



2/10/97 NO

T-1530-96

97 041 055

BETWEEN:

THE CANADIAN SHIPOWNERS ASSOCIATION,  
UPPER LAKES SHIPPING LIMITED,  
ALGOMA CENTRAL CORPORATION,  
SEAWAY SELF UNLOADERS,  
SEAWAY BULK CARRIERS  
and  
N.M. PATERSON & SONS LIMITED,

Applicants,

AND

HER MAJESTY IN RIGHT OF CANADA  
and  
THE ATTORNEY GENERAL OF CANADA,

Respondents.

**REASONS FOR ORDER**

**RICHARD MORNEAU,**  
**PROTHONOTARY:**

The Court has before it two motions by the applicants.

**BACKGROUND TO THE MOTIONS**

These two motions were submitted to the Court following the examination on affidavit of the respondents' affiant, Mr. J.F. Thomas.

The applicants, all of which work closely in the marine transport industry, filed an application for judicial review on June 27, 1996. In that application, they challenge the legality of order in council P.C. 1996-764 and of the *Marine Navigation Services Fees Regulations*, SOR/96-282 (the Regulations), made under the said order in council.

Among the grounds for their challenge, the applicants submit that the various services fees and the structure thereof are two features of the Regulations that do not comply with various federal government policies in that the various interested parties were not really consulted in respect of them. It should be noted that this ground for the applicants' challenge, which is summarized here, appears in detail in the text of their application for judicial review and in the affidavits filed in support of it.

On July 26, 1996, the respondents filed an affidavit in response, namely that of Mr. J.F. Thomas, Senior Assistant Deputy Minister at the federal Department of Fisheries and Oceans. In his affidavit, Mr. Thomas showed that he has personal knowledge of the development and implementation of the Regulations and of the consultations that took place for that purpose.

On September 5, 1996, Mr. Thomas was examined on his affidavit by counsel for the applicants.

#### THE APPLICANTS' FIRST MOTION

Following that examination of September 5, the applicants filed a motion on September 11 to obtain certain information and documents, and also to be permitted to attach documents to the transcript of the examination of Mr. Thomas presenting an exchange of correspondence that tends, according to counsel for the applicants, to support the argument that there was no real consultation on services fees and the structure thereof (item (d)(vii) of the notice of motion); as was mentioned above, this ground appears in the text of the applicants' application for judicial review of June 27, 1996.

At the hearing into this motion, it was agreed that no order was necessary in respect of certain items of the motion since the respondents had agreed to provide the respondents with the information they were seeking. Other items were deferred to a later date since the respondents will in the near future be filing a certificate of the Clerk of the Privy Council in respect thereof pursuant to section 39 of the *Canada Evidence Act*. Finally, the applicants were also seeking a change in the time limits fixed by an earlier order of this Court. However, it was agreed that this request should also be deferred and that the parties would submit a motion, quite possibly by consent, recommending a timetable after the proceedings related to Mr. Thomas'

affidavit had been completed. As a result, two items remained at the hearing into the motion.

The first, item (d)(vi) of the notice of motion, concerns an objection by counsel for the respondents to the following question by counsel for the applicants:

- Q. Could you undertake to supply us with the draft reports and the notes that were made on the draft reports before reaching its final condition.

This question related to paragraph 47 of Mr. Thomas' affidavit, which reads as follows:

From September 1995 to December 1995 the IBI Group conducted some 47 separate interviews with representatives of the industry. In January, the CCG released IBI's final report to the public, the whole as more fully appears from the said report produced herewith as exhibit X of my affidavit,

Counsel for the respondents objected to having Mr. Thomas comply, on the ground that the examination was an examination on affidavit in relation to an application for judicial review and not an examination for discovery in relation to an action. As a result, according to counsel for the respondents, the applicants cannot obtain documents not attached by the affiant to his affidavit, which is true *a fortiori* of drafts of a document. He based this argument on *Apotex Inc. v. A.G. of Canada et al.* (1992), 41 C.P.R. (3d) 390, at page 391, and *Merck Frosst v. Minister of National Health and Welfare* (1994), 53 C.P.R. (3d) 368, at page 375.

