Federal Court of Appeal  Cour d'appel fédérale

Date: 20191010

Docket: A-113-18

Citation: 2019 FCA 250

CORAM: **DAWSON J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

OCEANEX INC.

Appellant

and

CANADA (MINISTER OF TRANSPORT) and MARINE ATLANTIC INC.

Respondents

and

ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR

Intervener

Heard at St. John's, Newfoundland and Labrador, on May 28 and 29, 2019.

Judgment delivered at Ottawa, Ontario, on October 10, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

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

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Introduction

[1] The Terms of Union of Newfoundland with Canada require Canada to maintain a freight and passenger ferry service on what is known as the "constitutional route" – the route between North Sydney, Nova Scotia and Port aux Basques, Newfoundland and Labrador: *Newfoundland Act*, 12 & 13 Geo. VI, c. 22 (U.K.), Schedule, Term 32(1). Since 1987, the respondent Marine Atlantic Inc., a federal Crown corporation, has been Canada's "principal instrument" for carrying out this constitutional obligation. Canada pays it substantial subsidies for doing so. Marine Atlantic also provides service between North Sydney and Argentia, Newfoundland and Labrador.

[2] The appellant Oceanex Inc., a privately-owned corporation, is a competitor of Marine Atlantic. It provides, among other things, freight service between Halifax and St. John's, and Montreal and St. John's. It has repeatedly complained to the federal government about the low rates charged by, and the level of federal subsidies paid to, Marine Atlantic, which it maintains distort the market and cause it harm. It has also complained of the failure, in setting Marine Atlantic's rates, to take into account the National Transportation Policy set out in section 5 of the *Canada Transportation Act*, S.C. 1996, c. 10. The NTP states in part that the objectives that it declares – which include "a competitive, economic and efficient national transportation system" – are "most likely to be achieved when […] competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services […]."

[3] Not satisfied with the response to its complaints, Oceanex brought an application for judicial review in the Federal Court challenging the approval of Marine Atlantic's 2016/17 commercial freight rates. Though its notice of application referred to Marine Atlantic's commercial freight rates without qualification, the focus of the application was the rates charged on the constitutional route. In its amended notice of application, Oceanex described the decision that it sought to have reviewed as the decision of the federal Minister of Transport to approve the rates, or alternatively, the Minister's failure to approve them, the Minister's decision to pre-authorize rate increases up to 5%, the Minister's decision to allow Marine Atlantic to approve the rates, or Marine Atlantic's decision to approve them. The core ground for the application was that, regardless of how and by whom the rate decision was made, the decision-maker had erred in law by failing to consider the NTP.

[4] The amended notice of application also asserted that the Terms of Union create no constitutional obligation to approve rates on the constitutional route that are inconsistent with the NTP. This constitutional issue, and the potential for the Court's decision to affect the subsidies paid to Marine Atlantic for service on the constitutional route, attracted the intervention of the Attorney General for Newfoundland and Labrador. He expressed the concern that any decision that reduces or eliminates Marine Atlantic's federal subsidy would detrimentally affect the economy and well-being of the citizens of the province.

[5] The Federal Court dismissed the application: *Oceanex Inc. v. Canada (Transport)*, 2018 FC 250 (Strickland J.), 36 Admin. L.R. (6th) 181. In lengthy reasons, the Federal Court carefully reviewed the competing submissions and the corresponding portions of the record. It first

considered who, as between the Minister and Marine Atlantic, made the decision to implement the 2016/17 rates, and concluded that it was Marine Atlantic. It determined, however, that in making this decision, Marine Atlantic was not a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and that, as a result, subsection 18(1) of the *Federal Courts Act* did not give the Federal Court jurisdiction to review the decision. This was so even though the rate decision had a public aspect and was not either purely of a private and commercial nature or incidental to the exercise of Marine Atlantic's general powers of corporate management.

[6] Though it recognized that it was unnecessary to do so, the Federal Court proceeded, in the event its decision on jurisdiction was in error, to consider a number of the other issues raised by the parties. It found that Oceanex did not have direct standing to bring the application, because it was not directly affected by the rate decision, but exercised the discretion to grant Oceanex public interest standing. It held that the NTP was not a required consideration in setting the 2016/17 rates, so that the failure to consider the NTP when setting the rates was not a reviewable error. And it held that if (contrary to its conclusion) the NTP was a required consideration in setting the 2016/17 rates, the NTP could not limit the level of public costs assumed by Canada in meeting its constitutional obligation under the Terms of Union. It declined in light of its other conclusions to consider whether the decision on the 2016/17 rates was unreasonable on the basis that it was made without taking the NTP into consideration.

[7] Oceanex now appeals to this Court. It makes two main submissions. The first is that the Federal Court erred in failing to find that the Minister became "accountable" for the decision on

the 2016/17 rates when he recommended Marine Atlantic's corporate plan for approval of the Governor in Council under the *Financial Administration Act*, R.S.C. 1985, c. F-11. Once that submission is accepted, it submits, it follows that the Federal Court had jurisdiction, because in recommending the corporate plan under the *FAA* the Minister was a "federal board, commission or other tribunal" subject to judicial review.

[8] The second main submission is that the Federal Court erred in concluding that the Minister was not required in making his recommendation to consider the NTP in relation to the 2016/17 rates. Once that submission is accepted, Oceanex argues, this Court should set aside the dismissal of its application, grant a declaration that the Minister erred in law in failing to consider the NTP, and make an order requiring the Minister to have regard to the NTP going forward. Oceanex argues in the alternative that if it was Marine Atlantic that made the rate decision, then it too was required to consider the NTP, and the Federal Court erred in concluding that Marine Atlantic was not subject to the judicial review jurisdiction of the Federal Court and in failing to grant relief. Oceanex also submits that the Federal Court erred in finding that the Terms of Union and the NTP are incompatible, and erred in denying it direct standing.

