

Federal Court



Cour fédérale

Date: 20140505

Docket: T-696-13

Citation: 2014 FC 420

Vancouver, British Columbia, May 5, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ADVENTURE TOURS INC.

Applicant

and

ST. JOHN'S PORT AUTHORITY

Respondent

and

**ASSOCIATION OF CANADIAN
PORT AUTHORITIES**

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the St. John's Port Authority (the SJPA), dated March 15, 2012, which denied a March 4, 2013 request by Adventure Tours

Inc. (ATI) that it be permitted to conduct its tour boat operations in St. John's from SJPA managed property for the 2013 tourist season. The application is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7.

Background

[2] ATI has, for a number of years, carried on the seasonal business of a tour boat operator.

[3] The SJPA is a federal government business enterprise incorporated by letters patent pursuant to the *Canada Marine Act*, SC 1998, c10 (CMA). It is one of eighteen similarly constituted port authorities in Canada.

[4] ATI had, until 2005, conducted its operations out of the Port of St. John's. In 2006 the SJPA effected a Tour Boat Operations Policy, Pier 7 Development, which required all regular tour boat activities on SJPA property to be based within the Pier 7 operational zone and restricted the number of such tour boats to three kiosk tenants. ATI was not one of these.

[5] On October 28, 2011, ATI wrote to the SJPA inquiring if a special licence would be required to resume its tour boat operations in 2012. On November 7, 2011, the SJPA responded advising that it was neither seeking, nor accepting proposals for additional operators at that time. ATI sought to have that response set aside by way of judicial review, taking the position that the refusal contravened section 27 of the *Port Authorities Operations Regulations*, SOR/2000-55 (the Regulations) which it interpreted as providing for the mandatory authorization of licenses in

the absence of enumerated exceptions. ATI also sought an order of mandamus directing the SJPA to issue a tour boat operating license.

[6] In response, the SJPA brought a motion seeking an order to strike the ATI application. By order dated March 14, 2012 (*Adventure Tours Inc v St John's Port Authority*, 2012 FC 305 [*Adventure Tours I*]) Prothonotary Morneau concluded that the correspondence exchanged by the parties did not comprise either a formal request or an application for a license. Further, that the SJPA's response did not preclude a future application for a license, or further inquiry, but merely informed ATI of the status of current license processing. As the nature of the correspondence and the substance of the conduct complained of by ATI did not amount to conduct that could be subject to judicial review, the Prothonotary granted SJPA's motion to strike. In the event that he was wrong in that conclusion, but more in anticipation of a formal future request for a licence by ATI and with an eye to judicial economy, he also addressed the issue of the Court's jurisdiction over the matter. The Prothonotary found that operating a tour boat service for the transportation of tourists is a core function within the powers of a port authority as set out in subsection 28(2) of the CMA. As the matter under review was public in nature and the SJPA was acting as a federal body with respect to the awarding of tour boat licenses, the relief sought was against a "federal board, commission or other tribunal" as described in section 2 of the FCA. Therefore, pursuant to subsection 18(1) of the FCA, the Court had jurisdiction to conduct a judicial review of the matter.

[7] ATI appealed the Prothonotary's decision and on January 22, 2013, Crampton, C.J., dismissed the appeal (*Adventure Tours Inc v St John's Port Authority*, 2013 FC 55 [*Adventure*

Tours 2)). The Chief Justice agreed with the Prothonotary that the SJPA's November 7, 2011 response was not subject to judicial review. Although this finding was sufficient to dispose of the motion, for the same reasons given by the Prothonotary, the Chief Justice also addressed the question of jurisdiction. He agreed with the Prothonotary that when the SJPA sent its November 7, 2011 letter to ATI it was exercising public powers. Further, that the licensing of tour boat operations is among SJPA's core functions and is public in nature and character. Therefore, the SJPA was acting as a "federal board, commission or other tribunal" when it sent the letter and the Court had jurisdiction over the matter.

[8] The Chief Justice also noted that, although it was too late for the 2012 tourist season, ATI remained free to apply for a license to operate a tour boat service. If it did so and received an unsatisfactory response, then it could assess whether it had any grounds upon which to seek judicial review.

[9] On March 4, 2013, ATI wrote to the SJPA stating that, notwithstanding its dispute with the SJPA's authority to effect its tour boat policy, ATI wished to resume tour boat operations in the Port of St. John's at the earliest opportunity and, therefore, requested the permission of the SJPA to do so for the 2013 tourist season.

[10] On March 15, 2013, the SJPA responded declining ATI's request (the Decision). That Decision is the subject of this application for judicial review.

Decision under Review

[11] The SJPA noted that it strives to find the appropriate balance of vessel traffic and land usage that best serves its mandate, but that it faced an increasingly challenging berthing environment with space being limited and demand increasing. In response to this, it had adopted a policy and practice of limiting the number of tour boat operations in the port. Currently two operators have licence agreements in place entitling them to operate from the SJPA managed property at Pier 7 until May 31, 2016. In 2015, the SJPA proposes to assess tour boat operations within the dynamic of the port as it exists at that time, which might result in the undertaking of some form of public process regarding such operations for 2016 and onward:

“Accordingly, the SJPA has neither sought nor accepted proposals for additional tour boat operations from SJPA-managed property for 2013. Nor does it propose to seek or accept proposals for the years 2014 and 2015; pending its assessment of tour boat operations as noted above. As such, the SJPA must decline your request for a license for 2013.”

[12] The SJPA noted that potential tour boat operators remained at liberty to berth at non-SJPA managed property in the Port of St. John’s.

Issues

[13] In my view, the issue in this matter can be framed as being whether or not the SJPA has the legal authority to require the licensing of commercial tour boat operators.

[14] In its Memorandum of Fact and Law, ATI raised the issue of whether this Court has jurisdiction to address this matter. In my view, that issue was previously addressed by both the Prothonotary and the Chief Justice. While those decisions concerned the SJPA letter of November 7, 2011, the matter before me concerns the same decision making process and addresses the same question, being the SJPA's licensing of tour boat operations. The same analysis applies as the SJPA is again exercising public powers and the subject activity is among its core functions. Therefore, the SJPA was acting as a "federal board, commission or other tribunal" when it made the Decision and this Court has jurisdiction pursuant to subsection 18(1) of the FCA. The SJPA did not make written submissions on the issue and confirmed, when it appeared before me, that it did not challenge the Court's jurisdiction.

[15] In its written submissions, ATI also raised the issue of whether the SJPA's denial of a license constituted administrative action susceptible to judicial review. Again, the SJPA's written submissions in response did not challenge the current application for judicial review on that basis and it confirmed that position at the hearing.

Standard of Review

[16] The parties made no submissions regarding the applicable standard of review.

[17] However, as framed by the parties, the primary question before the Court is whether the SJPA has the legal authority to license and regulate ATI's commercial tour boat operations on and from federal real property managed by the SJPA in the Port of St. John's. Thus, the issue on this application concerns the SJPA's interpretation of provisions of the CMA, the Regulations

and the letters patent for the SJPA, St. John's Port Authority, (1999) C Gaz 1, 191 (the Letters Patent).

[18] The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved, in a satisfactory manner, the degree of deference to be afforded a particular category of question. If it has not, then the Court must engage the second step, which is to determine the appropriate standard having regard to the nature of the question, the expertise of the tribunal, the presence or absence of a privative clause, and, the purpose of the tribunal (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-64 [*Dunsmuir*]; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*]).

[19] Although prior jurisprudence does not address this specific question, it has addressed particular categories of questions that concern interpretation and application of home statutes. There is clear authority that “[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity” (*Dunsmuir*, above, at para 54; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] SCR 160 at para 28 [*Alliance*]). There is also a presumption that the applicable standard of review concerning a decision of an administrative tribunal interpreting or applying its home statute is reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 39 [*Alberta Teachers*]). This principle applies unless the question at issue falls into one of the categories of questions to which the correctness standard still applies, being a constitutional issue; a question of general law that is

of central importance to the legal system as a whole and outside the adjudicative specialized area of reference; the drawing of jurisdictional lines between two or more competing specialized tribunals; or, true questions of jurisdiction or *vires* (*Alberta Teachers*, above at para 30).

[20] The Supreme Court has also recently applied the presumption of reasonableness beyond that of tribunal decisions to those of other administrative decision makers interpreting his or her own statute (*Agraira*, above; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 [*McLean*]).

[21] Thus, in my view, the presumption of reasonableness has not been rebutted and applies to the SJPA's interpretation of provisions of the CMA, the Regulations and its Letters Patent as this is not a question to which the correctness standard applies (*Alberta Teachers*, above, at para 30). In these circumstances, I would have reached the same conclusion applying the second stage of the *Dunsmuir* analysis.

Positions of the Parties

ATI's Position

[22] ATI submits that Parliament has exclusive jurisdiction over navigation and shipping pursuant to subsection 91(10) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, App II, No 5 (*Constitution Act*) which includes protecting the common law public right of navigation (*Friends of the Oldman River Society v Canada (Minister of Transport)*,

[1992] 1 SCR 3 at p 54-5 [*Friends of the Oldman River*]; *British Columbia (Attorney General) v Lafarge Canada Inc*, [2007] 2 SCR 86 paras 62-64 [*Lafarge*]).

[23] Parliament enacted the *Canada Shipping Act, 2001*, c 26 to regulate shipping and navigation. The CMA does not devolve Parliament's constitutional jurisdiction over shipping and navigation on Canada's navigable waters to port authorities. The reference in the CMA to "shipping, navigation, transportation of passengers and goods..." is the language chosen by Parliament to describe the common law public right of navigation in the context of port authorities land-based management of federal infrastructure "related to" the public right of navigation.

[24] The CMA applies only to the management of federal port lands and infrastructure. Subsection 28(2)(a) limits the power of a port authority to engage in port activities related to shipping, navigation, transportation of passengers to those activities specified in its Letters Patent.

[25] Article 7.1(c) of the Letters Patent for the SJPA describes the activities that it may undertake and does not include any authority to limit, restrict or prohibit shipping, navigation or the transportation of passengers or goods. Nor does it permit interference with ATI's common law public right of navigation, including its right to carry on business in the transportation of passengers, or the denial or restriction of the availability of berthage, the restriction of the number of vessels engaging in shipping or navigation activities of any sort, or, the imposition of a tour boat licensing scheme. Any attempt to do so is *ultra vires* the SJPA's authority.

[26] Further, section 7(a) of the Regulations permits access to port property to conduct legitimate business. The exercising of the common law public right of navigation is a legitimate business to be conducted in the port and conducting activities as a port user grants ATI access to lands managed and occupied by the SJPA.

[27] Subsection 28(2) of the CMA and Article 7.1 of the Letters Patent expressly limit the SJPA's capacity to engage in "port activities" to the extent that those activities are specified in the Article itself. Article 7.1(c)(iii)(A) of the Letters Patent expressly limits the SJPA's licensing function to the federal real property that it manages. This does not extend to the licensing of marine activities to which the federal property is adjunct, nor can the SJPA license federal property in a way that interferes with the common law right of navigation, including the right to transport passengers for hire.

[28] While subsection 56(1) the CMA does grant the SJPA certain administrative capacities related to port traffic control, these are subject to the regulations made pursuant to subsection 62(1) of the CMA and national standards and practices for marine vessel traffic services contained in the *Canada Shipping Act, 2001*. Therefore, Parliament continues to retain its constitutional control over Canada's navigable waters because any port control activities that the SJPA may engage in are subject to those federal regulations and standards.

[29] While the SJPA states that it is open to ATI to berth at non-SJPA managed property, this is not a reality as the SJPA has a practical monopoly on the supply of berthage or anchorage in the port. Further, the effect of the SJPA policy is that some, but not all tour boat operators are

permitted to carry on their common law public right of navigation from certain federal lands managed by the SJPA. Further, that this right of use indirectly limits shipping, navigation and transportation of passengers in the port (*Westshore Terminals Ltd v Vancouver Port Authority*, 2001 FCT 312 at paras 4-5).

[30] Although the crux of its written argument was that the SJPA lacked the authority to require tour boat operators to be licensed and that to do so infringed on their common law public right of navigation, at the hearing, ATI focused on a view that the prevailing purpose of the CMA is to ensure that marine transportation services are organized to satisfy the needs of port users (CMA, subsection 4(c)).

[31] As I understood the submission, as a user of the port, ATI has the right and entitlement to carry on its business in the commercial transportation of passengers within the port. Section 5 of the CMA defines “user”, in respect of a port, as a person that makes commercial use of, or provides services at, the port. Port authorities are not “users”, but ATI is. Subsection 7(1) of the CMA states that a port authority is an agent of Her Majesty in Right of Canada only for the purposes of engaging in the port activities referred to in subsection 28(2)(a) which limits its authority to operate a port to the power to engage in port activities related to shipping, navigation and transportation of passengers and goods. The SJPA cannot exercise any authority that it may have in a manner that is contrary to its purpose of satisfying the needs of port “users”. Transportation of passengers is a commercial use made by a user of the port, not an activity of the SJPA. The SJPA is entitled to authorize “activities” that are related, but incidental or

ancillary, to “uses” which support the use of the port by commercial users (such as selling tour boat tickets), but is not entitled to issue licenses for core “uses”.

SJPA's Position

[32] The SJPA submits that ATI proposes to use federal real property, the berth at Pier 7 in the Port of St. John's, as its place of business.

[33] The authority to license tour boat services in support of local tourism on federal real property in the Port of St. John's derives from subsections 8(1)(a) and 28(2)(a) of the CMA; Article 7.1(c)(iii)(C) of the Letters Patent; and, sections 23, 24 and 27 of the Regulations.

[34] Letters patent may only issue if the Minister is satisfied that a port is financially self-sufficient (CMA subsection 8(1)(a) and (b)) and port authorities may pursue private purposes such as revenue generation and the enhancing of its financial position (*Air Canada v Toronto Port Authority et al*, 2011 FCA 347 paras 74-75 [*Air Canada*]).

[35] Subsection 28(2)(a) of the CMA provides that a port authority is authorized to engage in port activities related to shipping, navigation, transportation of passengers and goods so long as the activity is listed in the letters patent. In that regard, Article 7.1(c)(iii)(C) of the SJPA Letters Patent includes retail services in support of the local tourism industry provided such uses are carried on by subsidiaries or other third parties pursuant to leasing or licensing arrangements. Section 23 of the Regulations, which are common to all port authorities in Canada, states that a person may, in a port, conduct an activity described if authorized to do so in writing under a

contract or lease entered into, or a license granted by, the port authority. Both Article 7.1(c)(iii)(C) of the Letters Patent and section 23 of the Regulations require that a tour boat service in support of local tourism on federal real property be conducted pursuant to a leasing or licensing arrangement because a lease or license is required to enter on and make use of federal real property in these circumstances.

[36] Thus, any agreement with a third party to operate such a service must be by way of a licence, the issuance of which is at the discretion of the port authority acting fairly and reasonably. This was previously recognized by Chief Justice Crampton at para 48 of his order in *Adventure Tours 2*, above. The license required in this instance is a license to use federal real property for the purposes of conducting business as a tour boat operator.

[37] As to the public right of navigation, ATI asserts that this permits it to conduct itself as it sees fit in the Port of St. John's subject only to the rules of navigation under the *Canada Shipping Act, 2001*. However, this is contrary to Prothonotary Morneau's finding, accepted by the Chief Justice, in the prior application for judicial review in this matter (*Adventure Tours 1* and *Adventure Tours 2*, both above).

[38] While ATI submits that the public right of navigation encompasses the right of a vessel owner navigating in the port to carry on its business from federal real property, and, that the right of navigation has not and perhaps cannot be modified or extinguished by statute or regulation, it cites no authority, *per se*, for those propositions. The cases cited by ATI, *Friends of the Oldman River* and *Lafarge*, both above, do not support those positions.

[39] Further, and contrary to ATI's submissions, the law is clear that any right ATI may have to use federal real property in these circumstances is limited. The public right of navigation does not extend to operating a business which does not fall within the usual incidents, or a core of, the public right of navigation (*North Vancouver (City) v "Seven Seas SR" (The)*, [2000] 192 FTR 203 at para 35; *Iveagh v Martin*, [1961] 1 QB 232 at p 272-3, 276; *West Kelowa (District) v Newcombe*, 2013 BCSC 1411 at paras 40-44). Here, ATI is endeavouring to do much more than is encompassed by the public right of navigation. It proposes to use federal real property as its place of business. This cannot be said to be ancillary or incidental to navigation.

[40] The SJPA also submits that in *Friends of the Oldman River* above, the Supreme Court of Canada confirmed that the public right of navigation can be modified or extinguished by an authorizing statute (*Friends of the Oldman River*, above, at page 55; *Wood v Esson*, (1884) 9 SCR 239 at paras 7-8). Thus, whatever the nature and scope of the public right of navigation in Canada, Parliament has clearly authorized the SJPA to license or otherwise regulate tour boat operations in the Port of St. John's.

[41] There is no question that operating a tour boat service is an activity related to the transportation of passengers as set out in section 28(2)(a) of the CMA and as recognized by the Chief Justice at paragraph 44 of his order (*Adventure Tours 2*). The attempt to distinguish ATI's operations as those of a "user" is of no merit.

The Association of Canadian Port Authorities (ACPA), The Intervenor's Position

[42] The ACPA submits that the Canada port authorities (CPA) have the authority to license or otherwise regulate the business of commercial tour boat operators on and from federal real property and to manage marine traffic over the navigable waters under their jurisdiction.

[43] The primary legislation applicable to the CPA is the CMA, and additional powers and responsibilities are derived from their letters patent and the Regulations. Section 4 of the CMA describes its purpose and objectives. Section 5 defines "port" as meaning the navigable waters under the jurisdiction of a port authority and the real property and immovables that the port authority manages, holds or occupies as set out in the letters patent. The letters patent of a port set out precisely the federal real property and navigable waters under a CPA's jurisdiction for that port. Section 62 of the CMA is also relevant as this demonstrates that the regulatory authority extends to both land and navigable waters (subsection 62(1)(a), (b) and (c)). Further, section 2 of the Regulations states that they apply in respect of the navigable waters of a port, works and activities in a port and the property managed, held or occupied by a port authority.

[44] CPAs must be financially self-sufficient (CMA, section 8). Most port revenues are generated from the commercial use of the port lands and waters including revenue generated from leases, licences and fees. CPAs are authorized to impose fair and reasonable fees (subsection 49(1)) and can provide written authorizations to persons who wish to engage in certain activities that would otherwise be prohibited, such as offering goods or services for sale

in a port, by way of contract, lease or license (Regulation, sections 23, 27 and Schedule I, Part 13, item 18). Licensing is also a means of controlling the security of a port.

[45] CPAs also have authority to manage marine traffic over the navigable waters under their jurisdiction (Regulations, section 32) and to maintain safety and order in the marine environment.

[46] ACPA submits that port authorities have the authority to license tour operators when they are using real property managed by the port and also when they are operating in the navigable waters of the port. Thus, the SJPA is in error when it suggests that ATI is free to operate in the Port of St. John's if it can utilize privately owned berthage. Rather, it is the activity itself that is subject to licence. There would be a substantial and detrimental impact to all port authorities were this Court to decide that there was a right to unlimited unlicensed operations, particularly in busy ports with multiple uses and users operating from property not managed by the Port.

[47] As to ATI's suggestion that section 27 of the Regulations requires an authorization to be issued upon request, overriding any licensing requirement, this would lead to absurd results. In any event, because the legislation covers both land and navigable waters, Part 13, item 18 of the Regulations requires that persons offering services in the port must obtain a licence pursuant to section 23. That provision provides a complete answer in this case.

Analysis

[48] The question to be answered here is whether the SJPA has the statutory authority to require that ATI, as a commercial tour boat operator, be licensed. Subsumed within this is the further question of whether such authority exceeded the SJPA's jurisdiction as it infringed upon ATI's common law public right of navigation.

[49] As a starting point, it is worth considering just what it is that ATI does and wishes to do. As a seasonal tour boat operator, it seeks to embark passengers at a SJPA managed property, Pier 7 in the Port of St. John's, take them on tours on its vessel which includes transit of the navigable waters of the port, and then return the passengers to disembark at the same location.

[50] Prothonotary Morneau, when addressing SJPA's motion to strike, acknowledged ATI's argument that, as a port user conducting business involving the core function of the port, it had the right and entitlement to carry on that business and did not require the SJPA's authorization, license or permission to do so. There, as here, ATI argued that the SJPA had no jurisdiction or authority to prohibit tour boat activities, except as provided for in Part I of the Regulations, and that subsection 27(2) of the Regulations provided an automatic right of a user to sell its services. In response, Prothonotary Morneau stated:

[9] Under a motion to strike the Court will not determine what licence is required by a tour boat operator; nevertheless, I cannot agree that no licence is required. Not requiring a licence to authorize tour boat operations would prevent the Port from properly managing port activities; such a result would be illogical. The number of tour boats operating at any given time would be unpredictable, unmonitored and unconstrained. Captain Charles

Anonsen's correspondence with the SJPA in October 2011 reveals that he too understands his conduct to require authorization. I find therefore that a licence is required, and do not believe that section 27 of the Regulations entitles ATI to a mandatory issuance. There is no automatic right to operate a tour boat in the Port.

[51] Further, in the context of defining the character of the matter for which review was sought and determining the jurisdictional question of whether SJPA was acting as a federal board, commission or tribunal, Prothonotary Morneau also considered section 28(2)(a) of the CMA and concluded:

[27] Given the discussion above, I find that the circumstances of this case are materially different than those canvassed in both *DRL Vacations* and *54039 Newfoundland*. In my view, operating a tour boat service for the transportation of passengers, even though it might not be a ferry service but just for the transportation of tourists is squarely in the realm enumerated by paragraph 28(2)(a) of the Act. Contrary to a restaurant or a souvenir shop, ATI's tour boat service is more intimately connected to a main responsibility of managing port activities.

[...]

[29] The proposed activity addressed in this application relates to something that can only be authorized by a port authority; this is not something "any other business" could do, but is an exclusive legislative mandate of the port authority. I find that the proper characterization of the matter is as a "tour boat service" – a port activity which is more than incidental to the SJPA's main management responsibilities – and that the character of the matter under review is public in nature.

[52] The Chief Justice upheld this finding on ATI's appeal of the motion to strike:

[44] I agree with Prothonotary Morneau's conclusion that the operation of a tour boat service is an activity related to the "transportation of passengers" [section 28(2)(a) CMA] and that therefore the licensing of tour boat operations is among SJPA's "core" functions, as opposed to incidental functions. I also agree

with him that the licensing of tour boat operations is an exercise of administrative power that is public, rather than private, in nature and character.

[53] It is important to recall that these findings were made in relation to a jurisdictional analysis concerning the public rather than private nature of SJPA's actions. Nevertheless, they are relevant to the characterization of the nature of ATI's operations and, therefore, SJPA's authority to require such operations to be licensed. Clearly both the Prothonotary and the Chief Justice characterized ATI as operating a tour boat service for the transportation of passengers, an activity that fell with subsection (28)(2)(e) of the CMA.

[54] In my view, that authority is also apparent from the legislative scheme governing port authorities. Pursuant to the CMA, a port authority is an agent of the federal Crown, but only for the purposes of engaging in the port activities referred to in subsection 28(2)(a) of the CMA. The Minister may issue letters patent incorporating a port authority if the port meets the stipulated requirements, including financial self sufficiency (CMA, subsection 8(1)). Section 28 states as follows:

28.(1) A port authority is incorporated for the purpose of operating the port in respect of which its letters patent are issued and, for that purpose and for the purposes of this Act, has the powers of a natural person.

(2) The power of a port authority to operate a port is limited to the power to engage in

(a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods to the extent that those activities are specified in the letters patent; and

(b) other activities that are deemed in the letters patent to be necessary to support port operations.

[55] I do not read subsection 28(2)(a) in the restrictive manner proposed by ATI. It clearly permits a port authority to engage in port activities relating to shipping, navigation, and, the transportation of passengers. While ATI submits that the reference to shipping, navigation and transportation is intended by Parliament to describe the common law public right of navigation in the context of port authorities' land-based management of federal infrastructure "relating to" the public right of navigation, it offers no authority to support that interpretation. Further, as acknowledged by ATI at the hearing of this matter, "port" is defined by section 5 of the CMA as including navigable waters under the jurisdiction of the port authority and the real property that it manages. In this case, the limits of the SJPA's navigable waters are described in the Letters Patent (Schedule A) and were described at the hearing as essentially being the whole of the port, to a delineating line across the narrows leading in and out of St. John's harbour.

[56] It is also of note that section 56 of the CMA states that a port authority may, for the purpose of promoting safe and efficient navigation or environmental protection in the waters of the port effect port traffic control as described in sections 56 to 60. Further, that a port authority may take appropriate measures to maintain the order and safety of persons and property in the port (subsection 61(1)).

[57] The regulation making authority set out in the CMA reflects Parliament's intention that port authorities would have the authority to regulate aspects of navigation and shipping within the port and, generally, to maintain good order by way of control over port operations:

62. (1) For the purposes of this Part, the Governor in Council may make regulations respecting

- (a) the navigation and use by ships of the navigable waters in a port, including the mooring, berthing and loading and unloading of ships and equipment for the loading and unloading of ships;
- (b) the use and environmental protection of a port, including the regulation or prohibition of equipment, structures, works and operations;
- (c) the removal, destruction or disposal of any ship, part of a ship, structure, work or other thing that interferes with navigation in a port and provision for the recovery of the costs incurred;
- (d) the maintenance of order and the safety of persons and property in a port;
- (d.1) the information or documents that must be provided by the owner or the person in charge of a ship to the port authority;
- (e) the regulation of persons, vehicles or aircraft in a port....

[58] In my view, the above provisions make it clear that Parliament intended for port authorities to have effective management and control over port operations for the purposes of the CMA. Subsection 28(2) does, of course, impose limits on the power of port authorities to engage in port activities related to shipping, navigation and transportation of passengers to the extent that those activities are specified in the letters patent of the port. In the case of the SJPA, the relevant provision of the Letters Patent is Article 7:

7.1 Activities of the Authority Related to Certain Port

Operations. To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(a) to the extent specified below:

- (a) development, application, enforcement and amendment of rules, orders, bylaws, practices or procedures and issuance and administration of authorizations respecting use, occupancy or operation of the port and enforcement of the Regulations or making of Regulations pursuant to section 63(2) of the Act;

[...]

(c) management, leasing or licensing of the federal real property described in schedule B or described as federal real property in any supplementary letters patent, subject to the restrictions contemplated in section 8.1 and 8.3 and provided such management, leasing or licensing is for, or in connection with the following:

[...]

(iii) the following uses to the extent such uses are not described as activities in sections 7.1, 7.2 or 7.3:

(A) uses related to shipping navigation, transportation of passengers and goods, including the following uses to [or for users of] the port in connection with their use of the port and its facilities: [...] ferry operations, retail operations, tourist services and similar tourism-related activities located in the passengers terminal facilities [...]

[...]

(C) food, beverage and retail services in support of the local tourism industry [...]

provided such uses are carried on by Subsidiaries or other third parties pursuant to leasing or licensing arrangements; [Emphasis added]

[59] The Letters Patent also describe the navigable waters that are within the jurisdiction of the SJPA (Article 3.1, Schedule A) and the federal real property that SJPA manages (Article 3.1, Schedule B).

[60] The Regulations apply in respect of the navigable waters of a port, works and activities in a port and the property managed, held or occupied by a port authority (section 2). Prohibited activities are set out in section 5 and access to the port as described in section 7.

Part 3, Authorizations and Instructions for Activities in Ports, includes sections 23, 24 and 27 which are relevant to this matter.

23. A person may, in a port, conduct an activity set out in column 1 of the activity list if authorized to do so in writing expressly or by necessary implication under a contract or lease entered into with, or a licence granted by, the port authority.

24. If, by entering into a contract or lease or granting a licence, a port authority authorizes an activity set out in column 1 of the activity list that has or is likely to have any of the results prohibited under section 5, the port authority shall stipulate as a condition of the contract, lease or licence that the person with whom the contract or lease is made or to whom the licence is granted shall take measures designed to mitigate or prevent the result, if technically and economically feasible.

[...]

27. (1) A port authority may give a written authorization under this section to a person to conduct, in the port, an activity set out in column 1 of the activity list if

(a) an “X” is set out in column 3; or

(b) an “X” is set out in column 2 and the person or any person who would be covered by the authorization is unable to comply with the conditions posted or set out on forms for the conduct of the activity under section 25.

(2) On receipt of a request for an authorization, along with payment of the applicable fee, if any, and the information required under subsection 28(2), the port authority shall

(a) give its authorization;

(b) if the results of the conduct of the activity are uncertain or if the conduct of the activity is likely to have any of the results prohibited under section 5,

(i) refuse to give its authorization, or

(ii) give its authorization subject to conditions designed to mitigate or prevent the results; or

(c) if the port authority required that the person obtain insurance coverage, performance security or damage security in respect of the conduct of the activity and none is obtained or that which is obtained is inadequate, refuse to give its authorization.

[61] Schedule 1, activity list, Part 13 concerns the port of St. John's:

Item	Column 1 Activity	Column 2 Authorization by posted signs or forms (section 25)	Column 3 Authorization to a person (section 27)	Column 4 Prohibited (section 6)
...				
17.	placing a placard, bill, sign or device		X	
18.	selling or offering for sale goods or services		X	
19.	distributing circulars, leaflets or advertising materials		X	
20.	engaging in any form of solicitation		X	
21.	swimming			X

[62] It is clear from the legislative framework set out above that the Port of St. John's, for the purposes of the CMA, includes both the defined navigable waters of the port and the property managed by the SJPA. The SJPA, by way of subsection 28(2)(a), has the power to operate the port by engaging in activities relating to shipping, navigation and the transportation of passengers to the extent that those activities are specified in its Letters of Patent. ATI provides a seasonal tour boat service that transports passengers for a fee and wishes to operate from Pier 7 which is SJPA managed property. This clearly falls within shipping, navigation and the transportation of passengers. Therefore, the SJPA has the authority to engage in activities relating to ATI's operations pursuant to subsection 28(2)(a) so long as they are specified in the Letters Patent.

[63] Those port activities are described in the Letters Patent as including the management, leasing or licensing of the federal real property described therein, which would include the Pier 7 property, so long as it is for, or in connection with, uses relating to shipping, navigation and the transportation of passengers or retail services in support of the local tourism industry (Articles 7.1(c)(iii)(A) and (C)). In my view, it is clear that the activity of the SJPA in licensing ATI's tour boat operation conducted from the SJPA's real property is for, and is connected with a use by ATI relating to the transportation of passengers, as well as retail services in support of the local tourism industry. Therefore, the licensing of such an operation falls within the authority of the SJPA.

[64] Licensing pursuant to letters patent issued to port authorities has previously been considered by the Court. In *Air Canada*, above, in the context of determining if the Toronto Port Authority was a federal board, commission or other tribunal, the Federal Court of Appeal reviewed Article 2.1 of the letters patent for that port which is very similar to Article 7.1 of the SJPA Letters Patent. It agreed that it included "licenses" over federal real property and the issuance of "authorizations" for the use of the port. However, that these did not relate to takeoff and landing slots at the City Airport. This was because the granting of takeoff and landing slots, even if considered to be the granting of licenses over federal real property, is an integral part of the operation of the City Airport, a subject matter that was explicitly dealt with separately under Article 7.2(j). In my view, if taking off and landing from port-managed property is an activity that could, but for its segregation into another article, be licensed pursuant to an equivalent article, then the docking and undocking at Pier 7 for passenger embarkation and disembarkation can be captured by Article 7.1.

[65] Moreover, this Court has interpreted section 28 of the CMA, and Article 7.1 of the letters patent for the Vancouver Port Authority, a provision identical to Article 7.1 of the Letters Patent of the SJPA, as granting that port the authority to license those who have access to the port in the context of trucking companies providing cargo delivery services to the port (*PRTI Transport Inc v Vancouver Port Authority*, [1999] FCJ No 1701, 178 FTR 310 at para 30; *Pro-West Transport Ltd v Canada (Attorney General)*, 2006 FC 881 at para 43 (TD) (QL) [*Pro-West Transport*]).

In *Pro-West Transport*, Justice Teitelbaum stated that:

[42] [...] The VPA is licensing access to the VPA lands by setting conditions for access.

[...]

[43] To conclude, as was similarly held by my colleague Justice Rouleau in *PRTI Transport*, above, the VPA, like many other public authorities, can exercise its authority to grant licences containing terms and conditions relating to the use of and access to its property. In doing so, it does not exceed its jurisdiction.

[...]

[66] In addition to the authority pursuant to Article 7.1(iii)(A) and (C) of the Letters Patent, section 23 of the Regulations also permits a person to conduct an activity set out in column 1 of the activity list if expressly authorized to do so in writing, or by necessary implication under a contract or lease entered into with, or a licence granted by, the port authority. With respect to the SJPA, within Schedule 1 of the Regulations, Part 13, Column I, item 18, describes the activity of selling or offering for the sale of goods or services. Thus, ATI may conduct its business of offering its services as a tour boat operator from SJPA managed property, as this falls within an activity set out in column I, item 18, if authorized to do so in writing by way of a contract, lease or license granted by the port authority. While Article 7.1 pertains to the SJPA's

authority to undertake port activities in connection with stipulated uses, section 23 of the Regulations refers to the conduct of listed activities including offering services for sale. In my view, both provisions authorize the licensing of ATI's operations in these circumstances.

[67] ATI argues that since subsection 27(2)(a) of the Regulations is written using the mandatory "shall", the port authority must give that authorization upon receipt. Further, that the section 23 licensing requirement is, in effect, subservient to and not mutually exclusive of subsection 27(2)(a). Once the authorization is issued as of right, then if a license is required, it would simply be in furtherance of the implementation of the authorization.

[68] On the other hand, the SJPA submits that subsection 27(1) states only that the port authority "may" give a written authorization and that subsection 27(2)(a) is subject to that prior provision.

[69] The ACPA submits that ATI's interpretation of subsection 27(2)(a) of the Regulations would lead to the absurd result that any time a person sought an authorization, they need only ask and it must be granted, regardless of the effect it might have on port operations. I agree with this submission. I am also of the view that Parliament cannot have intended this outcome as it would essentially dismantle a port authority's control over port operations if issuing any authorization for any activity must automatically be granted as of right. It is notable, in this regard, that the activities listed in Part 13 include carrying out hot work, handling of dangerous goods, oil and liquefied natural gas transfers, conducting blasting and other activities that, if conducted as of right, would result in unacceptable hazard and risk.

[70] The obligation imposed by the word “shall” in subsection 27(2) does not oblige a port authority to provide its authorization upon receipt of any and all requests. Rather, subsection 27 must be read in whole. Subsection 27(1) states that a port authority may give a written authorization to conduct a described activity. Subsection 27(2) defines the port authority’s options in that regard. It shall either give its authorization, refuse to give its authorization or place conditions on an authorization, or, refuse authorization in the event of a failure to obtain adequate or any insurance or security. Subsection 27(2) does not compel a port authority to issue an authorization nor does it serve to render subsection 27(1) of no effect.

[71] I also do not agree that subsection 27(2)(a) serves to negate the licensing requirements of section 23. Part 3 of the Regulations contemplates authorizations by way of contract, lease or licence under section 23 or by other written authorization pursuant to section 27. They are distinct. It cannot be that the intent was that authorizations under section 27, automatically issued, would circumvent or limit a licensing requirement of section 23. This too would be an absurd result.

[72] As noted above, ATI also argued before Prothonotary Morneau that the SJPA had no jurisdiction or right to prohibit tour boat activities except as provided for in Part 1 of the Regulations and that subsection 27(2) provided for an automatic right for a user to sell its services. This argument was rejected as good management of a port requires that the activities of tour operators be licensed. I agree with that view.

[73] As to ATI's submission that the prevailing purpose of the CMA is to ensure that marine transportation services are organized to satisfy the needs of users such as itself (CMA, subsection 4(c)), and accordingly, that the SJPA must meet those needs and provide the described activities but that it has no control over how users actually use the port, this too cannot succeed. If this was true, competing usages such as container ships and container terminals, tour boats, sea planes, tanker transit and operations, passenger ferries, cargo ships, sailing vessels, all of whose operations pertain to shipping, navigation and transportation of persons or cargo and all of whom are port users, would be at a liberty to use port-managed property and navigate port waters at will. ATI's interpretation of subsection 4(c) of the CMA ignores its overall purpose which is to promote efficient, effective, safe and commercial viable port services at international standards. What ATI proposes is the antithesis of that purpose.

[74] The underlying theme of ATI's written submission was that any decision or action by the SJPA which interferes with, directly or indirectly, or restricts ATI's common law public right of navigation is *ultra vires*.

[75] It is, of course, correct that Parliament has exclusive jurisdiction over navigation and shipping pursuant to subsection 91(10) of the *Constitution Act*. However, to exercise that jurisdiction, Parliament must enact legislation. ATI submits that Parliament has done so by way of the *Canada Shipping Act, 2001* which exclusively regulates shipping and navigation and governs the exercise of the common law public right of navigation. Therefore, any aspect of the CMA which touches on those areas is *ultra vires*. As submitted by ATI, "The Canada Marine

Act did not devolve Parliament's constitutional jurisdiction over shipping and navigation on Canada's navigable waters to port authorities."

[76] In my view, Parliament is not restricted to enacting only one piece of legislation that concerns matters pertaining to shipping and navigation. It may address that subject matter as it sees fit. And, if it chooses to address aspects of that subject matter in different legislation then, so long as there is no conflict in application, it is free to do so. The election to proceed in this manner does not result in the additional federal legislation being "*ultra vires*". The *Canada Shipping Act, 2001* is the primary piece of legislation by which Parliament addresses issues concerning shipping and navigation. However, this does not limit its ability to also address other aspects of navigation and shipping in other legislation such as the CMA, the *Marine Liability Act*, SC 2001, c 6; the *Marine Insurance Act*, SC 1993, c 22; the *Navigable Waters Protection Act*, RSC 1985, c N-22 and otherwise.

[77] Further, the common law public right of navigation is not unrestricted. The *Canada Shipping Act, 2001* implements traffic reporting requirements, traffic routing schemes and traffic management plans that must be adhered to by all vessels transiting Canadian waters. Anchorage areas are dictated, and obstructions to navigation are prohibited. Ports are areas of heavy usage by multiple users and, by way of the CMA, Parliament permits certain regulation of vessel traffic and usage of port-managed property and navigable waters within the port, including by way of licensing.

[78] ATI's reference to *Friends of the Oldman River*, above, in support of its position, does not assist it. There, the Supreme Court acknowledged that the right of navigation is a public right of way, not an absolute right, and must be exercised reasonably so as not to interfere with the equal rights of others. However, it also recognized that the right can be modified or extinguished by statute, which is the case in this situation.

[79] Similarly, *Lafarge*, above, which was concerned with the division of powers between the federal and provincial governments and the doctrine of inter-jurisdictional immunity, does not assist ATI. There, the Supreme Court stated that, "While there is no separate head of legislative power over "ports", the federal government enjoys exclusive jurisdiction in relation to its public property and over shipping and navigation activities." The subsection 91(10) powers include the infrastructure of navigation and shipping activities. As stated in *Lafarge*, above, at para 62, "This power enables the federal government to build or regulate the necessary facilities like ports and to control the use of shipping lanes and water ways." By way of the CMA and the utilization of port authorities the federal government is regulating the use of port-managed property and navigable waters within such ports. It is entitled to do so. Further, by exercising its powers under the CMA as it has done in this instance, the SJPA is not acting outside of its authority.

[80] ATI also submits that the SJPA has altered the position it held in *Adventure Tours 1*, above, and now concedes that it has no jurisdiction to prohibit ATI, as a user of the port, from engaging in a core port activity from other berths or anchorages within the port. However, and as the SJPA pointed out, in *Adventure Tours 1* its submission was that ATI was free to negotiate

with and operate from private wharves in the Port of St. John's. In my view, the SJPA has not changed its position nor does anything turn on this point.

[81] The SJPA and the ACPA take differing positions on the extent to which licensing can apply to tour boat operations. The SJPA views licensing as applying only to operations from port-managed property, while the ACPA takes the view that all aspects of tour boat operations are subject to license as they are operating on navigable waters within the port. This is a question that need not be answered in this application for judicial review. However, if I were to consider, without deciding the point, I would be inclined towards ACPA's position given the foregoing description of the applicable legislative regime and the multi-faceted scope of port operations.

[82] In conclusion, for the reasons set out, it is my view that the SJPA does have the authority to require tour boat services operating from port-managed property to be licensed.

[83] ATI has not directly raised the question of whether the Decision was reasonable. As this issue was not before the Court, it need not be addressed.

[84] On one final point, as noted above, ATI's application for judicial review primarily concerned the SJPA's authority and jurisdiction. However, in the last two paragraphs of ATI's Notice of Application it asserts that the Decision was intended to specifically target and detrimentally affect one party, ATI, which is contrary to the requirements of natural justice and procedural fairness. Further, that the basis for the Decision was arbitrary and grossly

disproportionate to any legitimate objectives which was an error in law or in breach of natural justice or procedural fairness.

[85] The affidavit filed by Mr. Charles Anonson in support of the application for judicial review states at paragraph 19 that he believes the Decision was malicious and intended to specifically target and detrimentally affect ATI. However, he does not state the basis of this belief. At paragraph 20 he states that the Decision was arbitrary or grossly disproportionate to any legitimate objectives. No documentary or other evidence is attached in support of that statement. In its written submissions, ATI does not address these allegations.

[86] In these circumstances, the statements in Mr. Anonson's affidavit alone do not amount to a sufficient basis on which to support ATI's allegations of a breach of procedural fairness. The statements are neither explained nor substantiated with any evidence as to how the Decision or the decision-making process was malicious or targeted specifically at ATI. Nor has Mr. Anonson explained how the Decision, or the decision-making process, was arbitrary or disproportionate.

[87] Accordingly, the allegations of breach of procedural fairness are not made out and need not be addressed by this Court.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is denied; and
2. The SJPA shall have its costs.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-696-13

STYLE OF CAUSE: ADVENTURE TOURS INC v ST JOHN'S PORT
AUTHORITY AND ASSOCIATION OF CANADIAN
PORT AUTHORITIES

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND AND LABRADOR

DATE OF HEARING: APRIL 10, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** STRICKLAND J.

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