Federal Court  Cour fédérale

Date: 20180323

Docket: T-181-17

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[ENGLISH TRANSLATION REVIEWED BY THE AUTHOR]

Ottawa, Ontario, March 23, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.

Applicant

and

LAURENTIAN PILOTAGE AUTHORITY

Respondent

JUDGMENT AND REASONS

[1] The applicant, the Corporation des pilotes du Saint-Laurent Central inc. [the Corporation], is applying for judicial review of a decision of the Laurentian Pilotage Authority [the Authority] made on December 9, 2016, which suspended the pilotage licences of captains Donald Morin and Michel Simard [the pilots]. The main issue is whether the Authority could reasonably use the disciplinary power conferred upon it by the *Pilotage Act* in order to discipline

the pilots in a situation where they allegedly refused to provide their services without endangering navigation safety. For the following reasons, this application for judicial review is allowed.

I. Factual and regulatory background

[2] This case involves marine transportation on the St. Lawrence River. The legislative framework governing marine transportation is complex and involves several actors. The specific activity at issue is pilotage. It is generally recognized that the conduct of a ship in difficult waters, like those of the St. Lawrence River, requires a high degree of familiarity with local conditions, which is often beyond the grasp of the captains of ocean vessels. This is why ships that travel the St. Lawrence must call upon the services of pilots who have the required knowledge and skills. Pilotage has been subject to various types of legislative framework over the years. In 1962, the Government of Canada created a Royal Commission tasked with examining this legislative framework, chaired by Justice Yves Bernier (*Report of the Royal Commission on Pilotage*, Ottawa, 1968 [Bernier Commission Report]). In 1971, Parliament proceeded with an in-depth reform, inspired by the Bernier Commission, and passed the *Pilotage Act*, RSC 1985, c P-14 [the Act].

A. *The various stakeholders and their roles*

[3] Before describing the factual framework of this dispute, it is necessary to provide an overview of the main components of the regime created by the Act and the role of each party in that regard.

[4] The Act created pilotage authorities in various regions across the country. The Authority was assigned jurisdiction for the St. Lawrence River, from the St. Lambert Lock to the estuary. Section 18 of the Act states that the objects of the Authority are to "establish, operate, maintain and administer in the interests of safety an efficient pilotage service within the region set out in respect of the Authority in the schedule." In that regard, the Authority carries out three major types of activities (*Alaska Trainship Corp v Pacific Pilotage Authority*, [1981] 1 SCR 261 at 274 [*Alaska Trainship (SCC)*]).

[5] First, the Authority's regulatory power allows it to, among other things, establish compulsory pilotage areas, prescribe the classes of ships that are subject to compulsory pilotage and prescribe the pilotage charges that ships must pay.

[6] Second, the Authority regulates pilotage as a profession. To that end, sections 22 to 32 of the Act govern the issuance of licences or pilotage certificates to persons who meet the regulatory requirements. The Regulations that were adopted under the Act establish a training system. In addition, sections 27 to 29 establish a disciplinary regime that allows the Authority to suspend or revoke a licence or pilotage certificate under certain circumstances. This regime is central to the present dispute.

[7] Third, the Authority itself provides pilotage services to ships that request them. In that regard, the Act sets aside the previous regime, in which, in theory, it was the ship that directly retained the pilot's services and which had privity of contract with the pilot. For all practical purposes, the former regime became obsolete and gave way to various forms of collective

organization. In order to carry out its mission, the Authority has the power, under section 15 of the Act, to hire pilots. However, subsection 15(2) allows the majority of licensed pilots within a given region to form a body corporate with which the Authority can contract for the provision of pilotage services. In that case, the Authority cannot hire pilots in the region in question. Commenting on that aspect of the Act, the Federal Court of Appeal affirmed that "[i]t may be likened to a kind of collective bargaining" (*Pacific Pilotage Authority v Alaska Trainship Corp*, [1980] 2 FC 54 (CA) at 75 [*Alaska Trainship (FCA)*]).

[8] Amendments were made to the Act in 1998 in order to clarify certain terms of that original labour relations regime. In a nutshell, mandatory arbitration was substituted for "strikes" or, more precisely, the refusal to provide services when no contract is in force. Those amendments ensure the continuation of pilotage services, given their essential character. Thus, sections 15.1 and 15.2 of the Act provide for a mediation and arbitration process to resolve disagreements with respect to the renewal of a contract for services. Section 15.3, meanwhile, prohibits pilots or the body corporate that represents them from "refusing to provide pilotage services while a contract for services is in effect or being negotiated". According to section 48.1, any contravention of section 15.3 is punishable by a fine of not more than $10,000 per day.

[9] The Corporation is the body corporate constituted by the pilots of the central St. Lawrence region, that is, the region between Montreal and Quebec City. It signed a contract for services as specified by subsection 15(2) of the Act [the Contract for Services]. Captains Morin and Simard, against whom the impugned decision was made, are members of the Corporation and holders of pilotage licences.

[10] The Act does not contain all the rules that govern navigation on the St. Lawrence. It essentially regulates the pilotage profession, the obligation of certain ships to use pilots and the economic relationships between the parties. Navigation itself is subject to a separate set of rules. Those are mainly made by the Department of Fisheries and Oceans, rather than the Authority. Practically speaking, those rules are found in Notices to Mariners or Notices to Shipping issued by the Canadian Coast Guard. Section 7 of the *Collision Regulations*, CRC c. 1416, which was adopted under the *Canada Shipping Act*, SC 2001, c 26, makes the prescriptions of those notices mandatory.

