

A-151-96

CORAM: DESJARDINS J.A.
DÉCARY J.A.
CHEVALIER D.J.

BETWEEN:

ST. LAWRENCE CRUISE LINES INC.

Appellant
(Defendant)

AND:

HER MAJESTY THE QUEEN

Respondent
(Plaintiff)

Heard at Montreal (Quebec), on Thursday, May 15, 1997.

Judgment rendered at Ottawa (Ontario), on Friday, June 20, 1997.

REASONS FOR JUDGMENT BY:

DÉCARY J.A.

CONCURRED IN BY:

**DESJARDINS J.A.
CHEVALIER D.J.**

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REASONS FOR JUDGMENT

DÉCARY J.A.

This is an appeal from a judgment of the Trial Division relating to the validity of certain sections of the *Government Wharves Regulations*¹ (the "Regulations") made under the *Public Harbours and Ports Facilities Act*² (the "Act"). More precisely, the Court must decide whether the Governor in Council had the authority to impose specific charges, calculated on the basis of the number of passengers, in relation solely to cruise vessels engaged "in a voyage during which passengers are on board the vessel for at least one overnight period" and, in the event that he had such authority, whether the

¹C.R.C. 1978, c. 881, as amended on May 1, 1986, SOR/86-493.

²R.S.C. 1985, c. P-29.

imposition of such charges was discriminatory. The dispute arose out of the refusal of the appellant company to pay the charges in question, as a result of which the Crown brought action in the Federal Court claiming payment of the charges.³ The trial judge declared the impugned sections of the Regulations in issue to be valid and allowed the Crown's action.

Relevant statutory and regulatory provisions

Before describing the background to these proceedings, it would be worthwhile to reproduce the relevant provisions of the Act and the Regulations. The sections or portions of sections of the Regulations the validity of which the appellant has challenged are shown in boldface.

Public Harbours and Port Facilities Act.

INTERPRETATION

2. In this Act,

...

“vessel” includes every description of ship, boat or craft used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion, a dredge, a floating elevator, a floating home, an oil-rig, a sea-plane, a raft or boom of logs or lumber and an air cushion vehicle.

DÉFINITIONS

2. Les définitions qui suivent s'appliquent à la présente loi.

...

«navire» Toute construction flottante qui sert ou peut servir, exclusivement ou partiellement, à la navigation maritime, qu'elle soit pourvue ou non d'un moyen propre de propulsion, y compris une drague, un élévateur flottant, une habitation flottante, une plate-forme de forage, un hydravion, un radeau, une estacade de billes ou de bois de construction et un aéroglisseur.

NATIONAL PORTS POLICY

POLITIQUE PORTUAIRE NATIONALE

³The Federal Court has jurisdiction to hear this action by the Crown against an individual under the general jurisdiction conferred on the Court by section 22 of the *Federal Court Act* in respect of Canadian maritime law; paragraph 22(2)(s), in particular, gives the Federal Court jurisdiction with respect to "any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith".

3. (1) It is hereby declared that the objective of the national ports policy for Canada is to create a system of public harbours that

- (a) is an effective instrument of support for the achievement of Canadian international trade objectives and of national, regional and local economic and social objectives;
- (b) is efficient;
- (c) provides accessibility and equitable treatment in the movement of goods and persons to users of Canadian ports; and
- (d) is coordinated with other marine activities and surface and air transportation systems.

(2) It is further declared that achievement of the objective of the national ports policy requires

- (a) the administration, on a regional scale, of public harbours and public port facilities within a national administrative system; and
- (b) the establishment of consultative bodies to provide advice for the purposes of the planning and development of port policy in Canada.

4. It is the responsibility of the Minister to undertake the necessary measures to achieve the objective of the national ports policy, including the planning, development, direction, administration and maintenance of public harbours and public port facilities.

REGULATIONS

12. (1) The Governor in Council may make regulations for the management, control, development and use of any public harbour or public port facility, including regulations

...

