Federal Court Cour fédérale

Date: 20180612

Docket: T-2136-16

Citation: 2018 FC 613

Ottawa, Ontario, June 12, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JONES MARINE GROUP LTD

Applicant

and

**MINISTER OF TRANSPORTATION,
INFRASTRUCTURE AND COMMUNITIES
and NANAIMO PORT AUTHORITY**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Jones Marine Group Ltd [Jones or the Applicant] seeks judicial review of a decision of November 9, 2016 [the Decision] by the Minister of Transportation, Infrastructure and Communities [the Minister] to order the removal of Jones' sunken tug boat from Northumberland Channel at Nanaimo, British Columbia.

The Notice of Removal implemented by the Decision was issued pursuant to s 16(1) of the *Navigation Protection Act*, RSC 1985, c N-22 [the Act].

[2] There was a substantial dispute between the views of the British Columbia Coast Pilots Ltd [the BC Pilots] and a representative of Jones as to the risk presented by the sunken tug boat. That dispute is critical to the Decision.

[3] The Applicant challenges the Decision principally on the basis that it was (a) unreasonable; and (b) arrived at through a process that breached procedural fairness.

In the course of this judicial review, a further issue arose as to whether paragraphs of an affidavit submitted by the Applicant were admissible as new evidence or inappropriate opinion evidence.

II. Background

A. *Legislation*

[4] The issues in this judicial review bring into focus the provisions of two statutes. The most important of these from the Act are as follows:

Definitions	**Définitions**
2 The following definitions apply in this Act.	**2** Les définitions qui suivent s'appliquent à la présente loi.
obstruction means a vessel, or part of one, that is wrecked, sunk, partially sunk, lying ashore or grounded, or any thing, that obstructs or impedes navigation or renders it more	***obstacle*** Épave résultant du naufrage d'un bâtiment qui a sombré, s'est échoué ou s'est jeté à la côte ou à la rive ou chose qui obstrue, gêne ou rend plus difficile ou

difficult or dangerous, but does not include a thing of natural origin unless a person causes the thing of natural origin to obstruct or impede navigation or to render it more difficult or dangerous. (*obstacle*)

dangereuse la navigation, à l'exclusion de toute chose d'origine naturelle à moins qu'une personne soit responsable du fait que la chose obstrue, gêne ou rend plus difficile ou dangereuse la navigation. (*obstruction*)

…

[…]

Minister's powers

16 (1) The Minister may order the person in charge of an obstruction or potential obstruction in a navigable water — other than a minor water — that is listed in the schedule to secure, remove or destroy it in the manner that the Minister considers appropriate if the situation has persisted for more than 24 hours.

Pouvoirs du minister

16 (1) Le ministre peut ordonner au responsable, à l'égard d'un obstacle réel ou potentiel, dans des eaux navigables mentionnées à l'annexe, autres que des eaux secondaires, d'immobiliser celui-ci, de l'enlever ou de le détruire selon ses instructions, si la situation existe depuis plus de vingt-quatre heures.

Property belonging to Her Majesty

(2) The Minister may order any person to secure, remove or destroy a wreck, vessel, part of a vessel or any thing that is cast ashore, stranded or left on any property belonging to Her Majesty in right of Canada and impedes, for more than 24 hours, the use of that property as may be required for the public purposes of Canada.

Lieu appartenant à Sa Majesté

(2) Il peut ordonner à toute personne d'immobiliser, d'enlever ou de détruire des débris de bâtiment, un bâtiment, une épave ou toute chose qui se sont échoués, se sont jetés à la côte ou à la rive ou ont été abandonnés, en un lieu appartenant à Sa Majesté du chef du Canada, s'ils entravent depuis plus de vingt-quatre heures l'utilisation du lieu à des fins publiques fédérales.

Failure to comply with order

(3) If the person to whom an

Non-respect de l'ordre

(3) Si la personne qui reçoit

order is given under subsection (1) or (2) fails to comply with the order, the Minister may cause the order to be carried out.	l'ordre visé au paragraphe (1) ou (2) n'obtempère pas, le ministre peut faire exécuter l'ordre.
Not a statutory instrument	***Loi sur les textes réglementaires***
(4) For greater certainty, an order given under this section is not a statutory instrument as defined in subsection 2(1) of the *Statutory Instruments Act*.	**(4)** Il est entendu que l'ordre donné au titre du présent article n'est pas un texte réglementaire au sens du paragraphe 2(1) de la *Loi sur les textes réglementaires*.

The most important provisions from the *Pilotage Act*, RSC 1985, c P-14, are as follows:

Prohibition where pilotage compulsory	**Interdiction — Zone de pilotage obligatoire**
25 (1) Except as provided in the regulations, no person shall have the conduct of a ship within a compulsory pilotage area unless the person is a licensed pilot or a regular member of the complement of the ship who is the holder of a pilotage certificate for that area.	**25 (1)** Sauf dispositions contraires des règlements généraux, il est interdit à quiconque d'assurer la conduite d'un navire à l'intérieur d'une zone de pilotage obligatoire à moins d'être un pilote breveté ou un membre régulier de l'effectif du navire et titulaire d'un certificat de pilotage pour cette zone.
Pilot responsible to master	**Responsabilité du pilote envers le capitaine**
(2) A licensed pilot who has the conduct of a ship is responsible to the master for the safe navigation of the ship.	**(2)** Le pilote breveté qui assure la conduite d'un navire est responsable envers le capitaine de la sécurité de la navigation du navire.

