Federal Court  Cour fédérale

Date: 20180307

Docket: T-348-16

Citation: 2018 FC 250

Ottawa, Ontario, March 7, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

OCEANEX INC.

Applicant

and

CANADA (MINISTER OF TRANSPORT) AND MARINE ATLANTIC INC.

Respondents

and

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

Intervener

JUDGMENT AND REASONS

[1] This is an application for judicial review brought by Oceanex Inc. ("Oceanex"), pursuant to s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 ("*Federal Courts Act*"), challenging a decision which approved the 2016/17 rates for the provision by Marine Atlantic Inc. ("MAI") of commercial freight services by sea to and from Port aux Basques on the island of Newfoundland and North Sydney, Nova Scotia. As will be discussed below, the identity of the decision-maker is at issue and the challenge has given rise to a notice of a constitutional question.

[2] Oceanex asserts that the Minister of Transport ("Minister") permitted MAI to charge freight rates that are heavily subsidized, compete unfairly with and are detrimental to Oceanex, and that the decision that effected the 2016/17 freight commercial rates ("2016/17 Freight Rate Decision") was made without taking into account, and was inconsistent with, relevant considerations, in particular, the National Transportation Policy ("NTP") as set out in s 5 of the

Canada Transportation Act, SC 1996, c 10 ("CTA"). For the reasons that follow I have determined that Oceanex's application cannot succeed.

Background

[3] What follows is a brief description of the parties, the relevant legislation, the evidence and factual background leading up to the making of the 2016/17 Freight Rate Decision.

The Parties

[4] Oceanex is a corporation incorporated and existing pursuant to the *Canada Business Corporations Act*, RSC, 1985, c C-44 ("CBCA"). It describes itself as carrying on the business of short sea shipping and intermodal freight transportation in Canada. As a freight carrier, it offers scheduled pier to pier commercial freight services by water between the ports of Halifax, Nova Scotia and Montreal, Quebec and the port of St. John's, Newfoundland and Labrador. It states that it also offers door-to-door intermodal freight transportation service between the island of Newfoundland and destinations across North America. Oceanex was formed in 1991 and from 1998 to 2007 operated as a limited purpose trust, traded publically on the Toronto Stock Exchange. In 2007 a group of investors acquired all of the outstanding shares of Oceanex and privatized the company, one of those investors was Captain Sidney J. Hynes who has held the position of Executive Chairman of Oceanex since the privatization. Oceanex currently owns and operates three vessels and states that it transports all types of freight traffic, including general cargo, roll on/roll off equipment, containers and trailers.

[5] MAI is a corporation incorporated and existing pursuant to the CBCA. It is also a parent Crown corporation, as defined in s 83(1) of the *Financial Administration Act*, RSC, 1985, c F-11 ("FAA"), and is listed as such in Schedule III of the FAA. As a Crown corporation, its corporate affairs and financial administration are governed by Part X of the FAA. By way of corporate history, CN Marine Corporation was incorporated in December 1977 under the CBCA, at which time its shares were held by its parent company, the Canadian National Railway Corporation ("CNR"). In December 1978, the name of CN Marine Corporation was changed to CN Marine Inc. In 1986, pursuant to the *Marine Atlantic Inc. Acquisition Authorization Act*, SC 1986, c 36, ("MAIAAA") the Minister acquired from CNR all of the common shares of CN Marine Inc., which were held in trust for Her Majesty the Queen in Right of Canada and, pursuant to s 3 of the MAIAAA, the company's name was changed to Marine Atlantic Inc.

[6] MAI currently provides services on two routes. The first is a year round daily service between North Sydney, Nova Scotia and Port aux Basques, Newfoundland and Labrador which carries a mix of commercial and passenger traffic. The trip of 96 nautical miles takes approximately 6 hours from port to port. During off peak season, January to March, there are a minimum of 2 scheduled sailings per day from each of North Sydney and Port aux Basques, or 28 sailings per week. During the shoulder season, September to December and April to June, this increases to 34 sailings per week and, during peak season, July to August, there are 46 crossings per week. The second route is between North Sydney and Argentia, Newfoundland and Labrador. This is seasonal, June through September, primarily transports passengers, is a 280 nautical mile trip which takes approximately 14 to 16 hours port to port and is offered once per day between Monday and Saturday. MAI currently operates four vessels which have the

ability to accommodate both commercial and private passenger vehicle traffic as well as passengers. It owns three of these vessels and charters a fourth.

[7] The Minister of Transport is responsible for the management and direction of the Department of Transport ("Transport Canada" or "TC") (*Department of Transport Act*, RSC 1985, c T-18 ("*Department of Transport Act*"), s 3(2)). This includes being accountable to Parliament for Crown corporations falling within the mandate of Transport Canada, such as MAI. The Crown Corporation and Portfolio Governance group within Transport Canada supports the Minister in fulfilling these responsibilities for reporting to Parliament. Canada acknowledges that under the Terms of Union of Newfoundland with Canada ("Terms of Union"), which are incorporated by and are a schedule to the *Newfoundland Act*, 12-13 Geo. VI, c 22 (U.K.) ("*Newfoundland Act*"), as referenced in s 52(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Constitution Act, 1982*") and thereby are a part of the Constitution of Canada, Canada is constitutionally obliged to provide a ferry service between North Sydney, Nova Scotia and Port aux Basques, Newfoundland and Labrador ("Constitutional Route"). This service is effected by MAI.

[8] By Order dated July 19, 2016, the Attorney General of Newfoundland and Labrador ("Newfoundland") was granted intervenor status in this application. Newfoundland states that it intervenes as the application requires judicial interpretation of some of the most important provisions of the Terms of Union and because any decision that eliminates or reduces MAI's federal subsidy will detrimentally impact the economy and the well-being of the citizens of Newfoundland and Labrador.

Constitutional Route

[9] While the distance of the Constitutional Route is not great, a mere 96 nautical miles, the route is extremely important to the residents and economy of Newfoundland and Labrador. It has been described as the economic lifeline of the province, delivering goods to stores, exports to market as well as tourists to hotels and, friends and relatives to homes; the province's marine highway ("On Deck & Below: A Report on the Gulf Ferry Forum", Sept 1999 report to the Federal Minister of Transport, Leamon Affidavit, Exhibit 4) and, as "an essential infrastructure component in strengthening the province's economy" ("Our Place in Canada: Main Report of the Royal Commission on Renewing and Strengthening Our Place in Canada", Leamon Affidavit, Exhibit 6). As to the ferry service on the Constitutional Route, a Special Examination Report of Marine Atlantic Inc. by the Auditor General of Canada ("Auditor General's 2009 Report") described MAI, which is the only provider of ferry services on that route, as a vital transportation link to Newfoundland and Labrador, its commercial customers transporting about 50% of the goods entering the province, including about 90% of perishable goods (Leamon Affidavit, Exhibit 8). The Canadian Industrial Relations Board ruled in 2003 that a strike or lockout affecting MAI's ferry operations at any time of the year would impose an immediate and serious danger to Newfoundland's public safety or health (*Marine Atlantic Inc,* 2004 CIRB 275 at paras 41-45, Leamon Affidavit, Exhibit 5) and, a report prepared by the Minister of Transport's Advisory Committee on Marine Atlantic Inc. states that it is generally recognized that MAI plays an essential role in the economic and social life of the province, carrying approximately 37% of all passengers, 65% of all freight (including 95% of all perishable goods) as well as hazardous goods, and that tourists travelling by ferry contribute to the economy of the province (A Strategy

for the Future of Marine Atlantic Inc., Minister of Transport's Advisory Committee on Marine Atlantic Inc., March 31, 2005, Leamon Affidavit, Exhibit 7).

Legislation

(i) *Terms of Union*

[10] When Newfoundland became a province of Canada in 1949, the agreed basis for that union was set out in the Terms of Union. Relevant to this application are Terms 31, 32 and 36:

> *Public Services, Works and Property*
>
> 31. At the date of Union, or as soon thereafter as practicable, Canada will take over the following services and will as from the date of Union relieve the Province of Newfoundland and Labrador of the public costs incurred in respect of each service taken over, namely,
>
> (a) the Newfoundland Railway, including steamship and other marine services;
>
> (b) the Newfoundland Hotel, if requested by the Government of the Province of Newfoundland and Labrador within six months from the date of Union;
>
> (c) postal and publicly owned telecommunication services;
>
> (d) civil aviation, including Gander Airport;
>
> (e) customs and excise;
>
> (f) defence;
>
> (g) protection and encouragement of fisheries and operation of bait services;
>
> (h) geological, topographical, geodetic, and hydrographic surveys;
>
> (i) lighthouses, fog alarms, buoys, beacons, and other public works and services in aid of navigation and shipping;

> (j) marine hospitals, quarantine, and the care of shipwrecked crews;
>
> (k) the public radio broadcasting system; and
>
> (l) other public services similar in kind to those provided at the date of Union for the people of Canada generally.
>
> 32.(1) Canada will maintain in accordance with the traffic offering a freight and passenger steamship service between North Sydney and Port aux Basques, which, on completion of a motor highway between Corner Brook and Port aux Basques, will include suitable provision for the carriage of motor vehicles.
>
> (2) For the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime region of Canada, and through traffic moving between North Sydney and Port aux Basques will be treated as all rail traffic.
>
> (3) All legislation of the Parliament of Canada providing for special rates on traffic moving within, into, or out of, the Maritime region will as far as appropriate, be made applicable to the Island of Newfoundland.
>
> …
>
> 36. Without prejudice to the legislative authority of the Parliament of Canada under the British North America Acts, 1867 to 1946, any works, property, or services taken over by Canada pursuant to these Terms shall thereupon be subject to the legislative authority of the Parliament of Canada.

(ii) *Constitution Act, 1982*

[11] Pursuant to s 52 of the *Constitution Act, 1982*, the Terms of Union are part of the Constitution of Canada:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the	52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

inconsistency, of no force or effect.	
(2) The Constitution of Canada includes	(2) La Constitution du Canada comprend :
(a) the Canada Act 1982, including this Act;	a) la Loi de 1982 sur le Canada, y compris la présente loi;
(b) the Acts and orders referred to in the schedule; and	b) les textes législatifs et les décrets figurant à l'annexe;
(c) any amendment to any Act or order referred to in paragraph (a) or (b).	c) les modifications des textes législatifs et des décrets mentionnés aux alinéas a) ou b).
(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.	(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

[12] Section 53 and the Schedule to the *Constitution Act, 1982*, Modernization of the Constitution, lists amendments to the *British North America Act, 1867*, as revised, now the *Constitution Act, 1867*, and other enactments effecting the admission of provinces and territories. The *Newfoundland Act* is so listed, the Terms of Union being a schedule thereof.

(iii) *Marine Atlantic Inc. Acquisition Authorization Act*

[13] Pursuant to s 3 (1) of the MAIAAA, on June 27, 1986, the name of CN Marine Inc., a corporation incorporated under the CBCA, was changed to Marine Atlantic Inc. and the articles of the corporation were amended accordingly. Further, the Minister was authorized to and did acquire all the common shares of MAI held by CNR to be held in trust for Her Majesty in right

of Canada (s 4(2)). Sections 7 and 8 dealt with certain property and works and s 9 with the amendment of MAI's articles of incorporation to restrict its business to marine transportation:

7 (1) On the direction of the Minister, the National Company shall transfer to Her Majesty in right of Canada the property and works listed in Part II of Schedule B to Order in Council P.C. 1979-1449 of May 9, 1979.	7 (1) Au reçu de l'ordre du ministre, la Société nationale transfère à Sa Majesté du chef du Canada les biens et ouvrages énumérés à la partie II de l'annexe B du décret C.P. 1979-1449 du 9 mai 1979.
(2) The management, administration and control of the property and works transferred to Her Majesty pursuant to subsection (1) is hereby vested in the Minister.	(2) Le ministre est chargé de la gestion et du contrôle des biens et ouvrages transférés à Sa Majesté en application du paragraphe (1).
8 The Minister, on such terms and conditions as the Governor in Council may prescribe, may sell, lease or otherwise dispose of to Marine Atlantic Inc., or by agreement in writing permit Marine Atlantic Inc. to use,	8 Le ministre peut, aux conditions que le gouverneur en conseil détermine, vendre ou donner en location à Marine Atlantique S.C.C., ou d'une façon générale aliéner au profit de la société, ou permettre à celle-ci, selon entente écrite, d'utiliser les biens suivants — dont la propriété, le contrôle ou l'occupation appartient à Sa Majesté — gérés ou contrôlés par le ministre :
(a) any real or personal property or interest therein, or	a) des biens meubles ou immeubles, ou des droits sur ceux-ci;
(b) any power, right or privilege over or with respect to any real or personal property or interest therein	b) tout pouvoir, droit ou privilège afférent à des biens meubles ou immeubles, ou des droits liés à tel pouvoir, droit ou privilège.
that is vested in or owned, controlled or occupied by Her Majesty in right of Canada and over which the Minister has the management, administration or control.	
9 The Minister and Marine Atlantic Inc. are hereby authorized to take, and shall	9 Le ministre et Marine Atlantique S.C.C. sont autorisés à prendre les mesures

within three months after the coming into force of this section take, such steps as are necessary to amend the articles of Marine Atlantic Inc. to restrict the business that it may carry on to the acquisition, establishment, management and operation of a marine transportation service, a marine maintenance, repair and refit service, a marine construction business and any service or business related thereto.	nécessaires pour modifier les statuts de Marine Atlantique S.C.C. afin de limiter les activités de la société à l'acquisition, la mise sur pied, la gestion et l'exploitation d'un service de transport maritime, d'un service d'entretien, de réparations et de radoub, d'une entreprise de construction navale et d'une entreprise ou de services corrélatifs. La procédure de modification est entamée dans les trois mois suivant l'entrée en vigueur du présent article.

(iv) *Financial Administration Act*

[14] Part X of the FAA concerns Crown corporations and is binding on the Crown (s 84). Subsection 83(1) sets out the definitions for that part including a "parent crown corporation" which means a corporation that is wholly owned directly by the Crown, but does not include a departmental corporation.

[15] Pursuant to s 83(2), a corporation is wholly owned directly by the Crown if:

(a) all of the issued and outstanding shares of the corporation, other than shares necessary to qualify persons as directors, are held, otherwise than by way of security only, by, on behalf of or in trust for the Crown; or	a) toutes les actions en circulation de la personne morale, sauf les actions nécessaires pour conférer la qualité d'administrateur, sont détenues, autrement qu'à titre de garantie seulement, par Sa Majesté, en son nom ou en fiducie pour elle;
(b) all the directors of the corporation, other than *ex officio* directors, are appointed by the Governor in Council or	b) les administrateurs de la personne morale, sauf les administrateurs nommés

by a minister of the Crown with the approval of the Governor in Council.	d'office, sont nommés par le gouverneur en conseil ou par un ministre avec l'approbation du gouverneur en conseil.

[16] Corporate affairs are addressed in Division I of the FAA. Each Crown corporation is ultimately accountable, through the appropriate minister, to Parliament for the conduct of its affairs (s 88). The Governor in Council may, on the recommendation of that minister, give a directive to a parent Crown corporation, if the Governor in Council is of the opinion that it is in the public interest to do so (s 89(1)). However, before a directive is given, the minister shall consult the board of directors of the corporation with respect to the content and effect of the directive (s 89(2)). The minister must also cause a copy of any directive given to a parent Crown corporation to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the directive is given (s 89(4)). Forthwith after implementing a directive and completing any actions required to be taken in connection therewith, the parent Crown corporation shall notify the minister that the directive has been implemented (s 89(6)).

[17] Division II addresses officers and directors. An officer-director, in respect of a parent Crown corporation, is defined to mean the chairperson and the chief executive officer of the corporation, by whatever name called (s 104.1). Section 105 provides for the appointment of directors and officer-directors:

105 (1) Each director, other than an officer-director, of a parent Crown corporation shall be appointed by the appropriate Minister, with the approval of the Governor in Council, to hold office during pleasure for a term not	105 (1) À l'exception des administrateurs-dirigeants, les administrateurs d'une société d'État mère sont nommés à titre amovible par le ministre de tutelle, avec l'approbation du gouverneur en conseil, pour des mandats respectifs de

exceeding four years that will ensure, as far as possible, the expiration in any one year of the terms of office of not more than one half of the directors of the corporation.	quatre ans au maximum, ces mandats étant, dans la mesure du possible, échelonnés de manière que leur expiration au cours d'une même année touche au plus la moitié des administrateurs.
…	…
(5) Each officer-director of a parent Crown corporation shall be appointed by the Governor in Council to hold office during pleasure for such term as the Governor in Council considers appropriate.	(5) Les administrateurs-dirigeants d'une société d'État mère sont nommés à titre amovible par le gouverneur en conseil pour le mandat que celui-ci estime indiqué.

[18] Subject to Part X, the board of directors of a Crown corporation is responsible for the management of the businesses, activities and other affairs of the corporation (s 109).

[19] Division III deals with financial management and control:

122 (1) Each parent Crown corporation shall annually submit a corporate plan to the appropriate Minister for the approval of the Governor in Council on the recommendation of the appropriate Minister and, if required by the regulations, on the recommendation of the Minister of Finance.	122 (1) Chaque société d'État mère établit annuellement un plan d'entreprise qu'elle remet au ministre de tutelle pour que celui-ci et, si les règlements l'exigent, le ministre des Finances en recommandent l'approbation au gouverneur en conseil.
(2) The corporate plan of a parent Crown corporation shall encompass all the businesses and activities, including investments, of the corporation and its wholly-owned subsidiaries, if any.	(2) Le plan d'une société d'État mère traite de toutes les activités de la société et, le cas échéant, de ses filiales à cent pour cent, y compris leurs investissements.

(3) The corporate plan of a parent Crown corporation shall include a statement of

(a) the objects or purposes for which the corporation is incorporated, or the restrictions on the businesses or activities that it may carry on, as set out in its charter;

(b) the corporation's objectives for the period to which the plan relates and for each year in that period and the strategy the corporation intends to employ to achieve those objectives; and

(c) the corporation's expected performance for the year in which the plan is required by the regulations to be submitted as compared to its objectives for that year as set out in the last corporate plan or any amendment thereto approved pursuant to this section.

(4) The corporate plan of a parent Crown corporation shall be prepared in a form that clearly sets out information according to the major businesses or activities of the corporation and its wholly-owned subsidiaries, if any.

(5) No parent Crown corporation or wholly-owned subsidiary of a parent Crown corporation shall carry on any business or activity in any period in a manner that is not consistent with the last corporate plan of the parent Crown corporation or any

(3) Le plan d'une société d'État mère comporte notamment les renseignements suivants :

a) les buts pour lesquels elle a été constituée ou les restrictions quant aux activités qu'elle peut exercer, tels qu'ils figurent dans son acte constitutif;

b) ses objectifs pour la durée du plan et chaque année d'exécution de celui-ci, ainsi que les règles d'action qu'elle prévoit de mettre en oeuvre à cette fin;

c) ses prévisions de résultats pour l'année durant laquelle le plan doit, en conformité avec les règlements, être remis, par rapport aux objectifs pour cette année mentionnés au dernier plan, original ou modifié, approuvé en conformité avec le présent article.

(4) Le plan d'une société d'État mère doit mettre en évidence les principales activités de la société et, le cas échéant, de ses filiales à cent pour cent.

(5) Il est interdit à une société d'État mère ou à une de ses filiales à cent pour cent d'exercer pendant quelque période que ce soit des activités d'une façon incompatible avec le dernier plan, original ou modifié, qui a été approuvé en conformité

amendment thereto approved pursuant to this section in respect of that period.	avec le présent article pour cette période.
(6) Where a parent Crown corporation, or a wholly-owned subsidiary of a parent Crown corporation, proposes to carry on any business or activity in any period in a manner that is not consistent with the last corporate plan of the corporation or any amendment thereto approved pursuant to this section in respect of that period, the corporation shall, before that business or activity is so carried on, submit an amendment to the corporate plan to the appropriate Minister for approval as described in subsection (1).	(6) Dans le cas où une société d'État mère ou l'une de ses filiales à cent pour cent se propose d'exercer une activité d'une façon incompatible avec le dernier plan, original ou modifié, approuvé en conformité avec le présent article, la société, avant que cette activité ne soit commencée, soumet un projet de modification du plan au ministre de tutelle pour qu'il en recommande l'approbation dans les conditions prévues au paragraphe (1).
(6.1) The Governor in Council may specify such terms and conditions as the Governor in Council deems appropriate for the approval of a corporate plan or an amendment to a corporate plan.	(6.1) Le gouverneur en conseil peut assortir de conditions l'approbation d'un plan ou de ses modifications.
(7) The Governor in Council may make regulations prescribing, for the purposes of this section, the circumstances in which the recommendation of the Minister of Finance is required for the approval of a corporate plan or an amendment thereto.	(7) Le gouverneur en conseil peut, par règlement, indiquer, pour l'application du présent article, les circonstances qui nécessitent la recommandation du ministre des Finances pour l'approbation du plan, original ou modifié.

[20] Section 120 defines objectives, in relation to a parent Crown corporation as meaning the objectives of the corporation as set out in the corporate plan or an amendment to the corporate

plan that has been approved pursuant to s 122. Sections 123 and 124 address the annual submission of operating and capital budgets, respectively:

123 (1) Each parent Crown corporation named in Part I of Schedule III shall annually submit an operating budget for the next following financial year of the corporation to the appropriate Minister for the approval of the Treasury Board on the recommendation of the appropriate Minister.	123 (1) Chaque société d'État mère mentionnée à la partie I de l'annexe III établit annuellement un budget de fonctionnement pour l'exercice suivant; elle le remet au ministre de tutelle pour qu'il en recommande l'approbation au Conseil du Trésor.
(2) The operating budget of a parent Crown corporation shall encompass all the businesses and activities, including investments, of the corporation and its wholly-owned subsidiaries, if any.	(2) Le budget de fonctionnement d'une société d'État mère traite de toutes les activités de la société et, le cas échéant, de ses filiales à cent pour cent, y compris leurs investissements.
(3) The operating budget of a parent Crown corporation shall be prepared in a form that clearly sets out information according to the major businesses or activities of the corporation and its wholly-owned subsidiaries, if any.	(3) Le budget de fonctionnement d'une société d'État mère doit mettre en évidence les principales activités de la société et, le cas échéant, de ses filiales à cent pour cent.
(4) Where a parent Crown corporation anticipates that the total amount of expenditures or commitments to make expenditures in respect of any major business or activity in a financial year will vary significantly from the total amount projected for that major business or activity in an operating budget of the corporation or any amendment thereto that is approved pursuant to this section for that	(4) La société d'État mère qui prévoit que le total de ses dépenses ou de ses engagements de dépenses pour une activité principale au cours d'un exercice différera sensiblement du total prévu pour cette activité dans le budget de fonctionnement, original ou modifié, approuvé pour l'exercice en conformité avec le présent article, soumet un projet de modification du budget au ministre de tutelle

year, the corporation shall submit an amendment to the budget to the appropriate Minister for the approval of the Treasury Board on the recommendation of the appropriate Minister.

pour qu'il en recommande l'approbation au Conseil du Trésor.

(5) The Treasury Board may specify such terms and conditions as it deems appropriate for the approval of an operating budget or an amendment to an operating budget.

(5) Le Conseil du Trésor peut assortir de conditions l'approbation du budget de fonctionnement ou de ses modifications.

124 (1) Each parent Crown corporation shall annually submit a capital budget for the next following financial year of the corporation to the appropriate Minister for the approval of the Treasury Board on the recommendation of the appropriate Minister.

124 (1) Chaque société d'État mère établit annuellement un budget d'investissement pour l'exercice suivant; elle le remet au ministre de tutelle pour qu'il en recommande l'approbation au Conseil du Trésor.

(2) The capital budget of a parent Crown corporation shall encompass all the businesses and activities, including investments, of the corporation and its wholly-owned subsidiaries, if any.

(2) Le budget d'investissement d'une société d'État mère traite de toutes les activités de la société et, le cas échéant, de ses filiales à cent pour cent, y compris leurs investissements.

(3) The Treasury Board may approve any item in a capital budget submitted pursuant to subsection (1) for any financial year or years after the financial year for which the budget is submitted.

(3) Le Conseil du Trésor peut approuver un poste du budget d'investissement visé au paragraphe (1) pour un ou plusieurs exercices suivant celui que vise le budget.

(4) The capital budget of a parent Crown corporation shall be prepared in a form that clearly sets out information according to the major

(4) Le budget d'investissement d'une société d'État mère doit mettre en évidence les principales activités de la société et, le cas échéant, de

businesses or activities of the corporation and its wholly-owned subsidiaries, if any.

ses filiales à cent pour cent.

(5) No parent Crown corporation or wholly-owned subsidiary of a parent Crown corporation shall incur, or make a commitment to incur, a capital expenditure in any financial year for which the corporation is required to submit a budget pursuant to this section, unless

(5) Il est interdit à une société d'État mère ou à une de ses filiales à cent pour cent d'effectuer une dépense d'investissement ou de s'y engager au cours d'un exercice pour lequel la société doit présenter un budget en vertu du présent article, sauf dans les cas suivants :

(a) a budget for that year has been approved pursuant to this section; or

a) un budget pour cet exercice a été approuvé en conformité avec le présent article;

(b) the expenditure or commitment

b) la dépense ou l'engagement:

(i) is included in an item for that year that has been approved pursuant to subsection (3) as part of a budget for a previous year,

(i) figure dans un poste relatif à l'exercice et approuvé en conformité avec le paragraphe (3) pour un exercice précédent,

(ii) has been specifically approved pursuant to this section as though it were a capital budget, or

(ii) a été approuvé expressément en conformité avec le présent article comme s'il s'agissait d'un budget d'investissement,

(iii) is, in the opinion of the board of directors of the corporation or subsidiary, essential to continue a current business or activity of the corporation or subsidiary as set out in a corporate plan or budget of the corporation that has been approved pursuant to this section or section 122 or 123.

(iii) est, selon le conseil d'administration de la société ou de la filiale, essentiel à la poursuite des activités courantes de l'une ou l'autre telles qu'elles figurent au plan ou au budget de la société approuvés en conformité avec le présent article ou avec les articles 122 ou 123.

(6) Where, by reason of any one or more proposed

(6) La société d'État mère qui prévoit que le total de ses

expenditures or commitments to make expenditures, a parent Crown corporation anticipates that the total amount of expenditures or commitments to make expenditures in respect of any major business or activity in a financial year will vary significantly from the total amount projected for that major business or activity in a capital budget of the corporation or any amendment thereto that is approved pursuant to this section for that year, the corporation shall submit an amendment to the budget to the appropriate Minister for the approval of the Treasury Board on the recommendation of the appropriate Minister, and the expenditure or expenditures shall not be incurred or commitments made before that approval is obtained.

dépenses ou de ses engagements de dépenses pour une activité principale au cours d'un exercice différera sensiblement, à cause d'un ou de plusieurs projets de dépenses ou d'engagements, du total prévu pour cette activité dans le budget d'investissement, original ou modifié, approuvé pour l'exercice en conformité avec le présent article, soumet un projet de modification du budget au ministre de tutelle pour qu'il en recommande l'approbation au Conseil du Trésor; ces dépenses et engagements ne peuvent se faire avant l'approbation.

(7) The Minister of Finance may require that his recommendation, in addition to that of the appropriate Minister, be obtained before a capital budget or an amendment to a capital budget is submitted to the Treasury Board for approval under this section.

(7) Le ministre des Finances peut exiger que sa propre recommandation, en plus de celle du ministre de tutelle, accompagne un budget d'investissement, original ou modifié, soumis au Conseil du Trésor pour approbation.

(8) The Treasury Board may specify such terms and conditions as it deems appropriate for the approval of a capital budget or an amendment to a capital budget.

(8) Le Conseil du Trésor peut assortir de conditions l'approbation du budget d'investissement ou de ses modifications.

125 (1) After a corporate plan, operating budget or capital

125 (1) Une fois son plan, budget de fonctionnement ou

budget, or an amendment thereto, is approved pursuant to section 122, 123 or 124, the parent Crown corporation shall submit a summary of the plan or budget, or the plan or budget as so amended, to the appropriate Minister for his approval.

budget d'investissement, originaux ou modifiés, approuvés en conformité avec les articles 122, 123 ou 124, la société d'État mère en établit un résumé qu'elle soumet au ministre de tutelle pour son approbation.

(2) A summary shall encompass all the businesses and activities, including investments, of the parent Crown corporation and its wholly-owned subsidiaries, if any, and shall set out the major business decisions taken with respect thereto.

(2) Le résumé traite de toutes les activités de la société d'État mère et, le cas échéant, de ses filiales à cent pour cent, y compris leurs investissements, et souligne les décisions importantes prises à ces fins.

(3) A summary shall be prepared in a form that clearly sets out information according to the major businesses or activities of the parent Crown corporation and its wholly-owned subsidiaries, if any.

(3) Le résumé doit mettre en évidence les principales activités de la société d'État mère et, le cas échéant, de ses filiales à cent pour cent.

(4) The appropriate Minister shall cause a copy of every summary he approves pursuant to this section to be laid before each House of Parliament.

(4) Le ministre de tutelle fait déposer devant chaque chambre du Parlement un exemplaire de chaque résumé qu'il approuve en conformité avec le présent article.

(5) A summary laid before Parliament pursuant to subsection (4) stands permanently referred to such committee of Parliament as may be designated or established to review matters relating to the businesses and activities of the corporation submitting the summary.

(5) Le résumé déposé devant le Parlement en conformité avec le paragraphe (4) est automatiquement renvoyé devant le comité parlementaire chargé des questions qui touchent aux activités de la société qui a établi le résumé.

(v) *Canada Transportation Act*

[21] The CTA is binding on Her Majesty in right of Canada or a province (s 2) and applies in respect of transportation matters under the legislative authority of Parliament (s 3). Subject to s 4(3), which is not relevant to this application, nothing in or done under the authority of the CTA, other than Division IV of Part III, affects the operation of the *Competition Act*, RSC, 1985, c C-34 ("*Competition Act*") (s 4(2)).

[22] The CTA sets out in s 5, by way of declaration, the National Transportation Policy:

5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when	5 Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :
(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;	a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
	b) la réglementation et les

(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

(e) governments and the private sector work together for an integrated transportation system.

mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

(vi) *Canada Marine Act*

[23] The *Canada Marine Act*, SC 1998, c 10 ("CMA") states its purpose as:

4 In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to

(a) implement marine policies

4 Compte tenu de l'importance du transport maritime au Canada et de sa contribution à l'économie canadienne, la présente loi a pour objet de :

a) mettre en oeuvre une politique maritime qui

that provide Canada with the marine infrastructure that it needs and that offer effective support for the achievement of national, regional and local social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;

(a.1) promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy;

(b) base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions;

(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;

(d) provide for a high level of safety and environmental protection;

(e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;

(f) manage the marine infrastructure and services in a commercial manner that

permette au Canada de se doter de l'infrastructure maritime dont il a besoin, qui le soutienne efficacement dans la réalisation de ses objectifs socioéconomiques nationaux, régionaux et locaux aussi bien que commerciaux, et l'aide à promouvoir et préserver sa compétitivité;

a.1) promouvoir la vitalité des ports dans le but de contribuer à la compétitivité, la croissance et la prospérité économique du Canada;

b) fonder l'infrastructure maritime et les services sur des pratiques internationales et des approches compatibles avec celles de ses principaux partenaires commerciaux dans le but de promouvoir l'harmonisation des normes qu'appliquent les différentes autorités;

c) veiller à ce que les services de transport maritime soient organisés de façon à satisfaire les besoins des utilisateurs et leur soient offerts à un coût raisonnable;

d) fournir un niveau élevé de sécurité et de protection de l'environnement;

e) offrir un niveau élevé d'autonomie aux administrations locales ou régionales des composantes du réseau des services et installations portuaires et prendre en compte les priorités et les besoins locaux;

encourages, and takes into account, input from users and the community in which a port or harbour is located;	f) gérer l'infrastructure maritime et les services d'une façon commerciale qui favorise et prend en compte l'apport des utilisateurs et de la collectivité où un port ou havre est situé;
(g) provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and	g) prévoir la cession, notamment par voie de transfert, de certains ports et installations portuaires;
(h) promote coordination and integration of marine activities with surface and air transportation system.	h) favoriser la coordination et l'intégration des activités maritimes avec les réseaux de transport aérien et terrestre.