[9] For the reasons that follow, I would dismiss the appeal. As will become apparent, these reasons differ in a number of respects from the reasons of the Federal Court. That is in no small part because, as I perceive the way in which the arguments unfolded, Oceanex argues the case in this Court on the first main issue on a basis substantially different from that on which it was argued in the Federal Court. I also hold a different view from that of the Federal Court on the question of jurisdiction.

[10] In brief, I conclude that the Federal Court made no reviewable error in determining that Marine Atlantic made the rate decision, but that the Federal Court erred in concluding that the decision was not subject to judicial review. However, that error does not lead to the granting of the appeal, because the Federal Court correctly determined that there was no legal requirement in setting the rates to consider the NTP. I would not give effect to Oceanex's submission that the Minister became "accountable" for the rates when he recommended Marine Atlantic's corporate plan for approval by the Governor in Council. That was not the decision challenged by Oceanex when it brought its application for judicial review. I would decline to decide the question of the potential incompatibility of the NTP with the Terms of Union.

II. Standing

[11] Before turning to the principal issues, I will deal briefly with the issue of standing. In my view, it is unnecessary to deal at any length with Oceanex's submission that it should have had direct standing, or the respondents' submissions that Oceanex should not have been granted public interest standing. Public interest standing is a matter of discretion, to be exercised in a purposive, flexible, and generous manner: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 53, [2012] 2 S.C.R. 524. A discretionary decision of the Federal Court is reviewable, absent an error of law, only on the stringent standard of palpable and overriding error: *Cree Nation of Eeyou Istchee (Grand Council) v. McLean*, 2019 FCA 185 at para. 3, 306 A.C.W.S. (3d) 451. In deciding to grant Oceanex public interest standing, the Federal Court considered the relevant factors and gave particular emphasis to the concern that rate decisions raising serious justiciable issues might otherwise be immune from review. I see no basis to interfere with its exercise of discretion.

[12] Unless expressly limited, standing is standing, regardless of the basis on which it is acquired. Once Oceanex was granted public interest standing, its position was the same for all practical purposes as if it had direct standing. There is therefore no need to consider the standing issue further.

III. The remaining issues

[13] The issues that remain, then, are whether the Federal Court erred in

- failing to find that the Minister set, or was "accountable" for, the 2016/17 rates;
- determining that it had no jurisdiction to review the rate decision;
- concluding that it was not necessary to consider the NTP in setting the rates; and
- concluding that if the NTP had to be considered in setting the rates, the NTP could not constrain the level of costs assumed by Canada in meeting its constitutional obligation to provide ferry service on the constitutional route.

[14] To the extent that standard of review applicable to these issues requires consideration, I will deal with it in addressing the substantive issues.

IV. Did the Federal Court err in in failing to find that the Minister set, or was "accountable" for, the 2016/17 rates?

[15] The focus of Oceanex's first main submission appears, especially in light of its oral argument before this Court, to have shifted significantly from what it was in the Federal Court. There Oceanex argued that the Minister made the decision, not Marine Atlantic. It advanced two principal reasons for this submission: first, that the Minister controlled the terms and conditions of the operation and management of the ferry service on the constitutional route, and second, that

the Minister and his department, Transport Canada, were heavily involved in the preparation of Marine Atlantic's 2016/17-2020/21 corporate plan (Federal Court reasons at paras. 57 to 61). Marine Atlantic is a "parent Crown corporation" within the meaning of the *FAA* – a corporation that is wholly owned directly by the Crown. By section 122 of the *FAA*, it is therefore required to submit annually to the Minister a corporate plan for the approval of the Governor in Council on the Minister's recommendation. It is also required to carry on business in a manner consistent with its last approved corporate plan. Marine Atlantic's corporate plan for 2016/17-2020/21 included the 2016/17 rates.

[16] The Federal Court rejected Oceanex's submission. After reviewing the history of rate-setting on the constitutional route since 1949 and summarizing the evidence and the parties' positions, it concluded (at para. 186) that it was Marine Atlantic, and not the Minister, that made the decision on the 2016/17 rates. It determined that there was no legislative obligation on the Minister to set specific rate levels, and that nothing in the relationship between the Minister and Marine Atlantic established that Canada controlled Marine Atlantic, to the extent that the Minister effectively made the decision on the 2016/17 rates. It found that, while an agreement between the Minister and Marine Atlantic, known as the "Bilateral Agreement", had given the Minister a contractual right to approve the rates, the parties to that agreement had made and acted on an informal amendment to the agreement that authorized Marine Atlantic to set the rates by up to a 5% increase without ministerial approval. Acting in accordance with this amendment, the board of Marine Atlantic made the decision on its own to increase the 2016/17 rates by 2.6%.

[17] In oral argument in this Court, Oceanex submitted that its case did not depend on whether or not the Minister made the rate decision, and acknowledged that it was Marine Atlantic that made the specific decision to increase the rates by 2.6%. However, it argued that the Minister was "accountable" for the rate decision, because he has an implied supervisory power under the *FAA* to question Marine Atlantic's rate assumptions, and because he recommended to the Governor in Council for approval under the *FAA* a corporate plan for Marine Atlantic that included the rates. It submitted that this recommendation was subject to judicial review if the Minister allowed Marine Atlantic to set rates that were inconsistent with the NTP.