- (i) for the imposition and collection of rates or tolls on vehicles, vessels and persons coming onto or into or using any public

3. (1) La politique portuaire nationale a pour objet la création d'un système de ports publics qui ait pour rôle ou caractéristique:

- a) de contribuer à la réalisation des objectifs en matière de commerce extérieur ainsi que des objectifs sociaux et économiques, aux plans tant national que régional et local;
- b) d'être efficace;
- c) de garantir aux usagers des ports canadiens l'égalité de traitement et le libre accès aux services de transport de marchandises et de passagers;
- d) de coordonner ses activités avec celles du secteur maritime et avec les réseaux de transport aérien et terrestre.

(2) Sont essentielles à la réalisation de la politique portuaire nationale:

- a) l'administration régionale des ports et installations portuaires publics, dans le cadre d'un système administratif national;
- b) la création d'organismes consultatifs en matière d'élaboration et de mise au point de la politique portuaire canadienne.

4. Il incombe au ministre de prendre les dispositions nécessaires à la réalisation de la politique portuaire nationale, notamment en ce qui concerne la planification, le développement, la direction, l'administration et l'entretien des ports et installations portuaires publics.

RÈGLEMENTS

12. (1) Le gouverneur en conseil peut prendre des règlements en vue de la gestion, du contrôle, de l'exploitation et de l'utilisation des ports et installations portuaires publics, notamment dans les domaines suivants:

...

- i) l'imposition et la perception de droits ou taxes sur les navires, véhicules et personnes entrant dans ces ports ou installations ou en faisant usage, ou sur les marchandises ou cargaisons soit

harbour or public port facility and on goods or cargoes landed from or shipped on board those vessels, transhipped by water within the limits of any public harbour or stored on or moved across any public port facility;

- (j) prescribing the fee or charge to be paid for the use of any public harbour or any public port facility and for any service provided thereat by the Minister;

...

PAYMENT OF RATES

13. (1) The rates, tolls, fees or other charges imposed or prescribed by regulation in respect of a vessel or its cargo shall be paid by the master or person in charge of the vessel, without prejudice to any recourse the master or that person may have by law against any other person for the recovery of the amounts so paid, but the Minister may demand and recover those rates, tolls, fees or other charges from the owner or agent of the vessel or the owner, consignee or shipper of the cargo or his agent.

(2) In the case of any person using a public harbour or public port facility, the rates, tolls, fees and other charges are payable by that person.

(3) The rates, tolls, fees and other charges payable pursuant to this Act may be recovered as a debt, with full costs of suit, in any court of competent jurisdiction.

déchargées de ces navires, chargées à leur bord ou transbordées par eau dans le périmètre portuaire, soit stockées dans les installations portuaires publiques ou passant par elles;

- j) la fixation des droits ou frais exigibles pour l'usage de ces ports ou installations ou pour la prestation de services qu'y fournit le ministre;

...

PAIEMENT DES DROITS

13. (1) Les droits, taxes ou autres frais réglementaires afférents au navire ou à sa cargaison doivent être acquittés par le capitaine ou le responsable du navire, sans préjudice des recours ouverts en droit contre d'autres personnes. Le ministre peut toutefois les recouvrer soit du propriétaire ou de l'agent du navire, soit du propriétaire, du consignataire ou de l'expéditeur de la cargaison ou de son mandataire.

(2) Les droits, taxes ou autres frais afférents à l'usage, par des personnes, des ports ou installations portuaires publics sont à la charge de l'utilisateur.

(3) Les droits, taxes et autres frais prévus par la présente loi, ainsi que les frais et dépens de l'action, peuvent être recouverts devant tout tribunal compétent.

Interpretation

2. In these Regulations,

...

