

Federal Court



Cour fédérale

Date: 20220321

Docket: T-359-21

Citation: 2022 FC 369

Ottawa, Ontario, March 21, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

WILLIAM HARLESS

Applicant

and

**MINISTER OF FISHERIES, OCEANS, AND THE
CANADIAN COAST GUARD AND MINISTER OF
ENVIRONMENT AND CLIMATE CHANGE CANADA AND
ISLAND LIGHTS INC.**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] At issue in this judicial review is the transfer of the Black Rock Point Lighthouse [Lighthouse] and over two hectares of the surrounding land by the Department of Fisheries and Oceans [DFO] to Island Lights Inc. [Island Lights]. The Lighthouse is located in rural Cape Breton Island, Nova Scotia.

[2] The Applicant, William Harless, owns property adjacent to the Lighthouse property, which he purchased in September 2017. It is the Applicant's case that the sale of the Lighthouse property in 2018 for a nominal sum violated the Respondent Ministers' policies, breached the Respondent Ministers' duties of procedural fairness and the principle of legitimate expectations, and was substantively unreasonable. It is the Applicant's stated desire to see this cultural, historic, and valuable asset protected and used for the benefit of the public.

[3] The Minister of Fisheries, Oceans, and the Canadian Coast Guard and the Minister of Environment and Climate Change Canada [Respondent Ministers] submit that this judicial review is effectively a disguised neighbour dispute. In 2011, nearly 1,000 lighthouses, including the Lighthouse, were declared surplus by the DFO. The Respondent Ministers plead that the DFO undertook a process of due diligence and reasonably decided to transfer the Lighthouse, doing so under the auspices of a contractual framework that protects the Lighthouse's heritage value and ensures the navigational aid is maintained. The transfer was advertised in local newspapers in December 2017, as required by the applicable legislation, and finalized in April 2018. The Applicant learned of the transfer of the Lighthouse in June 2018 but only commenced these proceedings in February 2021. It is the Respondent Ministers' position that not only is the Applicant clearly out of time to bring this judicial review, the Applicant also has no standing to do so as he is not "directly affected" by the DFO's decision. The Respondent Ministers' submit that in any event, the decision to transfer the Lighthouse was reasonable.

[4] The Respondent Island Lights was incorporated in January 2017 for the purpose of acquiring and preserving the Lighthouse. Mary Jo-Anne MacDonald-Ryan is the President,

Secretary and a Director of Island Lights. In addition to her involvement with Island Lights, Ms. MacDonald-Ryan owns land adjacent to the Lighthouse property, which has been in her family since 1963. The Respondent Island Lights pleads that the transfer of the Lighthouse in 2018 concluded a process that had been started by Ms. MacDonald-Ryan approximately 20 years ago. Island Lights highlights that no one came forward or made inquiries when the intention to transfer was advertised in the local newspapers in 2017. Since the transfer of ownership in 2018, the Respondent Island Lights has undertaken repairs to the Lighthouse and cleared brush on the property in order to install a well and a septic system. The Respondent Island Lights pleads that this is a “not in my backyard case” on the basis that the Applicant knew of the transfer since June 2018 but only objected in November 2020 once he became aware that the Lighthouse property was being developed for tourism. The Respondent Island Light’s position is that the Applicant is out of time, has no standing to bring these proceedings, and in any event the DFO’s decision to transfer the Lighthouse was reasonable.

[5] For the reasons that follow, this application for judicial review is dismissed.

II. Background

[6] Parks Canada describes the Lighthouse and its location as follows:

Description of Historic Place

The Black Rock Point Lighthouse is a 10.8 metre high building with an engine room and a square tower built into one corner. The current wooden lighthouse was constructed in 1978 and is the third tower on the site – the first was constructed in 1868. A seasonal fog horn is present on the grounds, activated by a small beacon located near the tower. This secondary coastal light services the

entrance into the Great Bras d'Or Lakes channel from St. Anns Bay, on the eastern shore of rural Cape Breton Island.

Heritage Value

The Black Rock Point Lighthouse is a heritage lighthouse because of its historical, architectural, and community values. [...]

Black Rock Point Lighthouse is located in rural Cape Breton Island, in a forested setting, next to a cliff overlooking a rugged shoreline. Despite its location only a few kilometres from the Trans-Canada Highway, it remains isolated. Its prominent height ensures that it can be easily seen from the water and is a landmark to mariners in the region.

