Federal Court  Cour fédérale

Date: 20120312

Docket: T-953-11

Citation: 2012 FC 301

Ottawa, Ontario, March 12, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**THE SHIPPING FEDERATION OF CANADA,
AMERICAN PRESIDENT LINES LTD.,
CMA-CGM (CANADA) INC.,
HANJIN SHIPPING CO. LTD.,
HAPAG-LLOYD (CANADA) INC.,
"K" LINE CANADA LTD.,
MAERSK CANADA INC.,
MEDITERRANEAN SHIPPING COMPANY
(CANADA) INC., MONTSHIP INC.,
NYK LINE (CANADA) INC.,
OOCL (CANADA) INC.,
YANG MING SHIPPING (CANADA) LTD., and
ZIM INTEGRATED SHIPPING SERVICES
(CANADA) CO. LTD.**

Applicants

and

**THE VANCOUVER FRASER PORT
AUTHORITY**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Twelve international shipping lines and the Shipping Federation of Canada challenge the "Gateway Infrastructure Fee" imposed by the Vancouver Fraser Port Authority (VFPA) on vessel owners in respect of containerized cargo. The challenge is based on the alleged absence of jurisdiction of the VFPA to impose this type of fee on container cargo ship owners.

II. BACKGROUND

[2] The VFPA was created by amalgamation of the Fraser River Port Authority, the North Fraser River Port Authority and the Vancouver Port Authority. The VFPA is an agent of the Crown established under the *Canada Marine Act* (CMA) for the purposes of managing and operating the port as more fully described in the port's Letters Patent.

[3] The most pertinent part of the CMA for the purposes of the issues in this judicial review is s. 49, particularly paragraph 3:

49. (1) A port authority may fix fees to be paid in respect of	**49.** (1) L'administration portuaire peut fixer les droits à payer à l'égard :
(a) ships, vehicles, aircraft and persons coming into or using the port;	*a)* des navires, véhicules, aéronefs et personnes entrant dans le port ou en faisant usage;
(b) goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or moved across the port; and	*b)* des marchandises soit déchargées de ces navires, chargées à leur bord ou transbordées par eau dans le périmètre portuaire, soit passant par le port;
(c) any service provided by the port authority, or any right or	*c)* des services qu'elle fournit ou des avantages qu'elle

privilege conferred by it, in respect of the port.

accorde, en rapport avec l'exploitation du port.

(2) A port authority may fix the interest rate that it charges on overdue fees.

(2) L'administration peut fixer le taux d'intérêt frappant les droits impayés.

(3) The fees fixed by a port authority shall be at a level that permits it to operate on a self-sustaining financial basis and shall be fair and reasonable.

(3) Les droits que fixe l'administration portuaire doivent lui permettre le financement autonome de ses opérations et également être équitables et raisonnables.

(4) The fees and interest rate may be made binding on Her Majesty in right of Canada or a province.

(4) Les droits et le taux d'intérêt peuvent être rendus obligatoires pour Sa Majesté du chef du Canada ou d'une province.

(5) The fees fixed under paragraphs (1)(a) and (b) do not apply in respect of a Canadian warship, naval auxiliary ship or other ship under the command of the Canadian Forces, a ship of a visiting force within the meaning of the *Visiting Forces Act* or any other ship while it is under the command of the Royal Canadian Mounted Police.

(5) Les droits prévus aux alinéas (1) a) et b) ne s'appliquent pas aux navires de guerre canadiens, aux navires auxiliaires de la marine, aux navires placés sous le commandement des Forces canadiennes, aux navires de forces étrangères présentes au Canada au sens de la *Loi sur les forces étrangères présentes au Canada*, ni aux navires placés sous le commandement de la Gendarmerie royale du Canada.

(6) A fee that is in force in respect of a port on the coming into force of this section continues in force for a period ending on the earlier of the expiration of six months and the date on which it is replaced by a fee fixed under subsection (1).

(6) Les droits en vigueur à l'égard d'un port à l'entrée en vigueur du présent article demeurent en vigueur pendant une période maximale de six mois sauf s'ils sont remplacés plus tôt.

(Underlining by Court)

[4] The VFPA is part of the Asia-Pacific Gateway and Corridor (Gateway), a network of transportation infrastructure that includes the ports of the Lower Mainland and the principal road and rail connections across Western Canada.

[5] In October 2006 the Federal Government launched the Asia-Pacific Gateway and Corridor Initiative which was a series of infrastructure projects to be undertaken in the Lower Mainland area to improve the reliability of the Gateway for Canadian exports and to increase the region's share of container imports from Asia.