“cruise vessel” means a vessel carrying passengers for a fare where the vessel is engaged in a voyage during which the passengers are on board the vessel for at least one overnight period, but does not include a ferry; (*navire de croisière*)

[1986]

Wharfage, Berthage, Storage and Other Charges

25. (1) Subject to the Act and these Regulations, the charges on goods and vessels become due at the rates prescribed in the schedule,

(a) in respect of goods, when the goods are placed on a wharf, loaded or unloaded at a wharf or conveyed across, along, over or under a wharf; and

(b) in respect of a vessel, when it is

(i) moored to a wharf,

(ii) occupying a berth or any space at or near a wharf, or

(iii) secured in any manner whatever to a vessel that is subject to berthage.

(2) The person in charge of a vessel carrying cargo shall, in respect of goods landed or taken on board that vessel at a wharf, pay the wharfage due on those goods.

(3) The person in charge of a vessel that normally carries cargo shall, as soon as possible after the vessel has moored or taken berth at a wharf, give a report under his signature to the wharfinger listing

(a) the name of the vessel;

(b) the length of the vessel;

(c) the wharf visited;

(d) the time of arrival of the vessel at the wharf and its estimated time of departure from the wharf;

(e) the description and weights of all goods landed or taken on

Interprétation

2. Dans le présent règlement,

...

«navire de croisière» Navire qui transporte des passagers moyennant tarif et qui est utilisé pour un voyage au cours duquel les passagers sont à bord pour au moins une nuit, à l'exclusion des transbordeurs. (*cruise vessel*)

[1986]

Quayage, droits d'amarrage, d'entreposage et autres

25. (1) Sous réserve de la Loi et du présent règlement, les droits sur les marchandises et les navires sont exigibles aux taux prévus dans l'annexe,

a) dans le cas de marchandises, lorsqu'elles sont déposées sur un quai, chargées ou déchargées à un quai ou transportées en travers, le long, sur le dessus ou en dessous d'un quai; et

b) dans le cas d'un navire, lorsqu'il

(i) est amarré à un quai,

(ii) occupe un poste ou tout espace à un quai ou à proximité d'un quai, ou

(iii) est amarré d'une manière quelconque à un navire auquel est imposé un droit d'amarrage.

(2) La personne responsable d'un navire qui transporte une cargaison paiera, relativement aux marchandises que le navire débarque ou embarque à un quai, le quayage exigible à l'égard de ces marchandises.

(3) La personne responsable d'un navire qui, normalement, transporte une cargaison devra, le plus tôt possible après que le navire aura été amarré à un quai ou aura pris un poste à un quai, remettre au gardien de quai un rapport signé de sa main et donnant:

a) le nom du navire;

b) la longueur du navire;

c) le quai visité;

d) l'heure d'arrivée du navire au quai et son heure de départ prévue;

e) la description et le poids de

board; and
(f) in the case of a ferry vessel, the number and description of motor vehicles landed or taken on board.

(3.1) The master or person in charge of a cruise vessel shall, as soon as possible after the vessel

- (a) berths at a public port facility and embarks or disembarks passengers,
- (b) embarks passengers from a public port facility, directly or by lighter, or
- (c) disembarks passengers to a public port facility, either directly or by lighter,

provide to the wharfinger a statement setting out the number of passengers carried on board that vessel.

[1986]

...

26.1 (1) In addition to any other charges payable under these Regulations, the cruise vessel charge described in column I of item 1 of Schedule VII is payable in an amount determined by multiplying the number of units of that item, using the relevant unit basis set out in column II of that item, by the relevant rate set out in column III of that item.

(2) Subject to subsection (3), the cruise vessel charge referred to in subsection (1) is payable in respect of a cruise vessel for each public port facility used where

- (a) the cruise vessel has berthed at a public port facility and embarks or disembarks passengers;
- (b) passengers embark the cruise vessel from that facility, either directly or by lighter; or
- (c) passengers disembark from the cruise vessel to that facility, either directly or by lighter.

(3) Where a cruise vessel embarks passengers from or disembarks passengers to any public port facility more than once during a voyage, the cruise vessel

toutes les marchandises débarquées ou embarquées; et
f) s'il s'agit d'un transbordeur, le nombre et la désignation des véhicules à moteurs débarqués ou embarqués.

