

## TRANSPORTATION

Appeal from Federal Court (F.C.) decision dismissing judicial review challenging approval of respondent Marine Atlantic Inc.'s (Marine Atlantic) 2016-2017 commercial freight rates (2016/17 rates) — Marine Atlantic, federal Crown corporation, Canada's "principal instrument" for carrying out constitutional obligation of maintaining freight, passenger ferry service between North Sydney (Nova Scotia), Port aux Basques (Newfoundland and Labrador) (constitutional route) pursuant to *Newfoundland Act*, 12 & 13 Geo. VI, c. 22 (U.K.) (as am. by *Canada Act, 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 21) [R.S.C., 1985, Appendix II, No. 32], Schedule, Term 32(1) — Appellant competitor of Marine Atlantic, providing, *inter alia*, freight service between Halifax, St. John's — Complaining to federal government about low rates charged by Marine Atlantic, of failure to take into account National Transportation Policy (NTP) set out in *Canada Transportation Act*, S.C. 1996, c. 10 (CTA), s. 5 — Focus of judicial review being rates charged on constitutional route, failure of decision maker to consider NTP — Appellant asserting that Terms of Union creating no constitutional obligation to approve rates on constitutional route inconsistent with NTP — F.C. concluding Marine Atlantic making decision to implement 2016/17 rates — Also concluding Marine Atlantic not "federal board, commission or other tribunal" within meaning of *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 2(1), thus F.C. not having jurisdiction to review decision — F.C. also finding, *inter alia*, NTP not required consideration in setting 2016/17 rates, failure to do so not reviewable error — Appellant submitting F.C. erring: (1) in failing to find that respondent Minister becoming "accountable" for decision on 2016/17 rates when recommending Marine Atlantic's corporate plan for approval by Governor in Council under *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA), (2) in concluding that Minister not required to consider NTP in relation to 2016/17 rates — Main issues: whether F.C. erring in failing to find that Minister set, or "accountable" for, 2016/17 rates; in determining not having jurisdiction to review rate decision; in concluding not necessary to consider NTP in setting rates — Inappropriate for Court to address appellant's argument that F.C. erring in failing to find that Minister "accountable" for 2016/17 rates — F.C. not making palpable, overriding error on part of F.C. in concluding that Marine Atlantic making rate decision — Even if Minister's recommendation rendering Minister legally accountable for Marine Atlantic's rates, appellant's application not challenging that recommendation — F.C. cannot be faulted for failing to accede to challenge that was not made — No reference in appellant's original or amended notice of application to Minister's recommendation of corporate plan — F.C. erring in concluding not having jurisdiction to review rate decision made by Marine Atlantic — Marine Atlantic public body, its rate decision of public, not private character — Source of Marine Atlantic's power to set rates lying in rights, powers, privileges of natural person conferred by *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (CBCA) s. 15(1) — CBCA, s. 102(1), FAA, s. 109 not sources of Marine Atlantic's rate-setting powers; not specifying powers of corporation itself — CBCA not "Act of Parliament" within meaning of "federal board, commission or other tribunal" definition in *Federal Courts Act* — F.C.'s conclusion inconsistent with plain meaning of definition — Some Crown corporations incorporated under general company legislation like CBCA, which is then source of their powers — Reviewability of decision of public character taken by parent Crown corporation under power conferred by statute not turning on whether statute specific or general — Marine Atlantic's rate setting matter of contractual responsibility; thus, source was Marine Atlantic's statutory power to contract — No need to interfere with F.C.'s conclusion that present matter involving reassignment of responsibility by contract — Rate-setting decision having public character — Marine Atlantic public body for purposes of judicial review — Prerequisites for judicial review of rate decision by Marine Atlantic made out herein — No

need to interfere with F.C.'s determination that if Minister made rate decision, Minister not required to consider NTP — F.C. properly concluding that role of CTA, s. 2 to displace presumption of Crown immunity rather than to render NTP substantive limitation on exercise of regulatory authority — Issue not whether NTP applying to government, but whether applying to government action not taken under CTA — Appeal dismissed.

OCEANEX INC. V. CANADA (TRANSPORT) (A-113-18, 2019 FCA 250, Laskin J.A., reasons for judgment dated October 10, 2019, 36 pp.)