COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,* 2013 BCCA 55

Date: 20130206
Docket: CA038859

In the Matter of Section 45.1 of the *Coastal Ferry Act*, S.B.C. 2003, c. 14

And In the Matter of Order #11-01 of the British Columbia Ferries Commissioner

Between:

Seaspan Ferries Corporation

Appellant

And

British Columbia Ferry Services Inc. and the British Columbia Ferries Commissioner

Respondents

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman
The Honourable Madam Justice MacKenzie

On appeal from: British Columbia Ferries Commissioner, February 7, 2011, (*Re Section 45.1 of the Coastal Ferry Act, S.B.C. 2003, c. 14 and Regulation of Competitive Advantage Respecting BCFS' Drop Trailer Services on Its Major Routes,* Commission Order 11-01)

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Place and Date of Hearing:	Vancouver, British Columbia May 28 and 29, 2012
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2013

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Madam Justice MacKenzie

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This is an appeal, with leave, from an order of the B.C. Ferry Commissioner issued February 7, 2011 setting a minimum average tariff to be charged by British Columbia Ferry Services Inc. ("BCFS") in respect of its drop trailer services. The Commissioner issued his reasons for making the order on April 29, 2011. The Commissioner did not disclose the tariff itself in either the publicly available order or in his reasons; it was only provided to BCFS.

[2] The appellant, Seaspan, is the dominant company and major competitor of BCFS in the drop trailer business in British Columbia. It was a party to the proceedings before the Commissioner. On this appeal, it contends that the Commissioner failed to act in a procedurally fair manner, that he erred in his interpretation of the *Coastal Ferry Act*, S.B.C. 2003, c. 14, and that he did not have jurisdiction to keep the tariff that he established confidential.

BCFS and the *Coastal Ferry Act*

[3] Until 2003, coastal ferries in British Columbia were operated by a Crown corporation, the British Columbia Ferry Corporation. As a result of a review of services in the early 2000s, the government of British Columbia decided to transform the corporation into an entity that was more independent of central government.

[4] In 2003, it enacted the *Coastal Ferry Act*. Under s. 19 of that statute, the British Columbia Ferry Corporation was allowed to become a corporation under the *Company Act*, R.S.B.C. 1996, c. 62 and it ceased to be an agent of the government of British Columbia.

[5] The entity now operating coastal ferries in British Columbia is BCFS. Although governed by the province's general statute dealing with companies (now the *Business Corporations Act*, S.B.C. 2002, c. 57), BCFS is not a private company. Its sole voting share is held by the B.C. Ferry Authority, a corporation without share capital established under s. 2 of the *Coastal Ferry Act*. The B.C. Ferry Authority is a governmental body, but it is structured in a manner that gives it considerable

independence from central government. The Authority appoints the directors of BCFS.

[6] BCFS's operations are subject to a complex combination of legislation, administrative regulation and requirements set out in agreements with government. The legislative framework is designed to ensure that BCFS provides ferry transportation services at regulated costs, but also encourages BCFS to adopt an entrepreneurial approach to its operations.

[7] Section 27 of the *Coastal Ferry Act* allows the government to enter into an agreement with a person authorizing that person to operate ferries. To date, the government has entered into only one such agreement, a detailed 60-year contract under which BCFS is authorized and required to provide specific levels of coastal ferry services on 25 routes. Under the statute, the services provided for in the contract are defined as "core ferry services", and are heavily regulated by the British Columbia Ferry Commissioner, an independent official appointed under s. 35 of the statute.

[8] The core ferry services that BCFS is required to operate under its contract consist of basic passenger and roll-on roll-off vehicle transportation services. Nothing prevents BCFS from operating additional services. Indeed, the emphasis on BCFS operating on a commercial basis serves to encourage it to take advantage of business opportunities that may be profitable to it.

The Drop Trailer Service and Changes to the Legislation

[9] Both historically and today, most of the vehicles carried by BCFS are carried on a roll-on roll-off basis, with vehicle operators driving their vehicles onto a ferry at the departure terminal, remaining on the ferry during the voyage and driving their vehicles off the ferry at the arrival terminal.

[10] BCFS now also provides a drop trailer service on two of its routes (Tsawwassen-Swartz Bay and Tsawwassen-Duke Point). A tractor-trailer operator is able to leave a trailer at the departure terminal for transport by BCFS. BCFS

attaches the trailer to a device known as a "hostler unit", which then loads it onto the ferry. At the arrival terminal, BCFS unloads the trailer from the ferry, detaches the hostler unit and holds the trailer until it is picked up by the operator.