(3.1) Le capitaine ou la personne responsable d'un navire de croisière doit remettre au gardien de quai une déclaration indiquant le nombre de passagers à bord du navire le plus tôt possible après que le navire;

- a) a été amarré à une installation de port public ou y a embarqué ou débarqué des passagers;
- b) a embarqué des passagers à une installation de port public, directement ou par chaland;
- c) a débarqué des passagers à une installation de port public, directement ou par chaland.

[1986]

...

26.1 (1) En plus des droits payables en vertu du règlement, les droits relatifs aux navires de croisière prévus à la colonne I de l'annexe VII sont payables et égaux au montant obtenu par la multiplication du nombre d'unités, selon la base unitaire indiquée à la colonne II, par le taux prévu à la colonne III.

(2) Sous réserve du paragraphe (3), les droits relatifs aux navires de croisière visés au paragraphe (1) sont payables à l'égard des navires de croisière qui utilisent une installation de port public dans les cas suivants:

- a) les navires de croisière y sont amarrés et y embarquent ou débarquent des passagers;
- b) des passagers y embarquent dans les navires de croisière, directement ou par chaland;
- c) les passagers y débarquent des navires de croisière, directement ou par chaland.

(3) Lorsque les navires de croisière embarquent des passagers à une installation de port public ou y débarquent des passagers, plus d'une fois au cours d'un voyage, les droits relatifs aux navires de croisière sont payables

charge shall be payable only once for that voyage in respect of that public port facility.

une seule fois pour le voyage à l'égard de l'installation de port public visée.

...

[1986]

...

[1986]

28. No berthage charge is payable in respect of any vessel that is
 (a) not engaged in trade and that is owned by Her Majesty in right of a province or by the government of a foreign country;
 (b) exempt from the payment of berthage charges by the terms of any agreement between Canada and any foreign country; or
 (c) a fishing vessel berthed at a public port facility solely for the purpose of loading supplies, including fish bait, or unloading the vessel's catch of fish.

28. Aucun droit d'amarrage n'est payable à l'égard d'un navire;
 a) qui ne sert pas au commerce et qui appartient à Sa Majesté du chef d'une province ou au gouvernement d'un pays étranger;
 b) qui est exempté du paiement des droits d'amarrage en vertu d'une entente entre le Canada et un pays étranger;
 c) qui est un navire de pêche amarré à une installation de port public uniquement pour y charger des fournitures, y compris les appâts, ou y décharger ses prises de poisson.

...

[1986]

...

[1986]

SCHEDULE VII

ANNEXE VII

(Section 26.1)

(article 26.1)

OTHER CHARGES

AUTRES DROITS

(Effective Avril 1, 19897)

(En vigueur le 1^{er} avril 1987)

Column 1 Item Description	Column 11 Unit Basis	Column 111 Rate
1. Cruise vessel... on board	passenger	\$3.00

Colonne 1 Article	Colonne 11 Désignation	Colonne 111 Base unitaire	Taux
1. croisière...	Navire de à bord	3.00 \$	par passager

[1986]

[1986]

The facts

I shall reduce the facts, which are not really in dispute, to their simplest form.

The appellant operates a cruise service travelling among Kingston, Ottawa, Montréal and Québec. The cruises it offers last for relatively long periods, in that the

passengers spend at least one night on board. Its vessels stop along the way at a number of ports, including Kingston, where they use the Crawford Dock. On days when its vessels stop at the Crawford Dock to embark or disembark passengers, it berths at the dock at about 2:00 p.m. and leaves at about 7:00 p.m. Between 1988 and 1995, the cruises took place on board the *Canadian Empress*, which has a capacity of 66 passengers; between 1990 and 1992, cruises were also offered on the *Victorian Empress*, whose passenger capacity does not appear in the record. In 1994, for example, the cost of a four or five night cruise ranged from \$860 to \$1,370.