B. *Discussions concerning "post-Panamax" ships*

[11] This dispute is rooted in the arrival of the so-called "post-Panamax" ships in the St. Lawrence River. As their name indicates, those ships have dimensions that exceed those of the locks of the Panama Canal. Due to their size, the conduct of those ships on the St. Lawrence presents special challenges.

[12] In 2013, the Coast Guard issued Notice to Mariners 27A [Notice 27A], which deals with wide-beam vessels and long vessels in the Quebec City-Montreal section. That notice deals with ice navigation, meeting in risk areas, overtaking in risk areas, anchorage areas, and under-keel clearance. Notice 27A includes the following statement in the section on meetings in risk areas: "Any time, vessels will have to favor day transit in the section Quebec-Montreal [sic]." As for overtaking and meetings, Notice 27A states certain prohibitions, but combines them with exceptions when, based on certain pre-established criteria, pilots deem that safety allows it. In

those situations, the Corporation must file a report with the Coast Guard. Lastly, Notice 27A prescribes a minimum speed of 10 knots in order to ensure ship maneuverability.

[13] In fall 2016, concerns were expressed with regard to the restrictions imposed on the passage of post-Panamax ships by Notice 27A. In particular, the Authority found that the experience gained from the frequent passage of four ships belonging to Hapag-Lloyd (*Detroit Express*, *Livorno Express*, *Genoa Express*, and *Barcelona Express*), warranted a relaxation of certain requirements regarding those four ships, particularly for what everyone then understood as being a prohibition on night-time transits. Therefore, the Authority called for a meeting to be held to review those requirements.

[14] That meeting, held on November 24, 2016, was attended by representatives of the Authority, the Corporation, the Coast Guard, Transport Canada and the Montreal Port Authority. The minutes of that meeting were submitted as evidence. However, the minutes appear to be more like short-hand notes of the statements of each participant. They do not contain any formal resolutions that clearly describe the scope of the decisions that were made. Nevertheless, what stands out rather clearly from those minutes, as well as the statements and examinations of representatives of both parties, is that there was an agreement to the effect that the four Hapag-Lloyd ships could be authorized to transit at night under certain conditions. A statement from the President of the Corporation gives an idea of those conditions:

> [TRANSLATION]
>
> ...the rule would be with 2 pilots on board and the presence of light buoys, the 4 Hapag-Lloyd ships will no longer be subject to the day-time upstream timeframe. [...] It should be noted somewhere in there, either in Notice 27A or elsewhere, because otherwise,

> someone will challenge the double pilotage on those ships, but will want to keep the day and night transits.
>
> (Respondent's Record, p 40)

[15] Corporation representatives also emphasized that they were uncomfortable with granting individual exceptions, since that would risk overstepping the bounds of safe navigation on the St. Lawrence. The minutes also show that the Authority and the Montreal Port Authority were motivated mainly by economic considerations, given the investments made to receive post-Panamax ships in Montréal.

[16] It is important to emphasize that the November 24, 2016 meeting , was not a meeting of a decision-making body. Those in attendance at that meeting did not have the power to amend Notices to Mariners or the Authority's regulations. The minutes reveal some confusion as to the steps that were necessary for implementing the decision regarding the four Hapag-Lloyd ships. Towards the end of the meeting, the President of the Corporation stated that that might be done through informal communication with the affected shipowner. However, that statement cannot set aside the legal or administrative requirements dealing with the amendment of relevant rules.

[17] In addition, on November 27, 2016, the President of the Corporation expressed his expectations as to the formalization of the components of the agreement of November 24, 2016. In an email addressed to participants to the meeting, he wrote:

> [TRANSLATION]
>
> ...we are ready to go ahead right now with what was agreed last Friday. We have already agreed to an exception yesterday at the end of the afternoon so that one of those ships can continue its downstream trip and must not anchor at Trois-Rivières, but

> Notice 27-A must be amended or at least have the committee's assurance that it will be amended in order to include double pilotage as an indispensable condition for the passage of those ships upstream from Quebec City.
>
> (Applicant's Record, p 165)

[18] In addition, on December 1, 2016, the Corporation issued a bulletin intended for its members, in which it stated the following:

> [TRANSLATION]
>
> Because those ships are not 240 metres in length or longer, the presence of a second pilot has been disputed by the industry. In agreement with the Laurentian Pilotage Authority, we agreed to confirm the assignment of a second pilot to those ships. This is now a done deal—verbally, at least. We are awaiting written confirmation.
>
> As we have already explained to you, during the risk review of the transit of post-Panamax ships upstream from Quebec City, one of the initial conditions was that the transit of wide-beam ships (more than 32.5 m) should be done mainly during the day.
>
> Now that we have had the opportunity to gain experience from the four new Hapag-Lloyd ships, we believe that it is no longer necessary to require those four ships, and only those four, to comply with that passage condition.
>
> Thus, as soon as we have written confirmation of double pilotage on all the post-Panamax ships and after the pilots have analyzed the situation and the circumstances and deem them to be safe, the *Livorno Express*, *Genoa Express*, *Detroit Express* and *Barcelona Express* will be able to continue upstream as in the case of all other assignments.
>
> (Applicant's Record, p 168)

C. *The events of December 6, 2016*

[19] On December 6, 2016, the Authority assigned pilots Morin and Simard to pilot a post-Panamax ship owned by Hapag-Lloyd, the *Barcelona Express*, from Trois-Rivières to Montreal. Given the time at which the pilots had to take control of the ship, it was obvious that a significant part of the voyage to Montreal would take place during the night. At the end of the morning, a Corporation representative notified a manager at the Authority that the *Barcelona Express* could not travel at night and would have to anchor at Lanoraie.