[11] Drop trailer services have been part of the coastal ferry system in British Columbia for more than 50 years. The BC Toll Highways and Bridges Authority (the predecessor of the British Columbia Ferry Corporation) offered a drop trailer service when it commenced operations in 1960. By 1966, however, demand for vehicle space on public ferries exceeded supply in the summer, and starting in 1967, summer restrictions were placed on the drop trailer service. In 1973, the Corporation discontinued the drop trailer service entirely.

[12] A privately-operated drop trailer service was offered by the ferry subsidiary of the Canadian Pacific Railway, which was eventually acquired by Seaspan. The Commissioner described the situation in the decades leading up to 2008 as follows:

> In effect, the truck market was partitioned. Most trucks travelling with drivers would be handled by BC Ferries, along with passengers, cars and buses onboard the same vessels. Truck trailers to be ferried without their tractors and drivers, logistically rather different, would be handled by the private sector in a completely separate operation.

[13] In October 2008, BCFS decided to initiate a drop trailer service in order to fill unused space on its sailings and thereby increase its revenues. The service commenced in 2009.

[14] The regulatory focus of the *Coastal Ferry Act* is on core ferry services. In 2009, the *Act* provided only for limited regulation of other services. While the Commissioner was not prohibited from regulating drop trailer services, the extent of his regulatory power was limited. Except insofar as drop trailer services affected core ferry services, the statute did not provide for their regulation.

[15] In October 2009, the Office of the Comptroller General published its *Report on Review of Transportation Governance Models*. At p. 19, it considered the necessity for amendment to the regulatory regime:

> The governance model provides no regulation of services BCFS may provide that compete directly with private enterprise. For example, BCFS recently entered into the 'drop trailer' market. Truck trailers can be dropped off at a ferry terminal and BCFS will load and deliver them to their destination ferry terminal. This presents direct competition to private operations that provide similar services. While this is consistent with the entrepreneurial behavior to be expected of a commercial enterprise, it could be perceived that BCFS has undue advantages such as having exclusive use of the ferry terminals, having a monopoly on ferry services and receiving funds from the provincial and federal governments. To avoid the possibility that passenger fares could be allocated an unfair portion of the costs , and to ensure there is no perception of undue advantage, it is important that the allocation of costs between such commercial services and passenger/vehicle services be transparent and subject to independent oversight. To this end, the Commission should regulate such competitive services separately from its regulation of the transportation of vehicles and passengers in order to avoid impacting regulated fares under the price cap model.

[16] In 2010, the *Coastal Ferry Act* was amended to allow for regulation of "competitive services" undertaken by BCFS. The relevant provisions of the statute, as amended, are as follows:

> 1. In this Act:
>
> …
>
> "competitive service" means a ferry transportation service, including, without limitation, a drop trailer service, that is the same as or substantially similar to a service being provided
>
> (a) by a person other than a ferry operator, and
>
> (b) in a geographical area that is sufficiently near to where the ferry transportation service is or may be provided that the 2 services could reasonably be in competition;
>
> …
>
> "drop trailer service" means a service in which a ferry operator
>
> (a) loads on a vessel,
>
> (b) transports on the vessel on a major route, and
>
> (c) unloads from the vessel
>
> a trailer left with the ferry operator for those purposes;
>
> . . .
>
> "ferry operator" means each person who, under the terms of a Coastal Ferry Services Contract, is authorized to operate one or more ferries on one or more designated ferry routes;
>
> ….

> 45.1(1) If a ferry operator is providing a competitive service, the commissioner must determine whether the ferry operator is pricing the service below the direct costs and an appropriate proportion of the indirect costs associated with providing that ferry transportation service, or has an unfair competitive advantage, including, without limitation, an advantage resulting from the ferry operator having been provided with
>
> > (a) use of, access to or ownership of vessels or terminals that are or had been owned by the government or a government body within the meaning of the *Financial Administration Act*,
> >
> > (b) any tax exemption, or
> >
> > (c) any subsidy.
>
> (2) If the commissioner makes the determination referred to in subsection (1), the commissioner must regulate the ferry transportation service in one of the following ways:
>
> > …
> >
> > (b) calculate the amount that the commissioner considers would be charged as a tariff for that ferry transportation service to recover the direct costs and an appropriate proportion of the indirect costs attributable to providing the service were none of the factors referred to in subsection (1) of this section present, and order the ferry operator to charge at least that tariff when providing that ferry transportation service.

The Commissioner's Procedures and Order

[17] The drop trailer service was clearly a "competitive service", and the Commissioner began to investigate it as soon as the legislation was brought into force. From the outset, he involved Seaspan in the proceedings.