[6] Seventeen projects in three major areas that are under the control of the VFPA (the North Shore and South Shore Trade Areas and the Roberts Bank Rail Corridor) were selected and the VFPA committed substantial sums to be repaid through the mechanism of a new fee known as the Gateway Infrastructure Fee (GIF).

[7] The GIF was developed after the completion of a multi-stakeholder consultation process. The VFPA made the following decisions about the structure, repayment term, collection mechanism and annual evaluation process for the GIF:

- the GIF would be structured as a tonnage-based fee;
- the GIF would be structured to recover 90% of the costs of the Gateway Infrastructure Projects, incurred by VFPA, plus financing and major maintenance, and the VFPA will contribute the remaining 10% from its general revenues;
- the GIF would cease to apply once the Gateway Infrastructure Project costs have been repaid;

- no additional projects would be added to the Gateway Infrastructure Projects funded by the GIF;
- separate GIF rates would be implemented for each of the three trade areas, providing a closer link between the benefits received from the area-specific projects and the costs being paid;
- the GIF would only be charged to those stakeholders who obtain a significant benefit as a result of the Gateway Infrastructure Projects, and will not be charged to others who do not significantly benefit, such as the cruise lines, and those operating in the Fraser River Trade Area, Burnaby and Port Moody;
- the term of the GIF would be 30 years to approximate the life of the infrastructure constructed, the most equitable way to ensure that the cost is borne by all those who use the infrastructure over its life; and
- the GIF would be transparent, with the VFPA reporting annually on the Gateway Infrastructure Projects costs, the GIF collected and the remaining costs to be recovered.

[8] The fees are set out in the VFPA's Fee Document and provide that the GIF is payable in respect of containerized cargo by the owner of the vessel on volumes imported or exported over the wharf and in respect of non-containerized cargo, by the owner of the cargo based on tonnage loaded or unloaded over the wharf.

[9] The Applicants, who are twelve international shipping lines calling at VFPA's port and their trade association, The Shipping Federation of Canada, object to the VFPA's decision to assess the

GIF in respect of container shipments against the owner (which includes the charterer) of the respective vessels. The fee scheme was set out in a letter of March 10, 2011 and is what the Applicants style as the Decision.

[10] The Applicants contend that the ship owners do not receive any benefit from the Gateway Infrastructure Projects nor do they receive any service or services in respect of the GIF. As such, the Applicants argue that the GIF is not just and reasonable as required by s. 49(3) of the CMA, and is a tax rather than a user fee or regulatory fee.

[11] As was made clear in oral argument, the Applicants narrow their challenge to the issue of the GIF as it applies to containers. The Applicants do not challenge the VFPA's powers to set fees generally, nor do they contest the VFPA's power to invest in non-traditional (from a port's perspective) assets. Further, they do not challenge the VFPA's power to recoup the moneys expended nor do they contest the quantum of the GIF. The Court notes that these concessions are made for purposes of this litigation only.

[12] The Applicants' real complaint is that the charging mechanism on containers imposes an undue administrative burden and costs which cannot easily be passed on to the container owners or to the owners of the goods who presumably receive some benefit from improved Gateway infrastructure in terms of the efficiency of port container handling and ultimate delivery to destinations.

[13] The Applicants complain that the GIF assessed against the cargo ship owner cannot easily or efficiently be broken down by container and then charged back to the owner. They argue that the GIF divided by the number of containers shipped on modern container ships results in a *de minimis* charge per container but a large amount on an aggregated basis.

[14] It is in the above respects that the Applicants say that the fee is not just and reasonable and if a fee is not just and reasonable, as required by CMA s. 49(3), then the VFPA was without jurisdiction to establish the fee as against cargo ship owners.

III. LEGAL ANALYSIS

A. *Standard of Review*

[15] The Applicants have framed the issues as jurisdictional, thereby attracting a standard of correctness. However, only some of the Applicants' grounds of challenge are truly jurisdictional; the core challenge (see paragraph 11) is not.

[16] The Applicants' position is that the VFPA can only establish a fee which is "just and reasonable" pursuant to CMA s. 49(3) and since the GIF is not "just and reasonable" because of who is required to pay the fee, the VFPA acted without jurisdiction.

[17] This circular reasoning is the type of jurisdictional challenge which the Supreme Court has tried to limit. The Supreme Court has held that the category of true questions of jurisdiction is narrow. As confirmed in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paragraph 34, even the interpretation "by a tribunal of 'its own statute

or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review."

