Federal Court  Cour fédérale

Date: 20200325

Docket: T-1188-19

Citation: 2020 FC 414

Ottawa, Ontario, March 25, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GLOBAL MARINE SYSTEMS LTD.

Applicant

And

MINISTER OF TRANSPORT

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Global Marine Systems Ltd. ("Global Marine"), seeks to judicially review an email dated June 20, 2019, from Emilie Gelinas, Director of the Seaway and Domestic Shipping Policy division within the Marine Policy Directorate of Transport Canada. The email informed Global Marine that the standby activities of the vessel "Cable Innovator" were considered by Transport Canada to be marine activities of a commercial nature as defined in s 2(1)(f) of the *Coasting Trade Act*, SC 1992, c 31 (or the "Act"). This is an application for judicial review of that finding, brought pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The "Cable Innovator" is a British-flagged vessel, operated by Global Marine. It is a specialized cable ship utilized for the installation, maintenance and repair of subsea fibre optic cables. Global Marine provides these services pursuant to the North American Submarine Cable Maintenance Service Contract ("NAZ Contract") dated December 2, 2011 and entered into with various North American Zone Members, who each have interests in submarine cables within the North American Zone ("NAZ"). The NAZ covers a prescribed subsea area running along the west coast of North America from Mexico to Alaska and extending westward to the 167th meridian, near Hawaii.

[3] The "Cable Innovator", and its predecessor vessels, have been based in Victoria Harbour in Victoria, British Columbia, for many years. Global Marine asserts that this has been the case for the past 30 to 40 years. Pursuant to the NAZ Contract, the "Cable Innovator" must at all times be ready, manned and equipped to respond within 24 hours to notification from a NAZ Member of the need for a cable repair. Global Marine is paid a repair and maintenance service rate when mobilized to perform such services. It is also paid an annual fee in return for which it makes the "Cable Innovator", its crew and equipment, available to perform the work under the NAZ Contract, which includes the costs of the "Cable Innovator" when on standby. Global Marine reports that the vast majority of the work performed by the "Global Innovator" is outside Canada, and since 2012, less than 3% of the vessel's operating days were on projects in Canadian waters.

[4] On September 21, 2016, Global Marine submitted an Application for Vessel Temporary Admission to the Coasting Trade of Canada ("C47 application") to the Canada Border Services Agency ("CBSA") and the Canadian Transportation Agency ("CTA"). The CTA is required to determine if a suitable Canadian ship or non-duty paid ship is available to provide the proposed service or perform the activity described in a C47 application. On October 17, 2016, CBSA advised that the CTA had determined that there was no suitable Canadian ship available to provide the service or perform the activity described in the submitted C47 application and that Global Marine was authorized to temporarily import the "Cable Innovator" into Canada ("C47 Temporary Admission"). However, that a coasting trade licence ("C48 licence" or "coasting trade licence") must be obtained before the vessel could commence its operations.

[5] Global Marine asserts that its prior practice, since at least 2008, was to maintain an annual C47 temporary admission and to seek a C48 licence only when needed to undertake subsea cable maintenance or repairs in Canadian waters. This practice was meant to shorten the time that would be required to obtain a C48 licence.

[6] However, on May 2, 2017, Global Marine received an email from Transport Canada advising that the "Cable Innovator" was required to hold a C48 licence while on standby in Victoria Harbour. Various communications were exchanged and meetings were held between July 2017 and March 2019 during which Global Marine put forward information in support of its view that being on standby is not a marine activity of a commercial nature, and therefore, that a C48 licence is not required while the vessel is on standby. This included a meeting with the Assistant Deputy Minister of Transport Canada on February 27, 2019.

[7] By email of June 20, 2019, Ms. Gelinas advised Global Marine that Transport Canada continued to be of the view that the standby activities of the vessel "Cable Innovator" are marine activities of a commercial nature under s 2(1)(f) of the *Coasting Trade Act*, and that the "Cable Innovator" should, accordingly, obtain a C48 licence for cable repair and standby activities.

[8] On July 22, 2019, Global Marine filed a Notice of Application seeking judicial review of the June 20, 2019 email as a delegated decision of the Minister of Transport ("Minister").

Legislative Scheme

[9] It is not in dispute that obtaining a C48 licence is a two-part process. First, a C47 application, in prescribed form, must be submitted to the CBSA and CTA. The CTA determines if a suitable Canadian ship or non-duty paid ship is available to carry out the proposed service or perform the activity described in the application (*Coasting Trade Act*, ss 4(1)(a), 8(1)). If not, the CTA will approve the proposed temporary importation of the foreign vessel. However, regardless of the temporary importation being approved, the vessel may not engage in the proposed work until a valid coasting trade licence is issued by the Minister. At this second stage, the vessel must be inspected by Transport Canada's Marine Safety and Security vessel inspection branch to ensure that it meets all applicable safety and pollution requirements (*Coasting Trade Act*, s 4(1)(d) and (e)). Further, the duties and taxes in respect of the temporary importation must be paid (*Coasting Trade Act*, s 4(1)(c)).

[10] According to the affidavit of Marc-Yves Bertin, Director General of the Marine Policy Directorate at Transport Canada, sworn on September 19, 2019, and submitted in support of the

Minister's response to this application for judicial review ("Bertin Affidavit"), rates on imported goods are prescribed by the *Customs Tariff*, SC 1997, c 36. Imported marine vessels are generally subject to a tariff of 25%. However, a vessel imported into Canada on a temporary basis under a coasting trade licence will have that duty reduced to the customs duty on 1/120 of the value of the vessel for each month or part of a month during which it remains in Canada per the *Vessel Duties Reduction or Removal Regulations*, SOR/90-304, ss 3(1) and 4. Once the applicant has satisfactorily established that these requirements have been met, CBSA, on behalf of the Minister of Public Safety and Emergency Preparedness, will issue a coasting trade licence, which is valid for up to one year.

[11] What is in dispute in this matter is whether the "Cable Innovator" is engaged in "marine activity of a commercial nature", pursuant to s 2(1)(f) of the *Coasting Trade Act*, when it is on standby in Victoria Harbour, and therefore, whether it requires a coasting trade licence while on standby.

Coasting Trade Act

Coasting Trade Act, SC 1992, c 31

> 2 (1) In this Act,
>
> …
>
> Coasting trade means
>
> (a) the carriage of goods by ship, or by ship and any other mode of transport, from one place in Canada or above the continental shelf of Canada to any other place in Canada or above the continental shelf of Canada, either directly or by way of a place outside Canada, but, with respect to waters above the continental shelf of Canada, includes the carriage of goods only in relation to the

exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada,

(b) subject to paragraph (c), the carriage of passengers by ship from any place in Canada situated on a lake or river to the same place, or to any other place in Canada, either directly or by way of a place outside Canada,

(c) the carriage of passengers by ship from any place situated on the St. Lawrence River northeast of the Saint Lambert lock or on the Fraser River west of the Mission Bridge

(i) to the same place, without any call at any port outside Canada, other than one or more technical or emergency calls, or

(ii) to any other place in Canada, other than as an in-transit call, either directly or by way of a place outside Canada,

(d) the carriage of passengers by ship from any place in Canada other than from a place to which paragraph (b) or (c) applies

(i) to the same place, without any call at any port outside Canada, other than one or more technical or emergency calls, or

(ii) to any other place in Canada, other than as an in-transit call, either directly or by way of a place outside Canada,

(e) the carriage of passengers by ship

(i) from any place in Canada to any place above the continental shelf of Canada,

(ii) from any place above the continental shelf of Canada to any place in Canada, or

(iii) from any place above the continental shelf of Canada to the same place or to any other place above the continental shelf of Canada

where the carriage of the passengers is in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada, and

(f) the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters and, with respect to waters above the continental shelf of Canada, in such other marine

activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada; (*cabotage*)

…

3 (1) No foreign ship or non-duty paid ship shall, except in accordance with a licence, engage in the coasting trade.

…

4(1) Subject to section 7, on application therefor by a person resident in Canada acting on behalf of a foreign ship, the Minister of Public Safety and Emergency Preparedness shall issue a licence in respect of the foreign ship, where the Minister is satisfied that

> (a) the Agency has determined that no Canadian ship or non-duty paid ship is suitable and available to provide the service or perform the activity described in the application;
>
> (b) where the activity described in the application entails the carriage of passengers by ship, the Agency has determined that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships;
>
> (c) arrangements have been made for the payment of the duties and taxes under the *Customs Tariff* and the *Excise Tax Act* applicable to the foreign ship in relation to its temporary use in Canada;
>
> (d) all certificates and documents relating to the foreign ship issued pursuant to shipping conventions to which Canada is a party are valid and in force; and
>
> (e) the foreign ship meets all safety and pollution prevention requirements imposed by any law of Canada applicable to that foreign ship.

…

5 Subject to section 7, on application therefor by a person resident in Canada acting on behalf of a non-duty paid ship, the Minister of Public Safety and Emergency Preparedness shall issue a licence in respect of the non-duty paid ship, where the Minister is satisfied that

> (a) the Agency has determined that no Canadian ship is suitable and available to provide the service or perform the activity described in the application;
>
> (b) where the activity described in the application entails the carriage of passengers by ship, the Agency has determined that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships; and
>
> (c) arrangements have been made for the payment of the duties and taxes under the *Customs Tariff* and the *Excise Tax Act* applicable to the non-duty paid ship in relation to its temporary use in Canada.
>
> …
>
> 12 For the purposes of enforcing this Act, the Minister of Transport may designate any person or class of persons as enforcement officers and shall furnish every enforcement officer with a certificate of that designation
>
> …
>
> 13 (1) Where a ship contravenes subsection 3(1), the ship is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty thousand dollars.