[7] Ms. MacDonald-Ryan's father purchased property adjacent to the Lighthouse property in 1963 and it has since been transferred to Ms. MacDonald-Ryan. The McDonald-Ryan property includes the Black Rock Light Road, which is the road that leads to the Lighthouse.

[8] In 2000, the first version of what became the *Heritage Lighthouse Protection Act* was introduced into Parliament as Bill S-21. For the following eight years, it was reintroduced multiple times through different bills until its last version, Bill S-215, received royal assent in 2008. The *Heritage Lighthouse Protection Act* addresses, notably, the ability to petition to designate a lighthouse as a heritage lighthouse and the protection of such lighthouses should they be divested as surplus lighthouses to new owners.

[9] In or around 2000, when the first bill was introduced, Ms. MacDonald-Ryan began taking various steps, including calls to local government officials and the collection of historical information for a potential future information kiosk, in order to determine if and how she may apply to be the recipient of the Lighthouse. In 2006, Ms. MacDonald-Ryan and a number of

interested individuals formed a group called the Black Rock Point Heritage Society [Society]. The Society was registered on November 6, 2006. From the affidavits in the record, the object of the Society was to acquire the Lighthouse in order to preserve it and maintain its upkeep through tourism. The business plan ideas and options that were discussed included an information kiosk, a museum, craft stalls for local artists, cottages, camping, and a small shop selling ice cream and tourist maps.

[10] After the *Heritage Lighthouse Protection Act*, SC 2008, c 16 [Act] was enacted in 2008, Ms. MacDonald-Ryan contacted the DFO. Following a number of exchanges, Ms. MacDonald-Ryan met with John Ford, Senior Divestiture Officer at the DFO, and another DFO employee, at the Lighthouse property. According to the Senior Divestiture Officer, the object of the meeting was Ms. MacDonald-Ryan's expressed interest in acquiring and preserving the Lighthouse property.

[11] The *Act* came into force in 2010, two years after its enactment. The *Act* required that for two years, beginning with the coming into force of the *Act*, every Minister "who has the administration of lighthouses must maintain and make available to the public a list of those lighthouses that he or she considers to be surplus to the operational requirements of the portion of the federal public administration for which he or she is responsible" (subsection 8(1) of the *Act*). Consequently, in 2011, the DFO declared a number of lighthouses, including the Lighthouse, to be surplus and sought to transfer them to new owners.

[12] Pursuant to the *Act*, there was also a two-year period within which persons may petition to have a specified lighthouse designated as a heritage lighthouse. During that two-year period, a number of media articles, including from Canadian Broadcasting Corporation (CBC) and the Canadian Television Network (CTV) contained in the record, highlighted the availability of close to one thousand surplus lighthouses across Canada and the petitioning process for heritage designation. By July 31, 2012, almost one hundred lighthouses in Nova Scotia had been petitioned to be considered for heritage designation under the *Act*.

[13] The *Act* provides that a surplus lighthouse “may only be designated as a heritage lighthouse if a person or body submits a written commitment to buy or otherwise acquire the lighthouse and to protect its heritage character in the event that it is designated as a heritage lighthouse” (subsection 8(2)).

[14] The DFO prepared a combined guide and business plan submission form [Form] for those who wish to acquire a surplus lighthouse pursuant to the *Act*. The Form states that “those interested in acquiring a lighthouse must submit a business plan that demonstrates the long-term economic viability of their proposed use and their property management capacity”. The Form also requests, among other things, that the prospective owner explain how the heritage standards of the lighthouse will be maintained and provide information on the site’s potential to generate revenue to offset operating costs, including information on current and/or potential tourist activities that draw visitors to the vicinity.

[15] On May 31, 2013, Ms. Macdonald-Ryan submitted a business plan using the Form. In this Form, Ms. Macdonald-Ryan is listed as the contact person. The Form also listed the organization intended to hold the Lighthouse as Guardians of Black Rock Light, being a group of listed individuals that included Ms. Macdonald-Ryan.