III. Facts

A. *Parties*

[5] The Applicant Jones Marine Group Ltd is a marine towing company that owns and operates a fleet of tug boats on the coast of British Columbia. Critical to this matter is that it owns the "Samantha J", a tug that sank on October 6, 2014 [the Wreck].

[6] The Respondent Minister has authority under s 16 of the Act to order the removal of obstructions or potential obstructions from navigable waters. Ryan Greville, the then acting Regional Manager at Transport Canada, held the delegated authority of the Minister in respect of this provision.

[7] The Respondent Nanaimo Port Authority [NPA] was established under the *Canada Marine Act*, SC 1998, c 10, and is responsible for navigation and safety within its port area. That area includes six federally designated deep sea ship anchorages located within Northumberland Channel – the channel between the city of Nanaimo and Gabriola Island, one of British Columbia's beautiful Gulf Islands. The anchorages are designated NA-01 to NA-06; the Wreck sank in NA-01, as shown on Schedule A to these Reasons (Exhibit 3 of the Greville Affidavit).

[8] The BC Pilots operate under contract to provide pilotage services to ships that are subject to the *Pacific Pilotage Regulations*, CRC c 1270, which require a licensed pilot to be on board when moving or anchoring a vessel in a port.

Under the *Pilotage Act*, RSC 1985, c P-14, pilots are responsible for the safe navigation of vessels.

[9] The NPA recognizes the BC Pilots as experts in anchoring deep sea vessels in British Columbia and regularly consults the BC Pilots when making decisions regarding the anchorages.

B. *Removal Notices*

[10] The Wreck is located at NA-01 which is intended for the anchoring of large deep sea vessels up to 225m length over all [LOA]. The Wreck occupies only 2° of the 360° circumference of the anchorage.

[11] On December 30, 2014, Captain Dahlgren, the Director of Operations and Harbour Master of the NPA, contacted Greville to share his concern that the Wreck was obstructing navigation.

[12] After the Wreck sank on October 6, 2014, NA-01 was temporarily closed before being reopened to vessels under 165m LOA.

By January 6, 2015, there had been three incidents where BC Pilots had refused to anchor deep sea vessels at NA-01 because of the presence of the Wreck.

[13] On January 20, 2015, Greville issued a Notice to Remove under s 16 of the Act [the First Notice to Remove]. The Wreck was to be removed by March 16, 2015.

[14] Following the First Notice to Remove, the Applicant submitted in writing to Greville that the Wreck was not causing an obstruction to navigation.

[15] Greville met with Dahlgren regarding the Applicant's position and Dahlgren in a letter of July 24, 2015 outlined his opinion why the Wreck was an obstruction to NA-01:

a) the Wreck was within the anchorage "exclusion circle" and the approach route to two deep sea terminals in Northumberland Channel, requiring a limitation on vessel size in NA-01;

b) the deep sea gear of tug/barge combinations could foul on the Wreck while approaching the tie-up unit along the Gabriola Bluffs; and

c) if the Wreck was fouled or shifted, it could result in any remaining pollutants being released into the environment.

[16] Thereafter, on October 6, 2015, Greville issued a second Notice to Remove requiring removal by December 31, 2015 [the Second Notice to Remove], with Dahlgren's July 24, 2015 letter attached.

[17] In response, the Applicant, through Merle McKenzie, wrote to Greville on October 19, 2015. It was McKenzie's position that the Wreck was in a location and at a depth that made the risk to navigation extremely remote and the risk to the environment greater in salvage than by leaving the Wreck in place.

[18] McKenzie played an unusual role in the subsequent events. He was described as a para-legal and manager of the Marine and Transportation group at the law firm of Bull Housser & Tupper LLP in Vancouver. He represented to Greville that he represented the Applicant's insurer. While he was not the Applicant's counsel, he appears to have served in a counsel-like role for the Applicant.

[19] Greville held a teleconference with McKenzie and Dahlgren on October 23, 2015 to discuss Dahlgren's concerns, but ultimately they were not alleviated.

[20] Finally, on October 30, 2015, the President of the BC Pilots advised Greville, McKenzie, and Dahlgren of the BC Pilots' position that the Wreck constituted a material risk to navigation and indicated that vessel LOA should be restricted to 180m because of the swing area of the anchorage.

[21] A judicial review application of the Second Notice to Remove was filed in November 2015. It was the Applicant's position, supported by an expert affidavit of Marc McAllister, that the risk of fouling was too remote to be of concern.

[22] By mid-March 2016, the NPA knew of at least 15 incidents since January 1, 2016 where BC Pilots had refused to anchor deep sea vessels in NA-01 because of the Wreck's presence.