Decision under review

[12] The June 20, 2019 email from Ms. Gelinas states as follows:

> Dear Mr. Wrottesley:
>
> Thank you for your submission regarding the activities of the Cable Innovator, dated 25 March 2019. I write to advise you that the information provided does not change Transport Canada's assessment that the standby activities in support of cable repair by the Cable Innovator in Canadian waters are considered to be commercial marine activities under the Coasting Trade Act, and meets the definition of coasting trade found in section 2(1)(f) of the Act.
>
> Based on your most recent correspondence as well as your previous correspondence, we understand that Global Marine

> Systems, Ltd., disputes that the vessel is engaged in a marine activity. It is our assessment that a crewed ship, in port, being maintained in a state of readiness to deploy to repair an emergency cable break within 24 hours as per the North American Zone agreement under which the ships [*sic*] operates, is clearly engaged in a marine activity.
>
> The Cable Innovator should therefore obtain a coasting trade license for cable repair and standby activities. I would also note again that vessels that are in non-compliance with the Coasting Trade Act can face detention, and associated penalties, including fines upon summary conviction, as outlined in section 13 of the Act.
>
> I trust that this concludes the matter.
>
> Sincerely,
>
> Emilie Gelinas

Issues

[13] Global Marine submits that there are two issues to be addressed at this judicial review:

1. Is the Minister's interpretation of the phrase "marine activity of a commercial nature" at s 2(1)(f) of the *Coasting Trade Act* erroneous and does it fail to respect the modern rules of statutory interpretation?

2. Did the Minister unreasonably conclude that "Cable Innovator" was engaged in coasting trade?

[14] The Minister raises a preliminary issue, being whether the June 20, 2019 email is a decision or is otherwise reviewable as an administrative action. The Minister submits that the issue for substantive review is whether Transport Canada's assessment that the standby activities of the "Cable Innovator" fall within the definition of "coasting trade" is reasonable.

[15] In my view, the issues are as follows:

i. Preliminary issue: Is the June 20, 2019 email reviewable on judicial review? If so,

ii. Was the Minister's decision reasonable?

Standard of review

[16] While Global Marine in its written submissions took the position that the Minister's decision should be reviewed on the correctness standard, those submissions were filed prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*").

[17] When appearing before me, counsel for Global Marine and for the Minister submitted, and I agree, that the applicable standard of review is reasonableness.

[18] Counsel for Global Marine points out that in *Vavilov* the Supreme Court, amongst other things, stated that a "reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Further, that the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case, and that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at paras 88, 90, 105). In determining if a decision is reasonable, a reviewing court asks whether the decision, "bears the hallmarks of reasonableness — justification, transparency and intelligibly — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"

(*Vavilov* at para 99). To be reasonable, a decision must be "justified in relation to the constellation of law and facts that are relevant to [it]" (*Vavilov* at para 105).

[19] The Minister submits that there is a discretionary element inherent in Transport Canada's interpretation because the words at issue in s 2(1)(f), "any other maritime activity of a commercial nature", are not defined in the *Coasting Trade Act*. As such, their meaning must be informed by Transport Canada's expertise in maritime matters and with reference to the factual context. Transport Canada's interpretation should be reviewed for reasonableness in the manner set out in *Vavilov* (at paras 91-98).

[20] In my view, paragraph 85 of *Vavilov* provides a concise statement of what a reviewing court is to be concerned with when assessing an administrative decision utilizing the reasonableness standard:

> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

Preliminary Issue: Is the June 20 email a reviewable on judicial review?

The Minister's position

[21] The Minister submits that Global Marine misconstrues the June 20, 2019 email as being a "final decision" by Transport Canada that is capable of being judicially reviewed. The Minister

acknowledges that judicial review is not be restricted to decisions and orders and may be brought in respect of administrative action (*Federal Courts Rules*, SOR/98-106, Rule 300; *Air Canada v Toronto Port Authority Et Al*, 2011 FCA 347 at para 24 ("*Air Canada*")). However, the Minister submits that the subject email is not a decision or any other action that affects the legal rights of Global Marine, or one that imposes legal obligations or prejudicial effects (*Air Canada* at paras 28-29).

[22] While s 18.1 of the *Federal Courts Act* permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought", the Minister characterizes the email from Ms. Gelinas as non-binding guidance which does not directly affect Global Marine's rights (*Timberwest Forest Corp v Canada*, 2007 FC 148 at para 92, aff'd 2007 FCA 389). The Minister analogizes the email to an advance ruling or courtesy letter, neither of which constitute a reviewable decision or reviewable administrative action (*Philipps v Librarian and Archivist of Canada*, 2006 FC 1378 at para 32 ("*Philipps*"); *Hughes v Canada (Customs and Revenue Agency)*, 2004 FC 1055 at para 6 ("*Hughes*"); *Rothmans, Benson & Hedges Inc v Minister of National Revenue*, 148 FTR 3, [1998] FCJ No 79 at para 28 (FCTD) (QL/Lexis) ("*Rothmans*"); *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 at paras 9-11 ("*Democracy Watch*")). The Minister further submits that Global Marine had no statutory right to a determination of any kind by Transport Canada. Ms. Gelinas' responsibilities involve the administration of the *Coasting Trade Act*, including the provision of non-binding guidance. There is no decision taken when providing such general guidance. Ms. Gelinas' role in that regard is distinct from enforcement actions that may be taken under ss 13-16 of the *Coasting Trade Act* and which would affect the legal rights and interests of a party. The June 20,

2019, email contained only Transport Canada's assessment and advice that Global Marine should obtain a coasting trade licence for the repair and standby activities of the "Cable Innovator". There was no direction or order to do so. The email contains no determination of Global Marine's rights, but does flag consequences that could arise in the future for non-compliance with the *Coasting Trade Act*.

[23] The Minister also submits the June 20, 2019 email is the last email in a series of correspondence where the same viewpoint was reiterated — that the activities of the "Cable Innovator" met the definition of a coasting trade as found in s 2(1)(f) of the *Coasting Trade Act*. There is no reason to treat the June 20, 2019 email as a decision when compared with all of the previous emails setting out the same position. Given this, even if the June 20, 2019 email could be considered to be a decision, so too could the prior communications. On that basis, and because Global Marine did not seek judicial review of these prior decisions, it is now outside the 30 day time limit to do so with respect to the earlier, substantially similar, Transport Canada communications.

Global Marine's position

[24] Global Marine points to *Larny Holdings Ltd v Canada (Minister of Health)*, 2002 FCT 750 ("*Larny*") to support its view that judicial review under s 18.1 of the *Federal Courts Act* is intended to be broad in scope and given a liberal interpretation. This can extend to letters stating that, in the regulator's view, a violation of legislation has occurred and warning of further enforcement action if the practice at issue is not curtailed (also *Markevich v Canada*, 163 FTR 209, 172 DLR (4th) 164 (FCTD)("*Markevich*"); *Morneault v Canada (Attorney General)*, 189

DLR (4th) 96, 2000 CanLII 15737 (FCA) ("*Morneault*"); *Gestion Complexe Cousineau (1989) Inc v Canada (Minister of Public Works and Government Services)*, 125 DLR (4th) 559, [1995] FCJ No 735 (FCA) (QL/Lexis) ("*Gestion*"); *Falls Management Co v Canada (Minister of Health)*, 2005 FC 924 at paras 18-20).

Analysis

[25] In *Air Canada*, the Federal Court of Appeal addressed what may properly be the subject of a judicial review:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> [25] As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.
>
> …
>
> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> [29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding*

> *Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; D*emocracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.
>
> [30] The decided cases offer many illustrations of this situation: e.g., *1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47, 375 N.R. 368 (an official's letter proposing dates for a meeting); *Philipps v. Canada (Librarian and Archivist)*, 2006 FC 1378, [2007] 4 F.C.R. 11 (a courtesy letter written in reply to an application for reconsideration); *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (T.D.) (an advance ruling that constitutes nothing more than a non-binding opinion).

[26] To assess whether or not the June 20, 2019 email may be subject to judicial review, it is necessary to first review the relevant evidence and the factual background that led to the subject email.

[27] The Bertin Affidavit states that:

> 22. The Marine Policy Directorate ("Directorate") is a division of TC with responsibility for, amongst other things, administration and enforcement activities under the [Coasting Trade] Act. These responsibilities include:
>
> > a) conducting compliance and enforcement action as mandated by sections 12-16 of the Act;
> >
> > b) maintaining one or more designated officers with responsibility for takings enforcement action under the Act; and
> >
> > c) providing non-binding guidance on the administration of the Act to external stakeholders, such as prospective coasting trade licence applicants, and other government departments.

[28] Further, that the responsibilities of Ms. Gelinas, the author of the June 20, 2019 email, include the administration of the *Coasting Trade Act*. In particular,

> 24. As part of this administrative function, Ms. Gelinas and other members of the Directorate provide non-binding guidance and advisory opinions in response to inquiries from stakeholders, such as vessel owners/operators and shipping agents, regarding how the Act would likely be applied to a particular set of circumstances. These requests for guidance are quite frequent: in 2019, the Directorate has received 43 requests to date for guidance or advisory opinions regarding the likely application of the Act. Similarly, the Directorate reaches out to stakeholders when it receives information to suggest that they may not be in compliance with the Act, as it did here, in order to advise of the Act's requirements and to provide guidance.

[29] Ms. Gelinas is also an enforcement officer, designated as such by the Minister of Transport under s 12(1) of the *Coasting Trade Act*. As an enforcement officer, she makes decisions on enforcement action including determining whether the activities or actions of a vessel constitute a violation of the Act that warrants the laying of charges. Additionally, an enforcement officer may order the detention and search of a vessel in relation to the laying of a charge under the *Coasting Trade Act*. She has not taken enforcement action against the "Cable Innovator".

[30] Global Marine prepared its C47 application, dated September 21, 2016, and submitted it along with a letter dated September 27, 2016, providing background to the C47 application. The CTA permitted the temporary importation of the vessel by way of CBSA's October 17, 2016 letter.