In my view, the objection of counsel for the respondents must be sustained. Counsel for the applicants referred to no decisions for the purpose of contradicting those submitted by the respondents. However, he submitted that the purpose of Rule 1612 of the *Federal Court Rules* is quite possibly to expand the scope of examinations on affidavit, which was limited by the decisions referred to *supra*. Rule 1612 reads as follows:

1612. (1) A party who wishes to rely on material that is in the possession of the federal board, commission or other tribunal and not in the party's possession shall file in the Registry and serve on the federal board, commission or other tribunal a written request for a certified copy of the material

(2) An applicant's request may be included in the notice of motion.

(3) A copy of the request shall be served on the other parties

(4) The request shall specify the particular material in the possession of the federal board, commission or other tribunal and the material must be relevant to the application for judicial review.

I do not think that Rule 1612 can be relied on in respect of an examination. That is not the context to which the rule applies. Furthermore, Rule 1612 is brought into play by means of a written request to the federal board, commission or other tribunal. We will return to this rule in discussing the applicants' second motion.

The objection in item (d)(vi) is accordingly sustained.

The other objection to be discussed in relation to this first motion is found in item (d)(vii).

The purpose of this objection by counsel for the respondents is to prevent counsel for the applicants from attaching an exchange of correspondence to the transcript of the examination of Mr. Thomas that would both challenge the official position adopted by Mr. Thomas and support the ground concerning services fees. Counsel for the applicants could identify no rules or decisions that would enable this Court to order the incorporation of the said documents into the transcript.

At this point, I must digress by pointing out that the applicants are seeking to introduce the same documents in the second motion discussed *infra*. In the context of this first motion, however, I do not see how I could order what the applicants are seeking; the objection by counsel for the respondents in item (d)(vii) will accordingly be sustained.

#### THE SECOND MOTION

In this second motion, the applicants seek leave to file the same correspondence mentioned above as an exhibit to an affidavit. However, Rule 1603 provides that the applicants must file all their affidavits when they file their application for judicial review. There is cause to believe - and counsel for the applicants does not deny this - that the applicants were in possession of the correspondence in question when they drafted and filed their application for judicial review. Why then did they not introduce it in evidence at that time? This is the question that must be asked here. Furthermore, introducing it in evidence at that time would have had the advantage of giving the applicants everything they needed to confront M. Thomas on the situation.

The affidavit submitted by the applicants in support of this second motion says nothing about this.


This motion, like the first, must therefore be dismissed.

Furthermore, I note that if this second motion by the applicants were also intended - although I am not sure it was - to introduce the drafts discussed in item (d)(vi) of their first motion by affidavit, it is my view that this request would also have to be dismissed, since it would be necessary to establish that the applicants did not know about these drafts until after they filed their application for judicial review. If they knew about them before filing their application, they would in my view, at the very least, have had to attempt to procure them under Rule 1612 at approximately the same time as they filed their application for judicial review. A request under Rule 1612 would have constituted a starting point for possibly filing the same documents by means of a motion such as this one.

Richard Morneau  
Prothonotary

Montréal, Quebec  
September 20, 1996

Certified true translation



Stephen Balogh

**FEDERAL COURT OF CANADA**

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Court No. T-1530-96

**BETWEEN  
THE CANADIAN SHIPOWNERS  
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**REASONS FOR ORDER**

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**FEDERAL COURT OF CANADA**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**COURT FILE NO.:** T-1530-96

**STYLE OF CAUSE:** THE CANADIAN SHIPOWNERS ASSOCIATION,  
UPPER LAKES SHIPPING LIMITED,  
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THE ATTORNEY GENERAL OF CANADA,

Respondents.

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** September 16, 1996

**REASONS FOR ORDER BY:** Richard Morneau, Prothonotary

**DATED:** September 20, 1996

**APPEARANCES:**

Jacques A. Laurin for the applicants

Claude Joyal for the respondents

**SOLICITORS OF RECORD:**

Jacques A. Laurin for the applicants  
Legault Longtin Laurin Halpin  
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George Thomson for the respondents  
Deputy Attorney General of Canada  
Montréal, Quebec

**THE FEDERAL COURT  
OF CANADA**

**LA COUR FÉDÉRALE  
DU CANADA**

Court No.: T-1530-96

No. de la cause:

Let the attached certified translation of the following document in this cause be utilized to comply with Section 20 of the **Official Languages Act**.

Je requiers que la traduction ci-annexée du document suivant telle que certifiée par le traducteur soit utilisée pour satisfaire aux exigences de l'article 20 de la **Loi sur les langues officielles**.

**REASONS FOR ORDER**

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January 24, 1997

Richard Morneau

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**DATE**

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**Prothonotary**

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**Protonotaire**

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