[18] Given the course of the argument, and Oceanex's acknowledgment, it may not be strictly necessary for this Court to review the Federal Court's finding that it was Marine Atlantic that made the rate decision. I would in any event not disturb this finding. It was a heavily factually suffused determination of a question of mixed fact and law. Under *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, it is reviewable, absent an extricable error of law, only for palpable and overriding error. While ordinarily, according to *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559, this Court's task in an appeal from the judgment of the Federal Court in an application for judicial review is to determine whether the Federal Court selected the correct standard of review and applied it correctly, the *Housen* and not the *Agraira* standard applies where, as on this issue, the Federal Court made findings of fact or mixed fact and law based on the consideration of evidence at first instance, rather than on a review of the administrative decision: *Apotex Inc. v. Canada (Health)*, 2018 FCA 147 at paras. 56-58, 157 C.P.R. (4th) 289.

[19] As the reasons of the Federal Court make clear, there was ample evidence to support the conclusion that it was Marine Atlantic that made the rate decision. This included evidence that the rates were set by the board of Marine Atlantic and that they came into effect before the corporate plan approval process was completed. I see no palpable and overriding error on the part of the Federal Court in coming to this conclusion. Nor do I see any extricable error of law.

[20] This conclusion leaves the question whether, as Oceanex now submits, the Federal Court erred in failing to find that the Minister was "accountable" for the rate decision, having recommended Marine Atlantic's corporate plan, which set out the rates, for approval by the Governor in Council in accordance with the *FAA*. In my view, the short answer to this question is that even if the Minister's recommendation could render the Minister legally accountable for Marine Atlantic's rates, Oceanex's application did not challenge that recommendation. The Federal Court cannot be faulted for failing to accede to a challenge that was not made.

[21] There was no reference in Oceanex's original or amended notice of application to the Minister's recommendation of the corporate plan. Rather, as noted above, the amended notice of application challenged the Minister's decision to approve the rates, or alternatively his failure to approve them, his decision to pre-authorize rate increases up to 5%, his decision to allow Marine Atlantic to approve the rates, or Marine Atlantic's decision to approve them. The only *FAA*-related grounds put forward were that the Minister, or alternatively Marine Atlantic, failed to consider or violated the *FAA*.

[22] Similarly, the only reference to the *FAA* in the notice of appeal is in the list of legislation relied on. The errors Oceanex alleges include nothing that relates to the Minister's recommendation of the corporate plan.

[23] In Oceanex's memorandum of fact and law filed with this Court, there is one reference to accountability (in para. 5(a)), but it asserts error by the Federal Court in failing to consider whether, having delegated to Marine Atlantic his rate-setting power, the Minister remained legally accountable for the exercise of a power he allowed to be exercised on his behalf. This is an argument different from the argument now put to the Court, which depends on the *FAA*. The *FAA* is mentioned in two paragraphs of the memorandum (paras. 29 and 30), but not in relation to the argument of accountability based on delegation. The first of the two sets out the requirement under the *FAA* that a parent Crown corporation submit an annual corporate plan for approval by the Governor in Council (and operating and capital budgets for approval of the Treasury Board), and states that Marine Atlantic and the Minister "work very closely together to ensure that [Marine Atlantic] has a corporate plan in place which reflects the direction it receives from the government and how [Marine Atlantic] will deliver on its mandate." There is no reference to any error on the part of the Federal Court or any legal "accountability" arising from the plan process. The second of the two merely points to the *FAA* as the authority for the contract between Canada and Marine Atlantic establishing the terms on which ferry services were to be provided.

[24] In these circumstances, it would in my view be inappropriate for this Court to address, let alone give effect to, Oceanex's argument that the Federal Court erred in failing to find that in

approving Marine Atlantic's corporate plan, the Minister became "accountable" for the 2016/17 rates. I will therefore proceed to consider the further issues solely on the basis of the finding of the Federal Court that it was Marine Atlantic that made the 2016/17 rate decision.

V. Did the Federal Court err in determining that it had no jurisdiction to review the rate decision?

[25] Whether the Federal Court had jurisdiction to judicially review the rate decision is a question of law, to which the standard of correctness applies on appeal: *Canada (Judicial Council) v. Girouard*, 2019 FCA 148 at para. 30, 52 Admin. L.R. (6th) 24.

A. *The Federal Court's judicial review jurisdiction*

[26] By subsection 18(1) of the *Federal Courts Act*, the Federal Court has jurisdiction in applications for judicial review of decisions of a "federal board, commission or other tribunal" (except those tribunals in respect of which this Court has jurisdiction under section 28 of the Act): see *Girouard* at para. 31.

[27] The term "federal board, commission or other tribunal" is defined in subsection 2(1) of the Act. Subject to certain exceptions not relevant in this context, the definition includes a body that has, exercises, or purports to exercise jurisdiction or powers that are conferred by or under either an Act of Parliament or an order made pursuant to the Crown prerogative:

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act	**office fédéral** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus

of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.	par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[28] Despite the reference in the definition to "an order made pursuant to a prerogative of the Crown," properly read the definition extends to exercises of jurisdiction or power "rooted solely in the federal Crown prerogative": *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para. 58, 379 D.L.R. (4th) 737.

[29] This Court set out in *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 at paras. 29-30, 400 N.R. 137, a two-step inquiry for determining whether an entity is a "federal board, commission or other tribunal": the court must first identify the jurisdiction or power at issue, and then identify the source or the origin of that jurisdiction or power. The Court in *Anisman* cited with approval a passage in D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, in which the authors state that it is "the source of a tribunal's authority, and not the nature of either the power exercised or the body exercising it, [that] is the primary determinant of whether it falls within the [subsection 2(1)] definition." This Court reiterated the *Anisman* test in *Girouard* (at paras. 34, 37).

[30] The Supreme Court recently revisited the law governing the availability of judicial review in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, a case decided after the Federal Court's decision here, and one not involving the *Federal Courts Act*. In doing so it emphasized (at para. 14) that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" (emphasis added). It agreed with the observation by my colleague Justice Stratas in *Air Canada v. Toronto Port Authority Et Al*, 2011 FCA 347 at para. 52, [2013] 3 F.C.R. 605, that bodies that are public may nonetheless make decisions that are private in nature – the Court referred as examples to renting premises and hiring staff – and that these private decisions are not subject to judicial review.

[31] The Supreme Court went on to state (at para. 20) that "a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power," and added that "[s]imply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making." This Court has held, in effect, that the same prerequisite applies in determining reviewability under the *Federal Courts Act* – that "it is necessary to consider whether the powers exercised by the body in a particular instance are public in nature or of a private character": *Zaidi v. Immigration Consultants of Canada Regulatory Council*, 2018 FCA 116 at paras. 6, 8-9, 293 A.C.W.S. (3d) 370, citing *Air Canada* and referring to the factors that may assist in making this determination that it sets out.

B. *The Federal Court's decision on jurisdiction*

[32] After quoting from *Anisman*, the Federal Court began (at para. 201) its consideration of whether it had jurisdiction to review Marine Atlantic's determination of the 2016/17 rates by addressing the source of Marine Atlantic's power to make this determination. It first considered whether the power was conferred, in the language of the definition of "federal board, commission or other tribunal," "by or under an Act of Parliament."

[33] As the Court had discussed earlier in its reasons (at para. 5), Marine Atlantic is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and a parent Crown corporation as defined in subsection 83(1) of the *FAA*. Subsection 15(1) of the *CBCA* gives Marine Atlantic, like other *CBCA* corporations, the capacity and, subject to the Act, the rights, powers, and privileges of a natural person. Subsection 102(1) of the *CBCA* gives the directors, subject to any unanimous shareholder agreement, the authority to manage, or supervise the management of, its business and affairs.

[34] Section 109 of the *FAA*, similarly, gives the board of directors of a Crown corporation responsibility for the management of the businesses, activities, and other affairs of the corporation, subject to Part X of the *FAA*. The potential constraints to which the board of a parent Crown corporation are subject under Part X include the power of the Governor in Council under section 89, on the recommendation of the Minister, to give a directive to the corporation, and the obligation of the directors under section 89.1 to see that the directive is implemented. In addition, by subsection 122(5), no parent Crown corporation may carry on any business or activity in a manner that is not consistent with its last approved corporate plan.

[35] The Federal Court first determined (at para. 201) that Marine Atlantic's power to set its rates was not conferred by "any federal legislative authority for rate-setting," but rather that its board acted "pursuant to the general corporate authority afforded by the CBCA and/or the FAA to conduct the business of the corporation," including the power to enter into and amend the Bilateral Agreement. However, it expressed the view (at paras. 202 and 203) that the *CBCA* was not an "Act of Parliament" within the meaning of the term in the definition of "federal, board commission or other tribunal," because this would mean that decisions of "all of the thousands of CBCA incorporated companies" would be subject to judicial review if the decisions were deemed to be of a public character. It also rejected Oceanex's submission that the *FAA* was a source of Marine Atlantic's rate-setting power, in part on the basis that the *FAA* "applies to all Crown corporations" and "does not address [Marine Atlantic] specifically."

[36] The Federal Court then proceeded to determine (at para. 219) that Marine Atlantic's power to set rates did not derive from the Crown prerogative, but rather arose from the terms and conditions of the Bilateral Agreement with the Minister and was therefore "contractual." It further found (at para. 220) that even if a rate-setting power was conferred "indirectly" on the Minister through the order-in-council that approved his entering into the Bilateral Agreement, that agreement was subsequently amended by its parties without, and without the necessity for, an order-in-council, so that the prerogative was not engaged. The Court therefore concluded (at para. 224) that Marine Atlantic was not a "federal board, commission or other tribunal" when it made the rate decision. It followed that the Court had no jurisdiction to review the decision.

[37] However, the Court went on to consider (at paras. 225 and following), in the event that its conclusions on jurisdiction were wrong, whether Marine Atlantic's rate-setting was of a "public character." Before making its assessment, the Federal Court set out (at para. 227) the non-exhaustive list of factors set out in *Air Canada* (at para. 60, citations omitted), noting that no one factor is determinative:

> ● *The character of the matter for which review is sought*. Is it a private, commercial matter, or is it of broader import to members of the public?
>
> ● *The nature of the decision-maker and its responsibilities*. Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?
>
> ● *The extent to which a decision is founded in and shaped by law as opposed to private discretion*. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public. This is all the more the case if that public source of law supplies the criteria upon which the decision is made. Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review.
>
> ● *The body's relationship to other statutory schemes or other parts of government*. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter. Mere mention in a statute, without more, may not be enough.
>
> ● The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature. A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant.
>
> ● *The suitability of public law remedies*. If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature.

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

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

[38] The Court concluded (at para. 234) that Marine Atlantic provides the services on the constitutional route because of "Canada's constitutional obligation to do so," and that, based on the evidence, "Canada views its constitutional obligation as not simply providing a ferry service […] but to provide a service that, by its rates, is accessible to its public users." The Court found that, in this sense, Marine Atlantic's rate decision had "a public element." In light of this finding, it concluded (at para. 235) that the decision had "a public aspect and was not purely of a private or commercial nature [or] incidental to the exercise of [Marine Atlantic's] general powers of management […]." However, this conclusion did not lead to reviewability because, as it had already determined, the decision was not grounded in either statute or the prerogative.

C. *Analysis*

[39] In my view, the Federal Court erred in concluding that it did not have jurisdiction to review the rate decision that it found was made by Marine Atlantic. In making the rate decision, Marine Atlantic was exercising its powers of a natural person conferred by an Act of Parliament – the *CBCA* – and the Federal Court was wrong to read that statute out of the definition of "federal board, commission or other tribunal." In view of its role as a Crown corporation

fulfilling a constitutional obligation, Marine Atlantic is a public body, and its rate decision was of a public not a private character. The central issue raised by the application for judicial review was one of the legality of state decision-making concerning the rates on the constitutional route.

(1) Source of Marine Atlantic's power to set the rates

[40] I agree with the Federal Court to the extent that it concluded that the source of Marine Atlantic's power to set the rates was its rights, powers, and privileges of a natural person conferred by subsection 15(1) of the *CBCA*, including its power to contract. A statutory grant of the powers of a natural person includes the right to enter into and perform contracts: *C.U.P.W. v. Canada Post Corp*., 1996 CanLII 12458 at para. 15, 135 D.L.R. (4th) 80 (F.C.A.); *Friedmann Equity Developments Inc. v. Final Note Ltd*., 2000 SCC 34 at para. 34, [2000] 1 S.C.R. 842. Here the parties' amendment to the Bilateral Agreement gave Marine Atlantic the authority to set the rates up to an increase of 5%.

[41] For clarity, I should say that I would not, as the Federal Court appeared to do, also treat subsection 102(1) of the *CBCA* and section 109 of the *FAA*, referred to above, as sources of Marine Atlantic's rate-setting power. These provisions give the directors management authority within the corporation. They do not specify the powers of the corporation itself.

[42] As I have already stated, I also disagree with the Federal Court's conclusion that the *CBCA* is not an "Act of Parliament" within the meaning of the definition of "federal board, commission or other tribunal" in the *Federal Courts Act.* I do so for several reasons.

[43] First, the Federal Court's conclusion is inconsistent with the plain meaning of the definition. It refers to powers conferred by or under "an Act of Parliament" / "une loi féderale" without qualification.

[44] Second, a limited reading of "Act of Parliament" would not accord with the overall purpose of sections 18 and 18.1 of the *Federal Courts Act* – to transfer from provincial superior courts to the Federal Courts a broad jurisdiction to review federal administrative decisions: see *Hupacasath* at paras. 52-54; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 at 705, 184 N.R. 260 (C.A.). The Federal Court itself noted (at para. 199, citing *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62 at para. 3, [2010] 3 S.C.R. 585), that "the definition of 'federal board, commission or other tribunal' is sweeping, encompassing decision-makers that 'run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between.'"

[45] These decision makers can certainly include Crown corporations. As one commentator has observed, "important regulatory decisions in a variety of fields are clearly made either directly or indirectly by Crown corporations": Alastair A. Lucas, "Judicial Review of Crown Corporations," (1987), 25 Alta. L. Rev. 363 at 363. While the majority of parent Crown corporations are created by Parliament through legislation that is specific to them, and that sets out their mandate and powers (see, for example, *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, ss. 5, 16), others are incorporated under general company legislation like the *CBCA*, which is then the source of their powers. Marine Atlantic is in the latter category. Others in that

category include Canada Development Investment Corporation, The Federal Bridge Corporation, PPP Canada Inc., and VIA Rail Canada Inc.: see Government of Canada, "Overview of federal organizations and interests" (16 August 2016), online: <https://www.canada.ca/en/treasury-board-secretariat/services/reporting-government-spending/inventory-government-organizations/overview-institutional-forms-definitions.html>; Treasury Board of Canada Secretariat, "Annual Report to Parliament: Crown Corporations and Other Corporate Interests of Canada 2010", online: <http://publications.gc.ca/collections/collection_2011/sct-tbs/BT1-15-2010-eng.pdf>.

[46] Since there are no common law corporations, all corporations are creatures of statute, and their powers are always entirely statutory: see *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 25, 286 D.L.R. (4th) 129, leave to appeal refused, [2008] 1 S.C.R. ix. The reviewability of a decision of a public character taken by a parent Crown corporation under a power conferred by statute should not turn on whether the statute is specific or general.

[47] Third, the "floodgates" concern that appears to have animated the Federal Court's conclusion on this issue is in my view exaggerated, and does not justify a limited interpretation. Both the case law of this Court and now the Supreme Court's decision in *Highwood* make clear that judicial review is limited to decisions by public bodies that have a "public character." I endorse the observation of the British Columbia Court of Appeal in *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 at para. 49, 435 D.L.R. (4th) 111 – a case decided after *Highwood* – that "[i]t appears clear, based on Air Canada that the

mere existence of a statutory power will not suffice to allow a purely private matter to be judicially reviewed under the provisions of the Federal Courts Act […].”

[48] As to whether the source of Marine Atlantic’s power to set the rates was the Crown prerogative, I agree with the Federal Court that the setting of the rates was a matter of contractual responsibility, so that, as already discussed, its source was instead Marine Atlantic’s statutory power to contract. In light of the Federal Court’s conclusion that it was not the Minister but Marine Atlantic that set the rates, whether the source of the Minister’s power was the prerogative would be relevant only if Marine Atlantic exercised its rate-setting power as the delegate of the Minister. I see no basis to interfere with the Federal Court’s conclusion (at para. 219) that there was no delegation, but a reassignment of responsibility by contract.

(2) Character of the decision

[49] I also agree with the Federal Court that the rate-setting decision had a public character.

[50] I should perhaps first observe that despite certain comments by the Supreme Court in *Highwood*, there was in my view nothing problematic in the Federal Court’s reference to the factors set out in *Air Canada* in considering this question. In *Highwood*, the Supreme Court commented (at para. 21) that some confusion had arisen from courts’ reliance on *Air Canada* to determine the “public” nature of matters, and thus whether they were subject to judicial review. It stated that “what Air Canada actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged.”

[51] I see this caution concerning the *Air Canada* factors as limited to their use to conclude that a matter is "public" and amenable to judicial review without first being satisfied that the decision-maker was a public body exercising "state authority." In my view the factors remain available and helpful in determining what they were used for in *Air Canada* itself. None of the cases cited by the Supreme Court in expressing its concern were decisions of the Federal Courts. Indeed, the Federal Courts are arguably best equipped to follow the Supreme Court's direction in *Highwood*, because judicial review jurisdiction under the *Federal Courts Act* requires an initial finding that the power exercised is a "state" power – one sourced in statute or Crown prerogative. The *Air Canada* factors can then be used to ensure that its exercise is of a "sufficiently public character," consistent with *Highwood*, or to determine that it is "private" and therefore not reviewable.

[52] In my view, it is apparent that Marine Atlantic is a public body for purposes of judicial review. It is, again, a parent Crown corporation, wholly owned directly by the Crown and subject to the requirements of Part X of the *FAA*. The Treasury Board describes Crown corporations as "government organizations that operate following a private sector model, but usually have a mixture of commercial and public policy objectives": "Overview of federal organizations and interests" (emphasis added). As another indicator of their public nature, by section 3 and subsection 4(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1, parent Crown corporations are "government institutions" subject to that Act.

[53] There can also be no doubt that Marine Atlantic has a "public policy objective." Its corporate plan summary refers to Canada's constitutional obligation to provide ferry service on

the constitutional route, and states that Marine Atlantic "exists to fulfill that mandate." The Bilateral Agreement recites that "Her Majesty has for some time used the Corporation as her principal instrument for providing certain federally supported ferry and coastal shipping services."

[54] As for the nature of the rate decision itself, I share the Federal Court's view, to which it came (at para. 235) after considering the *Air Canada* factors, that it is of a public character, and cannot properly be said to be private and commercial in nature. To use the terminology employed in *Highwood*, the decision is public in a "public law sense," not merely in a "generic sense." Its public nature is not a function simply of its broad public impact. It arises from Marine Atlantic's role in fulfilling Canada's constitutional obligation, and from the potential effect of the rates on accessibility of the service that Canada is constitutionally required to provide. And Oceanex's challenge to the decision based on the failure to consider the NTP raises an issue of public law, going to the legality of state decision making.

[55] The decisions of other Crown corporations have been subjected to judicial review when they were exercising powers of a public character: see, for example, *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427; *Rural Dignity of Canada v. Canada Post Corp.*, (1991), 40 F.T.R. 255, 78 D.L.R. (4th) 211, affirmed (1992), 139 N.R. 203 (F.C.A.), 88 D.L.R. (4th) 191, leave to appeal refused, [1992] 2 S.C.R. ix. These cases recognize the suitability of public law remedies – one of the *Air Canada* factors – where a Crown corporation is exercising powers of this nature. In my view the prerequisites for judicial review of the rate decision by Marine Atlantic are equally made out here.

VI. Did the Federal Court err in concluding that it was not necessary to consider the NTP in setting the rates?

[56] In light of my conclusion that the Federal Court had jurisdiction to hear Oceanex's application, it is appropriate in my view for this Court to decide the issue of the applicability of the NTP to the rate decision that the Federal Court found was made by Marine Atlantic. While Oceanex's main argument on the application of the NTP assumed that the rate decision was made by the Minister, it argued in the alternative, and also submits on appeal, that if Marine Atlantic made the decision, then it too was legally bound to consider the NTP.

[57] The parties are in agreement that the standard of review on this issue is correctness, because it raises a question of statutory interpretation, and thus a question of law. I am content to proceed on that basis.

[58] It could be argued that Marine Atlantic implicitly interpreted the *CTA* as not requiring it to consider the NTP, and that this implicit decision attracts the presumption of reasonableness review that applies to a decision maker's interpretation of its home statute: see *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras. 2, 22, [2016] 2 S.C.R. 293. However, "[t]he presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing": *Edmonton East* at para. 33. Here there is no ground to conclude that Parliament chose to give this type of responsibility to Marine Atlantic in relation to the *CTA*: Marine Atlantic has no role in relation to the *CTA* that would give the *CTA* status as a "home statute" so as to trigger the presumption. In any event, this appears to be a case in which

standard of review makes no practical difference, because "the ordinary tools of statutory interpretation lead to a single reasonable interpretation": see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38, [2013] 3 S.C.R. 895; *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228 at para. 78, [2015] 4 F.C.R. 437.

A. *The NTP*

[59] Section 5 of the *CTA*, in which the NTP is set out, reads in full as follows:

National Transportation Policy	**Politique nationale des transports**
Declaration	**Déclaration**
5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when	**5** Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :
(*a*) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;	*a*) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
(*b*) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do	*b*) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la

not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;	concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;
(*c*) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;	*c*) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada*;*
(*d*) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and	*d*) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;
(*e*) governments and the private sector work together for an integrated transportation system.	*e*) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

[60] Section 5 is preceded by two provisions that figured prominently in Oceanex's argument, sections 2 and 3:

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

[61] There are two references to the NTP elsewhere in the *CTA*. First, paragraph 50(1)(*a*) authorizes the Governor in Council to make regulations requiring persons involved in transportation who are subject to federal legislative authority to provide information to the Minister of Transport for the purposes of national transportation policy development. This authority has been exercised in the *Transportation Information Regulations*, SOR/96-344, which

require marine operators, among others, to provide information. The definition of “marine operator” appears to include Marine Atlantic.

[62] The second reference is in section 53. Subsection 53(1) requires the Minister, no later than eight years after the day the subsection came into force, to commission “a comprehensive review of the operation of [the] Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.”

[63] Subsection 53(2) states that this review is to assess whether this legislation “provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5,” and that it may recommend amendments to the NTP or the legislation. Counsel advised that the review has been conducted; the provision is therefore spent.

[64] The *CTA* contains no provisions regulating rates for marine transportation. Its principal provisions that extend to marine transportation are those set out in Part V, which give the Canadian Transportation Agency certain powers respecting the transportation of persons with disabilities.

[65] Two federal statutes apart from the *CTA* refer to the NTP. First, subsection 3(1) of the *Motor Vehicle Transport Act*, R.S.C. 1985, c. 29 (3rd Supp.), states that the objectives of the Act include “[ensuring] that the National Transportation Policy set out in section 5 of the *Canada Transportation Act* is carried out with respect to extra-provincial motor carrier undertakings

[…].” Second, subsection 34(2) of the *Pilotage Act*, R.S.C. 1985, c. P-14, permits any interested person with reason to believe that any charge in a proposed tariff of pilotage charges is prejudicial to the public interest, including “the public interest that is consistent with the national transportation policy set out in section 5 of the *Canada Transportation Act*,” to file a notice of objection with the Agency. By section 35, the Agency may then investigate, including by holding a hearing, and make recommendations to the Pilotage Authority.

[66] There is no reference to the NTP in the *Canada Marine Act*, S.C. 1998, c. 10, which like the *Pilotage Act* applies to marine transportation. It includes, in section 4, its own purpose statement, cast in different terms.

B. *The Federal Court’s decision on applicability of the NTP*

[67] The Federal Court described this issue (at para. 301) as the “central issue” in the application. However, it is worth repeating that its decision on the issue was premised on its having erred in concluding that Marine Atlantic was the decision maker and that the Court was without jurisdiction. The majority of the submissions made on this issue appear to have been based on the assumption that it was the Minister who made the decision. The Federal Court’s conclusions on this issue reflect the same assumption.

[68] In addressing the applicability of the NTP, the Federal Court first considered the *CTA* as a whole, noting (at para. 320) that it does not expressly address marine transportation. It then turned to three decisions directly bearing on the interpretation of the NTP – *Ferroequus Railway Co. v. Canadian National Railway Co*., 2003 FCA 454, [2004] 2 F.C.R. 42; *Canadian National*

Railway Co. v. Moffat, 2001 FCA 327, [2002] 2 F.C. 249; and *Jackson v. Canadian National Railway*, 2012 ABQB 652, 73 Alta. L.R. (5th) 219, affirmed, 2013 ABCA 440, 91 Alta. L.R. (5th) 401, leave to appeal refused, [2014] 2 S.C.R. vii.

[69] In *Ferroequus* and *Moffat*, this Court considered the role of the NTP in the Canadian Transportation Agency's exercise of its powers under the *CTA*. *Ferroequus* involved an application by a railway company to the Agency for a "running rights" order, authorizing it to operate over another railway company's tracks. An order of this kind is available at the discretion of the Agency under section 138 of the *CTA*, having regard to "the public interest." This Court held (at para. 21) that the NTP informed and imposed legal limitations on the Agency's exercise of discretion under section 138. However, this Court also observed (at para. 22) that the policy expresses competing considerations, and so necessarily operates at "some level of generality" in guiding and structuring the Agency's exercises of discretion.

[70] *Moffat* concerned the Agency's jurisdiction to inquire into the application of the Terms of Union to the setting of freight rates. In determining that the Agency did not have this jurisdiction, this Court held (at para. 27) that the NTP is "not a jurisdiction conferring provision," but a declaratory provision setting out certain objectives to be "implemented by the regulatory provisions of the CTA and, in the current largely deregulated environment, by the absence of regulatory provisions." The Supreme Court has held, similarly, that "declarations of policy" do not confer jurisdiction on subordinate bodies, but rather "describe the objectives of Parliament in enacting the legislation": *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para. 22, [2012] 3 S.C.R. 489; see also

West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22 at para. 85, [2018] 1 S.C.R. 635 (Côté J., dissenting).

