

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120320

Docket: A-190-11

Citation: 2012 FCA 93

**CORAM: PELLETIER J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

In Rem

M.V. STORMONT AND THE M.V. PAUL E. NO. 1

And In Personam

MCKEIL MARINE INC., DETROIT-WINDSOR TRUCK

FERRY INC. AND CMT CANADIAN MARITIME

TRANSPORT LTD.

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on January 31, 2012.

Judgment delivered at Ottawa, Ontario, on March 20, 2012.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This is an appeal from a decision of Mr. Justice Beaudry of the Federal Court (the Motions Judge) declaring that the appellants, McKeil Marine Inc., Detroit-Windsor Truck Ferry Inc., and CMT Canadian Maritime Transport Ltd. (collectively McKeil), are liable for icebreaking fees in relation to their truck ferry business between the Port of Windsor and the Port of Detroit. McKeil appeals to this Court saying that the Motions Judge misconstrued the *Fee Schedule for Icebreaking Services*, Canada Gazette, Part I: January 16, 1999, Vol. 133, No. 3 (the *Fee Schedule*). McKeil also argues that, in any event, the Canadian Coast Guard (the CCG) does not have the authority to levy icebreaking fees for icebreaking services within the boundaries of the Port of Windsor because that authority has been given to the Windsor Port Authority under its Letters Patent.

THE FACTS

[2] Her Majesty the Queen in Right of Canada (the Crown) commenced an action in the Federal Court to collect unpaid icebreaking fees from McKeil. The parties agreed that the major point in issue was the proper interpretation of the relevant legislation and so set the matter down to be determined as a point of law under Rule 220 of the *Federal Courts Rules*, SOR/98-106.

[3] The matter proceeded on the basis of an agreed statement of facts, reproduced at paragraph 3 of the Motions Judge's decision: *Canada v. M.V. Stormont (The)*, 2011 FC 531, [2011] F.C.J. No. 676. For the purposes of this appeal, it is sufficient to know that McKeil operates a truck ferry service between the Port of Windsor and the Port of Detroit. Both ports are located on the Detroit River and on their respective sides of the international boundary, which lies in the middle of the river. The northwest boundary of the Port of Windsor is the Canada-US Border, as is the southeast boundary of the Port of Detroit. McKeil's ferries travel within the Port of Windsor to the Canada-US Border and cross directly into the Port of Detroit, without navigating any intermediate waters. The same is true on the return voyage from the Port of Detroit to the Port of Windsor.

[4] The parties agree that the Port of Windsor is located within the ice zone, as described in Annex I of the *Fee Schedule*. The parties also agree that the CCG provides icebreaking services within the Port of Windsor.

ANALYSIS

Standard of review

[5] This is an appeal from a judge's determination of a point of law on the basis of an agreed statement of facts. As such, the standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10, 37: correctness on questions of law, and palpable and overriding error on questions of fact, or on questions of mixed fact and law where there is no extricable question of law.

[6] Since McKeil made the same arguments before this Court as it did before the Federal Court, and since the correctness standard permits this Court to conduct its own analysis of the legal question raised, I will simply deal with McKeil's arguments so as to avoid the repetition involved in setting out the terms of the decision below and McKeil's grounds of appeal.

Interpretation of the *Fee Schedule*

[7] The portions of the *Fee Schedule* that are relevant to this appeal are reproduced below:

1. The definitions in this section apply in this fee schedule with respect to the calculation, collection and payment of icebreaking services fees.

[...]

“ice zone” means that part of Canada in which icebreaking services are available in support of commercial shipping as described in Annex I. (zone de glaces)

[...]

"transit" means any movement by a ship which includes one port of departure, one port of arrival and no intermediate port calls in between, but does not include any movement by a ship which remains entirely within the boundaries of a single port. (transit)

[...]

2. (1) Subject to subsections (2) to (7) and section 3, this fee schedule applies to all ships that transit the ice zone.

1. Les définitions qui suivent s'appliquent au calcul, à la perception et au paiement des droits de services de déglçage établis dans le présent barème des droits.

...

« zone de glaces » Secteurs du Canada où des services de déglçage sont disponibles durant l'hiver pour faciliter la navigation commerciale selon la description de l'annexe I. (ice zone)

...

« transit » Mouvement d'un navire entre un port de départ et un port d'arrivée et sans escale entre les deux, ce qui exclut le mouvement d'un navire qui demeure entièrement dans les limites d'un même port. (transit)

...

2. (1) Sous réserve des paragraphes (2) à (7) et de l'article 3, le présent barème des droits s'applique à tous les navires qui effectuent un transit dans la zone des glaces.

3. (1) Subject to subsections (2) to (6), the fee payable, for icebreaking services, by a ship for each transit to or from a Canadian port located in the ice zone within the ice season dates prescribed in Annex I is \$3,100.

3. (1) Sous réserve des paragraphes (2) à (6), le droit que doit payer, pour des services de déglçage, un navire pour chaque transit à destination ou en provenance d'un port canadien situé dans la zone des glaces dans les limites de la saison des glaces établies à l'annexe I est de 3 100 \$.

[8] I would summarize McKeil's arguments with respect to the interpretation of the *Fee Schedule* as follows.

[9] McKeil says that the *Fee Schedule* only applies when the entire "transit" occurs within the ice zone. It bases this argument on the French version of the *Fee Schedule* which seems to say that the fees apply when a "transit", used as a noun, occurs within the ice zone. By contrast, the English version is ambiguous on this point due to its use of the word "transit" as both a noun and a verb.

[10] McKeil also says that the use of the word "entre" in the French definition of the word "transit" ("Mouvement d'un navire entre un port de départ et un port d'arrivée...") suggests that there must be an intervening area of ice zone between the two ports. The English definition of the word "transit", which uses the word "includes" ("any movement by a ship which includes one port of departure, one port of arrival..."), does not convey the same idea.

[11] McKeil argues that in both cases, the principles of bilingual interpretation dictate that the unambiguous French version must be treated as the shared meaning of the two versions, thereby resolving any ambiguities found in English.

[12] I do not agree with the claim that there is ambiguity in the *Fee Schedule*. In my view, both language versions, when properly construed, say exactly the same thing.

[13] Before examining the legislative provisions more carefully, I think it useful to say a word about the drafting of bilingual statutes. Bilingual legislation is not drafted in one language and then translated into the other. Each version is drafted independently, without reference to the other, on the basis of a common set of instructions, Canada, Department of Justice, “Bilingual and Bijural Legislative Drafting of Federal Legislation: A Brief History of Drafting for the Government of Canada”, online: <http://www.justice.gc.ca/eng/news-nouv/others-autres/2009/doc_32413d.html>. As a result, it frequently happens that one language version of the law uses words or sentence structures that are not the precise equivalents of those used in the other language version. The issue is not whether one is a faithful translation of the other but rather, whether both versions convey the same idea.

[14] I might also point out that McKeil’s approach to this issue was flawed. It compared the English version of the *Fee Schedule* to a translation of the French version. The correct method is to compare the English and the French version directly.

[15] With this in mind, I turn to the language of the *Fee Schedule*. Both the French and the English versions have the same structure:

- an Interpretation section (« Définitions ») in which the terms used, including “transit” (« transit »), are defined;
- an Application section (« Application »), section 2, which defines the scope of the *Fee Schedule*; and
- a Fees section (« Droits »), section 3, which sets out the amount of the fees to be charged and the basis for such charges.

[16] This logical structure is subject to one anomaly: section 2, the Application section, is subject to section 3, the Fees section. This is a matter to which I shall return.

[17] McKeil argues that in English, section 2 says that the *Fee Schedule* applies to “all ships that transit the ice zone”, while in French, section 2 says that the *Fee Schedule* applies “à tous les navires qui effectuent un transit dans la zone des glaces”. As noted, McKeil says that the use of “transit” as a verb in section 2 of the English version creates an ambiguity as to whether only a part or the whole of the “transit” must occur within the ice zone. McKeil goes on to point out that the French version makes it clear that the entire “transit” must occur within the ice zone, a result of the fact that “transit” is used as a noun in that version. Therefore, says McKeil, the unambiguous French version of the *Fee Schedule* is to be preferred over the ambiguous English version.

[18] As a result, McKeil concludes that icebreaking fees only apply where both the port of departure and the port of arrival are within the ice zone. Since the ice zone, by definition, applies only to Canadian waters, it does not apply to the Port of Detroit, which lies in American waters.

Therefore, McKeil argues, the voyage from the Port of Windsor to the Port of Detroit is not a “transit”, and as such, is not subject to icebreaking fees.

[19] The error in McKeil’s reasoning is that section 2 of the *Fee Schedule* is subject to section 3. The English version of section 3 imposes icebreaking fees on “each transit to or from a Canadian port located in the ice zone”, while the French version imposes it on “chaque transit à destination ou en provenance d’un port canadien situé dans la zone des glaces”. Whatever ambiguity might arise from the text of section 2 is completely resolved by section 3, which requires only that either the port of departure or the port of arrival be in the ice zone.

[20] In this case, since the Port of Windsor is in the ice zone, any voyage that begins or ends in that Port is a “transit” subject to the *Fee Schedule*. As a result, I am of the view that McKeil’s argument fails and that the *Fee Schedule* applies to voyages by its ferries either to or from the Port of Windsor.

[21] I might add that this conclusion ensures that those who receive the benefit of icebreaking services bear some part of the cost of these services, while avoiding the absurd result that ships whose voyages begin or end outside of Canada incur no liability for icebreaking fees.

Statutory authority to levy icebreaking fees

[22] The Minister’s power to charge fees is found in section 47 of the *Oceans Act*, S.C. 1996, c. 31, reproduced below:

47. (1) The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees to be paid for a service or the use of a facility provided under this Act by the Minister, the Department or any board or agency of the Government of Canada for which the Minister has responsibility.

47. (1) Le ministre peut, sous réserve des règlements d'application du présent article éventuellement pris par le Conseil du Trésor, fixer les prix à payer pour la fourniture de services ou d'installations au titre de la présente loi par lui-même ou le ministère, ou tout organisme fédéral dont il est, du moins en partie, responsable.

(2) Fees for a service or the use of a facility that are fixed under subsection (1) may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility.

(2) Les prix fixés dans le cadre du paragraphe (1) ne peuvent excéder les coûts supportés par Sa Majesté du chef du Canada pour la fourniture des services ou des installations.

[23] McKeil's argument on this point is summarized at paragraph 69 of its Memorandum of Fact and Law:

...The power of CCG to fix fees is residual only. To displace CCG's ability to fix fees, all that is required under the *Oceans Act* is that the power be "assigned by law to any other department, board, or agency of the Government of Canada" (*Oceans Act*, s. 41). This has effectively been done under the *Canada Marine Act* [S.C. 1998, c. 10].

[24] As noted, this "residual powers" argument is based on section 41 of the *Oceans Act*:

41. (1) As the Minister responsible for coast guard services, the powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not assigned by law to any other department, board or agency of the Government of Canada, relating to

41. (1) Le ministre étant responsable des services de garde côtière, ses pouvoirs et fonctions s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux concernant :

(a) les services destinés à assurer

(a) services for the safe, economical and efficient movement of ships in Canadian waters through the provision of

[...]

(iii) ice breaking and ice management services, and

[...]

la sécurité, la rentabilité et l'efficacité du déplacement des navires dans les eaux canadiennes par la fourniture :

...

(iii) de services de brise-glace et de surveillance des glaces,

...

[25] McKeil's argument in this respect has two threads. The first is that the Minister cannot charge fees for a service that has been assigned by law to another department, board or agency of the Government of Canada. Thus the fact that the CCG currently provides icebreaking services in the Port of Windsor is not conclusive of the Minister's power to charge for those services. If the responsibility for providing icebreaking services within the Port has been assigned to another agency, the Minister has no power to charge fees in this respect.

[26] The second thread is that the Minister's ability to fix fees under section 47 can be displaced by an assignment of the right to fix fees to any other department, board or agency of the Government of Canada.

[27] Dealing with the second argument first, section 41 of the *Oceans Act* speaks to the assignment of the "powers, duties and functions" relating to the provision of services, which in this case is the provision of navigation services. Section 41 cannot be used to support an argument that

a grant of the power to fix fees to another agency deprives the Minister (and by extension, the CCG) of the right to charge fees for the services they have rendered.

[28] The remaining question relates to McKeil's first argument and that is whether the power and duty to provide icebreaking services has been assigned to another department, board or agency of the Government of Canada, specifically, to the Windsor Port Authority. McKeil argues that the regulation of marine activities in the Port of Windsor is within the mandate of the Windsor Port Authority. One can agree with this proposition without agreeing that it constitutes an assignment of the Minister's responsibilities with respect to icebreaking.

[29] In my view, section 41 is not an enabling section that gives the Minister a discretion as to whether or not to provide icebreaking services; it is a charging section which provides that the matters referred to in paragraphs 41(1)(a) to (e) are not only powers but are also duties of the Minister. If Parliament saw fit to impose on the Minister the duty to provide icebreaking services, it can only be because it regarded icebreaking services as a necessary service. In order for this duty to be assigned to another entity so as to relieve the Minister of the obligation, then that other entity must also be under a duty to provide icebreaking services. McKeil has not directed this Court to any disposition that imposes on the Port of Windsor a duty to provide icebreaking services, and I have not been able to find any. Therefore, I conclude that the Minister's obligation to provide icebreaking services has not been assigned to the Windsor Port Authority.

[30] As a result, the Minister is both authorized and required to provide icebreaking services in the Port of Windsor, and has done so. He is therefore entitled to charge fees for those services, as provided for in the *Fee Schedule*.

CONCLUSION

[31] When properly construed, both the English and the French versions of section 2 of the *Fee Schedule* convey the same idea. There is therefore no ambiguity requiring recourse to the principles of bilingual interpretation. Both language versions make it clear that the *Fee Schedule* applies to any “transit”, as defined therein, that either begins or ends in a port within the ice zone. The Port of Windsor is such a port. As a result, any “transit” that begins or ends in the Port of Windsor is subject to the terms of the *Fee Schedule*.

[32] McKeil has not been able to show that the Minister’s obligation to provide icebreaking services has been assigned to the Port of Windsor so as to deprive the Minister of the power to charge fees for such services.

[33] As a result, the appeal should be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

“I agree.

Eleanor R. Dawson J.A.”

“I agree.

David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-190-11

APPEAL FROM DECISION OF MR. JUSTICE BEAUDRY OF THE FEDERAL COURT, DATED MAY 9, 2011, DOCKET NUMBER T-1683-5

STYLE OF CAUSE: *In Rem* M.V. STORMONT AND THE M.V. PAUL E. NO.1 *and In Personam* MCKEIL MARINE INC., DETROIT-WINDSOR TRUCK FERRY INC., AND CMT CANADIAN MARITIME TRANSPORT LTD. v HER MAJESTY THE QUEEN IN RIGHT OF CANADA

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: January 31, 2012

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

DATED: March 20, 2012

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