[18] On July 19, 2010, the Commissioner issued a memorandum requesting information from BCFS in order to carry out his mandate under s. 45.1 of the *Act*. On July 30, 2010, Seaspan sought an opportunity to examine and respond to the information that BCFS was required to provide to the Commissioner. BCFS raised the issue of commercial sensitivity of information immediately.

[19] On August 31, 2010, BCFS filed its submissions with the Commissioner. In those submissions, it suggested that the Commissioner initially make a determination under s. 45.1(1) of the *Act*, and then allow further submissions to deal with s. 45.1(2) if necessary.

[20] In its August 31 submission, BCFS attached, as evidence, six confidential exhibits containing financial information. Seaspan requested a copy of portions of the exhibits, but did not receive them pending a determination of the confidentiality issue. It also sought additional information from BCFS. While BCFS provided additional information to the Commissioner in response to Seaspan's requests, it requested that the information not be made public or provided to Seaspan. Seaspan continued to seek the release of all information that was filed by BCFS.

[21] After considering submissions from the parties on the confidentiality issue, the Commissioner released some redacted material to Seaspan, but refused to release all of the material that it had requested. He found that releasing all of the material might harm the financial interests of BCFS. In refusing to release all of the material sought by Seaspan, the Commissioner rejected Seaspan's argument that procedural fairness demanded that it be provided with the information. The Commissioner noted that the requirements of procedural fairness are variable:

> In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada held at para. 22 that:
>
> > … the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected …. [T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> The court in *Baker* sets out at paras. 23-27 factors to be considered, including the nature of the decision being made, the process followed in making it, the nature of the statutory scheme and the terms of the legislation pursuant to which the administrative agency operates, the importance of the decision to the persons affected, the legitimate expectations of those persons that a certain procedure will be followed, and the choices of procedure made by the agency in light of its institutional constraints.

[22] He commented on the fact that his inquiry was inquisitorial in nature:

> This inquiry into the pricing practices of BCFS, and whether they create an unfair competitive advantage, is being carried out by the filing of written submissions by BCFS, with an opportunity to comment in writing given to the public. The Commissioner is being assisted in its review of the Filing and

> other submissions by Pricewaterhouse Coopers, an independent advisor retained by the Commissioner.

[23] The Commissioner considered that the material that he had released to Seaspan afforded it the ability to make meaningful submissions. He was not persuaded that the requirements of procedural fairness required him to release all of the confidential material provided to him by BCFS.

[24] Seaspan addressed the substantive issues under s. 45.1 in extensive submissions to the Commissioner filed on November 26, 2010. In those submissions, it agreed with BCFS's initial suggestion that the proceeding be bifurcated, with the Commissioner first determining the issues under s. 45.1(1) of the *Act*, and then giving the parties an opportunity to make further submissions, if necessary, on the issues under s. 45.1(2).

[25] BCFS responded on December 8, 2010. Among other responses, it suggested that the Commissioner was in a position to address the issue under s. 45.1(2)(b) if necessary, and that there was no longer any compelling reason to bifurcate the proceeding. Seaspan provided a further response on December 15. Among other submissions, it objected to the Commissioner making a s. 45.1(2)(b) order without further submissions.

[26] The Commissioner advised the parties that he did not anticipate receiving further submissions, but would make requests for further information if he found it necessary to do so. He did request some further confidential financial information from BCFS in early January 2011.

[27] In February 2011, the Commissioner issued his order. He made the following findings:

> (i) For costs indirectly attributable to the drop trailer service, it is appropriate to apply a "route overhead charge" to the costs of drop trailer service to recognize the provision of terminal and deck space, and marine transport. This charge is in addition to the costs that BCFS considers to be appropriate as presented in its submissions;
>
> (ii) When the "route overhead charge" is taken into account, BCFS is pricing drop trailer service on its major routes below the sum comprised of its direct

> costs and an appropriate proportion of indirect costs associated with the service;
>
> (iii) BCFS has an unfair competitive advantage arising from two factors: its exemption from income tax, and its operation under a regulatory framework designed to allow it to meet the cost of providing its contracted capacity, plus a return to equity, through price caps set before the start of each performance term …

[28] Accordingly, the Commissioner found that the requirements of s. 45.1(1) of the *Act* were met. He proceeded to make an order under s. 45.1(2)(b) without taking further submissions from the parties. The Commissioner described his methodology as follows:

> The commissioner has calculated the amount that he considers would be charged as an average tariff per vessel-foot (being a lane foot onboard a vessel occupied by drop trailers and their hostler units) to recover the direct costs and an appropriate proportion of the indirect costs, were none of the factors in s. 45.1(1) present.