[16] Following the submission of the Form, Ms. Macdonald-Ryan followed up with numerous individuals at DFO and Parks Canada to discuss the acquisition of the Lighthouse and its designation as a heritage lighthouse. In 2014, Ms. Macdonald-Ryan obtained estimates for repairs to the Lighthouse and liaised with DFO regarding possible grant funding to repair and preserve the Lighthouse. In 2016, following a grant application, the DFO agreed to support the efforts to repair and maintain the Lighthouse with a grant of \$50,000 (later increased to \$90,000).

[17] In 2016, for reasons of liability, insurability, and ability to generate ongoing revenue, Ms. Macdonald-Ryan began to consider incorporation. Consequently, Island Lights was incorporated on January 17, 2017.

[18] In 2017, Island Lights and the DFO entered into a Memorandum of Agreement and a Grant Agreement regarding the transfer of the Lighthouse and the corresponding grant funding. DFO and Island lights entered into an Escrow Agreement in March 2017 regarding the transfer of the lighthouse. In June 2017, Island Lights' counsel received the grant funding from the DFO for repairs to the Lighthouse.

[19] In September 2017, the Applicant purchased his property adjacent to the Lighthouse property.

[20] The Lighthouse was designated a heritage lighthouse in October 2017. That designation was possible under subsection 8(2) of the *Act*, given the written commitments contained in the Memorandum of Agreement regarding the sale of the Lighthouse and the preservation of its heritage character.

[21] The *Act* requires that at least ninety days (90) prior to the sale of a heritage lighthouse, a notice must be published in one or more newspapers of general circulation in the area in which the lighthouse is situated. Advertisements of the designation of the Lighthouse and its intended transfer to Island Lights ran in the Cape Breton Post and Le Courrier de la Nouvelle-Écosse on December 14, 2017 and December 22, 2017, respectively. As per Mr. Ford, Senior Divestiture Officer at DFO, there was no other interest expressed in the Lighthouse.

[22] In March 2018, the conditions of escrow were completed, and on April 20, 2018, counsel for Island Lights recorded the Instrument of Grant in the Land Registration Office, thereby transferring the title to the Lighthouse, along with the surrounding property, to Island Lights.

[23] The Lighthouse continues to function as an active aid to navigation. The Memorandum of Agreement provides continued access for the DFO, including the Canadian Coast Guard [CCG], to access and maintain the navigational aid equipment located inside the Lighthouse. While the

DFO remains responsible for the maintenance of the navigational aid, Islands Lights is responsible for the maintenance of the Lighthouse.

[24] During the summer of 2018, the Applicant noticed surveyors on the Lighthouse property and went to speak to them. According to the Applicant, he approached the surveyors, and asked them, among other things, who they were surveying the property for. In response, the surveyors informed him it was for Island Lights. According to the Applicant, this is when he became aware that the Lighthouse and its surrounding property had been transferred by the federal government to Island Lights.

[25] The next year, in 2019, the Lighthouse was re-sided, a new roof was installed, the eaves and doors were repaired with new trims, and other work was conducted.

[26] In order to operate washroom facilities, a septic system was required. In 2020, Island Lights began the process of constructing a septic system on the Lighthouse property and retained two companies, one for the engineering services for the septic system, and the other for the excavation and landscaping services.

[27] In November 2020, the Applicant became aware of the construction work on the Lighthouse property. The Applicant states that he spoke with the contractors and as a result suspects that an RV park will be erected on the property.

[28] In a letter dated December 5, 2020, from the Applicant to Island Lights, the Applicant requested that Inland Lights cease any further construction work on the Lighthouse property. The letter states that “I am the owner of the property adjacent to the lighthouse and I have been deeply disturbed by the cutting down of ancient trees, digging up of the ground and natural vegetation, and apparently plans to develop an RV park.” The Applicant states that he has involved legal counsel and will file an injunction against Island Lights if there is “any further defacement or alteration of this historic lighthouse property”.

[29] On December 10, 2020, counsel for the Applicant wrote to Island Lights, adopting the position that Island Lights breached and continues to breach the *Act* and covenants contained in the Crown Grant, and demanding that any further disturbance of the property at 124 Black Rock Light road cease.

[30] On December 15, 2020, counsel for the Applicant filed an access to information request concerning the Crown Grant issued to Island Lights.

[31] In a letter dated December 22, 2020, the Applicant’s counsel wrote to DFO and to Public Works and Government Services Canada, adopting the position that the conveyance should not have occurred.