The Evidence

[24] The documents submitted by the parties in support of and in response to this application for judicial review are voluminous. They include many affidavits with multiple exhibits as well as transcripts of cross-examination on those affidavits. These reasons will not explicitly address the content of each affidavit, however, they are as follows:

Oceanex

i. Affidavit of Captain Sidney J. Hynes, Oceanex CEO, sworn on September 8, 2016, with 75 exhibits, providing background information on the Newfoundland commercial freight market and short sea shipping; a history and description of Oceanex's current operations; his evidence regarding MAI and its relationship with the federal government, including MAI's operations, subsidies and the alleged 2010 amendment to the Bilateral Agreement; communications between Oceanex and the Minister with respect to Oceanex's concerns over the federal government's treatment of MAI; and, his evidence concerning the detrimental impact on Oceanex of the subsidized freight rates ("Hynes Affidavit #1");

ii. Expert affidavit of David Gillen, an economist, sworn on September 8, 2016, providing opinion evidence on the role of competition in achieving the policy objectives set out in the CTA; how economically efficient prices are set in transportation markets; and, what markets MAI serves and the consequences for Oceanex of the subsidization of MAI's

freight rates;

iii. Expert affidavit of Peter Neary, historian, sworn on August 18, 2016, providing opinion evidence on the origin and meaning of Term 32 of the Terms of Union ("Neary Report");

Canada

iv. Affidavit of Michèle Bergevin, Director, Portfolio Management within the Crown Corporation and Portfolio Governance Directorate in Transport Canada, sworn on September 28, 2016, attaching as an exhibit a copy of the document entitled "Implementation of 2010 Budget Decision - Guidance for Corporate Plan of 2010/11 - 2014/15" ("Bergevin Affidavit #1");

v. Affidavit of Michèle Bergevin sworn on December 7, 2016, with 22 exhibits, addressing Transport Canada's role with respect to ferry freight and passenger services, Canada's obligation under the Terms of Union to provide passenger and freight services on the Constitutional Route, an overview of the history of the provision of services on the Constitutional Route, an overview of MAI, its corporate governance and structure as well as the history of the setting of MAI's rates; and, information on Transport Canada's relationship with the marine industry ("Bergevin Affidavit #2");

MAI

vi. Affidavit of Shawn Leamon, MAI Vice President of Finance, sworn on December 7, 2016, with 27 exhibits, providing background about MAI; evidence concerning the importance of the MAI ferry service to Newfoundland and Labrador; an overview of MAI's operations; information concerning MAI's governance and its ability to set its rates; and, information related to the subsidy analysis of Jeffrey Church ("Leamon Affidavit");

vii. Expert affidavit of Jeffrey Church, an economist, sworn on December 7, 2016, providing opinion evidence on whether the incremental profit earned from MAI's commercial vehicle (freight) service is positive, which would contribute to the common costs of MAI and thereby reduce the subsidy requirement in whole from Canada and, in effect, meaning that the freight service itself is not subsidized; and, responding to the economic evidence of David Gillen ("Church Report");

Newfoundland

viii. Affidavit of Raymond Blake, historian, sworn on November 30, 2016, with 172 exhibits, providing opinion evidence on the intention of the parties to the Terms of Union with respect to Term 32; whether this was a commitment to simply operate a steamship between two points or something more; and, whether it was to be a subsidized service for the benefit of Newfoundland ("Blake Report");

ix. Affidavit of Dennis Bruce, economist, sworn on December 5, 2016, with 43 sources, responding to the opinion evidence of Captain Sidney J. Hynes and David Gillen and providing his opinion on whether Oceanex's evidence established that MAI's pricing had

a detrimental impact on Oceanex's service offerings and on Oceanex and, if MAI was no longer subsidized, what the impact on Newfoundland and Labrador's economy would be ("Bruce Report");

Reply and Sur-Reply Affidavits

Oceanex

x. Reply Affidavit of Captain Sidney J. Hynes sworn on January 19, 2017, with 6 exhibits, replying to the Leamon Affidavit, Church and Bruce Reports ("Hynes Affidavit #2");

xi. Reply Affidavit of David Gillen, sworn on January 19, 2017, replying to the Church and Bruce Reports;

Newfoundland

xii. Reply Affidavit of Dennis Bruce, sworn on March 1, 2017, replying to Hynes Affidavit #2;

Supplemental Affidavits

Oceanex

xiii. Supplemental Affidavit of Captain Sidney J. Hynes sworn on February 28, 2017, with 10 exhibits, regarding the admissibility of a report prepared for Transport Canada by Canadian Pacific Consulting Services ("CPCS") Transcom Limited ("CPCS Report"), dated May 1, 2015 ("Hynes Affidavit #3");

Further Supplementary Affidavits

MAI

xiv. Affidavit of Murray Hupman, MAI Vice President of Operations, sworn on September 20, 2017, concerning cross-examination evidence of Captain Sidney J. Hynes pertaining to the names of vessels available for short term charter ("Hupman Affidavit"); and

Oceanex

xv. Affidavit of Captain Sidney J. Hynes sworn on October 2, 2017, replying to the Hupman Affidavit ("Hynes Affidavit #4").

History of Setting the Rates

[25] It is not disputed that, pursuant to the Terms of Union, Canada is obliged to provide a ferry service on the Constitutional Route.

[26] From Confederation in 1949 until 1977, Canada fulfilled this obligation through CNR. Bergevin Affidavit #2 states that, based on a review of Order in Council P.C. 1953-197, dated February 13, 1953 ("1953 OIC"), Canada provided for the deficits in the operation of the Constitutional Route on the basis that they arose from that obligation. Further, based on a review of Order in Council P.C. 1955-1215, dated February 13, 1953 (this is actually dated August 16, 1955) ("1955 OIC"), that in accordance with the *Canadian National Railways Act*, RSC 1927, c 172 ("*Canadian National Railways Act*"), the Governor in Council, on the recommendation of the Minister, entrusted to CNR the management and operation of new ferry and ferry terminals on the Constitutional Route. The Minister approved the capital expenditures required for the route and any related deficits were paid to CNR by funds appropriated by Parliament. CNR operated ferry and coastal services in Newfoundland and Labrador, including the Constitutional Route, from 1955 to 1977.

[27] On December 14, 1977, Canada, represented by the Minister, and CNR entered into a Memorandum of Understanding respecting east coast ferry and coastal services ("MOU"). The MOU described the roles, responsibilities and relationships of Canada, CNR and CN Marine, the incorporation of which was envisioned by the MOU. This included that Canada would specify for each route the minimum standard of service to be provided and approve the basis on which fares or rates were to be charged by CN Marine to all users. CN Marine would contract with Canada to provide each ferry or coastal service required by Canada and submit annually for Governor in Council approval its capital and operating budgets and plans, annual reports and audited accounts and make recommendations to Canada concerning rates and fares to be charged. CN Marine Corporation was incorporated, under the CBCA, as a subsidiary of CNR on

December 14, 1977. In December 1978, CN Marine Corporation changed its name to CN Marine Incorporated ("CN Marine").

Tripartite Agreement

[28] On May 18, 1979, on recommendation of the Minister, the Governor in Council approved, by Order in Council P.C. 1979-1449, dated May 9, 1979 ("1979 OIC"), Canada's entering into a tripartite agreement with CNR and CN Marine (now MAI) ("Tripartite Agreement"). Amongst other things, the parties agreed to have the contracted water and railway handling services performed in accordance with the terms and conditions of specific operating agreements and to thereby provide the described traffic offering, including dock to dock water transport (s 1(a)); that Canada, in respect to present or future operating agreements, would annually advise CN Marine of any changes respecting the required standard of service or the general level of rates and fares then under consideration by Canada (s 6(b)); and, required CN Marine to prepare and submit to the Minister two categories of planning documents, including an operating plan summary and a preliminary estimation of revenue and expenditures, showing information which included recommendations as to specific rates and fares which Canada should approve as charges to the traffic offering to be levied by CN Marine under each specific operating agreement (s 29(b)(ii)). From 1978 to 1986, CN Marine operated various ferry services, including the Constitutional Route, and other coastal services in Atlantic Canada pursuant to the Tripartite Agreement.

Bilateral Agreement and Subsidiary Operating Agreements

[29] In 1986, pursuant to the MAIAAA, CN Marine changed its name to Marine Atlantic Inc. and CNR transferred all of its common shares to Canada.

[30] By Order in Council P.C. 1987-463 stamped approved on March 12, 1987 ("1987 OIC") the Governor in Council, on the recommendation of the Minister, approved the cancellation of the Tripartite Agreement and the entry by the Minister into an agreement with MAI substantially in the form of the agreement attached thereto as Schedule "A". That agreement established the relationship between Canada and MAI under which subsidiary operating, capital, and land lease agreements relating to operating specific ferry and coastal services in Atlantic Canada could be executed and was entered into on March 31, 1987 ("Bilateral Agreement").

[31] The preamble of the Bilateral Agreement notes that for some time Canada had used MAI (previously CN Marine Inc.) as its principal instrument for providing certain federally supported ferry and coastal shipping services in the Atlantic Provinces, pursuant to the Tripartite Agreement, and that Canada and MAI wished to continue that arrangement without the involvement of CNR. Canada and MAI agreed to establish a set of mutually satisfactory conditions which would, within the statutory requirements imposed by Part XII of the FAA, the regulations made thereunder and any other pertinent enactments of Parliament, facilitate the provision at Canada's request, of certain ferry and coastal shipping services premised on efficient and cost-effective operations by MAI and the maintenance of levels of performance satisfactory to Canada.

[32] Section 2 states that the Bilateral Agreement would come into force on January 1, 1987 and remain in effect until terminated pursuant to the terms of the agreement or by written agreement of the parties. MAI was to operate the contracted services (s 1(1)(d)) and s 3(1)) as specified in subsidiary operating agreements, defined as the current subsidiary operating agreements, the current subsidiary capital funding agreement or the current subsidiary land lease agreements as the context may require (s 1(1)(i)) ("Subsidiary Operating Agreement"). In consideration for the operation of the contracted services, Canada would pay to MAI amounts not exceeding the totals specified in the Subsidiary Operating Agreements of the applicable period. The Subsidiary Operating Agreements were to be amended annually to reflect agreed changes to the amounts payable thereunder (s 3(2)). As to the setting of fares and rates, s 3 states:

> (3) Fares and Rates
>
> (a) After receiving notice pursuant to section 6 (2) hereto concerning changes to the general level of rates, the Corporation shall recommend to the Minister for his approval, fares and rates for the movement of passengers, vehicles and cargo, and the approved fares and rates shall be used in the determination of the annual maximum Subsidiary Operating Agreement payments.
>
> (b) Any recommendation by the Corporation to amend the tariff shall be submitted for the approval if the Minister at least sixty (60) days prior to the desired implementation date. The Minister reserves the right to amend, at any time, fares and rates already approved and the Corporation shall implement such changes as directed by the Minister. Amendments to the tariff approved or ordered by the Minister shall be communicated to the Corporation at least thirty (30) days prior to the date of implementation and may result in a compensatory change in the annual maximum Subsidiary Operating Agreement payments.
>
> (c) the Corporation may, with the prior approval of the Minister, offer discounts where such action is consistent with sound commercial practice.

(d) the approved tariffs shall be appended to the Subsidiary Operating Agreements.

[33] As to capital funding, Canada agreed to make payments to MAI in accordance with the provision of the Subsidiary Capital Finding Agreement for MAI's approved annual capital budget and working capital needs (s 4(1)).

[34] The undisputed evidence of MAI and Canada is that, pursuant to the Bilateral Agreement, between 1987 and 2007 MAI annually recommended fares and rates to the Minister for approval and that the approved rates were used in determining the annual maximum Subsidiary Operating Agreement payments.

2007 Revitalization Strategy (Phase I)

[35] Bergevin Affidavit #2 states that in the 1990s, Canada shifted its role from a transportation owner and operator to that of a transportation regulator, policy maker and funder where appropriate. In 1995, Transport Canada released the National Marine Policy which sought to narrow Canada's role in providing ferry services. In 1996, the NTP was enacted as s 5 of the CTA. By 1998, MAI had reduced its services to only the Constitutional and Argentia Routes. By 2006, TC had determined that the amount of taxpayer money to subsidize the Argentia Route should be reduced and, for the first time, implemented a cost recovery policy. This period sometimes being referred to as the Revitalization Strategy Phase I. In 2007, Canada announced a long term strategy to revitalize the passenger and freight services operated by MAI. The first phase of this strategy included the adoption of predictable rate increases on the Constitutional Route by linking them to the Consumer Price Index; a fuel surcharge; a five year plan to be

developed by the MAI board of directors outlining initiatives to enable MAI to improve services and achieve operational efficiencies, which to keep the services affordable, should include cost containment measures and strategies to increase revenues from non-constitutional services; advancement of a fleet renewal plan; and, additional funding ("Government of Canada presents the long-term strategy to revitalize Marine Atlantic Inc.", Leamon Affidavit, Exhibit 10). By letter to MAI from then Minister Lawrence Cannon, dated January 11, 2007 ("2007 Minister's Letter") the Minister noted that when Treasury Board ministers approved MAI's 2006-2010 Corporate Plan they had specifically requested that a long term strategy be developed. The 2007 Minister's Letter, discussed further below, also outlined the revenue strategy, including setting of a cost recovery target of 60-65%.

2010 Revitalization Strategy (Phase II)

[36] The Auditor General's 2009 Report was a special examination report of Marine Atlantic Inc. made by the Auditor General pursuant to s 138 of Part X of the FAA. Amongst other things, the report raised concerns about MAI's ability to meet strategic challenges including the risk of being unable to deliver the services it was responsible for providing and that MAI lacked an operational planning framework to ensure that its strategic direction and corporate plans were implemented. MAI's challenges included aging ferries and shore-based assets, capacities to meet the traffic demand, failure to meet the cost recovery target set by the Minister and the need to increase its management capacity. The report states that MAI needed to agree with Canada on a plan of action, including long term funding, to overcome its challenges. In its response, MAI accepted the recommendation and stated that in collaboration with Transport Canada it was finalizing a comprehensive revitalization proposal. Bergevin Affidavit #2 states that in response

to the concerns raised by the Auditor General's 2009 Report, Transport Canada and MAI developed the 2010 Revitalization Strategy.

[37] Bergevin Affidavit #2 also states that as part of the 2010 Revitalization Strategy, Canada and MAI agreed to amend certain terms of the Bilateral Agreement. One amendment being that MAI would determine the rates for the Constitutional Route, unless the increase exceeded 5% of the existing rate, in which event the approval of the Minister was required. As it had since 2007, MAI continued to decide all rates on the Argentia route. Bergevin Affidavit #2 states that in order to implement the 2010 Revitalization Strategy, Canada and MAI agreed that they would work towards amending the Bilateral Agreement to reflect the action of the parties that had already been implemented.

[38] Further, that the adoption of the 2010 Revitalization Strategy is reflected in the document entitled "Implementation of Budget 2010 Decision, Guidance for Corporate Plan of 2010/11 - 2014/15" ("Implementation of Budget 2010 Decision"). That document was created by officials at Transport Canada and was sent by email to MAI on April 8, 2010. According to Canada, approval of the 2010 Revitalization Strategy was communicated to MAI through the Implementation of Budget 2010 Decision.

[39] Section 13 of the Implementation of Budget 2010 Decision states that:

> 13. The rate increases on the constitutional route would be set by MAI's Board of Directors to a maximum of five percent per year taking into consideration the operating environment, the expected traffic demand and the overall cost recovery objective for the year. Any higher rate increase would have to be submitted to

> the Minister of Transport, Infrastructure and Communities for approval with corresponding justification.

[40] The Leamon Affidavit states that MAI interpreted this to mean that, going forward, MAI's board of directors had this authority.

[41] MAI's 2010/2011-2014/2015 Corporate Plan under the heading "Revenue Generation", states the following:

> With the approval of the Revitalization Strategy, the Corporation's Board of Directors now accepts responsibility for future price changes across all services, including to a maximum of five percent per year on constitutional fares. This is a change from the previous situation, where increases on constitutional fares were limited to increases in the Consumer Price Index (CPI), and brings added agility to the Corporation.

[42] MAI's 2010/2011-2014/2015 Corporate Plan was approved by Order in Council 2010-0812, dated June 17, 2010.

[43] Starting with the 2010-2011 year, and in each subsequent year, the board of directors of MAI decided and implemented all rate changes for the Constitutional Route, none of which exceeded 5% of the prior year's rate. In January 2016, MAI announced that the rates for 2016/2017 would be increased by 2.6% of the previous years' rates for the Constitutional Route. A December 10, 2015 resolution of the board of directors of MAI approving the 2016/2017 – 2020/2021 corporate plan reflects this determination, which became effective on April 1, 2016.

Issues and Standard of Review

[44] The parties have approached this application from very different directions. Oceanex asserts that the Minister permitted MAI to charge freight rates that are heavily subsidized, compete unfairly with and are detrimental to Oceanex. Further, that the decision effecting the 2016/17 freight rates was made without taking into account, and was inconsistent with, relevant considerations, in particular, the NTP as set out in s 5 of the CTA. This spawned a number of related issues raised by various Respondents. For example, in their responding memorandum of fact and law both MAI and Canada raise as an issue Oceanex's standing to bring this application, to which issue Oceanex was permitted to respond by reply memorandum.

[45] In my view, having considered the submissions, the issues arising in this matter can be framed and addressed as follows:

1. Who made the 2016/17 Freight Rate Decision, the Minister or MAI? If MAI made the decision, is it a federal board, commission or tribunal as defined by s 2(1) of the *Federal Courts Act*?
2. Does Oceanex have standing to bring this application?
3. Was s 5 of the CTA a relevant consideration when making the 2016/17 Freight Rate Decision?
4. If s 5 of the CTA was a relevant consideration, can it constrain the level of public cost Canada assumes to provide ferry services on the Constitutional Route, the provision of which services arises from the Terms of Union?
5. Was the 2016/17 Freight Rate Decision reasonable?

[46] The question of the applicable standard of review applies only to the fifth issue identified above. In that regard, Oceanex submits the Minister made the 2016/17 Freight Rate Decision,

which was unreasonable, if not incorrect, as the Minister failed to take into account all relevant considerations, including the NTP and the impact of the 2016/17 freight rates on Oceanex. Thus, the decision should be quashed regardless of the applicable standard of review (*Federal Courts Act*, s 18.1(4)*; Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paras 71-73 ("*Hupacasath*"); G Régimbald, *Canadian Administrative Law*, 2d (LexisNexis, 2015) at 232-233 ("Régimbald")).

[47] Neither MAI nor Newfoundland make submissions as to the standard of review. Canada asserts that Oceanex has no standing and that there is no decision of the Minister that is amenable to judicial review. In the alternative, that the standard of review for any relevant decision of the Minister is reasonableness.

[48] In my view, the standard of review of a decision by a minister or a federal board, commission or tribunal in setting rates is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*")). In that regard, I note that statutorily regulated rate-setting decisions have previously been found to fall under the reasonableness standard because the setting of just and reasonable rates involves fact finding and the application of law and policy considerations, the latter often being polycentric in nature (see *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40 at para 38; *Re General Increase in Freight Rates* (1954), 76 CRTC 12 at para 4 (SCC), *Great Lakes Power Limited v Ontario Energy Board*, 2009 CanLII 39062 at para 22, aff'd 2010 ONCA 399, leave to appeal to SCC refused, 2010 CarswellOnt 9414; *Telus Communications Company v Canadian Radio-Television and Telecommunications Commission*, 2010 FCA 191 at para 33). While the setting of the 2016/17

freight rates was not governed by statute, the decision similarly involved the exercise of discretion which is to be afforded deference on judicial review (see *Yukon Energy Corporation v Yukon (Utilities Board)*, 2017 YKCA 15 at para 55; *Union Gas Ltd v Ontario (Energy Board)*, 2013 ONSC 7048 at para 25).

[49] A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to the outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

Constitutional Question

[50] On July 28, 2017 MAI filed a Notice of Constitutional Question in which it stated that it intended to question the constitutional applicability and effect of s 5 of the CTA and also set out background information and the legal basis for the constitutional question. A specific question is not framed, however, MAI states:

> …Marine Atlantic asserts that the Terms of Union permit and authorize a subsidy from the Government of Canada in respect of Marine Atlantic's service between North Sydney and Port aux Basques and thus that section 5 of the CTA does not and cannot apply to preclude such a subsidy. Any finding that section 5 of the CTA would preclude Canada from subsidizing Marine Atlantic's service between North Sydney and Port aux Basques and the rates it charges for such service would be inconsistent with Canada's constitutional commitment in Terms 31 and 32 of the Terms of Union, and to the extent of that inconsistency section 5 of the CTA would be of no force or effect.

[51] In my view, this is captured by Issue 4 above.

Preliminary Observation – Oceanex's application for judicial review

[52] To place the issues in context it is helpful, as a starting point, to briefly set out the basis of Oceanex's application. In its Amended Notice of Application Oceanex describes the decision under review as the decision of the Minister to approve the 2016/17 freight rates, whether the Minister directly approved the rates or purported to allow a third party, MAI, to do so. Alternatively, Oceanex asserts the Minister failed to approve the 2016/17 freight rates as proposed by MAI. In the further alternatives Oceanex challenges the decision: of the Minister to pre-authorize the rate increase proposed by MAI up to 5%; to allow MAI to approve the 2016/17 freight rates; or, the decision of MAI to approve those rates.

[53] The grounds for the application include that the Minister's decision to approve the 2016/17 freight rates is inconsistent with allowing competition and market forces to be the prime agents in providing viable and effective transportation services and has the direct effect of unduly favouring competing modes of transportation, such as trucking, to and from the island of Newfoundland and of reducing the inherent advantage of water transportation providers, such as Oceanex. Further, by failing to consider the NTP, the Minister erred in law and exceeded his jurisdiction by exercising his discretion unreasonably, contrary to public policy and by failing to take into account all relevant considerations.

[54] Oceanex's written representations assert the Minister allowed MAI to charge heavily subsidized rates and compete unfairly with Oceanex, notwithstanding that the Minister is bound

by the NTP which, Oceanex asserts, provides first and foremost that competition and market forces are the prime agents in providing viable and effective transportation services, with only limited exceptions and that the rates are inconsistent with the NTP. Oceanex states that it takes issue with having to compete with a business which does not have to cover its operating or capital costs. Further, that MAI has been able to maintain its market share to the detriment of Oceanex as a result of its subsidized rates.

Issue 1: Who made the 2016/17 Freight Rate Decision, the Minister or MAI? If MAI made the decision, is it a federal board, commission or tribunal as defined by s 2(1) of the *Federal Courts Act*?

(a) Who made the 2016/17 Freight Rate Decision, the Minister or MAI?

[55] The history of the determination of the rates for the Constitutional Route is set out above. However, the parties disagree as to whether the Minister or MAI made, or had the authority to make, the 2016/17 Freight Rate Decision.

Oceanex's Submissions

[56] Oceanex submits that, pursuant to the Bilateral Agreement, the Minister is required to: advise MAI of the level of fares and rates each year; approve the fares and rates for the movement of passengers, vehicles and cargo charged by MAI; and, reserved the right to amend at any time rates already approved (ss 7(2), 3(3)(a) and (b)). The Bilateral Agreement has not been amended, rescinded or replaced and remains in force. Accordingly, the Minister retains the power to approve MAI's rates and cannot shield rate decisions from judicial review by pre-approving rates or delegating to MAI.

[57] To support its position that the Minister made the 2016/17 Freight Rate Decision, when appearing before me Oceanex reviewed events from 1949 forward as, in its view, this establishes that Canada had always had and still maintains control over the terms and conditions by which MAI, and its predecessors, manage the ferry service, including the setting of rates.

[58] In essence, Oceanex submits that in 1949, pursuant to Term 33 of the Terms of Union and Order in Council P.C. 1454, dated April 1, 1949 ("1949 OIC"), Canada transferred certain properties to CNR, subsequently CN Marine, and entrusted it with the right to manage and administer those properties for the purpose of providing the ferry service. However, the entrustment did not give CNR an absolute right to operate and manage those properties and was always subject to specific terms and conditions, set by Canada by way of the 1949 OIC. This continued by way of 1979 OIC and the Tripartite Agreement. The power to manage didn't depend on who owned the assets as it was Canada that set the terms and conditions. The terms and conditions of the Bilateral Agreement, which were authorized by the 1987 OIC, in combination with MAI's corporate plan and other actions, show the continued power of the Minister to control the terms and conditions of the operation and management of the ferry service on the Constitutional Route.

[59] While Oceanex concedes that MAI owns the vessels in its service as well as vessel terminals, it asserts that MAI does so subject to the terms and conditions imposed by the Tripartite Agreement and the 1979 OIC, and that MAI does not have absolute discretion in providing that service. And, by way of the MAIAAA, Canada wholly owns MAI. As to ss 7 and 8 of the MAIAAA, according to Oceanex, Canada by these provisions permitted MAI to have all

of the properties it needed to operate and manage the ferry service, but subject to terms and conditions set by Canada.

[60] Oceanex disagrees that MAI receives only broad direction from Canada under the FAA. Rather, it submits that MAI is subject to close government control regarding significant aspects of the corporation's business. Further, MAI is subject to reporting duties under the FAA, including submitting corporate plans, operating budgets, and capital budgets. According to Oceanex, the corporate plan is the most direct form of government control over MAI as this document identifies MAI's corporate objects, strategy, goals, and business activities. The corporate plan also includes MAI's fees, sailings, annual performance, and financial outlook, all of which specific elements of the plan are subject to approval.

[61] Oceanex also submits that MAI and the Minister work closely together in creating the corporate plan before submitting the document to the Governor in Council for approval. This consultation process amounts to *de facto* or pre-approving of the corporate plan by the Minister, even before the document goes to the Governor in Council for final approval. According to Oceanex, pursuant to the FAA it was not open to the MAI board of directors to approve and announce rates in advance of approval of the corporate plan.

[62] Oceanex also submits the 2007 Minister's Letter imposed further terms and conditions on MAI, including cost recovery targets. This letter directed MAI to develop comprehensive performance targets and to include them in subsequent subsidiary agreements.

[63] As to the Implementation of Budget 2010 Decision, this was generated by Transport Canada in response to criticisms of the Auditor General and served to inform MAI of the steps it was required to take to remedy the situation. It also demonstrates direction by Canada over MAI. And, while it purports to pre-approve the setting by MAI's board of directors of the annual rate increases between 2010 and 2015 to a maximum of 5% per year without submission for approval to the Minister, it did not mention the NTP or the factors that may have been considered in arriving at those annual rate increases. Nor did it amend or purport to amend the Bilateral Agreement. At best the document represents the Minister's pre-approval of annual rate increases to a maximum of 5%. In any event, the annual budgeting and corporate plan process continued and involved the Minister in approving the specific rates that were eventually submitted for Treasury Board and Governor in Council approval, even though they were below 5%.

[64] Oceanex also submits that a letter of October 30, 2014 from then Minister Lisa Raitt to Mr. Paul Griffin, CEO of MAI ("2014 Minister's Letter") set out additional requirements for MAI and affirmed the Minister's control over all of MAI's substantive financial decisions. Specifically, MAI did not have authority to implement any of the requirements of the 2014 Minister's Letter until its corporate plan and operating and capital budgets were approved. Oceanex submits that there is no evidence that the 2014 Minister's Letter was effected having regard to the NTP.

[65] On January 6, 2016, MAI released its 2016/17 Corporate Plan Summary for approval by Canada. Oceanex submits that the approval process was identical to the process followed prior

to 2010 and as required by the FAA. And while MAI claims only to get policy direction from the Minister, the evidence is clear that the Minister and Canada are deeply involved in virtually every aspect of MAI's business and operations, including ultimately approving MAI's subsidized rates. While there is no evidence as to what factors were considered in setting the 2016/17 freight rates, the evidence is uncontroverted that neither the NTP or the impact on Oceanex of those rates was considered when the rates were set, or for any previous year, or to justify the pre-approval of the annual rate increase to a maximum of 5%.

MAI's Submissions

[66] MAI submits that, both as a matter of law and a matter of fact, the 2016/17 Freight Rate Decision was made by it and not the Minister.

[67] It submits that there is no statutory basis for the Minister to set MAI's rates. While under the MAIAAA the Minister acquired all of the common shares of MAI held by CNR (s 4) and certain other identified works and undertakings previously held by CNR (s 7(1)), it was only with respect to the latter property (and not the shares of MAI or assets owned by it) that the "management, administration and control" was vested in the Minister under s 7(2), and even then only until the Minister disposed of such assets (s 8). Neither s 7(2) of the MAIAAA nor any other provision of that legislation gave or purported to give the Minister any direct control over the assets or affairs of MAI. As with any other CBCA corporation, such control rests with MAI's board of directors except to the extent that the right to exercise such control has been restricted by contract (CBCA, s 102). Further, by 1986 when the MAIAAA came into effect, MAI owned all marine assets.

[68] Further, pursuant to ss 122-124 of the FAA, MAI's corporate plan, operating budget and capital budget are approved annually. The Governor in Council approves the corporate plan while Treasury Board approves the operating budget and capital budget, neither is approved by the Minister. Moreover, the roles of the Governor in Council and Treasury Board under the FAA are not to set MAI's rates, but to approve an overall corporate plan and budgets prepared and submitted by MAI. They are concerned with the bottom line, not single elements such as rates. Nothing in the corporate plan or budget approval process described by the FAA vests any right or responsibility in the Minister to set MAI's rates. And while MAI does consult with TC on various aspects of the proposed plan, it is to be expected that input from the key stakeholders would be sought. However, it is MAI's board of directors that approves the rate increases included in the plan. Further, letters of expectation from the Minister provide only broad policy direction.

[69] To the extent that the Minister acquired rate-setting power, he did so only by contract pursuant to the Bilateral Agreement. The evidence is unequivocal that the parties to the Bilateral Agreement subsequently reached an understanding that, notwithstanding its original terms, MAI could increase rates on the Constitutional Route by up to 5% annually and that the parties to the Bilateral Agreement both subsequently acted on the basis of that understanding. MAI submits that there was no legal impediment to this even if the understanding was not reflected in a formal written amendment to the Bilateral Agreement (S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thompson Reuters, 2016) at para 332; *Shelanu Inc v Print Three Franchising Corp*, (2003), 226 DLR (4th) 577 (Ont CA) at paras 54 and 94 ("*Shelanu Inc*"); *Shecker v Polonuk*

(Alta CA), [1992] AJ No 974 at p 2; Halsbury's Laws of England, *Contract*, Volume 22 (2012) at para 586 "Form of Variation").

[70] Further, Oceanex has no basis to complain about how the parties performed under that agreement as Oceanex is neither a party to nor an intended beneficiary of that contract (*Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1993] 3 SCR 108 at paras 22 and 32 ("*Fraser River*")).

[71] MAI submits that as a matter of law the Minister did not have the authority to set MAI's rates and the evidence establishes that as a matter of fact he did not do so. MAI made the 2016/17 Freight Rate Decision and, in setting it rates, MAI was not a federal board, commission or other tribunal as defined by s 18.1 of the *Federal Courts Act*. Setting rates is a commercial decision and accordingly not subject to judicial review.

Canada's Submissions

[72] Canada submits that the Minister did not make the 2016/17 Freight Rate Decision and that there was no statutory requirement for the Minister to do so. Canada and MAI are parties to a contract which originally provided that the Minister must approve MAI's rates, however, the parties amended the terms of that contract in 2007 and 2010, subsequent to which MAI's board of directors approved all rate increases.

[73] Term 32(1) of the Terms of Union requires Canada to maintain the Constitutional Route, but is silent on how Canada is to fulfil that obligation, including how fees and charges are

determined. Nor does the CTA establish any requirements on the manner in which Canada maintains the Constitutional Route. While Oceanex relies on s 5 of the CTA, which sets out the NTP, that policy is not the source of any legal requirement that the rates be set by a particular party. Nor does the FAA require Canada to set, establish or approve MAI's rates. Part X of the FAA sets out various legislative requirements for Crown corporations, such as the development and approval process for corporate plans and annual operating and capital budgets. However, the approval of those instruments constitutes only approval of the general direction and objectives of the corporation, it does not constitute an approval of MAI's rates. While in addressing its general direction, objectives or expected expenditures/revenues in its corporate plan and budgets MAI may provide certain specific information, such as anticipated rate increases, this is provided for informational purposes only. Neither the Governor in Council or Treasury Board approves the rate increases as part of the approval of the corporate plan and the operating and capital budgets. MAI has full authority to set the rate increase up to 5% annually. Similarly, the MAIAAA does not require Canada to set or approve MAI's rates. The MAIAAA does not alter MAI's legal powers, undermine its capacity to contract or otherwise alter the fact that MAI is a corporation with the powers of a natural person (ss 7-9), and, does not limit the powers that MAI previously held. The MAIAAA does not address the setting of rates nor impose any requirement on the Minister to set MAI's rates.

[74] MAI is not an agent of the Crown. MAI is a parent Crown corporation as defined by and listed under Schedule III, Part 1 of the FAA. Agent corporations are also defined in the FAA, being Crown corporations that are expressly declared by or pursuant to any other act of Parliament to be an agent of the Crown. The MAIAAA does not declare MAI to be an agent of

the Crown. Moreover, while s 3 of the *Government Corporations Operation Act*, RSC, 1985, c G-4 states that every corporation (defined as including a corporation incorporated under the CBCA, all of the issued shares of which are owned by or held in trust for the Crown, s 2) is for all its purposes an agent of the Crown, s 6 states that the act applies to a corporation only from the date of the issue of a proclamation by the Governor in Council declaring it to be applicable to that corporation. No such proclamation has been issued with respect to MAI. Nor does MAI meet the common law test for Crown agency as outlined in *R v Eldorado Nuclear Limited*, [1983] 2 SCR 551. This test looks at the degree of control the Crown exercises over an entity and how much discretion the alleged Crown agent has over its affairs. The Bergevin Affidavit evidence is that MAI controls its own hiring and firing, sets its sailing schedules, is responsible for procurement, and manages its other day-to-day affairs and that neither Canada or the Minister are responsible for the operations, management or day-to-day activities of MAI, this falls to its board of directors. MAI is also a corporate entity with the ability to sue and be sued in its own name. Thus, to the extent that Oceanex may be indirectly attributing its allegations of control over MAI to an agent relationship, such a relationship does not exist.

[75] Canada differentiates between the conferring of broad policy direction on MAI, such by way of cost recovery targets, and the issuing of statutory directives under s 89 of the FAA. Section 89 directives flow from the Governor in Council and compliance is mandatory for the affected Crown corporation. There is no evidence that MAI has ever received such a directive. And, where cost recovery targets were set, in 2007 and 2010, MAI had discretion as to how to achieve the targets. Nor are TC's comments on MAI's draft corporate plan directives, they are suggestions, ultimately it is MAI that decides whether to accept TC's comments or not when

preparing the plan. Canada also distinguishes between approving the corporate plan and approving rates, which need not be included in the plan. MAI's board of directors sets rate increases below 5% for the Constitutional Route and MAI announces its rates prior to the Governor in Council approving the corporate plan. These are separate processes, approval of the rates by MAI is not linked to approval of the corporate plan by the Governor in Council.

[76] As to the Bilateral Agreement, this is a contract, the creation of which was not required by legislation and is not governed by legislation. The wording of the Bilateral Agreement refers to the "contracted services" MAI will provide to Canada regarding the ferry service. The parties to the contract are Canada and MAI, both of which have the requisite capacity to conclude binding contracts. The Minister has the authority to bind the Crown at common law (*Quebec (Attorney General) v Labreque*, [1980] 2 SCR 1057 at 1082-3 ("*Labreque*"); *Verreault v Quebec (Attorney General)*, [1977] 1 SCR 41 at 46-7 ("*Verreault*"); *The Queen v CAE Industries Ltd*, [1986] 1 FC 129 (FCA) at paras 37 and 73 ("*CAE Industries Ltd*")) and by the authority contained in the *Department of Transport Act*. Pursuant to s 15(1) of the CBCA, MAI has the capacity, and subject to the CBCA, the rights, powers and privileges of a natural person. The FAA does not limit MAI's ability to enter into contracts.