[71] In *Jackson*, the Alberta Court of Queen's Bench refused to certify a proposed class action, in part in reliance on this Court's reasoning in *Ferroequus* and *Moffat*. The plaintiff in *Jackson* alleged that railway freight rates did not reflect decreased operating costs, and therefore contravened the NTP, resulting in unjust enrichment. The Court disagreed, concluding (at paras. 57-63) that the policy is a "purpose statement" that imposes no duty on railways to charge rates reflecting efficiencies they have realized.

[72] The Federal Court then considered the guidance in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014). The author states (at § 14.39-40) that "like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation […] are to be interpreted," and that "statements of purpose and principle do not create legally binding rights or obligations [but] merely state goals or principles that may be referred to in interpreting the rights and obligations that are created elsewhere in the legislation."

[73] Taking account of these authorities, the Federal Court held (at paras. 337-338) that the NTP is a purpose clause that does not itself create any legally binding rights or obligations, but rather aids in the interpretation of the rights and obligations created elsewhere in, and guides exercises of power under, the *CTA*. It reiterated that the *CTA* contains no provisions relating to the regulation or oversight of maritime freight rates and confers no powers on any entities to

make maritime freight rate decisions, or address complaints arising from rate decisions. It concluded (at para. 340) that because the decision under review had not been made under the *CTA*, the NTP did not limit the Minister's discretion in making it.

[74] The Court went on to state (at paras. 342-347) that sections 2 and 3 of the *CTA* did not change these conclusions. It reasoned that section 2 simply serves to displace the ordinary presumption of Crown immunity. Neither it nor section 3 expands the substantive provisions of the *CTA*.

[75] The Federal Court accordingly concluded (at para. 360) that the NTP was not a required consideration in the making of the rate decision.

C. *Analysis*

[76] I substantially agree with the reasoning of the Federal Court on this issue. In my view, it reflects a proper application of the required textual, contextual, and purposive approach to the interpretation of section 5 of the *CTA*: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193. It is also fully consistent with the authorities, including this Court's decision in *Moffat*. Indeed, *Moffat* can be read as having decided the issue in a manner that was binding on the Federal Court.

[77] In particular, I agree that sections 2 and 3 of the *CTA*, on which Oceanex heavily relies again in this Court, do not advance its position. The Federal Court properly concluded that the role of section 2 is merely to displace the presumption of Crown immunity, rather than to render

the NTP a substantive limitation on the exercise of regulatory authority. The form of words employed in section 2 is found in more than 100 other federal statutes. In each instance it appears, as it does in the *CTA*, under the heading "Binding on Her Majesty."

[78] As for section 3, it is not meaningless, as Oceanex suggested, if it is not interpreted as requiring the Minister, in making decisions, to consider the NTP. Rather, it plays a role in ensuring that both the limited provisions of the *CTA* that refer to the NTP, and the regulatory provisions that the *CTA* does contain, are given their proper application. The references to the NTP in the *Motor Vehicle Transport Act* and the *Pilotage Act*, and the absence of a reference in the *Canada Marine Act*, are a strong indication that when Parliament has wanted the NTP to apply outside the *CTA* context, it has expressly said so.

[79] In support of its position on appeal, Oceanex also refers to the text of the NTP itself. It points out that the text speaks of "strategic public intervention." It argues that this encompasses the expenditure of public funds in the form of subsidies, and is therefore conduct that only the government or the Minister, and not the Agency, can undertake. I would also reject this argument. The issue is not whether the NTP applies to the government, but whether it applies to government action not taken under the *CTA*. Further, as set out in *Moffat*, the Agency does have certain powers of "public intervention" under the *CTA*, including the power to make orders affecting the rights of railway owners, when it is in the public interest to do so. These powers simply do not extend to marine transportation.

[80] For these reasons, I would not interfere with the Federal Court's determination that if the Minister made the rate decision, he was not required to consider the NTP in doing so. If the Minister was not subject to a requirement to consider the NTP, I can see no basis for coming to a different conclusion respecting Marine Atlantic in its rate-setting role.

VII. Did the Federal Court err in concluding that if the NTP had to be considered in setting the rates, the NTP could not constrain the level of costs assumed by Canada in meeting its constitutional obligation to provide ferry service on the constitutional route?

[81] This is another issue that the Federal Court did not need to decide; the Court addressed it in case it was found to have erred in determining that there was no requirement to consider the NTP in setting the rates. I have concluded that the Federal Court did not err in this regard. This issue therefore does not arise.

[82] It is ordinarily prudent for the Court not to decide hypothetical questions, especially questions that are constitutional in nature. If it should become necessary to decide this issue, it would be preferable to do so not in the abstract, but with the benefit of evidence concerning such matters as how the various factors set out in the NTP (which the parties accepted is "polycentric" in nature) have been balanced, the financial consequences flowing from the balancing process, how those consequences might be reflected in changes to rates and subsidies, and the impact of those changes on users and potential users of the ferry service on the constitutional route, and on the province of Newfoundland and Labrador more generally. In the circumstances here, I would decline to address the issue.

VIII. Proposed disposition

[83] I would dismiss the appeal, with costs payable by Oceanex to the respondents. There should be no costs payable to or by the intervener.

"J.B. Laskin"
J.A.

“I agree.
Eleanor R. Dawson J.A.”

“I agree.
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-113-18
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE STRICKLAND DATED MARCH 7, 2018, DOCKET NUMBER T-348-16).	
STYLE OF CAUSE:	OCEANEX INC. v. CANADA (MINISTER OF TRANSPORT) and MARINE ATLANTIC INC. and ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	MAY 28 AND 29, 2019
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	DAWSON J.A. WOODS J.A.
DATED:	OCTOBER 10, 2019

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