Federal Court of Appeal  Cour d'appel fédérale

Date: 20160405

Docket: A-131-15

Citation: 2016 FCA 102

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

SYLVIO THIBEAULT

Appellant

and

MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES
and
MARINA DE LA CHAUDIÈRE INC.

Respondent

Heard at Montréal, Quebec, on November 23, 2015.

Judgment delivered at Ottawa, Ontario, on April 5, 2016.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This appeal concerns a judgment rendered by Mr. Justice Martineau of the Federal Court (the judge) in relation to three applications for judicial review submitted by Mr. Thibeault (the appellant). The appellant was seeking the cancellation of three ministerial approvals given pursuant to the *Navigable Waters Protection Act*, R.S.C. 1985, chapter N-22 (the Act) in respect

of works known as dock "B", dock "D" and the mooring area – Zone 4 of the Marina de la Chaudière Inc. (the Marina). These three cases (T-1068-13, T-1087-13 and T-1086-13) were addressed in a single judgment (2015 FC 163). The appellant was also seeking to have set aside the ministerial order ordering him to remove his floating structure located at the mouth of the Chaudière River. These two cases were heard consecutively but resulted in separate judgments (the second being indexed as 2015 FC 162).

[2] Both appeals were heard before our Court on the same day. They were decided separately, and these reasons apply only to the approvals of the structures of the Marina. The Court's reasons with respect to the appeal of the decision concerning the appellant's structure are recorded under 2016 FCA 101.

[3] In his decision, the judge stated that in his opinion, the Minister of Transport, Infrastructure and Communities (the Minister) could reasonably conclude that docks "B" and "D" and the mooring area – Zone 4 were works, and not vessels, within the meaning of the Act. He also concluded that it was reasonable for the Minister not to consider the appellant's allegations of ownership rights on the Chaudière River bed and that the Minister's assessment of the effects of the proposed works on navigation and riparian rights was also reasonable. Finally, he dismissed the appellant's allegations of bias.

[4] For the reasons that follow, I am of the view that the appeal should be dismissed.

I. The Facts

[5] The appellant has owned a shoreline lot on the Chaudière River basin since 1972. As noted by the judge, these proceedings are part of a lengthy legal saga dating back to the 1980s between the appellant and the Marina, which has operated a marina at the mouth of the Chaudière River basin for more than 35 years. The Marina claims to hold valid leases with the City of Lévis and the Québec Port Authority to operate a marina at this location, whereas several shoreline property owners have initiated proceedings before the courts of Quebec alleging that they are the owners of the Chaudière River bed on which their properties front. The Superior Court of Québec (the Superior Court) rejected the owners' claim in 1988 (*Marchand et al. v. Marina de la Chaudière et al.*, [1988] R.J.Q. 2733, EYB 1988-83449 (C.S.)), and the Court of Appeal of Quebec upheld that judgment ([1998] R.J.Q. 1971, REJB 1998-07251 [*Marchand*]). At the end of that decision, the Court of Appeal of Quebec stated that the applicants had riparian rights but declined to rule on the ownership of the river bed for lack of sufficient evidence. The Quebec courts went on to deal with multiple disputes between the same parties with respect to recognition of their respective rights.

[6] In 2013, the Marina filed applications for approval with the Minister under section 5 of the Act to build several works, including floating docks "B" and "D" and the mooring area – Zone 4 (Zone 4). On April 12, 2013, the Marina deposited plans to the land registry office in accordance with subsection 9(4) of the Act, and notice of these applications was published in the *Canada Gazette* and several local newspapers on April 20, 2013. The notice indicated that the Minister would take into consideration written comments submitted to the manager of the Navigable Waters Protection Program (NWPP) within 30 days as set out in subsection 9(5) of the Act.

[7] Through his attorney, the appellant sent a formal notice letter to the NWPP manager, Richard Jones, on May 13, 2013, alleging that docks "B" and "D" and part of Zone 4 were located on his private property and that the Minister did not have jurisdiction to issue the requested approvals insofar as the docks and mooring areas were not works but rather vessels within the meaning of section 2 of the Act. The appellant enclosed with this letter a deed and notice of registration of a land lease dated April 2013 apparently conferring upon him title to certain lots in the Chaudière River bed at the mouth of the basin, where the Marina intended to place docks "B" and "D" and certain buoys in Zone 4. The letter further stated that the appellant had a "vessel" at anchor near the site picked by the Marina for dock "B", on lot C, of which he claimed exclusive ownership, in order to do work on his property. Several other shoreline property owners also submitted written observations to the Minister.

[8] On May 16, 2013, the Minister issued a ministerial order under paragraph 6(1)(*a*) of the Act requiring the appellant to remove the structure he had installed on the ground that it was unauthorized and could interfere with navigation. That decision gave rise to another application for judicial review examined by the judge and for which the appeal is indexed as 2016 FCA 101.

[9] On June 12 and 14, 2013, the Minister issued approvals for the installation of docks "B" and "D" and Zone 4 subject to conditions concerning lighting, mooring of buoys and the issue of notices to shipping in certain cases. As indicated previously, the present appeal concerns the decision rendered by the judge dismissing the applications for judicial review relating to these three dockets.

[10] Concurrent to the proceedings initiated by the appellant before the Federal Court, the Marina filed a motion to institute proceedings with the Superior Court on July 9, 2013 to obtain a

permanent injunction against the appellant and another shoreline property owner. The representatives of the Marina also allege that the appellant and the other shoreline property owner removed dock anchors installed by the Marina, that the titles the appellant acquired in April 2013 did not confer any rights in the Chaudière River basin or bed and, lastly, that the Marina's docks had been duly approved by the Minister. Additionally, the appellant and two other shoreline property owners brought an action for damages of approximately $200,000 against the Marina for neighbourhood disturbances caused by boaters using the Marina's docks and for the anchoring of these docks on their property.

[11] On February 9, 2015, the judge rendered a judgment on the two cases before him and dismissed all applications for judicial review. With specific reference to the approvals given to the Marina by the Minister, the judge first concluded that docks "B" and "D" and Zone 4 could reasonably be qualified as works within the meaning of the Act. Based on the definitions of the terms "work" and "vessel" found in section 2 of the Act, the judge concluded that the fact that docks B and D of the Marina are "floating structures" does not mean that they are automatically "vessels." Insofar as these docks were anchored in a fixed manner and the Marina evidently intended to use them for mooring boats, it was reasonable for the Minister to conclude that the docks were not designed or used for navigation.

[12] With respect to the appellant's submission that the Minister committed a reviewable error by not ruling that he was the owner of the Chaudière River bed, the judge addressed that allegation by noting that the approvals granted by the Minister have no direct effect on the ownership rights of the Chaudière River bed, as clearly indicated in the approvals. These approvals indicate further, [TRANSLATION] "It is the applicant's responsibility to obtain any other forms of approval or building permits, under any applicable laws." The Minister's role is to

oversee compliance with the Act and its rules and regulations, not to determine and uphold ownership rights. Ownership and any related civil rights fall exclusively within the legislative authority of the provinces, and it is up to the provincial courts to address such questions.

[13] Finally, the judge examined the appellant's argument concerning his riparian rights, which do not include ownership of the river bed but are instead closely related to ownership of the riparian land. According to *Marchand*, a case decided by the Court of Appeal of Quebec in 1998, these rights include access rights, the right to general household use, the right to anchorage and mooring and the right to non-commercial supply and diversion. The appellant submitted that the Minister had made several errors in that his calculations did not take into account the true size of the vessels passing through the Chaudière River, the two-way vessel traffic, or winds and currents; moreover, he submitted that the proposal of the river lot lines did not follow the principles accepted by the Ordre des arpenteurs-géomètres du Québec and did not follow Transport Canada directive TP 10387E (*Aids and Waterways Navigation Protection – Navigational Impact Assessment Guidelines*) with respect to distance requirements. In that regard, the judge sided with the Minister once again, concluding that the Minister had assessed the effects on navigation of the works proposed by the Marina and had taken into consideration the riparian rights. That assessment was reasonable, and it was not for the Court to substitute its own assessment of the evidence and the technical factors considered by the Minister in exercising his discretion.

[14] The judge also dismissed the appellant's arguments concerning bias on the ground that these arguments essentially reflect a disagreement as to the facts and the methods used by the Minister. He said that there was no evidence of bad faith or evidence that the Minister, by his actions, gave reason to believe that the approvals would be issued before they were.

[15] Finally, it is to be noted that the Superior Court rendered its judgment on the two disputes between the appellant and the Marina on December 4, 2015, and therefore after the hearing date for this appeal. Following an exhaustive analysis of the chain of title, the Superior Court concluded that the appellant held good and valid ownership rights to the lots located in the Chaudière River bed, as described in the schedule to the judgment. It concluded further that the appellant and other shoreline property owners had riparian rights fronting on their properties allowing them to install docks and make normal use of them with their boats.

[16] However, the Superior Court also indicated that it was not for it to decide as to the suitability of anchoring locations for the Marina's docks and that this was the responsibility of Transport Canada. It concluded in part to:

> [TRANSLATION]
>
> **ALLOW** the intervention of the Attorney General of Canada for the sole purpose of declaring that the Federal Court and the Federal Court of Appeal have exclusive jurisdiction for issuing the approvals required under the *Navigable Waters Protection Act* and its regulations.

[17] That decision was appealed from the Québec Port Authority on December 22, 2015, and by the Marina on December 29, 2015. The appellant, meanwhile, filed two cross-appeals on December 30, 2015.

II. Issues

[18] The parties to this appeal have raised the following three questions:

a) Did the judge err in concluding that the Minister did not have to consider the ownership rights to the Chaudière River bed allegedly held by the appellant before issuing the disputed approvals?

b) Did the judge err in concluding that the Minister's assessment of the effects of the proposed works on navigation and riparian rights was reasonable?

c) Did the judge err in concluding that no reasonable apprehension of bias was shown in relation to the issue process for the disputed approvals?

III. Analysis

[19] The parties agree on the standard of review applicable in this Court. In an appeal from a decision concerning judicial review of an administrative decision, the Court of Appeal must determine whether the trial court used the appropriate standard of review and applied it correctly. In other words, this Court must, for all practical purposes, put itself in the trial judge's shoes and focus on the administrative decision challenged by way of judicial review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 46; *Agnaou v. Canada (Attorney General)*, 2015 FCA 29, [2015] C.R.R. no. 116 at paragraph 26.

[20] The appellant and the Minister also agree that the judge identified the appropriate standards of review. With respect to the first two issues, which involve factual elements and legal principles, the applicable standard is that of reasonableness. This standard requires deference. As stated by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59 [*Khosa*]: "Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47)." For the third issue, the applicable standard of review is that of correctness, because the reasonable apprehension of bias was addressed for the first time by the judge and

essentially raises a question of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraphs 8 and 9.

[21] Before addressing the three issues raised for the Court's attention, the relevant legislative provisions merit reiteration:

Definitions	*Définitions*
2. In this Act,	**2.** Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
"vessel" includes every description of ship, boat or craft of any kind, without regard to method or lack of propulsion and to whether it is used as a sea-going vessel or on inland waters only, including everything forming part of its machinery, tackle, equipment, cargo, stores or ballast;	« bateau » Toute construction flottante conçue ou utilisée pour la navigation en mer ou dans les eaux internes, qu'elle soit pourvue ou non d'un moyen propre de propulsion. Est compris dans la présente définition tout ce qui fait partie des machines, de l'outillage de chargement, de l'équipement, de la cargaison, des approvisionnements ou du lest du bateau.
"work" includes	« ouvrage » Sont compris parmi les ouvrages :
(*a*) any man-made structure, device or thing, whether temporary or permanent, that may interfere with navigation; and	*a*) les constructions, dispositifs ou autres objets d'origine humaine, qu'ils soient temporaires ou permanents, susceptibles de nuire à la navigation;
(*b*) any dumping of fill in any navigable water, or any excavation of materials from the bed of any navigable water, that may interfere with navigation.	*b*) les déversements de remblais dans les eaux navigables ou les excavations de matériaux tirés du lit d'eaux navigables, susceptibles de nuire à la navigation.
Approval of works	*Approbation des ouvrages*
5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water without the Minister's prior approval of the work,	**5.** (1) Il est interdit de construire ou de placer un ouvrage dans des eaux navigables ou sur, sous, au-dessus ou à travers celles-ci à moins que,

its site and the plans for it.

préalablement au début des travaux, l'ouvrage ainsi que son emplacement et ses plans n'aient été approuvés par le ministre.

Terms and conditions — substantial interference

(2) If the Minister considers that the work would substantially interfere with navigation, the Minister may impose any terms and conditions on the approval that the Minister considers appropriate, including requiring that construction of the work be started within six months and finished within three years of the day on which approval is granted or within any other period that the Minister may fix.

Conditions : obstacle important

(2) S'il estime que l'ouvrage gênera sérieusement la navigation, le ministre peut assortir son approbation des conditions qu'il juge indiquées et, notamment, exiger que la construction de celui-ci commence dans les six mois et se termine dans les trois ans qui suivent la date de l'approbation ou dans tout autre délai qu'il précise.

Terms and conditions — other interference

(3) If the Minister considers that the work would interfere, other than substantially, with navigation, the Minister may impose any terms and conditions on the approval that the Minister considers appropriate, including requiring that construction of the work be started and finished within the period fixed by the Minister.

Conditions : autre obstacle

(3) S'il estime que l'ouvrage gênera la navigation sans toutefois la gêner sérieusement, le ministre peut assortir son approbation des conditions qu'il juge indiquées et, notamment, exiger que la construction de celui-ci commence et se termine dans le délai qu'il précise.

Extension of period

(4) The Minister may, at any time, extend the period by changing the day on which construction of the work shall be started or finished.

Prorogation

(4) Le ministre peut proroger la date du début ou de la fin de la construction de l'ouvrage.

Compliance with plans, regulations and terms and conditions

(5) The work shall be built, placed, maintained, operated, used and removed in accordance with the

Respect des plans, règlements et conditions

(5) La construction, l'emplacement, l'entretien, l'exploitation, l'utilisation et l'enlèvement de

plans and the regulations and with the terms and conditions in the approval.

l'ouvrage doivent être conformes aux plans, aux règlements et aux conditions prévues dans l'approbation du ministre.

Ministerial orders respecting unauthorized works

Ordres ministériels à l'égard d'ouvrages non autorisés

6. (1) If any work to which this Part applies is built or placed without having been approved under this Act, is built or placed on a site not approved under this Act, is not built or placed in accordance with the approved plans and terms and conditions and with the regulations or, having been built or placed as approved, is not maintained, operated, used or removed in accordance with those plans, those terms and conditions and the regulations, the Minister may

6. (1) Dans les cas où un ouvrage visé par la présente partie est construit ou placé sans avoir été approuvé au titre de la présente loi ou est construit ou placé sur un emplacement non approuvé au titre de celle-ci ou n'est pas construit ou placé conformément aux plans et conditions approuvés au titre de la présente loi et aux règlements ou, après avoir été construit ou placé conformément à l'approbation, n'est pas entretenu, exploité, utilisé ou enlevé conformément à ces plans et conditions et aux règlements, le ministre peut :

(*a*) order the owner of the work to remove or alter the work;

a) ordonner au propriétaire de l'ouvrage de l'enlever ou de le modifier;

(b) where the owner of the work fails forthwith to comply with an order made pursuant to paragraph (*a*), remove and destroy the work and sell, give away or otherwise dispose of the materials contained in the work; and

b) lorsque le propriétaire de l'ouvrage n'obtempère pas à un ordre donné sous le régime de l'alinéa *a*), enlever et détruire l'ouvrage et aliéner — notamment par vente ou don — les matériaux qui le composent;

(c) order any person to refrain from proceeding with the construction of the work where, in the opinion of the Minister, the work interferes or would interfere with navigation or is being constructed contrary to this Act.

c) enjoindre à quiconque d'arrêter la construction de l'ouvrage lorsqu'il est d'avis qu'il gêne ou gênerait la navigation ou que sa construction est en contravention avec la présente loi.

(2) [Repealed, 2009, c. 2, s. 322]

(2) [Abrogé, 2009, ch. 2, art. 322]

Costs of removal, destruction or disposal

(3) Where the Minister removes, destroys or disposes of a work pursuant to paragraph (1)(*b*), the costs of and incidental to the operation of removal, destruction or disposal, after deducting therefrom any sum that may be realized by sale or otherwise, are recoverable with costs in the name of Her Majesty from the owner.

Frais d'enlèvement, de destruction ou d'aliénation

(3) Les frais entraînés par l'enlèvement, la destruction ou l'aliénation d'un ouvrage par le ministre en application de l'alinéa (1)*b*) sont, après déduction du montant qui peut être réalisé notamment par vente, recouvrables du propriétaire, ainsi que les frais de recouvrement, au nom de Sa Majesté.

Approval after construction started

(4) The Minister may, subject to deposit and notice as in the case of a proposed work, approve a work, its site and the plans for it and impose any terms and conditions on the approval that the Minister considers appropriate after the start of its construction. The approval has the same effect as if it was given before the start of construction.

Approbation après le début des travaux

(4) Le ministre peut, sous réserve de dépôt et d'avis comme dans le cas d'un ouvrage projeté, approuver un ouvrage, ainsi que ses plans et son emplacement, et assortir son approbation des conditions qu'il estime indiquées, après le début de sa construction; l'approbation a alors le même effet que si elle avait précédé le début des travaux.

Notice and deposit of plans

9. (1) A local authority, company or individual proposing to construct any work in navigable waters may apply to the Minister for approval by depositing the plans for its design and construction and a description of the proposed site with the Minister.

Préavis et dépôt des plans

9. (1) L'autorité locale, la compagnie ou le particulier qui se propose d'établir un ouvrage dans des eaux navigables peut déposer auprès du ministre les plans portant sur la conception et la construction de l'ouvrage, avec la description de l'emplacement projeté, et lui en demander l'approbation.

Plans for management and operation

(2) If the Minister considers that the work would substantially interfere with navigation, the Minister may also require that the local authority, company or individual deposit the

Plans de gestion et d'exploitation

(2) S'il estime que l'ouvrage gênera sérieusement la navigation, le ministre peut exiger de l'autorité locale, de la compagnie ou du particulier qu'il dépose en outre des

plans for the management and operation related to the work.

plans de gestion et d'exploitation relativement à l'ouvrage.

Deposit and notice — substantial interference

(3) If the Minister considers that the work would substantially interfere with navigation, the Minister shall direct the local authority, company or individual to

(*a*) deposit all plans in the local land registry or land titles office or any other place specified by the Minister; and

(*b*) provide notice of the proposed construction and the deposit of the plans by advertising in the Canada Gazette and in one or more newspapers that are published in or near the place where the work is to be constructed.

The plans shall be deposited and notice shall be provided in the form and manner specified by the Minister.

Dépôt des plans et avis de la demande : obstacles importants

(3) S'il estime que l'ouvrage gênera sérieusement la navigation, le ministre ordonne à l'autorité locale, à la compagnie ou au particulier :

a) d'en déposer tous les plans au bureau d'enregistrement ou au bureau des titres de biens-fonds du lieu en cause ou à tout autre lieu qu'il précise;

b) de donner avis du projet de construction et du dépôt des plans par annonce insérée dans la Gazette du Canada et dans un ou plusieurs journaux publiés dans la localité où l'ouvrage doit être construit, ou dans les environs.

Le dépôt est effectué et l'avis est donné conformément aux modalités fixées par le ministre.

Deposit and notice — other interference

(4) If the Minister considers that the work would interfere, other than substantially, with navigation, the Minister may direct the local authority, company or individual to deposit the plans in the local land registry or land titles office or any other place specified by the Minister, and to provide notice of the proposed construction and the deposit of the plans as the Minister considers appropriate.

Dépôt des plans et avis de la demande : autres obstacles

(4) S'il estime que l'ouvrage gênera la navigation sans toutefois la gêner sérieusement, le ministre peut ordonner à l'autorité locale, à la compagnie ou au particulier de déposer les plans au bureau d'enregistrement ou au bureau des titres de biens-fonds du lieu en cause — ou tout autre lieu qu'il précise — et de donner avis du projet de construction et du dépôt des plans. Le dépôt est effectué et

	l’avis est donné de la façon que le ministre estime indiquée.
Comments	Observations
(5) Interested persons may provide written comments to the Minister within 30 days after the publication of the last notice referred to in subsection (3) or (4).	(5) Dans les trente jours suivant la publication du dernier avis mentionné aux paragraphes (3) ou (4), les intéressés peuvent présenter par écrit au ministre leurs observations.

A. *Did the judge err in concluding that the Minister did not have to consider the ownership rights to the Chaudière River bed allegedly held by the appellant before issuing the disputed approvals?*

[22] The appellant argued that the judge erred in concluding that the Minister was not required to take into account the appellant's ownership right to certain sections of the Chaudière River bed in authorizing the Marina to install its pontoons. On the basic of the definitions of "lawful work" and "owner" set out in subsection 3(1) of the Act, as well as on subsection 5(5) of the Act, the appellant submits that the permission of the owner of the land on which a work is to be built must be sought before a work in a watercourse is built and installed. Indeed, the appellant adds that the NWPP manager took into account the fact that Transport Canada considers the Chaudière River bed to be Crown land belonging to the Port of Québec when he made the decision to issue approval documents to the Marina. The Environmental Affairs Section of Transport Canada, the Québec Port Authority and the City of Lévis were allegedly consulted for this reason.

[23] Moreover, according to the appellant, the judge erred in considering that the rights claimed by the appellant were mere "allegations of ownership rights," whereas the land titles acquired by the appellant had been made by notarial act and duly registered in the land registry.

These titles had not been contested before a court by the Marina when the Minister was advised of the existence of exclusive land and lease titles by the appellant on May 13, 2013.

[24] Finally, the appellant challenges the judge's assertion to the effect that the approvals granted by the Minister do not have a direct effect on ownership rights to the river bed insofar as the Marina is bound to obey the other laws and regulations in force. Insofar as the installation plans for docks "B" and "D" of the Marina as appended to the approval documents provide for the installation of chemical earth anchors at three places on the river bed, requiring the insertion of pins into the rock, this leads necessarily to physical encroachment upon and into the ground on land leased by the appellant and land owned by same, resulting in direct infringement of his ownership right.

[25] I do not find these arguments convincing, essentially since a distinction must be made between jurisdiction to legislate to protect the public right to navigate and ownership rights. It is well-settled in Canadian constitutional law that these two concepts must be not be confused, as explained in the following excerpt from the decision rendered by the Judicial Committee of the Privy Council in *Attorney General for the Dominion of Canada v. Attorneys General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700 at page 709, (*sub. nom. Reference re Provincial Fisheries*) 1898 CarswellNat 41:

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

> [See also: Peter W. Hogg, *Constitutional Law of Canada*, 5th Ed., Vol. 1, Scarborough, ON, Thomson Carswell, 2007 at pages 819-821.]

[26] In exercising the legislative powers over navigation assigned to it in subsection 91(10) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., chapter 3, reproduced in R.S.C. 1985, App. II, no. 5 [C.A., 1867], Parliament may consequently govern the public right of navigation without regard for any rights owners may hold to a watercourse bed. Speaking for the majority, Justice La Forest summarized as follows the guidelines applicable in this regard in the decision of the Supreme Court in *Friends of the Oldman River v. Canada (Department of Transportation)*, [1992] 1 S.C.R. 3 at page 54, 88 D.L.R. (4th) 1 [*Friends of the Oldman River*]:

> The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way. . . . It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. . . .
>
> [See also: *Le droit québécois de l'eau*, study conducted under Guy Lord, Centre de recherche en droit public, Université de Montréal, 1977, page 914.]

[27] It goes without saying that the power to legislate to protect the right to navigation includes the power to authorize obstructions to navigation. That is provided in section 5 of the Act. When authorizing obstructions to navigation, the Minister may take into account not only the potential impact of a work on navigation but also other criteria falling within federal jurisdiction, such as the environmental impact of the work or its repercussions for Indians and lands reserved for the Indians. It is presumably from this perspective that consultations were carried out with a consultation expert for Aboriginal groups and environmental officers with Transport Canada. Inversely, the provinces are not empowered to adopt legislation authorizing the placement of obstructions to navigation: *Friends of the Oldman River* at page 56.

[28] That said, Parliament may not infringe upon the private rights of individuals in exercising its legislative jurisdiction over navigation. This principle is described in *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459 (H.Ct. J. Ont.), [1911] O.J. No. 773 at paragraph 17 and reiterated by the Supreme Court in *Friends of the Oldman River* at page 60. This is why it is specified in the approvals that works are permitted only insofar as they also comply with all other requirements to which they may be subject:

> [TRANSLATION]
>
> This document approves the work in terms of its effect on marine navigation under the *Navigable Waters Protection Act*. The work must be built, placed, maintained, operated, used and removed in accordance with the approved plan(s), the *Navigable Waters Protection Act*, its regulations and the terms and conditions in the Approval.
>
> It is the applicant's responsibility to obtain any other forms of approval or building permits, under any applicable laws.
>
> [Appeal Book, volume 4, at pages 965, 967 and 969.]

[29] This guideline, which is reiterated in the letters of transmittal of the approvals (Appeal Book, volume 5, at pages 1308, 1313 and 1315), is in complete harmony with the federal character of the Canadian Constitution and the logic underlying the distribution of powers between the two levels of government. It would be contrary to the spirit of federalism to empower Parliament to suspend citizens' obligation to comply with standards otherwise validly adopted by the provincial legislatures.

[30] Evidently, then, the Marina could not be allowed, on the basis of the approvals it obtained under the Act, to infringe upon any ownership rights held by the applicant. In fact, the approvals obtained by the Marina could very well prove largely theoretical and devoid of any practical effect insofar as the docks must indeed be anchored in the river bed, should the recent judgment

from the Superior Court affirming the ownership rights claimed by the appellant be upheld on appeal.

[31] Is this to say that the Minister should have refrained from issuing the approvals requested by the Marina until ownership of the Chaudière River bed was judicially determined? I do not believe so. For one, the decision of the Superior Court was rendered after the approvals were issued. At the time of approval of the Marina's docks, ownership of the river bed at the site where the proposed docks were to be installed was being disputed, and the Court of Appeal of Quebec had declined to rule on this matter in 1988. In the circumstances, the judge correctly concluded that the Minister could reasonably disregard ownership rights to the Chaudière River bed in making the decision to issue the approvals.

[32] It is up to the Quebec courts to determine the issue of who, the appellant or the Marina, is owner of the lots on the Chaudière River bed where the docks authorized by the Minister are to be anchored. The Act authorizes the Minister only to govern the right of navigation and to allow works that could impair that right. It is not the Minister's role to become involved in matters which, under the C.A., 1867, relate to ownership and civil rights within a province, much less to adjudicate a dispute between two parties, just as [TRANSLATION] "[i]t is not up to [the Superior Court] to substitute itself for Transport Canada with a view to deciding on the suitability of sites for installing anchors for the docks of the Marina . . .": *Marina de la Chaudière Inc. v. Thibeault*, 2015 QCCS 5829, [2015] J.Q. no. 14020 at paragraph 200. The Supreme Court arrived at the same conclusion in 2012 in a decision dismissing an application for a permanent injunction submitted by the appellant to require the Marina to remove all of its structures in the Chaudière River basin: *Thibeault v. Marina de la Chaudière Inc.*, 2012 QCCS 2938, [2012] J.Q. no. 6267 (motion to dismiss appeal allowed in 2012 QCCA 1226, [2012] J.Q. no. 6393).

[33] For all of the above reasons, the first ground of the appellant against the decision rendered by the judge must be dismissed.

B. *Did the judge erroneously conclude that the Minister's assessment of the effects of the proposed works on navigation and riparian rights was reasonable?*

[34] The appellant submits in that regard that the NWPP officer did not take riparian rights into account before issuing the disputed approvals. On the basis of a Canadian Coast Guard publication entitled *Aids and Waterways Navigation Protection: Navigational Impact Assessment Guidelines* (Appeal Book, volume 2, at page 472 [TP 10387E]), the appellant alleges that the officer was required first to determine the size of the navigation channel and then to establish riparian rights and ensure that these rights were upheld.

[35] According to the appellant, the application of these guidelines should have resulted in the establishment of a clearance zone of approximately 45 metres starting at a depth of 1.8 metres. However, the officer provided for a clearance zone of only 14.5 metres, which represents the one-way traffic of vessels only, based on vessels of an average width of 3 metres. According to the appellant, this is not only insufficient but also demonstrates that riparian rights were not taken into account in the approval of the applications submitted by the Marina.

[36] For the reasons that follow, I cannot agree with the appellant's argument. Like the judge, I will first note that guidelines published by a Minister or government agency to provide information to parties appearing in the courts concerning enforcement of a law or regulation are not binding. These guidelines are not law and cannot, in any case, limit or make conditional a discretionary power granted by Parliament; see *Maple Lodge Farms Ltd. v. Government of Canada*, [1981] 1 F.C. 500 (F.C.A.), [1980] C.R.R. no. 171 at paragraph 29, affirmed in [1982] 2

S.C.R. 2, 137 D.L.R. (3d) 558; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2016] W.D.F.L. 179 at paragraph 32.

[37] Moreover, the evidence does not substantiate the appellant's argument to the effect that the Minister did not take riparian rights into account. The certified tribunal record contains a plan indicating a margin of 14.5 metres around riparian properties beginning at a depth of approximately 1.8 metres (see Plan 1 of 5, Illustration of the riparian rights in the St. Lawrence River & the Chaudière River estuary, Appeal Book A-131-15, volume 4, at page 1010). Additionally, the document explaining the decisions made concerning the applications for approval submitted by the Marina demonstrates that the riparian rights were taken into consideration, as the following excerpt indicates:

> [TRANSLATION]
>
> We have also taken into account various recommendations from our peers with respect to riparian rights to enter and leave the water (access rights) and certain declarations made previously by the NWPP. According to one of these documents, reasonable water access in tidal zones is 6 feet (1.8 m) in depth of water at the low tide level [based on two illustrations from the document TP 10387E].
>
> Additionally, to ensure that water access rights are equitable among all shoreline property owners, we took into consideration the centre line of shorefront lots, from which we extended perpendicular lines to extend the property lines of each lot. On this basis, it was established that water access rights should not exceed the limit of any lot in extending the perpendicular lines in this manner.
>
> We also considered a minimal manoeuvring zone of 14.5 m from the 2 m isobath to allow for the construction or placement of a dock or small-craft mooring for each lot. This manoeuvring zone was established using the parameters set out in the AECOM reference document allowing for two-way traffic in zones accommodating berthing (low speed) manoeuvres.
>
> [Rationale of prepublication decisions [The Act], TC, Appeal Book, volume 5, at pages 1296-1298.]

[38] Indeed, the approvals were granted subject to the relocation of certain docks and mooring zones such that shoreline property owners might exercise their water access rights and might set out small-craft moorings. The appellant would have liked for riparian rights to have been assessed to a greater distance to take into account factors including two-way traffic and vessels exceeding the size considered. However, disagreeing with the assessment of requirements for ensuring safety of navigation is insufficient to show that the officer's decision was unreasonable or failed to take riparian rights into account. Although there is no doubt that riparian rights must be taken into consideration as part of the approval process for works to be placed in navigable waters, numerous other factors must also be weighed in ensuring the safety of navigation. In particular, the reference document describes the characteristics of the basin fronted by the shoreline properties and the hydraulicity of the Chaudière River as well as the fact that this is an at-risk, uncharted area to be navigated with care. I consequently conclude that the judge did not err in concluding that the Minister's assessment of the effects of the proposed works on navigation and riparian rights was reasonable. It was not for the judge to substitute his own assessment of the evidence for that of the Minister in the absence of manifest errors in the exercise of his discretion.

C. *Did the judge err in concluding that no reasonable apprehension of bias was shown in relation to the issue process for the disputed approvals?*

[39] Finally, the appellant argued that the Minister had shown bias and a closed mind and had committed several errors that were not coincidences [TRANSLATION] "but rather an orchestrated outcome showing the arbitrary nature of the decision and a lack of transparency on the part of Transport Canada" (Memorandum of Fact and Law filed on behalf of the appellant at paragraph 208). This is a very serious allegation that is not to be made lightly and that must be

supported by solid evidence: *Canadian Transit Co. v. Canada (Minister of Transportation)*, 2011 FC 515, [2011] F.C.J. no. 620 at paragraph 90, aff. by 2012 FCA 70, [2012] F.C.J. no. 307.

[40] As the judge noted, it is not enough to submit substantive arguments while suggesting that they should not have been dismissed in order to give rise to apprehension of bias. In the absence of any tangible evidence showing or even raising suspicion that the appellant's arguments were disregarded without consideration, the Court cannot accept allegations of bias.

[41] In the present case, the appellant had every opportunity to submit his observations following publication of the notice of the proposed construction and the deposit of the plans in the *Canada Gazette*. It is clear on the evidence that the observations submitted by the appellant and other shoreline property owners were taken into account, since the approvals were granted subject to certain modifications to the proposed locations of the Marina's structures. In the circumstances, it was open to the judge to conclude that a reasonable and right-minded person informed on the matter would not have any reasonable apprehension of bias.

[42] The fact that document TP 10387E was not originally included in the tribunal record and was obtained by the appellant only after filing an access to information request is insufficient, in my mind, to show bad faith on the part of the Minister. Not only does the reference document in the certified record setting out the calculation methods for the minimum mandatory distance for safe passage of vessels (AECOM Canada Ltd., Transport Canada – Development of a Guidance Document with Regard to a Safe Navigational Envelope, Appeal Book, volume 5, at pages 1483 *et seq.*) not deviate substantially from the document omitted, it is also more recent. Moreover, the illustrations in the missing document on which the information in the reference document is based are reproduced therein.

[43] Lastly, the fact that this reference document indicates erroneously that the Minister calculated a manoeuvring zone for two-way traffic when in fact it allowed only for one-way traffic does not, in my opinion and in the absence of any other information to show that this was not an error in good faith but instead a deliberate lack of transparency, constitute a determining factor, particularly in the light of the fact that the Minister also had the authority to recommend a manoeuvring zone based on one-way traffic.

IV. Conclusion

[44] For all these reasons, I would dismiss the appeal with costs.

"Yves de Montigny"
J.A.

“I agree.
Johanne Gauthier J.A. ”

“I agree.
Richard Boivin J.A. ”

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-131-15
(APPEAL OF A JUDGMENT BY THE HONOURABLE MR. JUSTICE MARTINEAU OF THE FEDERAL COURT OF CANADA DATED FEBRUARY 9, 2015, DOCKET NOS. T-1068-13, T-1087-13, T-1086-13.)	
STYLE OF CAUSE:	SYLVIO THIBEAULT v. MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES AND MARINA DE LA CHAUDIÈRE INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 23, 2015
REASONS FOR JUDGMENT:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.
DATE OF REASONS:	APRIL 5, 2016

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