[77] Nor does the status of the Bilateral Agreement, as a contract, change simply because it has been adopted by an order in council. Depending on context, an order in council may be legislative, judicial or administrative in nature (*Coyle v British Columbia (Minister of Education)*, 1978 Carwswell BC 493 at paras 13-16 and 90 ("*Coyle*"); *Board of Commissioners of Public Utilities v Nova Scotia Power Corporation* (1976), 75 DLR (3d) 72 at paras 56-7

(NSCA) ("*NS Power*")). The Supreme Court of Canada has held that orders in council that authorize a Minister or a Crown corporation to enter into a contract are generally not legislative in nature. Rather, they are agreements between the parties, setting out the obligation for each party and are limited in effect to the parties to the agreement (*Re Manitoba Language Reference*, [1985] 1 SCR 721 at paras 26 and 30 ("*Re Manitoba Language*")).

[78] In this case, the Bilateral Agreement does not flow from statute and is therefore administrative rather than legislative in nature. In this regard, the Bilateral Agreement varies from the Tripartite Agreement, which flowed from the 1979 OIC that cited statutory powers under s 19 of the *Canadian National Railways Act* which entrusted rail property to a Crown corporation. The *Canadian National Railways Act* was repealed in 1995 as part of the modern era of deregulating transportation and the Bilateral Agreement does not have a similar statutory basis. Nothing in the MAIAAA requires an order in council for MAI to enter into contracts, which means the 1987 OIC is not a legislative instrument. In addition, the 1987 OIC approved the Bilateral Agreement "substantially in the form of agreement" attached, this indicated the Governor in Council's general approval of the Minister's decision to enter the contract, nothing more. The Minister already had the capacity and authority to contract, the 1987 OIC was not authorization.

[79] The evidence of Canada and MAI demonstrates that in 2007 and 2010 the parties to the Bilateral Agreement agreed to amend its terms with respect to whether ministerial approval was required for MAI to set its rates for the Argentia and Constitutional Routes respectively. As the parties consented to making these amendments, no particular form of an amendment was

required (*Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd & Anor*, [2016] EWCA Civ 396; *Soboczynski v Beauchamp*, 2015 ONCA 282 148 at paras 45-53; *Quebec (Agence du revenu) v Services Environnementaux AES inc*, 2013 SCC 65 at paras 27-35). The evidence also establishes that following the amendments the parties acted in accordance with them. From 2010 to the present the Minister has not approved the rates or participated in the setting of any of MAI's rates. In making the 2016/17 Freight Rate Decision MAI exercised its own corporate powers to do so, consistent with its contractual commitments to Canada. Accordingly, there is no decision of the Minister that is amendable to judicial review under s 18.1 of the *Federal Courts Act*.

[80] Nor can Oceanex, which is not a party to the Bilateral Agreement, purport to enforce its terms. Similarly, absent privity of contract, Oceanex cannot complain about how MAI or Canada performed under the Agreement. While the common law allows for judicial review of decisions of ministers to enter into certain contracts, Oceanex's claim is not based on the Minister improperly contracting with MAI. Rather, Oceanex takes issue with the Minister's performance of the contract, which is not amenable to judicial review. Context matters because the impugned rates in this case flowed from contract rather than statute.

[81] Regarding the CPCS Report, the 2014 Minister's Letter indicated that TC would be undertaking an internal review of federally funded ferry services, including those provided by MAI. Further, it is the role of the TC Marine Policy Directorate to develop policy, which includes engaging stakeholders. Therefore, it cannot be assumed, as Oceanex does, that the

CPCS Report flowed from a requirement to comply with the NTP and that the only purpose for it was to ensure compliance with the NTP.

Newfoundland's Submissions

[82] Newfoundland takes no position as to who is the correct decision-maker for the purposes of setting rates. It submits that the constitutional obligation contained in the Terms of Union persists no matter who Canada delegates to set rates.

Analysis

(i) Absence of any statutory requirement that the Minister set freight rates

[83] As indicated above, CN Marine Inc. (then CN Marine Corporation), was incorporated under the CBCA in 1977. Pursuant to s 3(1) of the MAIAAA, in 1986 its name was changed to Marine Atlantic Inc., its articles of incorporation were amended accordingly, and, the Minister acquired all of the shares of MAI from CNR. And, as required by s 9 of the MAIAAA, its articles were also amended to restrict MAI's business to the "acquisition, establishment, management and operation of a marine transportation service, a marine maintenance, repair and refit service, a marine construction business and any service or business related thereto". The MAIAAA is not comprehensive legislation, it is comprised of only 9 sections. It is an act to authorize the acquisition of MAI and to provide for related matters. It does not speak to corporate governance nor does it address the setting or approval of ferry services rates. No regulations are effected pursuant to the MAIAAA.

[84] As to the CBCA, MAI has the capacity and, subject to the CBCA, the rights, powers and privileges of a natural person. Its directors are required to manage, or supervise the management of, the business and affairs of the corporation (CBCA, s 102(1)). Every director and officer of a CBCA corporation, in exercising their powers and discharging their duties, is required to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s 122(1)). The CBCA is general legislation, it does not speak to rate-setting.

[85] As a parent Crown corporation (FAA, s 83), MAI is also regulated by Part X of the FAA which concerns corporate affairs. As such, and subject to the provisions thereof, its board of directors is responsible for the management of the business, activities and other affairs of the corporation (FAA, s 109). Every parent Crown corporation must annually submit a corporate plan to the minister concerned for the approval of the Governor in Council, on the recommendation of that minister (FAA, s 122) and annually submit an operating budget and a capital budget to the minister concerned for the approval of Treasury Board on the recommendation of that minister (FAA, ss 123 and 125). After the corporate plan and the operating and capital budgets have been so approved, the parent Crown corporation must submit a summary of the plan or budget to the minister for his or her approval (FAA, 125(1)). The summary is to encompass all the business and activities of the parent Crown corporation and must set out the major business decisions taken in respect thereof.

[86] The FAA speaks to corporate governance of parent Crown corporations on a general level. Its application, in the case of MAI, requires that the Minister recommend the annual corporate plan and the operating and capital budget for approval by the Governor in Council, and Treasury Board, respectively. The Minister is required to approve a summary of the corporate plan and operating or capital budget only after those plans themselves have received Governor in Council and Treasury Board approval. Nothing in the FAA speaks to specifics of the operations of the parent Crown corporations to which it pertains, such as the setting of freight or other rates. It does, however, require the corporate plan to encompass all of the business and activities of the corporation.

[87] The content of the CTA will be discussed further below, it is sufficient to state here that it contains no provisions that specifically pertain to marine transportation. Thus, it does not speak to rate-setting in that sector.

[88] In my view, nothing in the CBCA, MAIAAA, FAA or CTA required the Minister to set or approve the 2016/17 freight rates or prohibited MAI from setting the rates. In the result, there is no legislative basis for Oceanex's view that the Minister must determine the freight rates. Moreover, MAI's articles of incorporation, the CBCA, and the FAA all support that the management of MAI lies with it and its board of directors.

(ii) Corporate Plan

[89] Oceanex submits that the process by which the 2016/17-2020/21 corporate plan and operating and capital budget plan were developed illustrates or implies Ministerial approval of

the 2016/17 freight rates. In essence, what Oceanex argues is that the relationship or interaction between TC, MAI and the Minister demonstrates that the Minister controlled MAI's affairs and, in that way, set or approved the 2016/17 freight rates.

[90] The Leamon Affidavit states that, as described in the MAI annual Corporate Plan Summary, MAI operates at arm's length from its sole shareholder, Canada. Further, that while its shareholder, by way of the Minister, provides policy direction and funding for MAI's ongoing operation, MAI's board of directors sets its strategic direction and organizational goals and oversees their implementation.

[91] On cross-examination Mr. Leamon explained that planning for the corporate plan usually begins in the summer to prepare for approval by MAI's board of directors in December. On occasion there may be a meeting with TC during the preparation of the plan and there would be more frequent communication, including by email. Mr. Leamon deposed that Privy Council Office, Treasury Board and TC all have analysts who review the corporate plan prior to its submission for approval by the Governor in Council. Drafts of the corporate plan are exchanged with TC and, to a lesser degree, with Privy Council Office, Treasury Board and the Department of Finance Canada for comment.

[92] While the board of directors is responsible for setting the strategic direction for MAI, its shareholder, through the Minister, provides broad policy direction which covers the setting of funding levels or other broad government wide interaction, such as environmental matters. In MAI's case, the Minister sets cost recovery targets and on-time performance standards.

[93] Mr. Leamon deposed that revenue and traffic projections are a component of MAI's financial information included in the operation and capital budget and are discussed with TC. When asked if he agreed that MAI is subject to significant government control over its management, Mr. Leamon did not agree. Rather, he stated that the executive and board had autonomy to manage MAI strategically and that there were varying levels of input over the years, based on MAI's situation and what it was moving forward through the corporate plan. Day-to-day management of MAI has always been with the executive and board.

[94] Mr. Leamon confirmed that MAI provides a monthly billing report to TC as to its expenses in which it would address whether it was living within its appropriations and highlight any concerns about meeting high level objectives. There are also regular meetings between TC and MAI during the year, beyond the corporate plan drafting exercise, as well as paper communications.

[95] While TC sees inputs, such as traffic projections and MAI's rate increase projections, Mr. Leamon deposed that it was the total package of what MAI provides, all expenses and revenues, that are considered in determining appropriations. Significantly, Mr. Leamon noted that MAI does not wait for approval of its corporate plan before implementing rate increases. For example, in 2017 the rate increases were implemented in April but at the time of the examination of Mr. Leamon, in June 2017, the corporate plan not yet been approved. The rates would have been discussed with TC as part of the corporate plan process, but TC would not have approved those rates.

[96] And, while MAI has an obligation to provide the corporate plan, Mr. Leamon deposed that there was no requirement to produce specific components. However, traffic projections, revenue projections and planned rate increases are included in the document every year.

[97] Bergevin Affidavit #2 states that, pursuant to s 109 of the FAA, MAI's board of directors oversees management of business, activities and other affairs of MAI. MAI's board of directors, and not Canada, is responsible for the operations, management and day-to-day activities of MAI. MAI operates at arm's length from Canada and is the sole owner of its assets which includes ships, ferry terminal buildings and related assets. Canada retains high level oversight related to broad policy direction for Crown corporations such as MAI. For example, setting cost recovery policy and funding levels. The Minister ensures corporate plans are in place, that MAI has received policy direction consistent with its mandate, and that MAI delivers on this mandate. Section 122 of the FAA requires MAI to annually submit corporate plans to the Minister for Governor in Council approval. The corporate plan includes information relating to MAI's business and activities, including investments, and states MAI's objectives for a 5 year period and its strategy for achieving these objectives, including performance indicators and targets. The board of directors approves this plan by resolution.

[98] When cross-examined on her affidavit Ms. Bergevin stated that in developing the corporate plan, TC and MAI will correspond or meet to discuss draft plans prior to submitting the final plan for Governor in Council approval. TC comments on draft corporate plans to clarify content before formal approval is sought. For example, if MAI's performance measurement strategy was thought to be not strong enough, TC may ask MAI to include more

information. TC would also provide the draft plan to the Privy Council Office, Treasury Board Secretariat and Finance Canada, any comments received from those entities would be sent to TC. TC and MAI will communicate between October and March to ensure the corporate plan is approved by April 1 of each year. Ms. Bergevin deposed that such comments are not directions. MAI is free to follow or disregard them before submitting the plan to the Minister for Governor in Council approval. Nor are these comments the same as minister issued directives under s 89 of the FAA, which are binding on the subject Crown corporation. She did not agree that the corporate plan is a tool or mechanism by which Canada directs, influences or controls MAI.

[99] I note that the documents disclosed by MAI and contained in the record before me establish an exchange of draft 2016/17-2020/21 corporate plans between TC and MAI and that the TC Office of Crown Corporation Governance commented on the drafts and relayed comments of the central agencies. These comments are formed as suggestions. For example, this included comments about fixing typos; elaborating on MAI's background/operations for new Treasury Board ministers; consistency in using acronyms and defining terms in the plan; clarifying information in tables/graphs; including traffic data for the last period to improve the forecast section; providing more detail on MAI's economic situation; confirming the lifespan of vessels and time period needed to replace vessels; detailing corporate key risks; questioning the wording/description of MAI's price increases; revisiting wording for cost recovery targets on the non-constitutional route; and, including interest charges on public money. These exchanges and comments do not suggest that Canada dictated the rates.

[100] As discussed above, the general content of the corporate plan of a Crown corporation is determined by the FAA. MAI's 2016/17-2020/21 corporate plan includes the corporation's vision and mission statement and descriptions of its governance structure, executive team, and workforce. The plan further outlines the Auditor General's 2009 Report, strategic initiatives, MAI's economic outlook (including demographic and consumer trends, air travel and the overall impact on MAI's traffic). The corporate plan also includes MAI's strategic plan for a 5 year period and describes how this plan will be implemented using long-term fleet strategy, risk management, pricing models, and other activities. MAI also describes its financial outlook, including traffic demand, rates, revenue forecast, operating expenses, costs, capital requirements, and cost recovery. Financial projections and key performance indicators and the specific approvals sought from the Governor in Council and Treasury Board, respectively, are also addressed and financial statements appended.

[101] Under Governance Structure the plan states:

> Like all Crown Corporations, Marine Atlantic was established to allow it to operate at arm's length from its sole shareholder, the Government of Canada. While the shareholder provides policy direction and funding for the Corporation's ongoing operations, as stated in the *Financial Administration Act*, Marine Atlantic's Board of Directors ensures that the Corporation fulfils its mandate by setting the Corporation's strategic direction and organizational goals and overseeing their implementation by management. Up to ten Board members are appointed. The Chairman of the Board and the President and CEO are appointed by the Governor in Council on the recommendation of the Minister of Transport and the Board of Directors are appointed by the Minister of Transport with the approval of the Governor in Council.

[102] The Specific Approvals Sought are:

> MAI seeks Governor in Council approval of MAI's 2014-2019 Corporate Plan, Treasury Board approval of the operating and capital plans contained herein (See Section 8 – Financial Statements), and approval for the continuation of a line of credit as described below.

[103] As to Rates:

> In an effort to meet the 65% cost recovery target, the Corporation modeled revenue projections based on:
>
> - A 2.6% tariff increase annually on all transportation services including drop trailer management fees for the planning period. This increase will be implemented on April 1st of each year.
>
> - Increasing the fuel surcharge from 15% to 18% in 2016/17, then additional increases of 3% per year over the remainder of the planning period. While the price of fuel has dropped considerably, MAI must switch its fuel from a less expensive blended fuel to the more expensive MGO in order to meet the sulfur emission regulations. The increase in fuel surcharge is required to offset the increased cost of fuel in order for MAI to meet its cost recovery target. However, any planned increases to the fuel surcharge will have to be revisited as the price of fuel fluctuates.
>
> …
>
> While a 2.6% rate increase does not seem that significant on its own, the cumulative impact of these increases is quite significant. By the end of the planning period, tariffed rates for MAI's services will have increased by 34% since 2010, excluding the impacts of the fuel surcharge. As such, MAI is anticipating a significant degree of pushback from its customers and its stakeholders regarding its planned rate increases.
>
> …
>
> It is MAI's belief that continued upward pressure on rates will negatively impact traffic levels, as the will become unaffordable for some, and less expensive methods of travel become more prevalent.

[104] The corporate plan, contrary to what might be taken from Oceanex's submissions, is not focussed on the setting of the 2016/17 rates. Rather, it is a detailed report of MAI's overall corporate affairs, the content of which, on a general level, is prescribed by the FAA.

[105] Nor am I persuaded that the fact that MAI's directors are appointed by the Minister, with the approval of the Governor in Council, indicates ultimate "control" over the corporation by the Minister as Oceanex submits. This manner of appointment is specified by s 105(1) and (5) of the FAA and is true of all Crown corporations. Moreover, pursuant to the FAA, the board of directors of a Crown Corporation is responsible for the management of the business, activities and other affairs of the corporation.

[106] Similarly, the FAA requires that a corporate plan be prepared annually, to be approved by the Governor in Council on the recommendation of the Minister, as well as the general content of that plan. The corporation must also annually submit an operating budget for approval by Treasury Board on the recommendation of the Minister. Mere compliance with these statutory requirements does not, in my view, establish that MAI is controlled by the Minister to any greater extent than any other Crown parent corporation which must report to Parliament through him, or through any other responsible minister.

[107] And, while the evidence establishes that MAI works closely with TC's Crown Corporation and Portfolio Governance Directive in annually developing the plan, there is no evidence that the level or content of communication exceeded what would normally be anticipated when a Crown corporation is preparing its corporate plan. Common sense and good

corporate governance would suggest that the developers of a corporate plan, which has the effect of seeking appropriation of large sums of money from Parliament to fund the Crown corporation's operations and capital costs, would liaise with its responsible department to ensure that the necessary ministerial recommendation would be given, prior to the plan being submitted to the Governor in Council for approval. To do otherwise would be to risk delay and related operational consequences. Nor is there any evidence that during these communications TC dictated the amount of the 2016/17 freight rates for purposes of the preparation of the corporate plan.

[108] In sum, I am not persuaded that the process for developing the corporate plan establishes either that the Minister controlled the process and therefore set the rates, or that the Minister approved the rates. While it is true that TC knew what rates MAI would be proposing in its corporate plan and did not take exception to them, this is not the same as the assertion that the Minister set and approved these rates. MAI set the 2016/17 freight rates by resolution of its board of directors. The rates and the justification for them were contained in MAI's corporate plan. The Governor in Council approved the plan and Treasury Board approved the capital budget and operation budget, both on the recommendation of the Minister. Only then did the Minister approve a summary of those plans as previously approved by the Governor in Council and Treasury Board. The rates were only one aspect of the overall approval and were not separately addressed.

[109] I would also note that pursuant to s 122(6.1) of the FAA, the Governor in Council may specify such terms and conditions as the Governor in Council deems appropriate for the approval

of a corporate plan. And, pursuant to ss 123(5) and 124(8), Treasury Board may similarly specify terms and conditions for approval of an operating budget or capital budget, respectively. No such terms and conditions of approval were specified that would require rate-setting by the Minister or preclude rate-setting by MAI or otherwise.

[110] As to the timing of the rate-setting, as indicated above, the 2016/17 freight rates were approved by MAI's board of directors by resolution dated December 10, 2015. MAI issued a news release with its rates on January 28, 2016. The 2016/17-2020/21 corporate plan was not approved by the Governor in Council until May 20, 2016. Oceanex submits MAI required the approval of the Governor in Council to proceed with the corporate plan and, therefore, had no authority to set rates in advance of plan approval. Oceanex references s 122(5) of the FAA in support of this position. However, s 122(5) states only that no parent Crown corporation shall carry on any business or activity in any period in a manner that is not consistent with its last corporate plan. In my view, this has no application in these circumstances.

(iii) Control over MAI

[111] I have addressed Oceanex's allegation of the Minister's control over MAI by way of its corporate plan above.

[112] Oceanex also submits that pursuant to s 7(2) of the MAIAAA, the management, administration and control of MAI's property and works is vested in the Minister. This, amongst or combined with other things, demonstrates the Minister's control over MAI, including the setting of its rates. Conversely, Canada submits that s 7 serves only to vest the management,

administration and control over the specified property and works in the Minister. MAI submits that the MAIAAA does not give the Minister direct control over MAI and is silent on rates. As to the 1979 OIC, this is the transferred property and works set out in Part II of Schedule B and is not relevant as it does not pertain to marine assets owned by MAI. Further, s 13 of the Tripartite Agreement required CNR to sell all of its interest in the ferry-related assets to CN Marine, which later became MAI. Those ferry-related assets are listed under Schedule B, Part I of the 1979 OIC. By 1986, when the MAIAAA came into effect, CN Marine (now MAI) owned all of the marine assets.

[113] Subsection 7(1) of the MAIAAA states that on the direction of the Minister, CNR shall transfer to Canada the property and works listed in Part II of Schedule B to the 1949 OIC. Subsection 7(2) states that the management, administration and control of the property and works transferred to Canada by s 7(1) is vested in the Minister.

[114] The 1979 OIC states that the Governor in Council, pursuant to s 19 of the *Canadian National Railways Act*, entrusted to CNR the management and operation of lands owned or to be acquired by Canada as set out in Schedule A, on the condition that certain of them be leased to CN Marine. Additionally, pursuant to s 52 of the FAA, the Governor in Council directed the transfer to CNR of all of Canada's right, title and interest in and to the properties and works identified in Schedule B, in consideration of the issuance by CNR to the Minister, in trust, of all of its common shares. Schedule B, Part II, is entitled "Department of Transport Summary Rail Related Assets Located within Confirms of Ferry Terminals as of January 1, 1979". As its title

suggests, the listed assets are rail related assets, it does not transfer vessels or marine related assets.

[115] The 1979 OIC, under the heading "terms and conditions", states that to provide for through movement of rail traffic or rail cars, between rail terminals located in North Sydney and Port aux Basques, CNR shall obtain by purchase, charter, lease or otherwise, such facilities and marine equipment that it required to manage and operate the services necessary to the provision of such rail traffic. Or, with the approval of the Minister, to enter into agreements with other parties to provide for the management and operation of such services. When an agreement to provide for the management and operation of services for the carriage of highway vehicles and passengers between North Sydney and Port aux Basques (as well as passengers and freight along the south coast of Newfoundland and Labrador) was in effect between Canada and a third party, CNR was not required to manage and operate any such services as provided for under that agreement. Attached to the 1979 OIC and described as "Appendix "A" to submissions to Treasury Board" is a copy, unexecuted, of the Tripartite Agreement.

[116] In the result, in 1979, by way of the 1979 OIC, the right, title and interest of Canada in the Schedule B, Part II property and works, railways related assets, was transferred from Canada to CNR. By way of s 2 of the Tripartite Agreement, Canada transferred to CNR the Schedule B, Part II property "being property required by CNR for the contracted rail car handling services". By way of s 17(a) of the Tripartite Agreement, CNR leased those properties to CN Marine. And, in 1986 by way of s 7(1) of the MAIAAA, CNR transferred the properties back to Canada. Thus, to the extent that Canada, by way of s 7(2) of the MAIAAA was vested with the

management, administration and control over those properties and works, this pertained only to rail related assets. Further, the vesting of such management did not impact how MAI provided ferry services on the Constitutional Route. That is, control over rail related assets as granted back to Canada by s 7, does not imply control by the Minister over MAI's operational governance generally or, more specifically, the setting of its rates for ferry services.

[117] And, as pointed out by MAI, Schedule B, Part I of the 1979 OIC is entitled "Summary of Ferry and Coastal Service Assets…". By way of the 1979 OIC, these were transferred to CNR, as reflected in s 2(a) of the Tripartite Agreement. And, pursuant to s 13 of the Tripartite Agreement, CNR sold to CN Marine all of its interest in the property identified in Schedule B, Part I. Thus, by 1986 when the MAIAAA came into effect and by which CN Marine changed its name to MAI, MAI already owned all of those marine assets.

[118] As to s 8 of the MAIAAA, this concerns the transfer of property to MAI. The Minister, on such terms and conditions as the Governor in Council may prescribe, was authorized to sell, lease or otherwise dispose of to MAI, or, by agreement in writing, to permit MAI to use any real or personal property or interest therein, or any power, right or privilege over or with respect to any real or personal property or interest therein that is vested in or owned, controlled or occupied by Canada and over which the Minister has the management, administration or control. In my view, s 8 similarly does not serve to indicate Canada's control over MAI. To the contrary, this suggests that Canada will provide MAI with access to any property and property rights necessary to facilitate MAI's operations. In any event, the evidence is undisputed that MAI is the owner

and operator of the three vessels, and charterer of a fourth, that service the Constitutional Route as well as ferry terminal properties.

[119] In the result, in my view, ss 7 and 8 of the MAIAAA do not demonstrate control by the Minister over MAI or its corporate affairs.

[120] Oceanex also asserts that two letters from the Minister illustrate his control over MAI. This first of these is the 2007 Minister's Letter. It is from then Minister Cannon to the newly appointed Chair of MAI, Mr. Robert Crosbie. The letter states that the Minister was writing to outline some of Mr. Crosbie's priorities, which were germane to his role and "to set out the broad expectations for next five years", which priorities might be updated periodically to reflect changes that may occur.

[121] The Minister stated that the overall context in which the priorities were set was defined partly by past special examinations conducted by the Office of the Auditor General, the report of the Advisory Committee on MAI and by direction provided by Treasury Board ministers. Those ministers, when approving MAI's 2006/10 corporate plan, specifically requested that a long-term strategy be developed that addressed MAI's long-term financial requirements, taking into account future capital and fleet needs, potential cost reduction measures, rate structures, the appropriate level of cost recovery, and alternative service delivery options.

[122] The letter addressed MAI's escalating deficit and that additional funding was required. Accordingly, an additional $54 million above the then current reference level had been approved

for the next 5 years. Funds had also been requested for consideration in the next budget. However, simply funding MAI's entire deficit was not good stewardship of taxpayer money. The Minister stated his belief that MAI could increase its cost recovery target but nevertheless recognised that "given the critical nature of the service and its constitutional element, the target needs to be reasonable, particularly with respect to the level of revenues". A cost recovery target of between 60-65% (excluding capital and pension payments) was deemed to be reasonable, which was an increase from the current year level of 56%. The Minister stated that the new level should be achieved and maintained over the following 5 years using a balanced approach, a combination of revenue and cost contained strategies as outlined in the letter.

[123] The revenue strategy approved by government was stated to remove the arbitrary nature of past rate increases. Instead, it relied on the rationale that treated constitutional tariffs for passengers and vehicles separately from tariffs for the non-constitutional service. This included that on the Constitutional Route, passenger and vehicle tariffs annual increases were to be equal to the Consumer Price Index. On the non-constitutional route, tariffs were to be determined by the MAI board of directors in accordance with the cost recovery target. The Minister advised that a 5 year plan should be developed outlining specific initiatives to enable MAI to achieve and maintain the cost recovery target.

[124] As to performance measures, the Minister stated that the Office of the Auditor General noted in a 2004 Special Examination that MAI must set more comprehensive performance targets. In that regard, the Minister had requested that TC officials work with MAI to develop those targets in accordance with a benchmarking study undertaken by the department and that the

targets should be included in the annual subsidiary operating and capital funding agreements well as the annual report and corporate plan.

[125] The Minister concluded that, for each the proposals, he trusted that the Chair would continue to work closely with departmental officials and he looked forward to the Chair's ongoing support "as we work together to ensure safe, reliable, efficient and affordable ferry services that provide a critical economic and social link between Canada and the Province of Newfoundland and Labrador".

[126] In my view, the 2007 Minister's Letter is significant because it shows that in 2007 the Minister was setting the rates on the Constitutional Route, tying them to the Consumer Price Index. However, on the non-constitutional route, Argentia, it was the board of directors of MAI that was to set the rates, in accordance with the specified cost recovery target. The Minister also clearly envisioned the board of directors working closely with TC officials to address the proposals set out. Read in whole, however, I do not see the 2007 Minister's Letter as dictating general control over MAI, rather as setting broad long range expectations.

[127] I note in passing that the setting of rates had been previously addressed by the Bilateral Agreement. Thus, the permitting of MAI to set the Argentia rates as described by the 2007 Minister's Letter was a deviation from the terms of that agreement.

[128] The second Minister's letter, the 2014 Minister's Letter, came seven years later. It is dated October 30, 2014 and is to Mr. Paul Griffin, CEO of MAI, from then Minister Raitt. This

informs the CEO of some recent government decisions affecting MAI and outlines the government's expectations in that regard.

[129] The letter advises first that over the next year TC would be undertaking an internal, low-key review of all federally funded ferries, including the services provided by MAI, to inform decisions on how government should support ferry services in the long-term. The Minister also advised that policy authority had been granted to MAI to purchase the MV Highlander and MV Blue Puttees in 2015/16 and re-charter the MV Atlantic Vision for up to 3 years. MAI should also start its search for another suitable vessel for charter to replace the MV Atlantic Vision, similar to the MV Highlander and MV Blue Puttees, to ensure a homogenous fleet.

[130] In addition, up to $517.2 million over 3 years (2015/16 and 2017/18) had been secured to cover MAI's capital expenses and operating shortfalls. The letter also stated that MAI was expected to continue conducting its business in the most effective, efficient, safe, secure and environmentally sustainable manner as possible, while maintaining its overall cost recovery target of 65% using the existing formula. MAI should also be targeting 100 percent cost recovery for its non-constitutional services (Argentia, drop trailer management and on-board service) using a revised formula.

[131] The Minister also informed the CEO that the Bilateral Agreement between MAI and Canada would be rescinded once all real property issues had been resolved. "Instead, MAI should start planning against a set of key performance indicators and targets which would be reviewed on an annual basis through the Corporate Plan process". The indicator targets were

identified as effective and reliable ferry services and customer satisfaction. Once MAI's 2014/15 to 2018/19 Corporate Plan and Operating and Capital Budgets were approved, it would have the required authority to begin implementation of the initiatives. The Minister expressed her appreciation to all of the staff at MAI that worked closely with departmental officials to provide them with the necessary information required for the development of MAI's strategy.

[132] The 2014 Minister's Letter did not set, or refer to rates. And, as will be discussed below, it was written after MAI and Canada assert that the Bilateral Agreement, which required the Minister to set the rates, was amended to permit the MAI board of directors to set increases on the Constitutional Route of up to 5% without ministerial approval.

[133] In sum, while these letters confirm a close working relationship between MAI and TC, set broad expectations and confirm that the Minister set cost recovery rates to be achieved by MAI, I am not convinced that this illustrates a level of control over MAI by the Minister that exceeds what would be anticipated in this circumstance. MAI is a Crown corporation ultimately accountable, through the Minister, to Parliament for the conduct of its affairs (FAA, s 88). Accordingly, an ongoing working relationship would not be unanticipated between it and TC. More specifically, while the 2007 Minister's Letter did tie rates on the Constitutional Route to the Consumer Price Index, it stated that rates on the Argentia route were to be set by MAI. Unlike the 2007 Minister's Letter, the 2014 Minister's Letter does not set rates for the Constitutional Route. In my view, while this illustrates a shift in responsibility for the setting of rates, it does not support that the Minister made the 2016/17 Freight Rate Decision.

[134] Finally, it should be noted that pursuant to s 89 of the FAA the Governor in Council may, on the recommendation of the Minister, give a direction to parent Crown corporations if the Governor in Council is of the opinion that it is in the public interest to do so. However, before a directive is given, the Minister must consult the board of directors with respect to the content and effect of the directive and take other steps set out in s 89. Although in some parts of its written submissions Oceanex uses the term "directive", there is no evidence before me that any directive has ever been issued to MAI.

(iv) Bilateral Agreement

[135] MAI, in the exercise of its corporate capacity, was entitled to enter into contracts and agreements with Canada, and others, in respect of the carrying out of its business activities.

[136] In that regard and as referenced in the MOU, it is of note that the Auditor General had criticized the lack of contractual arrangements between Canada and CNR in respect of the east coast ferry and coastal services. The Tripartite Agreement stated that it was the objective of the parties thereto to establish and maintain mutually satisfactory conditions which would permit the execution from time to time of specific operating agreements in respect of the management and operation of certain ferry and coastal shipping services, referred as to the "contracted water services". The parties agreed to have the management and operation of the contracted water services performed in accordance with the terms and conditions of the specific operating agreements and to provide the traffic offering.

[137] The Bilateral Agreement, which replaced the Tripartite Agreement, states in its preamble that the parties, by way of the Bilateral Agreement, agreed to establish a set of mutually satisfactory conditions which would, within the statutory requirements imposed by Part XII of the FAA, its regulations and other pertinent enactments of Parliament, facilitate the provision, at Canada's request, of certain ferry and coastal shipping services. In consideration of the premises and mutual covenants and agreements contained in the Bilateral Agreement, the parties agreed as to the provision of the contracted services, being ferry and coastal shipping services as defined, and that MAI would operate the contracted services as specified in the subsidiary operating agreements.

[138] Oceanex does not challenge MAI's authority to enter into the Bilateral Agreement. Rather, it takes the position that MAI and the Minister are bound by its terms. In that regard, the Bilateral Agreement, which came into force on January 1, 1987, required the Minister, in respect of present or future subsidiary agreements, to, by April 30 of each year, advise MAI of any changes in the standards and levels of service and the general level of fares and rates (s 7(2)). After receiving that notice, MAI was required to recommend to the Minister for approval, fares and rates for the movement of passengers, vehicles and cargo; which approval of rates and fares would be used in the determination of the annual maximum subsidiary operating agreement payments (s 3(3)). Thus, pursuant to the Bilateral Agreement, the Minister approved the rates.

[139] It is not disputed that there was no formal written amendment of the Bilateral Agreement to permit MAI to effect annual increases of freight rates of up to 5%, without approval of the Minister. Oceanex's position is that, without such an amendment, MAI could not make the

2016/17 Freight Rate Decision, only the Minister could do so and, in that regard, he was required to take into consideration all relevant factors, including s 5 of the CTA and the impact of the rates on Oceanex. When appearing before me, Oceanex also submitted that any amendment to the Bilateral Agreement could only be effected pursuant to an order in council.

[140] Thus, the question is, could Canada and MAI amend the terms of the Bilateral Agreement and, if so, was the Bilateral Agreement subsequently amended to permit MAI to set these rates?

[141] The background to the alleged amendment to the Bilateral Agreement is as follows. The Implementation of Budget 2010 Decision states that the goal of the second phase of the revitalization strategy was to strengthen governance and management at MAI; to improve its customer services; to improve its commercial orientation; and to reach or surpass a 60-65% cost recovering target. As to strengthening governance and management, the document states that this objective included enhancing MAI's capacity in financial management, risk management, performance management, asset management and project management. Governance was also strengthened in terms of greater accountability between service management and the board of directors as well as between the board and the Minister. By pursuing these objectives through the proposed approach, MAI would address the key deficiencies noted by the Auditor General's 2009 Report.

[142] Under "governance strategies", the rationale is stated to be that governance renewal was necessary to further support MAI's response to the Auditor General's recommendations. As to the Bilateral Agreement, because the MAIAAA did not provide an overall framework for the

contractual relationship between Canada and MAI, the Bilateral Agreement was signed with respect to the operation of specific ferry and coastal services in Canada. However, the agreement had not been updated since 1987 even though MAI had undergone major changes, including shrinking from a four province and one US state ferry operation to a service that links Newfoundland and Nova Scotia. Rationale for the revamping of the Bilateral Agreement was set out and the Implementation of Budget 2010 Decision states that TC would pursue with MAI the finalization of a new bilateral agreement with a view to submitting it to Treasury Board for Governor in Council approval by the end of 2010/11.

