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**DRL Vacations Ltd.** (*Applicant*)

v.

**Halifax Port Authority** (*Respondent*)

INDEXED AS: DRL VACATIONS LTD. v. HALIFAX PORT AUTHORITY (F.C.)

Federal Court, Mactavish J.—Halifax, June 8; Ottawa, June 15, 2005.

Federal Court Jurisdiction — Judicial review of respondent’s decision to enter negotiations with company other than applicant to operate retail market in Port of Halifax because of alleged breach of fairness — Whether respondent acting as federal board, commission or other tribunal under Federal Courts Act, ss. 2(1), 18.1 — Federal Court statutory court, jurisdiction cannot be presumed — Phrase “jurisdiction or powers” in s. 2(1) referring to jurisdiction or powers of public character — Not including private powers which are merely incidents of legal personality exercisable by federal corporation — Character or nature of powers being exercised determining whether decision maker “federal board, commission or other tribunal” for purposes of s. 18.1 — Respondent’s licensing of port space for souvenir shop purely commercial enterprise, incidental to main responsibility for managing port activities relating to shipping, navigation, etc. — Respondent not acting as “federal board, commission or other tribunal” when making decision under review — Therefore, Federal Court not having jurisdiction to deal with applicant’s judicial review application.

Maritime Law — Harbours — Judicial review of respondent’s decision to enter negotiations with company other than applicant to operate retail market in Port of Halifax because of alleged breach of fairness — Canada Marine Act clear port authorities to operate largely independent of government — Port authorities agents of Her Majesty in right of Canada only for purposes of engaging in port activities relating to shipping, navigation, etc. — Canada Marine Act, s. 45(3) authorizing port authorities to lease or license federal real property subject to limits imposed by port authority’s letters patents — Port authorities public entities in some respects, commercial enterprises in others — Respondent not bound to follow federal government policies regarding competitive processes to award licences to operate retail markets.

This was an application for judicial review of the respondent’s decision to enter into negotiations with a company other than the applicant to lease port space for the purpose of operating a retail market catering to the passengers and crew of cruise ships entering the Port of Halifax. The respondent had styled its process as a “request for proposals” and several groups, including the applicant, had expressed an interest. The applicant alleged that the process was in fact a call for tenders and claimed the respondent had breached its duty to act fairly by basing its decision on undisclosed criteria. The respondent submitted that in making the disputed decision, it was not acting as a “federal board, commission or other tribunal” within the meaning of subsection 2(1) and section 18.1 of the *Federal Courts Act* and, consequently, the Federal Court was without jurisdiction to deal with the applicant’s application. The issue was whether in exercising the powers in issue, the respondent was acting as a “federal board, commission or other tribunal”.

*Held*, the application should be dismissed.

The Federal Court is a statutory court whose jurisdiction cannot be presumed. Section 18.1 confers jurisdiction on the Court to review the conduct of a “federal board, commission or other tribunal” which is defined in subsection 2(1). The respondent’s status and structure had to be considered to determine whether the Federal Court had jurisdiction to deal with the judicial review application. The respondent is a federal government business enterprise incorporated by letters patent pursuant to the provisions of the *Canada Marine Act*. One of the stated goals of that Act was to provide for a high degree of autonomy for the local or regional management of Canada’s ports. Another goal was to ensure that Canada’s marine infrastructure was managed in a commercially viable manner. The legal

regime governing port authorities makes it clear that authorities are to operate largely independent of government (sections 23 to 27). Under the Act, port authorities are agents of Her Majesty in right of Canada only for the purposes of engaging in port activities relating to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent. Subsection 45(3) authorizes port authorities to lease or license federal real property, subject to any limits in the port authority's ability to contract as agent for Her Majesty in right of Canada imposed by the authority's letters patent. While the respondent's letters patent do limit its ability to borrow money or mortgage the property as agent for the Crown, there is no apparent limitation therein that would apply to the type of activity in issue here. The respondent is run by a seven-person board of directors, is managed on a commercial basis and is required to be financially self-sufficient. While the respondent's letters patent require it to develop a written policy with respect to tendering in relation to construction, maintenance, repair, etc. of real property, the respondent is not bound to follow federal government policies with respect to competitive processes to award licences to operate retail markets. Port authorities are thus public entities in some respects and commercial enterprises intended to operate independently of government in other respects.

Case law has established a number of principles regarding what constitutes a "federal board, commission or other tribunal" under subsection 2(1) of the *Federal Courts Act*. The powers referred to in subsection 2(1) are not confined to those powers that have to be exercised on a judicial or quasi-judicial basis. However, the phrase "jurisdiction or powers" refers to jurisdiction or powers of a public character and does not include the private powers exercisable by a federal corporation, which are merely incidents of its legal personality or authorized business. Furthermore, although the character or nature of the institution is significant to the analysis, the character of the powers being exercised determines whether the decision maker is a federal board, commission or other tribunal for the purposes of section 18.1 of the Act. The institution may constitute a "federal board, commission or other tribunal" for some purposes but not for all. The mere exercise of statutory powers alone is not sufficient to bring an institution under subsection 2(1) of the *Federal Courts Act*. All of the circumstances of the case have to be considered.

With respect to the nature of the respondent, Parliament clearly chose to devolve responsibility for Canada's port system to arm's length port authorities so as to provide the port's local management with a high degree of autonomy. Also, the wording of the *Canada Marine Act* clearly shows the intent that Canada's ports be operated in an efficient and commercially viable manner. While the respondent is an organization with public responsibilities, it had to be determined whether the particular powers it had exercised in this case were public in nature or private commercial activity. The licensing of port space was for a "souvenir shop" to enhance the port experience of the passengers and crew of cruise ships docking at the Port of Halifax. The souvenir shop is a purely commercial enterprise, which is incidental to the respondent's main responsibility for managing port activities relating to shipping, navigation, etc. The respondent was not acting as a "federal board, commission or other tribunal" when it made the decision under review in this case and therefore the Court did not have jurisdiction to deal with the application for judicial review. The fact that the space in question is on federal land was not determinative of the issue. Entitling parties to judicially review every decision made in relation to federally owned port property would lead to absurd and inconvenient results and be antithetical to the achievement of Parliament's intent in creating the respondent.

Nevertheless, this is not to say that the respondent could never be considered to be a "federal board, commission or other tribunal". The question of whether an institution is acting in that capacity in a given set of circumstances is one that must be resolved on a case-by-case basis, having regard to both the status of the organization in question and the nature of the power being exercised.

statutes and regulations judicially  
considered

*Canada Marine Act*, S.C. 1998, c. 10, s. 4(e),(f), 7(1), 8(2)(d) (as am. by S.C. 2001, c. 4, s. 135), 14, 23, 24, 25, 26, 27, 28(2)(a), 45(2) (as am. *idem*, s. 141), (3) (as am. *idem*), 63.

*Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 28.

*Federal Court Act*, R.S.C., 1985, c. F-7, s. 2(1) "federal board, commission or other tribunal" (as am. by S.C. 1990, c. 8, s. 1).

*Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2(1) "federal board, commission or other tribunal" (as am. *idem*, c. 8, s. 15), 18.1 (as enacted by S.C. 1990, c. 8, s. 5;

2002, c. 8, s. 27).  
*Second Class Mail Regulations*, C.R.C., c. 1294.

cases judicially considered

not followed:

*Halterm Ltd. v. Halifax Port Authority* (2000), 184 F.T.R. 16 (F.C.T.D.).

applied:

*Wilcox v. Canadian Broadcasting Corporation*, [1980] 1 F.C. 326; (1979), 101 D.L.R. (3d) 484 (T.D.); *Aeric, Inc. v. Chairman of the Board of Directors, Canada Post Corporation*, [1985] 1 F.C. 127; (1985), 16 D.L.R. (4th) 686; 56 N.R. 289 (C.A.); *Toronto Independent Dance Enterprise v. Canada Council*, [1989] 3 F.C. 516; (1989), 60 D.L.R. (4th) 503; 38 Admin. L.R. 231; 30 F.T.R. 20 (T.D.); *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115; (1991), 7 Admin. L.R. (2d) 203; 49 F.T.R. 308 (T.D.).

considered:

*Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al. (No. 2)* (1975), 11 O.R. (2d) 167; 65 D.L.R. (3d) 231; 29 C.C.C. (2d) 325 (C.A.); *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694; (1995), 125 D.L.R. (4th) 559; 184 N.R. 260 (C.A.); *Jackson v. Canada (Attorney General)* (1997), 7 Admin. L.R. (3d) 138; 141 F.T.R. 1 (F.C.T.D.); affd (2000), 25 Admin. L.R. (3d) 247; 261 N.R. 100 (F.C.A.).

APPLICATION for judicial review of the respondent's decision to enter negotiations with a company other than the applicant after seeking requests for proposals from vendors to operate a retail market catering to the passengers and crew of cruise ships entering the Port of Halifax. Application dismissed.

appearances:

*D. Kevin Burke and Michelle M. Kelly* for applicant.

*Peter M.S. Bryson, Q.C. and David J. Demirkan* for respondent.

solicitors of record:

*Cox Hanson O'Reilly Matheson*, Halifax, for applicant.

*McInnes, Cooper*, Halifax, for respondent.

The following are the reasons for order and order rendered in English by

[1] MACTAVISH J.: In January 2003, the Halifax Port Authority (HPA) embarked on a process to find a vendor or vendors to operate a retail market catering to the passengers and crew of cruise ships entering the Port of Halifax. Several groups expressed interest, including DRL Vacations Ltd. (DRL). The HPA ultimately decided to enter into negotiations with another company.

[2] DRL now seeks to judicially review the HPA's decision in this regard, asserting that although the HPA had styled its process as a "request for proposals", it was in fact a call for tenders. According to DRL, it was denied fairness in the tender process, as the HPA failed to strictly adhere to the terms of the tender call by using criteria to evaluate each bid that were not identified in the call for tenders.

[3] Even if the process was truly a request for proposals (or RFP), DRL says that the HPA had a duty to deal with it fairly and in good faith. By basing its decision on undisclosed criteria, DRL says that the HPA breached this duty.

[4] A threshold issue arises in this case. The HPA submits that in making the decision which underlies this application for judicial review, it was not acting as a “federal board, commission or other tribunal” within the meaning of subsection 2(1) [as am. by S.C. 2002, c. 8, s. 15] and section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)]. As a result, the HPA submits that this Court is without jurisdiction to deal with DRL’s application.

[5] The jurisdictional issue will be addressed first. The starting point for this analysis must be the provisions of the *Federal Courts Act* itself.

#### The *Federal Courts Act*

[6] The Federal Court is a statutory court. Unlike provincial superior courts, whose jurisdiction is both general and inherent, jurisdiction in this Court cannot be presumed. There must be a statutory basis for the Federal Court to have jurisdiction in a given case.

[7] In this case, the claim to jurisdiction is founded on subsection 2(1) and section 18.1 of the *Federal Courts Act*.

[8] Section 18.1 of the *Federal Courts Act* confers jurisdiction on the Court to review the conduct of federal boards, commissions and other tribunals. As to what constitutes a “federal board, commission or other tribunal”, subsection 2(1) of the *Federal Courts Act* states that:

2. (1) . . .

“federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

Is the Halifax Port Authority a “Federal Board, Commission or Other Tribunal”?

[9] Thus the question for the Court is whether, in exercising the powers in issue in this case, the HPA was acting as a “federal board, commission or other tribunal”. In answering this question, it is necessary to have regard to the status and structure of the HPA, as well as the jurisprudence that has developed in this area. Each of these points will be addressed in turn.

#### The Status and Structure of the HPA

[10] The HPA is not a Crown corporation. It is a federal government business enterprise incorporated by letters patent in March 1999 pursuant to the provisions of the *Canada Marine Act*, S.C. 1998, c. 10 [the Act]. The *Canada Marine Act* came into force in 1998, for the purpose of making Canada’s ports competitive, efficient and commercially oriented.

[11] One of the stated goals of the *Canada Marine Act* was to provide for a high degree of autonomy for the local or regional management of Canada’s ports. Another goal was to ensure that Canada’s marine infrastructure was managed in a commercially viable manner: see paragraphs 4(e) and (f) of the Act.

[12] The legal regime governing port authorities makes it clear that authorities are to operate largely independent of government: see sections 23-27 of the Act.

[13] Under the legislation, port authorities are agents of Her Majesty in right of Canada only for the purposes of engaging in port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent: see subsection 7(1) and paragraph 28(2)(a) of the Act.

[14] Subsection 45(2) [as am. by S.C. 2001, c. 4, s. 141] of the Act provides that any civil, criminal or administrative action or proceeding with respect to the federal real property managed by a port authority shall be taken by or against the port authority and not by or against the Crown.

[15] Subsection 45(3) [as am. *idem*] authorizes port authorities to lease or license federal real property, subject to any limits in the port authority's ability to contract as agent for Her Majesty in right of Canada imposed by the authority's letters patent. While the HPA's letters patent do limit its ability to borrow money or mortgage the property as agent for the Crown, there does not appear to be any limitation in the letters patent that would apply to the type of activity in issue in this case.

[16] The HPA is run by a seven-person board of directors. In accordance with section 14 of the *Canada Marine Act*, directors are appointed by the Regional Municipality of Halifax and by the Province of Nova Scotia, as well as by the Governor in Council. The HPA's Board of Directors and officers are not employees of the federal government.

[17] The HPA is to be managed on a commercial basis and is required to be financially self-sufficient. The HPA receives no money from the federal government. Instead, its principle sources of revenue are fees on vessels, cargo and passengers using the Port of Halifax, as well as lease payments for facilities under its ownership and management.

[18] While the HPA's letters patent require it to develop a written policy with respect to tendering in relation to the construction, maintenance, repair, etc. of real property, the HPA is not bound to follow federal government policies with respect to competitive processes to award licences to operate retail markets.

[19] From this it can be concluded that while in some respects, port authorities are public entities, there are also strong indicators that they are commercial enterprises, intended to operate independently of government.

[20] Where does this leave us in determining whether, in the circumstances of this case, the HPA was acting as a "federal board, commission or other tribunal"? To answer this question, it is necessary to have regard to the jurisprudence that has developed in this area.

#### The Relevant Jurisprudence

[21] The earliest case of relevance here is the decision of the Ontario Court of Appeal in *Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al. (No. 2)* (1975), 11 O.R. (2d) 167. In this case, the Court was called upon to determine whether a provincial superior court had jurisdiction to issue an injunction against the Canadian Broadcasting Corporation or whether that power was reserved to the Federal Court.

[22] In this regard, the Ontario Court of Appeal concluded that while the CBC was a body that exercised powers conferred on it by an Act of Parliament, it was not a "federal board, commission or other tribunal" when carrying on the business of broadcasting. The Court held that in such situations, the CBC was a corporate entity carrying on its business purpose. In these circumstances, the CBC had none of the attributes of a "federal board, commission or other tribunal".

[23] Four years later, this Court had occasion to consider the status of the CBC as a "federal board, commission or other tribunal" in *Wilcox v. Canadian Broadcasting Corporation*, [1980] 1 F.C. 326 (T.D). In *Wilcox*, Justice Thurlow [as he then was] noted that the powers referred to in section 2 of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10] are not confined to those powers that have to be exercised on a judicial or quasi-judicial basis. He stated [at page 329] that the phrase "jurisdiction or powers" refers to jurisdiction or powers of a public character and does not include the private powers exercisable by an ordinary corporation created under a federal statute, which are merely incidents of its legal personality or authorized business.

[24] Justice Thurlow went on to observe that absurd and inconvenient results would flow from an interpretation that it does include such powers.

[25] In *Aeric, Inc. v. Chairman of the Board of Directors, Canada Post Corporation*, [1985] 1 F.C. 127, the Court of Appeal had to consider whether a decision made by the Chairman of Canada Post Corporation was of a significantly public character as to constitute him as a “federal board, commission or other tribunal”.

[26] In addressing this question, the Court of Appeal observed that the deciding factor was whether the powers being exercised by the corporation had a public character or were general powers of management conferred upon the corporation incidentally to carrying out its commercial activities.

[27] The Court of Appeal noted in *Aeric* that Canada Post Corporation was mandated to carry on business on a quasi-commercial basis. However, in distinguishing *Wilcox*, the Court observed that in relation to the decision in issue in that case, in accordance with the *Second Class Mail Regulations* [C.R.C., c. 1294], the Chairman of Canada Post Corporation was exercising the power conferred on him by a regulation approved by the Governor in Council to hear an appeal, as opposed to a general power of management. This was a power that was required to be exercised on a judicial or quasi-judicial basis and was not merely a business decision. In that context, the Court found that the Chairman was acting as a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Court Act*.

[28] Thus, it seems that in *Aeric*, the Court of Appeal found that although the character of the corporation is significant to the analysis, it is the character of the powers being exercised which will determine whether the decision maker is a federal board, commission or other tribunal for the purposes of section 28 of the *Federal Court Act*.

[29] In other words, the Court of Appeal did not make an across-the-board finding that either Canada Post Corporation or its Chairman were federal boards, commissions or other tribunals for all purposes. Rather, the Court’s finding was made in the context of the particular powers being exercised in that case.

[30] In *Toronto Independent Dance Enterprise v. Canada Council*, [1989] 3 F.C. 516 (T.D.), the question was whether, as a public body created under an Act of Parliament and distributing public funds, the Canada Council should owe a duty of fairness to potential recipients of these funds.

[31] In considering whether the Council was a “federal board, commission or other tribunal”, this Court noted that the fact that the institution was created by government was not, by itself, determinative of the question. Rather, the Court looked at the fact that the Council was created to be at arm’s length from the government, as well as at factors such as the government’s lack of control over the funds and the absolute discretion conferred on the Council. From this, the Court concluded that the Council was probably not a “federal board, commission or other tribunal”.

[32] In *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.), the Court confirmed that the definition of a “federal board, commission or other tribunal” in section 2 of the *Federal Court Act* [R.S.C., 1985, c. F-7] did not extend to cover those private powers exercisable by an ordinary corporation created by statute which are merely incidents of its legal personality or authorized business.

[33] In coming to this conclusion, the Court noted that, while the Farm Credit Corporation exercised statutory powers and would thus seem to fall within section 2 of the *Federal Court Act*, the particular circumstances of the case had to be considered in order to finally determine the issue. To this end, the Court examined the workings of the institution, observing that the government had no control over which farmers were able to get loans. The Court also noted that the Farm Credit Corporation had been granted a broad discretion in developing its own standards.

[34] The Court concluded that the powers in issue were incidental to the Farm Credit Corporation’s authorized business of commercial lending. Following the Court’s earlier decision in *Wilcox*, the Court concluded that it was without jurisdiction to entertain the application for judicial review.

[35] In *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, the Federal Court of Appeal was called upon to examine the conduct of the Minister of Public Works and Government Services in calling for tenders and awarding a lease.

[36] In assessing whether the Minister was acting as a “federal board, commission or other tribunal” in this regard, the Federal Court of Appeal described the phrase “powers conferred by or under an Act of Parliament” found in the definition of a “federal board, commission or other tribunal” in subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] as being “particularly broad”. The Court went on to say that “there is no reason to try and distort the usual meaning of the words or strive to divest them of all practical meaning by resort to fine distinctions suited to constitutional analysis, which would have a sterilizing effect contrary to the intent of Parliament” (at page 701). In coming to this conclusion, the Court noted that Parliament’s tendency to make government increasingly transparent suggested that the phrase should be given a liberal interpretation.

[37] After examining all of the circumstances in the case before it, the Federal Court of Appeal concluded that the Minister was acting as a “federal board, commission or other tribunal” and, as a result, his or her decision was reviewable by the Federal Court.

[38] It should be noted that this case dealt with the action of the Minister him- or herself, as opposed to that of an arm’s-length institution such as a port authority. As a result, the Court did not address any of the earlier jurisprudence dealing with these types of institutions.

[39] The status of the Canadian Wheat Board was under scrutiny in *Jackson v. Canada (Attorney General)* (1997), 7 admin. L.R. (3d) 138 (F.C.T.D.) (affd (2000), 25 Admin. L.R. (3d) 247 (F.C.A.)). In considering whether the Board was acting as a federal board, commission or other tribunal in refusing an export licence to the applicant, Justice Rothstein noted that the jurisprudence drew a distinction between the exercise of powers of a public character and the exercise of powers which are incidental to the carrying on of a business.

[40] While the Canadian Wheat Board had significant public aspects, Justice Rothstein found that not all of the powers conferred on the Board by the enabling legislation are public. By way of example, the Board has been vested with general powers incidental to its business such as the power to enter into contracts, to enter into ordinary commercial banking arrangements, to acquire and hold real property and generally to do all things necessary and incidental to the carrying out of its operations.

[41] Justice Rothstein observed that while an organization may be a “federal board, commission or other tribunal” for some purposes, it is not necessarily so for all purposes. In determining whether an organization is a “federal board, commission or other tribunal” in a given situation, in keeping with the decision in *Aeric*, the Court had to examine the nature of the powers being exercised in the case before him.

[42] In *Jackson*, the powers that the Board was exercising were regulatory in nature. Justice Rothstein observed that a regulatory power was, by its very nature, public in character. As a consequence, for the purposes of the decision in issue before him, Justice Rothstein found that the Canadian Wheat Board was acting as a “federal board, commission or other tribunal”.

#### *Halterm Ltd. v. Halifax Port Authority*

[43] This brings me to the decision in *Halterm Ltd. v. Halifax Port Authority* (2000), 184 F.T.R. 16 (F.C.T.D.), wherein the Court found that the HPA was a “federal board, commission or other tribunal” with respect to decisions made by it in relation to negotiations for the lease of a container port terminal.

[44] As in this case, the HPA objected to the jurisdiction of this Court, contending that although it was created by a federal statute, in negotiating a lease with Halterm Ltd., it was exercising its private powers incidental to its authorized business.

[45] The Court did not agree. In its view, a private corporation would not ordinarily have the authority to lease federal lands. It was, however, by virtue of the combined authority granted by paragraphs 8(2)(d), and 44(2)(a) and by subsection 45(3) of the *Canada Marine Act*, as well as the letters patent of the HPA, that the HPA had the right to lease federal real property.

[46] The Court then went on to consider [at paragraph 27] whether the lease of the federal real property by the

HPA was an “exercise of a jurisdiction or powers conferred by or under an Act of Parliament” so as to make the port authority a “federal board, commission or other tribunal” and thus, subject to judicial review by the Federal Court.

[47] Citing the decision of the Federal Court of Appeal in the *Gestion Complexe Cousineau* case, the Court concluded that when the HPA leases or negotiates to lease federal real property, it is exercising powers conferred on it by the *Canada Marine Act* and not the private powers of a corporation. As a consequence, in the context of the facts before it, the Court concluded that the HPA was a “federal board, commission or other tribunal” within the meaning of the *Federal Court Act* when negotiating leases.

#### Summary of Principles to be Derived from the Jurisprudence

[48] From this review of the jurisprudence, the following principles can be distilled:

1. The phrase “powers conferred by or under an Act of Parliament” found in the definition of a “federal board, commission or other tribunal” in subsection 2(1) of the *Federal Courts Act* is “particularly broad” and should be given a liberal interpretation: *Gestion Complexe Cousineau (1989) Inc.*;
2. The “powers” referred to in subsection 2(1) of the *Federal Courts Act* are not confined to those powers that have to be exercised on a judicial or quasi-judicial basis. However, the phrase “jurisdiction or powers” refers to jurisdiction or powers of a public character: *Wilcox*;
3. The powers referred to in subsection 2(1) do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business: *Wilcox*;
4. Although the character of the institution is significant to the analysis, it is the character of the powers being exercised that determines whether the decision maker is a federal board, commission or other tribunal for the purposes of section 18.1 of the *Federal Courts Act*: *Aeric*;
5. The fact that an institution was created to be at arm’s length from the government, the discretion conferred on the institution to manage its business, and the government’s lack of control over the finances of the institution are all indicators that the institution is not a “federal board, commission or other tribunal”: *Toronto Independent Dance Enterprise*;
6. The fact that the institution was created by government is not, by itself, determinative of the question: *Toronto Independent Dance Enterprise*;
7. The mere exercise of statutory powers alone is not sufficient to bring an institution under subsection 2(1) of the *Federal Courts Act*. All of the circumstances of the case have to be considered in order to determine whether, in exercising the powers in issue, the institution was acting as a “federal board, commission or other tribunal”: *Cairns*;
8. While an organization may be a “federal board, commission or other tribunal” for some purposes, it is not necessarily so for all purposes. In determining whether an organization is a “federal board, commission or other tribunal” in a given situation, it is necessary to have regard to the nature of the powers being exercised: *Jackson*.

#### Application of these Principles to the Facts of this Case

[49] DRL submits that the facts in *Halterm* are indistinguishable from those in the present case. As a consequence, it says that I should follow the reasoning in that case and conclude that the Court has jurisdiction to deal with this application for judicial review.

[50] As is clear from the jurisprudence, an institution may be considered to be a “federal board, commission or other tribunal” for some purposes and not for others. In determining whether an institution is acting as a “federal board, commission or other tribunal” in a given set of circumstances, it is necessary to have regard to both the status of the institution and the nature of the powers being exercised in the case under consideration.



[51] Dealing first with the nature of the HPA, it is clear that Parliament chose to devolve responsibility for Canada's port system to arm's-length port authorities. This was done for the express purpose of providing the local management of the ports with a high degree of autonomy. Further, the wording of the *Canada Marine Act* reveals Parliament's clear intent that Canada's ports be operated in an efficient and commercially viable manner.

[52] That said, a review of the *Canada Marine Act* and the HPA's letters patent also confirms that the HPA is an organization with a significant public aspect. Not only is it empowered to manage a major Canadian port for the benefit of the country as a whole, it also has regulatory responsibilities (see, for example, section 63 of the Act).

[53] While I am satisfied that HPA is an organization with public responsibilities, that is not the end of the matter. It is necessary to go on to examine whether the particular powers which have been exercised in this case are public in nature or are more in the nature of private commercial activity.

[54] What is in issue in this case is the licensing of port space for what has variously been referred to in these proceedings as a "souvenir shop", a "market" and a "retail outlet". The purpose of the shop was described by counsel as being to "enhance the port experience" of the passengers and crew of cruise ships docking at the Port of Halifax.

[55] In my view, such a souvenir shop is a purely commercial enterprise, one which is incidental to the HPA's main responsibility for managing port activities relating to shipping, navigation, transportation of goods and passengers and the storage of goods. As such, I find that the HPA was not acting as a "federal board, commission or other tribunal" when it made the decision under review in this case.

[56] As a consequence, I am satisfied that the Court does not have jurisdiction to deal with this application for judicial review.

[57] In coming to this conclusion, I am also influenced by the fact that in enacting the *Canada Marine Act* and in creating the HPA, Parliament clearly intended to ensure that the Port of Halifax is run in a commercially viable fashion. Entitling parties to judicially review every decision made in relation to federally owned port property, however incidental that decision may be to the operation of the port itself would, in my view, be the sort of absurd and very inconvenient result contemplated by Justice Thurlow in *Wilcox*, and, moreover, would be antithetical to the achievement of Parliament's intent in creating the HPA.

[58] The fact that the space in question is on federal land is not determinative of the issue, in my view. A number of the cases referred to above dealt with decisions relating to the expenditure or management of public property—that is tax dollars. These monies are monies to which ordinary private companies would not have access. Nevertheless, in cases such as *Wilcox*, *Cairns* and *Toronto Independent Dance Enterprises*, the courts have found that the institutions in question were not acting as federal boards, commissions or other tribunals in making the decisions under review.

[59] In *Halterm*, the Court was dealing with the lease of real property for a container port terminal, whereas in this case, what is in issue is the licensing of space to be used for a souvenir shop.

[60] *Halterm* is, therefore, arguably distinguishable from the present situation in that the transaction in question in that case was much more directly related to the business of the HPA as a port. In my view, the provision of a souvenir shop for the passengers and crew of cruise ships is considerably more incidental to the business of the Port of Halifax.

[61] However, for the reasons given, to the extent that *Halterm* is not distinguishable from the present case, I must respectfully decline to follow it.

[62] Before closing, I should note that my decision should not be interpreted to mean that the HPA could never be considered to be a "federal board, commission or other tribunal" as contemplated by the *Federal Courts Act*. It is clear that the question of whether an institution is acting as a "federal board, commission or other tribunal" in a given set of circumstances is one that has to be resolved on a case-by-case basis, having regard to both the status of the organization in question and the nature of the power being exercised in the case itself.

## Conclusion

[63] For these reasons, I am of the view that this Court does not have jurisdiction under subsection 2(1) and section 18.1 of the *Federal Courts Act* to entertain this application for judicial review.

[64] In light of my conclusion in this regard, and being mindful of the fact that DRL evidently has a civil action for damages pending against the HPA before the Nova Scotia Supreme Court in relation to these matters, I do not think it appropriate to express any view on the merits of DRL's claim. These should be left to a court with the jurisdiction to deal with them.

[65] Accordingly, the application for judicial review is dismissed.

## Costs

[66] The parties are in agreement that costs should follow the event. I agree that the HPA should have its costs. If the parties are unable to agree as to the amount of HPA's costs, then the costs are to be assessed.

## ORDER

THIS COURT ORDERS that:

1. This application for judicial review is dismissed, with costs to the HPA.