Federal Court Cour fédérale

Date: 20210831

Docket: T-9-21

Citation: 2021 FC 898

Ottawa, Ontario, August 31, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALAN MILLIKEN HEISEY

Applicant

and

REBECCA MACDONALD

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision issued on March 3, 2020, by Transport Canada approving Ms. MacDonald's application under subsection 7(6) of the *Canadian Navigable Waters Act*, RSC 1985, c N-22, "for the placement of a Mooring Buoy, Single Point, Located at 44° 53′ 57.23″ N, 79° 51′ 46.56″ W, Georgian Bay, Island 155A, Township of Georgian Bay, District Municipality of Muskoka, in the Province of Ontario."

I. The Parties and Background

[2] The Applicant, Mr. Heisey, is a resident of Toronto and owns a summer cottage on Islands 159 and 160 [the Heisey Islands] located in Georgian Bay, District Municipality of Muskoka.

[3] The Respondent, Ms. MacDonald, is the registered owner of Island 155 in Georgian Bay [the MacDonald Island]. For navigational purposes, it is also known as Island 155A. The colloquial name for MacDonald Island is Spray Rock, but this is not the legal name. She purchased the property in June 2016 for her and her children to use in the summer months.

[4] The Heisey Islands are approximately 300 metres away from MacDonald Island.

[5] In 2016, Ms. MacDonald installed a mooring buoy about 36 metres (120 feet) from her floating dock to permit her parents to safely moor their large trawler boat without risk of damage or injury during high winds.

[6] In 2018, Ms. MacDonald was informed by some neighbours that she needed Transport Canada's approval to install mooring buoys. She removed the buoy and made arrangements to seek Transport Canada's approval.

[7] She retained A&A Services and Marine Contracting Ltd. [A&A] to assist her with the process of applying to Transport Canada to install a mooring buoy. Among other things, A&A

specializes in dock and boathouse projects, including complete permit application services. On October 9, 2019, she submitted an application seeking approval to construct a private mooring buoy [the Mooring Buoy] 120 feet in front of her private seasonal dwelling, where the water is 18 feet deep, on Island 155 in Georgian Bay, District Municipality of Muskoka, in the Province of Ontario. The Mooring Buoy would be a single point to moor boats up to 47 feet (14 metres) in length. Attached to the application was an aerial map of the proposed single point Mooring Buoy as well as a Mooring Buoy Plan drawn by an Ontario Building Code Qualified Designer.

[8] On December 4, 2019, A&A was informed by Transport Canada of the requirement that there be public notice of the proposed work:

> Per subsection 7(3), please proceed with publication in the legal section of one English newspaper in or near the place where the work is to be constructed using the attached public notice model. The public notice is required to appear in only one edition of the publication.

[9] A&A advised Ms. MacDonald that the closest local newspaper to the Mooring Buoy's proposed location was the Midland Mirror. She posted the following notice in the Midland Mirror on January 23, 2020, in accordance with Transport Canada's instructions:

PUBLIC NOTICE

CANADIAN NAVIAGBLE [*sic*] WATERS ACT

> Rebecca MacDonald hereby gives notice that an application has been made to the Minister of Transport, pursuant to the Canadian Navigable Waters Act for approval of the work described herein and its site and plans.
>
> Pursuant to paragraph 7(2) of the said Act, Rebecca MacDonald has deposited with the Minister of Transport, on the online Navigable Waters Registry (http://cps.canada.ca/), under the NPP File Number 2019-401285 a description of the following work, its

> site and plans: Private Mooring Buoy Installation in, on, over, under, through or across Georgian Bay at Island 155! Georgian Bay in front of lot number Island 155A
>
> Comments regarding the effect of this work on marine navigation can be sent through the Common Project Search site mentioned above under the Comment section (search by the above referenced file number) or, by sending your comments directly by email at NPPONT-PPNONT@tc.gc.ca or by mail to Transport Canada, Navigation Protection Program, 100 South Front Street, 1st Floor, Sarnia, Ontario, N7T2M4.
>
> Comments will be considered only if they are in writing (electronic means preferable) and are received not later than 30 days after the publication of the last notice. Although all comments confronting [*sic*] to the above will be considered, no individual response will be sent.
>
> Signed at Honey Harbour this 15th day of January 2020.
>
> Rebecca MacDonald