[32] On January 5, 2021, counsel for Island Lights wrote to counsel for the Applicant denying that any covenants in the Crown Grant had been breached, denying that the Applicant has any

standing to enforce covenants between the Crown and Island Lights, and denying that there had been a breach of the *Act*.

[33] On February 17, 2021, the Applicant received the package of documents in response to his access to information. On February 24, 2021, the Applicant filed the present judicial review “in respect of the Minister of Fisheries, Oceans, and the Canadian Coast Guard’s ... sale of the designated heritage lighthouse known as the Black Rock Point Lighthouse”.

[34] The Applicant submits that the transfer breached the Respondent Ministers’ policies, their duties of procedural fairness and the principle of legitimate expectations. The Applicant submits that the decisions at issue were substantively unreasonable and failed to comply with the conditions of the *Act*. The Applicant highlights that the *Act* requires a public meeting prior to the sale of a heritage lighthouse “unless the sale is to a municipality or to a person or body that is acquiring the heritage lighthouse for a public purpose.” The Applicant submits that a public meeting ought to have been held on the basis that the sale was not “for a public purpose”.

[35] The Respondent Ministers submit that they declared a number of lighthouses to be surplus and sought to transfer ownership of them to community-based groups that would facilitate their public purpose, being the CCG’s navigation aid program for seafarers and the protection of the lighthouses’ heritage value, all while enhancing tourism potential in the local area. The Respondent Ministers submit that they reasonably interpreted their procedural and substantive obligations under the *Act*, fulfilled any duty of procedural fairness, and made a reasonable decision to transfer the Lighthouse property “at a nominal value to a benevolent

corporation under the auspices of a contractual framework that provides for enduring protection for shared public purpose goals”.

[36] The Respondent Island Lights supports the Respondent Ministers’ position.

[37] In their responding memoranda of fact and law, each Respondent raised the issues of timing of the application for judicial review and the Applicant’s standing to bring this application. The Applicant was permitted to respond by reply memorandum, and the Respondents were provided with additional time to respond to the reply memorandum during the hearing. Accordingly, the merits of the application, along with the preliminary issues of time and standing, were all addressed by the parties during the one-day hearing.

III. Issues

[38] Having considered the submissions of the parties, the issues arising in this application for judicial review may be framed as follows:

- A. Is the Applicant out of time to bring the present application?
- B. Does the Applicant have standing to bring this application?
- C. Did the Respondent Ministers owe the Applicant a duty of procedural fairness, and if so, was it met?
- D. Did the Respondent Ministers violate the doctrine of legitimate expectations?
- E. Was the decision to transfer the Lighthouse to Island Lights reasonable?
- F. Is the remedy requested by the Applicant unduly prejudicial to Island Lights?

[39] As explained below, considering my findings on the first issue of timeliness, it is unnecessary for me to consider issues B through F.

IV. Analysis

A. Timeliness of the Application for Judicial Review

[40] As noted above, the issue of the timeliness of the application for judicial review was raised by the Respondents in their respective reply memoranda. Section 18.1(2) of the *Federal Courts Act* provides for a thirty-day limit:

Time limitation

An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[41] The Respondent Ministers submit that the Applicant is clearly out of time to apply for the judicial review of the decision to transfer the Lighthouse and the surrounding property that was finalized in April 2018, almost three years prior to the date this Application was filed. The impending transfer to Island Lights was advertised in both languages in two local papers in

December 2017. The Respondent Island Lights pleads that the decision to transfer the Lighthouse and the property was communicated to Island Lights as the “party directly affected”, and to the public at large, including the Applicant, when it was recorded in the Land Registration Office in April 2018. The Respondents plead that in any event the Applicant admitted to being aware that the property had been transferred by the federal government to Island Lights in June 2018 when this was communicated to him by the land surveyors.

[42] In reply, the Applicant’s position is that this is a “matter” under subsection 18.1(1) of the *Federal Courts Act* to which the thirty-day time limit does not apply (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at paras 156 and ff), rather than a decision or order. The Applicant pleads that he challenges the course of conduct leading up to the transfer and the Respondents’ conduct subsequent to the transfer, rather than the transfer *per se*.

[43] Considering the record, I agree with the Respondents that what is at issue not a “matter” to which the thirty-day deadline does not apply. I find the application to be directed at a decision, namely, the sale of the property to Island Lights. The Respondent Ministers highlighted during the hearing that the Applicant’s objections relate to the transfer of the property and that the Applicant is not seeking to challenge or quash governmental policies.