[20] It is not necessary to give a detailed summary of the discussions that took place during the afternoon of December 6 in order to break the deadlock. Generally speaking, the Authority tried to offer written guarantees that would assuage the Corporation's concerns. The Authority sent a letter to the Corporation stating that it had made the double pilotage rule for post-Panamax ships "official". It also obtained confirmation by email from the Coast Guard that the latter intended to amend Notice 27A regarding double pilotage, although there was some confusion regarding the question of whether that amendment would also cover night navigation. For its part, in the middle of the afternoon, the Corporation required that the double pilotage rule be established through an amendment to the Contract for Services.

[21] Instead of continuing on their trip to Montreal, captains Morin and Simard anchored the *Barcelona Express* at Lanoraie as night was falling. Authority staff tried to contact them in various ways to tell them that they could continue their trip. A Coast Guard email was forwarded to them at around 5:15 p.m.; however, that email only mentioned double pilotage and not night

navigation. In a conversation with the Authority's dispatcher, Captain Simard indicated that he was only prepared to navigate at night if the Corporation confirmed that the required authorizations had been given in writing (Respondent's Record, p 83).

[22] It was only on December 12, 2016, that the Coast Guard issued an "interim exemption" from Notice 27A. Among other things, that document mentioned that:

> [TRANSLATION]
>
> Night navigation is authorized for those ships [only] when they are heading upstream in the Quebec City-Montreal section (as agreed during the November 24, 2016 meeting and in effect since December 6, according to the emails that gave this authorization);
>
> All ships with a beam wider than 32.5 metres are subject to double pilotage by the Laurentian Pilotage Authority (according to the December 6 letter from the LPA);

[23] The reason why it took time to issue this exemption is that the Coast Guard wanted it to deal with both the issue of double pilotage and the issue of ship speed. The speed issue was only resolved on December 12 (see examination of Sylvain Lachance, Applicant's Record at 757).

[24] It must be highlighted that the words found in parentheses in the first paragraph cited above were added to the document's final version. Drafts that had been shown to the Corporation for comments did not contain this mention (Applicant's Record, p 18, 249, 262). It is obvious that this mention cannot render captains Morin and Simard retroactively guilty of a disciplinary offence.

D. *The suspension of the pilots*

[25] On December 7, 2016, the Authority's chief executive officer suspended the pilotage licences of captains Morin and Simard, under the power granted him by section 27 of the Act. That suspension was initially for ten days.

[26] According to subsection 27(3) of the Act, the Authority's Board of Directors must immediately consider any licence suspension. The suspension of captains Morin and Simard was discussed during a board meeting on December 8, 2016. The Board decided to affirm the suspension, but also to reduce its length to seven days, in a resolution worded as follows:

> [TRANSLATION]
>
> WHEREAS the ship BARCELONA EXPRESS was anchored and its trip delayed for about 13 hours on December 6, 2016;
>
> IN VIEW OF the commitment noted in writing by the Authority to assign two (2) pilots to four (4) specific Hapag-Lloyd ships, including the BARCELONA EXPRESS;
>
> WHEREAS the pilots Michel Simard and Donald Morin, who had the conduct of the BARCELONA EXPRESS, had been informed by the Authority's dispatchers and by email, that the night transit was authorized by the Coast Guard and that the Coast Guard had amended Notice to Mariners No 27A such that the restriction regarding the night navigation of the BARCELONA EXPRESS had been lifted;
>
> WHEREAS pilots Michel Simard and Donald Morin insisted, despite that information, that their corporation give its prior consent for the BARCELONA EXPRESS to be able to continue its night navigation;
>
> WHEREAS the [Corporation] and its two (2) pilots used the situation as a pretext, despite the past commitments from the [Corporation] and the authorization given by the Coast Guard, to require the Authority to accept an amendment to the contract for services currently in force as a condition to continuing the voyage;

> WHEREAS such a request for an amendment to the contract for services is contrary to sections 15.3 and 27 of the *Pilotage Act*;
>
> WHEREAS the stoppage of the voyage of the BARCELONA EXPRESS cannot be justified by safety reasons and instead relied on abusive and illegal considerations;
>
> WHEREAS the decision to anchor the BARCELONA EXPRESS, for no relevant reason, is an act of negligence within the meaning of subsection 27(1)(c) of the *Pilotage Act*;
>
> WHEREAS the licences of pilots Michel Simard and Donald Morin were suspended by letter from the Chief Executive Officer on December 7, 2016;
>
> IT IS PROPOSED BY MR. SPIVACK AND ADOPTED BY THE MAJORITY:
>
> "That the Board confirms, particularly for the reasons expressed in the 'WHEREAS' statements of this resolution, the suspension by the chief executive officer of licence No 01-1961-407 of pilot Michel Simard and licence No 01-1969-460 of pilot Donald Morin, but for a period of seven (7) days starting on December 7, 2016;
>
> That management will examine possible action against the [Corporation] to discipline its behaviour as described in the same 'WHEREAS' statements."

[27] The next day, November 9, 2016, the Authority's Chief Executive Officer informed captains Morin and Simard of that decision.

[28] The Corporation later filed an application for judicial review of that decision.

II. Preliminary issues

[29] Before dealing with the merits of the case, two preliminary issues raised by the Authority must be addressed.