[29] The Commissioner established a minimum allowed average tariff ("MAAT") as a monetary rate for each vessel-foot of drop trailer traffic. He based the rate on a level of drop trailer traffic that had not yet been achieved, but was anticipated in the future (the "Horizon Volume of Traffic"). He further provided that when drop trailer traffic exceeded a particular level (expressed as vessel-feet per year) the MAAT would be revised. The public version of the order did not provide the figures for either the MAAT or the annual volume of traffic that would trigger a revision of the MAAT. In the public version of the order, the Commissioner explained that he considered that disclosure of that data would cause a real and substantial possibility of future harm to the financial or economic interests of BCFS.

The Issues on Appeal

[30] Section 50(1) of the *Coastal Ferry Act* provides:

> 50(1) An appeal on a question of law lies from a decision or order of the commissioner to the Court of Appeal with leave of a justice of that court.

[31] Seaspan sought, and was granted leave to appeal on the following questions:

(1) Did the Commissioner err in his interpretation of s. 45.1 [of the *Coastal Ferry Act*]? In particular:

(a) did s. 45.1 require the Commissioner to include a cost of equity in the tariff he imposed? and

(b) did s. 45.1 permit the Commissioner to calculate BCFS' costs with reference to an estimate of future costs?

(2) Did the Commissioner breach the duty of procedural fairness? In particular, did the Commissioner breach that duty when he:

(a) declined to disclose relevant materials to Seaspan? and

(b) determined the terms of the tariff without notice to Seaspan and without giving Seaspan an opportunity to make submissions on that subject? and

(3) Did the Commissioner exceed the discretion conferred upon him by s. 52 of the *Coastal Ferry Act* when he concealed the terms of the tariff?

[32] After leave was granted, Seaspan gave notice (both in its factum and by way of a Notice of Motion) that it would seek leave at the hearing of the appeal to argue that even if s. 45.1 permits the Commissioner to assess BCFS's costs by reference to an estimate of future costs, it was unreasonable, in the circumstances of this case, for him not to use current costs in his calculations. At the hearing, we allowed the argument to be presented, but reserved on the question of whether leave would be granted.

Are the Issues Raised by the Appellant Issues of Law?

[33] BCFS brings a preliminary objection to the appeal, arguing that the issues on which leave has been granted raise questions of fact or of mixed law and fact. It contends that the jurisdiction of this Court to entertain an appeal under s. 50 of the *Coastal Ferry Act* is limited to appeals that raise pure questions of law.

[34] Iacobucci J., for the majority of the Supreme Court of Canada, considered the classification of questions into questions of law, questions of fact and questions of mixed law and fact in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748:

> [35] … Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions

> about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.
>
> [36] For example, the majority of the British Columbia Court of Appeal in *Pezim* [*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557], concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely -- that newly acquired information about the value of assets can constitute a material change -- was a matter of law, because it had the potential to apply widely to many cases. [Emphasis added.]

[35] In my view, the two parts of the first question on which leave has been granted in this case can properly be described as raising pure questions of law. They are questions of the interpretation of statutory language. Question 1(a) asks, in effect, whether the word "costs" in s. 45.1 of the statute must be interpreted as including a return on equity. Question 1(b) asks whether the word "costs" must be taken to refer to current costs, or whether it may instead be taken to refer to anticipated costs over the longer term. Both of these questions are questions that are likely to arise in future cases, and neither is particularly closely connected to the specific facts of the current case. Neither of these questions requires a revisiting of findings of fact made by the Commissioner, nor are the legal issues so intertwined with factual determinations as to raise questions of mixed law and fact.

[36] A similar situation exists in respect of the third question. The question of whether the Commissioner has the power to make part of an order confidential is a pure question of law. It is not intertwined with findings of fact.

[37] The classification of the procedural fairness issues posed by the two parts of the second question is less obvious. They might be thought to raise mixed questions of law and fact, in that they require the application of a legal standard – that of procedural fairness – to the particular context of the case. Equally, however, it may be thought that the question of whether a tribunal has followed proper procedures raises an issue of law.

[38] In my view, s. 50 of the *Coastal Ferry Act* should be interpreted as allowing appeals to proceed to this Court on issues of procedural fairness, whether such issues are categorized as issues of law alone or as issues of mixed law and fact.

[39] Section 50 must be interpreted in its statutory context. The immediately preceding section of the statute is as follows:

> 49 (1) The commissioner has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on the commissioner by this or any other enactment.
>
> (2) Subject to section 50, an order, decision or proceeding of the commissioner must not be questioned, reviewed or restrained by any process or proceeding in any court.

[40] It appears to me that the legislative intent of ss. 49 and 50 is to eliminate the right to judicially review a decision of the Commissioner in favour of a right to apply for leave to appeal his decisions to this Court. In order to be effective, such a legislative scheme must ensure that this Court has full jurisdiction to deal with all matters that would otherwise be dealt with by way of judicial review, including issues of procedural fairness. If it is not so interpreted, the regime would give rise to an overly complex review process in which some issues would be subject to judicial review in the Supreme Court, while others would proceed directly to this Court by way of appeal.

[41] I note that the language used in s. 50 to restrict appeals to issues of law is less rigid than the language used in some other statutes. While s. 50 requires an appeal to be "on a question of law", it does not require it to be on a "question of law alone". The latter formulation is found in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 839 and the *Offence Act*, R.S.B.C. 1996, c. 338 s. 124, which restrict the ambit of summary conviction appeals to this Court. The same language is found in the *Assessment Act*, R.S.B.C. 1996, c. 20, s. 65(1), in respect of stated case appeals to the Supreme Court. In my view, s. 50 is somewhat broader than these other provisions, allowing appeals to be brought on questions that are predominantly, if not exclusively, issues of law.

[42] An appeal on an issue of procedural fairness is predominantly an appeal on a question of law. In the context of the *Coastal Ferry Act*, therefore, I conclude that such an appeal is available, with leave, to this Court.

[43] I would therefore reject BCFS's challenge to the jurisdiction of the Court to entertain the appeal on the issues on which leave has been granted.

[44] Seaspan's application for leave to broaden the appeal to deal with the merits of the Commissioner's decision to use future estimated costs rather than current costs is more problematic, in my view. It is difficult to characterize the new issue as predominantly a question of law. It is an issue that is closely tied to the facts of this case.

[45] I need not, however, come to any final determination of that issue, as it is my view that leave ought not to be granted in respect of the proposed new ground of appeal. The questions to be considered by this Court in deciding whether or not to grant leave to appeal from a decision of an administrative tribunal, are set out in *Queen's Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 at 109-110:

> (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from;
>
> (b) whether the appeal is limited to questions of law involving:

> (i) the application of statutory provisions;
>
> (ii) a statutory interpretation that was particularly important to the litigant; or,
>
> (iii) interpretation of standard wording which appears in many statutes …;
>
> (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward;
>
> (d) whether there is some prospect of the appeal succeeding on its merits … although there is no need for a Justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
>
> (e) whether there is any clear benefit to be derived from the appeal; and
>
> (f) whether the issue on appeal has been considered by a number of appellate bodies.

[46] The new ground of appeal that Seaspan wishes to raise does not concern questions of general importance, nor is it primarily a matter of interpreting statutory language. Further, it is not clear that any significant benefit would be derived by having the issue analysed on this appeal. I would, therefore, dismiss Seaspan's motion to expand the grounds of appeal.

What Standards of Review Apply to the Issues on Appeal?

[47] In light of the decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the parties are in agreement that the Commissioner is owed deference in respect of his interpretation of the provisions of the *Coastal Ferry Act*. Accordingly, the standard of review in respect of the substantive issues on this appeal is that of reasonableness.

[48] The parties differ, somewhat, on the standard of review that should be applied to the procedural fairness issues. Seaspan argues that the standard is best described as one of "fairness". It refers to *Gichuru v. Law Society of BC*, 2010 BCCA 543 at para. 29, and notes that in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, the Supreme Court of Canada cast doubt on the applicability of the usual standard of review analysis to matters of procedural fairness. At para. 74, Arbour J., speaking for a unanimous Court, said:

> The third issue [the issue of procedural fairness] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See generally *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, and *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration)*], *supra*.)

[49] In *Bentley v. Braidwood*, 2009 BCCA 604, this Court also expressed reservations with respect to applying the usual standard of review analysis to issues of procedural fairness:

> [59] There is difficulty in applying the language of standard of review, 'correctness' and 'reasonableness', to issues of procedural fairness. Whether the tribunal has the alleged duty, in respect to procedural fairness, is a matter on which the courts have the final say. However, subject to any express statutory requirements, a tribunal typically enjoys broad discretion as to how it will fulfill the requirements of procedural fairness, and there will rarely be a single correct answer.

[50] The Commissioner cites an obiter remark from *Timberwolf Log Trading Ltd. v. Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 for the proposition that both a standard of correctness and a standard of reasonableness apply to procedural fairness issues:

> [35] … [T]he scope and obligation to provide procedural fairness is a matter of law to be reviewed on a standard of correctness at first instance, and in this Court. Whether the Commissioner, through her delegate, fulfilled her duty of procedural fairness involves the exercise of her discretion, and thus attracts a standard of reasonableness on review both at first instance and in this Court.

[51] I am not convinced that this attempt to apply the standard of review analysis to issues of procedural fairness is particularly helpful. The approach taken in *Moreau-Bérubé* and *Bentley* appears to me to be more easily applied. That approach is also, I think, consistent with the approach taken by the majority of the Supreme Court of Canada in analysing the procedural fairness issue in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and with the approach adopted in ss. 58(2)(b) and 59(5) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[52] I agree with the submissions of Seaspan (with which BCFS is in substantial agreement) that the standard of review applicable to issues of procedural fairness is

best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

Did the Commissioner Err by Failing to Include a Return on Equity as a Cost?

[53] I turn, then, to the issues on which leave to appeal has been granted. The first question raises issues as to whether, in making his calculations under s. 45.1, the Commissioner erred in his interpretation of the word "costs". Seaspan alleges that he erred in two respects: in failing to include a return on equity as a cost, and in basing his calculations on what he called the Horizon Volume of Traffic rather than on actual current costs.

[54] The Commissioner rejected the idea that a return on equity should be included in assessing the costs of providing the drop trailer service. He said:

> Section 45.1(1) of the Act is clear that costs are to be considered but makes no mention of a profit or return on capital. Elsewhere in the Act, i.e. sections 40 and 41 addressing price cap setting, a distinction is made between costs and return on equity. The commissioner considers that a return on equity is not a cost, and so should not be included in the calculation of costs, direct or indirect, of the drop trailer service.

[55] Seaspan takes issue with the analysis. It argues that any private company operating a drop trailer service would have to make a profit on the service in order to stay in business. It says that the purpose of s. 45.1 of the statute is to remove all unfair competitive advantages enjoyed by BCFS. It argues, therefore, that the Commissioner acted unreasonably in not including an amount for return on equity as a cost of the drop trailer service. It emphasizes that BCFS itself had based its submissions on the idea that a return on equity was properly considered a cost of the drop trailer service.

[56] I accept that it is unlikely that any private company would choose to operate a drop trailer service whose revenues did not exceed the incremental expenses incurred in operating it. On the other hand, it is not obvious that a private company would refrain from operating such a service if the revenue from the service exceeded the incremental costs of operating it and also covered some of the expenses that the company was already incurring in its existing operations. As BCFS notes in its argument:

> [R]eturn on equity is assessed across the entirety of a business' operations. Not every component of those operations needs to yield the same (or any) return on equity, but the sum of the parts must be profitable if investment is to be attracted and retained.

[57] A private company in the situation of BCFS – having excess capacity and largely fixed expenses in the operation of its vessels – might well choose to operate a drop trailer service as part of its operations even if that service would not, looked at as an independent operation, be particularly profitable.

[58] It is true that in its submissions to the Commissioner, BCFS had included a notional return on equity as a "cost" of the drop trailer service. It had argued, however, that in assessing the costs of the drop trailer service, the Commissioner should concern himself only with the incremental costs of operating it. The Commissioner did not accept that approach. Instead, he required the drop trailer service to cover the incremental costs, and also cover a proportion of the cost of BCFS's overall operations. He described this amount as a "route overhead charge" and calculated it as a proportion of overall vessel- and terminal-related costs.

[59] In my view, the approach taken by the Commissioner did not ignore commercial realities. Further, it was consistent with both the purposes of the statutory provision and its language. While it might have been open to the Commissioner to take other approaches, I am not persuaded that the Commissioner's failure to include a notional return on equity as a cost of the drop trailer service was in any sense unreasonable.

Did the Commissioner Err in Using a Horizon Volume of Traffic Approach?

[60] The Commissioner set the MAAT at a level that would provide sufficient revenue to cover the costs of the drop trailer service when drop trailer traffic reached the Horizon Volume of Traffic. Seaspan says that approach was contrary to the statute. It says that instead of basing costs and revenues on what it calls a "speculative" volume of traffic, the Commissioner was required to measure costs and revenues based on current traffic volumes.

[61] The Commissioner gave the following reasons for adopting the approach that he did:

> The commissioner recognizes that BCFS' unit costs cannot reasonably be based on an initial start-up volume of drop trailer traffic, which might be expected to increase quickly from a small base. On the other hand, basing the unit cost on BCFS target "mature" volume which is a multiple of current volumes and five to seven years in the future also seems unreasonable. Accordingly, the commissioner accepts the expected costs at a horizon volume of traffic which is less than BCFS' target mature state.

[62] Again, the approach adopted by the Commissioner was one that attempted to take account of commercial reality. Rather than assessing a tariff based on an unrealistically low volume of traffic, he attempted to project the volume of drop trailer traffic that BCFS would be carrying in the medium term. This approach was, in my view, consistent with the approach that a private operator might take – allowing itself to have limited short term losses on its operations in order to build up a viable, and ultimately profitable, business.

[63] Section 45.1(2)(b) of the *Coastal Ferry Act* required the Commissioner to calculate an amount that he considered would have been charged to recover the costs of the drop trailer service if BCFS had not enjoyed certain competitive advantages. The section does not require those calculations to match revenues and costs on a short-term basis. I am unable to find that the Commissioner's decision to set the tariff based on medium-term projections was unreasonable or in any way contrary to the statute.

[64] I would therefore find that the Commissioner made no reviewable errors in his substantive application of s. 45.1(2).

Procedural Fairness and Disclosure

[65] Seaspan's next argument concerns the fairness of the Commissioner's proceedings. It contends that the Commissioner ought to have provided it with disclosure of all of the material filed by BCFS.

[66] BCFS objects to this issue being raised on appeal. It says that the Commissioner made his order on disclosure of information on November 15, 2010, and Seaspan, having not sought leave to appeal that order, cannot now collaterally attack it by way of this appeal.

[67] I would not accede to that objection. The Commissioner's November 15, 2010 order was an interlocutory one. It is a well established principle of administrative law that courts will review interlocutory orders of administrative tribunals only in exceptional circumstances. This Court outlined the principles in *Vancouver (City) v. B.C. (Assessment Appeal Board, Assessor of Area No. 09 – Vancouver)* (1996), 135 D.L.R (4th) 48:

> [26] The general rule seems clear in both criminal and civil proceedings: a tribunal should be permitted to complete its process and to render its final decision before judicial review is entertained. This rule is founded in the time honored principle that a tribunal, such as the Board in this case, is established to fulfil the statutory functions it is assigned. The Board should be seen as the master of its own process, and that process should not be interfered with by the courts until a final decision is rendered, lest there be one court application after another, which would clearly frustrate the Board's mandate and its legislative purpose.
>
> [27] Boards were established to deal with specialized problems requiring expertise not necessarily possessed by the courts. The courts have become increasingly reluctant to interfere with them. Although a Board in the course of its hearing may make errors, it should be accorded the benefit of the doubt until its final decision has been rendered. This principle has manifested itself in a number of cases [citations omitted].

[68] While the Court was considering judicial review proceedings in that case, the same principles apply in respect of statutory appeals from administrative tribunals. Seaspan was entitled to await the conclusion of the Commissioner's proceedings

before launching its appeal. An appeal of the Commissioner's final order does not constitute an improper collateral attack on his interlocutory decision.

[69] I turn, then, to the question of whether the Commissioner's failure to order disclosure of financial information to Seaspan was contrary to the principles of procedural fairness.

[70] There is no dispute that Seaspan was entitled to procedural fairness in the proceedings before the Commissioner. The Commissioner so held, and BCFS does not challenge that proposition before this Court. The issue before the Court is the content of that duty.

[71] Seaspan and BCFS agree that the considerations to be taken into account in determining the content of the duty are those discussed by L'Heureux-Dubé J. in *Baker v. Canada (Minister of Citizenship and Immigration)* at paras. 21-28. The factors are conveniently summarized in the judgment of Binnie J. in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at para. 42:

> [42] …The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in *Baker* to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27). Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive. [Emphasis in original.]

[72] In general, procedural fairness requirements are functional in nature. The primary goal of a requirement of disclosure in a case such as the present one is to ensure that parties are able to participate meaningfully and fully in the administrative process.

[73] The first factor to be considered in assessing the content of the duty of fairness is the nature of the decision being made and the process followed in making it. In *Baker*, at para. 23, L'Heureux-Dubé J. said:

> In *Knight* [*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653] at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

[74] The Commissioner, when pursuing an investigation under s. 45.1, is involved in a fact-finding exercise. The administrative process envisioned by the *Coastal Ferry Act* has, however, very little in common with the judicial process. The Commissioner is not engaged in resolving a *lis inter partes*. Rather, the process is inquisitorial. Unlike a judge, the Commissioner is entitled to search out evidence and require the parties to tender particular documents. The Commissioner may also engage the assistance of outside experts to assist in analysing data obtained from the parties.

[75] The second factor to be considered is the nature of the statutory scheme. In *Baker*, at para. 24, L'Heureux-Dubé J. made the following observation:

> [24] …The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.

[76] A decision under s. 45.1 of the *Coastal Ferry Act* is, effectively, a final decision. The only rights of appeal are under s. 50 of the statute, with leave of this Court.

[77] The third factor to be considered is the importance of the decision to the affected parties. There is no doubt that a decision by the Commissioner may have a substantial and direct affect on a "ferry operator" as defined by the *Act*. Its rights are

directly in issue in the Commissioner's decisions. Third parties, like Seaspan, are affected only indirectly by the decisions taken under the statute. There is no doubt, however, that decisions of the Commissioner may ultimately have financial repercussions for third parties.

[78] The fourth factor discussed in *Baker* is "legitimate expectations". There is nothing in the background of this case that would engage the doctrine of legitimate expectations with respect to disclosure, and I need not address this factor further.

[79] The final factor discussed in *Baker* is the choice of procedure made by the agency itself. In *Baker*, L'Heureux Dubé J. elaborated on this factor as follows at para. 27:

> [T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[80] The Commissioner chose, in this case, to involve Seaspan in the proceedings from the outset, and to give it the status of a party. He did not choose, however, to hold hearings or to hear witnesses.

[81] It must be recognized that the issues dealt with under s. 45.1 of the *Coastal Ferry Act* are typically financially sensitive. Given the nature of the tribunal, and the nature of the rights at stake under that section, I am unable to agree with Seaspan that procedural fairness requires that it have full disclosure of all of the material that is filed with the Commissioner.

[82] What is required is that Seaspan have sufficient information to allow it to participate in a meaningful manner in the proceedings. In my view, the Commissioner made no error in finding that detailed financial information did not need to be provided to Seaspan in order to give it that ability. The information that was disclosed to Seaspan afforded it the ability to meaningfully participate in the proceedings and to make valuable submissions to the Commissioner.

[83] In my view, the Commissioner did not act unfairly when he concluded that the financial harm that might be caused by disclosure of BCFS's detailed financial records to a competitor might be unduly damaging to it.

[84] In the result, I would not give effect to Seaspan's contention that its right to procedural fairness was breached by the Commissioner's decision. In the circumstances, it is not necessary to consider the BCFS's argument that, in any event, the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 prohibited the Commissioner from disclosing information.

The Decision not to Bifurcate Proceedings

[85] Seaspan contends that the Commissioner also acted in a procedurally unfair manner in failing to bifurcate the proceedings. Seaspan contends that the Commissioner ought to have proceeded by first making a determination under s. 45.1(1) and then allowing the parties the opportunity to make further submissions before proceeding to make a determination under s. 45.1(2).

[86] I do not think it can be suggested that the Commissioner is required, as a matter of law, to bifurcate proceedings under s. 45.1. Such a requirement could only arise if the Commissioner gave Seaspan a legitimate expectation that that procedure would be followed.

[87] While it is true that BCFS initially proposed a bifurcated process, there is nothing in the record that suggests the Commissioner accepted that proposal. At the very latest, Seaspan knew by early December 2010 that BCFS was no longer suggesting a bifurcation of the decisions under ss. 45.1(1) and 45.1(2). At that point, at the latest, it could not have had any clear expectation that the Commissioner would approach the s. 45.1 decision in two parts.

[88] I am not persuaded that the Commissioner made any error in refusing to bifurcate the proceedings.

Was the Commissioner Precluded from Keeping Provisions of the Order Confidential?

[89] While Seaspan has raised, as an issue on appeal, the question of whether the Commissioner had the power to keep parts of his order confidential, it has not made independent arguments on this issue. Instead, it says, simply, that "This question stands to be resolved by the same analysis that governs the disclosure issue".

[90] Given that Seaspan's argument on this issue depends on it having succeeded on the disclosure issue, I would also dismiss this ground of appeal.

[91] In dismissing this aspect of the appeal, I would note that principles of openness and public accountability are negatively affected by confidential orders. To some degree, such orders may also be seen as being contrary to the Rule of Law. While I recognize that it may sometimes be necessary for aspects of tribunal orders to remain confidential, I think it important to emphasize that the practice of making confidential orders is to be discouraged.

Conclusion

[92] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

"The Honourable Mr. Justice Low"

"The Honourable Madam Justice MacKenzie"