision-maker and the presence of a privative clause. The presence of such a clause militates in favour of reasonableness. The first three contextual factors, involving the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal, are interrelated and are aimed at discerning whether the nature of the question being considered is such that the legislator intended it would be answered by the administrative decision-maker as opposed to a court. Indicia of such an intention include the role assigned to the administrative decision-maker under the legislation and the relationship between the question decided and the institutional expertise of the decision-maker as opposed to the institutional expertise of a court: *Dunsmuir*, at para. 64; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 15-16; *McLean*, at para. 22; *Tervita Corp. v.*

Canada (Commissioner of Competition), 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-40; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46.

[54] Applying the foregoing to the instant case, the only one of the four categories of questions to which correctness applies that might be said to be applicable here is that of jurisdictional issue. The appellant argues that the arbitrator was deciding such an issue as he ruled on the scope of his jurisdiction to accept the respondent's offer. I disagree and believe that the arbitrator's award does not involve a so-called true question of jurisdiction, amenable to correctness review, as that concept has been defined in the administrative law jurisprudence of the Supreme Court of Canada and of this Court.

[55] In its post-*Dunsmuir* case law, the Supreme Court of Canada has more than once indicated that there are very few instances when such a "true" question of jurisdiction will be found to exist: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39 (*Alberta Teachers'*); *Edmonton East (Capilano),* at para. 26; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 39; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219, at para. 27; *Guérin*, at para. 32. Indeed, the Supreme Court has not found any such question in any case post-*Dunsmuir*. Our Court has likewise indicated that such questions, if they exist at all, will be few and far between: *P.S.A.C. v. The Senate*, at paras. 23-26; *Canadian Federal Pilots Assn.*, at paras. 41-48; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332, at paras. 39-46;

Canadian Copyright Licensing Agency (Access Copyright) v. Canada, 2018 FCA 58, at paras. 78-83 and 174.

[56] In *Alberta Teachers'*, Justice Rothstein, writing for the majority of the Supreme Court of Canada, indicated that jurisdictional issues typically do not arise where the tribunal interprets the scope of its authority under its constituent statute or statutes closely related to its function, noting at paragraph 34 that:

> […] unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[57] In *Guérin*, Justice Wagner (as he then was) and Justice Gascon, who wrote for the majority, likewise underscored that there will be few "true" questions of jurisdiction that engage correctness review and, citing from *Dunsmuir*, underscored that "[s]uch questions must be understood 'in the narrow sense of whether or not the tribunal had the authority to make the inquiry'" (at para. 32).

[58] Here, the jurisdictional issue posited by the appellant does not relate to the authority of the Arbitrator to undertake an inquiry, but rather, to his authority to issue a remedy and pick one of the parties' offers – the very essence of the question he was empowered to decide under the *Pilotage Act*. In accordance with the foregoing directions from the Supreme Court in *Alberta Teachers'* and *Guérin*, this question should not be characterized as a true question of jurisdiction to which correctness applies.

[59] Similarly, the contextual factors point strongly to the selection of the reasonableness standard in this case. There is a privative clause contained in subsection 15.2(3) of the *Pilotage Act*, which states that an arbitral award like the present is "final and binding". This points to the selection of reasonableness as the applicable standard of review.

[60] Even more importantly, the nature of the issues remitted to an interest arbitrator under the *Pilotage Act* leads to the conclusion that the reasonableness standard of review should apply. Interest arbitral awards are, if anything, even more deserving of deference than other labour decisions. Invariably, interest arbitrators are afforded wide discretion to settle the terms of the parties' agreement, and the decisions they make are almost always policy determinations and rarely involve legal issues. These are indicia of the need to afford their decisions deference: *Dunsmuir*, at para. 53; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paras. 57-58.

[61] Moreover, the types of issues that animate interest arbitral awards are outside the institutional expertise of courts but very much within the ken of labour arbitrators. Many awards set out the criteria that ought to apply in fashioning an award and have held that an award should attempt to replicate, so far as possible, the result that would have been reached by the parties in direct negotiations, had they been able to settle their agreement without resort to arbitration: see, for example, *Canadian National Railway and Teamsters Canada Rail Conference, Re,* 101 C.L.A.S. 145, [2010] C.L.A.D. No. 20 (Can. Arb.), at paras. 5-14; *Yukon (Government) v. P.S.A.C.*, 75 C.L.A.S. 344 (Can. Arb.), at para. 9; *Air Canada and ACPA, Re*, 112 C.L.A.S. 40

(Can. Arb.), at para. 56; *Bradley Air Services Ltd. and CAW, Local 2002, Re*, 114 C.L.A.S. 165 (Can. Arb.), at para. 44.

[62] The replication principle in essence involves asking which party's position is the more reasonable. This is measured with reference to issues such as: the parties' bargaining history and prior patterns of conduct; the demonstrated need for a clause requested; at least in the private sector, the employer's economic viability; and the prevalence of similar provisions in other comparable agreements. These issues are the daily diet of labour adjudicators but are rarely ones that a court is called upon to examine.

[63] Additionally, the need for finality, which animates the need for deference in labour cases generally, is particularly acute in interest arbitration cases. These types of disputes must be settled even more quickly than rights disputes to avoid industrial unrest as the parties are operating under an expired agreement until the interest arbitrator issues his or her award. Parliament was alive to the need for expedition in the *Pilotage Act*, both through the selection of the final offer process, which is often a more expeditious process than having the arbitrator rule on each issue, and through the tight time frames for the conduct of the arbitration, enshrined in sections 15.1 and 15.2 of the *Pilotage Act*.

[64] Thus, both the decided case law and a standard of review analysis lead to the application of the reasonableness standard to review Arbitrator Michaud's award.

B. *Was Arbitrator Michaud's Award Reasonable?*

[65] Having selected the standard of review, I am next required in accordance with *Agraira* to step into the shoes of the Federal Court judge and consider whether Arbitrator Michaud's award was reasonable. As noted, he made two types of determinations in his award on the point in issue. First, he examined whether he was prohibited from selecting the respondent's offer by reason of its conflict with the Regulations and the role ascribed to the appellant and the Governor in Council under the *Pilotage Act* in respect of making regulations. Second, after deciding that it was open to him to accept the respondent's offer, Arbitrator Michaud considered whether he should award it.

[66] The appellant contests only the first of these two determinations and says that, even if the reasonableness standard of review is applied, Arbitrator Michaud's award should be set aside because there is only one possible way to interpret the statutory and regulatory provisions in issue, namely, the way the appellant asserts.

[67] I disagree, and, contrary to the appellant's approach, believe that the starting point for the reasonableness analysis must be a consideration of the Arbitrator's award; the question is not how a court might interpret the provisions in issue, but, rather, whether the interpretation of the Arbitrator was a reasonable one. In evaluating this issue, we are, according to the Supreme Court, to consider both the reasons offered by the Arbitrator and the result reached to determine whether they are justified, transparent and intelligible and whether the result is a possible, acceptable outcome that is defensible in respect of the facts and applicable law: *Dunsmuir*, at

para. 47. The criteria of intelligibility and transparency are concerned mostly with the reasons whereas justification and defensibility focus more on the result.

[68] The appellant does not challenge the intelligibility and transparency of Arbitrator Michaud's award, and, indeed, there are no grounds to do so as the award very clearly meets these criteria. The Arbitrator provided logical and understandable reasons for his determination and therefore this aspect of reasonableness is easily met.

[69] I am likewise of the view that the award is justifiable and defensible. Contrary to what the appellant asserts, I believe it was open to the Arbitrator to find the precedents of *Pilotes FC* and *Pilotes CS* to be determinative and to have declined to follow the various authorities on which the appellant relies. In examining this question under the deferential reasonableness standard, this Court's focus should not be on whether we would conclude that *Pilotes FC* and *Pilotes CS* are distinguishable from the instant case but, rather, on whether it was reasonable for the Arbitrator to conclude that they were not. In other words, we must ask whether there is a defensible argument in support of the Arbitrator's reliance on these cases.

[70] In my view, there is a defensible argument that supports the Arbitrator's reliance on *Pilotes FC* and *Pilotes CS*. They involved the identical statutory and very similar regulatory provisions as well as the same types of arguments as were advanced by the appellant in this case. These facts render the Arbitrator's reliance on them reasonable. Moreover, contrary to what the appellant says, there is not a contradiction between the provisions in the respondent's offer and sections 8 and 10 of the Regulations such that the judgments in *Pilotes FC* and *Pilotes CS* are

distinguishable. The service agreement governs the relationship between the parties and sets out the circumstances in which the pilots may be required to work. This is a different issue from the matters dealt with in sections 8 and 10 of the Regulations, which govern the type of notice a ship-owner must provide to the appellant. While it might be somewhat cumbersome if the notices to the pilots differed from those ship-owners were to provide, this does not mean that the terms of the respondent's offer violate the Regulations as they deal with different subjects.

[71] It is also worth underscoring, as the Arbitrator and the Federal Court both noted, that the parties in their service agreement and also during this round of bargaining agreed to provisions or had provisions imposed in previous interest arbitrations that are similar to the impugned portions of the respondent's offer in that they provide additional requirements beyond what is contemplated by the Regulations. For example, the parties agreed to or previously had imposed:

- other limitations on night departures which could well have the effect of lengthening a vessel's departure time beyond the notice of departure to be given by a ship-owner under the Regulations (see, for example, the Affidavit of Fulvio Fracassi, Exhibits FF-92 and FF-93, s. 6.06 of the service contract, A.B. Volume 9, p. 1846 and Volume 10, p. 1850; Exhibit FF-95, arts. 8.06 et 8.09 of the service contract, A.B., Volume 10, pp. 1859-1860);

- the requirement that two pilots be present for certain trips even though the Regulations do not so require (see, for example, the Affidavit of Fulvio Fracassi, Exhibit FF-6, s. 7.03 of the service contract, A.B., Volume 3, p. 487); and

- limits on transit hours for certain ships beyond those foreseen by the Regulations (see, for example, the Affidavit of Fulvio Fracassi, Exhibit FF-6, art. 8.05 a) of the service contract, A.B., Volume 3, p. 520; Exhibit FF-97, ss. 8.04, 8.05 and 8.16 of the service contract, A.B., Volume 10, pp. 1870-1871).

[72] Thus, through their own actions, the parties have accepted that issues governed by the Regulations may also be the subject of provisions in their service agreement, which in some instances set out requirements that are additional to those in the Regulations. Similarly, certain of these provisions were awarded in previous interest arbitrations between the parties. The past practice therefore supports the reasonableness of including a similar provision in the 2015-2020 service agreement.

[73] Nor was there any need for Arbitrator Michaud to have considered the various authorities relied on by the appellant. They are distinguishable as they involved very different statutory schemes or situations that, unlike the *Pilotage Act*, did not provide for imposition of working conditions by an arbitrator. Furthermore, for a decision like the present to be upheld under the reasonableness standard, an adjudicator need not address each argument advanced by a party as the Supreme Court of Canada confirmed in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16; and *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Thus, not only were the authorities relied on by the appellant distinguishable, there was also no need for Arbitrator Michaud to have referred to them in his award.

[74] Finally, the fact that the ship-owners were denied leave to intervene in this judicial review application and did not appear before the Arbitrator does not mean that the Arbitrator's award is unreasonable as the two issues are wholly unrelated.

[75] I would therefore conclude, like the Federal Court did, that it was reasonable for the Arbitrator to have found that he was not barred from accepting the respondent's offer by reason of its provisions dealing with the notice of night departure to be given by the appellant to the pilots.

VII. Proposed Disposition

[76] I turn now to the proper disposition of this appeal. This issue is complicated by reason of the Federal Court's differential treatment of the night notice issue and the issue of ships' masters relieving pilots.

[77] In my view, it is impossible to reach different conclusions on these two issues and the Federal Court therefore erred in its disposition of the second issue. If anything, the appellant's position on the pilot relief issue is even weaker than it was on the issue under appeal as the appellant cannot point to any provision in the *Pilotage Act* or the Regulations that assigns it any particular role with respect to enforcement of section 26 of the *Pilotage Act*. There was accordingly no basis for the conclusion that the Arbitrator's treatment of this issue was unreasonable. The foregoing leads to the conclusion that the Arbitrator's award should be restored and this appeal should therefore be granted.

[78] While, strictly speaking, unnecessary for the disposition of these matters, I believe it is worthwhile to make a few comments about the remedy selected by the Federal Court to provide guidance in future cases.

[79] Final offer selection arbitration – sometimes called baseball arbitration – is designed to force the parties to narrow the gap between them to the greatest extent possible as the arbitrator is tasked with assessing which offer is the more reasonable. If a party takes an unreasonable position on any outstanding issue, or advances a position that it cannot take under the legislation or agreement governing the arbitration, it risks losing everything. This, in turn, increases the likelihood of successful consensual settlements.

[80] Final offer selection interest arbitration may be contrasted with the more traditional type of interest arbitration, under which the arbitrator is empowered to proceed on an issue-by-issue basis and is free to select the position of either party on any issue or to order something between the two or different from either party's position on each issue in dispute. This type of arbitration has been criticized for undermining free collective bargaining, particularly in those sectors where resort to arbitration is known as a possible outcome at the outset of bargaining. In such circumstances, there is less incentive to seek compromise if further compromise could be imposed by an arbitrator. (See, for example, S.A. Bellan, "Final offer Selection: Two Canadian Case Studies and an American Digression" (1975), 13 Osgoode Hall L.J. 851 at pp. 871-873; James Robbins and Aminah Hanif, "Interest Arbitration in Ontario" (2015), 28 Can J. Admin. L. & Prac. 81 at pp. 83-84; Charles J. Morris, "The Role of Interest Arbitration in a Collective

Bargaining System" (1976), 1 Indus. Rel. L.J. 427 at pp. 464-466; and Arnold M. Zack, "Final Offer Selection—Panacea or Pandora's Box" (1974), 19 N.Y.L.F. 567 at p. 573).

[81] In its remedial order, the Federal Court effectively turned a final offer selection process into the other type of arbitration as it removed the essential feature of final offer selection, namely the risk that a party will lose if its offer contains an impermissible or unreasonable component. A court should not make this sort of order as it wholly undermines the final offer selection process. Rather, in the event a court determines that it was unreasonable for a final offer selection arbitrator to have accepted one party's offer, the only possible order is that the other party's offer be accepted as final offer selection requires the rejection of the entirety of a party's offer if it contains an objectionable provision.

[82] In light of the foregoing, it follows that I would grant this appeal, set aside the Federal Court's judgment, and making the order that the Federal Court ought to have made, I would dismiss the appellant's application for judicial review of Arbitrator Michaud's award. As the respondent was entirely successful before this Court and ought to have likewise succeeded on all points before the Federal Court, I would award it its costs here and before the Federal Court.

"Mary J.L. Gleason"
J.A.

"I agree.
Marc Noël C.J."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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