A. *Interest and standing*

[30] Firstly, the Authority argues that the Corporation does not have the required legal interest to bring this application for judicial review. Section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, states that such an application can be made by "anyone directly affected by the matter in respect of which relief is sought". The Authority argues that the Corporation does not have such an interest, since it is not directly affected by the disciplinary suspensions that it challenges. According to it, only the pilots would have been personally able to bring this application.

[31] Writing for the Federal Court of Appeal, Justice Stratas held that in order to have the required interest to bring an application for judicial review, a party must show that the impugned decision "affected its legal rights, imposed legal obligations upon it, or prejudicially affected it in some way" (*League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 at para 58, [2012] 2 FCR 312). Those remarks emphasize two dimensions of the concept of interest. First, this interest must be legal, in the sense that it must deal with subjective rights and not simply with a purely commercial interest (see *Oceanex Inc v Canada (Transport)*, 2018 FC 250 at paras 257–279). Second, that interest must be personal, in the sense that the rights in question must belong to the applicant and not a third party. Thus, a contractors' association was denied the interest for bringing an application seeking the recognition of the rights of its members (*Independent Contractors and Business Association v Canada (Minister of Labour)*, 1998 CanLII 7520 (FCA) at para 30).

[32] The requirement of a personal interest is a corollary of the adversarial nature of the judicial process. That process is based on private initiative. Litigants are responsible to decide whether to exercise their rights or to remain passive. For example, this principle has been recognized in article 19 of the *Code of Civil Procedure*, CQLR c. C-25.01; see also Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at p 10. Requiring a right to be exercised by the person who holds it promotes individual autonomy. In principle, no one can sue to vindicate the rights of others. In the same manner, when a person decides to waive his or her rights or to settle, that decision should not be cast into doubt by a third party. For example, in *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144 at para 17, the Federal Court of Appeal affirmed that requiring a personal interest aimed to discourage third parties from litigating the rights of others.

[33] That said, private procedural law recognizes a certain number of situations in which a person can have standing to sue (*qualité pour agir*) to vindicate the rights of others. In that regard, the concept of standing is distinguished from interest. Professors Guillemard and Menétrey thus define standing:

> [TRANSLATION]
>
> The exceptions to the rule that a person cannot use the name of another to plead correspond to cases in which a person has standing (on behalf of another, a common interest or a collective interest). Standing involves two situations. If the action is not in defence of a personal interest, but in defence of a collective interest, standing then allows to select a proper litigant where the interest requirement does not identify someone. If standing leads to the broadening of the range of proper litigants by allowing certain persons to defend interests that are not strictly personal to them, a person is then allowed to act in the defence of others. In both cases, standing consists of opening the action to specifically designated persons who are not acting in defence of their personal interest.

> (Sylvette Guillemard and Séverine Menétrey, *Comprendre la procédure civile québécoise*, Cowanswille, Éd. Yvon Blais, 2011, pp 71–72; see also Loïc Cadiet and Emmanuel Jeuland, *Droit judiciaire privé*, 7th ed., Paris, LexisNexis, 2011, at pp 254, 262)

[34] In this case, I find that the Corporation has the standing to bring this application for judicial review. That finding is based on an analysis of the original labour relations regime set forth in the Act and implemented by the Contract for Services.

[35] Section 15 of the Act contemplates two alternative methods for organizing relations between a group of pilots and an authority. On the one hand, the pilots can choose to become employees of an authority. In this case, the usual labour relations regime applies and the pilots can form a union, which can be certified to represent the pilots. In addition, the majority of pilots in a region can form a body corporate that, according to subsection 15(2), gains the exclusive right to contract with the Authority for the provision of pilotage services. In providing for this possibility, Parliament intended to maintain a contractual structure that had gradually been implemented by the predecessors of the parties before the Act came into force (*Bernier Commission Report* at 599).

[36] The choice between these two possibilities leads to legal consequences that must be respected. For example, in the first case, pilots are employees of the Authority, which can therefore exercise its inherent powers as an employer (see *Cabiakman v Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 SCR 195). However, in the second case, there is no employee/employer relationship between the Authority and the pilots; instead, there is a contract for services between the Authority and the Corporation. What may be considered to be a breach

of a contract of employment in the first case must be analyzed, in the second case, as a potential breach of a contract for services, although the difference between the obligations flowing from those two types of contracts must be kept in mind.

[37] Nevertheless, in both cases, Parliament intended to create a collective labour relations regime. Certain common characteristics flow from this. One of those is the concept of exclusivity of representation. Justice LeBel of the Supreme Court of Canada thus described this concept:

> One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit, in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 [*Labour Code*]). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 L.C.). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 L.C.).
>
> (*Noël v Société d'énergie de la Baie James*, 2001 SCC 39 at para 41, [2001] 2 SCR 207)

[38] The text of the Act contemplates this exclusivity of representation when it states in subsection 15(2) that the Authority cannot directly employ pilots when the majority of them have chosen to form a body corporate. Subsection 15(3), which obliges this body corporate to allow licensed pilots or apprentice pilots to become members, also shows Parliament's intention of conferring exclusivity of representation upon this body corporate.

[39] The exact scope of that representation is not circumscribed by the Act. In *Noël*, the Supreme Court extended its scope to applications for judicial review. Of course, *Noël* deals with a different context. In order to understand the scope of that representation in the context of the original regime set forth in the Act, it is useful to review the Contract for Services that was signed by the parties. In doing so, I do not seek to use the Contract for Services to set aside the requirements of the *Federal Courts Act* regarding interest. On the contrary, the Contract for Services depicts a regime that existed when the Act came into force and which Parliament wanted to maintain.

[40] Article 3.01 of the Contract for Services states the principle of exclusivity of representation:

> [TRANSLATION]
>
> The Corporation acknowledges the Authority, for all legal purposes, as being the pilotage authority.
>
> The Authority acknowledges the Corporation, for all legal purposes, as being the sole representative of pilots and apprentice pilots in district nos. 1 and 1-1, individually or collectively, and as the main agency that can make recommendations to the Authority regarding pilotage matters for compulsory pilotage areas or give technical and professional advice regarding the pilot profession and the safety of navigating in those districts.

[41] It is true that the system for issuing licences and certificates is set forth in sections 22 to 32 of the Act and not by the Contract for Services. In addition, as we will see below, this regime involves not only the pilots who are members of the Corporation, but also the holders of pilotage certificates, who are not part of it. Nevertheless, certain provisions of the Contract for Services show the Corporation's interest in those questions. Thus, section 14 deals with pilot training.

Among other things, it sets forth that the Corporation will offer a training program leading to the licence issued by the Authority and a continuing development program for licensed pilots. The Contract for Services deals more specifically with the issue of disciplinary procedures. Article 15.02 states that: [TRANSLATION] "[i]n any dispute involving a pilot and the Authority, the Corporation is fully entitled to intervene in order to take up the pilot's cause". Articles 16.03 and 16.05 specify that the Authority must send the Corporation a copy of various documents that have been sent to a pilot as part of a disciplinary process under section 27 of the Act. In addition, article 16.03 specifies the rights of the Corporation and the affected pilot to respond to the allegations against a pilot.

[42] It seems to me that the parties to the Contract for Services wanted to allow the Corporation to represent the pilots in a manner similar to the role played by unions regarding their members. Articles 15.02 and 16.05 refer specifically to the disciplinary process in section 27 of the Act. I find that the Corporation has the necessary standing to bring an application for judicial review of a decision made as part of this disciplinary process.

[43] The wording of article 15.02 indicates that the parties did not want that representative role to be exclusive. Thus, when dealing with a disciplinary suspension, both the Corporation and the pilots can bring an application for judicial review. In past cases, the fact that it was the pilot himself who brought an application for judicial review of a disciplinary suspension (*In re Pilotage Act and in re Captain Colin Darnel*, [1974] 2 FC 580 (CA); *Barker v Pacific Pilotage Authority*, [1982] 2 FC 887 (CA)) does not deny the Corporation's standing.

[44] Moreover, to go back to first principles, we must bear in mind that the requirement of a personal interest is aimed at guaranteeing that a lawsuit to vindicate a right is brought by the holder of that right and no one else. In this case, although the names of captains Morin and Simard do not appear in the style of cause, they participated by signing affidavits and by being examined for discovery. There is nothing that leads me to believe that the Corporation is exercising the rights of captains Morin and Simard without their consent.

[45] In practical terms, I also note that a decision denying the Corporation's standing to challenge the disciplinary penalties imposed on the pilots would only delay the resolution of the dispute underlying this application. In another matter in which the applicant's interest was challenged, Justice Stratas of the Federal Court of Appeal held that the concept of interest had to be interpreted according to the purposes of the *Federal Courts Act* and that one had to consider the possibility that due to facts that arose after the application was filed, the applicant could establish the required interest if the proceedings were initiated anew:

> [55] Here, the purposes of the *Federal Courts Act* significantly bear upon this matter. Among other things, the Act is aimed at achieving justice, fairness, practicality, order, efficiency, and the minimization of cost, delay and waste in matters governed by the Act. The Act achieves these purposes by imposing various requirements, of which the requirement of direct standing is one. Those requirements must be interpreted and applied with a view to achieving the purposes of the Act — not with a view to laying traps for the unwary or providing fodder for the mischievous.
>
> [56] I adopt the Federal Court's conclusion at paragraph 18 of its reasons that accepting Sanofi-Aventis' submission would "do nothing to improve delivery of justice" and would serve "no good purpose." In the face of a dismissal, Teva would simply restart its application, this time with direct standing. If necessary, it would seek an extension of time to do so and would likely get it. Then everyone would file the same evidence and, perhaps years later, would make the same submissions. All that will have been accomplished is pointless cost, delay and waste.

(*Teva Canada Limited v Canada (Health)*, 2012 FCA 106, [2013] 4 FCR 391)

[46] Those remarks can easily be transposed to this case: if the Corporation's application were dismissed due to lack of interest, the pilots themselves can seek an extension of time in order to bring their own application for judicial review.

[47] Lastly, I note that the Corporation does not claim to have public interest standing within the meaning of *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

B. *The "clean hands" argument*

[48] Second, the Authority maintains that this Court should not hear the Corporation's application because the latter does not have "clean hands". If I have understood correctly, the Authority asserts that the Corporation would have acted wrongly by taking advantage of the situation that occurred on December 6, 2016, in order to obtain an amendment to the Contract for Services, to which it was not entitled. The Corporation thus used its monopoly to extort an unfair advantage from the Authority. This conduct would deprive the Corporation of the right to apply for judicial review of the impugned decision.

[49] Judicial review has a discretionary nature (*Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 37, [2015] 2 SCR 713). That means that an applicant does not have a strict entitlement to a ruling on the merits. The Court has the discretionary power to refuse to hear an

application, taking into account a range of factors that have been recognized by case law—for example, the existence of another appropriate remedy.

[50] When exercising this discretionary power, courts have sometimes refused to hear an application for judicial review due to the applicant's improper or abusive conduct (for example, see *Homex Realty v Wyoming*, [1980] 1 SCR 1011 at pp 1033-36). The expression "clean hands" is more often used to describe this concept in the context of an injunction. An injunction is also a discretionary remedy. In that context, a judge can refuse to issue an injunction when the applicant's conduct affects the equity of his or her application—in short, because he or she does not have "clean hands". That concept, however, must be handled with care. In his treatise on injunctions, Justice Sharpe issued the following warning:

> The maxim that one "who comes to equity must come with clean hands" is colourful but potentially misleading in so far as it suggests a general power to scrutinize all aspects of the plaintiff's behaviour and refuse relief if it offends. The "clean hands" maxim is best understood as a very general catch-all phrase encompassing many discretionary factors in more precise terms. By itself, it has really no analytical value, although, as will be seen, it has sometimes been employed as if it did.
>
> (Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf ed., Toronto, Carswell, 2017, para 1.1030)

[51] In *Thanabalasingham v Canada (Citizenship and Immigration)*, 2006 FCA 14 at para 10, the Federal Court of Appeal proposed a test to assess whether the "clean hands" doctrine applies in a particular case:

> In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The

> factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[52] For example, in immigration matters, this Court has sometimes refused to grant a stay of removal when the applicant went into hiding in order to avoid complying with the law, but subsequently asked for a remedy to stay in Canada (for example, see *Wong v Canada (Citizenship and Immigration)*, 2010 FC 569). However, I see no analogy with this case. In that matter, the applicant had clearly broken the law by going into hiding.

[53] In my view, we cannot refuse to hear an application for judicial review simply because the respondent denounces the applicant's conduct. In many of the disputes that are brought before the courts, the relationship between the parties is tense and each party criticizes the conduct of the other. If we allow its scope to become too broad, the "clean hands" doctrine may lead to a preliminary assessment of the case's merits based on a non-legal test. Except in the most flagrant cases, we should refrain from deciding a case on the basis of a general moral judgment. It seems to me that this was the gist of Justice Sharpe's warning.

[54] In this case, the Authority's "clean hands" argument is nothing more than a restatement of its arguments on the merits. The argument that the Corporation abused its monopoly is tantamount to the argument that the Corporation refused to offer its services contrary to section 15.3 of the Act. This is precisely what the Authority argued on the merits.

[55] The manner in which the Authority presents its "clean hands" argument also makes it difficult to apply the test crafted by the Federal Court of Appeal in *Thanabalasingham*. That test assumes that the Court can make a definitive finding as to the applicant's alleged conduct before reviewing the merits of the case. For example, in *Wong* or other similar immigration cases, the applicant's improper or abusive conduct was not challenged and was not directly related to the merits of the case. However, in this case, the parties joined issue precisely on the Corporation's alleged conduct and its legal characterization. In such a case, to borrow the words of the Federal Court of Appeal, ruling on the merits of the case does not threaten "the integrity of the legal and administrative processes".

[56] In summary, I see no reason to exercise my discretionary power to not review the merits of the case.

III. Issues and standard of review

[57] In its factum, the Corporation thus framed the issues that I should determine:

- The Authority's suspension of the pilotage licences of Michel Simard and Donald Morin for a period of seven days was illegal, since it was based on section 15.3 of the Act.
- The Authority's suspension of the pilotage licences of Michel Simard and Donald Morin under paragraph 27(1)(c) of the Act was abusive and arbitrary and was based on erroneous findings of fact.
- The Authority erred in law by finding that captains Simard and Morin were negligent in the performance of their duties.

[58] The Corporation argues that correctness applies to the first and third issues, while reasonableness applies to the second. For its part, the Authority argues that all the issues are reviewed for reasonableness.

[59] Of course, the issues must be formulated based on the decision under review. In its December 8, 2016 decision, the Authority grounded the suspension of captains Morin and Simard mainly in the concept of negligence, found in section 27 of the Act. The Authority also invoked section 15.3 of the Act, which prohibits the refusal of service, although it is unclear if this was a subsidiary argument or otherwise. Thus, in order to assess the legality of the impugned decision, I must review both of those potential grounds for the suspension. Therefore, the issues can be framed as follows:

- Did captains Morin and Simard show negligence by anchoring the *Barcelona Express*?
- Can captains Morin and Simard be sanctioned under section 27 of the Act because they had refused to provide a service, in breach of section 15.3?

[60] Framed as such, these issues are inescapably reviewed for reasonableness. In fact, since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], "a court must presume, in reviewing a decision in which a specialized administrative tribunal has interpreted and applied its enabling statute or a statute with a close connection to its function, that the reasonableness standard applies" (*Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 15). Moreover, "the *Dunsmuir* framework applies to administrative decision makers generally and not just to administrative tribunals" (*Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 54, [2014] 2 SCR 135).

IV. Analysis

A. *Negligence*

[61] With respect to the first issue, I must consider the reasonableness of the Authority's finding, whereby captains Morin and Simard showed negligence by anchoring the *Barcelona Express*. In order to complete this task, I must ask myself whether this finding is buttressed by adequate reasons and whether it falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para 47).

[62] To assess the range of possible outcomes, it is necessary to understand the purpose and scheme of the legislation at issue. It will then be possible to better grasp the scope of the concept of negligence to which paragraph 27(1)(c) of the Act refers.

[63] The starting point for this task is the Supreme Court's *Alaska Trainship* decision. In that case, the Court had to decide whether the Pacific Pilotage Authority, which was also created by the Act, could make a regulation requiring compulsory pilotage for certain ships based on the country where they were registered. Every level of court that dealt with the case found that the Authority could only make regulations for achieving the mission assigned to it by the Act, which is to ensure navigation safety. Thus, in the context of the regulation at issue, the flag nationality requirement was not connected to safety. This was already ensured through other regulatory provisions regarding the skills of pilots. The flag nationality requirement, therefore, was found to be invalid because it exceeded the powers conferred upon the Authority by the Act. In addition, in that case, it appears that the Authority made the disputed regulation due to opposition from

West Coast pilots to the measure sought. In the Federal Court of Appeal, Justice Le Dain highlighted that such considerations, which are essentially economic in nature, should not influence the interpretation of the Act (*Alaska Trainship (FCA)* at 76).

[64] Therefore, it is logical that the disciplinary regime in section 27 must also be linked to this fundamental purpose of the Act, the promotion of marine safety. The review of the scheme of the Act reinforces this finding.

[65] Section 27 is part of a regime for issuing licences and pilotage certificates. It is linked to the Authority's second mission, which was outlined earlier: the regulation of the pilotage profession. It is important to highlight that this regime applies not only to licence holders who offer their services to the Authority either as employees or through a body corporate like the Corporation, but also to holders of pilotage certificates, who are typically employees of shipowners and who therefore do not offer their services to the Authority. In that regard, the suspension process in sections 27 to 29 can be likened to the power held by professional corporations to sanction any of their members who have committed disciplinary infractions. It must be remembered that, in that regard, the mission of professional corporations is to ensure the protection of the public.

[66] That regime is essentially based on the development and maintenance of a pilot's skills. Its ultimate goal is navigation safety. At the hearing, counsel for the Authority argued that some components of that system were not directly aimed at navigation safety. For example, paragraph 27(1)(b) of the Act provides for the suspension of a pilot who showed up for work

intoxicated. However, since this offence can be committed without the pilot having conduct of a ship, the offence would not be directly aimed at navigation safety. In the same manner, paragraph 27(1)(d) provides for the suspension of a pilot who does not fulfill the conditions associated with his or her licence or pilotage certificate. Once again, the Authority argues that those conditions are not all linked to marine safety and can, for example, include certain administrative formalities. I decline to give effect to those arguments. Even though a pilot can be suspended in circumstances where his or her conduct does not present an immediate danger to navigation, it is clear that the prohibitions at issue are part of a regime aimed at navigation safety. If Parliament deemed it necessary to implement a permit regime to ensure that this goal is achieved, it goes without saying that offences can be created to ensure the integrity of this regime. To use a land-based analogy, being prohibited from driving without a licence is linked to road safety, even if it entirely conceivable that people who do not have a valid licence (for example, because they forgot to pay their annual fee) are able to drive a car safely.

[67] What is important to keep in mind is that the regime for issuing licences and pilotage certificates is completely separate from the Authority's other mission, which consists of offering pilotage services itself. In carrying out this other mission, the Authority can hire its own pilots if the latter elect to be treated as employees. In this case, the Authority exercises the powers associated with an employer regarding those pilots. Those powers are separate from those that flow from the regime in sections 27 to 29, which I have likened to a professional discipline system that essentially aims to protect the public.

[68] An employer can discipline an employee whenever the employee acts in a way that endangers public safety. A professional corporation can do the same. However, an employer's power of discipline has a broader scope than that of a professional corporation, since it can also punish breaches of the contract of employment that are entirely unrelated to safety. Those breaches can, for example, deal with unfair competition, absenteeism, insubordination or inadequate work performance.

[69] It then follows that when an authority directly employs pilots, it can exercise both the disciplinary powers of sections 27 to 29, which concern navigation safety, and the disciplinary powers that flow from its status as an employer, which are broader.

[70] However, when pilots made the choice set forth under subsection 15(2) of the Act, as in this case, they are not employees of the Authority. Therefore, it cannot exercise an employer's powers with respect to them. Issues regarding the adequacy of work are governed by a contract for services between the Corporation and the Authority and not by contracts of employment. Therefore, issues regarding the scope of the services that the pilots must provide give rise to contractual remedies between the Corporation and the Authority (for example, see *Laurentian Pilotage Authority v Corporation des pilotes du Saint-Laurent central inc*, 2015 FCA 295).

[71] It then follows that the disciplinary power set forth in sections 27 to 29 and more specifically, the concept of negligence that appears in paragraph 27(1)(c) must be interpreted as concerning conduct that endangers navigation safety. The concept of negligence cannot encompass issues that relate to the employer-employee relationship or the contractual

relationship between the Corporation and the Authority, if those issues do not affect navigation safety.

[72] In this case, the conduct of captains Morin and Simard did not endanger navigation safety. Sylvain Lachance, one of the officers of the Authority, admitted this during examination:

> [TRANSLATION]
>
> Q. [273] So then, the fact that the provision of service was refused, in itself, never endangered navigation safety?
>
> A. No.
>
> (Applicant's Record, p 703)

[73] The resolution adopted by the Board of the Authority on December 8, 2016, which I reproduced earlier, does not in any way mention safety-related concerns. The initial letter from the Authority's Chief Executive Officer was sent to captains Morin and Simard on December 7, 2016, the day after the events. That clearly shows that the decision to impose sanctions was made immediately, without the Authority conducting an investigation as to how the anchoring of the *Barcelona Express* could constitute a danger to navigation.

[74] The December 8, 2016 resolution shows that the Authority's grounds are completely different. The gist of what captains Morin and Simard were reproached for is that they refused to pilot the *Barcelona Express* to Montreal, while the Authority was of the opinion that the applicable normative framework either did not preclude it or no longer forbade it. That criticism is detailed succinctly in the following paragraph of the letter addressed to captains Morin and Simard on December 9:

> [TRANSLATION]
>
> Your decision to anchor the ship, in light of the lack of consent from your Corporation and despite the lifting of all restrictions on night transit by the Authority and the Canadian Coast Guard, clearly constitutes negligence in the performance of your duties.

[75] In stating that, the Authority gives a scope to the concept of negligence that goes well beyond navigation safety. The "negligence" at issue here is essentially a disagreement regarding the scope of the Corporation's contractual obligations to the Authority and regarding the impact of changes to the normative framework governing navigation on the St. Lawrence. Those questions have nothing to do with the underlying objective of sections 27 to 29 of the Act, which is to ensure navigation safety.

[76] When an administrative authority exercises a power in a way that is contrary to the purposes of its enabling statute, the decision in question is unreasonable (*Montreal (City) v Montréal Port Authority*, 2010 SCC 14 at paras 42–47, [2010] 1 SCR 427; *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at paras 19–20). That is what happened in this case. The Authority disciplined captains Morin and Simard for reasons foreign to the purposes of the disciplinary system of sections 27 to 29. Therefore, the Authority's decision is unreasonable.

B. *The refusal of service*

[77] In its resolution dated December 8, 2016 and its letter dated December 9, 2016, the Authority also indicated that it based its decision on section 15.3 of the Act. Thus, although captains Morin and Simard were suspended for "negligence in the performance of their duties", that the Authority appears to be also of the view that they had refused to provide their services

contrary to section 15.3. At the hearing, counsel for the Authority stated that the disciplinary power of section 27 necessarily had to extend to other provisions of the Act, otherwise, violations of the Act would risk going unpunished.

[78] Several reasons lead to the conclusion that it is unreasonable to extend the Authority's disciplinary power to a breach of section 15.3.

[79] First, such an extension confuses the Authority's different missions and the legal regime applicable to each of them. In fact, not only does the Authority regulate the pilotage profession, but it also offers pilotage services to shipowners. To do this, it uses the services of pilots, through the Corporation with which it has signed a Contract for Services. A refusal of service contrary to section 15.3 may arise in the course of that contractual relationship. The service that may be refused must necessarily be a service specified in the contract. It is obvious that the disciplinary power of sections 27 to 29 does not concern contractual or labour relations issues.

[80] Second, such an extension is contrary to the language of section 27. Paragraphs 27(1)(a) and 27(1)(b) refer specifically to other provisions of the Act. This is a convincing indication that Parliament did not want this disciplinary power to be used to sanction any provision of the Act whatsoever.

[81] Third, authorizing the Authority to discipline violations of section 15.3 would in fact allow it to take the law into its own hands. It must be borne in mind that the provision of pilotage services is governed by the Contract for Services between the Authority and the Corporation. A

dispute regarding the extent of the obligations that flow from this Contract should in principle be resolved by the methods associated with contractual disputes. Thus, the Contract contains an arbitration clause (article 17). An interlocutory injunction may be sought where the matter is urgent (for example, see *Laurentian Pilotage Authority v Corporation des pilotes du Saint-Laurent central inc*, 2015 FCA 295). In every case, it is a neutral third party, arbitrator or judge, who determines the rights of the parties. Adopting the interpretation proposed by the Authority would instead allow it to unilaterally decide on the scope of the Corporation's contractual obligations, including issues resulting from the impact of the regulatory framework governing navigation on the contractual obligations. Such a result is unreasonable.

[82] In addition, the existence of those contractual remedies, along with the offence created by section 48.1 of the Act, answers the impunity argument raised by the Authority. There is a remedy for a breach of section 15.3, although it must be imposed by an impartial third party.

[83] The suspension of captains Morin and Simard by the Authority cannot therefore be justified by the Authority's asserted power to discipline section 15.3 violations by itself, independent of the concept of negligence.

C. *Other issues*

[84] At the hearing, the parties devoted a significant portion of their arguments to the issue of whether there was in fact a refusal of service. In that regard, the Corporation maintains that the pilots could not be forced to carry out a night transit, while Notice 27A had not been formally amended to authorize it. For its part, the Authority relies heavily on the consensus of all parties

that were present at the meeting on November 24, 2016. The Authority also claims that Notice 27A did not formally prohibit the night transit of post-Panamax ships.

[85] Given the finding that I have made, it is not necessary for me to decide this issue. In fact, as I have mentioned earlier, this issued may be decided mainly through civil or penal proceedings, and not on an application for judicial review.

[86] In its factum, the Corporation also argues that the Authority failed to respect procedural fairness in the procedure that it followed when making its decision. Given that I have already found that the decision is unreasonable, it is not necessary for me to decide this issue. Nevertheless, I must state that when a short-term suspension is at issue, the Act does not provide for a hearing.

[87] The application for judicial review is allowed. The parties did not suggest that I set aside the usual rule of costs in the cause and I see no reason to do so.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the decision to suspend captains Donald Morin and Michel Simard is set aside, with costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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