[10] After the public notice was published, Transport Canada received twenty-six comments from individual summer residents, cottagers, boaters, and Camp Queen Elizabeth staff, as well as the Township of Georgian Bay, regarding the proposed Mooring Buoy installation.

[11] Transport Canada approved the Mooring Buoy Application on March 3, 2020 and it posted the approval to the Transport Canada public registry that same day. The approval was conditional upon the Mooring Buoy being used to moor vessels no more than 15 metres in length, displaying a yellow retroreflective material, and being lit with a yellow light that conforms to the standards and guidelines in the Canadian Aids to Navigation System. The approval contains mooring buoy plans and maps stamped as reviewed by Transport Canada.

[12] In July 2020, the Respondent purchased a buoy that complied with Transport Canada's technical specifications. This buoy did not come with a mounting bracket, so her father custom-made one to fit. The Mooring Buoy was delivered at the end of July/early August. She and her father spent many hours assembling and installing the Mooring Buoy.

II. A Preliminary Issue

[13] Prior to the hearing of this application, the Court issued a direction to the parties questioning the named Respondent:

> The named respondent is not the decision-maker and not a federal board, commission or tribunal. The parties are expected to address as a preliminary issue whether the proper respondent has been named and whether the Court has jurisdiction in this matter as presently constituted.

[14] Mr. Heisey responded, informing the Court that when he initially commenced these proceedings, he required an extension of time and had named Transport Canada as a respondent. Transport Canada responded that it could not be named as a party because it is the "tribunal in respect of which the application is brought" and there was a person directly affected by the decision, Ms. MacDonald, who was a named party.

[15] Rules 303(1) and (2) of the *Federal Courts Rules,* SOR/98-106, govern the matter:

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, <u>other than a</u>	a) toute personne directement touchée par l'ordonnance recherchée, <u>autre que l'office fédéral visé par la demande</u>;

tribunal in respect of which the application is brought; or	
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.
[emphasis added]	[soulignement ajouté]

III. Issues

[16] The parties raised several issues in their respective memoranda and oral submissions. In my view, the relevant issues are the following:

1. Does Mr. Heisey have standing to bring this application?
2. Did Transport Canada err in finding that Ms. MacDonald provided effective public notice?
3. Did Transport Canada err by failing to consider Ms. MacDonald's record of compliance?
4. Did Transport Canada err in granting the approval based on inaccurate information?
5. Did Transport Canada fail to provide internally coherent reasoning in the approval such that it was unreasonable?

IV. Analysis

1. Does Mr. Heisey have standing to bring this application?

[17] Mr. Heisey submits that he has standing to bring an application for judicial review under subsection 18.1(1) of the *Federal Courts Act* as someone "directly affected" by the decision.

[18] He cites and relies on *League of Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 [*League of Human Rights of B'Nai Brith Canada*]. He submits that he is "directly affected" because the approval affects his legal rights and prejudicially affects him in some way. He argues that the Mooring Buoy affects his navigational rights and forces him to travel to and from his cottage in a manner that is neither the safest nor the most direct. At paragraphs 21 and 22 of his memorandum, he describes his affected rights in the following manner:

> The Mooring Buoy (and the associated 50' yacht permitted in the Approval) is located on the applicant's most direct and safest line of travel by boat, especially in higher water years, between Honey Harbour and the Heisey Cottage.
>
> The applicant is prejudiced by the Approval because it forces him to travel to and from his property by way of a route that is neither the most direct nor the safest. The Mooring Buoy and the associated 50' yacht are located in waters that contain numerous unmarked shoals and are sometimes subject to strong winds, large waves, heavy fogs and mist. The Mooring Buoy directly affects the applicant's navigation rights.

