Federal Court  Cour fédérale

Date: 20091217

Docket: T-1798-04

Citation: 2009 FC 1287

Ottawa, Ontario, December 17, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALGOMA CENTRAL CORPORATION
UPPER LAKES GROUP INC.
and SEAWAY MARINE TRANSPORT,
A PARTNERSHIP OF UPPER ALES GROUP INC.
and ALGOMA CENTRAL CORPORATION

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

AND BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff by Counterclaim

And

ALGOMA CENTRAL CORPORATION
UPPER LAKES GROUP INC.
and SEAWAY MARINE TRANSPORT,
A PARTNERSHIP OF UPPER LAKES GROUP INC.
and ALGOMA CENTRAL CORPORATION
and UPPER LAKES SHIPPING LTD.
and UPPER LAKES SHIPPING INC.

Defendants to the Counterclaim

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This motion arises from an action filed by the plaintiffs claiming among other things, that harbour dues at certain Ontario ports set by the Minister of Transport (the Minister) under the *Canada Marine Act*, S.C. 1998 c. 10 (CMA or the Act), constitute an unlawful tax, and a corresponding counterclaim by the defendant, Her Majesty the Queen in Right of Canada, for payment of the outstanding dues.

[2] The defendant brings this motion for summary judgment, requesting an order dismissing the plaintiffs' action and granting the counterclaim for the following relief:

1. As against Algoma Central Corporation, payment of the sum of $528,125.66 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding;

2. As against Upper Lakes Shipping Ltd., payment of the sum of $230,991.60 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding;

3. As against Seaway Marine Transport, and therefore also jointly and severally as against its constituent partners, Algoma Central Corporation and Upper Lakes Group Inc. and/or Upper Lakes Shipping Inc., payment of the sum of $759,117.26 owing in respect of harbour dues as

of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding;

4. As against all of the defendants to the counterclaim:

(i) interest on the aforesaid sums owing by them, from and after September 30, 2004, calculated and compounded monthly, at the rate and in the manner prescribed in section 5 of the *Interest and Administrative Charges Regulations*, SOR/96-188;

(ii) the costs of this proceeding;

(iii) such further and other relief as this Honourable Court may deem just.

Background

[3] The plaintiffs, Algoma Central Corporation and Upper Lakes Group Inc. are corporations carrying on business in Canada and are the owners of vessels trading on the Great Lakes and St. Lawrence Seaway system. Seaway Marine Transport is a partnership of these two corporations. The plaintiffs engage in the carriage of bulk cargo such as grain, iron ore, aggregates, salt and other commodities between ports in Canada and between ports in Canada and the United States. The ports to which the plaintiffs travel include the Ontario ports of Kingsville, Sarnia and Sault Ste. Marie, and it is harbour dues at these three ports that the plaintiffs challenge.

[4] The plaintiffs claim that, pursuant to the 1995 *National Marine Policy* and the coming into force of the CMA, the Government of Canada intended to divest itself of these three ports and no longer provides services at Kingsville or Sault Ste. Marie, yet the Minister continues to levy harbour

fees against Canadian ships that use these ports. This they say has transformed the harbour dues from what was formerly a fee for a service into an unlawful tax.

[5] The plaintiffs also claim that a reciprocal agreement between Canada and the United States which exempts U.S. ships from harbour dues at these ports and exempts Canadian ships from harbour dues at similar U.S. ports is not authorized by law and constitutes a discriminatory practice, particularly in respect of dues levied at Sarnia.

[6] To understand the nature of this dispute, it is first necessary to review the recent changes to the regulation of marine transportation in Canada.

National Marine Policy

[7] The *National Marine Policy* was announced by the Minister in 1995 as a strategic plan intended to modernize this sector of the Canadian transportation system. The policy established three categories of ports, and a strategy to deal with each type. First, a national ports system was to be established under the control of Canada Port Authorities. These ports were large, self-sufficient ports vital to international and domestic trade, with diversified traffic, serving large market areas and linked to major rail lines or highway infrastructure. Eight national ports were identified under the policy.

[8] The second category of ports under the *National Marine Policy* was regional/local ports. Most of the ports operated by Transport Canada in 1995 fell under this category and under the

policy, regional/local ports were to be transferred to provincial governments, municipal authorities, community organizations, private interests, other groups and, in some cases, other federal departments. The ports of Kingsville, Sarnia and Sault Ste. Marie are all included on a list of regional/local ports set out in Appendix B to the policy.

[9] The third category consisted of remote ports, which the Government committed to maintain.

[10] The policy recognized that the transfer of regional/local ports may not be a simple matter. The transfer was intended to take place over a six year period, led by implementation teams responsible to identify prospective transferees, whether in the public or private sector, and complete all legal, financial and regulatory measures necessary for a transfer.

[11] For its overall stated objectives, the policy intended to:

1. Ensure affordable, effective and safe marine transportation services;
2. Encourage fair competition based on transparent rules applied consistently across the marine transport system;
3. Shift the financial burden for marine transportation from the Canadian taxpayer to the user;
4. Reduce infrastructure and service levels where appropriate, based on user needs; and
5. Continue the Government of Canada’s commitment to safe transportation, a clean environment and service to designated remote communities.

[12] The policy also intended to reflect the broad principle of commercialization.

Canada Marine Act

[13] As part of this new strategic plan, the Government introduced the Act which was intended to embody some of the principles of the policy and be a comprehensive piece of legislation governing the marine sector, consolidating into one act what previously was spread over several acts.

[14] The CMA was assented to on June 11, 1998. It amended 12 other acts of Parliament and repealed nine additional acts. Prior to its coming into force, public ports were regulated under the *Public Harbours and Port Facilities Act*, R.S.C. 1985, c. P-29 (PHPFA) and its associated Regulations.

[15] The preamble to the CMA states its purpose as follows:

An Act for making the system of Canadian ports competitive, efficient and commercially oriented, providing for the establishing of port authorities and the divesting of certain harbours and ports, for the commercialization of the St. Lawrence Seaway and ferry services and other matters related to maritime trade and transport and amending the Pilotage Act and amending and repealing other Acts as a consequence.	Loi favorisant la compétitivité du réseau portuaire canadien par une rationalisation de sa gestion, prévoyant la création des administrations portuaires et l'aliénation de certains ports, régissant la commercialisation de la Voie maritime du Saint-Laurent et des traversiers et des questions connexes liées au commerce et au transport maritimes, modifiant la Loi sur le pilotage et abrogeant et modifiant certaines lois en consequence.

[16] Part I of the Act concerns Canada Port Authorities, federally incorporated not-for-profit corporations intended to be financially self-sufficient. Part II of the Act deals with the second and third categories of ports identified in the *National Marine Policy*. Part II of the Act defines the category of ports to which it applies by reference to the terms “public ports” and “public port facilities”.

[17] In section 2 of the Act:

"public port" means a port designated as a public port under section 65.	« port public » Port désigné comme port public en application de l’article 65.
"public port facility" means a port facility designated as a public port facility under section 65.	« installations portuaires publiques » Les installations portuaires désignées comme installations portuaires publiques en application de l’article 65.

[18] Under section 65 of the CMA, all ports that were previously public harbours under the PHPFA were deemed to be public ports under the CMA. Section 65 of the CMA further gave the Governor General in Council broad authority to designate and define the limits of public ports or repeal the designation of public ports. Section 65 of the CMA provided:

65.(1) The Governor in Council may, by regulation,	65.(1) Le gouverneur en conseil peut, par règlement :
(a) designate as a public port any navigable waters within the jurisdiction of Parliament and any land covered by the	a) désigner comme port public tout plan d’eau navigable relevant du Parlement de même que le fond de ce plan d’eau s’il

navigable waters, if the land is under the administration of the Minister, including any related foreshore;

est sous la responsabilité du ministre, y compris l'estran;

(b) define the limits of a public port; and

b) fixer le périmètre de tout port public;

(c) designate any port facility under the administration of the Minister as a public port facility.

c) désigner publiques des installations portuaires sous la gestion du ministre.

(2) Every port and port facility that on the coming into force of this section was a public harbour or public port facility to which the Public Harbours and Port Facilities Act applied is deemed to have been designated under subsection (1).

(2) Les ports et installations portuaires qui, à l'entrée en vigueur du présent article, sont des ports publics ou des installations portuaires publiques régis par la Loi sur les ports et installations portuaires publics sont réputés avoir été désignés par règlement pris en vertu du paragraphe (1).

(3) With the exception of a port for which a port authority is incorporated under Part 1, every port and facility to which the Canada Ports Corporation Act applied on the coming into force of this section is deemed to have been designated under subsection (1).

(3) À l'exception de ceux pour lesquels une administration portuaire du Canada est constituée sous le régime de la partie 1, les ports et les installations portuaires qui, à l'entrée en vigueur du présent article, sont régis par la Loi sur la Société canadienne des ports sont réputés avoir été désignés par règlement pris en vertu du paragraphe (1).

(4) For greater certainty, the Governor in Council may make regulations under subsection (1) in respect of any public harbour or public port facility that is deemed under subsection (2) or (3) to have been designated and,

(4) Il est déclaré pour plus de certitude que le gouverneur en conseil peut prendre un règlement en vertu du paragraphe (1) à l'égard d'un port ou des installations mentionnés au paragraphe (2)

in the case of a public port, define its limits.	ou (3) et, dans le cas d’un port, en fixer le périmètre.

[19] All three ports at issue in this motion had long been public harbours under the PHPFA and thus, were all public ports under the new Act.

[20] Section 67 of the Act authorizes the Minister to fix fees in relation to public ports or public port facilities:

67.(1) The Minister may fix the fees to be paid in respect of	67.(1) Le ministre peut fixer les droits à payer à l’égard :
(a) ships, vehicles, aircraft and persons coming into or using a public port or public port facility;	a) des navires, véhicules, aéronefs et personnes entrant dans les ports publics ou faisant usage des ports publics ou d’installations portuaires publiques;
(b) goods loaded on ships, unloaded from ships or transhipped by water within the limits of a public port or stored in, or moved across, a public port facility; and	b) des marchandises soit déchargées de ces navires, chargées à leur bord ou transbordées par eau dans le périmètre portuaire, soit stockées dans ces installations portuaires ou passant par elles;
(c) any service provided by the Minister, or any right or privilege conferred by the Minister, in respect of the operation of a public port or public port facility.	c) des services fournis par le ministre, ou des avantages qu’il accorde, en rapport avec l’exploitation des ports publics ou des installations portuaires publiques.

[21] The term “fees” as used in subsection 67(1) of the Act is defined in section 2:

"fees" includes harbour dues, berthage and wharfage, as well as duties, tolls, rates and other	« droit » S’entend de toute forme de taxe, péage, contribution ou redevance,

charges, but does not include payments made under a lease or licence agreement.	notamment pour l'accès, l'accostage et l'amarrage au port, à l'exclusion de toute somme versée au titre d'un bail ou d'un permis.

[22] Section 72 of the Act grants the Minister the power to divest the Government of any port property:

72.(1) The Minister may enter into agreements in respect of	72.(1) Le ministre peut conclure des ententes en vue :
(a) the disposal of all or part of the federal real property and federal immovables that formed part of a public port or public port facility by sale or any other means; and	a) de la disposition, par vente ou tout autre mode de cession, de la totalité ou d'une partie des immeubles fédéraux et des biens réels fédéraux qui faisaient partie d'un port public ou d'installations portuaires publiques;
(b) the transfer of the administration and control of all or part of the federal real property and federal immovables that formed part of a public port or public port facility to Her Majesty in right of a province.	b) du transfert à Sa Majesté du chef de la province de la gestion et de la maîtrise de la totalité ou d'une partie des immeubles fédéraux et des biens réels fédéraux qui faisaient partie d'un port public ou des installations portuaires publiques.
(2) The agreements may include	(2) Les ententes peuvent comporter :
(a) provisions for the performance and enforcement of obligations under the agreements; and	a) des dispositions sur l'exécution, volontaire ou forcée, des obligations que ces ententes prévoient;
(b) any other terms and conditions that the Minister	b) les autres modalités que le ministre estime indiquées.

considers appropriate.	
. . .	. . .
(8) Subject to any regulations made under section 74, the Minister continues to have the management of public ports and public port facilities that the Minister has not disposed of or transferred.	(8) Le ministre conserve, sous réserve des règlements pris en vertu de l'article 74, la gestion des ports et des installations portuaires publiques qui n'ont fait l'objet ni de disposition ni de transfert.

[23] The *Public Ports and Public Port Facilities Regulations*, SOR/2001-154 (the 2001 Regulations) provide further governance over the divestiture of public ports.

Harbour Dues

[24] Subsection 75(a) of the Act states that Regulations made under section 12 of the PHPFA in respect of rates, tolls, fees or other charges are deemed to have been made under Part II of the Act and continue in force until repealed by the Minister.

[25] The *Public Harbours Regulations*, SOR/96-196 and the *Government Wharves Regulations*, SOR/96-197, were enacted pursuant to the PHPFA and continued in force under the Act. These Regulations set the rates for harbour dues and restructured how they were to be collected. It was a significant change from the previous dues structure, as harbour dues became payable for each of the first five entries of a vessel into a public port each month as opposed to the first five entries per calendar year. The Regulatory Impact Analysis Statement to the 1996 Regulations notes that in

1994 to 1995, public ports recovered approximately 45% of operating and maintenance expenditures and 25% of total expenditures, and that the raise in fees were intended to address this shortfall. In addition to this change in fee structure, there were 5% increases in public port charges in each of 2000 and 2001 and a 10% increase in 2004.

[26] Effective January 1, 2004, the *Public Harbour Dues Tariff Notice* (the Dues Notice) set harbour dues at public ports in Canada, and set the rates for ships using public ports. The Dues Notice also provides that dues are not payable in respect of vessels which are exempt from the payment of such dues by a treaty.

The Ports: Kingsville, Sault Ste. Marie and Sarnia

[27] The port of Kingsville is located on the north shore of Lake Erie, approximately 45 kilometres southeast of Windsor, Ontario. It was declared a public harbour by Order-In-Council on November 29, 1938. On July 8, 1999, the Crown transferred the public port facilities to the town of Kingsville and the Kingsville Port Users Association (KPUA). Pursuant to the transfer, it was agreed that Kingsville and the KPUA would operate and maintain the port and facilities. As part of the privatization agreement, the Government contributed $400,000 to the ongoing maintenance of the port and Transport Canada retained rights and responsibilities with respect to compliance with conditions associated with the contribution. Following the privatization of the port, the record indicates that a harbour master continued in his position until August 2000 and has not been replaced since. The Crown retains ownership of the harbour beds at the port of Kingsville.

[28] Sault Ste. Marie is located in northern Ontario and is a transit point between Lake Huron and Lake Superior. The port of Sault Ste. Marie was established by Order-In-Council dated March 21, 1912 and was privatized on May 14, 1998. The Government no longer provides any services at Sault Ste. Marie, although it retains ownership of the harbour beds. There is currently a harbour master at Sault Ste. Marie whose only role, by all accounts, is to prepare invoices for harbour dues owing.

[29] With respect to Kingsville and Sault Ste. Marie, Transport Canada continues to maintain regulatory responsibilities including emergency planning, security assessments and planning, marine fire fighting programs, investigations of grounding incidents and review and approval of dredging proposals.

[30] The port of Sarnia is the entire 40 kilometre stretch of the St. Clair River which connects Lake Huron and Lake St. Clair. Because of its geographic position, it is a major fuel depot for ships transiting between Lake Huron and Lake Erie. The port of Sarnia was declared a public harbour and its boundaries as a public harbour were defined, by Orders-In-Council dated July 25, 1885 and July 23, 1917. Transport Canada continues to own and operate public port facilities in Sarnia. There are also privately built and maintained ports within the boundaries of the port of Sarnia, which provide fuel to fleets passing through. If a ship docks at one of the privately held ports, harbour dues are charged. If a ship does not stop, no dues are charged. Part of the plaintiffs' concern is that the Crown now charges harbour dues for vessels refuelling in the St. Clair River and for other activities at privately owned docks.

[31] All three ports also appear in Schedule III to the 2001 Regulations, indicating that they are to have their section 65 designations as public ports repealed. However, subsection 3(1) of the 2001 Regulations sets out the conditions under which public port deproclamation will occur:

> 3(1) The designation under section 1 of a public port set out in Schedule 3 is repealed effective on the day on which the bed of the navigable waters at the port that is owned by Her Majesty in Right of Canada, or the last part of it, or, if applicable, the day on which the entire public port facility at the port, or the last part of it, is transferred to a person or body by Her Majesty in Right of Canada as represented by the Minister of Transport, whichever is later.

[32] This makes it clear that unless and until the bed of the navigable waters at any of those ports is transferred to a person or body by the Minister, they remain designated as public ports. At each of the three ports in question, the Crown has retained ownership of the harbour beds. Thus, Kingsville, Sault Ste. Marie and Sarnia all remain "public ports" subject to the Minister's authority to fix fees under section 67 of the Act.

The Canada/U.S. Reciprocal Agreement

[33] There is a long-standing reciprocal agreement between Canada and the United States under which Canadian flagged ships travelling from Canadian Great Lake ports to U.S. Great Lake ports are exempt from U.S. tonnage taxes, and U.S. flagged ships travelling from U.S. ports to Canadian ports are exempt from the payment of harbour dues at Canadian ports. This agreement was memorialized in Canada by an Order-In-Council dated March 22, 1910 and through legislation in

the U.S. signed into law on March 10, 1910. There is evidence, however, that the agreement goes back in time to at least 1884.

[34] In addition to their challenge to the legitimacy of harbour dues at the ports in question, the plaintiffs take the position that the exemption for U.S. ships is discriminatory, anti-competitive, unfair and contrary to the commercial objectives of the *National Marine Policy* and the Act.

Issues

[35] The issues are as follows:

1. Should this matter have been brought as an application for judicial review?
2. Is this an appropriate case for summary judgment?
3. Are the harbour dues an unlawful tax rather than a valid fee fixed pursuant to the Act?
4. Is the practice of not charging harbour dues to U.S. ships discriminatory and contrary to law?

[36] I have organized the remainder of this judgment under three headings. First, I have summarized the submissions of the defendant/moving party, second the submissions of the plaintiffs and third, I have provided my analysis. Within each heading, I have addressed each of the four disputed issues in turn.

Submissions of the Defendant/Moving Party

Judicial Review

[37] As a preliminary matter, the Crown complains that the plaintiffs have improperly brought this matter as an action and should have proceeded by way of an application for judicial review. They argue that at the heart of this action is a decision by the Minister, acting as a "federal board, commission or tribunal", to fix certain fees pursuant to section 67 of the Act and is therefore properly the subject of an application for judicial review.

[38] In support of this argument, the Crown substantially relies on *Canada v. Grenier*, 2005 FCA 348 at paragraphs 27 to 33, for the proposition that the principle of finality guards against indirect challenges to statutory decision-making, and that the plaintiffs must challenge statutory decisions according to the judicial review regime set out in the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, and the associated timelines.

[39] Notwithstanding the challenge to the appropriateness of bringing this action, the Crown acknowledges that the principles applicable to the review of an administrative decision apply whether the review of that decision is made by an application for judicial review, by appeal or by a collateral attack such as an action in damages (see *Grenier* above at paragraph 62). The Crown urges that if administrative law principles are applied, a standard of reasonableness should be applied to the decision on the basis that section 67 of the Act provides the Minister with a broad discretion in the setting of fees.

Summary Judgment

[40] It is the Crown's position that all the issues in dispute in this action are legal issues and do not raise any material factual disputes. As such, *viva voce* evidence is not required and a trial is not necessary. They say that the issues in dispute in this matter are more typical of the sort resolved on judicial review and are amendable to resolution in their entirety on this motion.

[41] The Crown therefore asks this Court to resolve the disputed issues between the parties on this motion.

Vires of the Harbour Dues

[42] The Crown argues that the Minister's authority with respect to setting charges under the Act is not constrained or limited in any of the ways suggested by the plaintiffs. They say, rather, that the Act permits the Minister to set charges, including harbour dues, on a national basis at common rates chargeable at all public ports.

[43] The Crown further says that because fees and harbour dues are set on a national basis for all public ports, there is nothing unlawful about continuing to set public port charges on a national basis. They argue that a national transportation system looks beyond the individual examples of Kingsville, Sault Ste. Marie and Sarnia and instead considers the total costs and deficits being

incurred by Transport Canada in relation to all public ports. On the basis of those larger expenditures, they say the fees are not unlawful.

[44] In fact, says the Crown, there is nothing in the Act which requires the Minister to set fees on a port by port basis, having regard to costs incurred at each individual port rather than on a system wide basis. The Minister's powers under section 67 are not limited to cost recovery objectives at all, and include broader pricing and revenue generating powers.

[45] The Crown relies on *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106, in which the Supreme Court considered whether harbour dues charged for use of waters surrounding certain privately owned docks constituted an unauthorized tax rather than a toll. The Court held at page 123 that, regardless of whether any services are provided to the vessels, charging harbour dues was not a tax:

> Even if the word "tolls" in s. 14 limits the Board to charges reasonably related to the cost of providing harbour services, a toll levied against a particular vessel need not be based on the actual cost of services rendered to that vessel. To show that the Board's fees were *ultra vires* as "taxes" it would at least be necessary to show that the Board's revenues were significantly greater than the cost of providing harbour facilities and services to the public and no such showing was attempted here. Indeed, a memorandum dated July 22, 1969 written to the National Harbours Board by Vice-Chairman of the Board indicates that the port of Saint John suffered net operating losses amounting to $644,049 and $781,222 in the years 1968 and 1967 respectively.

[46] The Crown also relies substantially on the authorities of *Aerlinte Eirann Teoranta v. Canada*, [1987] 3 F.C. 384, aff'd [1990] F.C.J. No. 170 (C.A.), *Canadian Shipowners Association*

v. Canada, [1997] F.C.J. No. 1002, aff'd [1998] F.C.J. No. 1515 (C.A.) and *Canadian Association of Broadcasters v. Canada*, 2008 FCA 157.

Canada/U.S. Reciprocal Agreement

[47] Finally, the Crown submits that there is nothing discriminatory about distinguishing between classes of users when fixing fees and the Minister has broad discretion under section 67 of the Act to do so. The Crown relies on the authorities of *Aerlinte* above, *Canadian Shipowners Association* above, and *Mid-Atlantic Minerals Inc.*, [2003] 1 F.C. 168, aff'd [2004] F.C.J. No. 79, for the proposition that a general power to set fees includes the discretionary power to create classes of users. The Crown further argues that nothing in the wording of section 67 or elsewhere in the Act supports the suggestion that the Minister cannot exercise his discretion to give effect to the reciprocal agreement between the U.S. and Canada.

[48] The Crown also responds to the plaintiffs' claim that the reciprocal agreement is not a formal treaty under the provisions of the Dues Notice. It is the Crown's position that the term "treaty" in the Dues Notice was intended to apply to the reciprocal agreement. In any event, harbour dues notices are not statutory instruments, nor regulations. Dues notices are instead merely a method of communication from Transport Canada to port users and in no way inhibit the Minister's ability to set fees under the Act (see *Deputy M.N.R., Customs and Excise v. Liberty Home Products Corp.*, [1990] F.C.J. No. 555 (C.A.)).

Submissions of the Plaintiffs/Defendants by Counterclaim

Judicial Review

[49] The plaintiffs state that their case is not a challenge to the decision of the Minister to promulgate the *Public Harbour Dues Tariff Notice* nor is it a challenge to the Minister's power to prescribe fees under section 67 of the Act. Rather, the plaintiffs say it is the way the harbour dues are applied that is subject to challenge.

[50] In support of bringing the request for relief by way of action rather than by way of judicial review, the plaintiffs rely on the authority in *Canadian Association of Broadcasters* above. In that case, the plaintiff challenged the legality of broadcasting fees as an unlawful tax by way of action.

[51] The plaintiffs further advance *Mid-Atlantic Minerals Inc.* above, at paragraph 28, for the proposition that because they are the defendants on the counterclaim, they may raise and argue any point of law in their defence which might defeat a claim.

Summary Judgment

[52] The plaintiffs argue that there are serious and genuine issues for trial, including the following:

1. Whether any services are provided in exchange for the harbour dues;

2. The original nature of harbour dues or harbour master fees and whether the harbour dues of today are consistent with their original purpose;

3. Whether there has been a shift in policy by the government to use harbour dues as a tax or means of generating revenue to support the Department of Transport;

4. Whether the harbour dues are applied in a manner that is consistent with the principles and objectives of the *Canada Marine Act* and the *Canada Transportation Act*;

5. Whether Canadian vessels are unfairly and unlawfully discriminated against in favour of American vessels and in particular, whether there is a valid treaty which permits the exemptions of U.S. vessels from the payment of harbour dues; and

6. Whether the delays in the divestiture and the continuing charge of harbour dues at ports where Transport Canada has withdrawn from service are consistent with the *National Marine Policy* and the *Canada Marine Act*.

[53] The plaintiffs submit that the Crown has not shown that the case is so doubtful that it does not deserve further consideration by the trier of fact.

<u>*Vires* of the Harbour Dues</u>

[54] The nub of the plaintiffs' claim is that the harbour dues charged at ports where no services are provided, namely, Kingsville and Sault Ste. Marie, are not a toll but instead amount to an unlawful tax.

[55] Under the Dues Notice, “harbour dues” are defined as “a toll on a vessel that comes into or uses a public port”. A toll, the plaintiffs argue, requires that some service or value is provided in exchange for the charge. In contrast, the plaintiffs argue that a tax is a charge by government for the purposes of generating revenue for a public purpose or for the purpose of defraying a public expense. Since no direct services are provided at Kingsville or Sault Ste. Marie, the plaintiffs say the charge cannot be a toll and therefore must be a tax.

[56] The plaintiffs say that historically the purpose of harbour dues was to be a fee paid for the services of a harbour master in respect of the operation of a particular port. Since there is no harbour master in the case of Kingsville and the harbour master in Sault Ste. Marie provides no particular service, there is no *quid pro quo*.

[57] The plaintiffs seek to distinguish *Thorne’s Hardware* above, by suggesting it stands for the proposition that as long as services were generally provided at the port in question, it is not necessary for a toll imposed on a vessel to be related to the cost of services provided to that particular vessel.

[58] Applying a pith and substance analysis, the plaintiffs suggest that the dominant purpose of the harbour dues are to generate revenue for the funding of Transport Canada’s port line of business in a general way, and that the redirection of what was intended to be a fee for the services of a harbour master into a tax to fund a national port network is an improper use not authorized by law.

Canada/U.S. Reciprocal Agreement

[59] The plaintiffs first submit that this reciprocal agreement is not valid because there was no statutory authority for the 1910 Order-in-Council, which the Crown claims as the authority for the exemption.

[60] Next, the plaintiffs point to the wording of the Dues Notice which provides an exemption for "a vessel exempted from the payment of such dues by a treaty between Canada and Foreign Country." The plaintiffs therefore submit that even if there is a valid reciprocal agreement, there is no formal treaty to allow for the exemption of U.S. flagged vessels.

[61] The plaintiffs argue that the exemption for U.S. ships constitutes discrimination against Canadian vessels for which there is no proper legal basis and should be held invalid on three principle grounds:

1. There is no proper legislative authority which authorizes the exemption of American vessels;

2. The exemption of American vessels constitutes discrimination or inequitable treatment between the ships and vessels of both countries and is therefore contrary to the *International Boundary Waters Treaty Act*, R.S.C. 1985, c-17; and

3. The exemption of American vessels under the Dues Notice does not promote and safeguard Canada's competitiveness and trade objectives, contrary to the objectives of the *Canada Marine Act* and the *Canada Transportation Act*.

Analysis and Decision

Judicial Review

[62] The plaintiffs' claim alleges that the Minister has acted beyond the scope of his statutory authority. The authority conferred upon the Minister by section 67 of the CMA is the authority to fix public port charges, including harbour dues. At issue, therefore, is the general decision or decisions of the Minister in fixing such dues, decisions taken by the Minister as a federal board, commission or other tribunal as defined in section 2 of the *Federal Courts Act*.

[63] The exclusive means to challenge a decision of a federal board, commission or other federal tribunal is an application for judicial review made pursuant to section 18.1 of the *Federal Courts Act*. Until a party has successfully pursued a judicial review application, the decision retains its legal force and authority (see *Grenier v. Canada*, 2005 FCA 348, 262 D.L.R. (4th) 337, [2005] F.C.J. No. 1778 (QL) at paragraphs 27 to 33).

[64] The alleged invalidity of the Minister's decision is at the heart of this action and is the basis for all of the relief sought by the plaintiffs. The plaintiffs are not entitled to disregard the statutory regime governing judicial review and thereby circumvent its prescribed procedures and time limitations by attacking the lawfulness of a decision in the guise of an action. The Federal Court of Appeal has stated definitively and repeatedly that to permit a plaintiff to proceed by action in order to have decisions of federal tribunals declared invalid is to compromise the finality of decisions, the principle which underlies the relatively short, 30 day time limit for the commencement of judicial

review applications (see *Manuge v. Canada*, 2009 FCA 29, [2009] F.C.J. No. 73 (QL) at paragraph 51, *Grenier* above, at paragraphs 27 to 29, *Budisukma Puncak Sendirian Berhad v. Canada ("Berhad")*, 2005 FCA 267, [2005] F.C.J. No. 1302 (QL) at paragraph 60, *Tremblay v. Canada*, [2004] 4 F.C.R. 165, 244 D.L.R. (4th) 422, [2004] F.C.J. No. 787 (C.A.) (QL) at paragraphs 14 and 16 to 18).

[65] Even if the plaintiffs' claim may be characterized as challenging an ongoing course of conduct rather than challenging the Minister's specific decisions to fix the harbour dues as he did, the proper forum for such a challenge is an application for judicial review (see *Manuge* above, at paragraph 45, *Krause v. Canada*, [1999] 2 F.C. 476 (F.C.A.)).

[66] It is also settled that the proper method by which to attack the *vires* of subordinate legislation is through judicial review, albeit in those circumstances the standard of review will always be correctness (see *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, 74 Admin. L.R. (4th) 79 (QL) at paragraphs 55 to 58, *Saskatchewan Wheat Pool v. Canada (Attorney General)*, 107 D.L.R. (4th) 190, at paragraphs 11 to 15). Thus, successful characterization of the Dues Notice as subordinate legislation is not of assistance to the plaintiffs.

[67] Nevertheless, there have been cases where the Federal Court of Appeal has, in the interests of clarity or efficiency or the particular circumstances of the parties, undertaken a review of a federal administrative decision challenged collaterally in an action. In such circumstances, notwithstanding that the matter was not brought before the Court through the proper procedure, the

Court considered the decision in accordance with administrative law principles, particularly by determining the applicable standard of review (see *Grenier* above, at paragraphs 58 to 63, *Berhad* above, at paragraphs 65 and 66).

[68] Notwithstanding these authorities, the plaintiffs rely on *Canadian Association of Broadcasters* and *Mid-Atlantic Minerals Inc.* above, to support bringing this claim by way of action. The case at bar is in many ways analogous to the *Canadian Association of Broadcasters* case above, where there was a challenge to fees charged pursuant to a regulatory scheme on the basis that they are unlawful taxes. However, neither the Federal Court nor the Federal Court of Appeal commented on why that case proceeded by way of action rather than application and as a result, I cannot rely on it as an authority on this aspect of the law.

[69] The plaintiffs also argue that since the Crown has brought a counterclaim against it, they may raise and argue any point of law in their defence which might defeat a claim (see *Mid-Atlantic Minerals* above, at paragraph 28). *Mid-Atlantic Minerals* above, stands for the proposition that declaratory relief is available in defence of a claim, whereas it is not available to a plaintiff in an action, since declaratory relief under section 18 of the *Federal Courts Act* is only available on applications of judicial review made under section 18.1. Thus, the plaintiffs in an action cannot rely on *Mid-Atlantic Minerals* above, to avoid the provisions of the *Federal Courts Act* articulated upon in *Grenier* above.

[70] For the reasons stated above, it seems clear to me that this action should properly have been brought by way of judicial review.

[71] Though the Federal Court of Appeal decisions in *Grenier* and *Berhad* above, are binding upon this Court, I do note that the law is not entirely settled. The Ontario Court of Appeal has openly questioned the effect of *Grenier*: *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, 86 Admin L.R. (4th) 163. Thus, at this time, the best approach is to proceed cautiously and not dispose of the case on this ground. I also note that the plaintiffs' action was commenced prior to the *Grenier* decision and in my view, fairness to both parties dictates that this case be decided on its merits without further delay. At the hearing, the parties were prepared to argue the merits of the case even though the Crown submitted arguments that the matter should have proceeded as a judicial review. Despite my determination that the plaintiffs have improperly brought this matter as an action, I would allow this case to move forward nonetheless. In my view, however, such disregard for the clear provisions of the *Federal Courts Act* should, in the normal course, be a complete bar to the progress of an action.

[72] In accordance with administrative law principles, the standard of review on a matter of law such as this is correctness, particularly with "true questions of *vires*".

Summary Judgment

[73] General principles with respect to the summary judgment provisions (Rules 213 to 219 of the *Federal Court Rules*) were set out by this Court in *Granville Shipping Co. v. Pegasus Lines Ltd.*, [1996] 2 F.C. 853 (T.D.) at paragraph 8:

> 1. The purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al*);
>
> 2. There is no determinative test (*Feoso Oil Ltd. v. Sarla (The)*) but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
>
> 3. Each case should be interpreted in reference to its own contextual framework (*Blyth* and *Feoso*);
>
> 4. Provincial practice rules (especially Rule 20 of the Ontario Rules of Civil Procedure, [R.R.O. 1990, Reg. 194]) can aid in interpretation (*Feoso* and *Collie*);
>
> 5. This Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (*Patrick*);
>
> 6. On the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman* and *Sears*);
>
> 7. In the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde* and *Sears*).The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*).

[74] In *Inhesion Industrial Co. v. Anglo Canadian Mercantile Co.*, [2000] F.C.J. No. 491 (T.D.) at paragraph 19, it was held that:

> 19 Upon a motion for summary judgment, both parties must file their best evidence. The moving party must of course lead evidence which it believes will convince the Court that it is appropriate to grant summary judgment in its favour. The responding party must however also put its best evidence forward. This issue was discussed by Justice Evans in *F. von Langsdorff Licensing Limited v. S.F. Concrete Technology, Inc.*, [1999] F.C.J. No. 526, (8 April 1999), Court File No. T-335-97 (F.C.T.D.):
>
> > Accordingly, the respondent has an evidential burden to discharge in showing that there is a genuine issue for trial: *Feoso Oil Ltd. v. Sarla (The)*, [1995] 3 F.C. 68, 81-82 (F.C.A.). However, this does not detract from the principle that the moving party has the legal onus of establishing the facts necessary to obtain summary judgment: *Ruhl Estate v. Mannesmann Kienzle GmbH* (1997), 80 C.P.R. (3d) 190, 200 (F.C.T.D.); *Kirkbi AG v. Ritvik Holdings Inc.*, [1998] F.C.J. No. 912, (F.C.T.D.; T-2799-96; June 23, 1998). Thus, both parties are required to "put their best foot forward" so that the motions judge can determine whether there is an issue that should go to trial: *Pizza Pizza Ltd. v. Gillespie* (1990), 33 C.P.R. (3d) 515, 529-530 (Ont. Ct. Gen. Div.).

[75] The jurisprudence on Rule 216 is clear that a motions judge should refrain from issuing summary judgment where the relevant evidence is unavailable on the record and involves a serious question of fact which turns on the drawing of inferences (see *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50, [2004] 3 F.C.R. 3, *Apotex Inc. v. Merck & Co.*, 2002 FCA 210, [2003] 1 F.C. 242).

[76] That being said, Mr. Justice Zinn in *Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FC 1198 noted:

> As was observed by Justice Slatter of the Alberta Court of Appeal in *Tottrup v. Clearwater (Municipal District No. 99)*, [2006] A.J. No. 1532, "[t]rials are primarily to determine questions of fact...[they] are not generally held to find out the answers to questions of law". Summary judgment is a valuable tool for both the parties and the court in circumstances where there is no need to determine the facts. Trials impose a burden on the parties in terms of costs, and on the parties and the court in terms of time. Whenever this is avoidable, it ought to be avoided.

The plaintiffs submitted there were serious and genuine issues for trial, however, I am satisfied that all the material issues can be decided on a motion for summary judgment. In this particular case, I find there to be a sufficient factual record such that the only issues in dispute between the parties are questions of law. As such, this is an appropriate case to be determined pursuant to Rule 216. I turn now to a discussion of the legal issues in dispute between the parties.

<u>*Vires* of the Harbour Dues</u>

[77] The plaintiffs characterize the harbour dues as charges that are traditionally associated with the duties of a harbour master or more generally as a fee for services received at a harbour. The plaintiffs say that because no services are actually provided by the Government at the ports of Kingsville or Sault Ste. Marie, the harbour dues are in fact a tax and not a fee.

[78] Conversely, the Crown takes the position that the harbour dues are part of a cost recovery scheme for a national transportation system which runs a significant deficit. Because the costs of maintaining the national system of ports greatly exceeds the revenues generated by the harbour dues and because the harbour dues are specifically authorized by the CMA, they say that the dues cannot be a tax.

[79] It is important to consider the broad language of section 67 of the CMA which, for ease of reference, I have reproduced again below:

67.(1) The Minister may fix the fees to be paid in respect of	67.(1) Le ministre peut fixer les droits à payer à l'égard :
(a) ships, vehicles, aircraft and persons coming into or using a public port or public port facility;	a) des navires, véhicules, aéronefs et personnes entrant dans les ports publics ou faisant usage des ports publics ou d'installations portuaires publiques;
(b) goods loaded on ships, unloaded from ships or transhipped by water within the limits of a public port or stored in, or moved across, a public port facility; and	b) des marchandises soit déchargées de ces navires, chargées à leur bord ou transbordées par eau dans le périmètre portuaire, soit stockées dans ces installations portuaires ou passant par elles;
(c) any service provided by the Minister, or any right or privilege conferred by the Minister, in respect of the operation of a public port or public port facility.	c) des services fournis par le ministre, ou des avantages qu'il accorde, en rapport avec l'exploitation des ports publics ou des installations portuaires publiques.
(2) The Minister may fix the interest rate to be charged on overdue fees.	(2) Le ministre peut fixer le taux d'intérêt frappant les droits impayés.

(3) The fees and the interest rate may be made binding on Her Majesty in right of Canada or a province.	(3) Les droits et le taux d'intérêt peuvent être rendus obligatoires pour Sa Majesté du chef du Canada ou d'une province.
(4) The fees fixed under paragraphs (1)(a) and (b) do not apply in respect of a Canadian warship, naval auxiliary ship or other ship under the command of the Canadian Forces, a ship of a visiting force within the meaning of the Visiting Forces Act or any other ship while it is under the command of the Royal Canadian Mounted Police.	(4) Les droits fixés en vertu de l'alinéa (1) a) ou b) ne s'appliquent pas aux navires de guerre canadiens, aux navires auxiliaires de la marine, aux navires placés sous le commandement des Forces canadiennes, aux navires de forces étrangères présentes au Canada au sens de la Loi sur les forces étrangères présentes au Canada, ni aux navires sous le commandement de la Gendarmerie royale du Canada.

[80] In section 2 of the CMA "fees" are defined as follows:

"fees" includes harbour dues, berthage and wharfage, as well as duties, tolls, rates and other charges, but does not include payments made under a lease or licence agreement.	« droit » S'entend de toute forme de taxe, péage, contribution ou redevance, notamment pour l'accès, l'accostage et l'amarrage au port, à l'exclusion de toute somme versée au titre d'un bail ou d'un permis.

[81] It is apparent from the wording of section 67 that the Minister has a broad authority to set fees and wide discretion when fixing the fees.

[82] A review of paragraph 67(1)(a) shows that the Minister may fix fees on ships for merely "coming into" a public port. The Minister may also set fees on ships using a public port or port

facility. This would indicate that the Act authorizes the Minister to fix a fee for a ship entering a public port. This part of the section does not contemplate, much less require, any service being provided to the vessel. It could be a fee for entering the harbour as opposed to a fee for services being provided to the vessel.

[83] Indeed, the Minister was entitled to fix such a fee on a ship entering the port even if no services were provided. Support for this finding can be found in *Canada v. Thorne's Hardware Limited*, [1981] 2 F.C. 393 (C.A.) at paragraph 10:

> 10 The second ground on which the Trial Judge found By-law B-1 to be inapplicable to the respondents' vessels was that the National Harbours Board did not provide any service to these vessels. The Board could therefore not require them to pay any dues, according to the trial judgment. I am afraid I cannot share this view. It is clear from reading the By-law in question that the dues it imposes are "payable in respect of each vessel that enters or operates within a harbour", regardless of whether or not services have been provided to the vessel. It seems to me, moreover, that the imposition of such dues is authorized by the early part of paragraph 14(1)(e) of the Act, which reads as follows:
>
> > 14. (1) The Governor in Council may make by-laws, not inconsistent with the provisions of this Act, for the direction, conduct and government of the Board and its employees, and the administration, management and control of the several harbours, works and property under its jurisdiction including
> > . . .
> >
> > (e) the imposition and collection of tolls on vessels or aircraft entering, using or leaving any of the harbours; on passengers; on cargoes; on goods or cargoes of any kind brought into or taken from any of the harbours or any property under the administration of the Board, or landed, shipped, transhipped or stored at any of the harbours or on any property under the administration of the Board or moved across

> property under the administration of the Board; for the use of any property under the administration of the Board or for any service performed by the Board; and the stipulation of the terms and conditions (including any affecting the civil liability of the Board in the event of negligence on the part of any officer or employee of the Board) upon which such use may be made or service performed; . . .

[84] The breadth of the Minister's authority under section 67 of the CMA is further underscored by reading section 67 in the context of the more limited fee setting provisions contained in Parts I and III of the CMA and in other statutory enactments.

[85] The plaintiffs, at the hearing of this matter, did not submit that the Minister had to set the harbour dues on a port-by-port basis. In other words, they did not take issue with the Minister's authority to set fees on a system-wide basis as he did. I note that this is precisely what makes the rates of the harbour dues the same at each port, regardless of the level of service available. It is clear that the CMA authorized the harbour dues in question. I will turn to the lawfulness of those dues.

[86] It is agreed that the harbour dues in question are not user fees, even though this may have been the origin of harbour dues. Thus, the only question is whether the harbour dues are in pith and substance a regulatory charge or a tax (see *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, 290 D.L.R. (4th) 385 (QL)).

[87] Pursuant to section 53 of the *Constitution Act, 1867*, only Parliament may impose a tax. If the harbour dues are in pith and substance a tax, they will be *ultra vires* and beyond the jurisdiction

of the Minister to impose despite the Minister's authority pursuant to the CMA. On the other hand, if the dues are in pith and substance a regulatory charge existing within a regulatory scheme, they may validly be imposed (see *620 Connaught* above, at paragraphs 2 and 16).

[88] As stated by Mr. Justice Rothstein in *620 Connaught* above:

> 25 In *Westbank*, Gonthier J. established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:
>
> > [A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. [para. 44]
>
> The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.
>
> …
>
> 27 Provided that a relevant regulatory scheme is found to exist, the second step is to find a relationship between the charge and the scheme itself.
>
> > This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour. (*Westbank*, at para. 44).

[89] The regulation of public ports under the CMA constitutes a national system and this system clearly constitutes a regulatory scheme. The relevance of the regulatory scheme to the plaintiffs, if not abundantly obvious, is evidenced through the plaintiffs' use of the public ports and their surrounding waters and Transport Canada's services at many of those ports as well as Transport Canada's continuing responsibilities concerning safety and navigation. These factors demonstrate that the plaintiffs benefit from the regulation of public ports. This leaves only the final factor; the existence of a relationship between the harbour dues and the national system of public ports.

[90] On this factor, the most relevant evidence presented was that which established that Transport Canada only covered a portion of the total costs incurred by Transport Canada in relation to public ports.

[91] The idea that in order to be considered a regulatory charge, a fee or levy must be specifically traceable to specific regulatory costs has been rejected. It will be sufficient if fees or dues arising in a regulatory scheme are deposited into the general revenue used to operate the regulatory scheme (see *Canadian Association of Broadcasters v. Canada*, 2008 FCA 157, [2009] 1 F.C.R. 3, [2008] F.C.J. No. 672 at paragraph 82).

[92] The Supreme Court of Canada dealt with the relevance of system wide cost recovery in *Thorne's Hardware* above, at pages 121 to 123:

> The trial judge apparently concluded that the Board provides no services to vessels using the dock at Mispec Point. He also agreed with the appellants' submission that the "tolls" were really taxes, and were therefore *ultra vires* the Board. The Federal Court of Appeal

disagreed, holding that s. 14 explicitly authorizes the imposition of "tolls" on any vessel entering the harbour, whether or not the Board rendered any service to the vessel charged. Mr. Justice Pratte said:

> It is clear from reading the By-law in question that the dues it imposes are "payable in respect of each vessel that enters or operates within a harbour", regardless of whether or not services have been provided to the vessel. It seems to me, moreover, that the imposition of such dues is authorized by the early part of paragraph 14(1)(e) of the Act.

I shall assume, arguendo, that the appellants are right in their contention that the word "tolls" is s. 14(1)(e) restricts the Board to charges reasonably related to the costs of operating the harbour. It does not follow, however, that a toll imposed on a particular vessel pursuant to s. 14 must be related to the cost of services provided to that vessel. Nor do the appellants cite any authority to this effect. Indeed one of the cases the appellants rely on appears to be authority to the contrary. In *Foreman v. Free Fishers of Whitstable*, (1969) L.R. 4 H.L. 266, the plaintiffs brought an action to recover "anchorage dues" allegedly owed by the defendants. In that case Lord Chelmsford said:

> I find nothing in the authorities to warrant the argument of the learned counsel that the benefit conferred by the owner of the port must be precisely that in respect of which the toll is demanded. On the contrary, it appears from Lord Hale, De Portibus Maris, chap. 6, that, "though A. may have the property of a creek, or harbour, or navigable river, yet the King may grant there the liberty of a port to B., and so the interest of the property and the interest of franchise be several and divided." And he afterwards mentions anchorage as a toll arising from the *jus dominii* or franchise of a port. In this case it is clear that the anchorage toll would not be payable in respect of any benefit which the anchoring vessel derived from the owner of the franchise.

Even if the word "tolls" in s. 14 limits the Board to charges reasonably related to the cost of providing harbour services, a toll levied against a particular vessel need not be based on the actual cost of services rendered to that vessel. To show that the Board's fees

> were *ultra vires* as "taxes" it would at least be necessary to show that the Board's revenues were significantly greater than the cost of providing harbour facilities and services to the public and no such showing was attempted here. Indeed, a memorandum dated July 22, 1969 written to the National Harbours Board by Vice-Chairman of the board indicates that the port of Saint John suffered net operating losses amounting to $644,049 and $781,222 in the years 1968 and 1967 respectively.

[93] A similar conclusion was reached in *Canadian Shipowners Association v.* Canada, [1997] F.C.J. No. 1002 (F.C.T.D.) at paragraph 14:

> Nor can I agree with the applicants' contention that the fees imposed by the Regulations are a tax. The fees that will be actually paid by the commercial ships for the aids to navigation provided by her Majesty will not exceed the total cost incurred by Her Majesty. In fact, only 20% of the total costs incurred by the Government are recovered for 1996-1997. As such, it is impossible to consider that the revenue generated by the Regulation constitutes a tax.

[94] I also note that in both *620 Connaught* above, at paragraphs 40 to 44 and in *Canadian Association of Broadcasters* above, at paragraph 85, a deficit incurred by the regulatory scheme in question was relied on as a significant factor demonstrating the relationship between the levy and the scheme and implicitly, the need for the levy.

[95] The individual public ports in Canada, it is agreed, form a system and this system falls under the regulation of Transport Canada. It is also a fact that Transport Canada expends more funds for the system than it collects from the various fees. Following the above jurisprudence, the harbour dues can hardly be considered a tax, as the Crown only recovers a portion of the total costs it expends on the public port regulatory system.

Canada/U.S. Reciprocal Agreement (Treaty and Discretion Argument)

[96] As noted earlier in this decision, Canada and the United States have a reciprocal agreement under which U.S. flagged vessels travelling from U.S. Great Lakes ports are exempted from paying harbour dues at Canadian Great Lakes ports and Canadian flagged vessels travelling from Canadian Great Lakes ports have been exempted from paying U.S. tonnage taxes at U.S. Great Lakes ports. With a brief interruption, this practice has been in effect since at least 1884. The plaintiffs submit that there is no legal basis for the exemption for U.S. vessels and that the practice is discriminatory.

[97] It is well settled that the power to fix fees, absent specific statutory limitations to the contrary, must be understood to include the power to distinguish between different users (see *Aerlinte* above, *Mid-Atlantic Minerals Inc.* above, at paragraphs 39 to 43. The Minister's broad discretion under section 67 of the CMA clearly includes the power to distinguish between different groups of users, including, in the circumstances of this case, the power to exempt U.S. flagged vessels from payment of harbour dues pursuant to the long-standing reciprocal arrangement described above, whereby Canadian flagged vessels, including those of the plaintiffs, are also exempted from U.S. tonnage taxes.

[98] In *Aerlinte Eirann Teoranta v. Canada*, [1990] F.C.J. No. 170, the Federal Court of Appeal rejected a similar discriminatory fee argument, stating:

> . . . I refer particularly to the decision of the Supreme Court of Canada in the *La Presse* case. That case was concerned with the parameters of section 3 of the *Radio Act* which empowered the Governor in Council to "...prescribe the tariff of fees to be paid for

> licences and for examination for certificates of proficiency held and issued under this Act." The submission there was that section 5 of the *Radio Regulations* as enacted by Order-in-Council was invalid because (l) it imposed a tax and not a licence fee; and (2) was unjust and discriminatory. In rejecting these submissions, Mr. Justice Abbott said:
>
> > As to the alleged discriminatory character of the regulation, I am not satisfied that it is in fact discriminatory. In any event s. 3 of the Act puts no limitation upon the powers of the Governor in Council to prescribe licence fees. That such fees may in fact be discriminatory, in my opinion, affords no legal ground of attack upon the validity of the Order. (Emphasis added)
>
> . . . I must add that even if the record established a factual basis for discrimination, the result would not be any different. I agree with the Trial Judge that "...neither discrimination nor even unreasonableness is a ground for quashing regulations enacted by the executive." (A.B. Vol. 19, p. 3417). I also agree with him that:
>
> > The power to make regulations prescribing charges for use of facilities and services without further fetter, is the power to establish categories of users. (A.B. Vol. 19, p. 3417).

The only material difference in the present case is that the decision to continue the reciprocal arrangement was the decision of the Minister made pursuant to the power given to him by statute, the CMA, and not a regulation.

[99] I find that any discriminatory effects of the decision to continue the reciprocal arrangement do not provide a ground for the decision to be quashed. The Minister’s authority to fix fees under section 67 clearly includes the power to distinguish between user groups.

[100] The plaintiffs' next argument is that because the Minister's Dues Notice exempted from paying harbour dues "a vessel exempted from the payment of such dues by a 'treaty' between Canada and any foreign country" (motion record volume 6, page 1050), the Minister cannot cite the reciprocal agreement as a valid exemption because the reciprocal agreement is not a formal treaty. I disagree. The Minister now sets the tariff of fees by his own decision and not by regulation as was done in the past.

[101] The uncontroverted evidence is that the Minister's decision was to continue the exemption for U.S. flagged vessels covered by the reciprocal arrangement and that the use of the term "treaty" in the Dues Notice was specifically intended to apply to the reciprocal agreement. Paragraph 51 of Mary Taylor's affidavit states:

> As appears from Exhibit "P", the harbour dues tariff notice prepared following the Minister's decision to fix increased public port fees under the CMA included a provision, carried forward from the earlier regulations under the PHPFA, excluding vessels exempted by a "treaty". My understanding was that this provision applied to the reciprocal arrangement between Canada and the United States, which arrangement would continue to be observed. There was no proposal or intention, either on my part, or to my knowledge, information and belief, on the part of any more senior members of the Department or the Minister, to end the longstanding reciprocal arrangement and the exemption of U.S. vessels under such arrangement from the payment of harbour dues at Canadian public ports on the Great Lakes. Had there been any decision, or even any proposal within Transport Canada, to end that longstanding exemption, I am sure I would have become aware of it.

[102] It is my view that the exemption created by the reciprocal arrangement is still in effect.

[103] In any event, the Dues Notice is not a regulation or other statutory instrument. It is merely a communication by Transport Canada to port users. The Minister's power to fix and levy fees derives solely from the CMA, not the notices, and the Minister's authority and discretion with respect to the exercise of that statutory power cannot be treated as being ousted or supplanted by the notices. Nor can quibbles over the wording of Transport Canada's notices be used as a basis for vitiating the Minister's statutory authority, and involuntarily imposing upon the Minister an outcome clearly contrary to the Minister's decisions and continuing intentions.

[104] Moreover, even if the notices were regulations and the plaintiffs were then found to be correct in their interpretation of such regulations, the plaintiffs would still not have any legal grounds whatsoever for avoiding their own payments of harbour dues. Even on those assumptions, the plaintiffs' arguments would amount to nothing more than complaints about the Minister's enforcement of regulations *vis à vis* others. Such complaints could not be relied on by the plaintiffs to justify avoidance of their own clear legal obligations.

[105] It may be that a different word could have been used in the Dues Notice but it must be remembered that the Dues Notice is merely the communication of the Minister's decision to interested parties and is not binding on him. From the evidence, the Minister's decision was to continue the reciprocal arrangement and it is the Minister's decision that is important to this case.

[106] In any event, even if I am in error on this point, the jurisprudence is clear that just because Canada is not collecting harbour dues from the U.S. flagged ships does not mean that the plaintiffs do not have to pay their harbour dues. I have already found that the Crown was entitled to fix the harbour dues by virtue of section 67 of the CMA (see *Distribution Canada Inc. v. Minister of Natural Resources*, [1993], 2 F.C. 26 (C.A.)).

[107] The plaintiffs also raised an argument of not being consulted on the changes to the fees. I am satisfied that adequate consultation took place. The plaintiffs or their representative have made representations to the Minister and other government representatives on many occasions.

[108] The Crown has counterclaimed for the amount of harbour dues owing plus interest. I am satisfied that there is no real dispute over the quantum of the dues owing or the applicable interest. There is no dispute as to the Minister's authority to set the fees. I am of the view that the counterclaim should be allowed.

[109] As a result of my findings, summary judgment is granted as follows:

1. The plaintiffs' action against the defendant is dismissed.
2. The defendant shall have its costs (including the costs of this motion).
3. The defendant's counterclaim is allowed as follows:

    (a) As against Algoma Central Corporation, payment of the sum of $528,125.66 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become

payable thereafter, and up to the date of judgment in this proceeding, in respect of harbour dues relating to vessels owned by Algoma Central Corporation;

(b) As against Upper Lakes Shipping Ltd., payment of the sum of $230,991.60 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding, in respect of harbour dues relating to vessels owned by Upper Lakes Shipping Ltd.;

(c) As against Seaway Marine Transport, and therefore also jointly and severally as against its constituent partners Algoma Central Corporation and Upper Lakes Group Inc. and/or Upper Lakes Shipping Inc., payment of the sum of $759,117.26 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding, in respect of harbour dues relating to vessels operated by Seaway Marine Transport;

(d) As against all of the defendants to the counterclaim:

(i) interest on the aforesaid sums owing by them, from and after September 30, 2004, calculated and compounded monthly, at the rate and in the manner prescribed in section 5 of the *Interest and Administrative Charges Regulations*, SOR/96-188, enacted pursuant to section 155.1 of the *Financial Administration Act*, R.S., 1985, c. F-11;

(ii) the costs of this proceeding.

[110] I retain jurisdiction to deal with any issue the parties cannot resolve on the issue of the quantum of the counterclaim.

JUDGMENT

[111] **IT IS ORDERED that:**

1. The plaintiffs' action against the defendant is dismissed.

2. The defendant shall have its costs (including the costs of this motion).

3. The defendant's counterclaim against the plaintiffs is allowed as follows:

(a) As against Algoma Central Corporation, payment of the sum of $528,125.66 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding, in respect of harbour dues relating to vessels owned by Algoma Central Corporation;

(b) As against Upper Lakes Shipping Ltd., payment of the sum of $230,991.60 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding, in respect of harbour dues relating to vessels owned by Upper Lakes Shipping Ltd.;

(c) As against Seaway Marine Transport, and therefore also jointly and severally as against its constituent partners Algoma Central Corporation and Upper Lakes Group Inc. and/or Upper Lakes Shipping Inc., payment of the sum of $759,117.26 owing in respect of harbour dues as of September 30, 2004, and such further amounts as become payable thereafter, and up to the date of judgment in this proceeding, in respect of harbour dues relating to vessels operated by Seaway Marine Transport;

(d) As against all of the defendants to the counterclaim:

(i) interest on the aforesaid sums owing by them, from and after September 30, 2004, calculated and compounded monthly, at the rate and in the manner prescribed in section 5 of the *Interest and Administrative Charges Regulations*, SOR/96-188, enacted pursuant to section 155.1 of the *Financial Administration Act*, R.S., 1985, c. F-11;

(ii) the costs of this proceeding.

4. I retain jurisdiction to deal with any issue the parties cannot resolve on the issue of the quantum of the counterclaim.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant provisions of the *Federal Court Rules*, SOR/98-106

213.(1) A plaintiff may, after the defendant has filed a defence, or earlier with leave of the Court, and at any time before the time and place for trial are fixed, bring a motion for summary judgment on all or part of the claim set out in the statement of claim.	213.(1) Le demandeur peut, après le dépôt de la défense du défendeur — ou avant si la Cour l'autorise — et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire sur tout ou partie de la réclamation contenue dans la déclaration.
(2) A defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.	(2) Le défendeur peut, après avoir signifié et déposé sa défense et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire rejetant tout ou partie de la réclamation contenue dans la déclaration.
214.(1) A party may bring a motion for summary judgment in an action by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.	214.(1) Toute partie peut présenter une requête pour obtenir un jugement sommaire dans une action en signifiant et en déposant un avis de requête et un dossier de requête au moins 20 jours avant la date de l'audition de la requête indiquée dans l'avis.
(2) A party served with a motion for summary judgment shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of	(2) La partie qui reçoit signification d'une requête en jugement sommaire signifie et dépose un dossier de réponse au moins 10 jours avant la date de l'audition de la requête indiquée

motion for the hearing of the motion.

dans l’avis de requête.

215. A response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.

215. La réponse à une requête en jugement sommaire ne peut être fondée uniquement sur les allégations ou les dénégations contenues dans les actes de procédure déposés par le requérant. Elle doit plutôt énoncer les faits précis démontrant l’existence d’une véritable question litigieuse.

216.(1) Where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

216.(1) Lorsque, par suite d’une requête en jugement sommaire, la Cour est convaincue qu’il n’existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(2) Lorsque, par suite d’une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est :

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

a) le montant auquel le requérant a droit, elle peut ordonner l’instruction de la question ou rendre un jugement sommaire assorti d’un renvoi pour détermination du montant conformément à la règle 153;

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

(3) Where on a motion for summary judgment the Court

(3) Lorsque, par suite d’une requête en jugement sommaire,

decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

la Cour conclut qu'il existe une véritable question litigieuse à l'égard d'une déclaration ou d'une défense, elle peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question particulière, soit de façon générale, si elle parvient à partir de l'ensemble de la preuve à dégager les faits nécessaires pour trancher les questions de fait et de droit.

(4) Where a motion for summary judgment is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the usual way or order that the action be conducted as a specially managed proceeding.

(4) Lorsque la requête en jugement sommaire est rejetée en tout ou en partie, la Cour peut ordonner que l'action ou les questions litigieuses qui ne sont pas tranchées par le jugement sommaire soient instruites de la manière habituelle ou elle peut ordonner la tenue d'une instance à gestion spéciale.

217. A plaintiff who obtains summary judgment under these Rules may proceed against the same defendant for any other relief and against any other defendant for the same or any other relief.

217. Le demandeur qui obtient un jugement sommaire aux termes des présentes règles peut poursuivre le même défendeur pour une autre réparation ou poursuivre tout autre défendeur pour la même ou une autre réparation.

218. Where summary judgment is refused or is granted only in part, the Court may make an order specifying which material facts are not in dispute and defining the issues to be tried, including an order

218. Lorsqu'un jugement sommaire est refusé ou n'est accordé qu'en partie, la Cour peut, par ordonnance, préciser les faits substantiels qui ne sont pas en litige et déterminer les questions qui doivent être instruites, ainsi que :

(a) for payment into court of all or part of the claim;	a) ordonner la consignation à la Cour d'une somme d'argent représentant la totalité ou une partie de la réclamation;
(b) for security for costs; or	b) ordonner la remise d'un cautionnement pour dépens;
(c) limiting the nature and scope of the examination for discovery to matters not covered by the affidavits filed on the motion for summary judgment or by any cross-examination on them and providing for their use at trial in the same manner as an examination for discovery.	c) limiter la nature et l'étendue de l'interrogatoire préalable aux questions non visées par les affidavits déposés à l'appui de la requête en jugement sommaire, ou limiter la nature et l'étendue de tout contre-interrogatoire s'y rapportant, et permettre l'utilisation de ces affidavits lors de l'interrogatoire à l'instruction de la même manière qu'à l'interrogatoire préalable.
219. In making an order for summary judgment, the Court may order that enforcement of the summary judgment be stayed pending the determination of any other issue in the action or in a counterclaim or third party claim.	219. Lorsqu'elle rend un jugement sommaire, la Cour peut surseoir à l'exécution forcée de ce jugement jusqu'à la détermination d'une autre question soulevée dans l'action ou dans une demande reconventionnelle ou une mise en cause.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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John Lucki Karen Lovell	FOR THE DEFENDANT/ PLAINTIFF BY COUNTERCLAIM

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