[44] It is clear from the Applicant’s memorandum, filed prior to the Respondents raising the issue of timeliness, that what is at issue is the decision of the DFO to sell the Lighthouse and the associated property. In the Applicant’s memorandum, the section Part IV: Order Sought states, in its entirety, that the “[Applicant] respectfully requests that this Honourable Court quash the sale

of the Lighthouse Property, and order that the Respondent Ministers not sell the Lighthouse Property unless it is in accordance with the [Act] and the applicable divestiture policies.” In addition, the Applicant’s memorandum contains the following headings: (i) The sale of the Lighthouse Property for nominal value violated the Federal Government’s Policies; (ii) The transfer of the Lighthouse Property should be quashed as the Respondent Ministers’ breach constituted a violation of the doctrine of legitimate expectations; and (iii) The sale of the Lighthouse Property to Island Lights for \$1 was unreasonable.

[45] As to the course of conduct following the transfer of the property in 2018, there was no subsequent decision or conduct by the Respondent Ministers, following the transfer, that is at issue here. There are two points to be made in this regard.

[46] First, the *Act* only applies to “lighthouses that are the property of the Her Majesty in right of Canada” (section 4, emphasis added). Consequently, there is a distinction to be made between the Lighthouse itself and the surrounding property. There are no allegations that, following the transfer of the Lighthouse and the surrounding property, the covenants with respect to the maintenance of the Lighthouse and the access rights for the navigational equipment contained in the Crown Grant have not been complied with by Island Lights. Indeed, it is common ground between the parties that repairs to the Lighthouse since the transfer have been in keeping with its historical character. The Applicant’s objections to the transfer arose following what is described in his memorandum as the “destruction of the Lighthouse property” in 2020, which details that contractors cut down trees and hedges and “dug up the landscape”. Thereby relating to the surrounding property, rather the Lighthouse.

[47] Second, there is also a distinction to be made between the conduct of Island Lights and the conduct of the Respondent Ministers. By 2020, the Federal Government had long ceased to be owner of the land surrounding the Lighthouse. As submitted by the Respondents, after 2018, the Federal Government had made no further decisions concerning Island Lights use of the land, including in relation to the construction and installation of a septic system necessary for washroom facilities.

[48] Accordingly, I find that the present application does not relate to a “matter” and the thirty-day time limitation in section 18.1(2) of the *Federal Courts Act* applies.

[49] The Applicant argues, in the alternative, that if there was a decision, it was not communicated to the Applicant and as such time did not begin to run until he received the response to his access to information request on February 17, 2021. Section 18.1(2) of the *Federal Courts Act* starts the clock once the decision is first communicated to the party directly affected by it. The Applicant’s argument is therefore premised on the Applicant being “the party directly affected” by the decision. I find that the Applicant is not “the party directly affected” by the decision to transfer the property (*Devinat v Canada (Immigration and Refugee Board)*, [2000] 2 FC 212 at para 40 (FCA)).

[50] Island Light pleads that, if communication to anyone other than Island Lights was required, the decision was in fact communicated. Advance notice of the sale was advertised in the local papers in December 2017, well after the Applicant purchased the adjacent property (September 2017). The sale itself was recorded in the Land Registry on April 20, 2018, and thus

communicated to the public at large. Finally, the sale was in fact communicated to the Applicant in person, by his own admission, in June 2018. Accordingly, I find that the Applicant became aware of the decision to transfer the Lighthouse and its surrounding property to Island Lights in June 2018, at the latest. In other words, for the purpose of Section 18.1(2) of the *Federal Courts Act*, the clock started to run years before the Applicant received the response to his access to information request in 2021. The Applicant is out of time.

[51] The Applicant submits that if the Court finds that he is out of time, the Court should exercise its discretion under section 18.1(2) of the *Federal Courts Act* to grant an extension of time. The Respondents disagree and submit that the Applicant has failed to meet the test for an extension of time as set out in *Canada (Attorney General) v Larkman*, 2012 FCA 204 [Larkman].