[19] I agree with the submission of the Respondent that Mr. Heisey does not have personal standing to bring this application.

[20] As the Federal Court of Appeal noted in *League of Human Rights of B'Nai Brith Canada* at paragraph 58, in order for an applicant to be "directly affected" within the meaning of subsection 18.1(1) of the *Federal Courts Act*, the administrative decision "must have affected its legal rights, imposed legal obligations upon it, or prejudicially affected it in some way" [emphasis added].

[21] The decision under review does not affect Mr. Heisey's legal rights, as he contends. Even if he must now navigate around the Mooring Buoy to go between the Heisey Islands and Honey Harbour, it adds mere seconds to his journey and cannot be said to affect his legal rights or, in any meaningful way, his navigational rights. The record shows that Transport Canada ensured that the size, appearance, and placement of the Mooring Buoy would not impede or obstruct navigation in the area. There is 150 metres of clearance between the Mooring Buoy and the opposite shore. Accordingly, even if a 15 metre boat was moored, there would still be ample clearance. Any assertion of impaired navigational rights is without merit.

[22] Further, the decision under review does not impose any legal obligations on Mr. Heisey. With respect, it is clear that he is unhappy with and cares deeply about the Mooring Buoy, but this does not mean he is "directly affected" by the approval. Although given in a different context, the observations of Justice Dawson, the motion judge in *League of Human Rights of B'Nai Brith Canada v Canada*, 2008 FC 732 at paragraph 26, are equally apt here:

> Without doubt, the applicant and the family members it says it represents deeply care, and are genuinely concerned, about Mr. Odynsky's citizenship revocation process and his past service as a perimeter guard of the Seidlung at the Poniatowa labour camp in German-occupied Poland. However, that interest does not mean that the legal rights of the applicant, or those it represents, are

> legally impacted or prejudiced by the decision not to revoke Mr. Odynsky's citizenship. Rather, their interest exists in the sense of seeking to right a perceived wrong arising from, or to uphold a principle in respect of, the non-revocation of Mr. Odynsky's citizenship.

[23] Mere interest in the decision is insufficient to entitle an applicant standing to seek judicial review.

[24] The Respondent submits that lack of personal standing is sufficient to dismiss this application.

[25] In his memorandum, the Applicant submits that, in addition or in the alternative to personal standing, he "has public interest standing to bring this application." Public interest standing is not a status that one has as of right; rather, it is a status granted by a court

[26] The Respondent correctly notes that the Applicant did not seek public interest standing in his Notice of Application; however, no authority was cited for the proposition that failure to do so is fatal to seeking it later.

[27] The leading authority on public interest standing is *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 [*Canadian Council of Churches*]. The issue of standing arose before the Federal Court of Canada – Trial Division on a motion by the defendant to strike out the statement of claim on the ground that the plaintiff lacked standing and that it disclosed no reasonable cause of action. I note that the issue of a request for public interest standing appears to have first been raised before the motion's judge.

[28] In *Canadian Council of Churches*, the Supreme Court of Canada articulated a three-part test for public interest standing; namely:

1. Has a serious issue been raised;

2. Does the party seeking public interest standing have a direct interest in the outcome of the litigation or, if not, does he have a genuine interest in it; and

3. Is there any other reasonable and effective way to bring the issue before the Court?

[29] The Applicant submits that the application raises a serious public issue; namely, the potential hazards to boaters and others in and around the Mooring Buoy area. I accept, only for the purposes of determining standing, that if the decision under review is unreasonable, then it may have an adverse impact on safety, and that is a serious issue.

[30] Although I have found that Mr. Heisey has no direct legal interest in the outcome of this litigation, I do accept that he has a genuine interest in it.