[23] The parties obtained a stay of the judicial review to allow the Respondent Minister an opportunity to reconsider the Second Notice to Remove.

[24] McAllister met and submitted a memorandum to Transport Canada in May 2016 that gave details of his methodology and findings to the effect that the Wreck was not a risk.

[25] This was followed up in May and June 2016 with meetings between the President of the BC Pilots and Greville in which the BC Pilots advised that despite McAllister's memorandum, the BC Pilots' position remained the same, that moving NA-01 elsewhere was not viable, and finally that McAllister's calculation of the number of shackles of anchor chain required at NA-01 was in error.

[26] Between that time and the October 6, 2016 meeting which led to the Decision, Greville was provided with a further memorandum from McAllister that the Wreck posed no risk. Greville then consulted further with McAllister, the NPA, the BC Pilots, and another Transport Canada official experienced in anchoring by distributing McAllister's latest memorandum and setting up the October 6, 2016 meeting.

[27] In the interim, Greville received a Maritime Hazardous Occurrence Report of an incident in October 2015 where a tow line of one of the Applicant's tugs snagged on an object on the ocean floor in the vicinity of the Wreck, causing the tug to keel over.

[28] The events surrounding the October 6 meeting are pivotal to the Applicant's allegation of a breach of procedural fairness. It is also part of the reasonableness analysis of the Decision.

[29] It is evident from the Record that the meeting was a last attempt to see if there was some common ground between the BC Pilots' expert advice that the Wreck was an obstruction and McAllister's opinion for the Applicant that it was not – or at least whether the risk could be managed.

[30] The October 6 meeting included the following:

- The BC Pilots' description of the various ways an anchor chain could foul the Wreck and the risk of fouling tow lines due to the area being frequently used by tugs with large barges and log barges. There is a dispute as to whether some of this information was truly new information or simply variations on the same theme of risk of fouled tow lines.
- The NPA's description of incidents where access to NA-01 had been denied and a discussion of the October 2015 snagging incident.
- A discussion of displaced vessels from NA-01 that were forced to anchor elsewhere and the cascading impact on the national availability of anchorages.
- A discussion of the probability of fouling being low but the severity of such a fouling being high.

[31] The minutes were circulated after the meeting, and McKenzie on behalf of the Applicant advised that with minor exception the minutes captured what was said and "we are taking instructions". The maximum LOA of 165m acceptable to the BC Pilots was confirmed.

[32] In late October, Dahlgren advised Greville that the vessel size restriction at NA-01 had caused three deep sea vessels to be denied from that anchorage and that overall anchorage for large vessels in the port and surrounding areas had been reduced.

[33] As a consequence of the foregoing, Greville concluded for the third time in the Decision of November 9, 2016 that the Wreck was an obstruction or potential obstruction to navigation in NA-01 contrary to s 16 of the Act and issued a third Notice to Remove requiring the removal of the Wreck by December 31, 2016 [the Third Notice to Remove].

[34] The Navigation Impact Assessment which forms part of the reasons for the Decision provided as follows:

> Wreck of the Samantha J is causing a substantial interference to navigation for the purpose of anchoring deep-sea vessels within the Port of Nanaimo. Alternative mitigations have not been identified. Notice to Remove, pursuant to NPA s. 16(1), issued on 20 Jan 2015. Following correspondence with the proponent's representatives, and further research conducted by NPP and the NPA, notice re-issued on 05 Oct 2015.
>
> Following meeting with BCCP, NPA and representatives on Oct 6th, 2016 and considering relevant information, while the likelihood of a deep sea vessel to foul an anchor line is low, the resulting impact should it occur is substantial and could result in severe damage to a vessel and the environment. New Notice to remove issued on Nov 9, 2016.

IV. Issues

[35] There are two central issues:

1. Was there a breach of procedural fairness?
2. Was the Decision reasonable?

The admissibility of additions to the Record is additionally discussed but the material touches on both issues.

V. Analysis

A. *Standard of Review*

[36] The parties agree, and I concur, that the issue of procedural fairness is subject to the correctness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[37] There is some disagreement between the parties with respect to the standard of review of the merits of the Decision. In my view, the Minister (or his delegate) has a wide discretion as to whether to order removal and what may be done in that process as evidenced by the words "[t]he Minister may" in s 16(1) and (2). Moreover, in respect of whether something is an "obstruction", that conclusion must be reasonable – it is not simply a discretionary finding. The scope of whether an obstruction exists is wide since the exercise is within the Minister's home statute in an area with which his or her officials have some experience, if not expertise. In this case the delegate had the benefit of independent expertise in the BC Pilots' involvement and opinions. The standard of review therefore is reasonableness, including deference to the Minister in both the assessment of risk and in the corrective actions to be ordered.

B. *Additional Evidence*

[38] The issue of admissibility of additions to the Record was not strenuously argued orally; however, since it was included in the written submissions and counsel relied on its written submissions in addition to its extensive oral arguments, the issue must be addressed.

[39] As a part of this judicial review, the Applicant filed a November 16, 2016 memorandum by McAllister. It was obviously not before Greville when he made the Decision.

[40] The memorandum purports to do two things: (a) it shows that if the Applicant had the right of reply following the October 6 meeting, it would have been able to provide a meaningful rebuttal to things said at the meeting; and (b) it provides significant evidence that builds on the unreasonableness of the Decision.

[41] This November 16 memorandum consists of McAllister's analysis and opinions regarding the October meeting minutes and demonstrates his disagreement with the opinions and statements expressed at the meeting, which he attacks as without foundation. His conclusion is somewhat new – that NA-01 was not a safe anchorage in and of itself because the very conditions which would lead to a ship fouling on the Wreck would jeopardize the ship whether the Wreck was present or not.

[42] While the use of "new evidence" can be allowed to show the impact of a breach of procedural fairness, there must be such a breach of procedural fairness: see *Association of*

Universities and Colleges of Canada v Canadian Copyright Licencing Agency (Access Copyright), 2012 FCA 22, 428 NR 297.

[43] For the reasons given later, I have concluded that the Applicant did not have a right of reply, and if it did, it did not exercise it sufficiently diligently so as to constitute a breach of procedural fairness.

[44] In reviewing this "new" evidence, it is repetitive of earlier evidence and speculative in nature. If it were admitted, it would show what the evidentiary record before Greville was. It would not support a contention that there are gaps in the facts or the facts are wrong. There is more than sufficient evidence of what was before Greville. The affidavit cannot be admitted simply on the basis that it would show what was the record before Greville.

[45] In large measure the affidavit is an expression of opinion and in some instances argument. The first is permissible if it was before Greville, the second is not. It is difficult to segregate that which might be admissible from that which is not.

[46] With respect to opinion evidence, McAllister would be qualified to give his opinion but that does not materially assist the Applicant. In large measure this case is a conflict of opinions between him and the BC Pilots. It is open to Greville to favour one opinion over another. The admission of parts of the affidavit does not show why Greville's choice of which opinion to accept is unreasonable. Nevertheless, the portions of the affidavit containing McAllister's opinion are admissible on the basis described in paragraph 45 to show the conflicting opinions.

[47] Therefore, I conclude that the additional evidence is admissible for the limited purposes described but is of little material assistance to the Applicant.

C. *Breach of Procedural Fairness*

[48] The Applicant's position is that the Minister failed to provide a fair process by not providing adequate notice, not giving the Applicant a reasonable opportunity to respond to the evidence and by coming to the Decision on the basis of an incomplete record. The Applicant also adds in "fettering discretion" and "legitimate expectation".

[49] In considering the "content of the duty of fairness", the Court is to take account of the nature of the process and the factors set out in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*]. The Applicant has argued that the process was in essence to be court-like, where it made its case, the opponents made theirs, and the Applicant had a right of reply. This is not the proper procedural framework under which this matter was to be decided.

[50] The five *Baker* factors are either neutral or favour the Respondent's position of a lesser procedural process, with the exception of the nature of the statutory scheme given the absence of a statutory appeal in respect of s 16 decisions. The nature of the decision, which has no established process, the importance of the decision, which is directed to safety and involves the precautionary removal of a potential obstruction and the public interest, the absence of legitimate expectations, and the deference owed to the Minister as to the procedure to be followed all support a lower level of procedural protections.

[51] The Act leaves it to the Minister to set the necessary procedure. Over the two years that this issue of the Wreck was being debated, there was nothing that suggested the type of process to which the Applicant says it was entitled.

This was a non-judicial administrative decision requiring Greville to interpret and implement his home statute, and rely on his department's expertise or the expertise available to it in addressing marine safety, including any potential safety risks. It is not an ongoing process of argument and debate.

[52] As referred to earlier, the importance of the Decision is to public safety. The Applicant's cost of removal (which was never quantified) would be only a minor factor in the overall importance of the Decision.

[53] I cannot find a sufficient basis for a claim of any "legitimate expectation". There was no "holding out" by the Respondent as to the process, and certainly nothing that suggested a right of reply. The most that the Applicant had was in Transport Canada's August 19, 2016 letter granting the Applicant two weeks for the submission of new evidence.

[54] There was therefore no representation upon which the Applicant can rely in respect of a post-October 6 reply opportunity, nor was there anything upon which such a right could be implied. The interactions over the two years were flexible and varied but there was no "clear, unambiguous and unqualified" conduct that would establish a legitimate expectation regarding the procedure to be followed: *Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at paras 95-96, [2013] 2 SCR 559.

[55] If the Applicant wanted a right to reply, it had to take reasonable steps to obtain it or at least make its position known. It did neither.

[56] Therefore, the claim of legitimate expectation must be denied.

[57] In respect of a fair process, taking account of the type of decision to be made, the evidence at issue, and the nature of the disputing opinions, I conclude that the process was fair.

The Applicant is entitled to a fair process, not a never ending one.

[58] The October 6 meeting was an obvious last attempt to obtain some type of resolution through discussion of the Applicant's response to Greville's reconsideration. The Applicant was on notice as of August 19, 2016 that unless it had new evidence within two weeks, a new removal order would be issued. It had notice that the matter was coming to a decision point and the Applicant had fostered this by its request for the meeting with the NPA and the BC Pilots to review McAlister's latest memorandum so as to "move this matter forward".

[59] The Applicant knew what the issues were, what the evidence was, and the nature of the differing opinions. It knew that the Respondent's concern was the possibility of the anchoring ship's anchor chain fouling the Wreck. This involved a technical issue of the scope of the chain, the number of shackles, and the swing of the ship. This was not a new issue.

[60] There was no materially new information exchanged at the October meeting, but only discussion of the various scenarios under which the anchor chain could snag the Wreck.

Variations on an established theme are not new evidence, and there is no evidence that the Applicant was caught by surprise or was unable to address this issue at this October meeting.

[61] McAllister's November 16, 2016 memorandum is of no assistance to the Applicant in respect to unfairness. He outlines the continuing disagreement with the BC Pilots and his contention that there was either insufficient evidence or inaccurate evidence.

[62] The Applicant has placed considerable reliance, on the statements in its post-October meeting correspondence, that "we are taking instructions". In my view, this is insufficient to ground some form of right of reply. It is vague and time insensitive. If the Applicant believed it had such a right or wished to assert a right, it was incumbent on the Applicant to specify what it intended to do and when.

[63] A party cannot hang back on asserting what it claims is a right, particularly when it was obvious that the matter was about to be decided. The Applicant had 33 days between the October meeting and the Decision during which it was silent.

[64] Greville had no obligation to wait for the Applicant. The Applicant had a full and complete opportunity to be heard. It knew the case it had to meet and had ample opportunity to address the issues under reconsideration.

[65] The positions of the parties were well known. There is no evidence that those positions would be changed.

At some point in processes such as these, a decision must be made. The issues had crystallized and I see nothing unfair or unreasonable in Greville exercising his duty to decide the matter when he did.

[66] In *Nanoose Conversion Campaign v Canada (Environment)*, 141 FTR 54, 1997 CarswellNat 2448 (WL Can) at para 22 (TD), aff'd (2000) 184 FTR 84 (CA), the Court's analysis supports the Minister's ability to rely on the opinion of the BC Pilots. They are an expert, independent body skilled in the art of inland navigation, anchoring, and coming alongside. It is hard to think of a more relevant body from whom to seek advice.

[67] There is no merit in the argument that Greville fettered his discretion by adopting the opinion of the BC Pilots. Consultation with others is not fettering discretion unless there is a failure to exercise independent judgment following such consultation: *Moresby Explorers Ltd v Canada (Attorney General)*, 2001 FCT 780, [2001] 4 FC 591 (TD).

[68] In *Holland v Canada (Attorney General)*, 188 FTR 305, 2000 CarswellNat 5998 (WL Can) (TD), the Court, in the context of the broad discretion of the Commissioner of the RCMP, endorsed the use of the advice of others so long as the final decision rests with the statutory decision maker. The Court's comments at para 23 are similarly applicable here:

> In light of the legislative purpose and the broad grant of discretion, the Court will only interfere in limited circumstances, where it is clear that the statutory considerations have been ignored, or others have been given undue weight, or there is serious procedural unfairness. In this case, the record discloses that the Commissioner consulted with a number of parties and relied on particular members of the R.C.M.P. to provide him with information in relation to the application. In my view, this is not fettering

> discretion as long as the final decision rested with the statutory decision-maker. The Commissioner of the R.C.M.P. has a broad range of responsibilities. It is reasonable for him to enlist the assistance of members of the Force to assist in discharge of those responsibilities.

[69] Greville had a similar discretion and in the exercise of it he consulted and obtained advice not just from the BC Pilots, but from other experienced Transport Canada Marine Safety officials, the Council of Marine Carriers, the NPA, and McAllister.

[70] It is the obligation of the decision maker to weigh the evidence – as he apparently did. So long as the decision maker is reasonable, he or she is free to prefer one opinion and one viewpoint over another without such preference constituting a fettering of discretion.

[71] The Applicant's reliance on a court-like process and a court-like evidentiary record is misplaced. As held in *Pure Spring Co v Minister of National Revenue*, [1946] Ex CR 471, 1946 CarswellNat 18 (WL Can) at para 38 (Ex Ct Can), an administrative decision maker has a multi-faceted source of information upon which to rely:

> [T]he authorities make it quite clear, in my opinion, that the Minister in making his discretionary determination under Section 6(2) is not restricted to the same considerations as would govern a court of law in arriving at a judicial decision; he is not confined to provable facts or admissible evidence, but may obtain his information from any source he considers reliable; he may use his own knowledge and expertise or that of his officers in his department in whom he has confidence and he may take the benefit of their advice which recommends itself to him; in a field exclusively assigned to him by Parliament he is free to act as Parliament itself; he may use his own judgment and in doing so, be guided by the "intuition of experience which outruns analysis", as Mr. Justice Homes put it; he may use all the aids which will enable him to carry out honestly the administra tion [*sic*] and definition of a policy that Parliament has entrusted to him.

[72] As discussed in respect of the reasonableness of the decision, so long as the information relied upon is relevant and reliable, Greville can rely on evidence from the NPA and the BC Pilots without subjecting it to a cross-examination-like process. He is entitled to use his experience and judgment in preferring some advice and rejecting others.

[73] Therefore, the Court concludes that there was no breach of procedural fairness in making the Decision.

D. *Reasonableness*

[74] Much of the relevant factual matrix of the Decision has been discussed in the section entitled Breach of Procedural Fairness.

[75] The Applicant contends that (a) the LOA restriction is arbitrary; (b) available mitigation measures were not considered; (c) the dangers of Wreck removal were not considered; and (d) the loss of revenue to NPA was a factor in the Decision.

[76] In my view, there was more than sufficient justification for the Respondent’s decision. The Decision must be considered in the context of the broad discretion to determine what is an “obstruction” or “potential obstruction”. An obstruction need not obstruct or impede navigation, but may also render navigation more difficult or more dangerous.

[77] There are at least five evidentiary factors supporting the Decision:

- the limitation on anchoring and the instances of pilots being turned away from NA-01;
- the evidence from the BC Pilots and the NPA of actual fouling on the Wreck;
- the Applicant's own incident of near fouling in the area of the Wreck;
- the competing scenarios and advice of McAllister on the one hand and the NPA and the BC Pilots on the other; and
- the BC Pilots' refusals in 2015 and 2016 to use the anchorage.

[78] There was evidence that the risk of fouling may be low but the impact of fouling would be high. In the Navigation Impact Assessment there was a conclusion that there was a substantial interference with navigation and that there was a risk of a deep sea vessel fouling on anchor lines.

[79] Greville's reliance on the BC Pilots' advice, taking into account their resistance to using the anchorage, was entirely reasonable. While the Applicant was willing to suggest that the NPA's opposition and thus its advice to Greville was driven by loss of revenue (as if the Applicant's concern for the cost and risk of raising the Wreck was not a factor in its own position), there is no suggestion of gain or loss to the BC Pilots by taking one view or the other. There was no reason not to accept the BC Pilots' conclusion at face value. It is also an unfair attack on the NPA grounded in nothing more than speculation. Greville denied under oath that he considered NPA's loss of revenue. The Applicant has produced no evidence to the contrary. The allegation is a barefaced inaccuracy.

[80] There is no evidence that the LOA restriction is arbitrary. It arose from the concerns of the NPA as harbour master and the BC Pilots in using a safe anchorage.

[81] There is no evidence that Greville ignored or refused to consider mitigation measures. In addition to the presumption of consideration of relevant matters, the discussion of various options and opinions, including chain length, are in the nature of mitigation. Moreover, there were no effective mitigation measures identified, and Greville cannot be faulted for this finding.

[82] It is inaccurate to suggest that Greville failed to consider the cost and risk of removing the Wreck. Most specifically, in the November 9, 2016 letter accompanying the Third Notice to Remove, Greville recognized the concerns for the hazards associated with Wreck removal and offered to work with the Applicant in respect of methodology and timing.

[83] Therefore, considering all the material in the Record, the Court concludes that the Decision is reasonable.

VI. Conclusion

[84] This application for judicial review will be dismissed with costs.

JUDGMENT in T-2136-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

SCHEDULE A

File Number: «REGION_NO» 431

Navigation Impact Assessment – Obstruction/Complaint

Obstruction/Complaint Information			
Program Activity: Obstacle / Obstruction		**P.A. Characteristic:** Wreck	
Date Received: 30 Dec 2014		**Date of Occurrence:** 06 Oct 2014	
Authorized works ☐	Unauthorized works ☐	Obstruction on scheduled navigable water ☑	Private buoy on all navigable waters ☐
Description: On 06 October 2014, the tugboat, "Samantha J" sunk at Gabriola Bluffs with 2 POB. SS Chip barge 314 was in tow at the time of the incident. The Samantha J now rests on the bed of Northumberland Channel, within the navigational jurisdiction of the Nanaimo Port Authority (NPA), inside the area designated as deep sea ship anchorage NA-1.			
Known previous complaints or occurrences: None			

Obstruction/Complaint Location Information			
	Latitude	Longitude	Source
Centre Point	49° 08' 52.56" N	123° 50' 46.85" W	DGPS
Topo map #: 092G04		**Hydro Chart #:** 3458	
Site Details: Within Nanaimo Port Authority anchorage NA-01, fronting the Gabriola Bluffs, in 77 m (255 feet) of water.			

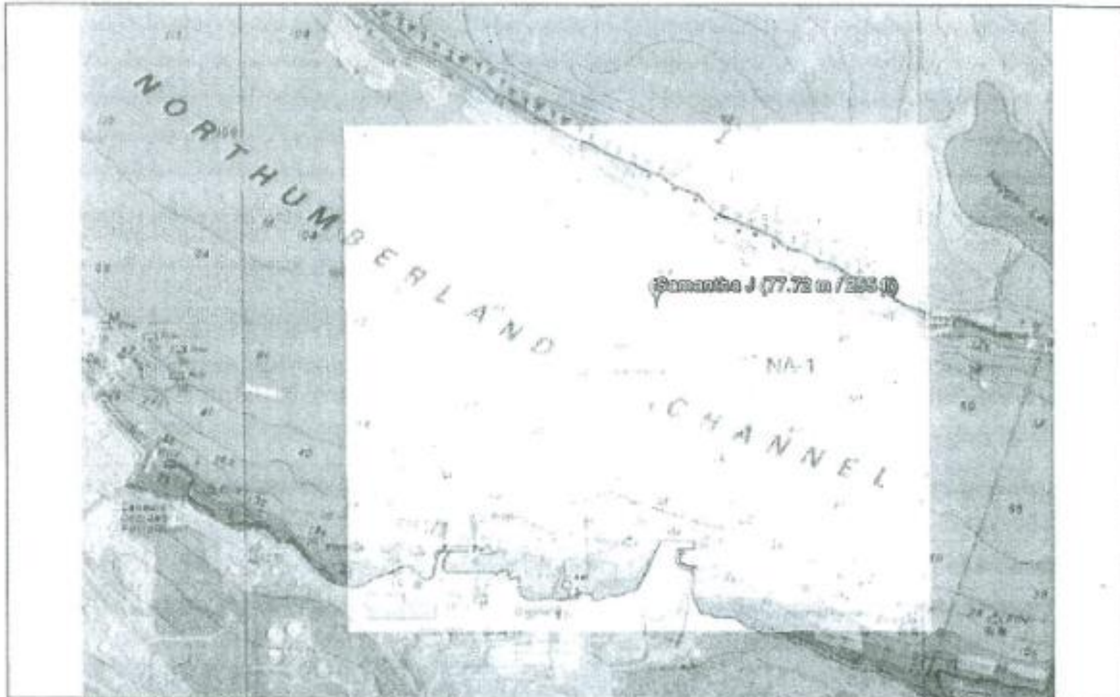
Waterway Details				
Primary Waterway: Northumberland Channel			**Secondary Waterway:**	
Width:1435	**Depth:** 55	**Tidal Range:** 4.9 m	**Ref Water Level:** Chart	**Flow/Current:** Weak
Waterway Size: Large deep sea port		**Bank Characteristics:** Industrial, developed, populated		**Obstructions:** None
Clearance Restrictions	**Horizontal:** None	**Vertical:** Unlimited		**Depth:** None

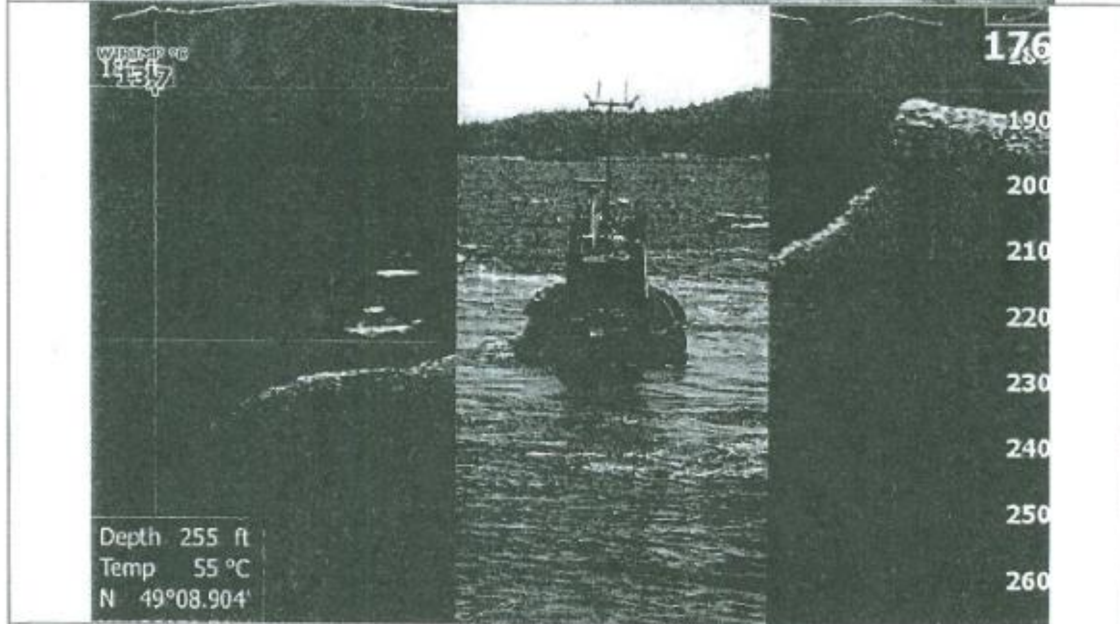
Usage Details

Navigation Activities: Northumberland Channel is heavily used for both commercial and recreational navigation, as well as for seaplane operations. The south shore is primarily occupied by industrial facilities, including barge ramps, commercial docks, private mooring buoys, and log handling facilities. The north shore, in the vicinity of the Samantha J, is used almost exclusively for log boom storage. Within the channel on the sea bed, there is a charted outflow pipe to the west of the wreck, and a submarine cable to the East. The NPA's anchorage NA-1 has been designated between these two features, and is regularly used by deep sea vessels. The entire harbour is within a compulsory pilotage area established by the Pacific Pilotage Regulations.

Exhibit 3 for Identification
Witness: R. GREVILLE
Date: MAY 8, 2017
Reporter: Chris Linneman
REPORTEX AGENCIES LTD.
Ph: (604) 684-4347 • www.reportexagencies.com

«OFFICER_NAME»





Largest Vessel	Length: all	Width: all	Draft: all
Volume	High		

Seasons	Winter ☑	Spring ☑	Summer ☑	Fall ☑

Transport Canada Transports Canada

File Number: «REGION_NO» 433

Additional Information Reviewed
Other relevant information from NWDS files: None

Specific Navigation Impacts	*(0 – No Impact, 1 – Low, 2 – Medium, 3 – High, 4 – Cannot be Mitigated)*	
Consideration	**Nature**	**Degree**
If the subject is a work, is it compliant with the NPA (previous T&C, MWO, regs) or the PBRs?	Not a work.	N/A
Does the subject restrict vertical clearance?	No. No overhead works.	0
Does the subject restrict horizontal clearance?	Yes. The NPA has limited vessel size in NA-1 due to the wreck being within the "exclusion circle" and approach route to the two deep sea terminals in Northumberland Channel.	3
Does the subject restrict draft for any vessels capable of using this waterway?	Available draft at the highest point of the wreck is sufficient for all vessels to navigate over top. However, there is potential for the deep sea gear of tug/barge combinations to become fouled on the wreck on their approach through the channel.	3
Does the subject impact a known navigation channel?	No. Excluding the use of the channel as a designated anchorage area, the use of the channel as a means of an aqueous route remains unaffected.	0
Does the subject impact access to/from a marine facility?	Yes. Access to nearby marine facilities remains unaffected. However, the port-designated anchorage NA-1 was originally closed, but has since been re-opened with a temporary size limit imposed on vessels anchoring there for as long as the wreck remains in place.	3
Does the subject reduce visibility for vessels?	No. Vessel is on the sea bed.	0
Are there any impacts to known public or private Aids to Navigation?	No impact on public or private aids to navigation.	0
Does the subject add to the cumulative impact to navigation on the waterway?	Yes. The presence of the adjacent submarine cable and outfall pipe limit the ability of the NPA to relocate NA-1 within the sheltered portion of the channel.	3
Are there any other impacts that may occur?	None anticipated.	0

Impact Determination				
Complaint Category:	Immediate Safety Matter ☐	Navigation related ☑	Private Buoy Regulations ☐	No Mandate ☐

Summary of Determination: NPA issued a NOTSHIP #2014-33 to close anchorage NA-1 due to the presence of the sunken tug.

Internal review is sufficient ☐	More information required ☑	Site Inspection required ☐	Referral to other govt. dept. ☐

External Reviews

	Navigation input requests			
	Stakeholder	**Comments Received**	**Sent**	**Received**
☐	Harbours/Ports			
☐	CCG - LoS/MNS			

No action required
Details and justification of decision: Wreck of the Samantha J is causing a substantial interference to navigation for the purpose of anchoring deep-sea vessels within the Port of Nanaimo. Alternative mitigations have not been identified. Notice to Remove, pursuant to NPA s. 16(1), issued on 20 Jan 2015. Following correspondence with the proponent's representatives, and further research conducted by NPP and the NPA, notice re-issued on 05 Oct 2015. Following meeting with BCCP, NPA and representatives on Oct 6th, 2016 and considering relevant information, while the likelihood of a deep sea vessel to foul an anchor line is low, the resulting impact should it occur is substantial and could result in severe damage to a vessel and the environment. New Notice to remove issued on Nov 9, 2016.

Compliance Monitoring Requirements
Post, Follow-up after compliance date of 15 Nov 2015 on re-issued Order to remove.

Officer Signatures

Non-Delegated Officer:		Date:	
Delegated Officer:		Date:	
Regional Manager:		Date:	

Quality Assurance Review

Administrative QA:		Date:	
Operational QA:		Date:	

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2136-16
STYLE OF CAUSE:	JONES MARINE GROUP LTD v MINISTER OF TRANSPORTATION, INFRASTRUCTURE AND COMMUNITIES and NANAIMO PORT AUTHORITY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 29 AND 30, 2018
JUDGMENT AND REASONS:	PHELAN J.
DATED:	JUNE 12, 2018

APPEARANCES:

Shelley Chapelski Erica Grant	FOR THE APPLICANT
Marja K. Bulmer Kathleen Hamilton	FOR THE RESPONDENT, MINISTER OF TRANSPORTATION, INFRASTRUCTURE AND COMMUNITIES
Jason Herbert Emily Snow	FOR THE RESPONDENT, NANAIMO PORT AUTHORITY

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT, MINISTER OF TRANSPORTATION, INFRASTRUCTURE AND COMMUNITIES
DLA Piper (Canada) LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE RESPONDENT, NANAIMO PORT AUTHORITY