[31] On May 2, 2017, Ms. Katerina Klimas, a Policy Analyst for the Marine Policy Directorate, wrote to Global Marine's Canadian agent, King Bros. Limited, with respect to the C47 Temporary Admission. The email states that it had come to the attention of Transport Canada that a coasting trade licence had not yet been obtained for the "Cable Innovator" and that the vessel was on standby in Victoria Harbour for the activities described in the C47 Application. Further, that foreign vessels that have been granted temporary admission to Canada's coasting trade are expected to acquire their coasting trade licence prior to or at the same time that they begin the marine activity of a commercial nature for which the application was made. Ms. Klimas stated, "[p]lease kindly obtain your Coasting Trade Licence as soon as possible. If you wish to discuss further, please don't hesitate to contact me directly."

[32] On May 10, 2017, Ms. Louise Laflamme, Chief, Marine Policy and Regulatory Affairs, wrote a follow up email to King Bros. Limited stating that vessels that are in non-compliance with the *Coasting Trade Act* may face penalties and vessel detention and drawing attention to ss 3(1), 13(1)-(2) and 16(1) of the Act in that regard. The letter states that immediate attention to the matter would be greatly appreciated and that CBSA was copied on the email so it would be aware of the issue. The email also indicated that the recipient should not hesitate to contact Ms. Laflamme should there be questions on the information provided or if the recipient wished to discuss it further.

[33] King Bros. Limited responded on the same date stating that the "Cable Innovator" was on standby and was not, at that time, engaged in coasting trade. Should it get a job in Canadian waters, it would then take the steps necessary to obtain a coasting trade licence.

[34] Ms. Gelinas responded by email of May 11, 2017. In her email, she summarized the C47 application made on behalf of the "Cable Innovator" and stated that as the vessel was operating on standby (the activity for which had been applied for) during the timeframe outlined in all of the attached documents, and that she again asked that a coasting trade licence for the "Cable Innovator" be obtained.

[35] By email to King Bros. Limited dated July 13, 2017, Ms. Gelinas stated that the activity of maintaining the "Cable Innovator" in a state of readiness, on standby for cable repairs off the west coast of Canada, is considered a marine activity of a commercial nature under the *Coasting Trade Act*. As such, a coasting trade licence was required for the vessel to undertake the activity of being on standby. And:

> As the vessel is currently in non-compliance with the Act, I will kindly ask again that you obtain the coasting trade licence for the Cable Innovator, and that you inform Transport Canada once you have obtained it. <u>If the licence is not obtained, TC will take action to detain the vessel until a licence is obtained or until the vessel permanently leaves Canadian waters.</u> As noted below, and outlined in the Act under section 13, where a ship contravenes subsection 3(1), the ship is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty thousand dollars, and, where an offence is committed by a ship under subsection (1) on more than one day or is continued by the ship for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

[emphasis in original]

[36] Ms. Gelinas stated that she would follow up shortly to discuss and ensure that the information she provided had been understood.

[37] On July 13, 2017, Mr. Simon Smith, Vice President of King Bros. Limited, sent an email to Ms. Gelinas indicating his recent involvement and asking her to identify the section of the *Coasting Trade Act* that expressly defines a ship on standby as engaging in the coasting trade. He also noted that King Bros. Limited had never encountered this issue with any prior C47 application approvals.

[38] Ms. Gelinas responded on July 14, 2017, noting that coasting trade is defined in the Act, restating Transport Canada's position that being on standby is considered to be a marine activity of a commercial nature falling under s 2(1)(f), and reproducing ss 2(1)(a)-(f) of the *Coasting Trade Act*. She asked to be advised when King Bros. Limited had received further direction from Global Marine and suggested that they speak by phone the following week in order to resolve the issue.

[39] By letter of July 21, 2017, Global Marine provided detailed information as to its operations, including pursuant to the NAZ Contract, the role of the "Cable Innovator" and its "port calls" in Victoria. Global Marine stated that it disagreed that the vessel's port calls in Victoria constitute commercial marine activities in Canada for which a coasting trade licence is required, noting that it had maintained C47 temporary admissions for vessels for over 10 years and that this was the first time Transport Canada had demanded a C48 licence be immediately obtained. Global Marine stated that it welcomed the opportunity to meet to discuss the issues and to address any concerns Transport Canada may have.

[40] On August 28, 2017, Ms. Gelinas replied to the July 21, 2017 letter and reiterated Transport Canada's position that the activity of being on standby to provide a service is considered to be coasting trade and that a licence needs to be obtained before the vessel commences its activities or operations. She noted again that vessels not in compliance can face detention and associated penalties.

[41] By email of August 29, 2017, Global Marine sought a meeting.

[42] By email of August 30, 2017, Ms. Gelinas acknowledged the request and stated that "[w]e remain open to dialogue with Global Marine" and that Transport Canada was available to meet on September 6, 2017. Further:

> The purpose of the meeting will be for Global Marine to provide broader awareness of CS INNOVATORS activities and for Transport Canada to ensure that Global Marine has clarity on what constitutes a coasting trade activity under Canada's *Coasting Trade Act*. In advance of the meeting, we ask that Global marine provide us with any additional information that will need to be considered during our meeting.

[43] Global Marine provided further information on September 1, 2017. The meeting was held on September 6, 2017, and on the same date Global Marine provided Transport Canada with a copy the presentation it had made at the meeting.

[44] Ms. Gelinas acknowledged the information by email of September 7, 2017 and stated that Transport Canada would review it.

[45] Global Marine followed up by emails on October 6, 2017 and on October 11, 2017. In the latter email, it inquired if Ms. Gelinas had decided her position with respect to the "Cable Innovator" requiring a permission under the *Coasting Trade Act* to simply be in Canadian waters in port awaiting repair jobs and that Global Marine "need that formal decision in order to help decide how we will move forward".

[46] By email of October 11, 2017, Ms. Gelinas stated that Transport Canada was still looking into it and were doing their best to get back to Global Marine as soon as possible.

[47] On July 4 and 5, 2018, Global Marine wrote to the Minister. It stated that it had the benefit of having a cable ship based in Victoria since the late 1970s. And, while there had been no change in the statutory regime nor in Global Marine's operating practices, in May 2017 Transport Canada advised that a C48 coasting trade licence was required for the "Cable Innovator" while it is sitting idle in Victoria Harbour. Global Marine attached a five-page memorandum outlining why it did not agree with Transport Canada's position that, in so doing, the vessel was engaged in a "marine activity of a commercial nature" pursuant to s 2(1)(f) of the *Coasting Trade Act*. Global Marine asked the Minister to confirm that while sitting idle the "Cable Innovator" was not subject to s 2(1)(f).

[48] On October 12, 2018, Ms. Gelinas sent an email to Global Marine apologising for the delay in reply and stating that she would like to schedule a meeting to discuss the operating of the "Cable Innovator" at the port of Victoria. Global Marine responded on October 15, 2018, and

again on November 8, 2018, indicating willingness to meet and that it would be helpful to know the specific topics to be covered in advance of the meeting.

[49] On November 9, 2019, Mr. Marc-Yves Bertin wrote to Global Marine identifying himself as the Director General responsible for Marine Policy at Transport Canada. He stated that it would be important for his team to meet with Global Marine to discuss Global Marine's letter to the Minister but that in anticipation of the meeting, "I should reconfirm that the activity of 'keeping the vessel on permanent standby to attend very short notice cable repairs as specified by the cable owners contracts' — which was noted in your most recent coasting trade application submitted to the Canadian Transportation Agency on September 21, 2016 — meets the definition of coasting trade found under section 2(1)(f) of the Coasting Trade Act. Therefore, when the Cable Innovator is in Canadian waters on standby, a coasting trade licence is required."

[50] On February 27, 2019, Global Marine met with the Assistant Deputy Minister of Transport Canada to discuss the issue. On March 25, 2019, at the Assistant Deputy Minister's request, Global Marine provided its written submission outlining why it held the view that sitting idle on standby is not a marine activity of a commercial nature and, consequently, does not require a C48 licence. This included the rejection of Transport Canada's interpretation of s 2(1)(f) and Global Marine's view of how the section is properly interpreted.

[51] The next communication was the June 20, 2019 email from Ms. Gelinas, which is reproduced above.

[52] I am not persuaded that the June 20, 2019 email, which marked the culmination of an extended discussion, can be properly analogized to a courtesy letter. Courtesy letters are typically written in reply to a request that a prior decision be reconsidered.

[53] For example, in *Hughes v Canada (Customs and Revenue Agency)*, 2004 FC 1055, referenced by the Minister, pursuant to an internal selection process the applicant had been determined to be an unqualified for a position with Canada Customs and Revenue Agency ("CCRA"). He did not seek judicial review of that decision. Instead, he sought to have the decision re-opened by writing a letter complaining about the selection process. This resulted in a letter in response from the Assistant Commissioner of the Human Resources Branch of the CCRA explaining that, according to the staffing program, there was no further available recourse.

[54] The applicant attempted to characterize that letter as a decision subject to judicial review. This Court did not agree stating:

> [6] I agree with the Respondent that, at most, Mr. Tucker's letter is a courtesy letter. The case law is clear that a courtesy letter written in response to a request for reconsideration is not a decision or order within the meaning of the *Federal Court Act*, and, therefore, cannot be challenged by way of judicial review (*Batkai* v. *Canada (M.C.I.)*, 2002 FCT 514 at para. 13 (F.C.T.D.); *Krishnamurthy* v. *Canada (M.C.I.)* [2000] F.C.J. No. 1998 (Q.L.) at para. 14 (F.C.T.D.); *Brar* v. *Canada (M.C.I.)* (1997), 140 F.T.R. 163 at paras. 7-9 (F.C.T.D.)).

[55] Similarly, *Brar v Canada (Minister of Citizenship and Immigration)*, 140 FTR 163, [1997] FCJ No 1527 (FCTD) (QL/Lexis), also relied upon by the Minister, concerned the

judicial review of a decision of a visa officer refusing to reconsider the refusal of the applicant's application for permeant residence. There this Court held that:

> [7] In these proceedings the applicant Brar is not challenging the visa officer's refusal letter of January 23, 1996. He is rather, challenging the letter of July 8, 1996, which refused the request for reconsideration. The respondent characterizes that letter as simply a "courtesy response", which does not constitute a "decision" as that phrase is employed in section 18.1 of the *Federal Court Act*.
>
> [8] I agree with the respondent. This view is supported by the decision of Noël J. in *Dumbrava* v. *M.C.I.*, where it was decided that when there is a fresh decision based on new facts, there is always "a fresh exercise of discretion". In the case at bar, the visa officer did not refer to any new facts or submissions nor did she state that she was reconsidering her decision. As was stated by McKeown, J. in *Dhaliwal* v. *M.C.I.*, counsel cannot extend the date of decision by writing a letter with the intention of provoking reply".
>
> [9] On this record, there is nothing to explain why Brar's counsel did not file a timely application for judicial review or an application for extension of time. I agree with respondent's counsel that the letter of July 8, 1996, is merely a courtesy response and not subject to review pursuant to section 18.1. On this basis, the within application for judicial review is dismissed. However, I propose to express my view on the second issue raised by the parties, namely the issue of *functus officio*.
>
> [footnotes omitted]

[56] In this matter, as demonstrated by the correspondence described above as between Transport Canada and Global Marine, it is clear that Transport Canada had adopted its view as to the interpretation and application of s 2(1)(f) when it initiated contact with Global Marine. It is also apparent that it did not alter that position over the course of the subsequent discussions. However, Transport Canada also repeatedly invited Global Marine to provide information, which Global Marine viewed as supportive of its position, suggested and convened meetings with Global Marine for the purpose of allowing it to pursue its position, and significantly, Transport

Canada indicated that it was considering the information provided. Indeed, the June 20, 2019 email explicitly acknowledged Global Marine's March 25, 2019 submission.

[57] In my view, by inviting Global Marine to provide further information, it must be assumed that Transport Canada intended to and did consider that information. And, while it did not change its initial assessment, it is not apparent that a final decision was reached by Transport Canada prior to the June 20, 2019 letter. Ms. Gelinas concludes her letter by stating, "I trust that this concludes the matter", which indicates a finality not otherwise apparent by the holding of meetings and the exchange of communications. Thus, this is not a situation where a final decision was made and communicated as such to Global Marine, who then sought a reconsideration. The June 20, 2019 email is not, therefore, in the nature of a courtesy letter.

[58] Similarly, *Philipps* does not assist the Minister as it is distinguishable on its facts from the matter before me. In *Philipps*, a collection of private archives were given to Library and Archives Canada ("LAC") subject to the donor's condition that there no be public access to the archives until 20 years after his death. Subsequently, his wife requested that this period be extended to 10 years after her death. LAC agreed. LAC later again changed the restriction on access to 25 years after the death of the donor's wife. The applicant had made several requests for access, and following an exchange of correspondence on the issue, LAC eventually sent the applicant a letter informing him that the existing restrictions on access would be maintained and that its decision was final. The applicant sought judicial review, which was granted in part.

[59] This Court held that the letter was susceptible to judicial review and that LAC could not claim that it was a mere courtesy in response to a request made by the applicant. The Court noted that prior jurisprudence held that a courtesy letter written in reply to a request for a review or a reconsideration is not a decision or an order within the meaning of the *Federal Courts Act* and, thus, cannot be challenged by way of a judicial review. Further, that before there is a new decision which is subject to judicial review, there must be a fresh exercise of discretion such as a reconsideration of a prior decision on the basis of new facts (*Philipps* at para 32).

[60] The Court in *Philipps* concluded that the letter at issue was not a courtesy letter because, by a prior letter, LAC had decided to review the decision to deny the applicant access. Accordingly, by the prior letter, LAC had decided to use its discretion to review its prior decision.

[61] In this matter, and unlike *Philipps*, it is not clear in the circumstances before me that a prior final decision had been made and communicated as such, but that, due to a change of circumstances and new information, Transport Canada utilized a fresh exercise of its discretion and made a new decision. Rather, as indicated above, Transport Canada advised Global Marine of its assessment of the application of s 2(1)(f) of the *Coasting Trade Act* but also invited Global Marine to engage in discussions, provide information and attend meetings to discuss why it did not agree with Transport Canada that s 2(1)(f) applied to the standby operations of the "Cable Innovator". While Transport Canada did not change its view as a result of those representations, it also did not clearly signal that it had made a final decision until the June 20, 2019 email.

[62] In sum, based on its communications and actions, it is not clear that Transport Canada made a prior final decision. Therefore, its June 20, 2019 email is not a courtesy letter as it is not a response to a request for reconsideration. In any event, even if I am wrong and even if Transport Canada made a prior final decision but decided to utilize a fresh exercise of its discretion to consider the new submissions of Global Marine that it invited, and then made a new decision on June 20, 2019, that new decision would not be a mere response to a reconsideration request.

[63] The Minister also submits that the June 20, 2019 email falls into the category of non-binding guidance, or is analogous to an advance ruling. In that regard, the Minister relies on *Rothmans*. There, the applicant requested an advance ruling from Revenue Canada, Customs, Excise and Taxation about whether certain tobacco products met the definition of "tobacco stick". In its advance ruling, Revenue Canada characterized some of the products as tobacco sticks (*Rothmans* at para 24). The applicant challenged that characterization and sought an order quashing the decision. The applicant's originating notice of motion was struck and the within application was dismissed because, "[t]he advance ruling does not grant or deny a right, nor does it have any legal consequences. It does not have the legal effect of settling the matter or purport to do so. It is at the most a non-binding opinion. Moreover, there is no evidence that any tax has been levied on a product corresponding to the prototype of the product in the advance ruling" (*Rothmans* at para 28).

[64] The Minister points to the Guidelines Respecting Coasting Trade Licence Application, s 4.6.1, in support of the view that Transport Canada was providing guidance and advice only:

> 4.6.1 Transport Canada
>
> 84. While it is a proponent's responsibility to obtain a coasting trade licence in respect of any foreign or Canadian registered non-duty paid ship engaged in coasting trade, Transport Canada may be contacted for guidance on the application of the Coasting trade Act with respect to particular activities (i.e. whether an activity is or is not considered to be coasting trade)…
>
> 85. Requests regarding what does or does not constitute coasting trade can be directed to Transport Canada, Marine Policy.

[65] Of note here is that Global Marine did not contact Transport Canada and seek its guidance. Rather, on May 2, 2017, Transport Canada contacted Global Marine's Canadian agent, King Bros. Limited, stating that it had come to the attention of Transport Canada that a coasting trade licence had not yet been obtained for the "Cable Innovator" and that the vessel was on standby in Victoria Harbour for the activities described in the C47 application.

[66] The Bertin Affidavit states that on or about April 2017, Transport Canada became aware for the first time that the "Cable Innovator" was operating on standby in the Port of Victoria in a state of readiness to repair subsea fibre optic cable within 24 hours in accordance with the obligations of the NAZ Contract. Transport Canada became aware of this because of litigation commenced by the International Longshore and Warehouse Union ("ILWU"), challenging the employment by the "Cable Innovator" of foreign temporary workers as crew. In support of its application for judicial review, Global Marine submitted the affidavit of John Wrottesley, Permitting Manager for Global Marine ("Wrottesley Affidavit"). This states that on August 18, 2016, Global Marine received a letter from the ILWU asserting that Global Marine's ship, the CS "Wave Venture", which had been maintained in Victoria Harbour and was later replaced by the "Cable Innovator", was engaged in cabotage as defined under the *Coasting Trade Act*. The

ILWU letter is provided as an exhibit to the Wrottesley Affidavit and asserts that the ILWU was aware of the coasting trade licence application submitted for the CS "Wave Venture", that the ILWU has members who are available to crew vessels in a wide range of unlicensed marine positions, and inviting Global Marine to make such crewing arrangements on the CS "Wave Venture" while it is in Canada.

[67] Viewed in this context, Transport Canada's communications to Global Marine cannot be seen as a circumstance where, pursuant to the Guidelines Respecting Coasting Trade Licence Application, a proponent sought and Transport Canada provided non-binding advice as to the potential application of the *Coasting* Trade *Act* in its particular contemplated circumstances. Rather, here Transport Canada initiated contact with Global Marine after the C47 Temporary Admission had been granted to point out what it had come to believe was non-compliance with the *Coasting Trade Act*. The guidelines do not speak such a circumstance.

[68] That said, the Bertin Affidavit states that part of the responsibilities of the members of the Marine Policy Directorate, including Ms. Gelinas, are to provide non-binding guidance in response to shareholders as to the application of the Act (having responded to 43 such inquiries to date), and that the Directorate also "reaches out" to stakeholders when it receives information suggesting non-compliance, as it did in this situation (no other such instances are indicated), to advise of the Act's requirements and provide guidance. While it may be that only non-binding guidance as to the application of the Act, or even non-compliance, has been provided in other circumstances, in my view, the circumstances here go beyond the providing of mere non-binding advice. Here, a final decision was conveyed by the June 20, 2019 email expressing Transport

Canada's determination that the "Cable Innovator" was in non-compliance with the Act because a coasting trade license was required for its standby operations. The email also conveyed Transport Canada's clear, if not explicit, message that continued non-compliance would result in enforcement action. In that regard, it is to be recalled that Ms. Gelinas, the author of the June 20, 2019 email, is a designated enforcement officer.

[69] The Minister submits that Ms. Gelinas' email to Global Marine did not create a binding outcome because she did not pursue enforcement, despite her emails stating that the "Cable Innovator" was in non-compliance. Rather, she was merely exercising an advisory function. The Minister submits that at no time did Ms. Gelinas actually say that she would prosecute if the licence was not obtained. Rather, that she had the discretion to do so. In my view, this submission cannot withstand scrutiny. Transport Canada, the regulator, was informing Global Marine that in Transport Canada's view the "Cable Innovator" was in non-compliance with the *Coasting Trade Act*, that it was required by that legislation to get a C48 coasting trade licence, and if they did not, that the legislation permits the laying of charges. It is not realistic to suggest that Transport Canada might not have followed through with enforcement action if Global Marine did not comply or remove its vessel from Canadian waters. The clear message was that Transport Canada could and would do so if the deemed non-compliance was not remedied.

[70] Moreover, in her July 13, 2017 email to Global Marine, Ms. Gelinas did state that the vessel would be detained if the non-compliance was not remedied:

> As the vessel is currently in non-compliance with the Act, I will kindly ask you again that you obtain the coasting trade licence for the Cable Innovator, and that you inform Transport Canada once you have obtained it. If the licence is not obtained, TC will take

> action to detain the vessel until a licence is obtained or until the vessel permanently leaves Canadian waters.
>
> [emphasis in original]

[71] She then went on to specify the penalty provisions of the Act.

[72] Accordingly, in my view, this is not a circumstance in which non-binding advice was being provided. This was a warning of enforcement action if the deemed non-compliance was not remedied.

[73] It is true that if Global Marine continued to disagree with Transport Canada's interpretation and application of the *Coasting Trade Act*, and if Ms. Gelinas did pursue prosecution, then Global Marine would have an opportunity at trial to defend its interpretation of that legislation. Conviction was not a certainty.

[74] However, few responsible ship owners would chose to subject themselves to prosecution in order to avail of a challenge to a regulator's interpretation of legislation. In this case, Global Marine did not want to take such a risk. Not simply the risk of a fine, but also the risk of being detained, which Ms. Gelinas pointed out on several occasions, and, therefore, being unable to respond to its contractual obligations, the repair of subsea fibre optic cables. Global Marine therefore removed the "Cable Innovator" from the Canadian port and brought this application for judicial review challenging Transport Canada's interpretation of s 2(1)(f) of the *Coasting Trade Act*.

[75] This brings us to *Larny*. There, the Manager of the Tobacco Enforcement Unit of Health Canada sent a letter outlining Health Canada's position on cash rebates offered on the purchase of multiple packs of cigarettes. The letter stated that its purpose was to assist the recipients in complying with s 29 of the *Tobacco Act* (now, the *Tobacco and Vaping Products Act*, SC 1997, c 13) which precluded offering cash rebates for the purchase of tobacco products, and set out the offence provisions of that legislation. The letter also stated that warning letters would be sent to retailers who contravened s 29. The Minister of Health and the Manager were responsible for the administration and enforcement of the *Tobacco Act* and were of the view that selling multipacks of cigarettes at a price less than the price per pack, if sold individually, violated s 29 of the *Tobacco Act*. Having received the initial letter and a warning letter, the applicant stopped offering multipack prices and saw his sales decline. The applicant characterised the letter as a direction from Health Canada ordering the applicant to cease and desist his marketing and pricing strategies and sought judicial review.

[76] The Minister of Health took the position that as no legal consequences flowed from the letter it could not be viewed as a "decision or order" under s 18.1(2) of the *Federal Courts Act*. Further, that the activity involving the provision of a non-binding opinion as to how a provision of a statue is perceived to apply was not a decision that was open to review. It was argued that neither the Minister nor the Manager had any direct enforcement power as they could not levy a sanction, revoke a licence or otherwise directly affect the applicant for what they may perceive to be a violation of s 29. While they could lay an information, it was then up to a court to determine the issue.

[77] Justice Nadon did not agree, and was of the view that judicial review under s 18.1 was intended to be broad in scope and readily available to applicants. Referencing *Gestion* at pages 700-705 and *Morneault* at paras 40-43, Justice Nadon concluded that,

> [18] Mr. Justice Stone's remarks in *Morneault*, *supra*, like those of Décary J.A. in *Gestion Complexe*, *supra*, are to the effect that judicial review under section 18 of the Act must be given a broad and liberal interpretation, as a result of which a wide range of administrative actions will fall within the Court's judicial review mandate. It is also clear that judicial review is no longer restricted to decisions or orders that a decision maker was expressly charged to make under the enabling legislation. Rather, judicial review will extend to decisions or orders that determine a party's rights, even if the decision at issue is not the ultimate decision. It also follows from the Court of Appeal's decision in *Morneault*, *supra*, that the word "matter" found in section 18.1 of the Act is not restricted to "decisions or orders", but encompasses any matter in regard to which a remedy might be available under section 18 or subsection 18.1(3).

[78] Justice Nadon also referenced *Markevich* (at paras 9-13) which concerned a letter written by a Revenue Canada officer, on behalf of the Minister of Revenue, advising the applicant therein that Revenue Canada had decided to try to recover unpaid taxes and to take measures to recover the previously written off debt. The Court found, notwithstanding the fact that the letter contained, “no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect the rights or interests of individuals”, that the letter still constituted an act capable of judicial review by this Court. Two of the paragraphs of *Markevich*, which were quoted by Justice Nadon in *Larny* are as follows:

> [12] However, in order to qualify as an "act or proceeding" that is subject to judicial review, the administrative action impugned must be an "act or proceeding" of a "federal board, commission or other tribunal", that is a body or person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] of the *Federal Court Act*). While the letter written on the

> Minister's behalf to the applicant that is the subject-matter of this application for judicial review was not an act or proceeding by a federal body in the exercise of any statutory power, the Minister, of course, is a person having statutory powers under the *Income Tax Act*.
>
> [13] Even though not taken in the exercise of a statutory power, administrative action by a person having statutory powers may be reviewable as an "act or proceeding" under paragraph 18.1(3)(*b*) if it affects the rights or interests of individuals. The letter in question here contained no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect any right or interest of the applicant. However, it is a reasonable inference from both the letter, and the applicant's communications with Ms. Kara, the writer of the letter, that it signified that Revenue Canada had made a decision to try to collect the unpaid tax and intended to take measures to attempt to recover the previously "written off" tax debt. And, as is apparent from the requirements to pay that was subsequently issued, this was indeed the case.[
>
> [emphasis in original]

[79] Justice Nadon did not agree with the Minister that the letter in *Larny* was properly characterized as an opinion or warning letter not issued pursuant to any specific legislative authority, but rather as a courtesy to inform the applicant of the Minister's position as to the effect of section 29 of the *Tobacco Act*, nor that no legal consequence flowed to the applicant. Justice Nadon also disagreed that the letter was a non-binding opinion with respect to the interpretation of s 29. Rather:

> [24] The direction sent by the respondents is, in my view, coercive, in that the purpose thereof is to threaten the applicant to immediately stop selling the multi-packs, failing which a charge would be laid and criminal prosecution might be commenced. I have no doubt that what the respondents hoped for was what in fact happened, i.e. that the applicant would stop selling multi-packs so as to avoid criminal prosecution. As I have already indicated, the applicant's decision to stop selling multi-packs has resulted in financial loss.

[80] Justice Nadon found that the letter was therefore a “decision, order, act or proceeding” and was reviewable by the Court.

[81] In my view, this is a very similar circumstance to the one before me. The intent of the June 20, 2019 email was to compel Global Marine to take action, which in Transport Canada’s view, was required to bring the “Cable Innovator” into compliance with the *Coasting Trade Act*. Transport Canada had made a decision that there was non-compliance. It also had the statutory authority to take enforcement action, which it had previously indicated would follow if a C48 coasting trade licence was not obtained. The email directly and prejudicially affected Global Marine’s rights and interests as Global Marine’s only options were to disrupt its operations and remove the “Cable Innovator” from Canadian waters, which it did, or face potential prosecution in order to challenge Transport Canada interpretation and application of s 2(1)(f) of the *Coasting Trade Act*.

[82] In that regard, *Larny* is also significant because the Minister in that case also took the view that the applicant could only obtain a judicial declaration regarding the meaning of s 29 of the *Tobacco Act* from the court having jurisdiction in regard to a summary conviction process. However, since no charge had been laid, that process had not then been commenced. In that regard, Justice Nadon stated:

> [30] If the applicant followed the respondents' logic, it would have put itself to the risk and expense of criminal prosecution in order to obtain a declaration concerning the meaning of section 29 of the TA, and more particularly, whether the sale of multi-packs constitutes a "cash rebate" under the section. In other words, the applicant would have to engage in conduct that allegedly breached the statute, wait for a charge, suffer the prejudice that would result from the charge, and then expend substantial sums of money in

> defending the charge. That, surely, cannot be the solution to the applicant's difficulties. As Farwell L.J. stated at pages 420-421 in *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.)…
>
> ….
>
> [33] The case before me is surely not a case where the dispute between the parties is merely speculative. There is, in my view, a real and live dispute between the parties with respect to the interpretation of section 29 of the TA. The applicant is certainly justified, on the facts of the case, to seek a remedy from this Court without having to submit itself to a criminal prosecution.
>
> [34] The upshot of the matter is that the respondents were at liberty to lay a charge against the applicant and, hence, seek an interpretation of section 29 of the TA from the court of summary conviction. However, the respondents did not charge the applicant, but proceeded to send coercive letters in the hope that compliance would result, without the necessity of having to lay a charge. In these circumstances, I am satisfied that this Court is a proper forum. I am also satisfied that this application for judicial review is not premature.

(Also see *Falls Management Co v Canada (Minister of Health)*, 2005 FC 924 at paras 18-19; *BPCL Holdings Inc v Alberta*, 2006 ABQB 757 at para 9).

[83] Here, Global Marine is in a similar situation. Ms. Gelinas, a designated enforcement officer, clearly stated in her July 13, 2017 email that if a C48 licence was not acquired that Transport Canada would take action to detain the "Cable Innovator" until a licence was obtained or the vessel permanently left Canadian waters. Other correspondence also clearly indicated the risk of prosecution. Thus, the dispute as to the interpretation of s 2(1)(f) of the *Coasting Trade Act* and its application to the standby activities of the "Cable Innovator" is a live dispute and Transport Canada indicated that if Global Marine failed to comply or to leave Canada, which it did, the vessel would or could be prosecuted. Therefore, Global Marine's interests were directly affected by Transport Canada's administrative action.

[84] To be clear, Transport Canada by its June 20, 2019 email, and prior communications, sought to compel Global Marine and the "Cable Innovator" to comply with Transport Canada's interpretation of s 2(1)(f) of the *Coasting Trade Act*. That compliance action was successful as the "Cable Innovator" left Canadian waters, and by doing so, the vessel was no longer in non-compliance. However, in the result, other than by way of this application for judicial review, Global Marine has no way of challenging Transport Canada's interpretation – other than by having the "Cable Innovator" return to Canadian waters and resume standby activities without a coasting trade licence for that activity, thereby subjecting itself to prosecution.

[85] In these circumstances, I am persuaded that the June 20, 2019 letter was an administrative action that had a direct negative effect on Global Marine's rights and interests, and as such, is reviewable as a "decision, order, act or proceeding" by this Court.

[86] Nor do I agree with the Minister's submission that if the June 20, 2019 email is a reviewable decision then so too were Transport Canada's prior communications, and on that basis, that Global Marine is now out of time to seek judicial review of the prior decisions. As discussed above, the June 20, 2019 decision reflected an assessment by Transport Canada taking into consideration the invited submissions made by Global Marine. It was a new and final decision.

ISSUE: Was Transport Canada's interpretation of s 2(1)(f) of the *Coasting Trade Act* reasonable?

i. Interpretation of s 2(1)(f)

Global Marine's position

[87] Global Marine submits that Transport Canada's interpretation of s 2(1)(f) of the *Coasting Trade Act* is untenable when viewed in the context of the modern rules of statutory construction. This is because Transport Canada's interpretation is inconsistent with the ordinary meaning of "marine activity of a commercial nature", it is irreconcilable with the context and scheme of the *Coasting Trade Act* and with its purpose, and because Transport Canada's interpretation would produce absurd results. Global Marine is also of the view that the decision is inconsistent with Transport Canada's past practice.

[88] As to the ordinary meaning of "marine activity of a commercial nature", Global Marine argues that the essential issue is whether the "Cable Innovator" is undertaking a marine activity while on standby. It concedes that the standby activities of the "Cable Innovator" are commercial, but submits that "marine" qualifies "activity" and that the ordinary meaning of activity is "a condition in which things are happening or being done" or "an action taken in pursuit of an objective". As such, the "Cable Innovator" on standby in Victoria Harbour is engaged in a static activity, which is not, in and of itself, directed towards accomplishing a purpose.

[89] Global Marine also submits in order to determine if there exists any valid reason to depart from the ordinary meaning of s 2(1)(f), the Court must consider the entire context and scheme of the *Coasting Trade Act*. Transport Canada's interpretation is inconsistent with the other activities listed under ss 2(1)(a)-(e) of the *Coasting Trade Act* and is therefore contrary to the

limited class rule (*ejusdem generis*) of statutory interpretation. According to Global Marine, the specific types of activities listed in ss 2(1)(a)-(e) all belong to a class of operational marine activities, marked by defined beginning and end, undertaken to complete a specific task, which corresponds with Global Marine's ordinary meaning interpretation. Global Marine similarly argues that the exceptions to s 3(1) in the *Coasting Trade Act* confirm that coasting trade is only meant to refer to operational marine activities.

[90] Global Marine also submits that Transport Canada's interpretation of s 2(1)(f) is contrary to the purpose of the *Coasting Trade Act*, which is largely protectionist, reserving certain marine activities of a commercial nature for Canadian ships. Referencing HJ Darling's *Report of Inquiry on the Coasting Trade of Canada and Related Marine Activity* (Ottawa: Canadian Transport Commission, 1970) ("Darling Report"), Global Marine submits that this report specifically contemplated that the definition of 'other marine activities' should not be all-inclusive. Global Marine submits that Transport Canada's interpretation dissociates the meaning of "marine activity of a commercial nature" from the purpose of the Act because, when no work is being done within Canadian waters or above the continental shelf of Canada, no activity falls within the Act's purpose. The purpose of the *Coasting Trade Act* is only to protect work in Canadian waters. The "Cable Innovator" did not undertake any such work and the scope of coasting trade cannot be extended beyond the purpose of the Act.

[91] Finally, Global Marine submits that Transport Canada's interpretation would produce absurd results because, if sitting idly was a marine activity of a commercial nature, then this would necessitate the acquisition of a C48 license even for ships performing activities that were

otherwise exempt from the licencing requirements whenever they sat idly on standby waiting for those exempt activities to resume. Or, it would result in a foreign flag ship trading internationally needing to obtain a C48 licence if it was delayed while in Canada. Further, if being on standby is in and of itself a marine activity, a Canadian ship would always be available and suitable to perform that activity — even if they could not perform related contractual obligations. This would cause significant problems in obtaining C47 temporary admissions and C48 licences for foreign ships like the "Cable Innovator".

Transport Canada's position

[92] Transport Canada also addresses the textual, contextual, and purposive interpretation of the *Coasting Trade Act*. It submits that Global Marine's approach to textual interpretation is dissective and fails to treat the phrase "marine activity" as a phrase, clause or as a provision as a whole. Transport Canada submits that the meaning of activity in the *Coasting Trade Act* does not require movement from one place to another. Further, while the standby activity of the "Cable Innovator" is stationary, it does involve activity as it is crewed, fueled and in a position to respond on short notice. Its state of operational readiness is at odds with Global Marine's assertion that the vessel is idle, which is defined as, "not occupied or employed". And, by its very nature, the standby activity of the "Cable Innovator" is a marine activity. Further, this Court has, in *obiter*, previously given support to the meaning of "marine activity of a commercial nature" that includes stationary activities (*Berhad v Canada*, 2004 FC 501 at para 84 ("*Berhad*")).

[93] Nor does the *Coasting Trade Act* require that a marine activity of a commercial nature have a defined beginning and end, and in any event, in this circumstance the beginning and end of the standby activity is the term of the NAZ Agreement. While Global Marine seeks to limit the meaning of s 2(1)(f) on the basis of ss 2(1)(a)-(e), the Act states that coasting trade includes "any other marine activity of a commercial nature". The use of the word "any" without restriction broadens the scope of what may be considered a "marine activity". Transport Canada submits that by virtue of the state of operational readiness of the "Cable Innovator", which is inextricably linked to its contractual marine cable repair operations, the vessel is engaging in a marine activity of a commercial nature. While that activity is static, it is not passive, and it is clearly directed towards a purpose – the accomplishment of the vessel's cable maintenance and repair operations.

[94] Transport Canada submits that a contextual and purposive analysis of the *Coasting Trade Act* includes the legislative history of the *Coasting Trade Act*, which demonstrates that the definition of "coasting trade" was purposefully expanded. Further, that the overarching policy objective of the Act is to encourage commercial marine activity within Canadian waters by Canadian ships. Only where the CTA has determined that there is no Canadian ship suitable and available to provide the service or perform the activity described in a C47 application will a foreign ship be eligible to obtain a coasting trade licence. Transport Canada disputes that there is a distinction between activity and service described in the C47 application made by Global Marine in 2016, and submits that this is unsustainable when reference is had to the Act's purpose and the requirement, set out is s 4(1)(a) and s 5(1)(a), that no Canadian ship is suitable and available to provide the service or perform the activity described in the application. A

purposeful analysis supports a definition of "any other marine activity of a commercial nature" as including a service integral to an activity.

[95] Finally, Transport Canada submits that the "Cable Innovator" has largely been on standby in Victoria Harbour since 2016. This is its default position, except when undertaking cable repairs, and it is a core aspect of its contractual obligations. This long-term operational circumstance distinguishes its operations from the circumstance of a foreign flag internationally trading vessel that may be delayed in port for only a short time. Further, the standby activities of the "Cable Innovator" are inextricably linked to, and facilitate, its cable repair work and therefore constitute a marine activity of a commercial nature. On this basis, no absurdity arises from Transport Canada's interpretation of s 2(1)(f).

Analysis

[96] The Supreme Court has stated, on multiple occasions, how statutory interpretation is to be approached:

> [33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21)…

(*Canada (Canadian Human Rights Commission) v Canada (Attorney General*), 2011 SCC 53 at para 33; also see *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para 21; *Canada (Attorney General) v Thouin*, 2017 SCC 46 at para 26; *Canadian Broadcasting Corp v SODRAC* 2003 Inc, 2015 SCC 57 at para 48; *Vavilov* at para 117).

[97] The Supreme Court of Canada in *Canada Post Corp v Canadian Union of Postal Workers,* 2019 SCC 67 addressed how a reviewing court is to assess the reasonableness of an administrative decision based on statutory interpretation:

> [40] The administrative decision maker "holds the interpretative upper hand" (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 40). When reviewing a question of statutory interpretation, a reviewing court should not conduct a de novo interpretation, nor attempt to determine a range of reasonable interpretations against which to compare the interpretation of the decision maker. "[A]s reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 28, quoted in Vavilov, at para. 83). The reviewing court does not "ask itself what the correct decision would have been" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 50, quoted in *Vavilov*, at para. 116). These reminders are particularly important given how "easy [it is] for a reviewing court to slide from the reasonableness standard into the arena of correctness when dealing with an interpretative issue that raises a pure question of law" (*New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53, 390 N.B.R. (2d) 203, at para. 30).
>
> …
>
> [42] Where the meaning of a statutory provision is in dispute, the administrative decision maker must demonstrate in their reasons that they were alive to the "essential elements" of statutory interpretation: "the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision" (*Vavilov*, at para. 120). Because those who draft statutes expect that the statute's meaning will be discerned by looking to the text, context and purpose, a reasonable interpretation must have regard to these elements — whether it is the court or an administrative decision maker tasked with the interpretative exercise (*Vavilov*, at para. 118). In addition to being harmonious with the text, context and purpose, a reasonable interpretation should conform to any interpretative constraints in the governing statutory scheme, as well as interpretative rules arising from other sources of law. In this case, the Appeals Officer's interpretation was constrained by interpretative rules within the Code, the *Interpretation Act*, R.S.C. 1985, c. I-21, and common law rules of statutory interpretation.

(Also see *Vavilov* at paras 115-124)

[98] The issue in this matter is whether the standby service of the "Cable Innovator" falls within the definition of "coasting trade" under s 2(1)(f) of the Act:

> (f) the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters and, with respect to waters above the continental shelf of Canada, in such other marine activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada; (*cabotage*)

[99] Here, Global Marine concedes that the standby service of the "Cable Innovator" is commercial in nature, given that an annual fee is paid under the NAZ Contract whether or not the vessel is mobilized to provide repair or maintenance services. Thus, more specifically, the question is whether Transport Canada reasonably found that the standby services fall within the scope of the phrase "in any other marine activity".

[100] By way of factual background, it is of note that when making the C47 application, Global Marine in its accompanying letter stated that it was applying to allow 24/7 standby in Canada to be able to quickly mobilize to conduct repairs. Further, that the "Cable Innovator" was to be "based on permanent standby in Victoria", being a favourable position from where the vessel is able to attend cables in Canada and the United States. Additionally, the cable owners have a maintenance contract in place to ensure the provision of specialized maintenance and repair services of a specialist dedicated vessel and all dedicated support functions of the contractor, such as,

> (Rapid access to spare cable from the depot in Victoria, necessary kits and parts, and skilled and experienced personnel), on an emergency 24 hour notice basis (this is the required time frame), ie the vessel is solely dedicated to this service and is ready, manned and equipped to sail for repair operations within 24 hours of notification from the cable owner.

[101] The description of the service/activity applied for was:

- Service: Keeping the vessel on permanent standby to attend very short notice emergency cable repairs as specified by the cable owners maintenance contracts (ie on passage to repair site within 24 hours)
- Activity: Locating the cable and fault position, cable retrieval, repair (fault removal, new cable/plant insertion, splicing fibre optics, jointing, re-protection, re-armouring), cable testing, re-lay, inspection and burial (where applicable) of Canadian submarine telecommunications systems.

[102] The CBSA C47 Temporary Admission stated that the CTA had determined, pursuant to s 8(1) of the *Coasting Trade Act*, that there was no suitable Canadian ship available "to provide the service or perform the activity described in your application".

[103] Global Marine submits that the ordinary meaning of "marine activity of a commercial nature" does not include sitting idle on standby and that Transport Canada's interpretation, which concluded otherwise, was unreasonable. It reaches this view on the basis that "marine" qualifies an "activity", the latter being defined by the *Concise Oxford English Dictionary*, 12th ed, as "a condition in which things are happening or being done" or, alternatively, as "as action taken in pursuit of an objective". Similarly, that the word "action" relates to "the process of doing something to achieve an aim". Global Marine argues that the ordinary meaning of "marine activity" does not include a being on standby, which is a "static activity", not in and of itself directed at accomplishing a purpose.

[104] I agree with Transport Canada's submission that Global Marine approaches its analysis of the phrase on a dissective basis.

[105] In applying the ordinary meaning rule, interpretation starts with ordinary meaning – reading the words in their grammatical and ordinary sense. But, "[i]nterpreters are obliged to consider the total context of the words to be interpreted in every case, no matter how plain those words seem upon initial reading" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at §3.7). The grammatical and ordinary sense of words in a statutory provision is not determinative, rather, the section must be read in its entire context and that: "This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue" (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 34).

[106] Further, in view of the description of the services/activity described in the C47 application and the vessel's obligation under the NAZ Contract to provide dedicated 24/7 service, it is clear that the standby services are, as Transport Canada suggests, inextricably linked to the vessel's repair services. The vessel must be prepared to respond at all times. To do so, it must assume a standby posture. While Global Marine suggests that this is a "static" activity, which is not in and of itself directed towards accomplishing a purpose, it remains an activity. It is static only in the sense that the ship is alongside and not undertaking repairs. It is an active state of readiness. Moreover, the standby posture is an action taken in pursuit of an objective — that objective is to permit the vessel to respond within 24 hours to any notification of the need for a

cable repair and thereby meet its contractual obligations. Indeed, the NAZ Contract provides for both an operational daily rate for repairs and an annual fee. Repair work and dedicated readiness are not separately contracted for. It was not unreasonable, in these circumstances, for Transport Canada to find that the ordinary meaning of "marine activity of a commercial nature" included the standby service of the "Cable Innovator".

[107] Global Marine also asserts that ss 2(1)(a)-(e) reflect its interpretation that the context and scheme of the Act do not support a finding that being on standby falls within s 2(1)(f). This is based on the view that that those subsections pertain to the carriage of goods from one place in Canada or above the continental shelf of Canada to another such place (s 2(1)(a)), or the carriage of passengers between two places in Canada or from a place in Canada or above the continental shelf of Canada to another such place in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada (ss 2 (1)(b)-(e)). Those specific types or activities all belong to a class of operational marine activities marked by a defined beginning and end, undertaking to complete a specific task. Thus, Global Marine submits that when sitting idle on standby at Victoria Harbour, the "Cable Innovator" is not engaged in an activity falling within the same class as those defined as coasting trade activities.

[108] The limited class rule may, in theory, support Global Marine's position that the scope of the term "any other marine activity of a commercial nature" in s 2(1)(f) is limited so as to be consistent with some feature of the other enumerated activities in ss 2(1)(a)-(e) as the "the scope of the general term may be limited to any genus or class to which the specific items all belong" (*Walker v Ritchie*, 2006 SCC 45 at para 25). Global Marine identities the feature common

among the list as “operational marine activities, marked by a defined beginning and end, undertaken to complete a specific task”.

[109] But, viewed in the context of the purpose of the *Coasting Trade Act*, the carriage of goods and passengers as delineated in ss 2(1)(a)-(e) is primarily concerned with the conduct of those marine activities within specified geographic constraints. That is, coasting trade is defined to include those marine activities as they are carried out within Canada, or on or over its continental shelf. This is in keeping with the protectionist purpose of that legislation, being to preserve such activities that occur in Canadian waters to Canadian flag ships. Seen in that context, s 2(1)(f) does not differ, as it defines coasting trade as the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters, and with respect to waters above the continental shelf of Canada, in such other marine activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf. Foreign flag vessels cannot pursue those activities in Canadian waters unless granted a C48 license.

[110] While I do not agree with Global Marine that the common feature of the carriage of goods and passenger provisions of ss 2(1)(a)-(e) is “operational marine activities, marked by a defined beginning and end, undertaken to complete a specific task”, even if that was accepted, I agree with Transport Canada that the standby service and the repair activities of the “Cable Innovator” are intrinsically linked. Global Marine cannot supply one without the other. And, viewed in in this context, the defined beginning and end of the standby and repair duties of the “Cable Innovator” are prescribed by the NAZ Contract which necessitates the vessel’s dedicated

availability and 24-hour emergency repair response time throughout its term and by the period of time for which Global Marine sought permission for the temporary admission to the coasting trade of Canada. The C47 application indicates this period was 12 months, from November 1, 2016 to October 31, 2017.

[111] It is true that standby activities are different from any other form of coasting trade explicitly described in ss 2(1)(a)-(e), being forms of trade that involve movement of people or goods from one place to another. Standby is not movement of goods or passengers. However, I am not persuaded that a vessel must be in transit in order to be engaging in a marine activity. Ships carrying passengers and goods within Canada as described in ss 2(1)(a)-(e) also spend time in port to embark and disembark passengers and load and unload cargo. They are still engaged in coasting trade when they do so. Further, in *Berhad*, Justice Campbell, in *obiter*, accepted counsel's submission concerning the *Coasting Trade Act* (at para 84):

> So coasting is not only moving cargo and moving people back and forth, but it's also coming in a stationary sense and doing work, commercial work, commercial exercises in a stationary sense in Canadian waters. So that rig that comes in, it's a foreign flag vessel, a foreign flag rig, it can't just come in to Canadian waters and start drilling. It can't do it. You have to get an exemption under the Coasting Trade Act, duty pay your vessel and come in and do it.
>
> Similarly I would submit the floating hotel. No different. A foreign flag passenger ship operator could not bring a ship into Vancouver harbour, position it in the harbour and say, "We're just a floating hotel." If they do that, they are coasting.

[112] It is difficult to see how the standby services of the "Cable Innovator" differ. It is true that the vessel is not moving and that it is not conducting cable repairs while in port in Victoria Harbour. But, it is also not mothballed with a skeleton crew. It is a seagoing vessel that is fully

manned and maintained in a 24/7 state of preparedness. It must maintain that status in order support its cable repair work obligations and it is being paid to do so while in Victoria Harbour. In my view, as such, it was not unreasonable for Transport Canada to interpret this standby work as a marine activity falling within s 2(1)(f) of the *Coasting Trade Act*.

[113] More significantly, a contextual and purposeful analysis of the phrase "marine activity of a commercial nature" includes an examination of the purpose of the Act and the legislative history of that provision.

[114] It is undisputed that the purpose of the Act is protectionist. Section 3(1) prohibits foreign or non-duty paid vessels from engaging in the coasting trade, subject to the exceptions set out in s 3(2), unless granted a licence pursuant to ss 4 or 5.

[115] As to the legislative history of the *Coasting Trade Act*, both parties reference the Hansard debates with respect to Bill C-52 which died on the order table but which was a predecessor bill to Bill C-33, which received Royal Assent on June 23, 1992. The debate concerning Bill C-52 included this extract quoted by both parties:

> "Coasting Trade" is defined in the Canada Shipping Act as including the carriage by water of good or passengers from one port or place in Canada to another port or place in Canada. This Bill will expand this definition to include all commercial activities in the territorial sea to the edge of the continental shelf or 200 miles, which ever is the greater. I gather that there was some uncertainty in the existing statute as to whether dredging and the laying of cables could be said to be moving from one place to place within Canada. This Bill has a more clear definition bringing these matters within the scope of the law.

(Bill C-52, "Coasting Trade and Commercial Marine Activities Act", *House of Commons Debates*, 33-2, Vol 7 (16 September 1987) at 9002 [emphasis added].)

[116] While Global Marine asserts that this extract illustrates that the intent of the legislators was not to expand "coasting trade" to include an entirely new class of activities, but only to resolve ambiguity, that interpretation is not reflected by the above text, which explicitly references expansion of the definition. Nor is Global Marine's interpretation reflected in the subsequent adoption of s 2(1)(f).

[117] Moreover, the subsequent House of Commons Debate on Bill C-33 includes,

> To summarize, the proposed Coasting Trade Act will extend the jurisdiction of the current coasting trade laws to include: (1) all commercial activities within 12 miles with the exceptions noted and (2) all commercial marine activities related to resource exploration of exploitation out to 200 miles or the outer edge of the Continental Shelf, whichever is the greater, again with the exceptions noted.
>
> This act protects operators of Canadian flagships wishing to work within Canadian waters and on the Continentals Shelf.
>
> [*Translation*]
>
> At the same time it allows international cruise ships to operate without meeting the requirements of the Coasting Trade Act…

(Bill C-33, "Coasting Trade Act", *House of Commons Debates*, 34-3, Vol 3 (9 October 1991) at 3524 [emphasis added].)

[118] As to the Darling Report, one of its recommendations was that the term "other marine activities" should be defined to include dredging, salvage, towing and all vessel activities in connection with oil and gas production. This would encompass seismographic, standby, supply and other types of vessels used in those activities, but exclude drilling rigs or platforms unless self-propelled, and vessels engaged in scientific work of a government or non-commercial nature (Darling Report at 209). That recommendation was not followed as there is no definition of "other marine activities" contained in the current form of the *Coasting Trade Act* and which is

framed so as to define those ships to which the Act does not apply (s 3(2)). Moreover, the basis for the recommendation was that coasting trade should be confined to the actual carriage of goods and passengers *as well as* the defined "other marine activities" which were not so restricted. In the result, in my view, the Darling Report adds little that is of assistance to the interpretation of the current Act.

[119] Finally, I disagree with Global Marine's submission that Transport Canada's interpretation would lead to absurd results. Section 3(2) of the *Coasting Trade Act* sets out the statutory exemptions to the coasting trade licencing requirements. Global Marine submits that Transport Canada's interpretation would require foreign vessels engaged in an exempt activity (such as fishing, research activity, seismic activity or salvage operations) to obtain a coasting trade licence if they ceased those activities and sat idle on standby waiting to resume them. However, ships that fall within the statutory exemptions are just that, statutorily exempt. It matters not whether, for example, seismic activities are underway or if the vessel is in port to resupply or to await suitable weather conditions before resuming that activity. It was and remains exempt.

[120] In sum, Transport Canada's finding that the standby activity of the "Cable Innovator" constituted "marine activity of a commercial nature" flowed logically from Global Marine's description of the vessel's service and activity in its C47 application. It is consistent with the ordinary meaning of the words, a contextual reading of the phrase within the *Coasting Trade Act*, and with the legislative history of the *Coasting Trade Act*.

ii. Was Transport Canada's decision otherwise reasonable?

[121] In addition to its statutory interpretation argument, Global Marine submits that Transport Canada's decision was unreasonable on two other grounds.

[122] First, that Transport Canada erred by misconstruing Global Marine's application for the C47 Temporary Admission and relying on this unfounded understanding of the C47 Temporary Admission application to justify its decision. Global Marine submits that Transport Canada failed to recognize the distinction between the coasting trade activity described in the C47 application (cable repair and maintenance) and the broader services required to complete the activity (keeping the vessel on standby), which distinction was made in the application and is made in the Act.

[123] Second, Global Marine submits that that there was no factual basis for Transport Canada to reasonably require Global Marine to obtain a C48 licence. Global Marine submits Transport Canada's reasoning appears to have rested to a significant degree on the fact that Global Marine was receiving commercial compensation while the vessel was on standby. But, s 2(1)(f) requires both a marine activity and that it must be of a commercial nature. The "Cable Innovator" did not engage in maintenance or repair work in Canadian waters — the coasting trade activity for which a C47 Temporary Admission was sought. Therefore, there was no marine activity and no factual basis for the Minister to require that a C48 licence be obtained.

Analysis

[124] Section 8(1) of the *Coasting Trade Act* states that, in relation to an application for a coasting trade licence, the CTA shall make the determinations referred to in ss 4(1)(a) and (b) and ss 5(a) and (b).

[125] Section 4 of the *Coasting Trade Act*, states:

> 4(1) Subject to section 7, on application therefor by a person resident in Canada acting on behalf of a foreign ship, the Minister of Public Safety and Emergency Preparedness shall issue a licence in respect of the foreign ship, where the Minister is satisfied that
>
> > (a) the Agency has determined that no Canadian ship or non-duty paid ship is suitable and available to provide the service or perform the activity described in the application;
> >
> > (b) where the activity described in the application entails the carriage of passengers by ship, the Agency has determined that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships;
> >
> > (c) arrangements have been made for the payment of the duties and taxes under the Customs Tariff and the Excise Tax Act applicable to the foreign ship in relation to its temporary use in Canada;
> >
> > (d) all certificates and documents relating to the foreign ship issued pursuant to shipping conventions to which Canada is a party are valid and in force; and
> >
> > (e) the foreign ship meets all safety and pollution prevention requirements imposed by any law of Canada applicable to that foreign ship.
>
> 5 Subject to section 7, on application therefor by a person resident in Canada acting on behalf of a non-duty paid ship, the Minister of Public Safety and Emergency Preparedness shall issue a licence in respect of the non-duty paid ship, where the Minister is satisfied that
>
> > (a) the Agency has determined that no Canadian ship is suitable and available to provide the service or perform the activity described in the application;

> (b) where the activity described in the application entails the carriage of passengers by ship, the Agency has determined that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships; and….
>
> [emphasis added]

[126] Sections 8(1), 4(1)(a) and 5(a) makes it clear that the role of the CTA is to determine whether a Canadian ship or non-duty paid ship is suitable and available to *provide the service or perform the activity* described in the application. And, as set out above, in its letter accompanying the C47 application, Global Marine provided a description of the service/activity applied for. The service being the standby, and the activity being the cable repair.

[127] Global Marine points to two communications from Transport Canada in support of its view that Transport Canada misunderstood the distinction between service and activity as described in the C47 application. The first of these was the May 11, 2017 email from Ms. Gelinas, which states:

> The coasting trade application you submitted to the Canadian Transportation Agency for the CABLE INNOVATOR states that the activity you will be providing under license is for stand-by (as-required) services for emergency cable repair on the West Coast of Canada…
>
> …
>
> As the vessel is currently operating on stand-by (the activity for which you applied for), during the timeframe outlined in all of the attached documents, I kindly ask you again to obtain the coasting trade license for the CABLE INNOVATOR.
>
> [emphasis in original]

[128] The second is the November 9, 2018 email from Mr. Bertin which states:

> …I should reconfirm that the activity of "keeping the vessel on permanent standby to attend very short notice cable repairs as specified by the cable owners contracts" – which was noted in your most recent coasting trade application submitted to the Canadian Transportation Agency on September 21, 2016 – meets the definition of coasting trade found under section 2((1)(f) of the Coasting Trade Act. Therefore, when the Cable Innovator is in Canadian waters on standby, a coasting trade licence is required.

[129] However, these communications must be viewed in the context of Global Marine's very clear explanation in its September 27, 2016 letter to the CTA, accompanying its C47 application, wherein it described the service/activity applied for in terms of both standby service and cable repair activity. Further, that Transport Canada's communications to Global Marine were concerned only with its view that the "Cable Innovator" required a C48 licence in connection with standby activities — and not just at the time that it might undertake cable repairs in Canadians waters. Viewed in whole, Transport Canada's communications clearly recognize the distinction between the applied for standby services and the repair activities. I am not persuaded Transport Canada erred by misconstruing Global Marine's application for a C47 Temporary Admission. Further, as discussed above, the standby service and the repair activity are intrinsically linked by the terms of the NAZ Contract.

[130] Finally, for the reasons set out above, I also see no merit in Global Marine's submission that Transport Canada's reasoning rested too heavily on the fact that the "Cable Innovator" was receiving commercial compensation while on standby and failed to recognize that the vessel must also be providing a marine activity for that purpose. Moreover, in its decision, Transport Canada clearly stated that its assessment was that the standby activities in support of cable repair

by the "Cable Innovator" in Canadian waters "are considered to be commercial marine activities under the Coasting Trade Act" meeting the definition of coasting trade found in s 2(1)(f) of the Act. Transport Canada clearly considered that the standby services of the "Cable Innovator" were both commercial and marine activities. Further, any suggestion that a ship engaged in a 24/7 standby operation is not engaged in a "marine" activity defies common sense. In my view, Global Marine's arguments on this point are, in essence, a repetition of its statutory interpretation submissions.

Conclusion

[131] As stated in *Vavilov*:

> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[132] Having reviewed the decision and the record in whole I am satisfied that Transport Canada's interpretation of s 2(1)(f) of the *Coasting Trade Act* as including the standby activities of the "Cable Innovator" within the definition of coasting trade, and thereby necessitating a C48 coasting trade licence, was consistent with this requirement.

[133] Transport Canada is owed deference in its interpretation. Further, its reasons are justified in relation to the relevant factual and legal constraints that bear upon it, and it is transparent and intelligible. The decision is reasonable.

Costs

[134] While both parties requested costs in the event of an outcome in their favour, I am of the view that there was mixed success. The Minister's argument that Transport Canada's email of June 2019 could not be the subject of judicial review did not succeed. Nor did Global Marine's submission that Transport Canada's interpretation of s 2(1)(f) of the *Coasting Trade Act* was unreasonable. In these circumstances, I am exercising my discretion under Rule 400 of the *Federal Courts Rules* and decline to award costs to either party.

JUDGMENT IN T-1188-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1188-19
STYLE OF CAUSE:	GLOBAL MARINE SYSTEMS LTD. v MINISTER OF TRANSPORT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 3, 2020
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MARCH 25, 2020

APPEARANCES:

Richard A. Wagner Jean-Simon Schoenholz	FOR THE APPLICANT
Helen Gray Yusuf Khan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT