

*Federal Court of Appeal*



*Cour d'appel fédérale*

**Date: 20160405**

**Docket: A-130-15**

**Citation: 2016 FCA 101**

[ENGLISH TRANSLATION]

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

**BETWEEN:**

**SYLVIO THIBEAULT**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

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

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

**REASONS FOR JUDGMENT:**

**BOIVIN J.A.**

**CONCURRED IN BY:**

**GAUTHIER J.A.  
DE MONTIGNY J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160405

Docket: A-130-15

Citation: 2016 FCA 101

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

**BETWEEN:**

**SYLVIO THIBEAULT**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT**

**JUSTICE BOIVIN**

I. Introduction

[1] Sylvio Thibeault (the appellant) is appealing from a judgment by a Federal Court judge (the judge) rendered on February 9, 2015 (2015 FC 162). The judge dismissed the appellant's application for judicial review. The appellant was seeking to set aside a ministerial order by the Minister of Transport, Infrastructure and Communities (the Minister) dated May 16, 2013. The

ministerial order required the appellant to remove his floating structure located at the mouth of the Chaudière River within twenty-four (24) hours because it is not a “work” approved by the Minister under the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22 (the Act) in effect when the ministerial order was issued.

[2] In another judgment related to this matter with citation number 2015 FC 163, the judge also dismissed the application for judicial review by the appellant, who was seeking to have set aside three ministerial approvals granted under the Act for “works” known as dock “B”, dock “D” and the mooring area - zone 4 of the Marina de la Chaudière Inc. (the Marina).

[3] Both appeals were combined and heard before this Court on the same day. However, separate decisions were rendered. Our Court’s decision on the appeal regarding the three ministerial approvals is cited as 2016 FCA 102.

[4] This decision concerns only the appeal of the ministerial order dated May 16, 2013. The references in these reasons are to the provisions that were applicable when that ministerial order was issued.

[5] For the reasons that follow, I conclude that the appeal should be dismissed.

## II. The facts

[6] The relevant facts related to this case are not in dispute.

[7] On April 20, 2013, a notice was published in the *Canada Gazette* informing the public that the Marina had applied to the Minister for approval of three floating docks on the Chaudière River, and of mooring areas in the St. Lawrence River and in the Chaudière River. After the publication of the notice, any party was permitted to submit their comments, in writing, on the effect of these proposed works on marine navigation. That is what the appellant did.

[8] More specifically, on May 13, 2013, the appellant sent a formal notice – including five annexes – to Richard Jones, manager of the Navigable Waters Protection Program (the NWPP manager). The notice was treated as an opposition to the Marina’s application for ministerial approval. The appellant informed the NWPP manager that he is the exclusive owner or occupant of the bed of the Chaudière River where docks B and D and the mooring buoys in zone 4 were to be installed by the Marina. According to the appellant, the Minister does not have the authority to issue the approvals requested by the Marina because the floating docks in question must be considered “vessels” rather than “works” under the Act. The appellant also informed the NWPP manager [TRANSLATION] “that he had placed a vessel at anchor near the site selected by the Marina for dock “B”, on Lot C, of which he has exclusive ownership, in order to do work on his property” (Appeal Book, volume 3 at pages 612–642).

[9] That same day, May 13, 2013, the Marina filed a complaint with the NWPP manager. In its complaint, the Marina sought to have determined whether the floating structure installed by the appellant was authorized.

[10] On May 14, 2013, Richard Doyon (the inspecting officer) went to the site to perform a visual inspection of the floating structure installed by the appellant and to take photos. The inspection report states that [TRANSLATION] “[t]his structure resembles a platform, and is level with the water ... This structure could be a hazardous obstruction at night if its lights were to fail, especially since it is level with the water and not very visible.” (Inspection report and notes, Appeal Book, volume 3 at page 651).

[11] On May 16, 2013, the Minister issued a ministerial order requiring the appellant to remove his floating structure from navigable waters under paragraph 6(1)(a) of the Act because it is an “unauthorized work” that may interfere with navigation. That is the ministerial order that the appellant is challenging herein.

[12] The appellant is not asking the Court to stay the ministerial order. Instead, he files a Notice of Application for judicial review to have the order struck down. Given the appellant’s refusal to comply with the ministerial order within the prescribed timeframe, the Minister had the “unauthorized work” removed on June 7, 2013.

[13] On February 9, 2015, the judge dismissed the appellant’s application for judicial review. The judge ruled that the Minister had the authority to issue the challenged ministerial order and that it was reasonable to order the appellant to remove his floating structure.

[14] The relevant provisions of the Act in the present appeal are as follows:

**2. In this Act,**

...

“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;

...

“work” includes

(a) any man-made structure, device or thing, whether temporary or permanent, that may interfere with navigation; and

(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.

**2.1** This Act is binding on Her Majesty in right of Canada or a province.

**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, its site and the

**2. Les définitions qui suivent s’appliquent à la présente loi.**

[...]

« 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.

[...]

« ouvrage » Sont compris parmi les ouvrages :

a) les constructions, dispositifs ou autres objets d’origine humaine, qu’ils soient temporaires ou permanents, susceptibles de nuire à la 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.

**2.1** La présente loi lie Sa Majesté du chef du Canada ou d’une province.

**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, préalablement au début des travaux, l’ouvrage ainsi que son emplacement

plans for it.

...

**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

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

(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

(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.

et ses plans n'aient été approuvés par le ministre.

[...]

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

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) 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.

### III. Issues

[15] This case raises the following issues:

- A. Did the judge err in deciding that the Minister could reasonably conclude that the appellant's floating structure was a "work" within the meaning of the Act and that the Minister therefore had the authority to order the appellant to remove it from navigable waters?
- B. Did the judge err in deciding that it was reasonable that the Minister did not consider the *Minor Works and Waters Order*?
- C. Did the judge commit an error in deciding that the Minister did not demonstrate bias?

### IV. Analysis

[16] In an appeal pertaining to judicial review proceedings, this Court ascertains that the trial judge correctly identified the applicable standard of review and that he applied it appropriately. The Court must "step into the shoes" of the Federal Court judge and render the decision that the judge should have rendered (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 46).

[17] The parties agree that the judge identified the appropriate standards of review and did not commit an error in that regard. The respondent is also of the opinion that the judge applied them correctly. However, the appellant disagrees on this point and submits that the judge erred in his application of the standards of review.



[18] As for the first two issues, which raise questions of mixed fact and law, the applicable standard is reasonableness (*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.

[19] At this point, I will address each of the issues in dispute.

A. *Did the judge err in deciding that the Minister could reasonably conclude that the appellant's floating structure was a "work" within the meaning of the Act and that the Minister therefore had the authority to order the appellant to remove it from navigable waters?*

[20] As a preliminary remark, I will note that the parties' submissions at the hearing were needlessly complicated. Based on a review of the file, this matter is by and large much simpler than the presentation made to the Court.

[21] Before the judge, the appellant submitted that his floating structure was a "pontoon boat," and therefore a "vessel" within the meaning of section 2 of the Act and that it was unreasonable for it to be called a "work" in the ministerial order based on sections 5 and 6 of that same Act.

[22] In analyzing the appellant's argument for the judicial review application he initiated, the judge identified the problem in this case very well from the outset in paragraph 13 of his reasons:

... Thus, the Court does not have to ask itself whether the floating structure that was removed is a "vessel", but rather whether the Minister's designation of it as an [TRANSLATION] "unauthorized work" is reasonable in this case.

[23] Despite the appellant's disagreement, I conclude that the evidence of record supports the NWPP manager's conclusion that the appellant's floating structure was an "obstacle to navigation" and therefore a work within the meaning of section 2 of the Act.

[24] More specifically, the visual inspection performed by the inspecting officer on May 14, 2013, and recorded in the inspection report on May 17, 2013, states the following:

[TRANSLATION]

This structure resembles a platform, and is level with the water. We do not know what it is made of (wood, metal or other materials???). It has a very small red flashing light at its northern extremity, and a fixed white light at its southern extremity. Two yellow balls are also attached to its southern extremity. This structure could be a hazardous obstruction at night if its lights were to fail, especially since it is level with the water and not very visible. (Appeal Book, volume 3 at page 651).

[25] Moreover, in support of the inspection report, photos taken of the floating structure in question were also attached thereto and, as the judge stated, "corroborate the observations made by the [inspecting] officer in the departmental report" (judge's reasons at paragraph 17).

[26] I am therefore of the opinion that the Minister could reasonably conclude that it was a "work" within the meaning of the Act and not a "vessel." He did not have before him any serious evidence supporting the appellant's submissions.

[27] I also do not think it is relevant to consider the case law cited by the appellant to support his submission that his floating structure should be defined as a “vessel”, except perhaps with *3897121 Canada Inc. v. Marina de la Chaudière Inc.*, 2012 FC 889 (T-895-12) [3897121 *Canada*], which the appellant emphasized.

[28] First, it is important to keep in mind that the decision in *3897121 Canada* was decided by a Federal Court judge as part of a motion to strike out a pleading under rule 221(a) of the *Federal Courts Rules*, SOR/98-106. More specifically, the appellant submits that the Federal Court judge in that case ruled that certain docks in the Marina were [TRANSLATION] “a ship under the FCA” (*Federal Courts Act*, R.S.C. (1985), c. F-7). For the appellant, it is therefore obvious that docks (pontoons) B, C and D of the Marina [TRANSLATION] “all have the same characteristics, like the appellant’s pontoon boat” (Appellant’s Memorandum of Fact and Law at paragraphs 69 and 70).

[29] However, that is not the case. A careful reading of that decision confirms that the appellant is trying to extrapolate and draw a parallel from a decision that does not stand for the proposition that he is advancing. Indeed, the judge did not rule on the definition of the word “vessel” as provided in the Act in the context of the Marina docks. Nor did he conclude, as the appellant implies, that the docks in question were “ships” within the meaning of the *Federal Courts Act*. In short, I cannot accept the strained interpretation submitted by the appellant, and that case does not support his submission.

[30] For all of these reasons, this ground of appeal must be dismissed.

- B. *Did the judge err in deciding that it was reasonable that the Minister did not consider the Minor Works and Waters Order?*

[31] In the alternative, the appellant submits that his work was caught by the exception set out in section 5.1 of the Act. That exception is better known as the exceptional regime on “small docks,” which do not require ministerial approval.

[32] The appellant argues that the location of his floating structure complies in all respects with the conditions of the Order and that the Minister was therefore obligated to analyze the specific regime on “small docks” for his floating structure.

[33] That submission by the appellant is unfounded.

[34] Firstly, in his letter dated May 13, 2013, the appellant informed the Minister that he had installed [TRANSLATION] “a ship at anchor” and not a “small dock”. More importantly, the photos taken to support the inspection report show a floating structure consisting of wooden planks at water level, partially submerged and barely visible. Simply looking at the photos attached to these reasons leaves no doubt or ambiguity and is more than sufficient to justify that the NWPP manager did not find it appropriate to consider the Order under the circumstances (Appeal Book, volume 2 at pages 351–353).

[35] For these reasons, it was reasonable for the judge to conclude as he did, and this ground of appeal must therefore also be dismissed.

C. *Did the judge commit an error in deciding that the Minister did not demonstrate bias?*

[36] On this last issue, the appellant submits a number of arguments, some of which overlap with the previous issues. Essentially, the appellant submits that the Minister has repeatedly demonstrated bias in favour of the Marina on several occasions: (i) the ministerial order was apparently issued only because the Marina had filed a complaint; (ii) the NWPP manager allegedly willfully ignored the exclusive occupancy; and (iii) the period of 20 days between the ministerial order being issued and the removal of the appellant's floating structure was apparently intended to work in the Marina's favour because the approval document for dock B was going to be issued on June 14, 2013.

[37] An allegation of bias is serious and must be backed by substantial evidence and, in this case, the appellant has not discharged his burden. I agree with the judge's reasons and reject all of the appellant's arguments on this issue. More specifically, I will cite the following excerpt from paragraph 35 of the judge's reasons:

In addition, there is no evidence of bad faith. The applicant [appellant] was unable to demonstrate in this case that the ministerial order was issued to accommodate the Marina or simply because it was what the latter wanted. The Minister had to review the merits of the Marina's complaint. The Minister started the process as soon as he became aware of the existence of an unapproved work in the Chaudière River. In some of the documents in the certified record, the Minister's officers refer to the fact that an application for Dock B is under review, but make no mention of the fact that this application had already been or would be approved. Moreover, contrary to the applicant's [appellant's] claims, nothing in the Act indicates that the Minister must take into consideration exclusive ownership or occupancy in considering unauthorized works.

[38] The appellant did not satisfy me that the judge erred in stating that the judge failed to demonstrate that an “. . . informed person, viewing the matter realistically and practically” would have reason to fear that the decision [to issue the ministerial order] would have been made in a biased way (*Committee for Justice and Liberty et al. v. National Energy Board*, [1978] 1 S.C.R. 369 at page 394)” (judge’s reasons at paragraph 36).

[39] This last ground for appeal must therefore also be dismissed.

V. Conclusion

[40] For all of these reasons, I conclude that the judge did not err in applying the applicable standards of review and therefore propose that the appeal be dismissed, with costs.

“Richard Boivin”

---

J.A.

“I agree  
Johanne Gauthier J.A.”

“I agree  
Yves de Montigny J.A.”

Translation

ANNEX



**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-130-15

**(APPEAL OF A JUDGMENT BY THE HONOURABLE MR. JUSTICE MARTINEAU OF THE FEDERAL COURT OF CANADA DATED FEBRUARY 9, 2015, DOCKET NO. T-884-13.)**

**STYLE OF CAUSE:** SYLVIO THIBEAULT v. THE  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** NOVEMBER 23, 2015

**REASONS FOR JUDGMENT:** BOIVIN J.A.

**CONCURRED IN BY:** GAUTHIER J.A.  
DE MONTIGNY J.A.

**DATED:** APRIL 5, 2016

**APPEARANCES:**

Isabelle Pillet  
Jacques Demers

FOR THE APPELLANT

Mariève Sirois-Vaillancourt

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

De Man Pillet  
Montréal, Quebec

FOR THE APPELLANT

William F. Pentney  
Deputy Attorney General of Canada

FOR THE RESPONDENT