[31] For the purposes of this application, the most important test is the last one. No-one appears to be directly affected by the decision, except Ms. MacDonald and Transport Canada. Had the application for the Mooring Buoy been denied, then she would have standing to challenge the decision. However, as it was approved, it appears to the Court that unless Mr. Heisey or some other interested person is granted public interest standing, the reasonableness of the authorization decision cannot be challenged. It is not in the interest of justice that

administrative decisions that may impact others are immune from review. Accordingly, the Court finds that Mr. Heisey has public interest standing to challenge the decision under review.

2. Was effective public notice provided?

[32] The Applicant submits that Transport Canada erred by condoning ineffective public notice. He says that the notice is inadequate because it was posted in the wrong place and at the wrong time. Further, he submits that the notice itself is defective. Together, he submits that the approval is a denial of natural justice and a breach of procedural fairness, and should therefore be quashed.

[33] The Applicant submits that the manner of providing notice was insufficient because it was published too far away from the affected area. Ms. MacDonald was required to publish information about the proposed Mooring Buoy in the legal section of one English language newspaper in or near the place where the work is to be constructed. She published her notice in the Midland Mirror, a newspaper that does not directly service the Township of Georgian Bay, District Municipality of Muskoka, where the Mooring Buoy was to be installed. The Town of Midland, where that newspaper is published, is in Simcoe County, 40 kilometres from the Village of Honey Harbour where Mr. Heisey says most property owners in the affected area originate their boat trips.

[34] The Applicant directs the Court to the decision in *Nisga's Tribal Council v British Columbia (Environmental Appeal Board)*, [1988] BCJ No 3110 (SC) [*Nisga's Tribal Council*] wherein the notice was found insufficient when published in a newspaper far from the

community actually affected by the decision. The British Columbia Supreme Court held that publishing notice in a town 150 miles from the affected area did not constitute “effective notice” or comply with the provision to publish “all or part of the permit in one or more newspapers with local distribution.”

[35] The Applicant submits that there is no evidence that Ms. MacDonald made any effort to ensure that publishing notice in the Midland Mirror would be effective. He proposes that there were better options available such as the Globe and Mail, the Toronto Star, and the National Post, all of which service the Goblin Bay/Cognashene area where the Mooring Buoy was to be located.

[36] The Applicant adds that the notice is ineffective even though he and many others knew about the notice and the Mooring Buoy application. In *Nisga’s Tribal Council*, the Court found that a lack of evidence of prejudice was immaterial to the issue of notice.

[37] Ms. MacDonald also posted notice on Simcoe.com. This website provides news and information to, and is supported by newspapers in, communities in Simcoe County. It does not say that it services the communities outside of Simcoe County, including the Township of Georgian Bay, District Municipality of Muskoka, where the Mooring Buoy was to be installed. Mr. Heisey submits that the Court should draw a negative inference from the fact that she posted notice on Simcoe.com, suggesting that she must have done so knowing that the publication in the Midland Mirror was insufficient on its own. This “suggestion” is mere speculation and the Court gives it no credence.

[38] The Applicant further submits that Transport Canada erred by condoning the notice as it was published in “the dead of winter”. The notice was published in the Midland Mirror on January 23, 2020. He says that at that time, boats would have been in winter storage and both recreational boat users and seasonal residents would not have been present in the community, making it highly unlikely that they would/could have seen the notice.

[39] Lastly, he submits that Transport Canada erred in condoning the notice as its contents were deficient. He submits that the notice did not properly identify the location of the proposed work. According to the Minister’s directions as described in the Model for Public Notice, effective notice requires a description of proposed work, the place where the work is to be located including the closest lot number, and its site and plans. The Applicant at paragraph 70 of his memorandum notes the following alleged deficiencies in the notice:

> (a) The notice did not contain the latitude and longitude of the proposed Mooring Buoy, despite the fact that this information was known to the respondent. The respondent provided the latitude and longitude of the proposed Mooring Buoy in the Mooring Buoy Application itself, but not in the notice given to the public. (see Exhibit “B” to the affidavit of the respondent.)
>
> (b) The notice simply described the Mooring Buoy as being located in Georgian Bay. Georgian Bay is a body of water that is 190 km long and 80 km wide.
>
> (c) The notice made no reference to the Township of Georgian Bay and the community of Cognashene, despite the proposed Mooring Buoy being located in this Township and this community.
>
> (d) The notice made reference to “Island 155A”, but also makes reference to “Island 155!”. A lot number is only meaningful if described in the context of registered plan and municipality within which it is located.
>
> (e) The notice made no reference to the most recognizable geographical feature of the location of the Mooring Buoy - its presence in Goblin Bay.

> (f) The notice failed to provide a map of [*sic*] sketch of the location of the proposed Mooring Buoy.

[40] The Respondent submits that *Nisga's Tribal Council* does not assist the Applicant; I agree. The facts are significantly different than those here. In *Nisga's Tribal Council*, there was no newspaper in Nass Valley, the affected area. The nearest centre with a newspaper was Terrace – some 55 miles away. Smithers, where the notice was published, was about 150 miles away from the affected communities. The Court allowed the application for judicial review, holding that the Terrace newspaper should have been selected for purposes of the notice.

[41] The Respondent observes, based on the reasoning in *Nisga's Tribal Council*, that the notice in this case ought to have been published in the Midland Mirror, being the closest local newspaper to the affected area, and it was.

[42] The Respondent further submits that the notice, as published, did come to the attention of local residents. She notes that by January 26, 2020, the Applicant had availed himself of the opportunity to make a written objection to the application on several occasions, and submitted comments on 6 separate occasions, with attachments. Moreover, 25 other individual members of the public submitted written comments, as did the Township of Georgian Bay, the Cognashene Cottagers' Association, and The Georgian Bay Association.

[43] The Court agrees with the Respondent that the evidence shows that the public notice, as published, came to the attention of local residents. There is no evidence of prejudice to anyone, and no evidence offered that anyone who wished to comment did not due to lack of notice.

[44] The Court notes that the Applicant does not allege that there is a closer local newspaper that the Respondent should have used. Instead, he argued that it should have been published in a national newspaper like the Globe and Mail. I agree with the Respondent that it would be unreasonable to publish public notice for a Mooring Buoy in Georgian Bay in a national newspaper or one published primarily in Toronto. There is no evidence before the Court that publication in such a newspaper would come to the attention of the affected local residents, whereas there is evidence that the notice as published did.

[45] In response to the concerns the Applicant raises as to the content of the notice, the Respondent submits that the notice was in the proper form as it gives the correct description of the Mooring Buoy's location, provides the public with a meaningful opportunity to comment on the application, and refers readers to the Transport Canada public registry which contains the complete application including plans and location maps.

[46] The Respondent submits, and I agree, that there is no evidence that the description of the Buoy and/or its location led to any confusion for the public. Of the thirty-eight comments received by Transport Canada about the Mooring Buoy, none reveals any confusion about its proposed location.

[47] Even if the notice could have been worded differently, the allegation is that its wording failures go to procedural fairness. Procedural fairness requires fairness, not perfection: see *Canadian Pacific Railway Co v Vancouver (City),* 2006 SCC 5, at paragraph 46.

[48] The fact that the notice was published in the wintertime is of no moment. While I accept that summer residents may not get a chance to read notices published in the winter months, in its letter of December 4, 2019, Transport Canada required the notice to be published within 90 days or the application would be closed. Accordingly, it had to be published in the winter months. Winter is a fact in Canada, even for cottagers on Georgian Bay, and I can see nothing inappropriate or unfair in Transport Canada requiring publication when it did. Again, while the Applicant complains that the timing of the publication restricted those who might otherwise have commented, there is no evidence before the Court of any affected person stating that he or she wished to comment but did not receive notice due to its timing. In short, there is no evidence of prejudice.

[49] For these reasons, the Court finds that fair, reasonable, and effective public notice of the Mooring Buoy was given.

3. Did Transport Canada err by failing to consider Ms. MacDonald's record of compliance?

[50] The parties agree that the standard of review of reasonableness applies to the judicial review of the substantive elements of the Minister's decision. A reasonable decision is one that is both based on an internally coherent and justified in relation to the facts and law that constrain the decision maker: *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 at para 85.

[51] The Applicant notes that paragraph 7(7)(h) of the Act provides that "[i]n determining whether to issue the approval, the Minister must consider the following … the record of

compliance of the owner under this Act." He submits that the Minister, contrary to the Act, expressly refused to consider the record of (non)compliance of the Respondent as described in the objection letters received from interested persons.

[52] In the summer of 2016, the Respondent installed a mooring buoy in approximately the same location as the Mooring Buoy at issue in this case, without obtaining approval from Transport Canada. In the spring of 2018, the Respondent then made an application to the Township of Georgian Bay's Committee of Adjustment seeking a variance from the zoning bylaws to permit her to demolish an existing cottage on her property and rebuild a larger one in its place.

[53] Many of the Respondent's neighbours objected to the proposed variance. One reason for their objection was the presence of an illegally installed mooring buoy because it generated the impact of two cottages despite the fact that the Township's Official Plan did not permit the use of any waterfront property as a yachting outstation.

[54] On May 15 2018, the Respondent's agent wrote to the neighbours on the Respondent's behalf, apologizing for and promising to remove the illegally installed mooring buoy. The Applicant submits that the Respondent only apologized so that the neighbours would retract the objection to her variance application. He also asserts that implicit in her promise to remove the illegal mooring buoy was a promise to not install another one.

[55] Given the illegally installed mooring buoy, the Applicant submits that the Respondent had a heightened obligation to ensure her neighbours received actual and effective notice of the Mooring Buoy application.

[56] The Applicant submits that Transport Canada should have considered the Respondent's prior illegal installation of a mooring buoy, her lack of need for a mooring buoy since she already had a dock, and the history of her minor variance application. Its failure to do so, he submits, raises a serious question of statutory interpretation and warrants judicial review by this Court.

[57] In granting the approval, Transport Canada had before it the Respondent's May 2018 apology email, a letter from the Mayor of the Township dated February 21, 2020, confirming that the Respondent had removed her previously-installed mooring buoy, photographic evidence of the previous mooring buoy, the Committee of Adjustment's approval of the variance application which noted the Respondent's promise to remove the previous mooring buoy, and ten objection letters each referencing the previous illegal mooring buoy and the promise to remove it.

[58] Transport Canada acknowledged that it had received numerous objections to the Mooring Buoy application on the basis of the Respondent's prior illegal installation of a mooring buoy and subsequent promise to remove it. However, it expressly stated that it had "no mandate" to consider either of these. The Applicant submits that this is an error of law.

[59] Section 7 of the Act sets out a list of factors that Transport Canada must consider in determining whether to issue the approval. The record shows that Transport Canada did consider these factors, including the official record of compliance of the Applicant. It is of note that considering any comments received from interested persons within the thirty day time limit and considering the record of compliance of the owner are separate factors in the list that must be considered. I agree with the Respondent that the record of compliance has the meaning given the term by Transport Canada – the official record of compliance on file at Transport Canada. It does not mean allegations of non-compliance raised by members of the public that are not substantiated by an official source.

[60] Transport Canada clearly considered the allegations of noncompliance raised in the comments and reasonably determined that it was not mandated to address them. It also considered the Respondents' record of compliance and found that no official complaint had been lodged against her.

[61] Transport Canada did not fail to consider the Respondent's record of compliance under the Act and therefore made no error in law.

4. Did Transport Canada err in granting the approval based on inaccurate information?

[62] The Applicant submits that the Respondent provided inaccurate information in the Mooring Buoy application because the plan incorrectly stated that the scale was 1 inch = 10 feet of water. This made it appear that it was not possible to moor large yachts at the existing dock. On February 2, 2020, before Transport Canada issued the approval, the Applicant personally

provided evidence that the water depth at the existing floating dock was actually much deeper than the Respondent had indicated and it was in fact possible to moor large boats. Thus, the evidentiary record before Transport Canada indicated that the Respondent did not require the installation of the Mooring Buoy, since she was already capable of mooring large yachts at her existing dock. He says that in her affidavit, the Respondent does not refute the assertion that the water depth as indicated in the Mooring Buoy application was inaccurate. Insofar as the approval implicitly acknowledged that the Mooring Buoy was necessary, the Applicant submits that the approval was unjustified in light of the evidentiary record and should be quashed.

[63] The Respondent submits that A&A, the company whom she retained to assist her with the Mooring Buoy application, specializes in dock and boathouse projects, including permit application services. Further, an OBC Qualified Designer completed the Mooring Buoy Plan for the application. Thus, to her knowledge, the information in the application is accurate.

[64] Regarding the Applicant's allegation as to the water depth next to the existing floating dock, first she says it is unreliable; the source of this information is based on the Applicant swimming in it fifty years ago. Second, she submits that the water depth represented in the application is accurate to the best of her knowledge, though she accepts that water depth fluctuates from time to time. Third, she submits that the water depth at the existing dock is only relevant to whether it is possible to moor a large boat near the existing dock. Relatedly, whether a large boat can be moored at the existing floating dock is irrelevant for the approval process for the Mooring Buoy application. Transport Canada concluded that it had no mandate to address

the Applicant's comment that the Respondent had not demonstrated any "need" for the mooring buoy.

[65] There is nothing in the Act that requires an application for works in navigable waters to be needs-based. There is also nothing in the Act to suggest that property owners are limited to one spot to anchor their vessels. Thus, it is irrelevant whether or not the Mooring Buoy application contains inaccurate information about the water depth at the existing floating dock that implicitly suggests that a Mooring Buoy is required because there is nowhere else to anchor vessels.

[66] Accordingly, I find that the decision was not based on any inaccurate information relevant to the determination required.

5. Did Transport Canada fail to provide internally coherent reasoning in the approval?

[67] The Applicant submits that underlying all the issues in this judicial review application is the issue of public safety. His position is that Transport Canada's reasons fail to address the underlying safety concerns in an internally coherent manner.

[68] He submits that there is undisputed evidence before this Court that the Mooring Buoy presents a real danger to the public, particularly the young people attending the YMCA Camp Queen Elizabeth. For example, Transport Canada's reasons, as summarized in the summary-matrix in the certified tribunal record indicates that Transport Canada received objections on the following safety-related bases: the buoy will pose a nighttime navigational hazard; any vessels

moored to the buoy will create a navigational hazard and a significant obstacle to sailboats; the buoy will interfere with YMCA water activities; and the buoy and any vessel attached will obstruct sightlines for operators, including rescue operations.

[69] In response to these objections, Transport Canada stated that vessel operators, including YMCA vessel operators, should be referencing the Collision Regulations for safe navigation and that the buoy would be charted. The Applicant submits that these responses are patently unreasonable in that they expect YMCA rescue operations to navigate around the Mooring Buoy. YMCA Campers are children and most Camp Counsellors are teenagers. The Applicant submits it is "absurd" to resolve safety concerns on the basis that these young people should refer to the regulations.

[70] Further, the Applicant submits that the buoy is not charted. He notes that the Scott Blair Affidavit states that the Mooring Buoy does not appear on the more current version of the GPS software for Georgian Bay, meaning that a boater relying on GPS to navigate would not know the mooring buoy was there. By relying on the false premise that the buoy would be charted, Transport Canada's reasons "obviously" lacked rational coherence.

[71] The Respondent submits that Transport Canada was transparent about its decision-making process and even delivered a detailed letter to the Georgian Bay Association confirming that its program is designed such that every application is "dutifully analyzed" by a trained officer who will consider all the factors established in subsection 7(7) of the Act and work to mitigate any interference with navigation that the work may cause.

[72] In terms of safety of navigation, she submits that Transport Canada did consider the fact that the Mooring Buoy's proposed location was 36 metres away from the MacDonald Island and over 150 metres away from the opposite shoreline. Transport Canada concluded that 60.88 metres of clearance would be required to allow 2-way traffic to navigate safely. The record shows Transport Canada's detailed calculations of swing radius and NIAG calculations for the Buoy.

[73] She further notes that Transport Canada also considered specific comments regarding the Mooring Buoy (and any vessel moored to it) as a nighttime navigational hazard, a visual obstruction, a significant obstacle to sailboats, and a serious safety concern due to boat traffic. Transport Canada addressed these comments by performing calculations that support sufficient clearance, charting the Mooring Buoy, and requiring the Mooring Buoy to be lit and reflective.

[74] The Respondent submits that it was not unreasonable for Transport Canada to recommend that boat operators should consult the Collision Regulations as it is the YMCA's responsibility to brief its users on safety procedures. With respect to the YMCA summer camp, the *Small Vessel Regulations*, SOR/2010-91, which are applicable to water activities like kayaking and canoeing, require persons responsible for leading or guiding a trip, teaching a course, or being on the water in any type of leadership position to ensure that all participants are briefed on relevant safety and emergency procedures prior to the excursion.

[75] The Respondent also submitted that her parents' trawler can be anchored in the exact same spot with or without a Mooring Buoy by using its own cable anchor. She submits that

using the Mooring Buoy is safer as it is a more secure anchor hold than a cable anchor and ensures that vessels will always anchor in a consistent location.

[76] Lastly, she submits that the Mooring Buoy improves the safety of navigation for the public because it is lit, reflective, and will be charted. Removal of the Mooring Buoy means that the trawler will be anchored near the MacDonald Island in inconsistent and uncharted locations, without a lit and reflective Buoy to alert the public.

[77] The record shows that Transport Canada considered the comments submitted in relation to the Mooring Buoy application. It contains a detailed review and numerous calculations regarding the Mooring Buoy and any navigational safety concerns it could pose. Transport Canada addressed each comment in turn, either by specifying that it was not within its mandate, was irrelevant, or had been resolved by the several conditions imposed upon the Mooring Buoy's approval. The Applicant has not led any evidence that Transport Canada erred in these calculations or that the conditions imposed based on safety concerns, such as the requirements that the Buoy be lit and reflective, are inadequate.

[78] I agree with the Respondent that it is reasonable for Transport Canada to recommend that the YMCA advise its campers about water safety procedures, even if – and perhaps especially if – they are inexperienced users.

[79] There is no compelling evidence that the Mooring Buoy compromises safe navigation in the area. In fact, a well-lit, reflective Mooring Buoy may actually improve safety as it ensures

vessels will anchor in a consistent and charted location that can better withstand high winds and other extreme weather events.

[80] The decision under review is internally coherent and reasonable.

V. Conclusion

[81] This application will be dismissed. The Respondent is entitled to her costs. The parties are agreed that costs fixed at $4,000.00 is reasonable, and I agree.

JUDGMENT IN T-9-21

THIS COURT'S JUDGMENT is that this application is dismissed, with costs to the Respondent, fixed at $4,000.00.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-9-21
STYLE OF CAUSE:	ALAN MILLIKEN HEISEY v REBECCA MACDONALD
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JULY 5, 2021
JUDGMENT AND REASONS:	ZINN J.
DATED:	AUGUST 31, 2021

APPEARANCES:

Justin Papazian	FOR THE APPLICANT
Maija Pluto	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Papazian Heisey Myers Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Gaertner Baron Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT