Date: 20020808

Docket: T-1032-00

Neutral citation: 2002 FCT 846

Ottawa, Ontario, August 8, 2002

BEFORE: PELLETIER J.

BETWEEN:

PILOTES DU SAINT-LAURENT CENTRAL INC.

Applicant

and

LAURENTIAN PILOTAGE AUTHORITY

Respondent/APPELLANT

AND BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY

Applicant/APPELLANT

and

PILOTES DU SAINT-LAURENT CENTRAL INC.

Respondent

and

JEAN-YVES DURAND

Third Party

REASONS FOR ORDER AND ORDER

[1] The Laurentian Pilotage Authority ("the Authority") and the Pilotes du Saint-Laurent Central Inc. ("the Corporation") entered into a contract for services under which the Authority would assign two pilots to a ship [TRANSLATION] "when safety of navigation requires it". When three ships of atypical construction were put into service in the St. Lawrence Sector under the Authority's jurisdiction, the Corporation and the Authority entered into discussions to determine whether safety of navigation required that two pilots be assigned to these ships. Ultimately, the Authority decided that the assignment of a second pilot was not necessary, a decision the Corporation challenged. The Corporation invoked the arbitration clause provided in the contract for services and the dispute was submitted to an arbitrator. The arbitrator rejected the Authority's contentions that he was not competent to decide the matter and, after careful review of the evidence before him, ruled that safety of navigation required the presence of a second pilot on board. The Corporation filed a motion to homologate, which was opposed by a motion to quash filed by the Authority. The case came before prothonotary Morneau, who granted the motion to homologate and dismissed the motion to quash. In this motion, the Authority is appealing the prothonotary's decision to a judge of the Court. Although several errors were alleged, the principal point at issue is the effect that should be given by the Court to the agreement reached between the parties.

[2] The Authority is an organization created by the *Pilotage Act*, R.S.C. 1985, c. P-14 ("the Act"), the objects of which are "to establish, operate, maintain and administer in the interests of safety an efficient pilotage service" on the St. Lawrence. The Corporation is a private body corporate which enjoys a monopoly of including and acting exclusively for pilots of ships plying the St. Lawrence River between Québec and Montréal.

[3] The Act sets out the objects and powers of an Authority:

18. The objects of an Authority are to establish, operate, maintain and administer in the interests of safety an efficient pilotage service within the region set out in respect of the Authority in the schedule.	18. Une Administration a pour mission de mettre sur pied, de faire fonctionner, d'entretenir et de gérer, pour la sécurité de la navigation, un service de pilotage efficace dans la région décrite à l'annexe au regard de cette Administration.
20. (1) An Authority may, with the approval of the Governor in Council, make regulations necessary for the attainment of its objects, including, without restricting the generality of the foregoing, regulations:	20. (1) Une Administration peut, avec l'approbation du gouverneur en conseil, prendre les règlements généraux nécessaires à l'exécution de sa mission et, notamment :
...	...
(*k*) prescribing the conditions, in addition to anything provided by subsection 25(1),	*k*) imposer, outre l'exigence prévue au paragraphe 25(1), les circonstances dans

under which a ship shall have a licensed pilot or holder of a pilotage certificate on board;
(*l*) prescribing the minimum number of licensed pilots or holders of pilotage certificates that shall be on board ship at any time; and

...

lesquelles un navire doit avoir à son bord un pilote breveté ou le titulaire d'un certificat de pilotage;
l) fixer le nombre minimal de pilotes brevetés ou de titulaires de certificats de pilotage qui doivent se trouver à bord d'un navire;

...

[4] Needless to say, if there is to be a pilotage service there must be pilots. Section 15 of the Act deals with the employment of pilots by an Authority:

15. (1) Subject to subsection (2), an Authority may employ such officers and employees, including licensed pilots and apprentice pilots, as are necessary for the proper conduct of the work of the Authority.
(2) Where a majority of licensed pilots within the region, or any part thereof, set out in respect of an Authority in the schedule who form or are members or shareholders of a body corporate elect not to become employees of the Authority, the Authority may contract with that body corporate for the services of licensed pilots and the training of apprentice pilots in the region or part thereof where the contract is to be effective, and the Authority shall not employ pilots or apprentice pilots in the region or that part thereof where such a contract is in effect.

15. (1) Sous réserve du paragraphe (2), une Administration peut employer le personnel, notamment les pilotes brevetés et les apprentis-pilotes, qu'elle estime nécessaire à l'exercice de ses activités.
(2) Lorsque la majorité des pilotes brevetés de la région - ou d'une partie de la région - décrite à l'annexe au regard d'une Administration donnée forment une personne morale ou en sont membres ou actionnaires et choisissent de ne pas devenir membres du personnel de l'Administration, celle-ci peut conclure avec la personne morale un contrat de louage de services pour les services de pilotes brevetés et la formation d'apprentis-pilotes dans la région - ou partie de région - visée par le contrat; l'Administration ne peut alors engager de pilotes ou d'apprentis-pilotes dans la région - ou partie de région - en cause.

[5] The pilots in the Central St. Lawrence region formed a body corporate, the Corporation, and as provided in section 15 the Authority and the Corporation concluded a contract for the services of pilots who are members of or shareholders in the Corporation.

[6] In accordance with the power conferred on it by the Act, the Authority, with the consent of the Governor in Council, promulgated the *Laurentian Pilotage Authority Regulations*, C.R.C., c. 1268 (the Regulations), in which the following clause giving rise to the dispute at bar is found:

35. (1) The minimum number of licensed pilots or holders of pilotage certificates that shall be on board a ship at any time is one, except that a minimum of two licensed pilots or holders of pilotage certificates shall be on board	35. (1) Un seul pilote breveté ou titulaire d'un certificat de pilotage est requis en tout temps à bord d'un navire; cependant, deux pilotes brevetés ou titulaires d'un certificat de pilotage sont requis pour tout navire
...	...
(*g*) where, owing to the conditions or nature of the voyage, more than one person is required to perform pilotage duties on the ship.	*g*) qui, vu les conditions ou la nature du voyage, exige la présence de plus d'un pilote pour remplir les fonctions à bord du navire.

[7] The contract for services between the parties refers to the Authority's position that [TRANSLATION] "given the composition of its board of directors and its staff it possesses the necessary expertise to do what is required to ensure safety of navigation". Despite that, in clause 3 of the said Agreement, the Authority recognized the Corporation as [TRANSLATION] "the principal organization which can make recommendations to the AUTHORITY on pilotage matters for the compulsory pilotage zone or give technical and professional advice on the exercise of the profession of pilot and safety of navigation in that district".

[8] The dispute between the parties turns more particularly on clause 7.03 of the said Agreement:

[TRANSLATION]

7.03 A single pilot is assigned to a pilotage function, except in the following cases when two pilots are assigned:

(a) when safety of navigation requires it . . .

[9] This provision became an issue when the Authority and the Corporation could not agree on the minimum number of pilots to be assigned to three ships which were longer than

average, but the dead weight of which was less than that requiring assignment of two pilots under the Regulations. The Corporation made its concerns known to the Authority. The latter conducted its own review, consulted shipowners and suggested to the Corporation that there be a trial period to determine whether the assignment of two pilots to the ships was necessary. The Authority eventually concluded that the assignment of two pilots was not necessary, and indicated this to the Corporation.

[10] Once presented with this conclusion, the Corporation invoked clause 19 of the Agreement, under which any dispute or disagreement between the Authority and the Corporation resulting from the interpretation or the implementation of the Agreement would be referred to a committee for adjudication and, if not settled, would be submitted to arbitration. The applicable clauses read as follows:

19.01 Any dispute or disagreement between the AUTHORITY on the one hand and the CORPORATION or any of its members on the other, or vice versa, resulting from the interpretation or implementation of this contract, shall be referred to a committee for adjudication within 120 days of the incident giving rise to the said dispute or disagreement or of such time as the party referring the dispute or disagreement to arbitration learns of the facts . . . Any reference to the committee shall be by the sending of a written notice from the CORPORATION or any of its members with the CORPORATION's agreement, or a written notice by the AUTHORITY, as the case may be. Such written notice shall be sent to the other party.

19.02 The committee mentioned in clause 19.01 shall consist of two representatives of the CORPORATION and two representatives of the AUTHORITY, one of the four acting as the committee's secretary . . . The committee shall dispose of the dispute or disagreement by a majority decision within 15 days of the date of the first date of hearing or the date of summons, if the committee has not sat. If the committee fails to sit or make a decision within the specified deadlines, clause 19.03 applies.

19.03 Any dispute or disagreement which the committee referred to in the preceding paragraph has not settled within the deadline mentioned in article 19.02 may be referred by either of the parties for a decision to an arbitrator selected at random from a panel of four arbitrators, namely Angers Larouche, Paule Gauthier, Marcel Morin and Jean-Yves Durand.

19.07 Arbitration fees as such shall be divided between the PARTIES, each PARTY paying its own costs. Once selected, the arbitrator shall convene the PARTIES to hear the case and his decision shall be binding and final for all legal purposes.

[11] As settlement was not possible, the dispute went to arbitration as provided in clause 19.03. The Authority strongly disagreed that the minimum number of pilots to be assigned to a ship could be subject to arbitration, arguing that this was a matter of public order which could

not be delegated to an arbitrator. In the Authority's view, either the arbitration clause was bound to exclude this question or it was invalid on account of its inclusion.

[12] For its part, the Corporation considered that it was not out of the ordinary for a dispute on the interpretation or implementation of the agreement to be submitted to arbitration, for the very reason that the parties had so provided in their agreement. The arbitrator's decision did not in any way alter the Regulations created by the Authority in accordance with its statutory powers. The arbitral award did not alter the minimum number of pilots to be assigned under the Regulations. It simply stated that in certain cases safety of navigation required the assignment of an additional pilot.

[13] Besides challenging the arbitrator's jurisdiction, the Authority sought to enter evidence that it was not necessary to assign two pilots to the ships in question in order to ensure safety of navigation. The Corporation presented evidence to the contrary.

[14] The arbitrator carefully examined the question of his jurisdiction and concluded that the point at issue was within the jurisdiction conferred upon him by the agreement between the parties. He then went on to an analysis of the evidence regarding pilotage of the ships in question from the standpoint of the requirements of safe navigation. In the arbitrator's view, the Corporation was right: safety of navigation required the assignment of two pilots to the ships in question.

[15] The Corporation then filed a motion to homologate the arbitral award under the applicable provisions of the *Code of Civil Procedure* (C.C.P.). The Authority objected to this procedure and filed its own motion asking that the arbitral award be quashed. The two motions were heard by prothonotary Morneau, who allowed the motion to homologate and dismissed the motion to quash.

[16] At the very start of his analysis, the prothonotary set out the rules applicable to the point at issue, which he summarized as follows:

-the burden of proof rests with the party objecting to homologation;

-the court hearing the motion to homologate cannot review anything relating to the merits of the dispute;

-the arbitration agreement must be given a broad and liberal interpretation;

-the fact that an arbitral award has an impact on third parties is not a factor that can be used to prevent giving effect to the award.

[17] The prothonotary then considered the Authority's argument that the arbitrator could not claim to exercise the power to set the minimum number of pilots to be assigned to a ship, as this discretion was a matter of public order and is reserved by the Act for the Authority. He quoted and adopted the arbitrator's comments indicating that the assignment of more pilots than the minimum required by the Regulations was not contrary to the Act or public order when safety of navigation required it. In fact, paragraph 35(*g*) of the Regulations leaves open this possibility when it states that only one pilot will be assigned to a ship except in certain cases, specifically where "owing to the conditions or nature of the voyage, more than one person is required to perform pilotage duties on the ship".

[18] The prothonotary concluded that if the Authority "did not want to undertake more than the minimum, it should not have entered into the contract". He could not accept the following arguments by the Authority:

-the Authority was not qualified to delegate its powers or to undertake clauses 7.03(a) and 19 of the contract;

-the contract was invalid;

-the award dealt with a dispute not contemplated by the contract; or that

-the award was contrary to public order.

[19] The Authority appealed the prothonotary's decision, alleging ten grounds of error. Some relied on the provisions of Chapter VII, Book VII of the *Code of Civil Procedure*, in particular articles 946.4 and 946.5. Article 946.4 states that the court hearing a motion to homologate an arbitral award cannot refuse homologation except on proof that one of the conditions listed in the article has been met. The Authority argued that homologation should be denied because it did not have the capacity to conclude the arbitral agreement, insofar as it gave the arbitrator the power to make decisions reserved by the Act for the Authority. In the Authority's submission, its lack of capacity to conclude such an agreement arose from the fact that as it held a delegated discretionary power it could not delegate that power to a third party, the arbitrator, through an arbitral agreement.

[20] The Authority argued that it did not have the capacity to enter into the arbitral agreement for another reason. It maintained that it could only exercise its delegated powers to ensure safety of navigation. As it had already ruled on the requirements of safety of navigation in section 35 of the Regulations, the arbitral award requiring it to assign a higher number of pilots than the minimum required went beyond ensuring safety of navigation. This exceeded its jurisdiction, so that it could not undertake an arbitral agreement which led to such a conclusion.

[21] The Authority argued that it was without capacity to bind itself so as to limit the future exercise of its discretion regarding double pilotage when circumstances appeared to require this. This would impose a limitation on the exercise of its discretion.

[22] The Authority also referred to article 946.5 of the C.C.P., according to which the court could deny homologation of its own motion if it found that the award was contrary to public order. In the Authority's submission, a public corporation is governed by the particular Act creating it, a proposition taken from article 300 of the *Civil Code of Quebec*. Here the legislation creating the Authority required that it exercise its discretion by regulation approved by the Governor in Council, and it has done so with respect to the minimum number of pilots to be assigned to a ship. Consequently, the Authority would be acting against public order by attempting to exercise its administrative powers under the contract instead of exercising them in accordance with the Regulations.

[23] The Authority cited public order as regards the effect of the arbitral award on shipowners, who would be obliged to pay the fees for pilots whose assignment to their ships was not necessary to guarantee safety of navigation. Additionally, the Authority maintained that the arbitral award gave the arbitrator the power of judicial review over the Authority's decisions, a power reserved for the courts. In the Authority's submission, the arbitrator did not have jurisdiction to review a decision made by it in accordance with the power conferred on it by the Act.

[24] The Corporation did not agree that the question before the court was one of incapacity or public order. It maintained that there was nothing unusual in the Authority and the Corporation invoking the arbitral clause in an effort to settle their dispute over an issue arising from their agreement. The dispute in question, namely determining the requirements of safe navigation, did not in any way impinge on the Authority's administrative powers. What is more, the question of the standard of judicial review arose in the context of the provisions of the *Code of Civil Procedure* (C.C.P.) dealing with the homologation of arbitral awards.

[25] It is thus worth reproducing the relevant provisions of the C.C.P. here:

946.2. The court examining a motion for homologation cannot enquire into the merits of the dispute.	946.2. Le tribunal saisi d'une requête en homologation ne peut examiner le fond du différend.
946.4. The court cannot refuse homologation except on proof that	946.4. Le tribunal ne peut refuser l'homologation que s'il est établi :
(1) one of the parties was not qualified to enter into the arbitration agreement;	1) qu'une partie n'avait pas la capacité pour conclure la convention d'arbitrage;
(2) the arbitration agreement is invalid under the law elected by the parties or, failing any	2) que la convention d'arbitrage est invalide en vertu de la loi choisie par les parties ou, à

indication in that regard, under the laws of Québec;

défaut d'indication à cet égard, en vertu de la loi du Québec;

(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

3) que la partie contre laquelle la sentence est invoquée n'a pas été dûment informée de la désignation d'un arbitre ou de la procédure arbitrale, ou qu'il lui a été impossible pour une autre raison de faire valoir ses moyens;

(4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or

4) que la sentence porte sur un différend non visé dans la convention d'arbitrage ou n'entrant pas dans ses prévisions, ou qu'elle contient des décisions qui en dépassent les termes; ou

(5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

5) que le mode de nomination des arbitres ou la procédure arbitrale applicable n'a pas été respecté.

In the case of subparagraph 4 of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

Toutefois, dans le cas prévu au paragraphe 4, seule une disposition de la sentence arbitrale à l'égard de laquelle un vice mentionné à ce paragraphe existe n'est pas homologuée, si cette disposition peut être dissociée des autres dispositions de la sentence.

946.5. The court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order.

946.5. Le tribunal ne peut refuser d'office l'homologation que s'il constate que l'objet du différend ne peut être réglé par arbitrage au Québec ou que la sentence est contraire à l'ordre public.

947. The only possible recourse against an arbitration award is an application for its annulment.

947. La demande d'annulation de la sentence arbitrale est le seul recours possible contre celle-ci.

947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation.

947.1. L'annulation s'obtient par requête au tribunal ou en défense à une requête en homologation.

947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

947.2. Les articles 946.2 à 946.5 s'appliquent, avec les adaptations nécessaires, à la demande d'annulation de la sentence arbitrale.

[26] The first question that arises is the standard of review. The parties raised the question of the standard of review of the arbitrator's decision, but on an appeal from the prothonotary's decision the Court must first consider the standard of review of the latter's decision. This was laid down by the Court of Appeal in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425:

[para. 64] I am in agreement with counsel for the appellant that the proper standard of review of discretionary orders of prothonotaries in this Court should be the same as that which was laid down in *Stoicevski* for masters in Ontario. I am of the opinion that such orders ought to be disturbed on appeal only where it has been made to appear that

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

(b) in making them, the prothonotary improperly exercised is discretion on a question vital to the final issue of the case.

[para. 65] In each of these classes of cases, the Motions Judge will not be bound by the opinion of the prothonotary; but will hear the matter *de novo* and exercise his or her own discretion.

[27] In view of the fact that the prothonotary's decision is vital as to the motions to homologate and to quash, I must exercise my own discretion and re-hear the matter *de novo*.

[28] What is the standard of review by the Court of the arbitrator's decision in a situation where there has been an application to homologate and to quash? The Corporation argued, and I agree, that the question of the standard of review is dealt with by article 946.2 C.C.P., which provides that the Court examining a motion for homologation cannot inquire into the merits of the dispute. Additionally, article 946.4 C.C.P. requires the Court to grant the motion to homologate except where the respondent can show that one of the obstacles mentioned in the article exists. Accordingly, there is no question of the Court examining the arbitral award in order to find errors of law. That would be to consider the merits of the dispute, which is expressly prohibited: *Corporation des pilotes du Bas Saint-Laurent v. Administration de pilotage de Laurentides*, [1999] J.Q. No. 5368, at paragraph 10. In one of the first cases dealing with these provisions, which did not come into effect until December 1986, Lemieux J. discussed the standard of review as follows:

[TRANSLATION]

Allowing an ordinary court of law to exercise its superintending and reviewing power is contrary to the very intent of the wording of article 946.2 C.C.P. Only errors involving nullity, that is errors dealing with points of fact or law, which establish jurisdiction, or errors on points of public law, including the rules of natural justice, or dealing of necessity with arbitrators in the performance of their duties, should be applicable.

Leisure Products Ltd v. Funwear Fashions Inc., J.E. 88-1934, page 6.

[29] The first ground of error alleged by the Authority is the following:

[TRANSLATION]

The prothonotary erred in law by adopting the principle that the Court could not review the interpretation used by the arbitrator for any provision of an Act, regulation or contract, especially when it was a matter of public order or limited its jurisdiction.

[30] As the passage from *Leisure Products, supra,* indicates, not every error justifies the Court's intervention; only those involving nullity, or those of public order which of necessity govern arbitrators in the performance of their duties. Accordingly, the errors alleged in the arbitral award must be considered to see whether they cross this threshold.

[31] The second ground of error reads as follows:

[TRANSLATION]

The prothonotary erred in law in adopting the principle that the impact of the arbitral award on third parties was not a factor to be considered, especially when the award had the effect of making an order amounting to a direction requiring shipowners to accept a second pilot on board their ships and consequently to pay his fees.

[32] The prothonotary relied on *Guns N' Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, [1994] R.J.Q. 1183 (C.A.), and *Corporation des pilotes du Bas Saint-Laurent v. Administration de pilotage des Laurentides*, C.S.Q. 200-05-012157-99, as support for his conclusion on this point. The arbitral award had no application to shipowners. It bound the Authority [TRANSLATION] "for all legal purposes". It was the Authority which had the power and duty to implement it where shipowners were concerned, as Banford J. noted in *Corporation des pilotes du Bas Saint-Laurent, supra*:

Further, under the terms of the agreement, it is the Authority alone which has the duty of paying for the pilots' services. If the bill could be passed on to the shipowners, this might result from the regulations in effect or the agreements binding on the parties. The disputed award does not in any way affect these rules.

[33] I see no valid distinction between this case and *Corporation des pilotes du Bas Saint-Laurent, supra,* and consequently I cannot accept this ground of error or the third ground of error relating thereto:

[TRANSLATION]

The prothonotary erred in law in concluding that the statements made by the Superior Court in *Corporation des pilotes du Bas Saint-Laurent v. Administration de pilotage des Laurentides* were made in a situation very similar to the case at bar, justifying homologation of the arbitral award.

[34] In both cases, an Authority objected to a motion to homologate on the ground that the arbitrator's decision was liable to impose a financial burden on third parties who were not represented before the arbitrator. As in *Corporation des pilotes du Bas Saint-Laurent,* the financial relations between the Authority and the shipowners were not affected by the arbitral award. If there was a valid distinction between these two cases, the Authority did not indicate it in its arguments.

[35] The following four grounds of error then alleged by the Authority may conveniently be grouped together:

[TRANSLATION]

The prothonotary erred in law in deciding that the appellant's decision to assign pilots to ships was taken as part of its regulatory power to set the minimum number of pilots, whereas it actually derived from the **administrative power** conferred on it by section 35 of the *Laurentian Pilotage Authority Regulations*.

He also erred in law in concluding that the appellant could undertake by contract to provide more than a minimum number of pilots, since the number of pilots **could not go beyond what was necessary to ensure the safety of navigation**, in accordance with the rule stated in section 18 of the *Pilotage Act,* R.S.C. c. P-14, which limits the appellant's jurisdiction.

The prothonotary erred in law as to the meaning of the word "minimum" in paragraph 20(*l*) of the *Pilotage Act*, which only indicates that the appellant cannot set the maximum number of pilots, since it would be **contrary to its objects to impose on shipowners the payment of fees for a number of pilots not required to ensure safety of navigation**.

The prothonotary erred in law in concluding that the appellant could undertake to do more than was specified by regulation. Such an undertaking would exceed its powers or give a third party,

the mis-en-cause arbitrator, the power to take the appellant's place in exercising an **exclusive discretion conferred on it as a public authority** by the applicable Act and regulations.

[36] The Authority's argument on these points may be summarized as follows. Any power it enjoys to set the number of pilots on board a ship must be exercised in relation to safety of navigation. Any assignment of pilots beyond the number required to ensure safety of navigation exceeds the Authority's powers. The Authority exercised its regulatory power regarding the assignment of pilots through the promulgation of section 35 of the *Laurentian Pilotage Authority Regulations*. Specific assignments are thus administrative actions taken in accordance with the Regulations. They cannot go beyond the limits set by the Regulations. The Authority is exclusively responsible for assigning pilots, a responsibility which cannot be delegated to someone else, such as an arbitrator.

[37] The Corporation did not deny that the powers enjoyed by the Authority must be exercised so as to ensure safety of navigation. However, legal commentators have recognized that a person to whom a discretion is delegated may seek to carry out the purpose of Parliament by means of a contract. In the case at bar, clause 7.03 of the Agreement falls squarely within the Authority's function of ensuring safe navigation. The Corporation argued that the arbitral award did not conflict with safety of navigation and did not in any way contradict section 35 of the Regulations.

[38] Section 20 of the *Pilotage Act* does not limit the Authority's room to manoeuvre. It confers on the Authority the power to act by regulation in certain cases, but does not require it to do so:

20. (1) An Authority may, with the approval of the Governor in Council, make regulations necessary for the attainment of its objects, including, without restricting the generality of the foregoing, regulations	20. (1) Une Administration peut, avec l'approbation du gouverneur en conseil, prendre les règlements généraux nécessaires à l'exécution de sa mission et, notamment :
. . .	. . .

[39] One of the areas in which it may act by regulation is the setting of the minimum number of pilots on board, mentioned in paragraph 20(*l*) of the Act:

(*l*) prescribing the minimum number of licensed pilots or holders of pilotage certificates that shall be on board ship at any time . . .

[40] The Authority exercised this power when it adopted the *Laurentian Pilotage Authority Regulations*. Those Regulations deal with the question of the number of pilots on board in section 35, which is reproduced in full below:

35. (1) The minimum number of licensed pilots or holders of pilotage certificates that shall be on board a ship at any time is one, except that a minimum of two licensed pilots or holders of pilotage certificates shall be on board	
35. (1) Un seul pilote breveté ou titulaire d'un certificat de pilotage est requis en tout temps à bord d'un navire; cependant, deux pilotes brevetés ou titulaires d'un certificat de pilotage sont requis pour tout navire	
(*a*) where the ship is to be piloted in that part of District No. 1 between Montreal and Trois-Rivières or between Trois-Rivières and Quebec and is likely to be under way for more than 11 consecutive hours in that part of that district;	*a*) qui sera piloté dans la partie de la circonscription n° 1 comprise entre Montréal et Trois-Rivières ou entre Trois-Rivières et Québec et qui y fera probablement route pendant plus de 11 heures consécutives;
(*b*) where the ship is to be piloted in District No. 2 and is likely to be under way for more than 11 consecutive hours in that district;	*b*) qui sera piloté dans la circonscription n° 2 et y fera probablement route pendant plus de 11 heures consécutives;
(*c*) where a ship in excess of 63,999 tons deadweight is to be piloted in District No. 1;	*c*) de plus de 63 999 t de port en lourd, dans la circonscription n° 1;
(*d*) where a ship in excess of 74,999 tons deadweight is to be piloted in District No. 2; or	*d*) de plus de 74 999 t de port en lourd, dans la circonscription n° 2;
(*e*) where the ship is to be piloted in District No. 1 or District No. 2 and is (i) a tanker of 40,000 tonnes deadweight or more, or (ii) a passenger ship of more than 100 m in length;	*e*) qui sera piloté dans la circonscription n° 1 ou la circonscription n° 2 et qui est : (i) soit un navire-citerne de 40,000 tonnes métriques de port en lourd ou plus, ii) soit un navire à passagers de plus de 100 mètres de longueur;
(*f*) in District No. 1 and in District No. 2 during the winter navigation period; or	*f*) dans la circonscription n° 1 et la circonscription n° 2, durant la période de navigation d'hiver;
(*g*) where, owing to the conditions or nature of the voyage, more than one person is required to perform pilotage duties on the ship.	*g*) qui, vu les conditions ou la nature du voyage, exige la présence de plus d'un pilote pour remplir les fonctions à bord du navire.

[41] It should be noted that paragraph (*g*) of that section contemplates a category in which the assignment of a second pilot is a matter of discretion, which necessarily implies that the categories listed in section 35 do not exhaust the possibilities for assignment of a second pilot to a ship.

[42] In fact, the contract for services between the Authority and the Corporation in its turn describes certain circumstances that will require the assignment of a second pilot:

[TRANSLATION]

7.03 Only one pilot at a time is assigned to a pilotage duty, except in the following cases in which two pilots are assigned:

(a) when safety of navigation requires it;

(b) to all passenger ships 100 metres or more in length;

(c) at all times for tow lines and tugs, as illustrated in the drawing in Appendix I of Appendix A;

(d) for a ship which is underway, when the voyage is likely to last more than 11 consecutive hours in the same sector of the region;

(e) when the ship to be piloted is disabled;

(f) at all times on tankers of 40,000 tonnes dead weight or more, and at all times on ships of 64,000 tonnes dead weight or more;

(g) during the winter navigation season;

(h) when a ship is making a trial voyage.

[43] The reader cannot fail to see that clause 7.03 deals with certain circumstances not covered in section 35. If there is authority for this treatment, it must be under the heading of "the conditions or nature of the voyage [require] more than one person . . . to perform pilotage duties on the ship". The cases of the disabled ship and the ship on a trial voyage are two examples of this. Tugs are another. The conclusion that necessarily follows is that section 35 of the Regulations does not exhaust the cases in which a second pilot may be assigned. The Authority challenged clause 7.03 of the Agreement. It argued that there is only one valid interpretation of

the provision and that is that it exists solely to ensure that pilots will be available to perform the assignments it makes. Interpreting this clause otherwise would invalidate it because it would place a prior limitation on the Authority's discretion to assign a second pilot. These arguments have to be weighed in light of certain provisions of the Act.

[44] The *Pilotage Act* provides in subsection 15(2) for the possibility of contractual relationships between the Authority and a body corporate representing the majority of pilots in the region. The contract contemplated is a contract for services. The background to the creation of pilotage authorities, as set out in paragraph 5 of the Authority's written submissions, strongly suggests that it is in the Authority's interest to conclude an agreement with the Corporation that will guarantee peace between shipowners and pilots:

[TRANSLATION]

The *Pilotage Act* was adopted after major disputes between shipowners and pilots and the Bernier Commission showed that it is necessary for a public body to intervene between shipowners and pilots to ensure that pilotage service is maintained and navigation is safe.

[45] The *Pilotage Act* recognizes the importance of contracts for services by creating machinery to impose a contract for services in some circumstances:

15.1 (1) Where a contract for services referred to in subsection 15(2) does not provide a mechanism for the resolution of disputes in the contract renewal process, fifty days before the contract expires, the parties to the contract shall jointly choose a mediator and an arbitrator and shall refer to the mediator all issues related to the renewal of the contract that remain unresolved.	15.1 (1) Cinquante jours avant l'expiration d'un contrat de louage de services mentionné au paragraphe 15(2) qui ne comporte aucune disposition sur le règlement des différends à survenir au cours des négociations en vue de son renouvellement, les parties au contrat sont tenues de choisir d'un commun accord un médiateur et un arbitre, et de soumettre au médiateur toutes les questions liées au renouvellement du contrat qui demeurent en litige.
(2) The Minister shall choose the mediator or arbitrator if the parties cannot agree on one or if the one they choose is unavailable.	(2) Le ministre désigne un médiateur ou un arbitre lorsque les parties ne peuvent s'entendre sur leur choix ou lorsque le médiateur ou l'arbitre qu'elles ont choisi n'est pas disponible.
(3) The mediator has thirty days in which to bring the parties to agreement on the outstanding issues, at the end of which time the parties to the contract shall refer all of the remaining outstanding issues to the arbitrator.	(3) Le médiateur dispose d'un délai de trente jours pour amener les parties à s'entendre sur les questions qui lui ont été soumises; une fois ce délai expiré, les parties au contrat soumettent les questions qui demeurent en litige à l'arbitre.

15.2 (1) The parties to the contract shall each submit a final offer in respect of the outstanding issues to each other and to the arbitrator within five days after the date on which those issues are referred to the arbitrator.
(2) Within fifteen days, the arbitrator shall choose one or other of the final offers in its entirety.

(3) The final offer chosen by the arbitrator is final and binding and becomes part of the new contract for services that is effective on the day after the former contract expires.

15.2 (1) Chaque partie au contrat est tenue de faire parvenir à l'arbitre - ainsi qu'à la partie adverse - sa dernière offre sur toutes les questions qui demeurent en litige, dans les cinq jours suivant la date à laquelle il en est saisi.
(2) L'arbitre dispose d'un délai de quinze jours à compter de la date à laquelle elles lui sont soumises pour choisir l'une ou l'autre des dernières offres dans son intégralité.
(3) La dernière offre choisie par l'arbitre est définitive et obligatoire et est incorporée au contrat de louage de services renouvelé, lequel prend effet à la date d'expiration du contrat précédent.

[46] The Act imposes no limit on the conditions which an Authority and a representative of the pilots may negotiate. It even requires an arbitrator to choose between the final offers filed by each party. This example does not serve to establish that any term in a contract for services is beyond the scope of judicial review for excess of jurisdiction; rather, it serves to indicate that the question of safety of navigation arises in a context in which the contractual relationships established with the pilots' representative are also covered by the Act.

[47] What is the scope of a contract for services as contemplated by the Act? According to the Authority's arguments, such a contract could in no way limit its discretion to decide on a case-by-case basis whether a second pilot should be assigned; and no dispute resolution procedure could impose on it the need to assign a second pilot if it did not think this was necessary for navigation. The Authority might perhaps have been able to negotiate such a contract, but it did not do so. It negotiated a contract in which it undertook to assign a second pilot in certain circumstances, in particular when safety of navigation required it.

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

[49] The jurisprudence and legal theorists both agree that a public authority has the capacity to carry out its function by contract, subject to the provisions of the Act governing the

authority. This is what the Quebec Superior Court said in *Association des juristes de l'État v. Gil Rémillard*, [1994] R.J.Q. 2909, at 2915 and 2917:

[TRANSLATION]

These precedents have been commented on by the authors Dussault and Borgeat in their *Traité de droit administratif*:

[*Verreault*] relied first and foremost on the application to Her Majesty in right of Quebec of the civil law rules of mandate, but implicitly recognized that the Crown has a general capacity to enter into contracts.

The question is whether by specific legislation this general power has been limited. Does entering into a contract with the private sector for the provision of administrative services or judicial support imply an unlawful subdelegation of powers?

. . . . .

The services provided by the mediators, whether they are public servants or private mandataries, have no connection to "sound administration of the department". If that is so, the contractual relationship of the mandatary mediator with the Minister must necessarily be based on his general power to enter into contracts. There is no inconsistency or contradiction there with the *Public Service Act* or the *Act respecting the ministère de la Justice*. We can find no court decision or legal commentary indicating that a department, a Minister or the government cannot carry out its function by means of contracts.

[50] This is especially true when the Act itself recognizes the public authority's power and capacity to conclude particular contracts in order to carry out its function. If Parliament had intended to limit the scope of such contracts, it surely would have been possible for it to do so: and if the Act provides not only that there will be contracts for services, but also that the terms of the latter may be imposed on the Authority by an arbitral award in the case mentioned in section 15.1, it can hardly be said that Parliament intended to reserve exclusively for the Authority every question dealing with safety of navigation and the assignment of pilots.

[51] This is what the Quebec Court of Appeal had to say concerning a contracting party which subsequently challenged the validity of its contract:

[TRANSLATION]

If that was its argument, it would have been better for it not to sign: having signed, it was hardly in a position to challenge the document.

Cité de Jacques Cartier v. Tanguay, [1965] Q.B. 352.

[52] The conclusion that results from this analysis is that the question of safety of navigation cannot be considered in isolation from the contract for services between the Corporation and the Authority. The Act recognizes the validity of contractual relationships between the parties as well as the regulatory power of the Authority. What is more, it also recognizes the possibility of arbitration to settle disputes between these parties, and even the possibility of imposing on the Authority conditions which it might have rejected in negotiations between the parties.

[53] The Authority alleged other errors in the prothonotary's reasons. It sustained that he was wrong to find that determinations regarding safety of navigation were part of the Authority's regulatory power, whereas in the Authority's submission they belonged to its administrative power. Whatever way this question is answered, it does not contribute anything to the resolution of the issues here. It is clear that the Authority exercised its regulatory power by adopting the Regulations: but it is also clear that the Authority exercised its administrative power by entering into the contract for services with the Corporation. Its validity does not depend on whether it is administrative or regulatory in nature.

[54] The Authority alleged that the prothonotary erred as to the meaning to be given to the minimum number of pilots, when he found that the Regulations did not prevent the Authority from assigning a number greater than the minimum. In view of the Authority's function, it could not prescribe a minimum number of pilots on board that would be insufficient to guarantee safety of navigation. The Authority argued that it would be inconsistent with its function to impose on shipowners the fees for pilots whose assignment to their ships was not necessary for safety of navigation. However, the general rule does not exclude the possibility of special situations requiring the assignment of an additional pilot. In doing so, the Authority would not be assigning more pilots than are required by safety of navigation, but exactly the number required in the circumstances. In each case, the fees represent the cost of ensuring safety of navigation, and nothing more.

[55] The Authority denied that it could undertake a contractual obligation beyond what is covered by regulation. In fact, the Regulations leave the Authority the discretion to assign more than one pilot when the voyage or circumstances require more than one to perform the functions on board, which must necessarily be part of the Authority's function to ensure safety of navigation. In giving the Corporation an undertaking that it would assign a second pilot when safety of navigation required this, the Authority was only carrying out its mandate. When there was a dispute between the Authority and the Corporation as to the meaning of their undertaking, the arbitrator resolving the dispute was not exercising the discretion conferred on the Authority. The Authority had already exercised that discretion by entering into a contract for services. The arbitrator was only determining the meaning of that undertaking in the context of a disagreement as to the interpretation or implementation of the conditions. What the Authority characterized as

delegation was only the performance of a mandate conferred on the arbitrator by the Authority and the Corporation.

[56] The Authority then stated the following ground of error:

[TRANSLATION]

The prothonotary also erred in law in deciding that the appellant was not unlawfully delegating its powers if it gave the mis-en-cause arbitrator the power to prescribe the number of pilots required on board ships in order to ensure safety of navigation.

[57] The prothonotary did not say what the Authority claimed. He came to the following conclusion:

The situation is that the L.P.A. gave an undertaking and the two parties referred the settlement of any disagreement in this regard to arbitration: nothing more.

[58] This is entirely consistent with the analysis set out above. The arbitrator was not in any way prescribing the number of pilots required on board ships. That had been determined by regulation and the agreement made between the parties. All the arbitrator was doing was resolving the dispute between the parties as to the requirements of safety of navigation on three particular ships.

[59] In its final ground of error, the Authority objected that the prothonotary failed to consider certain arguments it put forward:

[TRANSLATION]

Finally, the prothonotary also erred in law in failing to consider the following arguments submitted by the appellant:

(a) the appellant did not have the legal capacity to bind by contract the future exercise of its discretionary powers;

(b) it is the function of this Court, by its superintending and reviewing authority over federal public agencies, to decide whether the appellant committed an *ultra vires* act in refusing to assign a second pilot to certain ships;

(c) pursuant to the applicable rules of public law, correct interpretation of the arbitration clause gives the mis-en-cause arbitrator the power to give effect to contractual obligations resulting from decisions of a public nature taken by the appellant, but without becoming involved in those decisions;

(d) the sole purpose of clause 7.03 of the contract for services, pursuant to the other clause 4.06, is to ensure that pilots are available when the appellant considers that the circumstances require the presence of a second pilot.

[60] Whether the prothonotary considered them or not, these propositions cannot be accepted. The rule that a public agency can carry out its mandate either by contract or regulation was settled in *Association des juristes de l'État v. Gil Rémillard, supra*. This is especially true when the Act governing the public authority authorizes it to proceed by contract, which is the case here. It is the nature of a contract that it binds the contracting party to certain actions, defined in advance, if certain conditions occur. Otherwise, the contract would be pointless and of no use. The power to contract necessarily implies the capacity to bind discretion. That rule is recognized in the academic commentary:

[TRANSLATION]

However, this rule should not be taken too far: it would be wrong to say that every contract limiting the exercise of powers conferred by Parliament for the attainment of certain objectives is *ultra vires*. The true "test" is to determine not whether a statutory power is limited by the conclusion of the contract, but whether the contract is consistent with the objectives sought by the Act. That is how all the decisions on this point have to be understood.

Patrice Garant, *Droit administratif - structures, actes et contrôles*, 4th ed., Cowansville, Que., Yvon Blais, 1996, vol. 1, p. 491.

[61] The contract in question falls squarely within the purpose of the Act, which is to ensure safety of navigation.

[62] It is true that it is this Court's function to decide whether in its capacity as a federal board, commission or other tribunal, the Authority has exceeded the limits of its powers. This is a jurisdiction conferred on it by the *Federal Court Act*, R.S.C. 1985, c. F-7. For his part, the arbitrator exercises jurisdiction conferred on him by the agreement between the Authority and the Corporation. He has no power except what the parties have given him. He only determines whether the Authority's decision is consistent with its contractual obligations, while the Court applies the rules stated in subsection 18.1(4). In short, the arbitrator only exercises a power given to him by the Authority.

[63] Also on the question of the arbitrator's jurisdiction, it cannot be said that the arbitrator's function is simply to give effect to the contractual obligations resulting from decisions of a public nature made by the appellant, without thereby denying the clear provisions of the arbitration clause. Clause 19 is clear and unambiguous about the function of the arbitration

clause. That clause exists to resolve a dispute or disagreement between the parties on the implementation and interpretation of their agreement. The argument of the arbitral award which deals with a dispute not covered by the arbitration clause is based on an assumption which has already been rejected, namely that the Authority cannot define in a contract with the Corporation the circumstances in which it will assign a second pilot to a ship to ensure safety of navigation.

[64] Finally, with respect, it is simply not plausible that clause 7.03 is in the contract for services to ensure that pilots will be available. The Authority relied on clause 4.06, but one also has to read clauses 4.01 and 7.02 to get the meaning of the Corporation's duty regarding pilot availability:

[TRANSLATION]

4.01 The AUTHORITY hires the CORPORATION and its members exclusively to provide pilotage services and to train apprentice pilots in District No. 1.

In consideration of this exclusive hiring and subject to the other provisions of this contract, the CORPORATION gives the AUTHORITY an undertaking, and **assures and guarantees** the latter, that at all times, at any period and at any place, it will provide in pilotage District No. 1 **any pilot required to provide any ship subject to compulsory pilotage** with pilotage services in that District, such services to be rendered in the same manner and to have the same quality and effectiveness as usual.

7.02 Subject to clauses 11.01 to 11.04 [safety standards], pilots shall perform any pilotage assignment at the time and place prescribed and may not pilot any ship without being assigned to do so.

[My emphasis.]

[65] Clause 7.03 adds nothing to the availability of pilots which is not already specified in clauses 4.01 and 7.02. If the clause ensures anything, it is employment for pilots, binding the Authority to assign two of their number in certain circumstances.

[66] The final ground of error alleged by the Authority was the following:

[TRANSLATION]

Consequently, the prothonotary erred in law in homologating the arbitral award, despite the fact that it was void under subparagraphs 946.4(1) and (2) and articles 946.5 and 947.2 C.C.P.

[67] This is only a conclusion derived from the analysis made by the Authority concerning the validity of the arbitral award and the prothonotary's reasons. As that analysis was

not approved, the resulting conclusions do not apply. The appeal from the prothonotary's decision is dismissed with costs.

ORDER

The motion to appeal the prothonotary's decision is dismissed with costs.

"J.D. Denis Pelletier"

Judge

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

FEDERAL COURT OF CANADA

TRIAL DIVISION

SOLICITORS OF RECORD

FILE: T-1032-00

STYLE OF CAUSE:

PILOTES DU SAINT-LAURENT CENTRAL INC.

APPLICANT

-and-

LAURENTIAN PILOTAGE AUTHORITY

RESPONDENT/APPELLANT

LAURENTIAN PILOTAGE AUTHORITY

APPLICANT/APPELLANT

-and-

PILOTES DU SAINT-LAURENT CENTRAL INC.

RESPONDENT

-and-

JEAN-YVES DURAND

THIRD PARTY

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: SEPTEMBER 11, 2001

REASONS FOR ORDER AND ORDER BY: PELLETIER J.

DATE OF REASONS: AUGUST 8, 2002

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MARIO ST-PIERRE	FOR LAURENTIAN PILOTAGE
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MONTRÉAL, QUEBEC	AUTHORITY