In 1986, the Governor in Council amended the Regulations to impose a charge of \$3.00 per passenger solely in respect of cruise vessels that were engaged "in a voyage during which the passengers are on board the vessel for at least one overnight period". The amount of the charge is set out in Schedule VII to the Regulations, and has fluctuated over the years.

The Minister of Transport (the "Minister") is relying on this amendment to the Regulations in demanding payment from the appellant of \$60,937.12 in respect of the period from 1988 to 1995; that figure corresponds to the number of passengers who used the Crawford Dock multiplied by the amount of the charge payable. The amount in question has been paid into court, pending the decision of this Court.

The evidence shows that during the years in issue other cruise vessels, including the *Island Queen*, which has a capacity of 300 passengers, and the *Island Belle*, which has a smaller capacity, offered only day cruises and used the Crawford Dock in the same manner, for the same purposes and more often than the appellant's vessels, but did not pay the charges set out in Schedule VII since their passengers did not spend any nights on board during their cruise.

The evidence further shows that the appellant's vessels did not berth at the Crawford Dock during the night and that all cruise vessels paid the berthage charges set

out in the Regulations, regardless of whether the cruise was for one day, as in the case of the *Island Queen*, or several days, as in the case of the appellant's vessels. These berthage charges were established on the basis of the length of the vessel and the number of days or fractions of days during which the vessel was berthed.

Lastly, it is common ground, based on the documents entered in evidence by consent, that the objective of the Governor in Council in imposing charges in respect of cruises that included as least one night on board was to generate revenue regardless of the specific manner in which passengers used harbour facilities, and that the Governor in Council had targeted these cruises because the charges imposed were not a "significant portion" of the cost of their cruise. The following documents are particularly relevant:

-a letter from the Minister of Transport dated April 10, 1986, in response to a letter

written by the president of the appellant company, Mr. Clark:

Please inform Mr. Clark that the proposed increases in harbour fees and the introduction of a Cruise Vessel Passenger Charge are required to reflect the rising costs of providing the public harbours and ports infrastructure. They will also add to the level of cost recovery for public harbours and ports, which is part of the federal government's deficit reduction exercise.

As a result of consultations with users and departmental officials, the proposals have been revised. The new Cruise Vessel Passenger Charge will not come into effect until 1 April 1987, and will be \$3.00 per passenger. This is to allow time to reflect the charge in cruise vessel fares for the 1987 season. The charge does not apply to day cruises or ferry operations, and it is assessable when a vessel uses a public port facility to embark or disembark passengers.

You can assure Mr. Clark that his operation and his particular concerns were taken into account in the development of this passenger charge. In fact, certain modifications were made to the wording to ensure that a vessel leaving from and returning to the same public port facility, such as Kingston, would pay the charge only once at that port.

I have been informed that the Department of Fisheries and Oceans is not intending to introduce a cruise vessel passenger charge. ...

[A.B., at pp. 22-23]

-A letter from the Canadian Coast Guard dated some time in February 1989, in

response to a letter from Mr. Clark:

As you have indicated, the passenger charge represents a charge for the use of the facility, not unlike wharfage and berthage charges historically reflected in the tariff schedule. Revenues from public port tariffs contribute to the upgrading and restoration of facilities to make them safe for vehicle and passenger traffic associated with cruise vessel activity. Day cruises were specifically exempted from the cruise vessel passenger charge to avoid the

situation where the \$3.00 charge would represent a significant portion of the overall fares charged to passengers. Apart from this exemption for day cruises, overnight cruise vessels and tour operations across the country are subject to the charge. Day cruises continue to be subject to all other public port tariffs such as berthage.

[A.B., at pp. 26-27]

-Transport Canada's accounts receivable, describing the charges for which payment was sought as "passenger fees" ("droits imposés au passager").

The trial judge rejected the appellant's arguments relating to the invalidity of the impugned sections. He stated that he was of the view that the Regulations did not violate the principle of equitable treatment set out in paragraph 3(1)(c) of the Act, since all overnight cruise vessels were affected; that the purpose of the Governor in Council's action, which was to raise revenue and reduce the deficit, was a valid purpose; and that the distinction between long-term cruises and short-term cruises was not discriminatory.

With respect, I believe that the trial judge erred and that he should have dismissed the Crown's action.

A procedural question

At the hearing, the Court queried about the power of the Crown in this instance to bring action against the owner of the vessels rather than the passengers, to recover the unpaid charges. When the charges claimed are "in respect of a vessel", subsection 13(1) of the Act provides that they may be recovered from the owner of the vessel or the owner of the cargo, while "in the case of any person using a public harbour or public port facility", subsection 13(2) provides that the charges "are payable by that person".

Since, after reserving judgment to consider the matter, I have reached the conclusion that the charges in issue could not be recovered, I need not decide whether, in the event that the charges could be recovered, the Crown was right to consider the charges claimed to be charges in respect of the vessel and, accordingly, to bring action against the owner of the vessel.

The substantive issue

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.*⁴,

... 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*⁵, 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.*,⁶ Beetz J. adopted the following observation by Louis-Philippe Pigeon in *Rédaction et interprétation des lois*⁷:

[TRANSLATION]

⁴[1968] A.C. 997 at p. 1030 (House of Lords).

⁵[1959] S.C.R. 121 at p. 140. See also: *Alaska Trainship v. Pacific Pilotage*, [1981] 1 S.C.R. 261 at p. 269.

⁶[1985] 1 S.C.R. 368 at p. 406.

⁷Quebec, Éditeur officiel, 1978 at p. 34.

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. ...

What does the *Public Harbours and Ports Facilities Act* say, what does it permit, in this case?

Section 3 of that Act defines "national ports policy" in terms of four roles or characteristics, including the following, at paragraph 3(1)(c):

(c) provides accessibility and equitable treatment in the movement of goods and persons to users of Canadian ports; and

c) de garantir aux usagers des ports canadiens l'égalité de traitement et le libre accès aux services de transport de marchandises et de passagers;

This legislative objective is exceptional. It would seem that there are only two other statutes in the body of federal legislation that speak in these terms, and curiously, those two statutes also relate to "national ports policy". They are the *Canada Ports Corporation Act*⁸ and the *Harbour Commissions Act*⁹. Even the *National Transportation Act, 1987*¹⁰ does not use this language, although paragraph 3(1)(e) of that Act conveys a similar concept:

(e) each carrier or mode of transportation, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

e) chaque transporteur ou mode de transport supporte, dans la mesure du possible, une juste part du coût réel des ressources, installations et services mis à sa disposition sur les fonds publics;

I note that the *Aeronautics Act*¹¹ contains no similar or analogous provision.

⁸R.S.C. 1985, c. C-9, paragraph 3(1)(c).

⁹R.S.C. 1985, c. H-1, paragraph 3(1)(c).

¹⁰R.S.C. 1985 (3rd Supp.), c. 28.

¹¹R.S.C. 1985, c. A-2.

Given that Parliament has taken exceptional pains to add this requirement of equitable treatment to the text of the Act itself, I deduce from this that it intended to give users of Canadian harbours broader rights than the rights that stem from the implied requirement of non-discrimination which the courts generally read into enactments.

We were told by counsel for the respondent that the impugned regulations were made with the objective of raising revenue and reducing the deficit. She added, at the hearing, that the charges are imposed on the appellant company, regardless of what particular use it makes of the port facilities: it is not, she said, a user fee. The objective of the Governor in Council is not in dispute in the instant case. The issue here is therefore not what motives guided the Governor in Council,¹² but rather whether the objective is consistent with what the enabling statute authorizes.

The objective of raising revenue and reducing the deficit is certainly permitted by paragraphs 3(1)(a) and (b), and it is at least implicitly recognized in the fact that the Minister is granted general powers of administration (section 4) and development (subsection 12(1)). However, any action taken with that objective must be taken in the manner permitted by the Act, and the Act does not authorize it unless it is in connection with the use made of the facilities (I would note that it is common ground in this case that the charges are in respect of the use of the facilities rather than in respect of coming into port). While the amount of the charges need not reflect the exact cost of the use made of the facilities,¹³ the charges imposed must be related to a particular use and users must be treated equitably.

I am of the view that imposing charges solely on overnight cruise vessels that make the same use of port facilities as do day cruisers does not comply with the

¹²See: *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at pp. 112-17, and *Haig v. Canada*; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at pp. 1046-47.

¹³See: *Thorne Hardware Ltd.*, *supra*, note 12 at p. 122.

principle of equitable treatment, which I interpret to mean that where use is equal, and absent any other valid objective which would permit a distinction to be made, all vessels in the same class should be treated equally.¹⁴ I find it hard to see why, for example, if the use of port facilities is equal, a sardine fishing boat should not receive the same treatment as a lobster fishing boat, or berthing fees for two yachts should vary based on their respective market values. The objectives defined in subsection 3(1) of the Act are complementary, as the word "and" indicates. Certainly the Minister may impose fees to raise revenue and reduce the deficit, but in so doing he must "provide equitable treatment" to cruise vessels. In this case, the impugned provisions are inconsistent with that objective.

In deciding that the Act does not authorize the Governor in Council to distinguish between overnight cruise vessels and day cruisers, as he did in this case, and accordingly that the impugned provisions are invalid, I am actually adopting the same approach as led the Supreme Court of Canada, in *Alaska Trainship*,¹⁵ and Denault J., in *Great Lakes Pilotage Authority Ltd v. Misener Shipping Ltd.*,¹⁶ to strike down certain regulations in respect of pilotage.

In my view, this is sufficient to dispose of the matter. Counsel for the appellant invited us to decide that the Act does not permit the Governor in Council to define the word "vessel", by regulation, otherwise than as that word is defined in the Act, and that the Regulations cannot contain provisions that apply to certain classes of vessels and not to others. I am in agreement with the first of these propositions, but not with the second. The Regulations could not include in "vessel" a class that was not included in the definition of the word "vessel" set out in the Act; in this instance, the argument is

¹⁴I reach this conclusion based both on the French version, "garantir ... l'égalité de traitement", and on the English version, which is apparently less stringent, "provides ... equitable treatment".

¹⁵*Supra*, note 5.

¹⁶(1987), 11 F.T.R. 208 (F.C.T.D.).

academic since in the English version Parliament has used the word "includes" rather than "means", and since the definition given, "every description of ship, boat or craft ...", is sufficiently broad to encompass cruise vessels. On the other hand, it is implicitly necessary, for the administration of the Act, that it be possible for the Regulations to distinguish among certain classes of vessels. The objective defined in paragraph 3(1)(a) of the Act, I think, allows special status to be conferred on fishing vessels, for example, as paragraph 28(c) of the Regulations does, and the objective defined in paragraph 3(1)(d) would also, in my view, allow for ferries, which are connected with the ground transportation system, to be treated as a class apart. I do not share the opinion of counsel for the appellant that an express statutory provision is required in order for classes or sub-classes to be established by regulation.¹⁷

In closing, I would like to comment briefly on certain decisions of the Federal Court on which the respondent and the trial judge relied; they are: *Gulf Trollers Assn.*,¹⁸ *Aerlinte Eireann Teorante v. Canada (Minister of Transport)*,¹⁹ *New Brunswick Broadcasting Co., Ltd. v. C.R.T.C.*²⁰ and *Airport Taxicab (Malton) Association v. Canada (Minister of Transport)*.²¹

In *Gulf Trollers*,²² public notices were issued by fishery officers under the *Fisheries Act* imposing restrictions on fishermen engaged in commercial salmon fishing that were not imposed on sport fishermen. The applicable Act contained no requirement of equitable treatment, and the case was decided on a point of

¹⁷See: *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 at pp. 102-103.

¹⁸*Supra*, note 17.

¹⁹(1990), 68 D.L.R. (4th) 220 (F.C.A.).

²⁰[1984] 2 F.C. 410 (F.C.A.).

²¹(1986) 7 F.T.R. 105 (F.C.T.D.).

²²*Supra*, note 17.

constitutional law rather than administrative law. In any event, the case did not address the possibility of establishing distinctions within a class, for example sport fishermen.

In *Aerlinte*,²³ the *Aeronautics Act* then in force did not guarantee equitable treatment. The *Air Services Fees Regulations* established different landing fees for domestic flights, international flights and transoceanic flights; the fees were established on the basis of the weight of the aircraft and the evidence had established that the costs of building and maintaining runways and providing passenger services were higher in the case of transoceanic flights; the Court found that, on the facts, there was no discrimination. The respondent relied on a passage from the reasons of the Court, at page 228, which is mere *obiter*, and which is, moreover, of debatable merit. At bottom, that decision supports the appellant's position, in that it confirms that the Governor in Council may determine the amount of the fees he imposes on the basis of the use made of the public facilities in question by a carrier and its passengers, without being guilty of discrimination.

In *New Brunswick Broadcasting*,²⁴ in which this Court recognized that the CRTC had the power to establish classes of persons who are entitled to use frequencies, the *Broadcasting Act* contained a provision that gave the Commission the power to establish such classes. That decision is of little use to us here.

In *Airport Taxicab*,²⁵ the impugned regulations, which had been made under the *Department of Transport Act*, permitted separate permits to be issued to taxi drivers and limousine drivers. The regulations had been made with the aim of ending a war that had been going on between the drivers in question. Section 25 of the Act in question gave the Governor in Council the power to "make such regulations as he

²³*Supra*, note 19.

²⁴*Supra*, note 20.

²⁵*Supra*, note 21.

deems necessary for the management, maintenance, proper use and protection ...". The Act contained no requirement of equitable treatment. Rouleau J. concluded, first, that the purpose of the statutory provisions was, *inter alia*, to allow the Crown to limit, control and supervise the conduct of commercial activity carried on within the boundaries of airports, and that the impugned regulations reflected that objective. Second, he concluded that there was nothing in the evidence to indicate unequal or discriminatory treatment. I do not see how this decision can help the respondent.

In short, the result of these proceedings is dictated by the fact that paragraph 3(1)(c) of the Act contains an exceptional requirement of equitable treatment. Where use is equal, and absent any other valid objective that might justify a distinction, the Governor in Council may not target those vessels within a single class of vessels that are most likely to generate revenue for it, or from which it is easiest for it to collect revenue.

In reality, the charges imposed on the appellant in the instant case amount to the same thing as a tax on the income of a business engaged in an activity that the Minister of Transport considers to be a luxury. The *Public Harbours and Port Facilities Act* quite simply does not allow the Minister of Transport to substitute himself in this respect for the Minister of Finance.

Disposition

I would allow the appeal, dismiss the action by Her Majesty the Queen, declare the definition of "cruise vessel" in section 2 of the *Government Wharves Regulations* as well as subsection 25(3.1), section 26.1 and, consequently, Schedule VII to the Regulations, to be invalid, and I would award the appellant its costs on appeal and at trial.

"Robert Décary"

J.A.

"I concur.

Alice Desjardins, J.A."

"I concur.

François Chevalier, D.J."

Certified true translation

C. Delon, L.L.L.

FEDERAL COURT OF APPEAL

A-151-96

BETWEEN:

ST. LAWRENCE CRUISE LINES INC.

Appellant
(Defendant)

AND:

HER MAJESTY THE QUEEN

Respondent
(Plaintiff)

REASONS FOR JUDGMENT