Federal Court  Cour fédérale

Date: 20161229

Docket: T-450-16

Citation: 2016 FC 1413

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Fredericton, New Brunswick, December 29, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY
(hereinafter the "Authority")

Applicant

and

CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.
(hereinafter the "Corporation")

Defendant

JUDGMENT AND REASONS

I. Nature of the matter

[1] The Court is hearing an application for judicial review of the arbitral award by the Honourable Pierre A. Michaud [the Arbitrator], dated February 17, 2016, in which he chose the

Corporation's final offer regarding the renewal of a contract of service. The Arbitrator exercised the power granted to him under section 15.2 of the *Pilotage Act*, RSC 1985, c P-14 [the Act].

[2] For the following reasons, I would allow the application for judicial review.

II. Background

[3] The Authority is a federal Crown corporation that is governed by the Act and responsible for administering and providing pilotage services in the Laurentians region, particularly in the waters of the St. Lawrence River. In order to fulfil its mandate of ensuring safe and efficient ship navigation, the Authority retains the services of the Corporation through a contract of service for licensed pilots and the training of apprentice pilots.

[4] For its part, the Corporation is a legal person established for a private interest, which provides maritime pilotage services in its district, which is between the port of Québec and the port of Montreal. The Corporation's objects are specified in the contract of service that was reached with the Authority:

> [TRANSLATION]
> … the purposes of the Corporation are, among others, to negotiate the best monetary benefits from the best contract of service for the services of licensed pilots, to promote the advancement of the marine pilotage profession and to ensure safe navigation in the districts …

[5] The Corporation has a monopoly on pilotage services in its district.

[6] The Act sets forth the objects and powers of the Authority in sections 18 and 20, respectively, as follows:

> **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.
>
> **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:
>
> …
>
> d) prescribing the notice, if any, to be given by a ship, of its estimated time of arrival in a compulsory pilotage area or its estimated time of departure from a place in a compulsory pilotage area and the manner of giving the notice.

[7] As a result, with the approval of the Governor in Council, the Authority can introduce general regulations in order to carry out its mission.

[8] With the contract of service about to expire, the Authority and the Corporation held around 29 negotiation sessions between March 2015 and October 2015 in order to renew the contract between the parties. The parties agreed to extend the existing contract for another five years (until June 30, 2020) with the exception of certain contentious issues that were submitted to the Arbitrator.

[9] Under subsection 15.2(1), the Arbitrator had to choose one of the two final offers in its entirety. For the reasons set forth in the arbitral award, the Arbitrator chose that of the Corporation. The Corporation’s final offer therefore became final and binding.

III. The arbitral decision

[10] The Arbitrator reviewed the six disputed aspects of the new contract. I will only mention the first and sixth aspects, which are the subject of this application for judicial review. They are summarized as follows:

1. Sections 11.02 of Appendix D and 9.02 of Appendix C, which deal with the returning of a ship to its master's control;
2. Letter of understanding no. 13 on notice of night departure.

[11] The Arbitrator correctly specified that all the elements of the offer from either party must be valid and legal to be reasonable, otherwise, the Arbitrator's decision itself would be invalid.

[12] The Authority argued before the Arbitrator that the Corporation's final offer was *ultra vires*, since the effect of the provisions that dealt with the two above aspects would undermine the regulatory power of the Authority and the Governor in Council, which comes from the *Laurentian Pilotage Authority Regulations*, CRC, c 1268 [the Regulations].

[13] In his analysis of the legality of the Corporation's final offer, the Arbitrator cited the decision from *Pilotes du Saint-Laurent Central Inc. v. Laurentian Pilotage Authority*, 2002 FCT 846, [2002] FCJ No. 1118 [*Pilotes 2002*], in which this Court analyzed the effect of the agreement that governed the relationship between these same parties. In my view, the Arbitrator erroneously retained from that decision that there is no hierarchy of the Authority's regulatory power regarding its contractual obligations. Even though I find that there is a hierarchy and that the regulations must always be complied with during negotiations, I agree with the Arbitrator

and Mr. Justice Pelletier, then a judge of the Federal Court, in *Pilotes 2002*, that the Authority can carry out its mission by regulation, by negotiation or by a combination of the two.

[14] The Arbitrator concluded by saying that he chose the Corporation's offer in its entirety for reasons that will be discussed later.

IV. Issues

[15] The issues before this Court are as follows:

1. What is the applicable standard of review?
2. Is the offer that was chosen by the Arbitrator (in this case, the Corporation's offer) *ultra vires* the legislation and, as a result, unreasonable?

V. Analysis

A. *Standard of review*

[16] The Authority maintains that, given the nature of the reasons for disputing the arbitral award, there is no need to apply a standard of review. I cannot support this proposal. *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 62, [2008] 1 SCR 190 [*Dunsmuir*] establishes that this Court must ascertain whether the jurisprudence has already determined in a satisfactory manner the appropriate degree of deference. In this case, the parties did not refer the Court to decisions in which the standard of review was determined in a context of arbitral decisions resulting directly from section 15.2 of the Act; this analysis should therefore be undertaken.

[17] Based on *Dunsmuir*, above, several factors should be considered: a privative clause, a discrete and special administrative regime in which the decision-maker has special expertise, and

the nature and importance of the question of law. The presence of those factors argues in favour of deference and the standard of reasonableness.

[18] With respect to the first factor, the Corporation argues that the Act contains the equivalent of a privative clause in subsection 15.2(3), which reads as follows:

> (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.

[19] The Corporation relies on *National Gypsum (Canada) Ltd. v. Canadian National Railway Company*, 2014 FC 869 at paragraph 49, [2014] FCJ No. 1293 [*National Gypsum*], in which Madam Justice Strickland found that a provision of the *Canada Transportation Act*, SC 1996, c 10, under which the arbitrator was required to choose the final offer of one of the two parties, resembled a privative clause. I believe that it is the same for subsection 15.2(3) of the Act.

[20] For the second factor, the Authority maintains that the Arbitrator has no expertise with applying the Act, and that the standard of review is correctness. However, the Arbitrator was chosen by consensus between the two parties. Although I acknowledge that the Arbitrator does not have the same level of expertise in applying the Act as a genuine administrative decision-maker addressing his or her home statute, I support the position that "if an arbitrator has been selected … and is fulfilling the role described within that scheme, then it must be assumed that he has acquired special expertise" (*National Gypsum*, above, at paragraph 48). In addition, it is generally the reasonableness standard of review that applies to interpreting "statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, above, at

paragraph 54). As a result, I believe that the Arbitrator has expertise that argues in favour of the reasonableness standard of review.

[21] Lastly, this issue does not have great importance for the legal system. It affects the Authority and the Corporation. Having found the presence of the first two elements and the absence of a question of law of general importance, I find that the issues require the reasonableness standard of review.

B. *Is the Corporation's offer ultra vires?*

[22] The Authority objects to two aspects of the Corporation's final offer: the relief of the pilot by the ship's master, and the notice of a night departure.

(1) Relief of the pilot by the ship's master

[23] Section 26 of the Act sets forth certain instances in which the master of a ship may relieve the pilot of his or her duties:

> **26** (1) Notwithstanding any provision of this Part, where the master of a ship <u>believes on reasonable grounds that the actions of a licensed pilot or holder of a pilotage certificate on board a ship are, in any way, endangering the safety of the ship, the master may, in the interest of the safety of the ship, take the conduct of the ship</u> from the licensed pilot or holder of a pilotage certificate or relieve the licensed pilot from duty on board ship.
>
> [Emphasis added.]

[24] That is the only provision that allows the master to ensure the ship's conduct when it is in danger. However, during arbitration, the evidence showed that masters and/or shipowners abused this power. In fact, four companies had a systematic policy under which, when the ship is getting

under way and berthing, the masters ensure the ship's conduct even if it is not in danger. In addition, those policies remained in force even after the Authority became aware of them; it took no measures to remedy this supposed violation of the Act. For that reason, in its final offer, the Corporation added the following section (which is found in sections 11.02 of Appendix B and 9.02 of Appendix C):

> [TRANSLATION]
> When the Authority is informed that a master has relieved a pilot for reasons other than those set out in subsection 26(1) of the Act, if needed, it will take the necessary measures to bring an immediate stop to this practice and to prevent the master and/or shipowner from reoffending.

[25] The Authority maintains that this provision illegally prejudices its discretionary power to enforce compliance with the Act by undermining the following of its powers: (i) determining whether there was a violation of section 26 of the Act; and (ii) choosing the method for ensuring compliance with the Act. In summary, the Authority believes that this provision would oblige it to impose penalties in cases that, in its view, would not justify it. On that point, the Corporation specifies that informing the Authority of a breach of the Act does not necessarily impose the obligation to act upon it. In support of its claim, the Corporation notes the presence of the words [TRANSLATION] "as applicable" in the text of its offer.

[26] The Authority has broad discretionary powers to enforce compliance with the Act. In addition, section 48 of the Act allows any individual to file a complaint with the civil authorities, including the Corporation. In fact, that section sets forth penalties for contraventions of the Act. I believe that no one, including the Authority, can or should be obliged to file a complaint with the authorities or to take any action whatsoever against an individual. In my point of view, this

freedom to either file a complaint or not is an integral part of our society. If the Corporation believes that a master, shipowner or other person contravenes the Act, it is not prohibited from filing complaints with the authorities.

[27] If the Authority must respond to the Corporation's requests by taking measures against a shipowner or master who has allegedly contravened section 26, the Authority's discretionary power is in practice delegated first to the pilots. Additionally, if the Authority refuses to "take the necessary measures to bring an immediate stop to this practice and to prevent the master and/or shipowner from reoffending" (therefore having no other choice but to take action against a presumed offender), and that refusal is disputed through a grievance, the Authority's discretionary power is delegated to an arbitrator.

[28] The case of *Happy Adventure Sea Products (1991) Ltd. v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2006 NLCA 61, at paragraph 24, 260 Nfld & PEIR 344 dealt with the issue of whether a public authority can sign contracts that limit its discretionary power in law. By applying that case to this one, I conclude that it falls to the Authority to exercise its discretionary power to take measures to ensure compliance with section 26 of the Act. The addition of the disputed clause undermines the Authority's discretionary power and, consequently, the Arbitrator's decision on the matter is not reasonable.

(2) Notices of night departure

[29] Section 8 of the Regulations provides for certain timeframes for the notices required when a ship needs a pilot:

> **8** The owner, master or agent of a ship that is to depart from a berth in the compulsory pilotage area for any purpose, other than making a movage, shall, by calling a pilot despatch centre,
>
> a) give a first notice of its estimated time of departure 12 hours before its estimated time of departure; and
>
> b) give a final notice confirming or correcting its estimated time of departure at least four hours before the estimated time.

[30] Section 10 deals with timeframes required when the owner, master or agent of a ship wants to correct the time of departure.

[31] As a reminder, the Regulations were implemented by the Authority under section 20 of the Act, which gives it the power to implement regulations to prescribe the notice, if any, to be given by a ship, of its estimated time of arrival in a compulsory pilotage area or its estimated time of departure.

[32] The Corporation maintains that letter of understanding no. 13 sets forth more restrictive, even incompatible, standards than those of the Regulations. It maintains that the Authority cannot contract for the purposes of limiting its regulatory powers or committing itself in advance to [TRANSLATION] "provide services that limit its regulatory discretion." In support of its claims, the Authority notes that it requires the approval of the Governor in Council to adopt its regulations. The Corporation is opposed to those proposals and cites section 15 of the Act. That provision sets out the steps to take in the event that the Authority and the Corporation do not agree on the renewal of the contract of service for the assignment of pilots. I emphasize this last term because it will become important to the Corporation's position.

[33] As previously mentioned, when the contract renewal negotiation process raises contentious issues, section 15.2 allows an arbitrator to choose the final offer of one of the two parties, which will be "final and binding and becomes part of the new contract for services." For that purpose, I first emphasize that the Authority knew the possible outcome of arbitration from the start, and that it tried to negotiate the existing notice timeframes.

[34] The parties even created a committee with two representatives from each party and a chair chosen by both parties to make recommendations on notices for night departures. The Arbitrator recalled in his arbitral award that, as was established by the parties, he had to consider the committee's recommendations in his analysis of the final offers. The Arbitrator found that [TRANSLATION] "the issues that were analyzed in the risk review by Innovation Maritime on the safe duration of a transit done by a single pilot and those of the review follow-up committee are closer to the offers of the Corporation … "

[35] In addition, the Authority can legally carry out its mission by regulation or by contract (see *Pilotes 2002*, above). In that case, which involved the same parties, Pelletier J., then a judge of the Federal Court, reviewed Parliament's intention in order to resolve this same issue:

> **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 …
>
> ...
>
> **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.
>
> ...
>
> **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. … *Association des juristes de l'État v. Gil Rémillard*, [1994] R.J.Q. 2909, at 2915 and 2917: …

[36] The Authority claims that the disputed section is in conflict with the notice, which is found in section 8 of the Regulations and creates different expectations for masters of ships. In addition, the Authority claims that masters should have some certainty regarding their times of departure. To support its position, it refers to the costs that can accumulate when a ship is docked. For its part, the Corporation listed before the Arbitrator and this Court the sections in the current contract that may contain contradictions in the Regulations and the contract regarding the expectations of masters. For example, section 6.06, which was negotiated in 1994, reads as follows:

> [TRANSLATION]
> The departure of a ship from its berth, mooring or lock cannot take place after the fourth hour before dusk and before dawn the next day, with dusk and dawn being determined according to section 15.

[37] It is clear that this section of the contract may limit the departure of a ship, even if the master complies with the notices set forth under section 8 of the Regulations.

[38] To cite another example, in the contract signed in 2012, the parties agreed on the following clause:

> [TRANSLATION]
> For tankers greater than 25,000 DWT, ships greater than 245 m in length and ships with a draught greater than 10.3 m for container

> ships and 10 m for other ships, the pilot is assigned as per the timetable mentioned in sections 8.15 and 8.16 if they are leaving when night is falling.

[39] The timetable set out for those ships does not guarantee the masters that they can leave the dock at the scheduled time, even if they give the notice mentioned in section 8 of the Regulations.

[40] It follows that the conditions for assigning pilots do not undermine the Authority's powers for implementing regulations and are not *ultra vires*. In addition, given that the Corporation's final offer regarding the notice of night departure does not contravene the Regulations (it is only more restrictive), it was reasonable for the Arbitrator to find that that part of the Corporation's final offer was legal.

VI. Conclusion

[41] In summary, the Authority objected to two elements before this Court that were included in the Corporation's final offer: (i) sections 11.02 of Appendix D and 9.02 of Appendix C, which deal with the returning of a ship to its master's control; and (ii) letter of understanding no. 13 on the notice of night departure. For the reasons stated above, I believe that sections 11.02 of Appendix D and 9.02 of Appendix C are *ultra vires* because they undermine the Authority's discretionary powers that are conferred upon it by the Act. However, that is not the case for letter of understanding no. 13. Due to section 15.2 of the Act, I would return the case to the Arbitrator with instructions that he choose one of the two final offers: the Authority's or the Corporation's. The Corporation's offer will need to be amended to eliminate the sections that were judged to be *ultra vires*.

[42] In conclusion, I note that the Corporation requested that the Court rule on the legality of a clause proposed by the Authority, that is, the validity of its offer to recommend some amendments to the Governor in Council on the issue of notices of departure. Since the Arbitrator did not rule on this issue, I will not address it.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed in part. Sections 11.02 of Appendix D and 9.02 of Appendix C are declared *ultra vires*. As a result, the Arbitrator's arbitral award from February 17, 2016, is set aside and the case is referred back to the Arbitrator so that he may choose either the Authority's final offer or the Corporation's final offer, with that of the Corporation needing to be amended to eliminate sections 11.02 from Appendix D and 9.02 from Appendix C. Since the parties claimed two issues before this Court, and the Authority was successful in one and the Corporation in the other, I consider it appropriate not to award costs. The application is allowed under the terms noted above, without costs.

"B. Richard Bell"
Judge

Certified true translation
This 15th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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