[18] The Applicants' real challenge is as to the manner in which the VFPA carried out its jurisdiction to fix fees not as to its legal authority to fix fees. As stated earlier, the Applicants do not challenge the power to set fees or more specifically the GIF.

[19] It is only on the issue of whether the GIF is a tax, not a fee, that the Applicants raise a true question of jurisdiction. That issue involves a consideration of the legal quality of the GIF, potentially involves a consideration of the constitutional power to tax, and the jurisdictional boundaries of the VFPA in relation to other executive bodies. This is not an area of VFPA expertise. However, for reasons given later, there is no basis for considering the GIF as a tax.

B. *GIF – Fair and Reasonable*

[20] Section 49-53 of the CMA permits the establishment of fees, restricts or sets criteria for such fees and provides for a mechanism against unjustly discriminatory fees.

[21] Section 2 of the CMA defines fees:

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

[22] The GIF would at least fall within the category of “and other charges” under that definition.

[23] Fees are, as stipulated in s. 49(3), to be at a level which permits a port to operate on a self-sustaining basis and to be “fair and reasonable”. Although there is no challenge to the level of the GIF or to the fairness and reasonableness of the quantum of the GIF assessed and to be assessed against the Applicants (an issue which would be subject to the reasonableness standard of review), the Applicants say that to be lawful there must be a direct link between the fee charged and either a service provided or a benefit received.

[24] The Applicants take the position that a container ship owner receives no service for the GIF nor does it receive any benefit from the port and infrastructure improvements made for which the GIF is assessed. They acknowledge that the cargo owners may receive a benefit from the efficiencies gained in moving cargo from the port to the ultimate destination but the benefit does not accrue to the ship owner.

[25] The decisions of the Canadian Transportation Agency (CTA) relied upon to ground the requirement for a direct link between a fee and a port service must be read with care. The CTA only has jurisdiction under s. 52 of the CMA in respect of complaints against unjust discrimination in respect of fees. In *Re Irving Oil Limited*, CTA Decision No. 293-W-2010 and in *Re Neil Surry et al*, CTA Decision No. 370-W-2006, the CTA's comments and analysis relate to fees which are unjustly discriminatory. As held in *Re Neil Surry*, at paragraph 42, a discriminatory fee becomes unjust where the fee is not functionally and rationally connected to the costs of providing the service.

[26] In this case, the Applicants are not complaining about discrimination. Indeed, it would be questionable whether this Court would or could entertain such a complaint.

[27] The Applicants' reliance on administrative decisions decided under the *Pilotage Act* is misplaced. Although the *Pilotage Act* was enacted at the time of the CMA, is in the marine field and refers to pilotage fees being "fair and reasonable", the mandates and functions of ports are quite different from the unique specialized services of marine pilots. Section 33 of the *Pilotage Act*, which permits a tariff, was specifically limited to the provision of certain services. Therefore, there had to be a connection between the tariff charge and the service provided for the charges to fall under s. 33 of the *Pilotage Act*.

[28] Section 49 of the CMA is differently constituted, more expansive and less specifically tied to services provided. Only s. 49(1)*(c)* draws a connection between fees to be paid and a service provided by the port authority. However, even in s. 49(1)*(c)* the fee need not be for only a service but the fee can be assessed in respect of any right or privilege given by the port authority.

49. (1) A port authority may fix fees to be paid in respect of	**49.** (1) L'administration portuaire peut fixer les droits à payer à l'égard :
…	…
(c) any service provided by the port authority, or any right or privilege conferred by it, in respect of the port.	*c)* des services qu'elle fournit ou des avantages qu'elle accorde, en rapport avec l'exploitation du port.

[29] The link between a fee and a service does not exist in s. 49(1)*(a)* where the fees to be paid are in respect of "ships … coming into or using the port". The container cargo ships are subject to fees simply by entering into the VFPA's waters and alongside in the port.

49. (1) A port authority may fix fees to be paid in respect of	**49.** (1) L'administration portuaire peut fixer les droits à payer à l'égard :
(a) ships, vehicles, aircraft and persons coming into or using the port;	*a)* des navires, véhicules, aéronefs et personnes entrant dans le port ou en faisant usage;

[30] Likewise, in s. 49(1)*(b)* there is no link between the fees assessed and the provision of port services. In this instance a fee can be assessed in respect of "goods loaded on ships, unloaded from ships or transhipped by water within the limits of the port or moved across the port". Containers and their content would fall into the category of goods loaded and unloaded for which a fee could be assessed without the VFPA providing any specific service.

49. (1) A port authority may fix fees to be paid in respect of	**49.** (1) L'administration portuaire peut fixer les droits à payer à l'égard :
…	…
(b) goods loaded on ships, unloaded from ships or	*b)* des marchandises soit déchargées de ces navires,

transhipped by water within the limits of the port or moved across the port;	chargées à leur bord ou transbordées par eau dans le périmètre portuaire, soit passant par le port;

[31] Therefore, the GIF is exigible against the container ship owners by virtue, at least, of s. 49(1)*(a)* and/or *(b)* of the CMA. The VFPA need not link the GIF to a service or benefit in order to justify requiring the container ship owners to pay the fee.

[32] Even if there was a requirement for a direct link between the GIF and a benefit, there are benefits to the ship owners from a more efficient port where cargo can be released more quickly and ships freed to provide more voyages.

[33] The record in this case does indicate that a VFPA official advised ship owner representatives that there were no benefits to ship owners from the infrastructure improvements. While I do not take *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, so far as to suggest that there is an open invitation to Courts to redo the work of a decision maker or to develop new and different reasons to justify a decision, there is ample evidence and common sense to support a finding of benefits to ship owners from improved port efficiency.

[34] Therefore, I conclude that the Applicants have not established that the GIF is not "fair and reasonable". The fee is sustainable under s. 49(1)*(a)* and/or *(b)* of the CMA insofar as it requires container ship owners to pay that fee.

[35] The decision to levy the fee against the ship owner is reasonable as the ship is the primary contact with the port. The ease of collecting the fee from the ship owner versus assessing the fee against each owner of each piece of cargo in the container or against each container owner is obvious. In any event, such a decision is within the operation of the VFPA home statute and Letters Patent and is subject to a deferential reasonable standard of review which is clearly met.

C. *Fee v Tax*

[36] The Applicants' position that the GIF is a tax is based in part on the absence of a connection between the fee and the provision of a service. That position rests on the basis that the GIF does not meet the requirements of s. 49(3) and therefore the fee is a tax.

[37] For the reasons given under the heading "Fair and Reasonable", the Court has held that the GIF is authorized by s. 49(1). That finding should be sufficient to dispose of the issue of a disguised tax.

[38] The Applicants argue that the GIF is imposed for a broader, more public, purpose to encourage the growth of the Asia-Pacific Gateway and Corridor through better use of capacity. Insofar as the VFPA is concerned, it was investing in infrastructure "beyond traditional port activities and lands".

[39] This Court, in *Algoma Central Corp v Canada*, 2009 FC 1287, considered the distinction between a harbour fee and a tax. The case involved a "public port" under Part 2 of the CMA for which the Minister of Transport is responsible as distinct from ports under Part 1 of the CMA for

which the relevant port authority is responsible. That distinction does not undermine the analysis of port fee versus tax issue.

[40] In *Algoma*, above, Justice O'Keefe determined:

- the regulation of public ports under the CMA constitutes a national system which is clearly a regulatory scheme.
- the users of those public ports and the surrounding waters benefit from the regulation of public ports.
- to be a regulatory fee, a harbour fee need not be specifically traceable to specific regulatory costs – it is sufficient if the revenues obtained were less than the money expended on the regulatory system.

[41] This latter point was set forth in *Canadian Shipowners Association v Canada*, [1997] FCJ No 1002, aff'd [1998] FCJ No 1515 (CA), where this Court held that a fee is not a tax where the amount collected will not exceed the total cost incurred.

[42] In my view, the regulation and operation of port authorities constitute part of a national scheme for the self-sufficient, independent but interrelated operations of ports in Canada (See CMA s. 4 – Purpose Clause).

[43] The Court has already addressed benefits to users; that users of the port authority's ports and surrounding waters benefit from the regulation of these ports.

[44] Of critical importance is that, through the GIF, the VFPA will only recover 90% of the amount expended on this project. The balance will come from other revenues. The VFPA has an oversight commitment to report on its compliance with the scheme for repayment of the infrastructure costs.

[45] In *620 Connaught Ltd v Canada*, 2008 SCC 7, the Supreme Court specifically addressed the distinction between a tax and a regulatory charge. The Court, at paragraph 28, summarized that distinction:

> **28** In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*.

[46] Applied to the present case, there is a regulatory scheme for the operation of port authorities, the VFPA, in particular; that scheme is clearly relevant to ships which used the VFPA's port including its waters and facilities; there is a relationship between the GIF and the scheme for the operation of the port, its efficient use of facilities and the movement of goods through the port.

[47] In light of these authorities, I conclude that the GIF is not a tax. It is not important for this analysis to classify the GIF as a fee or regulatory charge.

IV. CONCLUSION

[48] Therefore, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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