[143] Under "revenue strategies", the document deals with 100% cost recovery on value added services (i.e. non-constitutional service) and minimal rate increases on the Constitutional Route:

> Minimal rate increases on the constitutional route
>
> 11. The approach outlined above protects the customer base that uses strictly the constitutional transportation service between North Sydney and Port aux Basques. The transportation fares for this service applicable to passengers, passenger related vehicles and commercial related vehicles should not need to increase by more than three percent per year to achieve the Corporation's overall cost recovery objective. However, CPI rate increases on an annual basis are no longer sustainable in the foreseeable future as MAI's costs have risen at a much faster rate than MAI's revenue.
>
> 12. MAI is planning to increase the transportation fares on the constitutional route by six percent in October 2010 after the announcement of the asset renewal plan and an expected significant customer service improvement. It should be noted that the last rate increase took place in January 2009 and was in line with the 2.5 percent CPI increase.
>
> 13. **The rate increases on the constitutional route would be set by MAI's Board of Directors to a maximum of five percent per year taking into consideration the operational environment, the expected traffic demand and the overall cost recovery objective for the year. Any higher rate increase would have to be submitted to the Minister of Transport,**

> **Infrastructure and Communities for approval with corresponding justification.**
>
> [Emphasis added]

[144] As to implementation, the Implementation of Budget 2010 Decision states that soon after Cabinet approval of this Memorandum to Cabinet, MAI's Chair would receive a letter of expectations from the Minister explaining the revitalization strategy and asking MAI to integrate the detailed strategies into the Corporate Plan of 2010/11-2014/15 to keep moving towards a more commercial orientation, meet cost recovery strategies and improve customer service. The gradual implementation of the 5 year plan would be monitored by TC on an annual basis and would be accounted for in the annual submissions to Treasury Board of MAI's corporate plan.

[145] The Implementation of Budget 2010 Decision was sent to MAI by email on April 8, 2010. Bergevin Affidavit #2 states that approval of the 2010 Revitalization Strategy was communicated to MAI by way of the Implementation of Budget 2010 Decision.

[146] The Bilateral Agreement was not subsequently formally amended nor is there any evidence that a letter of expectations was sent by the Minister following the issuance of the Implementation of Budget 2010 Decision.

[147] However, the MAI 2010/11-2014/15 corporate plan speaks to the anticipated re-vamped Bilateral Agreement, expected to be completed in 2010/11. As to the setting of rates by MAI, under "Management Renewal", it states:

3.4 Revenue Generation

Marine Atlantic's Revenue Generation Strategy was developed based on research by two consulting firms specializing in pricing strategy and marketing. The new revenue generation approach will grow revenue based on optimizing prices for existing services, and introducing new services and fees with the aim to:

- improve cost recovery on constitutional services;
- move towards 100% cost recovery on non constitutional services;
- Prices for existing services - Marine Atlantic will initiate price increases across a number of its existing services beginning in 2010/11 including base tariffs on the Argentia and the Gulf services, as well as drop trailer management fees. Further detail on these actions can be found in Section 5.7; and
- Introduction of new services and fees - Marine Atlantic will introduce a new Terminal and Security Fee in 2010/11 and will lay the groundwork for the introduction of dynamic pricing in 2011/12 with the development of the approach for dynamic pricing initiated in the latter part of the 2010/11 fiscal year. Further detail on dynamic pricing can be found in Section 5.2.4.

The above mentioned actions will result in incremental revenue to the Corporation and improve its overall cost recovery. With the approval of the Revitalization Strategy, the Corporation's Board of Directors now accepts responsibility for future price changes across all services, including to a maximum of five percent per year on constitutional fares. This is a change from the previous situation, where increases in constitutional fares were limited to increases in the Consumer Price Index (CPI), and brings added agility to the Corporation.

[Emphasis added]

[148] Similarly, MAI's 2010/11 Annual Report also reflects this change in rate-setting authority, in the "Notes to the Financial Statements, Nature of Operations and Authority", it states:

> The Corporation receives annual parliamentary appropriations for operations from the Government of Canada to the extent that the cost of providing ferry services is not recovered from commercial revenues. The Corporation's Board of Directors accepts responsibility for price changes across all services, including to a maximum of five per cent per year on constitutional fares. The Corporation also sets a fuel surcharge based on the annual cost recovery target. The acquisitions of vessel, facilities and equipment are subject to approval of parliamentary appropriations.

[149] This is also reflected in the MAI 2010/11 Subsidiary Operating Agreement.

[150] A resolution of the MAI board of directors dated December 10, 2015 approved the 2016/17-2020/21 corporate plan, including a 2.6% tariff increase, a 3% increase on fuel surcharge in 2016/17, and the 2016/17 Capital Plan including the Fleet Renewal Plan, (the fuel surcharge increase was subsequently rescinded by resolution of the board of directors dated January 27, 2016).

[151] The affidavit evidence of Leamon and Bergevin is that in each year since 2010, the increase of MAI's rates was less than 5% and was approved by MAI without involvement of the Minister.

(a) *Effect of 1987 OIC on amendment of the Bilateral Agreement*

[152] When appearing before me, Oceanex submitted that the Bilateral Agreement could not be amended by Canada and MAI. Rather, any amendment required authorisation by way of an order in council. In effect, this would mean that, if MAI did set the rates, that action was unauthorized and could not stand.

[153] As I understand Oceanex's reasoning, it is that pursuant to the 1949 OIC, the Governor in Council merely entrusted to CNR the management and operation of the Newfoundland Railway, but subject to such terms and conditions as the Governor in Council may from time to time impose. Therefore, the 1949 OIC did not convey any absolute rights on CNR. Subsequently, the 1976 Report of the-Auditor General of Canada to the House of Commons noted that under the Terms of Union in 1949 Canada took over the operation of the Newfoundland Railway, which included ferry services, and assigned management and operation of the services to CNR by way of an entrustment order upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide. However, that no regulations or conditions had been issued and that CNR operated the services without formal agreement or guidelines. As a result of this criticism, in 1977 Canada and CNR entered into the MOU, which set out terms and conditions for those services. By way of the 1979 OIC and the Tripartite Agreement, Canada continued to exercise the power that it had since 1949 (but did not utilize until the MOU) over the "terms and conditions" governing MAI. This was followed by the 1987 OIC authorizing the Bilateral Agreement. In this regard, Oceanex submits that s 8 of the MAIAAA closely mirrors prior "terms and conditions" between Canada and CNR. Further, that the Bilateral Agreement reflects and implements the Governor in Council's authority over MAI's terms of operation and, therefore, an order in council is needed to amend that agreement.

[154] Conversely, Canada submits that while in 1949 there was a legislative provision which required an order in council, that is no longer the case. The MAIAAA contains no provision requiring an order in council. The 1987 OIC merely approved the Minister's decision to enter into the Bilateral Agreement and it is the only order in council that is now relevant. However, it

does not provide the Minister with the capacity or the authority to enter into the Bilateral Agreement, which arises from his capacity as a natural person to contract, nor does it require the Minister to seek an order in council to amend the Bilateral Agreement.

[155] In my view, to resolve this issue it is necessary to consider some relevant legislative history. By way of the 1949 OIC, the Governor in Council acknowledged that, pursuant to the Terms of Union, Canada would take over from Newfoundland the Newfoundland Railway, including steamship and other marine services. Further, that under the provisions of the *Canadian National Railways Act*, the Governor in Council may, from time to time by order in council, entrust to CNR the management and operation of any lines of railway and any property or works and any powers, rights or privileges over or with respect to any railways, properties or works which may from time to time be vested in or owned, controlled or occupied by Canada, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide, such management and operation to continue during the pleasure of the Governor in Council and subject to termination or variation from time to time in whole or in part by the Governor in Council. Accordingly, by way of the 1949 OIC, the Governor in Council ordered that, effective April 1, 1949, the Newfoundland Railway, including the property described therein, vested in Canada and entrusted the management and operation thereof to CNR, on the terms in the *Canadian National Railways Act* expressly specified, namely that such management and operation would continue during the pleasure of the Governor in Council and be subject to termination or variation from time to time, in whole or in part, by the Governor in Council.

[156] It is of note, first, that s 19 of *Canadian National Railways Act* expressly stated that the Governor in Council may from time to time, by order in council, entrust to CNR the management and operation of the property described therein. Thus, in 1949, there was a statutory requirement for an order in council if the Governor in Council sought to entrust management and operation of the property or a power over the railway to CNR. Second, the 1949 OIC permitted to Governor in Council to set terms and conditions on the entrustment of the management and operation, but there is no evidence before me that any terms and conditions were set.

[157] The *Canadian National Railways Act* was repealed in whole on August 24, 1995. Prior to its repeal, the Governor in Council by way of the 1953 OIC amended the terms of entrustment to CNR effected by the 1949 OIC such that, as of January 1, 1952, Canada could assume, as a direct obligation, any deficits occurring in the operation of the Constitutional Route and capital expenditures for the service would not be reflected in CNR's accounts but would be shown as a separate item in the public accounts of Canada. Also prior to its repeal, by way of the 1955 OIC, the Governor in Council, again under the authority of s 19 of the *Canadian National Railways Act*, ordered that the MV William Carson and the ferry service between North Sydney and Port aux Basques were entrusted in respect of management and operations to CNR, on the terms specified in the *Canadian National Railways Act*, namely that such management and operations would continue during the pleasure of the Governor in Council and subject to termination or variation from time to time by the Governor in Council. Again, up to this time, there were no terms and conditions imposed by the 1949 OIC or the 1953 OIC.

[158] The MOU, entered into by Canada and CNR in 1977, does not reference an order in council. Its background section notes, amongst other things, that the prior entrustments and government funding of the operating deficits resulted in diffuse management and did not provide appropriate incentives for efficiency. Further, that the Auditor General had criticized the lack of contractual arrangements between Canada and CNR in respect of the east coast ferry and coastal services. The purpose of the MOU was stated to be to set out the understanding of the parties relating to the incorporation of CN Marine and the roles, responsibilities and relationships of Canada, CNR and CN Marine respecting the provision of the ferry and coastal services. The MOU states that it does not establish legally binding obligations between the parties (2(2)) but provided for the contracting with CN Marine for the provision of the services, setting out a general statement of responsibilities of each party (4(1)(c), 4(2), 4(3)(a)).

[159] Subsequently, by way of the 1979 OIC, the Governor in Council pursuant to s 19 of the *Canadian National Railways Act*, amongst other things, varied the 1949 OIC by adding the specified terms and conditions respecting the management and operation of the Newfoundland Railway. It is of note that this is the first time such terms and conditions were set out. These were that:

> Terms and conditions
>
> (1) to provide for the through movement of rail traffic on rail cars, within and between the rail terminals located in the ports of North Sydney, Nova Scotia, and Port aux Basques, Newfoundland, the Canadian National Railway Company shall
>
> (a) obtain, by purchase, charter, lease or otherwise, such facilities and marine equipment as the Company requires to manage and operate the services necessary to the provision of such movement of rail traffic; or

> (b) with the approval of the Minister of Transport, enter into agreements with other parties to provide for the management and operation of such services.
>
> (2) Whenever there is in effect between Her Majesty and any third party an agreement to provide for the management and operation of services for
>
> (a) the carriage of highway vehicles and passengers between the ports of North Sydney, Nova Scotia, and Port aux Basques, Newfoundland; and
>
> (b) the carriage of passengers and freight, along the south coast of Newfoundland, and, along the northern Newfoundland and Labrador coasts,
>
> the Canadian National Railway Company shall not be required to manage and operate any such services as are provided for under the agreement,

[160] In the result, as authorized by the 1979 OIC, on May 18, 1979 the Tripartite Agreement was entered into. The Tripartite Agreement states that it is the objective of the parties to establish and maintain that set of mutually satisfactory conditions which would permit the execution from time to time of specific operating agreements in respect of the management and operation of certain ferry and coastal shipping services (the "contracted water services") and noted that, by way of the 1979 OIC, the Governor in Council had varied or revoked certain orders or portions thereof which had provided for the entrustment to CNR of certain property of Canada entrusted to CNR and the management or operation of various ferry and coastal shipping services.

[161] Finally, by way of the 1987 OIC, the Governor in Council, on the recommendation of the Minister, approved the cancellation of the Tripartite Agreement and the entry by the Minister into an agreement with MAI substantially in the form of the agreement attached thereto as

Schedule “A”, being the Bilateral Agreement. The 1987 OIC makes no reference to any underlying statutory requirement stipulating that an order in council was required to effect this action, unlike the prior orders in council which were required by and referenced s 19 of the *Canadian National Railways Act* when entrusting management and operations to CNR.

[162] As noted above, Canada submits that, in the absence of statutory requirement, the 1987 OIC is no more than an acknowledgment by the Governor in Council of the Minister’s decision to enter into the Bilateral Agreement. It did not give the Minister authority, or a source of power, to enter into the Bilateral Agreement. Canada submits that the Minister had the legal capacity to enter into contracts by way of the *Department of Transport Act* and because the Minister has the capacity to do so as a natural person.

[163] In that regard, the *Department of Transport Act* general authority provision states only that the Minister holds office during pleasure and has the management and direction of the department (s 3(2)). As to specified responsibilities, these pertain only to canals (s 7(1)) and that the Minister can carry out any of the powers, duties and functions vested, immediately prior to November 2, 1936, in the Minister of Marine and with respect to civil aviation and the Minister of National Defence, by an act, order or regulation. However, there is authority that states, subject to any statutory restrictions otherwise imposed, a Minister who has the management and direction of his or her department, such as s 3(2) of the *Department of Transport Act*, is thereby conferred statutory authority to enter into contracts within his or her department’s domain (*The Queen v Transworld Shipping*, [1976] 1 FC 159 at 163 (FCA) at pp 307-308). As stated in Peter W Hogg et al, *Liability of the Crown*, 4d (Toronto: Carswell, 2011) at p 322:

> Apart from statute, the scope of a Crown servant's authority to bind the Crown by contract is determined by the general law of agency. No statute or order in council is required to provide the authority to contract. Unless limited by statute or by order in council (or other direction of cabinet), a minister, as the chief executive officer of a department, has actual authority to bind the Crown by contract in respect of all matters within the scope of his or her department's operations….

[164] Canada also asserts that the Minister has the capacity to enter into contracts at common law and refers to *Verreault* in support of this view. There, pursuant to an order in council signed by the Lieutenant Governor of Quebec authorizing the Minister of Social Welfare to sign a contract for the purchase of a piece of land for the purpose of the erection of a home for the elderly, the deputy minister, on behalf of the minister, signed an agreement with the applicant under which the applicant was to build the home. Following an election, the work was stopped. In Superior Court, the applicant obtained an award for lost profit and damage to its reputation. Subsequently, the Court of Appeal for Quebec dismissed the action on the ground that the contract was null and void as the order in council had authorized only the purchase of land, not construction of the home.

[165] The Supreme Court of Canada allowed the appeal and held that in the absence of any statutory restriction, a contract made by an agent of the Crown acting within the scope of his ostensible authority is a valid contract by the Crown. The Supreme Court of Canada found that the first piece of legislation at issue could not be construed as legislation of general application making an order in council necessary for the construction. Nor did the subject order in council or the contract reference that legislation. As to the second piece of legislation, *An Act Creating the Department of Social Welfare*, s 8 thereof, similar to s 12 of the *Department of Transport*

Act, stated that no deed, contract, document or writing shall be binding on the department, nor may it be ascribed to the minister, unless signed by him or by the deputy minister. The Supreme Court of Canada said it could not be concluded from s 8 and s 10, which stated that the Lieutenant Governor in Council may authorize the minister, upon such conditions as he determines, to organize schools and other institutions administered by the department, that the minister could not award a contract for the building of the home for the elderly without authorisation from the Lieutenant Governor in Council.

[166] It was therefore necessary to consider whether, in the absence of any statutory restriction, a minister is capable of contracting in the name of government. The Supreme Court of Canada adopted the view that a contract made by an agent of the Crown acting within the scope of his ostensible authority is a valid contract by the Crown. However, in the absence of a Parliamentary appropriation referable to the contract, it is unenforceable. In this matter, Canada relies on the Supreme Court's statement that "Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of appointed mandate, would not be applicable to her", as permitting the Minister, as a natural person, to enter into the Bilateral Agreement.

[167] The Supreme Court of Canada restated this principle in *Labreque*, finding that the relationship between a civil servant and his employer was not, strictly speaking, a relationship with an abstract being, the state. It was a relationship with a relatively more concrete entity, the Crown, which personifies the state but exercises only executive authority. "The Crown is also the Sovereign, a physical person who, in addition to the prerogative, employs a general capacity

to contract in accordance with the rule of ordinary law. The general capacity to contract, like the prerogative, is also one of the attributes of the Crown in right of a province: *Verreault & Fils v Attorney General of Quebec*".

[168] This Court in *CAE Industries Ltd* referenced *Verreault* and held:

> 73 I am satisfied that by its decision in *Verreault* the Supreme Court of Canada meant to depart from what had been regarded as conventional legal wisdom, namely, that a minister of the Crown has no authority to bind the Crown in contract unless the authority to do so exists under a statute or an order in council. I understand that case to hold that by the general rules of mandate, including those of apparent mandate, a minister of the Crown as head of a government department has authority to bind the Crown in contract unless that authority is restricted by or pursuant to statute. In my view the subject matter of the contract with which we are concerned fell within general responsibilities of the ministers from whose departments the work with which it is concerned would emanate or was related.

[169] In this matter, while the general authority afforded to the Minister pursuant to s 3(2) of the *Department of Transport Act* does not explicitly authorize the Minister to enter into contracts pertaining to transportation, nor does it restrict the Minister's authority in that regard. Oceanex does not point to any other statutory restriction that would preclude the Minister entering into the Bilateral Agreement without explicit statutory authority. Further, there is also no legislative requirement, such as s 19 of the *Canadian Nation Railway Act*, that an order in council be issued to permit the Minister to enter into the Bilateral Agreement with MAI. And, based on *Verreault*, s 12(1) of the *Department of Transport Act* does not suggest that the Minister could not enter into a contract without authorization by an order in council. Accordingly, the entering into the Bilateral Agreement, in my view, would therefore fall within the general responsibilities and authority of the Minister (*CAE Industries Ltd* at para 74).

[170] That said, the 1987 OIC exists. As noted above, it states that the Governor in Council approved the cancellation of the Tripartite Agreement and the entry by the Minister into an agreement with MAI, the Bilateral Agreement. Oceanex asserts that this means that the Bilateral Agreement cannot, therefore, be amended except by order in council.

[171] Because I have found that an order in council was not necessary to authorize the Minister to enter into the Bilateral Agreement, I am also of the view that it would similarly not be necessary for an order in council to permit him to amend that agreement.

[172] I am also of the view that the mere existence of the 1987 OIC does not elevate it or the Bilateral Agreement to legislative status. In *Coyle* the British Columbia Supreme Court referenced the Nova Scotia Court of Appeal's decision in *NS Power*, where it has been argued that approval of certain contracts by order in council gave the contracts "special legislative status". The Nova Scotia Court of Appeal pointed out that orders in council can be of at least two kinds. They can be the exercise of the Governor in Council of a legislative power delegated by the legislation. They can also be administrative acts of the kind commonly prescribed by statute. These are of an executive nature. They do not enact laws or regulations, but carry out executive functions by the authority of the royal prerogative or as authorized by statute, for example, appointment of officials, approvals of expenditures and approval of contracts (*Coyle* at para 14).

[173] In *NS Power*, the approval of the subject contracts by order in council were held to be acts of approval that were not the exercise by the Governor in Council of a legislative power

delegated to him by the legislature. Rather, they were administrative acts of control of the kind commonly prescribed by statute to ensure Cabinet supervision of important or unusual action by a Crown corporation. There the approvals were like other Governor in Council approvals which the corporation was required to obtain before it took actions such as entering into contracts. The approvals were acts of an executive nature, similar to the thousands of orders in council which do not enact laws or regulations but which carry out executive functions by the exercise of Crown prerogative, or more commonly, as authorized by statute. In that case, the legal effect of giving such approval was merely to give the corporation power to make certain contracts, a power which would be lacking without such approval, making the contract *ultra vires* of the corporation (at paras 56-57).

[174] In *Re Manitoba Language* the Supreme Court of Canada considered whether certain types of orders in council, and documents incorporated by reference, fell within s 23 of the *Manitoba Act, 1870* and thus required translation. The Supreme Court considered what criteria applied to distinguish legislative instruments from other types of instruments. As to orders in council authorizing a minister or Crown corporation to enter into a contract, the Supreme Court held that, generally, an instrument of this kind does not embody a "rule of conduct" (described as a rule that sets out norms or standards of conduct, which determine the manner in which rights are exercised and responsibilities are fulfilled) which has the force of law and it clearly does not apply to an undetermined number of persons. These types of orders were found not to be legislative in nature, although the case might be different where the contract is entered into pursuant to statute, essentially as a substitute for enacting a regulation. As to contracts and schedules that might be attached to such an order in council, because in most cases the

instruments to which they were attached were not legislative in nature, nor were the attached documents.

[175] In this case the 1987 OIC, which approved the Minister entering into the Bilateral Agreement, is not required by or entered into pursuant to statute. It is not legislative in nature as it neither enacts a rule of conduct or has the force or law for an undetermined number of persons (*Re Manitoba Language* at paras 19-20). In my view, the 1987 OIC, while it may not have been strictly necessary, was executive in nature and served to confirm Parliament's approval of the Minister's recommended course of action, the execution of the Bilateral Agreement, a contract with significant cost implications requiring annual approval of appropriations by Parliament.

[176] In these circumstances, I do not conclude, as Oceanex argues, that an order in council was required to amend the Bilateral Agreement. Moreover, in my view, once the Bilateral Agreement was executed, it was the terms of that contract which governed the relationship between the parties, including the amendment of that agreement.

(b) *Was s 7(2) of the Bilateral Agreement amended by the parties such that the Minister was not required to approve MAI's rates which do not exceed 5%*

[177] The Bilateral Agreement is silent as to amendments. Thus, there is no requirement that any amendment be in writing, but nor does the agreement sanction amendment. It is of note that s 34 states that a failure by the Minister to require fulfilment of any obligations, or to exercise any rights contained in the agreement, shall not constitute a waiver, renunciation or surrender of any right of Canada under the agreement of such right. Yet, here the Minister has and is not

insisting on the enforcement of the right to set rates. Or, more specifically, to annually advise MAI of any changes in the standard and level of service and the general level of fares and rates pursuant to s 7(2). And, as between the parties to the contract, there is no dispute that it has been amended.

[178] Similarly, s 33 states that, in the event of any dispute as to the interpretation, meaning, application or obligation arising out of any undertaking or covenant contained in the Bilateral Agreement, the matter shall be resolved by a final and binding decision of the Governor in Council after consultation between the Minister and the Chairman of the board of the corporation. There is no similar provision requiring a decision of the Governor in Council to amend the agreement. Nor have the parties to the contract asserted any dispute as to its application. Further, s 35 states that no implied terms or obligations of any kind by or on behalf of Canada shall arise from anything in the Bilateral Agreement and that the express covenants and agreements it contains and made by Canada are the only covenants and agreement upon which any rights against Canada may be founded. This does not suggest that there is an implied obligation on Canada to make any amendments of the Bilateral Agreement in writing or subject to the approval of the Governor in Council.

[179] Oceanex does not challenge the status of the Bilateral Agreement as anything but a contract. Rather, it takes the view that it could not be amended without an order in council and, in fact, was not amended in the absence of an amendment in writing. However, the evidence as described above makes it clear that Canada and MAI have, since 2010, proceeded on the basis that the Bilateral Agreement was so amended.

[180] There is authority to support that a written contract may be rescinded or varied by subsequent oral agreement and that parties' subsequent conduct may establish a variation or rescission (see SM Waddams, *The Law of Contracts,* 7d (Toronto: Thomson Reuters, 2017) at §332; *Triple R Contracting Ltd v 384848 Alberta Ltd*, 2001 ABQB 52 at paras 21-22).

[181] As stated in *Shelanu Inc*:

> [54] At the trial, the existence of the oral agreement and thus the intention of the parties was in issue. The trial judge relied on the parties' subsequent course of conduct to infer that they did not intend to continue to be bound by the exclusion clauses in the agreement. The trial judge found that Print Three had orally agreed to the surrender of a franchise by Shelanu on a previous occasion, and had allowed Shelanu to change locations and to lease space directly without anything being in writing. Where the parties have, by their subsequent course of conduct, amended the written agreement so that it no longer represents the intention of the parties, the court will refuse to enforce the written agreement. This is so even in the face of a clause requiring changes to the agreement to be in writing. See *Colautti Construction Ltd. v. City of Ottawa* (1984), 1984 CanLII 1969 (ON CA), 46 O.R. (2d) 236, 9 D.L.R. (4th) 265 (C.A.), per Cory J.A.
>
> [55] On appeal, the appellant has conceded the existence of the oral agreement and its terms but asks this court to enforce the written agreement instead. That submission, in effect, asks this court not to give effect to the intention of the parties. Such a submission is contrary to the classical theory of contract interpretation which emphasizes that courts should ascertain and give effect to the intention of the parties: R. Sullivan, "Contract Interpretation in Practice and Theory" (2000) 13 S.C.L.R. (2d) 369.
>
> [56] Sullivan states, at p. 378, that, "if a conflict arises between the intention of the parties as inferred from the totality of the evidence on the one hand and the meaning of the text on the other, intention should win." Professor Waddams has also argued that if a party knows or has reason to know that a written contract on which that party relies does not represent the intention of the other party, it should not be enforced. See S.M. Waddams, The Law of Contracts, 3rd ed. (Toronto: Canada Law Book, 1993) at paras. 328-29.

[182] As a general rule, the doctrine of privity of contract provides that a contract can neither confer rights nor impose obligations on third parties. While principled exceptions may apply, this is dependent on the intention of the contracting parties. The test for intention was set out by the Supreme Court of Canada in *Fraser River*, being that the parties to the contract must intend to extend the benefit to the third party seeking to rely on the contractual provisions and the activities performed by the third party seeking to rely on the contractual provision must be the very activities contemplated as coming within the scope of the contract in general, or the provision in general, as determined by reference to the intention of the parties.

[183] This is not a case like *Fraser River*. There is no suggestion that Canada and MAI intended the Bilateral Agreement, or s 7(2), to confer a benefit on Oceanex. Thus, the third party beneficiary rule has no application. As there was no reasonable reliance on s 7(2) by Oceanex, as a third party, there was no reason to limit the powers of the parties to change the terms of their relationship (Angela Swan & Jakub Adamski, *Canada Contract Law*, 3d (Markham: LexixNexis, 2012) at 3.28). Oceanex is a stranger to the Bilateral Agreement and neither that agreement nor the common law preclude Canada and MAI agreeing to amend its terms.

[184] In effect, by insisting that the Minister approve the rates, Oceanex seeks to enforce s 7(2) of the Bilateral Agreement. However, there is no statutory or applicable legal principle that would serve to preclude Canada and MAI from amending the Bilateral Agreement and the evidence as to their subsequent actions clearly establishes that they have done so.

[185] Nor do I see any merit to Oceanex's submission that the Implementation of Budget 2010 Decision illustrates that Governor in Council approval was required to amend the Bilateral Agreement or that the fact that it addresses an intended re-vamping of the Bilateral Agreement precludes the possibility of amendment of the Bilateral Agreement. This latter point is also not supported by the fact that the document explicitly states that the rates on the Constitutional Route would be set by MAI's board of directors to a maximum of 5% per year.

[186] In conclusion, based on the evidence before me, I find that it was MAI, and not the Minister, who made 2016/17 Freight Rate Decision. There was no legislative obligation on the Minister to set specific rate levels. Neither the prior orders in council, the corporate plan, the Minister's Letters nor the relationship between TC and MAI establish that Canada controlled MAI, beyond its relationship to it as a parent Crown corporation, and thereby effectively made the 2016/17 Freight Rate Decision. And, while the Bilateral Agreement afforded the Minister the agreed contractual right to do so, the parties to that contract made and acted upon an informal amendment of the Bilateral Agreement to permit MAI to set the rates up to a 5% increase, without ministerial approval. Neither party to that contract disputes this and their respective actions support the intended amendment. Nor was there a requirement for an order in council to authorize the amendment.

(b) Is MAI a federal board, commission or tribunal?

[187] As I have found that MAI made the 2016/17 Freight Rate Decision, this leads to the question of whether, in doing so, it was acting as a federal board, commission or tribunal, thereby affording jurisdiction to this Court to review the subject decision.

Oceanex's Submissions

[188] Oceanex submits that the *Federal Courts Act* allows this Court to review decisions from federal boards, commissions, and tribunals that are rooted in statute or the Crown prerogative. Broadly interpreting the Court's jurisdiction enhances government accountability and promotes access to justice (*Canada (Attorney General) v TeleZone Inc,* 2010 SCC 62 at para 32 ("*TeleZone*")). Similarly, government authority must be rooted in a legal source to allow judicial review to maintain government accountability (*Dunsmuir* at para 28).

[189] In this case, the source of the 2016/17 Freight Rate Decision is both statutory and in the Crown prerogative. The 1949 OIC and 1979 OIC, both issued pursuant to s 19 of the *Canadian National Railway Act*, had a direct statutory link. The 1987 OIC and Bilateral Agreement, by its preamble, are linked to the FAA. The Governor in Council exercised the prerogative when approving the Bilateral Agreement by way of the 1987 OIC. All exercises of the Crown prerogative are reviewable as confirmed by the Federal Court of Appeal in *Hupacasath* (at paras 66-67), where the Court considered the nature of the impugned decision rather than the source of the power. While prerogative powers were once non-reviewable, the Court now only exempts pure policy decisions from judicial review, such as conferring honours or declaring war (*Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215 (Ont CA) at paras 50-51 ("*Black v Canada*")). Since rate-setting is not a pure policy matter, Oceanex submits the 2016/17 Freight Rate Decision is reviewable as an exercise of the Crown prerogative. And, even if the 2016/17 Freight Rate Decision is a policy decision, Oceanex submits this affects only the standard of review rather than the Court's jurisdiction.

[190] Oceanex further submits the Crown prerogative includes exercising powers as an ordinary person (*Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at para 392; Peter W Hogg, *Constitutional Law of Canada,* 5d (Toronto: Caswell, 2007) at 1.9). In this case, by way of the 1987 OIC, the Governor in Council approved the Bilateral Agreement using the prerogative power.

[191] Although Oceanex is of the view that the Minister made the 2016/17 Freight Rate Decision, in the alternative, it submits that MAI acted as a federal board, commission, or tribunal when setting rates for the Constitutional Route and that its decision is therefore reviewable. Although MAI is not a Crown agent, and has the legal capacity to contract under the CBCA, the decisions of the corporation can still be subject to judicial review using a functional analysis of MAI's private and public roles (*Air Canada v Toronto Port Authority,* 2011 FCA 347 ("*Air Canada*").

[192] MAI is the government's principal instrument for providing ferry service on the Constitutional Route, which has a public character. Oceanex submits that MAI's core function is to provide services on the Constitutional Route, a public matter from which rate-setting cannot be separated. The fact that Canada fulfils its constitutional obligation by contract with MAI, a Crown corporation, does not change the character of the matter or render the exercise of rate-setting immune from review (*Air Canada* at para 52; *DRL Vacations v Halifax Port Authority,* 2005 FC 860 at para 55 ("*DRL Vacations*"); *Archer v Canada (Attorney General),* 2012 FC 1175 at paras 25-27, 35-36 ("*Archer*"); *TeleZone* at paras 3, 32; *Dunsmuir* at paras 28-29; *Rubin v President Canada Mortgage & Housing Corp,* [1989] 1 FCR 265 at paras 17-18; *Re Doctors*

Hospital and Minister of Health (1976), 12 OR (2d) 164 (ON SC); *Great Lakes United v Canada (Minister of the Environment)*, 2009 FC 408 at paras 223-225). Oceanex submits that the entire decision-making process shows that it was shaped by public policy and instruments including the FAA, the Bilateral Agreement and the 1987 OIC. MAI is also woven into the network of government through its close relationship with TC, its existence being "inextricably linked to a statutory scheme". MAI is also publically funded, directed and controlled by the Minister and its actual operations cannot be said to be arm's length from the Minister. Because MAI is financially dependent on the government, this differentiates it from self-sufficient entities like port authorities (*DRL Vacations* at para 17). According to Oceanex, review of the legal and factual matrix as a whole demonstrates that MAI serves a public purpose and the 2016/17 Freight Rate Decision is subject to review.

MAI's Submissions

[193] MAI submits that, in setting its rates, it was not acting pursuant to a power conferred upon it as a federal board, commission or tribunal. Rather, the power to set rates for the services it provides flows as an incident of MAI's legal personality as a corporation with the powers of a natural person afforded to it by the CBCA, not as an exercise of powers conferred by or under an Act of Parliament. While it ceded that right, in part, by entry into the Bilateral Agreement, in 2010 the Minister ceded back to MAI some of its rate-setting power. The Minister, by relinquishing his contractual right to set rates, was not conferring any power on MAI but was merely removing a contractual restraint (*Pillsbury Canada Ltd v Minister of National Revenue*, [1964] CTC 294 (Ex Ct) at para 22; *Southam Inc et al v Attorney General of Canada et al*, 1990 3 FC 465 at p 13 (FCA) ("*Southam*")).

[194] Even if the 2010 relinquishment back to MAI of its inherent rate-setting powers were seen as a conferral, MAI can only be a federal board, commission or other tribunal if that conferral was either by or under an Act or Parliament or an order made pursuant to a prerogative of the Crown (*Southam* at pp 13-14). Here there was no statute purporting to authorize MAI to set commercial freight rates. Nor was any conferral by or under an order made pursuant to a prerogative of the Crown. Any conferral was by contract. The right of the Crown to acquire and dispose of rights by contract, in this case by way of entry into and subsequent relinquishment of contractual rights of control over MAI's rates pursuant to the Bilateral Agreement, arises from its capacity as a natural person, not from some power or privilege unique to the Crown (Christopher Forsyth & William Wade, *Administrative Law,* 11d (Oxford: Oxford University Press, 2014) at p 180; HWR Wade, "*Procedure and Prerogative in Public Law*" (1985), 101 LQR 180 at p 191; *Labreque* at p 1082).

[195] Finally, for a decision to be subject to judicial review it must involve the exercise of a public power and not be simply the actions by a party in its private, commercial capacity. The definition of a federal board, commission or other tribunal has been held not to extend to cover those private powers exercisable by a corporation which are merely incidents of its legal personality or authorized business. MAI is in the business of providing ferry services and the decision of what rates should be charged for this service is a private commercial decision, not a public law matter. MAI is not a crown agent or a statutorily recognized administrative body charged with public responsibilities. Nor did MAI's rate-setting emanate directly from a public source of law or is MAI woven into the network of government or exercising a power as a part of that network. There is no evidence that the decision of MAI's board of directors was instructed,

directed, controlled or significantly influenced by government or another public entity. Accordingly, its decision was not that of a federal board, commission or tribunal and is not subject to judicial review (*DLR Vacations* at paras 32, 48 and 55; *Air Canada* at paras 50-52; *Wilcox v Canadian Broadcasting Corp*, [1980] 1 FCR 326 at para 10 (FCTD)).

[196] While MAI's operations serve to fulfil a constitutional obligation, the rate-setting for this service is a private commercial decision. Rate-setting is private by its very nature and does not flow from public law powers. Nor does MAI manage a government program or scheme in the public interest. MAI's reporting duties under the FAA are no different than any other Crown corporation and this does not mean MAI is woven into the network of government.

Analysis

[197] The starting point in addressing this issue is s 18 of the *Federal Courts Act*, which states:

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney	b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir

General of Canada, to obtain relief against a federal board, commission or other tribunal.	réparation de la part d'un office fédéral.
…	…
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[198] A federal board, commission or other tribunal is defined by s 2 as meaning:

2 (1) In this Act,	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;	**office fédéral** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[199] The Supreme Court of Canada has held that the definition of "federal board, commission or other tribunal" is sweeping, encompassing decision-makers that "run the gamut from the

Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between" (*TeleZone* at para 3).

[200] The Federal Court of Appeal has held that a two-step enquiry must be made in order to determine whether a body or a person is a federal board, commission or other tribunal:

> [29] The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.
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> [30] In *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, the learned authors, D.J.M. Brown and J.M. Evans, state that in determining whether a body or person is a "federal board, commission or other tribunal", one must look at "the source of a tribunal's authority". They write as follows:
>
> > In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown.
>
> […]

(*Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at paras 29-30 ("*Anisman*"); see also *Innu Nation v Pokue*, 2014 FCA 271 at para 11).

(i) MAI's power not conferred by statute

[201] It has been held that the words "conferred by or under an Act of the Parliament of Canada" in s 2 mean that an Act of Parliament has to be a source of the jurisdiction or powers which are being conferred (*Southam* at p 13). As discussed above, MAI did not determine the 2016/17 freight rates pursuant to conferment of any federal legislative authority for rate-setting. Rather, its board of directors acted pursuant to the general corporate authority afforded by the CBCA and/or the FAA to conduct the business of the corporation. This encompassed the entering into a contract, the Bilateral Agreement, its effective amendment, and the resultant resolution of the board of directors setting the rates. And, as also discussed above, the fact that entry by the Minister into the Bilateral Agreement was approved by an order in council does not afford the agreement legislative status.

[202] Oceanex initially submitted that because MAI is incorporated pursuant to the CBCA, its powers are thereby conferred under an Act of Parliament bringing it within the definition of a federal board, commission or other tribunal. It conceded, when appearing before me, that this would mean that all of the thousands of CBCA incorporated companies, including Oceanex, would fall within the definition with the effect that decisions of all of those entities would therefore be subject to judicial review if the decisions were deemed to be of a public character. Oceanex also argues the Bilateral Agreement is "linked" to the FAA. According to Oceanex, this is because the Bilateral Agreement was authorized by the 1987 OIC and the preamble to the agreement states that the parties agreed to establish mutually satisfactory conditions, which

would fall within the statutory requirements imposed by Part XII of the FAA. Thus, power was therefore conferred through an act of Parliament, the FAA.

[203] To the extent that Oceanex is suggesting that the FAA is federal legislation that confers power on MAI in the context of s 2(1) and s 18(1) of the *Federal Courts Act*, I do not agree. The FAA applies to all Crown corporations, it sets out their corporate reporting responsibilities, including the generating of a corporate plan for approval by the Governor in Council. It does not address MAI specifically. As to the Bilateral Agreement preamble, it is just that, a preamble. And, in any event, it simply serves to set out that the agreed contractual conditions upon which the ferry service will be provided will be compliant with the FAA and other pertinent acts of Parliament. While it does reference the FAA, it is not a conferral of power on MAI pursuant to the FAA. Nor do I accept that conferral of powers under an act of Parliament can somehow be cobbled together by way of a "bundle of rights" arising from prior orders in council, Oceanex's assertion of the Minister's control over MAI and links like the one to the FAA.

[204] In my view, the power that MAI sought to exercise was the setting of the 2016/17 freight rates as a part of its overall corporate planning. While, pursuant to the Bilateral Agreement and the FAA, it was required to produce a corporate plan, and MAI did include its rates in its corporate plan, the source of its rate-setting power was not legislative.

(ii) Crown prerogative

[205] This leaves the question of whether MAI was exercising power conferred by or under an order made pursuant to a prerogative of the Crown.

[206] Crown prerogative has been described as consisting of a bundle of miscellaneous powers and rights which are inherent to the Crown and no one else, such as the power to summon and dissolve Parliament. At the same time, the Crown possesses the power of an ordinary person, such as the power to make contracts. These powers are not prerogative as they are possessed by many. Further, that "[t]here is nothing whatever "prerogative" about the making of a government contract or an *ex gratia* payment by a government department" (HWR Wade, "*Procedure and Prerogative in Public Law*" (1985), 101 LQR 180 at p 191).

[207] In *Canada (Prime Minister) v Khadr*, 2010 SCC 3 ("*Khadr*"), the Supreme Court of Canada considered whether the remedy sought in that case was precluded by the fact that it touched on the Crown prerogative over foreign affairs. It defined the prerogative power as:

> [34] The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Effect of Exercise of Royal Prerogative of Mercy upon Deportation Proceedings, Re*, [1933] S.C.R. 269 (S.C.C.), at p. 272, *per Duff* C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

[208] The Supreme Court concluded, in that case, that the prerogative power over foreign affairs had not been displaced by s 10 of the *Department of Foreign Affairs and International Trade Act* and continued to be exercised by the federal government. The decision at issue, not to request the repatriation of Khadr, was made in the exercise of the prerogative over foreign affairs.

[209] The Supreme Court of Canada went on (at para 36) to state that it is for the executive and not the courts to decide whether and how to exercise its powers, but the courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Canadian Charter of Rights and Freedoms* ("*Charter*") (*Operation Dismantle v The Queen*, [1985] 1 SCR 44 (SCC)) or other constitutional norms (*Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539 (SCC)).

[210] Similarly, in *Hupacasath*, the Federal Court of Appeal stated:

> [32] The Governor in Council's power to make the order comes from the Crown's prerogative powers. These are the Crown's remaining inherent or historical powers as the common law has shaped them: Peter W. Hogg, Q.C., *et al*., *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at pages 19-20. Looking at it another way prerogative powers are "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown". A.V. Dicey, *Law of the Constitution*, 10th ed. (1959) at page 424.

[211] Like *Khadr*, *Hupacasath* concerned the conduct of foreign affairs. There Canada signed a foreign investment promotion and protection agreement with China. The Governor in Council passed an order in council authorizing the Minister of Foreign Affairs to take the actions necessary to have an agreement between Canada and China (a bilateral treaty) come into effect. The agreement came into effect when the minister signed and delivered to China an instrument of ratification. The Federal Court of Appeal stated that the conduct of foreign affairs is one area which the Crown holds some prerogative powers, including the right to enter treaties and agreements. There, to bring the agreement into effect, the Crown, acting through the Governor

in Council, used its prerogative power to make an order instructing the minister to issue an instrument of ratification. In turn, the minister complied with the order.

[212] As discussed above, in this matter while it may not have been necessary for the Crown to rely on traditional prerogative powers as the Minister that the authority and capacity to contract pursuant to the *Department of Transport Act* and at common law, the Minister's entry into the Bilateral Agreement was approved by the 1987 OIC. In that regard, the 1987 OIC was the general medium by which the Crown prerogative Governor in Council was exercised (*Coyle* at para 17). Because the Governor in Council did not approve entry into the Bilateral Agreement as the exercise of a legislative power delegated to him by the legislation, the 1987 OIC can only be the carrying out of executive function by authority of Crown prerogative, the approval of entry into the contract (*Coyle* at para 14).

[213] I do not agree with Oceanex that in *Hupacasath*, the Federal Court of Appeal, in effect, changed the test for jurisdiction of this Court set out in *Anisman*, being whether the decision-maker is empowered by or under a federal statute or an order made pursuant to prerogative power of the Crown, and instead looked at the nature of the impugned decision rather than the source of power (in paras 66 and 67).

[214] In *Hupacasath*, the Federal Court of Appeal dealt with jurisdiction and justiciability. With respect to jurisdiction, it stated that in matters where review is sought of orders or decisions made under federal legislation, this Court undisputably has jurisdiction (para 30). Where the Governor in Council's power to make an order is not conferred by an Act of Parliament, then the

source of its power comes from the Crown's prerogative powers (para 32). In principle, exercises of pure Crown prerogative can be judicially reviewed. The question before the Federal Court of Appeal was where that review could take place, as the jurisdiction of the Federal Court to review exercises of pure Crown prerogative had been brought into question by *Black v Canada*.

[215] The Federal Court of Appeal stated that the making of an order by the Governor in Council authorizing the Minister to issue an instrument of treaty ratification was one founded upon Crown prerogative and nothing else. Thus, the question before it was whether federal officials exercising a pure prerogative power were exercising a power "conferred by order or under an Act of Parliament or by an order made pursuant to a prerogative of the Crown" within the means of s 2(1) of the *Federal Courts Act*. On analysis, the Federal Court of Appeal concluded:

> [54] An interpretation that the Federal Court has the power to review federal exercises of pure prerogative power is consistent with the Parliament's aim to have the Federal Courts review all federal administrative decisions. The contrary interpretation would carve out from the Federal Courts a wide swath of administrative decisions that stem from the federal prerogative, some of which can have large national impact: for a list of the federal prerogative powers, see Peter W. Hogg, Q.C., et al., *Liability of the Crown*, *supra* at pages 23-24 and S. Payne, "The Royal Prerogative" in M. Sunkin and S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).
>
> …
>
> [57] In the case at bar, these concerns are very much in play. If the contrary interpretation is adopted, the Governor in Council's making of the order in this case authorizing the Minister to issue the instrument of ratification – a pure exercise of prerogative power – would have to be reviewed in the provincial superior courts. But the Minister's issuance of the instrument of ratification in this case – an exercise of power "by or under an order made

> under the prerogative" under subsection 2(1) of the *Federal Courts Act* – would have to be reviewed under this Court's exclusive jurisdiction under subsection 18 (1) of the *Federal Courts Act*. There would have to be two separate proceedings in two separate courts, with every potential for unnecessary expense, delay, confusion and inconsistency.

[216] Thus, in my view, the Federal Court of Appeal did not suggest that the source of the power is not relevant to determinations of jurisdiction. To the contrary, it found that this Court has jurisdiction to review both pure exercises of prerogative power as well as exercises of power by or under an order made under the prerogative.

[217] The Federal Court of Appeal then went on to consider whether the exercise of a pure federal Crown prerogative was appropriately reviewable, that is, whether its subject matter being policy oriented and concerned with foreign relations was justiciable. It was in that context that Federal Court of Appeal stated that "[w]hether the question before the Court is justiciable bears no relation to the source of government power" (para 63). In other words, whether the source of the power is statute or is prerogative, this does not determine if the action or decision complained of is reviewable/justiciable (paras 63-64).

[218] Thus, before the issue of justiciability arises, for this Court to have jurisdiction there must be a conferral of power the source of which is legislative or the Crown prerogative.

[219] However, as discussed above, the 1987 OIC served, on the recommendation of the Minister, to approve the cancellation of the Tripartite Agreement and the entry by the Minister into an agreement with MAI, substantially in the form of the document attached, being the

Bilateral Agreement. Thus, the 1987 OIC served to confirm Parliament's approval of the Minister's recommended course of action. The making of the 1987 OIC was not pursuant to a legislative provision and was an exercise of pure prerogative. However, the approval of that course of action by the Governor in Council did not, in this circumstance, confer any power on the Minister as he had the authority and capacity to enter the contract pursuant to s 3 of the *Department of Transport Act* and/or at common law. Thus, as the 1987 OIC served only to confirm Parliament's approval of the entry by the Minister into the Bilateral Agreement, by doing so the Minister was not exercising a power by or under an order made by Crown prerogative. Moreover, the 1987 OIC itself does not confer any power on MAI, the decision-maker. Any powers or responsibilities of MAI, including the setting of rates, arise by way of the terms and conditions of the Bilateral Agreement. That is, they are contractual.

[220] Here it is perhaps arguable that the "ultimate source" (*Air Canada* at para 49) of the power to set the rates stemmed from the Crown prerogative approving the Minister's entry into the Bilateral Agreement. However, as I have found above, nothing in the Bilateral Agreement precluded the parties to that agreement from amending its terms and an order in council was not required to do so. Thus, even if the rate-setting power was indirectly conferred on the Minister by Crown prerogative by way of the 1987 OIC which approved his entry into the Bilateral Agreement, one of the terms of which contract assigned rate-setting responsibility to the Minister, the parties subsequently amended that term of the contract and reassigned that contractual responsibility to MAI. In these circumstances, I cannot conclude that MAI was exercising a delegated Crown prerogative authority when it made the 2016/17 Freight Rate Decision.

[221] Nor is this a circumstance like *Archer*, upon which Oceanex heavily relied, where the authority of a minister to lease was sub-delegated. There the minister was granted authority over scheduled harbours by way of s 4 of the *Fishing and Recreational Harbours Act* and to lease harbours pursuant to s 8 of that legislation. This Court found that read together, s 4 and s 8 gave the minister the option to delegate his authority over the use and management of a harbour to its leasee. Here, there is no legislative basis conferring rate-setting on the Minister and no delegation. MAI's ability to set its rates arose from the amendment to the Bilateral Agreement.

[222] Similarly in *Halterm Ltd v Halifax Port Authority* (2000), 184 FTR 16 (FCTD), cited by Oceanex, the Court concluded that where the port authority was leasing or negotiating to lease federal real property to Halterm, it was exercising power given to it by the *Canada Maritime Act*, not the private powers of a corporation. Because it was exercising powers specifically given to it by the *Canada Maritime Act*, it was a federal board, commission or tribunal when negotiating the lease and, therefore, the Court had jurisdiction to hear Halterm's judicial review application. Again, this is not such a circumstance.

[223] And while contracts that are closely controlled by statutes can be enforced as a matter of public law (*Mavi v Canada (Attorney General)*, 2011 SCC 30 at paras 49-50 ("*Mavi*") citing *R v Rhine*, [1980] 2 SCR 422 (SCC)), that is not the situation in this case.

[224] In conclusion, in my view, in these particular circumstances, MAI was not acting as a federal board, commission or other tribunal when it made the 2016/17 Freight Rate Decision because it was not exercising jurisdiction or power conferred on it by or under an act of

Parliament or an order made pursuant to Crown prerogative. In the result, this Court does not have jurisdiction over the matter. This finding is determinative.

[225] However, in the event that I am wrong, I will consider whether the rate-setting was of a public character. This is because, while an entity, including a Crown corporation, may be a federal board, commission or tribunal for some purposes, it is not necessarily so for all purposes (*DRL Vacations* at para 41; *Jackson v Canada (Attorney General)* (1997), 7 Admin LR (3d) 138 at para 4 ("*Jackson* (FC)"), aff'd (2000) 25 Admin LR 247 *Air Canada* at para 52; *Canadian Daily Newspaper Association v Canada Post Corp*, [1995] 3 FCR 131 at para 15; *Re Aeric Inc and Chairman, Canada Post Corp*, [1985] 1 FC 127 at paras 14-15 (FCA)("*Aeric*"); *Labrador Airways Ltd v Canada Post Corp* (2001), 102 ACWS (3d) 704 at paras 6-8 ("*Labrador Airways Ltd*")). Rather, the conduct or power exercised must be of a public character. An entity does not act as a federal board, commission or other tribunal when it is conducting itself privately or is exercising a power of a private nature (*Air Canada* at para 50; *DRL Vacations* at para 48). In each case, the Court must examine the nature of the powers being exercised (*Aeric* at para 15; *Jackson* (FC) at para 4). As stated in *Air Canada*:

> 52 Every significant federal tribunal has public powers of decision making. But alongside these are express or implied powers to act in certain private ways, such as renting and managing premises, hiring support staff, and so on. In a technical sense, each of these powers finds its ultimate source in a federal statute. But, as the governing cases cited below demonstrate, many exercises of those powers cannot be reviewable. For example, suppose that a well-known federal tribunal terminates its contract with a company to supply janitorial services for its premises. In doing so, it is not exercising a power central to the administrative mandate given to it by Parliament. Rather, it is acting like any other business. The tribunal's power in that case is best characterized as a private power, not a public power. Absent some exceptional circumstance, the janitorial company's recourse lies in

> an action for breach of contract, not an application for judicial review of the tribunal's decision to terminate the contract.

[226] In *Air Canada*, the Federal Court of Appeal also noted that the Supreme Court of Canada had reaffirmed that relationships that are essentially private in nature are addressed by private law, not public law (*Air Canada* at para 60; *Dunsmuir*; also see *Mavi*). However, that there perhaps can be no comprehensive answer to what is public, and what is private. Rather, the factors developed over time by the jurisprudence must be considered in the context of the facts of each case:

> [60] In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. Some of the relevant factors disclosed by the cases are as follows:

[227] The Federal Court of Appeal then set out some of the relevant factors (citations omitted):

> i. *The characterization of the matter for which review is sought*. It is private, commercial matter, or is it of broader import to the members of the public?
>
> ii. *The nature of the decision-maker and its responsibilities*. Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?
>
> iii. *The extent to which a decision is founded in and shaped by law as opposed to private discretion*. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more

willing to find that the matter is public. This is all the more the case if that public source of law supplies the criteria upon which the decision is made. Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review;

iv. *The body's relationship to other statutory schemes or other parts of government*. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter. However, mere mention in a statute, without more, may not be enough;

v. *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity*. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature. A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant.

vi. *The suitability of public law remedies*. If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature;

vii. *The existence of compulsory power*. The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction.

viii. *An "exceptional" category of cases where the conduct has attained a serious public dimension*. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment.

[228] No one factor is determinative (also see *DRL Vacations* at para 48).

[229] In this case, the character of the matter for which review is sought is the setting of the 2016/17 freight rates. As described above, Oceanex's application for judicial review of the 2016/17 Freight Rate Decision asserts that the decision was inconsistent with allowing competition and market forces to be the prime agents in providing viable and effective transportation services. More specifically, that MAI's heavily subsidized rates allow it to compete unfairly with Oceanex and that the decision failed to consider the NTP when setting the rates. Thus, viewed in this context, Oceanex's complaint that it is being denied a competitive advantage is very much a private commercial matter given that it is the only other significant supplier of marine freight services to Newfoundland. While the rates do have a broad import to the public users of the Constitutional Route, this is not the substance of Oceanex's application. Indeed, Oceanex acknowledges that without subsidization, MAI's rates would increase (see, for example, the transcript of cross-examination of Captain Hynes, June 7, 2017 at Q577). Nor does Oceanex ground its application on the basis of a negative impact of subsidization on Canadian taxpayers. However, viewed more broadly, the rate-setting decision also has a public character. This is because MAI in servicing the Constitutional Route is fulfilling Canada's constitutional obligation.

[230] For the reasons set out above, Canada is of the view that MAI is not a Crown agent and Oceanex does not contest this. Nor is it a statutorily recognized administrative tribunal. The rate-setting decision is not authorized by nor does it emanate directly from a public source of law. The power to set rates arises generally from MAI's corporate status but more specifically from the amendment to the Bilateral Agreement, that is, by contract. There is no legislation or regulation prescribing that MAI was to make the rate-setting decision or setting out any criteria

by which it was to do so. However, there was broad policy direction given to it, including cost recovery targets, that would potentially impact rates, as would other factors such as Canada's view that rates on the Constitutional Route must be reasonable in order to be accessible to users and not breach its constitutional obligation.

[231] MAI is a parent Crown corporation. Thus, it is a distinct corporate entity. As discussed above, it is regulated by the FAA which entails reporting requirements. MAI confers with TC when MAI is generating its annual corporate plan and operating budget. MAI is not financially self-sufficient. However, I do not conclude that in meeting the FAA requirements, which are necessary to justify the required appropriation of public funds, MAI is woven into the network of government and is exercising a power as a part of that network. That said, as a Crown corporation the FAA does impose a requirement on MAI that the corporate plan be approved by the Governor in Council. However, this requirement does not address specifics and, in the case of MAI, rates themselves are not separately approved by the Governor in Council. It is obvious, however, that the rates, as they represent the primary source of MAI's revenue, are a factor that underlies the approval of the plan and the appropriation of funds to offset its operating deficit.

[232] As to remedy, here the only practical remedy, should Oceanex succeed, would be a declaration that the decision-maker was required to consider the NTP when setting the rates and must do so when making future rate-setting decisions. As fares have already been paid by MAI's customers at the rate set by the 2016/17 Freight Rate Decision, it is simply not practical to quash that decision.

[233] While rates affect the public users of the Constitutional Route, MAI has no compulsory power over the public. Nor can I conclude that the 2016/17 Freight Rate Decision, increasing user rates by 2.6%, has had a very serious, exceptional effect on the rights or interests of a broad segment of the public. However, failure to consider a relevant policy when rate-setting, as alleged by Oceanex, has a public aspect as it pertains to the rule of law.

[234] Viewed in a broad context, MAI provides the subject marine transportation service because of Canada's constitutional obligation to do so. Bergevin Affidavit #2 states that the Minister is of the view that rates on the Constitutional Route must be reasonable so that the service is accessible to the public. Put otherwise, Canada views its constitutional obligation as not simply providing a ferry service on the Constitutional Route, but to provide a service that, by its rates, is accessible to its public users. In this sense, rate-setting by MAI has a public element.

[235] Viewed in whole, my overall impression is that the 2016/17 Freight Rate Decision had a public aspect and was not purely of a private and commercial nature nor incidental to the exercise of MAI's general powers of management of the corporation (see *Labrador Airways Ltd* at paras 6-8).

[236] However, I have found above that MAI does not fall within the definition of a federal board, commission or tribunal because it was not exercising a power conferred on it by or under an act of Parliament or order made pursuant to Crown prerogative and, therefore, that this Court does not have jurisdiction to hear this matter. This lack of jurisdiction is not cured by the fact

that the 2016/17 Freight Rate Decision may have a public law aspect, which I have addressed only in the event that I erred in my jurisdictional finding.

[237] Similarly, in the event that I am in error in any of my prior findings, I will also consider Oceanex's standing to bring this application for judicial review.

Issue 2: Does Oceanex have standing to bring the application?

Oceanex's Submissions

[238] In response to MAI and Canada's challenge to its standing, Oceanex submits that it has direct standing or, alternatively, public interest standing in this matter.

[239] As to direct standing, s 18.1 of the *Federal Courts Act* provides that an application for judicial review may be made by anyone directly affected by the matter in respect of which relief is sought. The Federal Court of Appeal has interpreted "directly affected" to mean that the decision under review must have affected the applicant's legal rights, imposed legal obligations upon it or prejudicially affected it in some way (*League for Human Rights of B'Nai Brith Canada v R*, 2010 FCA 307 at para 58 ("*B'Nai Brith*")). Oceanex submits it is prejudicially affected by the matter of MAI's heavily subsidized commercial freight rates and, therefore, has standing to seek judicial review.

[240] Oceanex also submits that there is no general principle of law that prevents persons whose commercial interests are prejudicially affected by a decision from seeking judicial review.

Therefore, the commercial nature of its interest in the matter is not determinative. Similarly, the NTP contemplates balancing commercial interests in transportation services, which supports granting Oceanex standing. Further, a standing analysis is focused on the effect of the decision on an applicant rather than the nature of an applicant's interest (*Ultima Foods Inc v Canada (Attorney General),* 2012 FC 799 at para 102 ("*Ultima Foods*"); *B'Nai Brith* at paras 57-58). Direct prejudice to commercial interests includes the risk an applicant will go out of business or a loss in market share or revenue (*Henry Global Immigration Services v Canada (Minister of Citizenship & Immigration)* (1998), 84 ACWS (3d) 756 at para 22 (FCTD) ("*Henry Global Immigration Services*"); *Ultima Foods* at para 111). In this case, MAI's subsidized rates have a direct prejudicial impact on Oceanex including its ability to capture more of the commercial freight market and increase its rates, leading to its inability to cover its total costs and replace its ships.

[241] Oceanex submits that the cases relied upon by the Respondents are distinguishable on the basis that the applicants therein were not in fact directly affected by the decision in question (*Re Rothmans of Pall Mall Canada Ltd et al v Minister of National Revenue et al*, 67 DLR (3d) 505 at paras 509-510, 513 ("*Rothmans*"); *Aventis Pharma Inc v Minister of Health et al*, 2005 FC 1396 at paras 15-18 ("*Aventis*"); *Arctos Holdings Inc et al v Attorney General of Canada et al*, 2017 FC 533 at para 51 ("*Arctos*"); *Canwest Mediaworks Inc v Canada (Attorneys General),* 2008 FCA 207at para 16 ("*CanWest*")). These cases also involved claims of future harm that were speculative in nature, rather than direct financial harm to the applicant (*CanWest*).

[242] Oceanex asserts that it has established the harm arising from the rate-setting decision sufficient for the purposes of standing. Further, if the Respondents questioned its evidence, then they should have sought undertakings for further particulars. Allowing the Respondents to raise this evidentiary issue now would amount to an abuse of process. In addition, only Newfoundland challenged Oceanex's evidence of prejudice, while Canada and MAI did not.

[243] Aside from being commercially affected, Oceanex submits the decision in question also legally directly affected it. This is because the application involves the question of whether the decision-maker properly considered the factors set out in the NTP, a statutory instrument which binds it. Denying a competitor the ability to challenge the decision for failing to consider all of the factors listed in the NTP, which Oceanex submits sets free competition as the general rule that must guide government to which public intervention as an exception, would cause the NTP to become hollow and entirely irrelevant.

[244] Alternatively, even if Oceanex does not meet the directly affected test, it is not precluded from meeting the test for public standing (*Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957 at para 79; *Friends of the Island Inc v Canada (Minister of Public Works)*, [1993] 2 FC 229 at para 80, rev'd on other grounds, 131 DLR (4th) 285, leave to appeal to SCC refused, [1996] SCCA No 80 ("*Friends of the Island*")), the principles of which are to be interpreted in a liberal and generous manner (*Downtown Eastside Sex Workers United Against Violence v Canada*, 2012 SCC 45 at paras 40, 42 ("*Downtown Eastside*")).

[245] Oceanex submits that it meets the *Downtown Eastside* three prong test for public interest standing. First, as to a serious justiciable issue, ensuring the Minister's decision was made in accordance with legislated government policy, the NTP, meets this prong. The assertion that MAI's rates are a matter of policy does not render the decision immune from review.

[246] As to the second prong, the requirement to have a real stake and genuine interest in the outcome of the application, Oceanex satisfies this through its long history of involvement in the subject matter of this application and submits that there is a sufficient nexus between its interest and the decision under review. This differs from *Marchand v Ontario*, (2006) 81 OR (3d) 172 (Ont Sup Ct, aff'd (2008), 88 OR (3d) 600 (Ont CA) ("*Marchand*")), where the applicant had no real interest in the outcome of the proceeding. Oceanex asserts it has a real stake in competitive freight rates and is not a mere busybody. Further, this prong focuses on engagement with the issue rather than the nature of Oceanex's interest in the matter.

[247] The third prong is also met as this proceeding is a reasonable and effective means of bringing the matter before the Court. There is no other practical means of inquiring into the Minister complying with the NTP and no other parties will seek to review the Minister's decision. In addition, interpreting the NTP and the Terms of Union are of general public importance and warrant this application proceeding (*Downtown Eastside* at paras 47, 50-51; *Friends of the Island* at paras 81, 83). Further, the fact that the issue raised by Oceanex is focused on competition does not take the matter out of the NTP and bring it within the *Competition Act*, which statute is not the appropriate mechanism to ensure the Minister complies with the NTP. Oceanex submits the *Competition Act* does not allow individuals to commence

proceedings and in this case the Competition Bureau refused to investigate, leaving Oceanex with no recourse but to bring this application. Oceanex submits that while the law is unclear on whether the Competition Bureau can interpret the Terms of Union or compel the Minister to follow the NTP, the Federal Court has the necessary powers to remedy this issue. Accordingly, there is no need to refer the matter to the Competition Bureau. Further, Canada did not previously raise this issue with Oceanex.

MAI's Submissions

[248] MAI submits that, pursuant to s 18.1 of the *Federal Courts Act*, a party can seek judicial review of a decision if that party is directly affected by the matter in which relief is sought. However, the 2016/17 Freight Rate Decision relates only to the freight rates charged by MAI to third parties. Oceanex has no interest in the subject matter of the application, other than its commercial interest as a competitor of MAI, which is not sufficient to make Oceanex a person directly affected by the decision so as to afford it standing to bring this application for judicial review (Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2017) at para 4.3435 ("Brown & Evans"); *Rothmans* at p 510; *Aventis* at para 15; *Arctos* at paras 52-53).

[249] MAI submits that Oceanex, in its reply submissions, for the first time alleged that this Court should exercise its discretion and grant it public interest standing in this matter. However, it is manifest from Oceanex's record and submissions that it is pursuing this matter solely for its own economic self-interests. Oceanex has identified no broader constituency which would benefit if it succeeds in this application. Rather, the result Oceanex seeks to bring about would

negatively impact the public through higher rates. Nor is this a case such as *Downtown Eastside* where the applicant is raising issues of public importance that transcend their own immediate interests (at para 73).

[250] Further, in *CanWest* the Federal Court of Appeal stated that an applicant "surely cannot rely on the same interest that did not qualify it for "private interest standing" to establish that it has a "genuine interest" for the purpose of public interest standing" (at para 15). Accordingly, for the reasons MAI set out, Oceanex does not qualify for private interest standing, nor does it meet the public interest standing test.

Canada's Submissions

[251] Canada submits that the Minister did not make the 2016/17 Freight Rate Decision, but, if he did, then Oceanex lacks standing as it cannot meet the necessary criteria. Decisions that touch upon MAI's rates are not decisions that directly affect Oceanex. Nor is Oceanex a party to the Bilateral Agreement, which it concedes gives rise to the obligations at the heart of this application, therefore, it has no standing to seek enforcement of its terms. Nor does it have a history of involvement with the subject matter of that agreement or claim a specific interest in the management of it. Quashing the 2016/17 rates affects MAI's interests rather than those of Oceanex.

[252] Canada submits that Oceanex's only plausible interest in this application is challenging the perceived unfairness in the Minister's treatment of MAI, one of Oceanex's competitors, which unfairness affects them only commercially. Oceanex has stated that its real complaint is

not about the setting of the 2016/17 rates, but about the perceived unfairness in the appropriations Parliament voted to MAI, which Oceanex argues are anti-competitive. Further, it brings this complaint notwithstanding that it has already pursued a complaint with the Competition Bureau. This does not give rise to standing as a purely commercial interest in the subject matter of a proposed judicial review is not sufficient to grant a party direct interest in the matter (*Rothmans* at pp 509-510; *CanWest* at paras 13-14; *Aventis*).

[253] Further, in its original submissions Oceanex did not explicitly seek public interest standing and, in any event, it again does not meet the relevant criteria (*Downtown Eastside* at para 37; *Marchand* at paras 24, 34). Oceanex's admitted interest is purely commercial and private in nature, not public. It therefore cannot establish a genuine interest or real stake in the litigation.

[254] The evidence establishes that Oceanex does not claim to represent the public interest in bringing this application. Rather, Oceanex argues that it brings the application in its role as a competitor to MAI, which interest relates solely to Oceanex and its shareholders and is aimed at achieving greater revenue for a privately held company. This is not an access to justice situation in which a group that represents a broader public interest can be permitted public interest standing to advance claims even where they have no direct or personal interest (*CanWest* at paras 13-14).

[255] Nor is this application a reasonable and effective way to bring the issue before the Court. The Hynes affidavit evidence affirmed that Oceanex's interest in this matter is a commercial one

based on anti-competitive freight rates. This complaint focuses on competition issues, which Oceanex partially pursued with the Competition Bureau. Captain Hynes' evidence was that he raised the issue with the Bureau several years ago, but the Bureau refused to investigate. While the Competition Bureau has discretion over investigating competition complaints, there is recourse to the Federal Court for unsatisfied complainants (*Charette v Canada (Commissioner of Competition),* 2003 FCA 426). Instead, Oceanex brings this application to circumvent the Competition Bureau's process and collaterally attack MAI's rates. There is also a question of whether Oceanex is the most appropriate party to raise this issue because other groups exist that could challenge the rate-setting issue who actually represent the public interest and who are not answerable to private shareholders.

[256] And, while *Globalive Wireless Management Corp v Public Mobile Inc,* 2011 FCA 194 ("*Public Mobile*") allowed public interest standing for a corporation, that decision distinguished prior case law based on the unique issue before the Court. *Public Mobile* involved an order in council that varied an administrative body's decision using statutory powers under the *Telecommunications Act*. In that case, the Court found that unless public interest standing was granted the order in council would effectively be immune from judicial review. *Public Mobile* is distinguishable as Oceanex's complaint of anti-competitiveness is not a matter of public importance to all Canadians. Nor is this a situation concerning immunization of government action, where the decision was made by MAI pursuant to amendment of the Bilateral Agreement. There was no decision by the Minister, accordingly, there is no basis for judicial review. *Public Mobile* also noted the Court must be vigilant against allowing application for judicial review to facilitate competitive warfare and conserving scarce judicial resources.

Analysis

(i) Direct standing

[257] Subsection 18.1(1) of the *Federal Courts Act* states:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[258] In *B'nai Brith*, the Federal Court of Appeal held that to be directly affected by a decision, the decision must have affected the legal rights, imposed legal obligations on, or prejudicially affected, the party bringing the application for judicial review in some way (*Rothmans*; *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 ("*Irving Shipbuilding*")). In that case, there was no evidence suggesting that B'nai Brith was so affected. This test has been consistently applied by subsequent jurisprudence (see, for example, *Forest Ethics Assn v National Energy Board*, 2014 FCA 245 at para 29; *Burry v Newfoundland & Labrador (Citizen's Representative)*, 2010 NLTD(G) 103 at para 25).

[259] The jurisprudence also supports the proposition that a commercial interest in the issues in a judicial review application, in and of itself, is not a sufficient basis for standing (*CanWest* at para 17; *Rothmans*; *Aventis* at para 19; *Arctos* at para 52).

[260] In *Rothmans* the application concerned the statutory construction of the definition of a cigarette found in s 6 of the *Excise Tax Act*. The Department of National Revenue, Customs and Excises adopted the position that the filter of a cigarette should not be included in determining its length for purposes of the definition. The appellants contended that it should and that the department's position gave the respondent companies a competitive advantage which caused the appellants prejudice. They sought to require the minister to include the filter when determining length. The issues on appeal were whether the appellants had standing and, in any event, whether the specific forms of relief sought would be appropriate to challenge the action of the minister.

[261] The appellants and the respondent companies were competitors in the manufacture and sale of tobacco products. The appellants did not contend that they had any interest in marketing a cigarette of the proportions in issue. Nor did they not seek the interpretation which they contended to be correct in order to permit them to do anything in particular that they could not then do. Rather, their purpose was to prevent the respondent companies from doing something which the appellants viewed as giving those companies a competitive advantage. The Federal Court of Appeal held that this was not sufficient to give rise to standing. The appellants did not have a genuine grievance and the interpretation:

> … does not adversely affect the legal rights of the applicants nor impose any additional legal obligation on them. Nor can it really be said to affect their interests prejudicially in any direct sense. If it permits the respondent companies to do something which the appellants are not doing, it is because the appellants chose not to do it.
>
> (*Rothmans* at p 510)

[262] The Federal Court of Appeal also noted that it might be conceded that in certain contexts a competitive interest may be regarded as conferring status to challenge an administrative action, giving the example of, on *certiorari*, to quash the grant of a license allegedly issued in excess of jurisdiction. However, a person should not have the right to interfere with or meddle in official action affecting an existing competitor for the sole purpose of preventing that competitor from obtaining some advantage, particularly where the action complained of is something that the person complaining is free to take advantage of himself. Further, that the motive of the application must be considered, and that the public interest in competition must be borne in mind in exercising judicial discretion as to whether to recognize standing in a competitive relationship.

[263] In *Aventis* the Federal Court of Appeal stated that it had held on several occasions that a person who was not a party to a decision taken by a minister, but was affected only in the commercial sense, has no status to seek judicial review of that decision under s 18.1 of the *Federal Courts Act*. It quoted *Rothmans* and stated:

> [15] Aventis attempts to distinguish this case on the basis that there the applicant had no equivalent product on the market whereas here Aventis does. While this is a factual distinction, it is not a distinction affecting the legal principle that a party seeking to protect a commercial advantage only has no status to challenge the Minister's decision in matters of this kind.

[264] The Court concluded that the legal principles were clear: a commercial interest alone is insufficient to permit a person who was not a party to the application before the minister for a Notice of Compliance to seek relief under s 18.1.

[265] In *CanWest* the applicant filed an application for judicial review seeking an order of *mandamus* requiring that the respondent Minister of Health, and the Attorney General of Canada, investigate and prosecute breaches by American entities of the direct-to-consumer advertising prohibitions effected by the *Food and Drugs Act* and related regulations. This Court found that CanWest had no standing, which was determinative, as CanWest could not establish any direct interest in the outcome of the application:

> [15] In its simplest terms, the only parties directly affected by the order of *mandamus* or declaration sought by CanWest would be those U.S. entities that have been identified by CanWest as allegedly being in breach of the DTCA prohibition and the Respondents.
>
> [16] Indeed, on the record filed for the Application, CanWest has not even established a commercial impact of a successful judicial review. In argument before me, counsel for CanWest attempted to argue that a positive ruling from this Court on the Application would have positive financial implications for CanWest. It argues that, if U.S. entities are prevented from publishing DTCA in U.S. media that now finds its way into Canada, pharmaceutical companies who wish to advertise in Canada would then choose to advertise, in legally permissible ways, in CanWest's media enterprises. In other words, they submit, the playing field would be levelled. The problem with this assertion is that it is based on pure speculation. There is nothing before me to indicate that CanWest would be the beneficiary of additional advertising revenue if investigations and prosecutions against U.S. media were pursued.
>
> [17] Even if I were to assume that CanWest has a commercial interest in the outcome of the Application, I am still not persuaded that this would be enough to make it a party "directly affected". A commercial interest in the issues in a judicial review application, in and of itself, is not a sufficient basis for standing (*Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500, 67 D.L.R. (3d) 505 (F.C.A.); *Aventis Pharma Inc. v. Minister of Health et al*, 2005 FC 1396, 45 C.P.R. (4th) 6 at para. 19, 143 A.C.W.S. (3d) 350).
>
> [Emphasis in original]

[266] On appeal, CanWest abandoned its argument that the Federal Court had erred in concluding that it was not directly affected within the meaning of the *Federal Courts Act*.

[267] In *Ultima Foods* an application for judicial review was brought by Canadian dairy processors and yogurt producers for judicial review of the decision of the respondent Minister of International Trade in issuing supplemental import permits to the respondent American-owned dairy processor. Referencing *Rothmans* and *CanWest*, this Court noted that an applicant for judicial review will be directly affected by a decision within the meaning of s 18.1(1) where the decision affects the applicant's legal rights or obligations, or directly prejudices the applicant. However, the applicants had not persuaded it that the decision to grant the permits directly affected their legal rights or obligations in any way.

[268] As to the issue of direct prejudice, while there was affidavit evidence as to how the permits would adversely affect the applicants, including that they would be forced to compete with a subsidized competitor and with an imported product that enjoyed a massive competitive advantage, based on the evidence given on cross-examination on the affidavits, Justice Simpson was not persuaded that the applicants would experience direct prejudice, concluding:

> [111] It is clear from this evidence that the Applicants were concerned about the competitive disadvantage they would suffer as the result of the Chobani Permits, but nevertheless positive about the prospects for sales of their own brands of Greek Yogurt. As noted by counsel for the Attorney General, if the Applicants were concerned about direct harm to their businesses, one would expect to see internal documents as evidence of projected lost sales, lost market share, harm to their reputation, and/or concerns about the inability to obtain an adequate allocation of Canadian milk. In the absence of such evidence, and given the evidence to the contrary, as discussed above, I conclude that the Chobani Permits will not cause the Applicants direct prejudice. At most, there may be a

> short period of disruption in which the Applicants must compete to develop market share as the market for Greek Yogurt expands.

[269] It has also been held that the question of standing should not be addressed in the abstract but in the context of the ground of review on which the applicant relies (*Irving Shipbuilding* at para 28; also see *P&S Holdings Ltd v Canada*, 2015 FC 1331 at para 35, aff'd 2017 FCA 41).

[270] Here, in its Amended Notice of Application Oceanex asserts, amongst other things, that the 2016/17 Freight Rate Decision is inconsistent with allowing competition and market forces to be the prime agents in providing viable and effective transportation services, has the direct effect of unduly favouring competing modes of transportation, such as trucking, to and from the island of Newfoundland, and of reducing the inherent advantages of water transportation providers, such as Oceanex. Further, that the decision directly affects Oceanex's rights and interests as a provider of water transportation services to and from the island of Newfoundland, including its right to operate and compete freely for freight transportation without the unfair burden of MAI's heavily subsidized rates approved in violation of the obligations imposed by the NTP pursuant to s 5 of the CTA; the decision had a detrimental effect on Oceanex's continued ability to maintain its current level of water transportation services to Newfoundland; the ongoing effect of the highly subsidized rates reflected in the decision has had and will continue to have a detrimental impact on Oceanex's ability to acquire, finance and operate a replacement vessel and its opportunities for growth as compared to what it would have been in a truly competitive market.

[271] In its written submissions Oceanex states that it and MAI carry the same commercial freight for the same customer base. While Oceanex expects to have to compete for commercial

short sea shipping traffic, "it takes issue with having to compete with a business which does not have to cover its operating or capital costs, and charges heavily subsidized rates as a result". The basis for its application as set out in its written submissions is that the 2016/17 Freight Rate Decision is unreasonable as it failed to consider the NTP, the CPCS Report, and the detrimental impact of the 2016/17 freight rates on competition.

[272] Applying all of this to the matter before me, I first point out that, the responsibility for setting rates, whether by the Minister or MAI, arises from the Bilateral Agreement, a contract to which only Canada and MAI were parties. Thus, Oceanex has no legal rights, participatory or otherwise, arising from that agreement. Nor does the Bilateral Agreement impose any legal obligations on Oceanex. Similarly, the 2016/17 Freight Rate Decision, made pursuant to the Bilateral Agreement, does not directly affect any legal rights of Oceanex or impose any legal obligations on it.

[273] Oceanex also submits that aside from being commercially affected, the decision legally directly affected it. The premise for this appears to be that denying it, a competitor, the ability to challenge the decision for failing to consider the factors listed in the NTP would render the NTP hollow. I note that the test for standing is clear. It requires that, to be directly affected by the decision, the decision must affect Oceanex's legal rights. Oceanex does not identify any legal rights so affected and provides no support for its proposition that it is sufficient that the decision "legally directly affected it". Were the test for standing as broad as Oceanex submits, any entity would acquire direct standing merely on the basis of asserting a claim. This cannot be so.

[274] As to direct prejudicial effect, Oceanex does not challenge the 2016/17 Freight Rate Decision as a customer of MAI directly impacted by the subject rate increase, its complaint is based not on the rate increase itself. Further, the alleged impacts of the decision are all commercial in nature and pertain to Oceanex's role as a competitor of MAI. They are indirect in the sense that they do not arise from the 2.6% rate increase itself and are not the result of the decision to increase the rate by that amount. While Oceanex asserts that competition in the market place was a required relevant consideration by way of s 5 of the CTA and that this was not addressed by the decision-maker, at its core, what Oceanex is asserting is that as a competitor it is commercially prejudicially affected by subsidization of the Constitutional Route by Canada. In my view, this is not sufficient to establish direct standing (*Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at para 22).

[275] In any event, I also have concerns about Oceanex's allegations of commercial impact. Oceanex asserts that the subsidized rates have a direct prejudicial impact on its ability to increase its own rates, leading to its inability to cover its total costs and replace its ships. However, as pointed out by Newfoundland in its submissions, Oceanex provided very little information about its financial marketing and operational data. Oceanex submitted only two, one page financial documents, both pertaining to minimum earnings before interest, taxes, depreciation and amortization ("EBITA"), both of which actually indicate growth in profitability from 2007 to 2014. Newfoundland also submits that while the Hynes affidavit evidence states that a key detrimental impact on Oceanex resulting from subsidized freight rates has been the continual loss of volume or potential volume of freight rates by Oceanex, a chart attached to that evidence indicates that since 2009 Oceanex has in fact increased its market share while MAI volumes

have declined. And, on cross-examination, Captain Hynes conceded that there was no continual loss of volume and that Oceanex's market share had in fact increased.

[276] While for the purpose of standing, I need draw no conclusion as to the financial impact on Oceanex, as stated in *Ultima Foods*, when a competitor claims that it is concerned about direct harm to its business, one would expect to see internal documents as evidence of lost market share, projected sale losses and other concerns. In this case, one would expect to see financial statements supporting that, at its current freight rates, Oceanex cannot cover its costs and replace its ships.

[277] Oceanex also relies on *Henry Global Immigration Services* to argue that direct prejudice to commercial interests includes the risk that an applicant will go out of business. That case concerned a decision by the Canadian Consulate General in Hong Kong to vary from existing policy and to deal only with the applicant's clients at their home addresses and not to correspond with the applicant, who was their immigration consultant. This Court held that the decision under review had the effect of precluding or seriously impeding the applicant from performing his advisory role to claimants seeking landing and arguably ran the risk of putting the applicant out of business in relation to claimants from China, who were the principle if not only source of his business. I note that *Henry Global Immigration Services* was decided in 1998, thus predating the Federal Court of Appeal's decision in *B'Nai Brith*, as well as the decisions in *Ultima Foods*, *Aventis* and *CanWest*, which are all factually more similar to this matter. Moreover, while Oceanex submits that it is commercially disadvantaged by the subsidization of MAI's rates, there is no evidence that Oceanex is at risk of going out of business as a result of the 2.6% freight rate

increase arising from the decision under review. Its assertion is based more broadly on what it terms as heavily subsidized rates.

[278] *Rothmans* may be distinguishable on the basis that in that case the purpose, or motive, of the application was to prevent another entity from obtaining a competitive advantage that the applicant itself chose not to pursue while here Oceanex does not seek to prevent a commercial advantage, rather it claims that it is commercially disadvantaged by the 2016/17 Freight Rate Decision. Ultimately, however, its motive is the hope of gaining a commercial advantage if subsidization can be challenged by the application of the NTP. It is therefore factually closer to *Ultima Foods*, but its interest is still a commercial one.

[279] Ultimately, in these circumstances, I am not satisfied that Oceanex meets the test for direct standing.

(ii) Public standing

[280] In *Downtown Eastside*, the Supreme Court of Canada addressed the law of standing setting out the rationale behind limiting standing. It stated that the traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. However, that in public law cases, such as the one before it, the courts have relaxed these limitations and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations. There, the Downtown Eastside Sex Workers United Against Violence Society, whose objectives included improving working conditions for female sex workers, and Ms. Kiselbach, a former sex worker working as a

violence prevention coordinator, launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*.

[281] The Supreme Court of Canada stated that:

> 37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: , at p. 598; , at p. 626; , at p. 253; *Hy and Zel's*, at p. 690; , at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[282] These factors should be seen as interrelated considerations to be assessed and weighed cumulatively, not individually, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes (*Downtown Eastside* at paras 20, 36). In determining whether to grant standing in public law cases courts should exercise their discretion and balance the underlying rationale of restricting standing with the important role of the Court in assessing the legality of government action. "At the root of the law of standing is the need to strike a balance "between ensuring access to the Courts and preserving judicial recourses" *Canadian Council of Churches*, at p 252" (*Downtown Eastside* at para 23).

(a) *Serious justiciable issue*

[283] To constitute a serious justiciable issue, the question raised must be a substantial constitutional issue or an important one and the claim must be far from frivolous, although the courts should not examine the merits of the case other than in a preliminary manner (*Downtown Eastside* at para 42). By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role. Where there is an issue which is appropriate for judicial determination, the court should not decline to determine it on the ground that, because of its policy context or implications, it is better left for review and determination by the legislation or executive branches of government (*Downtown Eastside* at para 40).

[284] In this matter, Oceanex does not directly raise a constitutional issue. However, it asserts that the Terms of Union did not require Canada to offer any specific rates on the Constitutional Route, to subsidize rates or to offer any specific level of service and that Terms 32(2) and (3) have no current application. And, in any event, that Canada failed to establish on the evidence that the Minister, in order to justify deviating from the NTP, considered the Terms of Union when he approved the 2016/17 freight rates. Oceanex submits that ensuring that the Minister's decision was made in accordance with legislated government policy raises a serious justiciable issue meeting the first part of the test for standing.

[285] MAI asserts that s 5 of the CTA has no application and, in any event, it cannot support an application for judicial review of its freight rate decision in light of the Terms of Union which

impose the burden of a subsidy of Canada in respect of MAI's rates. MAI also raises the constitutional question described above.

[286] Canada asserts that under the Terms of Union it is constitutionally required to provide a ferry service on the Constitutional Route and how it does so, including how the rates are set, is not regulated by the Terms of Union or any other statute. Rather, this is a pure policy issue that implicates Canada's obligations to Newfoundland.

[287] Newfoundland sees Oceanex's challenge as an effort to end Canada's subsidization of the Constitutional Route and has intervened because judicial interpretation of provisions of the Terms of Union is required and because any decision that eliminates or reduces MAI's federal subsidy will detrimentally impact the economy and well-being of the citizens of Newfoundland and Labrador.

[288] I note that Oceanex does not attack the constitutionality of legislation or claim that *Charter* or other rights have been breached. Rather, it claims that the serious justiciable issue is the alleged failure of the decision-maker to take into account, as a relevant consideration, s 5 of the CTA, the NTP, which policy Oceanex asserts required a consideration of the competitive impact of MAI's subsidized rates had on its business.

[289] In my view, while the issue Oceanex raises does peripherally attract constitutional considerations, at its core it is simply a question of whether a policy applies and if so, was it considered in the decision-making process. If it does, then the constitutional issues follow.

Thus, at its core, for Oceanex this is a commercial and not a public interest issue. Oceanex is concerned primarily with its personal stake in the matter, not with how subsidization of MAI's rates affects the public users of subject services.

[290] That said, a serious issue need not be a constitutional matter and public interest standing has, in some circumstances, been granted where the decision at issue would otherwise be effectively immune from judicial review (*Public Mobile*; *B'Nai Brith*). Here, if the decision-maker was required to consider the NTP, but failed to do so, then this is potentially a serious justiciable issue in that it speaks to the rule of law.

(b) *Real stake or genuine interest*

[291] As to Oceanex's interest, the evidence is clear that Oceanex has had a long embedded thorn in its side pertaining to subsidization of rates. In 2009, Oceanex wrote to the Minister expressing concern about a fuel surcharge and drop tractor fees, suggesting that these could be interpreted as a form of subsidy or grant to transport companies given MAI's subsidization. By letter of February 18, 2011, Oceanex requested a meeting with the then Minister to address its stated concerns with subsidization of MAI and its impact on Oceanex's competitiveness. In a letter dated May 31, 2011, Oceanex raised its concerns to the then Minister about a MAI discount for commerce offered on the Argentia Route and asserting that MAI, a Crown corporation, was using unfair competitive tactics. A similar letter from Oceanex followed on September 28, 2011, asserting that the commercial trucking industry was receiving a subsidy from MAI with which Oceanex could not compete. By letter of November 21, 2011 Oceanex acknowledged meeting with the Minister to explain its concerns about the level of subsidizing of

MAI and the impact on its business; the then Minister responded on March 14, 2012, acknowledging that Oceanex was concerned about the level of subsidies that MAI received but stated that, as Oceanex was aware, this was in support of a government of Canada constitutional obligation. Similar correspondence from Oceanex includes letters dated April 5, 2012, May 16, 2012, July 6, 2012, October 24, 2012, an email of October 25, 2015 included "A Commentary on Certain Business Practices of Marine Atlantic Inc and the Legislation and Governance Framework in which the Crown Corporation Operate", a powerpoint presentation dated February 5, 2013, and a letter dated November 17, 2015. In response to this last letter, by email of May 2, 2016, the then Minister advised that he had noted Oceanex's concerns related to the level of subsidies MAI received and that Transport Canada had commissioned an external consultant in 2015 to assess, amongst other things, the freight transport market in Newfoundland, which internal analysis was being finalized. This appears to have resulted in the CPCS Report.

[292] The record is clear that Oceanex's interest is the perceived competitive disadvantage at which it is placed due to subsidization of MAI. While Oceanex has clearly been engaged in this issue, it has not done so from the perspective of a concerned citizen, taxpayer, or user of the ferry service. Indeed, the evidence of Captain Hynes when cross-examined on his affidavit evidence was that if subsidies were removed MAI would have to double or triple the rates of its users. However, Oceanex frames this interest in the context of an alleged failure to consider a relevant policy, the NTP, by the decision-maker when making the 2016/17 Freight Rate Decision. In that regard, Oceanex has established a genuine interest in the issue of competition in freight transport on the Constitutional Route. Competition is a consideration captured by the NTP, the applicability of which goes to the merits of Oceanex's application.

(c) *Reasonable and effective means of bringing the issue before the Court*

[293] As to a reasonable and effective means of bringing the issue before the Court, while Oceanex frames this judicial review as a challenge to the setting of the 2016/17 freight rates based on failure to consider the NTP, as noted above, the core of Oceanex's complaint is that subsidization at current levels is anti-competitive. Lengthy reports from economists were tendered which, amongst other things, attempt to compare Oceanex's operations with those of MAI to address the existence and impact of subsidies in light of differing operating routes, vessel types, efficiencies, and other factors. This raises the spectre of whether the issue is really one that should have been brought to the Competition Bureau pursuant to the *Competition Act*. Captain Hynes' evidence on this point on cross-examination was that while a complaint had not been made concerning Oceanex's allegations of anti-competitive practices, several years ago a telephone call had been placed to the Competition Bureau. Captain Hynes stated that the Competition Bureau decides "what they investigate and they wouldn't investigate it". In response to a request for an undertaking to advise of the date and details of the complaint by Oceanex to the Competition Bureau regarding anti-competitive practices on the part of MAI or TC, Oceanex responded this was not relevant. When appearing before me, counsel for Oceanex asserted that the Competition Bureau does not have jurisdiction over the Terms of Union or enforcement of the NTP. However, no legislative basis nor jurisprudence in support of this position was provided. Similarly, Canada and MAI, while asserting that the matter was more properly brought before the Competition Bureau and that if Oceanex was dissatisfied with the refusal to investigate it could have pursued judicial review of the refusal, those parties did not substantially engage with the issue.

[294] In short, there is a real question as to whether the anti-competitive nature of Oceanex's claim is more properly before the Competition Bureau which, with its expertise, may well be a more appropriate venue. However, given the limited submissions of the parties, I am not in a position to make any finding in that regard.

[295] That issue aside, as to other factors to be considered with respect to public standing, Oceanex is certainly well placed to bring the application. It is also unlikely that any other party would challenge the 2016/17 Freight Rate Decision. Public users would not be inclined to seek higher rates based on Oceanex's competitive concerns, although public users would likely be very concerned with a rate increase. It is also speculation to suggest that taxpayer watch dog groups may challenge the decision. And, of course, this is not an access to justice situation for a disadvantaged litigant whose rights are affected.

[296] However, as stated in *Downtown Eastside*, the principle of legality refers to two ideas: that state action should conform to the constitutional and statutory authority, and, that there must be practical and effective ways to challenge the legality of state action. Oceanex argues that if it is denied standing then there is no other means by which the 2016/17 Freight Rate Decision can be challenged, rendering the decision immune from review.

[297] In *B'Nai Brith*, the Federal Court of Appeal, while denying direct standing to B'Nai Brith, agreed with the applications judge that it met the three part test for public standing as set out in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 ("*Canadian Council of Churches*"). There, the Federal Court of Appeal

addressed the concern raised in *Canadian Council of Churches* as to the immunization of government from certain challenges:

> [61] Before leaving this issue, I would add that the granting of public interest standing in this case is consistent with a significant policy concern mentioned by the Supreme Court of Canada in *Canadian Council of Churches*, *supra*. At page 256, the Supreme Court expressed concern that an overly restrictive approach to public interest standing would immunize government from certain challenges. This Court has granted public interest standing where the spectre of immunization of government decisions was in play and the *Canadian Council of Churches* criteria for intervention were met: *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.).
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> [62] The concern about immunization is in play in these cases, just as it was in *Harris*, *supra*. The Governor in Council's decisions were in favour of Messrs. Odynsky and Katriuk. None of the parties would proceed to Court from the decisions, because the decisions did not adversely affect them. As the applications judge stated (at paragraph 16), "[i]n a case like this one where citizenship is not revoked, the [Governor in Council's] decision will never be judicially reviewed except where a third party seeks to do so." By virtue of its past knowledge, experience and dedicated efforts on issues such as this, the appellant was well placed to test the decisions of the Governor in Council in the courts. If public interest standing were not granted to this appellant, the decisions of the Governor in Council would be immune from review. That is to be avoided.

[298] Ultimately, my real concern in this matter arises from the prospect of the 2016/17 Freight Rate Decision, and all freight rate-setting decisions, being rendered immune from review. This possibility arises from the somewhat unusual circumstance by which rates are determined in this matter. That is, responsibility for setting rate increases of less than 5% being assigned to MAI by way of amendment to the Bilateral Agreement, entry into which contract by the Minister was approved by the 1987 OIC but not on the basis of legislative authority or because of lack of authority or capacity of the Minister. If the NTP applies to the making of freight rates decisions, then the 2016/17 Freight Rate Decision should not be immune from review because decision-

making responsibility was contractually assigned to MAI. Similarly, had the rate increase exceeded 5% and been made by the Minister, it should not be immune from review on the basis that the rate-setting responsibility arises from a contract when the basis of the challenge is an alleged failure to consider a relevant policy.

[299] As seen from *Public Mobile*, public interest standing has been granted to competitors on the basis of the same concern:

> [55] In seeking to challenge the Order in Council, Public Mobile has clearly raised serious issues relating to the interpretation of the Act as well as the application of the control in fact test in this case. There is also no reasonable and effective way to bring this issue before a court without resort to public interest standing. Neither Globalive nor the Attorney General could reasonably be expected to challenge the Order in Council. Only Public Mobile did challenge it.
>
> [56] Unless public interest standing is granted, the Order in Council would therefore effectively be immune from judicial review. Ensuring that no government action is beyond the reach of the courts is fundamental to the rule of law. Indeed, in *Canadian Council of Churches*, the Supreme Court wrote that "the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (at page 256; see also *Hy and Zel's Inc. v. Ontario (A.G.)*, [1993] 3 S.C.R. 675 at 692). It is important that the requirements for public interest standing not be applied mechanistically (*Corporation of the Canadian Civil Liberties Assn. v. Canada (A.G.)* (1998), 40 O.R. (3d) 489 at 497 and 519 (per Charron J.A.), leave to appeal denied, S.C.C. Bulletin, 1999, p. 422). Instead, the court's application of the test should be informed by the factual context and policy issues at play, including the spectre of immunizing government action from review by the courts and the public importance of the issue raised by the applicant (see *Odynsky* at paragraph 61; *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.); Downtown Eastside Sex Workers United *Against Violence Society v. Canada (A.G.)*, 2010 BCCA 439, 10 B.C.L.R. (5th) 33 at paragraph 41 [*Downtown Eastside Sex Workers*]).
>
> [57] It is certainly true that courts must balance this consideration against the importance of preserving judicial

> economy and preventing commercial rivals from using judicial review as a tool of competitive warfare. However, where as in this case the interests of all Canadians are involved to an unusual degree, concerns about immunization become paramount. Though these concerns do not give the court licence to ignore the *Canadian Council of Churches* test, I believe it is appropriate in this context to recognize that Public Mobile has sufficient interest in the outcome of this litigation to be granted public interest standing. *Canwest Global v. Canada (A.G.)*, 2008 FCA 207, 382 N.R. 365, in which this court held that an indirect commercial interest did not constitute a genuine interest in the outcome of the litigation for the purpose of public interest standing, is therefore distinguishable from this case. There were no concerns in *Canwest Global* about government action being immunized from judicial review.

[300] I acknowledge that in these circumstances there is a live question as to whether the setting of freight rates is, in fact, a government action attracting the possibility of public interest standing. This is dependent, in part, on who the decision-maker was, whether the decision was purely a contractual decision and whether the NTP has application to the decision. However, I am addressing standing in the alternative to my finding that MAI made the decision and that this Court does not have jurisdiction because there was no conferral of jurisdiction or power by legislation or prerogative. In addition, the question of the application of the NTP goes to the merits of the matter, rather than the issue of standing. Given this, weighing the *Downtown Eastside* factors and keeping in mind the underlying purposes of the law of standing, I am persuaded that this is a circumstance where I should exercise my discretion in favor of Oceanex and grant public interest standing.

Issue 3: Was s 5 of the CTA a relevant consideration when making the 2016/17 Freight Rate Decision?

[301] I have found above that MAI was the decision-maker and was not a federal board, tribunal or commission in making the 2016/17 Freight Rate Decision, therefore, that this Court does not have jurisdiction, which finding is determinative. However, in the event that I am in error, I will also address the central issue of this matter, being whether s 5 of the CTA, the NTP, applies and therefore should have been considered by the decision-maker.

Oceanex's Submissions

[302] Oceanex submits that the NTP, by way of s 2 and s 3 of the CTA, is binding on the Crown and specifically applies to all transportation matters under the legislative authority of Parliament, not just those modes of transportation addressed by the CTA. Further, that on its face it requires competition to be the primary consideration with any strategic public intervention being an exception to that rule. The NTP has been held to inform and impose legal limitations on the discretion of decision-makers and, while it does not impose a particular result, it sets out the considerations that must be taken into account in decision-making. Here the Minister was required to consider the NTP and give proper weight to its relevant factors in the context of a fair process (*Ferroequus Railway Co v Canadian National Railway Co*, 2003 FCA 454 at paras 21-22 ("*Ferroequus*"); *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 37-38 ("*Suresh*")). This Court is required to determine whether the Minister exercised his power within the legal constraints imposed on his discretion by the NTP.

[303] Oceanex argues that while *Canadian National Railway Company v Moffatt et al*, 2001 FCA 327 ("*Moffatt*") considered the NTP to be a purpose or declaratory clause, purpose clauses limit the discretion of decision-makers (Ruth Sullivan, *Sullivan on the Construction of Statues*, 6th ed. (Markham: LexisNexus, 2014), p 1445 ("*Sullivan*")). Further, allowing the Minister to ignore the NTP in setting MAI's rates would render the NTP meaningless. Nor does the polycentric nature of the NTP mean the Minister is free to ignore the policy, either the policy applies to the decision or it does not. Failing to consider the NTP is fatal to the rate-setting decision and does not even require considering how the Terms of Union interact with that policy.

[304] Oceanex submits the evidence establishes that, in setting the 2016/17 freight rates, neither the NTP, the CPCS Report nor the impact of the rates on Oceanex were considered. As the decision-maker failed to take into account these relevant considerations, the decision must be quashed and remitted back with directions to reconsider and issue a new decision having regard to what was previously ignored (*Régimbald* at 232-233; *Oakwood Development Ltd v St Francis Xavier*, [1985] 2 SCR 164 at 174; *Atwal v Canada (Secretary of State)*, [1994] FCJ No 1113 at para 10 (FCTD); Brown & Evans at 14-176-14-183).

[305] Further, that MAI's heavily subsidized rates are wholly at odds with the NTP; result in freight transportation services not being provided in the most efficient way possible by the most efficient firm; and, specifically harm Oceanex and constitute a form of public intervention that unduly favours one firm, MAI, in violation of the NTP. Not only should the rates have been considered in the context of the NTP criteria but they should also have been considered in light of the history of Oceanex's efforts to have the issues addressed by the Minister. TC retained

CPCS to investigate the degree of distortion in the Newfoundland mainland freight market flowing from Canada supporting MAI, along with looking at possible solutions in terms of revised fee structures. The existence of the CPCS Report demonstrates that the issues considered therein were relevant to the Minister and his mandate, but this was ignored by the Minister in approving the 2016/17 freight rates.

MAI's Submissions

[306] MAI submits s 5 of the CTA is no more than a purpose clause which provides direction as to how the substantive provisions of the CTA are to be interpreted, and provides no basis to quash MAI's commercial rates (*Sullivan* at § 14.39; *Greater Vancouver Regional District v British Columbia*, 2011 BCCA 345 at para 43 ("*Greater Vancouver*")).

[307] Section 5 of the CTA is not a jurisdiction conferring provision (*Moffatt* at para 27). In the result, while it may assist in defining the purpose of that statute, which may in turn assist in interpreting its provisions and, in that context, help define limits on exercises of discretion under the statute, the 2016/17 Freight Rate Decision was not made by the Minister or MAI pursuant to any provision of the CTA. Thus, s 5 does not control or govern the rate-setting decision.

[308] Further, not all purpose statements establish a unified and coherent policy. They may set out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases, as is the case with s 5 which is polycentric and identifies competing objectives. In this matter, lower commercial freight rates further some of the s 5 objectives. Even when s 5 applies, it rarely forms the basis for relief (*Ferroequus* at para

22; *Sullivan* at § 14.44; *Jackson v Canadian National Railway*, 2012 ABQB 652, aff'd 2012 ABCA 440 at paras 57-63 ("*Jackson* (AB)")) and the polycentric nature of s 5 evidences that it was never intended to define a standard against which rate decisions are to be measured by way of judicial review as the Court cannot substitute its view for that of the decision-maker as to how the competing goals should be balanced.

Canada's Submissions

[309] Canada submits the CTA establishes no requirements on the manner in which it maintains the Constitutional Route. The NTP, as found in s 5 of the CTA, is not the source of any legal requirement that the rates be set by any particular party, nor that they be set higher than they are or that they be increased at a faster rate. The NTP is a broad legislated policy statement on achieving a competitive, economic and efficient national transportation system. It is a polycentric policy in that it involves a large number of interlocking and interacting interests and considerations (P Cane, *An Introduction to Administrative Law*, 3d (1996) at p 35 cited in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 36 ("*Pushpanathan*")), notably recognizing the role of public intervention in national transportation.

[310] The NTP is a policy framework which is mandatory only in regard to what is covered by the CTA, railways and airports. At best, the NTP's broad policy goals act in the backdrop to the Minister's decision-making and cannot fetter his discretion over how the Constitutional Route is to be operated. It is not a legal rule that binds rate-setting on that Route, but it can be part of the Minister's broader considerations. Those broader considerations would also include the National Marine Policy, which regulates marine transportation and specifically addresses MAI's services.

Nor is the Minister required, every time he makes a decision in the national marine context, to specifically invoke the NTP by name to indicate he considered the polycentric (*Pushpanathan* at para 36; *VIA Rail Canada Inc v Canadian Transport Agency*, 2005 FCA 79, rev'd on other grounds, 2007 SCC 15) interests the policy enshrines (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 86-88). The NTP's polycentric nature also militates against Oceanex's position that competition is the policy's primary consideration.

[311] The NTP does not purport to address issues of unfair competition within a mode of transportation, nor does the CTA prescribe recourse for claims of unfair competition. Such matters fall under the jurisdiction of the *Competition Act*.

[312] In any event, Canada's broader policy approach is consistent with the policy objectives of the NTP. In 1995, by way of the National Marine Policy, Canada sought to reduce its role in providing ferry services, the diminishment of public intervention, in favour of allowing the services to be provided by the public sector or turned over to the provinces. Continuing, however, to support constitutionally mandated services as well as those required in remote communities. By 1998 MAI had reduced its services to the Constitutional Route and the Argentia route, its other ferry routes having been privatized. On those remaining services Canada has worked towards reducing public intervention as seen by the 2007 and 2010 Revitalization Strategy processes out of which cost recovery policies were established on the Argentia and Constitutional Routes. These measures attempt to strike a balance between the costs to Canadian taxpayers and the costs for users of the ferry services in the context of Canada's constitutional obligation, which Canada cannot breach, and which requires the services

to be readily accessible to users. This balancing is clearly demonstrated by the documents in the record, including Cabinet discussions.

[313] Regardless, these policy decisions, set by Canada as the regulator of MAI, are ultimately pure policy decisions that implicate Canada's constitutional obligation to Newfoundland and Labrador, the nature of which obligation and the province's wishes with respect to it, form relevant considerations for Canada when making decisions about the service.

Newfoundland's Submissions

[314] Newfoundland submits that Parliament did not intend s 5 of the CTA to serve as a mechanism to regulate, control and adjudicate competition in a specific transportation sector and to interpret it in that way exceeds its intended purpose and function.

[315] Newfoundland points out that Oceanex asserts that it has been harmed by the subsidization of MAI, as demonstrated by its written representations, as the rates charged by MAI prevent it from obtaining a sufficient return on its investment, and that these rates are anti-competitive and contrary to s 5 of the CTA. Newfoundland submits that while this judicial review is brought under the CTA, it is in essence a competition complaint, which characterization is supported by the content of Oceanex's Amended Notice of Application and by numerous references in Hynes Affidavit #1.

[316] However, the purpose of the CTA is not to regulate competition. Newfoundland points out that the predecessor to the CTA, the *National Transportation Act* ("NTA"), contained a

scheme by which application could be made to the Transportation Commission for leave to appeal a rate established by a carrier which the applicant believed to be prejudicially affecting the public interest. The Transportation Commission could investigate and make an order requiring the carrier to remove the prejudicial feature. As acknowledged in Hynes Affidavit #1, in the 1990s a predecessor company to Oceanex filed complaints against CN for injurious commercial freight rates between Newfoundland and Nova Scotia using that statutory mechanism. However, Parliament repealed the NTA and replaced it with the CTA, which does not include a similar scheme. Further, the application of the *Competition Act* to the transportation sector is implicit from the fact that s 4(2) of the CTA expressly states that the CTA does not affect the operation of the *Competition Act*.

[317] Newfoundland submits that the precise legal function of s 5 of the CTA is not clear. In *Moffatt* it was held to be a declaratory provision which states the objectives of Canada's NTP. The Federal Court of Appeal in *Ferroequus* noted that the policy expressed the often competing considerations that the National Transportation Agency was required to balance when making a particular decision. It therefore operated generally, served only to guide and structure the National Transportation Agency's exercise of discretion in any given fact situation, and would rarely dictate a particular result. In *Jackson* (AB) at para 58, s 5 was held to be a purpose statement, referencing *Sullivan* who, in her text, comments that purpose statements do not apply directly to the facts but rather give direction on how the substantive provisions of the legislation are to be interpreted (*Sullivan* at p 454). Here, Oceanex does not seek to use s 5 to interpret a substantive provision of the CTA, in fact its application is completely divorced from the CTA. Neither the Minister nor MAI set rates in accordance with a specific section of the CTA. And,

even if it did contain a specific rate-setting provision, the case law and *Sullivan*'s comments indicate that s 5 would have little weight.

Analysis

[318] As noted above, the CTA states that it is binding on Canada or a province (s 2) and that it applies in respect of transportation matters under the legislative authority of Parliament (s 3). Further, that nothing done under the authority of the CTA (excepting Division IV of Part III, rates tariffs and services, railway transportation) affects the operation of the *Competition Act*, subject to s 4(3), which is not relevant to this matter.

[319] Section 5 is stated to be a declaration, it precedes the interpretation provisions of the CTA and the following Parts I to IV of that legislation. Although Oceanex focuses exclusively on s 5 of the CTA, asserting that it was a relevant consideration with respect to the setting of the 2016/17 freight rates, in my view, it is helpful to look a little more closely at the CTA in whole.

[320] Pursuant to s 7(1) of the CTA, the agency known as the National Transportation Agency is continued as the Canadian Transportation Agency ("Agency"). Part II of the CTA deals with air transportation, including the issuance, suspension or cancellation of licences. The Agency can investigate complaints of unreasonable fares or rates and order that they be disallowed or amended as the Agency considers reasonable in the circumstances (s 66). Part III deals with railway transportation, Division IV addresses rates, tariffs and services including complaints of unreasonable charges or associated terms and conditions. If the Agency finds these to be unreasonable it may, by order, establish new charges or associated terms and conditions

(s 120.1). The Agency can also establish competitive line rates (s 132(1)). And, under Part IV, conduct final offer arbitration. The CTA does not similarly address marine transportation by vessel or otherwise.

[321] All of the parties reference the Federal Court of Appeal's 2003 decision in *Ferroequus*. There, Ferroequus applied to the Agency, pursuant to s 138(1) of the CTA, seeking an order authorizing it to operate over portions of the Canadian National Railway track so as to compete with Canadian National and Canadian Pacific in the carriage of wheat from the Prairies. Subsection 138(2) of the CTA empowered the Agency to make the requested order:

138 (2) The Agency may grant the right and may make any order and impose any conditions on either railway company respecting the exercise or restriction of the rights as appear just or desirable to the Agency, having regard to the public interest.	138 (2) L'Office peut prendre l'arrêté et imposer les conditions, à l'une ou à l'autre compagnie, concernant l'exercice ou la limitation de ces droits, qui lui paraissent justes ou opportunes, compte tenu de l'intérêt public.

[322] The Agency refused to grant the requested running rights order, primarily because Ferroequus had adduced no evidence of either market abuse or failure as a result of the conduct of the existing rail carriers or of a problem with the rates or the service as a result of a lack of competition.

[323] On appeal to the Federal Court of Appeal, Ferroequus argued, amongst other things, that the language of s 138(2) did not support such a restricted reading which was contrary to the NTP, enacted as s 5 of the CTA, which stipulated, in part, that competition and market forces are,

whenever possible, the prime agents in providing viable and effective transportation services. Ferroequus argued that the Agency should have regarded s 138 as a measure adopted by Parliament for enhancing competition, together with the other provisions in the same part of the act designed to enhance competition, being the remedies of inter switching and competitive live rates.

[324] The Federal Court of Appeal did not agree and found that the Agency committed no reviewable error on the competition issue. In the context of the intertwined nature of issues of discretion and statutory interpretation it stated:

> [20] First, the open-ended language of subsection 138(2) defining the Agency's legal powers is redolent of discretion. The only express legal limitation on the Agency's discretion to grant a running rights order is that it must have "regard to the public interest."
>
> [21] Second, it is common ground that the factors to which the Agency must have regard when determining whether the grant of running rights is in the public interest are contained in the National Transportation Policy. This Policy both informs and, because of its statutory base, imposes a legal limitation on, the Agency's exercise of discretion.
>
> [22] However, since the Policy expresses the often competing considerations that the Agency must balance when making a particular decision, it inevitably operates at a level of some generality and does no more than guide and structure the Agency's exercise of discretion in any given fact situation. Thus, it imposes a relatively soft legal limit on the Agency's exercise of power, in the sense that it will rarely dictate a particular result in any particular case.

[325] In that regard, the Federal Court of Appeal also stated that it was important to note that the decision of whether to grant a railway running rights over another's tracks is highly polycentric in nature. On the facts of that case, this involved balancing the competing interests

of shippers and producers with those of the existing rail carriers. The broad ramifications of the decision and the range of interests potentially afforded were indicated by the nature and number of the interveners before the Agency.

[326] In my view, it is significant that in *Ferroequus* the decision under review concerned the refusal by the Agency to exercise its discretion to grant an order as it was empowered to do by s 138 of that legislation. That is not the circumstance in this matter. Nothing in the CTA pertains to the setting of marine freight rates and no decision has been made, by the Agency or other decision-maker, which arises out of the provisions of that act. While in *Ferroequus* it was common ground that the factors the Agency had to consider in reaching its decision as to whether the granting of the running rights was in the public interest were contained in the NTP, there is no such link as between the 2016/17 Freight Rate Decision and s 5 of the CTA. Indeed, the Federal Court of Appeal described the dispute in *Ferroequus* as concerning the role of the enhancement of competition in the exercise of the Agency's power to grant a railway company the right to operate over another company's trade. That power came from s 138(2) of the CTA.

[327] *Moffatt* also concerned an appeal from an Agency decision. Moffatt wished to engage in the business of transporting goods in containers between central Canada and Newfoundland. Pursuant to the CTA, he made a submission for final offer arbitration of a freight dispute with CNR. Moffatt submitted what he thought were the highest rates CNR could charge based on the principles contained in Term 32(2) of the Terms of Union. The Agency concluded that as CNR had offered through rates, these fell within the purview of Term 32(2), and submitted the matter

to arbitration assigning the task of developing a maritime rate structure and Terms of Union rates to the arbitrator.

[328] The Federal Court of Appeal found that the Agency lacked jurisdiction to conduct an inquiry into the application of Term 32(2) to the setting of freight rates to Newfoundland and to assign to the arbitrator the task of developing the rates.

[329] The Federal Court of Appeal noted that the Agency was a creation of statute and that the powers it exercised must be found in statutory law. Therefore, it was necessary to consider whether jurisdiction had been conferred on it by statute to conduct the inquiry into the application of Term 32(2) and to instruct the arbitrator to develop a maritime rate structure and Terms of Union rates.

[330] There were three possible sources for such jurisdiction. The first was Part IV of the CTA under which the matter came before the Agency. The Federal Court of Appeal concluded that nothing in Part IV authorized the Agency to have conducted the inquiry that it did. The Federal Court of Appeal then asked if there were provisions of the CTA, outside Part IV, which conferred jurisdiction. The Federal Court of Appeal found that there was no provision in the CTA conferring on the Agency the power, duty or function of administrating the whole of the CTA. It concluded that unless there was specific jurisdiction contained in the CTA to conduct a Term 32(2) inquiry upon submission of an application for final offer arbitration, then there was no such jurisdiction. With respect to the Agency's submission that s 5 conferred the requisite jurisdiction, the Federal Court of Appeal stated:

> [27] However, section 5 is not a jurisdiction conferring provision. While not minimizing its importance, I believe that section 5 is a declaratory provision which states the objectives of Canada's National Transportation Policy. Those objectives are implemented by the regulatory provisions of the CTA and, in the currently largely deregulated environment, by the absence of regulatory provisions. Section 5 does not, itself, confer on the Agency the jurisdiction it assumed in this case. If it were construed to do so, then presumably any legal question could also be brought before the Agency for determination. Obviously section 5 was not intended to confer on the Agency jurisdiction over all disputes of any sort affecting carriers, simply because they involve legal or constitutional questions. Of course, the Constitution must be respected. But section 5 does not give the Agency plenary power to address any constitutional question that is raised before it where there is no specific statutory authority for it to conduct such an inquiry. This is the point made by La Forest J. in *Cuddy Chicks*, *supra*, in relation to subsection 52(1) of the *Constitution Act* and it is equally applicable to section 5 of the CTA. Indeed, unlike prior legislation, the CTA does not mention Term 32(2) and there is no general jurisdiction in the Agency to regulate freight rates as there was in such prior legislation.

[331] While the Federal Court of Appeal went on to consider whether Term 32(2) itself was a source of jurisdiction for the Agency, concluding that it was not, what is significant here is its finding that s 5 is a declaratory provision stating the objectives of the NTP which are implemented by the regulatory provisions of the CTA. The CTA contains no regulatory provisions that specifically pertain to the marine sector, unlike the air and rail sectors. It contains no provisions that apply to rate-setting in that sector. While the Court in *Moffatt* additionally stated that the objectives of the NTP are also implemented by the absence of regulatory provisions, possibly meaning that the forces of competition naturally came into play as a result of deregulation, this is of little significance to the present analysis.

[332] In *Jackson* (AB), the plaintiff contended that it was Parliament's policy that railway transportation would be provided to all users at the lowest total cost; that railways would bear the actual cost of services provided to them at public expense; and, that the railways would receive only fair and reasonable compensation. Section 5 of the CTA was central to the plaintiff's argument that, in charging maximum rates, Canadian National and Canadian Pacific breached the policies underlying the specific provisions of the CTA.

[333] The Alberta Court of Queen's Bench referenced *Moffatt* and *Ferroequus*. Relying upon *Sullivan*, it found that s 5 is a purpose statement:

> [58] Section 5 of the *CTA* is a "purpose statement", as described in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Vancouver: Butterworths Canada Ltd., 1994) at 263-264:
>
> > ... A purpose statement is a provision set out in the body of legislation that declares the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Usually purpose statements are found at the beginning of an Act or the portion of the Act to which they relate. Some are explicit and begin with the words "The purposes of this Act are..." or "It is hereby declared that...". Others simply recite the principles or policies that the legislature wishes to declare without introductory fanfare...
> >
> > Like preambles, purpose statements reveal the purpose of legislation and they are also an important source of legislative values. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they cannot be contradicted by courts; they carry the authority and the weight of duly enacted law. In the absence of specific legislative direction, however, it is still up to courts to determine what use should be made of the purposes or values set out in these statements.

> ...Purpose statements play an important role in modern regulatory legislation. Such legislation establishes a general framework within which powers are conferred to achieve particular goals or to give effect to particular policies. Purpose statements expressly set out these policies and goals...
>
> In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome...
>
> ...
>
> ...[t]he declarations set out in a purpose statement may inform judicial understanding of the Act as a whole and guide interpretation in a particular direction.
>
> Not all purpose statements establish a unified and coherent philosophy. Sometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases.

…

[61] The Plaintiff, in his Brief of Law in respect of Certification, characterizes the National Transportation Policy embodied in section 5 as follows:

(a) transportation services would be provided at the lowest total cost to serve the needs of shippers;

(b) carriers “as far as is practicable” were to bear “a fair proportion of the real costs” of the resources and services provided to them at public expense;

(c) each carrier “as far as is practicable” was to receive only “fair and reasonable compensation” for the services it was to provide.

[62] This is, at best, a gross simplification of objectives set out in the National Transportation Policy. The National Transportation Policy does not state that any particular form of transportation must be provided at the lowest total cost, but that a safe, economic, efficient and adequate transportation network should make use of

> all available modes of transportation at the lowest total cost. While the National Transportation Policy does provide that carriers "as far as practicable" are to bear a fair proportion of the real costs of resources provided to them at public expense, and to receive fair and reasonable compensation for the services they would provide, these broad statements of policy must be read in the context of the entire policy, which also emphasizes the importance of competition, market forces, and the economic viability of each mode of transportation.
>
> [63] The National Transportation Policy sets out a number of competing principles and is intended to guide the decisions of the Agency. It is, per Saxton J.A. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2005 FCA 79, [2005] 4 FCR 473 at para 39, "... polycentric, meaning that it requires the Agency to balance competing principles". It does not establish a specific duty on the part of the Railways to charge rates below those mandated by the Agency to reflect decreasing HCMC.

[334] In the sixth edition of *Sullivan*, the author states that, strictly speaking, a purpose statement (or policy statement or statement of principles) is not a descriptive component, but rather, is a type of interpretation provision. "Its function is to set out the principles or policies the legislation is meant to implement or the objective it is meant to address" (§ 14.38). *Sullivan* goes on to state:

> 14.39 Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles, norms or policies. Unlike preambles purpose statements come after the enacting clause of the statute and are part of why is enacted into law. This makes them binding in the sense that they carry the authority and weight of duly enacted law. However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation – that do apply to facts – are to be interpreted.

[335] *Sullivan* states that this essential point was overlooked by the appellant in *Greater Vancouver* when it argued that a purpose statement in British Columbia's *Local Government Act*

created a binding manner and form consultation requirement, which argument did not succeed. Rather, "[a]s the British Columbia Court of Appeal rightly observed, statements of purpose and principle do not create legally binding rights or obligations, nor do they purport to do so. They merely state goals or principles that may be referred to in interpreting the rights and obligations that are created elsewhere in the legislation" (*Sullivan* at § 14.40).

[336] As to the function of purpose statements, *Sullivan* notes that they play an important role in modern "program" legislation. Such legislation establishes a general framework within which administrative and legislative powers are conferred to actual particular goals or to give effect to particular policies. "Purpose statements expressly set out these policy and goals. They give context for the entire Act". *Sullivan* also notes that not all purpose statements establish a uniform and coherent philosophy: "[s]ometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases" (§ 14.44).

[337] In my view, what is very clear from all of the foregoing is that s 5 of the CTA is a purpose clause as defined in *Sullivan*. Thus, it is a type of interpretative provision that sets out the policy that the legislation within which it is contained, the CTA, is intended to achieve. And, most significantly, as a purpose statement, the NTP does not create legally binding rights and obligations. Rather, it states goals or principles that can be used to interpret the rights and obligations that are created elsewhere in that legislation. And, in circumstances where the NTP has application, it must be recalled that it is polycentric and therefore requires the Agency to balance its competing principles.

[338] In the result, while s 5 can certainly be referenced to interpret substantive provisions of the CTA and must guide decisions of the Agency made pursuant to powers granted to it under that legislation, this is not such a case. The 2016/17 Freight Rate Decision was not made by the Agency. The CTA does not confer any power or jurisdiction on the Agency or any other entity to make maritime freight rate decisions or to address complaints arising from such rates. As stated above, the CTA contains no provisions pertaining to the regulation or oversight of maritime rates.

[339] For its part, Oceanex refers the Court to § 14.45 of *Sullivan*:

> **14.45** ***Purpose statements define limits of discretion***. Another important function of purpose statements is to define the limits of discretion conferred by legislation. This function is evident when purpose statements are contained in provisions that confer discretion on administrative boards and tribunals. Such provisions may confer powers to be exercised generally "for the purposes of this Act" or for particular purposes mentioned in the text of the provision.

[340] However, in my view, while s 5 may define the limits of discretion, it does so only with respect to discretion conferred by and exercised pursuant to the CTA. Thus, while Oceanex relies on *Ferroequus* in support of its view that the NTP imposes legal limitations on the discretion of the 2016/17 Freight Rate Decision-maker, as this decision was not made pursuant to the CTA this is not a circumstance where the NTP applies to limit the rate-setting discretion of that decision-maker.

[341] Oceanex also submits that s 5 of the CTA is binding on the Minister by way of ss 2 and 3 of that legislation:

2 This Act is binding on Her Majesty in right of Canada or a province.	2 La présente loi lie Sa Majesté du chef du Canada ou d'une province.
3 This Act applies in respect of transportation matters under the legislative authority of Parliament.	3 La présente loi s'applique aux questions de transport relevant de la compétence législative du Parlement.

[342] In my view, s 2 is an interpretive provision that serves a similar purpose as definitional or application clauses, which is to assist with applying the substantive provisions of the CTA. Specifically, s 2 serves to displace the common law presumption of Crown immunity, as codified by s 17 of the *Interpretation Act*, RSC 1985, c I-21:

17 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.	17 Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

[343] In other words, s 2 displaces the common law presumption that legislation does not prejudice the Crown's rights or prerogatives by expressly binding the Crown (*Sullivan* at § 27.1). Section 2 does not otherwise confer any specific legal privileges or obligations on the Crown.

[344] Nor do I agree that, because s 3 states that the CTA applies to transportation matters under the authority of Parliament, the NTP therefore binds the Minister without reference to the CTA's substantive provisions. While pursuant to s 3 the CTA applies to all transportation matters under the legislative authority of Parliament – which would include navigation and shipping – as discussed above, the role of s 5, the NTP, as a declaratory provision contained in

the CTA, is primarily to interpret or inform the substantive statutory provisions of that legislation.

[345] Like definitional and purpose clauses, the scope of the CTA's application under s 3 must also have regard to the legislation itself. For example, the CTA specifically applies to rail and air transportation matters as noted in Parts II and III respectively. It also generally extends to other forms of transportation under Part V, which deals with undue barriers to transportation for persons with disabilities. Section 172 allows the Agency to investigate whether undue obstacles to transportation exist and allows the Agency to take corrective measures. When read together, s 172 and s 3 apply the CTA to the marine transportation sector. In this context the NTP, and in particular s 5(d), guides the Agency's discretion to resolve undue obstacles arising in the marine transportation sector. However, the Agency's jurisdiction or powers in that regard stem from the CTA's substantive provisions, not the NTP.

[346] It is also possible that s 3 would have application pursuant to s 52(1). This requires the Minister to annually put before Parliament a report on the state of transportation in Canada, including the extent to which carriers and modes of transportation receive compensation, indirectly and directly, for resources, facilities and services that were required to be provided as an imposed public duty. Section 3 would, presumably, have the effect of causing maritime transportation to be encompassed by the s 52 requirement.

[347] I am not persuaded, however, that ss 2 and 3 have application so as to impose on the Minister a binding obligation or duty to explicitly address s 5 of the CTA, the NTP, when

making decisions or taking actions that do not arise from powers conferred or obligations imposed by the CTA. In other words, ss 2 and 3 should be read in the context of the applicable substantial provisions of the CTA to determine how the Crown is bound. To find otherwise would mean that every decision made by the Minister in every transportation sector would require explicit referral to and consideration of the NTP.

[348] Oceanex, referencing *Suresh*, submits that the Minister was required to consider the NTP and give proper weight to its relevant factors. However, paras 37-38 of *Suresh*, referenced by Oceanex in this regard, concern the Supreme Court of Canada's standard of review analysis:

> 37 The passages in *Baker* referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Re Sheehan and Criminal Injuries Compensation Board* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Dagg, supra*, at paras. 111-12, per La Forest J. (dissenting on other grounds).
>
> 38 This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

[349] As to the standard that should be adopted with respect to a minister's decision that a refugee constitutes a danger to the security of Canada, the Supreme Court of Canada agreed that the reviewing court should adopt a deferential approach. The minister's discretionary decision should only be set aside if it was patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence or the minister failed to consider the appropriate factors (*Suresh* at para 29).

[350] The Supreme Court of Canada in *Suresh* also addressed its prior decision in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 stating, to the extent that it reviewed the minister's discretion in that case, its decision was based on the ministerial delegate's failure to comply with self-imposed ministerial guidelines, as reflected in the objectives of the *Immigration Act*, international treaty obligations and, most importantly, a set of published instructions to immigration officers.

[351] In that regard, the Supreme Court of Canada stated that the passages in *Baker* referring to the weight of particular factors must be read in that context: "*Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors". The Court referenced *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147 (HL); *Re Sheehan and Criminal Injuries Compensation Board* (1974), 52 DLR (3d) 728 (Ont CA); *Maple Lodge Farms Ltd v Government of Canada*, [1982] 2 SCR 2 ("*Maple Lodge Farms*"); *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 ("*Dagg*") in this regard.

[352] In *Maple Lodge Farms* at pp 7-8, the Supreme Court stated:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

(Also see *Dagg* at para 111).

[353] In my view, this is not a circumstance such as *Maple Lodge Farms* as the CTA does not contain an administrative scheme or provisions that address the setting of marine freight rates nor was the maker of the 2016/17 Freight Rate Decision exercising its discretion in that regard. Thus, the ground for intervention by a reviewing court, reliance on considerations that are irrelevant or extraneous to the statutory purpose, do not come into play.

[354] Further, for the reasons set out above, I am not persuaded that the NTP was a "patently relevant" factor that the decision-maker was required to consider when setting the 2016/17 freight rates. There is no statutory link between the NTP and the freight rate decision-making process, there are no regulations, guidelines or other criteria pertaining to the application of the NTP in this decision-making context that would provide such a link and Oceanex does not point to any authority to support that the NTP is a "patently relevant" consideration in rate-setting or other decisions not made pursuant to the provisions of the CTA. Thus, while in a general sense, issues such as competition have relevance to rate-setting on the Constitutional Route, in these

circumstances, the NTP is not a "patently relevant" factor that must be considered (see Brown & Evans at 15-2321).

[355] Moreover, and in any event, nor can the NTP fetter the decision-making process. Policy statements can only serve as a guide, it is the governing law that must be interpreted and applied (see *Stemijon Investments Ltd v The Attorney General of Canada*, 2011 FCA 299 at para 31). Here the CTA does not apply to freight rate decision-making.

[356] Oceanex also asserts that the existence of the CPCS Report demonstrates that the Minister viewed himself as bound by the NTP. I also do not agree with that submission.

[357] The CPCS Report was prepared for TC and is entitled "Newfoundland Domestic Trade Routes and Competition Assessment". It states that its purpose was to assess the degree of distortion in the Newfoundland/mainland of Canada freight market attributable to Canada's financial support of MAI. It considered this potential market distortion in the context downward pressure on the rates charged by Oceanex and in discouraging other marine carriers from entering the market. Oceanex obtained the CPCS Report by way of a request made pursuant to the *Access to Information Act*, RSC 1985, c A-1. By my Order of May 12, 2017, I permitted the report to be filed by way of supplemental affidavit (Hynes Affidavit #3), however, as conceded by Oceanex, it could not be relied upon for the truth of its content.

[358] The CPCS Report makes no reference to the NTP. It does not suggest that it was produced because of any obligation imposed by s 5 of CTA. Rather, it sought to assess the

degree of any market distortion and possible solutions in terms of revised fare structures. It states that the research and analysis developed from the study would contribute to TC's internal analysis and further policy developments.

[359] Based on the evidence before me, I find that it is highly probable that TC commissioned this study in response to Oceanex's ongoing complaints concerning subsidization of MAI. Indeed, Oceanex participated in the study. Thus, while the CPCS Report demonstrates clear awareness of Oceanex's concerns, it does not establish that it was generated as a result of or because the Minister viewed himself bound by the NTP.

[360] In conclusion, for the reasons above, I find that s 5 of the CTA, the NTP, was not a required consideration in the making of the 2016/17 Freight Rate Decision. Accordingly, a failure to consider it when making the 2016/17 Freight Rate Decision is not a reviewable error and does not render the decision unreasonable.

Issue 4: If s 5 of the CTA is a relevant consideration, can it constrain the level of public cost Canada assumes to provide ferry services on the Constitutional Route, the provision of which services arises from the Terms of Union?

[361] Again, having found that s 5 of the CTA, the NTP, was not a relevant consideration when making the 2016/17 Freight Rate Decision, I address Issue 4 in the event that I erred in my prior findings.

Oceanex's Submissions

[362] Oceanex submits that there is no evidence that the Minister considered the Terms of Union, in order to justify deviating from the NTP, when he approved the 2016/17 freight rates, thus, the Court need not consider what the Terms of Union require or how they mesh with the NTP. In any event, the Terms of Union do not provide any guarantee of specific rates levels for commercial freight traffic or guarantees a subsidized service. The issue as Oceanex frames it is whether the current level of subsidized rates is dictated by the Terms of Union. Put otherwise, whether the current level of rates is the only way that Canada can meet its constitutional obligation without violating the NTP.

[363] Oceanex submits that the paramount consideration in interpreting the Terms of Union is the meaning of the words chosen by the parties (*Prince Edward Island (Minister of Transportation and Public Works) v Canadian National Railway Co*, [1991] 1 FC 129 at paras 11-12 ("*PEI Railway*"); *British Columbia (AG) v Canada (AG) (Vancouver Island Railway)*, [1994] 2 SCR 41 ("*Vancouver Island Railway*")). Term 31 does not guarantee a subsidy and can only mean that if there is a public cost it will be borne by Canada. Oceanex interprets this to mean that "we'll subsidize if necessary, but not necessarily a subsidy". Similarly, while Term 32(1) requires Canada to maintain service on the Constitutional Route in accordance with the traffic offering, its language does not require the freight service to be offered at specific rates or guarantee a subsidized service.

[364] While the meaning of Term 32(1) has not been previous considered by the courts, the terms "traffic offering" and "traffic offered" have been considered in decisions affecting the railway sector. These indicate that the phrase "in accordance with the traffic offering" should be interpreted to mean "at a level that meets demand" and does not support an interpretation requiring subsidizing rates in violation of the NTP or rates that artificially create demand (*Canadian National Railway Company v Emerson Milling Inc*, 2017 FCA 79 at paras 88-92 ("*CNR v Emerson Milling Inc*"); *Northumberland Ferries Ltd v Canada*, [1944] ExCR 123 at para 90 ("*Northumberland Ferries*"); *Canadian Pacific Railway Co v Quebec (AG)*, [1930] SCR 94 at 4; A MacMurchy & S Denison, *Canadian Railway Law Annotated, 1903* (Canada Law Book: 1905) at 379-381). Further, historical evidence demonstrates Canada and Newfoundland never agreed that "in accordance with the traffic offering" guaranteed any specific level of service or rates.

[365] Oceanex also submits that Terms 32(2) and (3) do not currently require subsidized rates on the Constitutional Route. Rather, having regard to the current context of deregulation, the Federal Court of Appeal has rejected the suggestion that Term 32(2) requires rate regulation of any kind and has found that Term 32(3) is currently inapplicable and, therefore, does not operate to require the Minister to approve any particular rates (*Moffatt* at paras 30, 52, 60). In addition, Term 32 must also be interpreted in light of Term 36 which provides that any service taken over by Canada under the Terms of Union would be subject to the laws of Canada, which include the CTA and the NTP.

[366] On a plain reading of the Terms of Union, there is no basis to deviate from the NTP. And, in any event, as the Minister is responsible for the NTP and the Terms of Union it was, at a minimum, incumbent upon him to justify why any failure to comply with fundamental principles of competition propounded in the NTP was required by the Terms of Union (*Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001] OJ No 4767 at paras 166, 168, 177, 184 (Ont CA)).

[367] When appearing before me, Oceanex also argued that the historical evidence supporting the Neary Report negates interpreting the Terms of Union as requiring specific rate guarantees or precluding the application of the NTP to the Constitutional Route. For example, drafts of the Terms of Union exchanged between delegations from Canada and Newfoundland show attempts by Newfoundland to broaden Canada's obligation for the Constitutional Route, such as adding the word "efficient" or requiring rate regulation for all ferry services, but these were rejected. This supports Neary's conclusion that Term 32 has a specific and limited meaning, unique to its particular circumstances. Nor does the historical record use the phrase "subsidy" in reference to the Constitutional Route ferry service, accordingly, reading in a subsidy to the Terms of Union is a dangerous exercise.

[368] Oceanex also challenges the expertise of Dr. Blake. According to Oceanex, Dr. Blake's expertise lies with historical events after 1949 rather than the period leading up to Newfoundland joining Confederation. This lack of expertise negates Dr. Blake's opinion that the parties to the Terms of Union understood that Canada would assume all costs for the ferry service and that this service would not operate on a cost recovery basis. In addition, Oceanex argues portions of the

historical record contradict Dr. Blake's evidence, for example, the Constitutional Route being profitable in 1947 according to sources in the Newfoundland delegation. Nor when cross-examined on his expert affidavit evidence was Dr. Blake able to cite specific documents that established that Canada and Newfoundland understood that the federal government would have to provide a subsidy for the ferry service once Canada took over the service.

Canada's Submission

[369] Canada submits that Term 32(1) of the Terms of Union requires it to maintain the Constitutional Route but is silent on how Canada fulfils that obligation, including how fees and charges are determined. In that regard, since 1987 Canada has contracted with MAI to be the service provider for the route.

[370] The Terms of Union are a part of the law of the Constitution of Canada and must be construed as such (*Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12 at para 44, leave to appeal denied [2000] SCCA No 191 ("*Hogan*"); *Vancouver Island Railway* at paras 62-72; *Canada v Prince Edward Island*, [1978] 1 FC 533 (FCA) at paras 35-37 ("*PEI (1977)*"); *Friends of the Island* at para 68).

[371] Adopting a plain and ordinary meaning interpretation (*Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at paras 31-44), Term 32(1) does not preclude the establishment by Canada of tolls and related charges nor from contracting with other parties to provide ferry services. However, because Term 32 sets out a constitutional obligation, it should be construed in accordance with its larger object: to ensure a vital

transportation link between Newfoundland and the mainland of Canada. Oceanex has not challenged the existence of Canada's obligation to provide ferry service on the Constitutional Route. That obligation is at the forefront of Canada's consideration in the delivery of that service. Canada is also cognizant of the overall cost to Canadian taxpayers. Canada's cost recovery requirements for MAI attempt to balance the costs between users of the ferry service and taxpayers. When Parliament votes for an appropriation, there is a constant balancing of the costs to taxpayers, the need for the service to be readily accessible to users and, importantly, Newfoundland's view on the provision of the service. These factors are all weighed in ensuring that Canada does not breach its constitutional obligation.

[372] Canada made no representations on Term 31 and took the view that its interpretation was not necessary to address this application. Canada also took no further position on interpreting Term 32 and maintained that this application would be decided without resort to the Terms of Union.

MAI's Submissions

[373] MAI submits that as the Constitution is the supreme law of Canada, s 5 of the CTA cannot support an application for judicial review in respect of decisions relating to MAI's rates. This is because the provisions of the Terms of Union impose the burden of a subsidy on Canada.

[374] Term 31 required Canada to take over the Newfoundland Railway, including steamship services, and to relieve the province of Newfoundland of the public costs for these services. This language clearly recognizes that there would be an ongoing public cost, or subsidy, associated

with the service which Canada would pay, rather than Newfoundland. In other words, a clear burden was placed on Canada to cover the costs of each service taken over. Oceanex's position that s 5 of the CTA can preclude or limit Canada from subsidizing MAI's operations is inconsistent with Canada's constitutional commitment in Term 31.

[375] MAI further submits that Term 32(1) requires Canada to maintain in accordance with the traffic offering a freight and passenger steamship service on the Constitutional Route. Term 32(2), drafted during an era of railway rate regulation, provides that through-traffic moving between North Sydney and Port aux Basques will be treated as all-rail traffic. In other words, the cost to shippers and passengers was to be equivalent to the cost of railway traffic across the distance of the Cabot Strait, it was to be subsidized by Canada. While there may be issues as to the current import of Term 32(2) (*Moffatt* at para 61), Term 32 as a whole still has the effect of imposing the burden of a government subsidy on Canada. And, even if the provision is currently suspended, it can still be utilized when interpreting the Terms of Union as a whole and is significant because it clearly illustrates that there is an implied subsidy on the Constitutional Route. Term 32(2) could only be carried out by changing less than the actual shipping costs. As to the wording "in accordance with the traffic offering", this can only mean that the service must be accessible and affordable to the public.

[376] While there may not be clear evidence about the profitability of the ferry service on the Constitutional Route prior to 1949, it has been unprofitable since then and the cost of subsidy has been borne by Canada, as a public cost as required by Term 31. The purpose of the subsidy was to make the transportation of people, freight and vehicles more affordable over the shortest route

to and from the island of Newfoundland. When new provinces, like Prince Edward Island ("PEI") and Newfoundland joined Canada the idea, as far as possible, was to not place them in a disadvantageous position, even if some of the geography was disadvantageous. The Terms of Union provided that Newfoundland's inherent geographical disadvantage could be mitigated by subsidizing rates on the Constitutional Route. It is this subsidization that Oceanex challenges but subsidization is the effect of Canada picking up the public costs.

[377] Any decision to subsidize MAI's services in furtherance of Canada's constitutional obligation is solely governed by the Terms of Union. Subsection 52(2) of the *Constitution Act, 1982* mandates that the jurisdiction Canada enjoys pursuant to those constitutional provisions cannot be subject to any statutory constraint, accordingly, the CTA cannot override constitutional duties under the Terms of Union. As such, there is no scope for judicial review based on s 5 of the CTA of Canada's decision to provide a subsidy in furtherance of its constitutional commitment under the Terms of Union.

[378] Similarly, decisions as to the quantum of the subsidy authorized by the Minister and appropriated by Parliament in furtherance of Canada's obligations under the Terms of Union are not reviewable based on s 5 of the CTA. Canada realizes that, without appropriations, rates would have to be set so high that the required service on the Constitutional Route would be inaccessible to many. The decision as to the quantum of the subsidy needed to meet Canada's constitutional commitment is a policy decision about the expenditure of public funds. A court cannot, in the guise of judicial review based on s 5 of the CTA, require Parliament or the Minister to reduce the subsidy.

Newfoundland's Submissions

[379] Newfoundland submits that the Terms of Union constitutionally obligate Canada to provide a subsidized freight and passenger services on the Constitutional Route in perpetuity. As a result of this constitutional obligation, the broad policy goal of competitiveness expressed in s 5 of the CTA is not applicable to the Minister or MAI's decision setting rates for the Constitutional Route.

[380] In interpreting the Terms of Union, the starting point is the text itself. If the text is clear on its face, then there is no need to resort to historical evidence. If the text is not clear, then a court may employ additional evidence to determine what the intention of the parties was in 1949. Both *PEI Railway* and *Vancouver Island Railway* interpreted provincial terms of union and did not preclude the use of historical evidence, although it was unnecessary to do so in those cases. A strict interpretive approach is no longer employed even in the field of commercial contract law (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53). It has also been held that courts are not limited to strict textualism when interpreting the Terms of Union and they should not be interpreted in a strict contractual manner (*Hogan* at para 54).

[381] Newfoundland also submits that the Terms of Union obligate Canada to fund the Constitutional Route. While Term 32(1) imposes no financial obligation on Canada with respect to the Constitutional Route, the Terms of Union must be read as a whole. Terms 32(1), 31(a), and 33(a) must be read together to determine Canada's financial obligations. Term 32(1) imposes a perpetual obligation on Canada to operate a ferry service on the Constitutional Route

through using the word "maintain" (*Canadian National Railway Co v Board of Commissioners of Public Utilities*, [1976] 2 SCR 112 at para 35 ("*Public Utilities*")). Canada's obligation to bear the costs associated with the services is explicitly stated in Term 31(a) and, pursuant to Term 33(a), in 1949 Canada obtained ownership of Newfoundland Railway's steamships that serviced the Constitutional Route. While Term 31(a) does not indicate what is encompassed by the term "public costs", this must mean more than simply relieving debts associated with the construction of the railway, prior to Confederation, as this is specifically provided for in Term 23. Accordingly, it is necessary to look to case law and the historical evidence to resolve the ambiguity in this wording.

[382] Newfoundland submits that Term 31(a) imposes a broad and direct financial obligation on Canada and that this is consistent with existing case law. For example, *PEI (1977)* interpreted PEI's Terms of Union as imposing a financial and operational obligation to operate a ferry service between PEI and New Brunswick. The purpose and effect of both provinces' terms was to transfer the financial obligation associated with operating a subsidized interprovincial ferry service to the government of Canada. To determine that MAI must charge the full costs of the service directly to the users amounts to determining that Canada should no longer bear the public costs of the service. Newfoundland also submits the historical evidence supports the argument that Newfoundland and PEI's terms of union are substantively similar regarding transportation and it addresses this in its written submissions.

[383] Further, the historical record supports the position that the parties to the Terms of Union never intended Newfoundland to bear the full costs of operating the service. Specifically,

Dr. Blake notes that Canada subsidized the gulf ferry service from 1906-1923, when it was nationalized by Newfoundland. After 1923, the service was in effect subsidized by the Dominion of Newfoundland as a division of the money-losing Newfoundland Railway with losses from 1904-1921. Only in 1936-1937 and during certain years during World War II did the rail company's finances improve. The primary documents attached to the Blake Report demonstrate that in the lead up to Confederation, Canada was well aware the steamship service would require extensive capital and operating subsidies. Dr. Blake concluded that there was no expectation that the ferry service from Port aux Basques to North Sydney would operate a cost recovery model, and it was understood that Ottawa would cover all deficits incurred by the ferry and, moreover, that the service would, like the union of Newfoundland with Canada more generally, provide great benefits to the people of Newfoundland. It was a subsidized ferry for the benefit of Newfoundland and Labrador.

[384] Similarly, an article by Jeffery Collins attached as an exhibit to the Neary Report concluded that Term 31(a) contemplated Canada assuming the financial responsibility for the railway and ferry service which was largely responsible for Newfoundland's vast debt incurred during the pre-Confederation years and that both governments recognized that operating any modern transportation system in Newfoundland with its "sparse and scattered population" would be a continuing costly endeavor which the province, with its small tax base, could not afford to maintain without federal relief (Jeffrey Collins, "Executive Federalism and the Terms of Union: A New Approach to Understanding the "Roads-for-Rails" and "Roads-for-Boats" Agreements" (2012) 27:2 Newfoundland and Labrador Studies).

[385] Further, Canada's and Newfoundland's post-union behavior supports the interpretation that Term 31(a) is an ongoing financial obligation. The 1953 OIC and 1955 OIC demonstrate that Canada believed the Terms of Union obligated it to take on the operating and capital deficits related to the service. The deficits of PEI and Newfoundland were to be treated in the same manner.

[386] As to the application of Term 36, Newfoundland does not agree that Canada's transportation policy has, since 1949, evolved from rate regulation and subsidization to one based upon free market principles and competition, as reflected in s 5 of the CTA, such that the Terms of Union are subject to these new policies by virtue of Term 36.

[387] While Term 36 may grant Parliament the power to legislate with respect to the Constitutional Route, it does not grant it the power to alter the very substance of the Terms of Union. To interpret it as such would amount to Canada having unilateral power to amend the Constitution. The amending of provincial terms of union must be done using the amending formula in s 43 of the *Constitution Act, 1982* (*Hogan* at para 61). As such, it is irrelevant that there has been an evolution in political thinking about transportation since 1949 as reflected in s 5 of the CTA. The Terms of Union are to be interpreted by reference to what they meant at the time they were signed.

[388] Newfoundland states that it is not asking this Court to determine the extent or quantum of Canada's financial obligation for the Constitutional Route. Rather, it is sufficient for the Court

to determine that the obligation exists such as to remove the setting of rates from the application of s 5 of the CTA.

Analysis

[389] I have determined above that failure to consider s 5 of the CTA, the NTP, when setting the 2016/17 freight rates was not a reviewable error. Accordingly, it is not strictly necessary for me to also consider, in the alternative, if the CTA was a required consideration, then whether Canada's constitutional obligations imposed by the Terms of Union restrict or limit the application or effect of the NTP. However, in the event that I am in error in my prior conclusion, I will also address this issue.

[390] As a starting point, it is beyond doubt that the Constitution is the supreme law of Canada (*Constitution Act, 1982*, s 52), that the Terms of Union are part of the Constitution of Canada (*Constitution Act, 1982*, s 52(2)(b) and its Schedule item 21; *Hogan* at paras 44 and 61; *Friends of the Island* at para 57; *Vancouver Island Railway* at para 54; *PEI Railway* at para 7) and that the terms of union upon which provinces joined Canada created constitutional duties and obligations on Canada (*Friends of the Island* at para 57; *PEI (1977)* at para 35; *Vancouver Island Railway* at para 55).

[391] In support of their respective positions, Oceanex and Newfoundland have submitted expert affidavit evidence of historians addressing the history of the Constitutional Route, the Terms of Union as well as the subsequent operation of that Route.

[392] The Neary Report, prepared on behalf of Oceanex and entitled "*The Provenance of Term 32 of the Terms of Union between Newfoundland and Canada*" states that its purpose was to understand the origin and meaning of Term 32 and, in particular, to address the question "Based on the historical record, why did the parties include the phrase, "in accordance with the traffic offering" in Term 32 of the *Terms of Union of Newfoundland and Canada* and what was this phrase meant to cover?"

[393] Although the Neary Report states the research for that paper did not find debate of that phrase in the negotiations leading up to the Terms of Union, its author asserts that, in context, "offering" has the common sense meaning in the Queen's English, suggesting demand arising naturally from the market. The Neary Report also concluded that Term 32 has now lost some of its original and literal meaning. This conclusion is premised on a 1988 Memorandum of Understanding between the federal and provincial government to terminate the Newfoundland Railway in favour of an inter-modal system ("Roads for Rails") in combination with a national policy of deregulation. Neary states that Term 32 is in part, but not entirely, a "spent" provision, in that regard referencing provisions of the 1988 Memorandum of Understanding (s 3 and s 9) and *Moffatt* in support of the statement that Term 32 has been hollowed out by deregulation.

[394] The Blake Report is lengthy, 94 pages plus 75 appended documents. It traces the history of what is now referred to as the Constitutional Route, or more specifically, its subsidization, from 1892, though the negotiation of the Terms of Union. Blake submits that both Newfoundland and Canada understood in 1948 that the Constitutional Route was not likely to be a self-supporting operation and that the federal government would have to provide a subvention,

or subsidiary, to cover the cost of the ferry operation. Further, that his research established that it was understood by both Newfoundland and Canada in the negotiations that led to the Terms of Union that, pursuant to Terms 31, 32, and 33, Canada was responsible not only to operate and maintain the ferry service on the Constitutional Route and to provide an efficient service, but also to cover all costs associated with operating the service. Both parties also believed that when Canada took over the Newfoundland Railway, including steamship services, it would result in lower transportation costs to and within Newfoundland which would then lead to the lowering of the cost of living in Newfoundland. There was no expectation that the ferry services on the Constitutional Route would operate on a cost recovery basis. It was also understood that Canada would cover all deficits incurred by the ferry service which would, like the union with Canada, provide great benefits to the people of Newfoundland.

[395] I found the expert reports of the historians to be vastly interesting and informative, including as to the negotiation of the Terms of Union and the financial state of affairs pertaining to the Newfoundland Railway and ferry services from 1860 to post-Confederation. However, I am not persuaded that it is necessary to resort to historical evidence in this matter as, in my view, the text of the Terms of Union is clear.

[396] In *PEI Railway*, the Federal Court of Appeal noted that the appellant's Memorandum of Argument contained a full background of factual and historical information relating to the issue before it, being whether a decision by the National Transportation Agency, the effect of which was to order the abandonment by CNR of eight railway lines which constituted the entire railway system serving PEI, was contrary to the PEI Terms of Union and, for that reason, beyond the

jurisdiction of the Agency. However, the Federal Court of Appeal found that it was not necessary to refer to that background in detail for purposes of disposing of the questions before it.

[397] The PEI Terms of Union included:

> That Canada shall be liable for the debts and liabilities of Prince Edward Island at the time of the Union;
>
> That the Dominion Government shall assume and defray all of the charges for the following services, viz;
>
> …
>
> Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion;
>
> …
>
> That the railways under contract and in course of construction for the Government of the Island, shall be the property of Canada;

[398] The Federal Court of Appeal stated the PEI Terms of Union did not require Canada to operate the railway in PEI or to maintain and operate a rail link between the railway within PEI and the railway on the mainland. Rather, the PEI Terms of Union expressly state that the railways in PEI shall be the property of Canada and Canada will pay the cost of a service that will place PEI in continuous communication with the Intercolonial Railway and the Railway system of the Dominion:

> [11] In my view, what the Appellant is in effect arguing is that the Terms of Union are not clear on their face as shown by what he calls the poor drafting, brevity, disorganization and the like. To resolve the doubt one must discern an understanding that must be

> implied from the circumstances at the time and the conduct of the parties since the Terms of Union were approved. I find this approach rather dangerous because it can easily lead to a rewriting of the terms if not a slanting of the arrangement unjustifiably in favour of one side. But more fundamentally I think the Appellant's approach is misguided because what is surely paramount is the meaning to be given to the words chosen by the parties in the Terms of Union.
>
> [12] In this respect, I do not agree that the words chosen were badly expressed or otherwise defective. In fact, I believe the relevant Terms of Union are clear in their intent and meaning and should be taken to express the agreement that was intended by the parties. In other words, there is no need to rely on the rules of statutory construction, extrinsic evidence, or legislative history when the language under consideration is clear.

[399] The Federal Court of Appeal went on to find that these two railway related provisions of the PEI Terms of Union did not impose an obligation to operate the railway system in perpetuity as argued by the appellant. In arriving at that conclusion it stated that it relied on the clear meaning of the language employed in the PEI Terms of Union.

[400] Similarly, in *Vancouver Island Railway*, the Supreme Court of Canada considered whether Canada owes a continuing constitutional obligation to the province of British Columbia to ensure the maintenance of passenger and freight rail services on a railway between Victoria and Nanaimo. This involved a consideration of Term 11 of the British Columbia Terms of Union which the Supreme Court noted held constitutional status. The Supreme Court stated:

> 55 The railway obligations placed upon Canada by Term 11 which are thus endowed with constitutional force are located principally in the first paragraph of the term which I repeat:
>
> > 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards

> the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.

I must emphasize, at the outset, that in the express language of Term 11, there is no reference to railway operations, continuing, perpetual, or otherwise.

…

68 It cannot be contended that either Canada or British Columbia was unaware, in 1871, of the distinction between constructing a railway, and operating a railway. A useful comparison exists in the Terms of Union which governed the entry of Prince Edward Island into Confederation in 1873 (*Prince Edward Island Terms of Union* (reprinted in R.S.C., 1985, App. II, No. 12); see also *Constitution Act, 1982*, Schedule, Item 6):

> That the Dominion Government shall assume and defray all the charges for the following services, viz.:
>
> . . .
>
> Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion; [Emphasis added.]

In *The Queen in Right of Canada v. The Queen in Right of Prince Edward Island, supra,* the Federal Court of Appeal effectively assumed that this clear language imposed upon Canada an operational obligation to ensure a service, and the court determined only how "continuous" that service must be. The contrast between this term, and British Columbia's Term 11, is striking: where, in Term 11, is the operational reference to railway service?

69 Although constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question. As early as 1883, in interpreting s. 109 of the *Constitution Act, 1867*, it was recognized in *Attorney-General of Ontario v. Mercer*

> (1883), 8 App. Cas. 767 (P.C.), by the Lord Chancellor (Earl of Selborne) at p. 778 that:
>
> > It is a sound maxim of law, that every word ought, prima facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or by the context.
>
> Equally, at the same time as the "living tree" approach to constitutional interpretation was developed in *Edwards v. Attorney-General for Canada*, *supra*, it was also said that "the question is not what may be supposed to have been intended, but what has been said" (per Lord Sankey L.C., at p. 137). In passing, I would not wish to be taken as having decided whether the other broad principles established in the *Edwards* case apply to specific agreements like Terms of Union, which were intended to settle specific problems.
>
> [Emphasis in original]

[401] The Supreme Court held that the interpretative approach proposed by British Columbia denied the straight forward proposition that regard must first be had for the language of the provision to be interpreted, referencing the Federal Court of Appeal's decision in *PEI Railway* quoted above.

[402] The Supreme Court of Canada stated that, in like manner, the case made by British Columbia was answered with relative ease as Term 11 was clear on its face, it imposed an obligation of construction on Canada, not an obligation of operation.

[403] Similarly, in my view, the relevant Terms of Union in this matter are clear on their face. Terms 31 and 32(1) state:

> 31. At the date of Union, or as soon thereafter as practicable, Canada will take over the following services and will as from the date of Union relieve the Province of Newfoundland and Labrador

> of the public costs incurred in respect of each service taken over, namely,
>
> (a) the Newfoundland Railway, including steamship and other marine services;
>
> …
>
> 32.(1) Canada will maintain in accordance with the traffic offering a freight and passenger steamship service between North Sydney and Port aux Basques, which, on completion of a motor highway between Corner Brook and Port aux Basques, will include suitable provision for the carriage of motor vehicles.

[404] As stated by the Supreme Court of Canada in *Public Utilities*:

> 35 By Term 31 Canada agreed to take over various public services, in particular those operated by the Newfoundland Railway; the latter is specifically described as "including steamship and other marine services". The steamship service was granted a special treatment: by Term 32 Canada contracted the express obligation to maintain a freight and passenger steamship service between North Sydney and Port-aux-Basques.

[405] In fact, the parties do not dispute that the Terms of Union place a constitutional obligation on Canada to provide a ferry service on the Constitutional Route. Where they disagree is with respect to the financial obligation that this engages and whether the NTP can constrain that obligation.

[406] Each word in a constitutional document must be constructed in its primary and natural sense unless the context or subject requires a more limited sense (*Vancouver Island Railway* at para 69 referencing *Attorney-General of Ontario v Mercer* (1883), 8 App Cas 767 (PC)). In my view, "public costs" as found in Term 31 can really mean only one thing. That is, to the extent that any revenue generated by the operation of a service taken over by Canada does not exceed

the costs incurred in providing that service (whether operating or capital), these are "public costs" in that they require the use of taxpayer dollars to pay them. On a plain reading, Term 31(a) and Term 32(1), when read together, suggest a forward looking financial obligation, when public costs are incurred in the maintaining of the ferry service on the Constitutional Route. Currently, this is the sum annually appropriated by Parliament to be paid to MAI, as supported by its corporate plan, for the cost of the provision of that service.

[407] Thus, while it is true that Term 31(a) does not make reference to the provision of a "subsidy", the effect of assuming the "public cost" of and maintaining the ferry service is to subsidize deficits incurred by that service if it is not self-sufficient. The conduct of Canada and Newfoundland since 1949 is clearly indicative of those parties interpreting "public costs" as meaning that Canada would be responsible for payment of deficits incurred in the operation of the Constitutional Route (*PEI (1977)* at para 69).

[408] Oceanex asserts that Term 31 does not "guarantee" a subsidy, or a level of subsidy or require the service to be offered at specific rates. It is true that Term 31 does not use those terms. However, Oceanex appears to accept that if there is a public cost incurred in providing the ferry service on the Constitutional Route, then it must be borne by Canada. In my view, the fact that Term 31 is silent as to guarantees, rates and subsidies has little relevance. It is the incurring of public costs, the level of deficit, that will dictate whether a subsidy is required and at what level. The setting of rates is a function of this as well as other factors, such as Canada's view that the service must be reasonably accessible to users.

[409] Newfoundland submits that applying the CTA to limit or eliminate the subsidy for the Constitutional Route would essentially unilaterally amend the Terms of Union, absent the required constitutional amendment. In my view, it is sufficient to say that the NTP, a general statement of policy contained in the CTA, cannot impede Canada's Term 31(a) and Term 32 constitutional obligation.

[410] It is significant that, in essence, what Oceanex really takes issue with is the overall level of subsidization of MAI and the impact that this has generally on MAI's rates, not the 2.6% freight rate increase from the prior year's rates, which is the subject of the 2016/17 Freight Rate Decision made by MAI. It argues that if MAI were profitable, or less unprofitable, then the current level of subsidization of its deficit would not be required. In effect, if MAI were forced to raise its rates to substantially reduce or eliminate its operating deficit and corresponding need for subsidization, it would be less competitive, which would be to Oceanex's commercial advantage. This may be so, but in view of Canada's constitutional obligation to provide and maintain a ferry service on the Constitutional Route, tolerance for MAI's deficit level, and therefore its subsidy, is ultimately a discrete question of public policy and spending determined by Parliament.

[411] In that regard, I would note that funding decisions concerning the allocation of public financial resources falls within the policy-making function of government. They are political in nature and are not subject to judicial review: "As a matter of law and Constitutional principle, a decision respecting the disbursement of public funds is within the authority of the Legislature alone and is not justiciable" (*ATU, Local 1374 v Saskatchewan (Minister of Finance),* 2017

SKQB 152 at para 45; see also *Hamilton-Wentworth (Regional Municipality) v Ontario (Minister of Transportation)* (1991), 78 DLR (4th) 289 at 303-304 (Ont Div Ct); Brown & Evans at 15-12; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525).

[412] As to Oceanex's submission that, based on *Moffatt*, Terms 32(2) and (3) do not currently require subsidized rates on the Constitutional Route, Terms 32(2) and (3) deal with railway rate regulations. Term 32(2) states that for the purpose of railway rate regulation the island of Newfoundland will be included in the Maritime region of Canada, and through traffic moving between North Sydney and Port aux Basques (i.e. transit by ship) will be treated as all rail traffic. Term 32(3) states that all legislation of the Parliament of Canada providing for special rates on traffic moving within, into or out of, the Maritime region will, as far as appropriate, be made applicable to the island of Newfoundland (see *Public Utilities* at para 38).

[413] As discussed above, *Moffatt* concerned an appeal from the Canadian Transportation Agency. One of the possible sources of the Agency's jurisdiction in that case was Term 32. The Federal Court of Appeal held that because Term 32(2) does not mention the Agency there was no express conferral of jurisdiction on it to regulate railway rates generally or rates to and from Newfoundland specifically. The Federal Court of Appeal then considered whether Term 32(2) could be considered such that railway rate regulation by the Agency could be necessarily implied. The Federal Court of Appeal did not accept this and stated that Term 32(2) does not, in itself, require regulation:

> [30] Could it be construed, however, that railway rate regulation by the Agency is necessarily implied? In other words, could it be said that Term 32(2) requires rate regulation, that such rate regulation necessarily implies that there be a regulator and that the

> regulator be the Agency? I think not. In my opinion, Term 32(2) does not, of itself, require rate regulation. The words "For the purpose of railway rate regulation" presume the existence of rate regulation that is relevant to the balance of the Term, but they do not mandate that Parliament enact or maintain such regulation. The railway rate regulation to which the words "For the purpose of railway rate regulation" refer, was always found in the *Railway Act*, the *National Transportation Act* or the *National Transportation Act, 1987*. For Term 32(2) to apply, there must exist some relevant railway rate regulation in legislation administered by the Agency.

[414] The Federal Court of Appeal held that Term 32(3) was a clear example of a constitutional provision that is no longer applicable given the repeal in 1966 of the *Maritime Freight Rates Act*. It could not be seriously suggested that Term 32(3) still applied in such a manner "as to require the continuation of legislation providing for special rates within or from the maritime region". Term 32(3) only guaranteed Newfoundland access to special rates provided to the maritime region in legislation, should Parliament choose, in the future, to enact such legislation. However, Term 32(3) currently had no application. While Term 32(3) is part of the supreme law of Canada, the living tree doctrine did not make it effective at that time (para 60). Similarly, Term 32(2) subsists and will guarantee Newfoundland the protection it affords should Parliament, in the future, enact railway regulation which is relevant to Term 32(2). Until then, it is suspended (*Moffatt* at para 61).

[415] In my view, while Terms 32(2) and (3) may be suspended in the absence of legislation enacting railway rate regulation relevant to Term 32(2), or legislation providing for special rates on traffic moving within, into, or out of, the Maritime region, this does not impact the effect of Term 31(a) and Term 32(1). In other words, the absence of special rail rate regulations that would have applied to the freight service on the Constitutional Route, or other special rates on

traffic, does not relieve Canada's obligation to provide and maintain the ferry service, to assume the public cost of doing so where such is incurred, and which obligation cannot be prescribed by the NTP. It simply means that as no specific rates have been regulated, what does not exist cannot be applied.

[416] Oceanex also argues that "in accordance with the traffic offering" as found in Term 32(1) should be interpreted to mean "at a level that meets demand" and does not support an interpretation requiring subsidizing rates in violation of the NTP or rates that artificially create demand. In my view, the cases referenced by Oceanex, *CNR v Emerson Milling Inc* at paras 88-89, *Northumberland Ferries* and *Canadian Pacific Railway Co v Quebec (Attorney General)*, [1965] SCR 602 at 4, do not support that interpretation and, in any event, it is not necessary to consider the interpretation of "in accordance with the traffic offering" for the purposes of this matter.

[417] Finally, Oceanex submits that Term 32 must be interpreted in light of Term 36. According to Oceanex, this means that any service taken over by Canada under the Terms of Union would be subject to the laws of Canada, which include the CTA and NTP.

[418] On its face, Term 36 states that without prejudice to the legislative authority of Parliament under the *British North America Acts, 1867 to 1946* (now the *Constitution Acts 1867 to 1982*), any works, property, or services taken over by Canada pursuant to the Terms of Union shall thereupon be subject to the legislative authority of Parliament. As stated by the Supreme Court of Canada in *Public Utilities*, Term 36 "… removes any doubt, if possible, that on the

taking over Canada and not the Province of Newfoundland would be the body to legislate with respect to the Newfoundland Railway as described in Terms 31 and 33" (at para 16).

[419] In my view, Term 36 merely confirms that services taken over by Canada are subject to the legislative authority of Canada. However, s 52(2) of the *Constitution Act, 1982* states that the Constitution is the supreme law of Canada, and any law that is inconsistent with it is, to the extent of inconsistency, of no force or effect. Thus, the CTA is federal legislation and by way of general application, such as by s 172, it has application to the marine transport sector, as discussed above. Section 5, the NTP, is a declaratory provision setting out policy that must be considered when decisions are made pursuant to the CTA. It does not bind marine freight rate decision-makers. And, even if it did and was a required consideration, it cannot serve to prescribe, financially or otherwise, Canada's constitutional obligation arising pursuant to Terms of Union to provide a ferry service on the Constitutional Route. Reading Term 32 together with Term 36 does not alter this outcome. Thus, to the extent that Oceanex is suggesting that Term 36 serves to make the CTA paramount to Canada's Term 31(a) and Term 32(1) obligations, I do not agree.

[420] In conclusion, in view of Canada's constitutional obligation, I am not persuaded that the NTP can serve to constrain the level of public costs assumed by Canada in meeting its constitutional obligation to provide for ferry services on the Constitutional Route as imposed by the Terms of Union.

[421] Further, MAI daily transports passengers, their vehicles and freight on the Constitutional Route. The Terms of Union do not specify how the ferry service is to be provided or maintained and, as between Canada and Newfoundland, this is not at issue. It is also apparent from the evidence in the record before me that this obligation was considered by Canada to be paramount, that it could not be breached and required Canada to ensure a ferry service that is readily accessible for passengers and freight shippers who wish to use the Constitutional Route. Further, that the Minister and Cabinet were aware of Oceanex's longstanding complaint that subsidization permitted MAI to charge lower freight rates which, in turn, negatively impacted Oceanex's rates and business. The record also demonstrates that beginning in the 1990s Canada took measures to reduce publically funded ferry services by way of the Canadian Marine Policy, which specifically addressed MAI and the concept of commercialization, but also recognized Canada's constitutional obligation. Further measures intended to address the public cost of the Constitutional Route, such as setting 60-65% of its cost recovery targets for MAI, followed. In my view, decisions concerning the appropriate quantum of public funds necessary to provide the service on the Constitutional Route are, ultimately, policy decisions of the government of Canada which are discrete from the decision under review.

Issue 5: Was the 2016/17 Freight Rate Decision reasonable?

[422] Because I have found that the NTP is not a relevant factor and, therefore, that the decision-maker did not err in failing to consider it when making the 2016/17 Freight Rate Decision and, in any event, that the NTP cannot constrain the quantum of public cost Canada assumes in meeting its constitutional obligation arising from the Terms of Union to provide a ferry service on the Constitutional Route, I need not consider whether the 2016/17 Freight Rate

Decision was unreasonable on the basis that it was made without taking the NTP into consideration.

Conclusion

[423] In summary, I conclude that MAI made the 2016/17 Freight Rate Decision. This decision was made pursuant to an informal amendment of the Bilateral Agreement, which amendment was agreed to and acted upon by Canada and MAI as parties to that contract. Although the 1987 OIC approved the Minister entering into the Bilateral Agreement, there was no legislative requirement that an order in council be issued to permit this and the Minister had the authority and capacity to enter into contracts pursuant to the *Department of Transport Act* and at common law. Thus, an order in council was not necessary to authorize the Minister to enter into the Bilateral Agreement or to amend it. Because MAI was not exercising jurisdiction or power conferred by or under an act of Parliament or an order made pursuant to a prerogative of the Crown when it made the 2016/17 Freight Rate Decision, it was not acting as a federal board, commission or tribunal pursuant to s 2(1) of the *Federal Courts Act*. Accordingly, pursuant to s 18(1), this Court does not have jurisdiction over the matter. This finding is determinative. However, in the event that I erred in this finding, and the decision-maker was acting as a federal board, commission or tribunal, I also considered and determined, in that event, that the matter does have a public law aspect which is necessary to permit the decision to be reviewed by this Court.

[424] Also in the event that I erred in my above determination as to the identity of the decision-maker and jurisdiction, I considered and determined that Oceanex does not have direct standing

in this matter as its interest is purely commercial. However, given the circumstances, in particular the possibility of freight rate decisions made without consideration of a relevant policy being immune from challenge, I exercised my discretion and granted Oceanex public interest standing.

[425] Again, in the event that I have erred in my prior determinations, I then considered whether the NTP was a relevant consideration in the making of the 2016/17 Freight Rate Decision and concluded that it was not. Rather, it is a declaratory provision and purpose clause that sets out the policy that the CTA is intended to achieve, setting out the goals or principles that can be used to interpret the rights and obligations created by substantive provisions found in the body of the CTA. The NTP does not itself create legally binding rights or obligations. Further, in the absence of a statutory or other link between the CTA and the freight rate decision-making process, nor is the NTP a relevant consideration.

[426] Finally, and again in the event of error in my prior determinations, I considered and concluded that even if the NTP were a relevant consideration, it could not constrain the level of public costs Canada assumes to provide ferry services on the Constitutional Route, the provision of which service arises from Term 31(a) and Term 32 of the Terms of Union. At its core, Oceanex takes issue with the overall level of subsidization afforded to MAI and the impact that this has on MAI's rates, not with the 2.6% rate increase effected by the 2016/17 Freight Rate Decision which is the decision, made by MAI, under review in this matter. Decisions concerning the necessary and acceptable quantum of public funds appropriated by Parliament to address the public costs, or deficits, arising from the provision of the services by MAI on the Constitutional

Route are, ultimately, policy decisions of the government of Canada concerning the spending of public funds necessary to fulfil Canada's constitutional obligation.

[427] Having reached these conclusions, it was not necessary to consider if the 2016/17 Freight Rate Decision was unreasonable on the basis that it was made without taking the NTP into consideration.

[428] For all of the reasons set out above, I have concluded that Oceanex's application must be dismissed.

Costs

[429] By direction of January 24, 2018, the Court requested that the parties provide an agreed lump sum as to costs. Failing agreement, each party was to submit its own lump sum figure.

[430] An agreed lump sum was not achieved. However, by letter of February 8, 2018 counsel for Newfoundland advised that during a teleconference held on February 1, 2018 all parties agreed with Newfoundland that it should neither recover costs nor should costs be awarded against it. This was subsequently confirmed by Oceanex, Canada and MAI. Accordingly, there shall be no order as to costs in favour of Newfoundland.

[431] By letter of February 5, 2018, Oceanex sought costs in the amount of $662,614.74 representing $62,844.95 in fees (Column III) and $599,769.79 in disbursements. Oceanex submitted, pursuant to Rule 400, that the Court should exercise its discretion and award Oceanex

fees for a second counsel (50% of fees under tariff) at all the cross-examinations, as well as fees for two first counsel and one second counsel (50% of fees under tariff) at the hearing of the application. Further, that the figure for Oceanex's disbursements consisted primarily of costs associated with Oceanex's expert reports ($519,094.67), followed by travel ($32,779.36) and transcripts/court reporters' fees ($9,840.41). Alternatively, Oceanex sought costs in the amount of $642,206.79, representing $42,437.00 in fees (Column III) and $599,769.79 in disbursements, which includes fees for only one counsel at the cross-examinations and one first counsel and one second counsel (50% of fees under tariff) for the hearing of the application.

[432] By letter of February 5, 2018, Canada sought costs in the amount of $67,413.61 calculated in accordance with the Federal Court Tariff, Column III and reflecting $45,330.55 in applicable fees and $22,083.06 in disbursements. By letter of February 6, 2018, Canada requested, given the high quantum of costs sought by Oceanex, in the event that Oceanex was successful then that the parties be given an opportunity to provide submissions on Oceanex's costs.

[433] By letter of February 5, 2018, counsel for MAI requested costs in the amount of $285,000.00 (inclusive of taxes) comprised of $54,000.00 in fees and $231,000.00 in disbursements, calculated in accordance with Tariff B, Column III.

[434] Given my findings above and in accordance with Rule 400 by which the Court has full discretionary power over the amount and allocation of costs and the determination of by whom

they are to be paid, I am awarding Canada its requested costs of $67,413.61 and MAI a lump sum cost award of $150,000.00, both payable by Oceanex forthwith.

JUDGMENT IN T-348-16

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. Canada shall have its costs of this application in the amount of $67,413.61 and MAI shall have its costs of this application in an all-inclusive lump sum amount of $150,000.00, both payable by Oceanex forthwith.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-348-16
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PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
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