[52] The Federal Court of Appeal has repeatedly held that the overriding consideration that governs the granting of extensions of time under subsection 18.1(2) of the *Federal Courts Act* is that the interests of justice be served (*Larkman* at paras 62, 85 and 90; *Wenham v Canada (Attorney General)*, 2018 FCA 199 [Wenham] at paras 42, 47, and 48). As set out in *Larkman* at paragraph 61, four questions guide this inquiry:

- (1) Did the moving party have a continuing intention to pursue the application?
- (2) Is there some potential merit to the application?
- (3) Has the Crown been prejudiced from the delay?
- (4) Does the moving party have a reasonable explanation for the delay?

[53] It is not necessary that all four questions be answered in favour of the moving party, given the overriding consideration of whether the interests of justice are served. In *Larkman*, the Federal Court of Appeal underscored the importance of the thirty-day deadline and explained the rationale behind a strict approach to the deadline:

[86] In considering this, I am mindful that the Federal Court and this Court have underscored the importance of the thirty day deadline in subsection 18.1(2) of the *Federal Courts Act*. Many authorities suggest that unexplained periods of delay, even short ones, can justify the refusal of an extension of time: *Powell v United Parcel Service*, 2010 FCA 286 at paragraph 3; *Kobek v Canada (Attorney General)*, 2009 FCA 220 at paragraphs 2 and 5; *McBean v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1149; and many others.

[87] The need for finality and certainty underlies the thirty day deadline. When the thirty day deadline expires and no judicial review has been launched against a decision or order, parties ought to be able to proceed on the basis that the decision or order will stand. Finality and certainty must form part of our assessment of the interests of justice.

[88] Often decisions or orders resolve important questions that impact many members of the public. Often decisions or orders make it possible for other matters to go ahead in the public interest. In these situations, the need for finality and certainty is heightened. For example, soon after a decision on an environmental assessment is made, the government, the proponent of the project and the wider public need to know quickly whether the decision is final. An all-too-liberal approach to the granting of an extension of time can interfere with this, allowing applications for judicial review to pop up like a jack-in-the-box, long after the parties have received the decision and have relied upon it.

[54] I am therefore mindful of the guidance by the Federal Court of Appeal and the rationale for a strict approach to the thirty-day deadline. I now turn to the four questions that guide this Court's exercise of its discretion.

(a) *Did the Applicant have a continuing intention to pursue the Application?*

[55] The Applicant pleads that he “only became aware of all the relevant facts for this application when he received the January 2021 letter from Island Light’s counsel, filed his access to information request and when he received the certified tribunal record in the course of this application.” (Emphasis added). The Respondents’ position is that the Applicant has in fact known about the transfer since 2018 and therefore did not have a continuing intention. The Respondent Ministers plead that the Applicant does not state what “all the relevant facts” are.

[56] I do not find that the Applicant had a continuing intention to pursue the Application. The Applicant was informed by a surveyor in 2018 that Island Lights owned the Lighthouse and the surrounding land. During the cross-examination of the Applicant, he was asked “why didn’t you take action at that point?” He replied:

A. I thought it was a done deal. I mean, the transfer had already occurred, unbeknownst to myself, but I was reassured in the knowledge that it was a federally protected heritage lighthouse. I read a little bit about what that meant, I had a strong feeling that this was going to be good for no problem with it neighborhood. I thought it was really truly going to be a preservation of the lighthouse. I had no idea whatsoever that there were any plans to develop it into something that could make a personal profit or something like that.

Q. But you made no inquiry, right?

A. I did – I – I did get invol – I did speak with Joanne Ryan [Ms MacDonald-Ryan] on a couple of occasions, one occasion because there was some vandalism activity going on back there. And at that time there were people over there throwing beer bottles and I was concerned that the lighthouse may be damaged, and I communicated that information to her.

My friend who comes out here and works here and stays here when I’m gone, had spoken with Joanne and asked her about –

what their plans were for the property, and Joanne communicated that the plans were to preserve the lighthouse. So, our expectations were we had a property that was under the protection of Federal Law, we had every expectation that it was going to be taken care of. I had no suspicion whatsoever that anybody would even consider doing something as outrageous as putting up an RV Park on a – on a lighthouse, so I was really, you know, I thought it was unfortunate that the transfer had occurred. I didn't think it was worth trying to, you know, do anything about a transfer as long as these people were going to preserve the lighthouse, and protect the property and had respect for the neighborhood, I had no problem with it.

[57] In the Applicant's affidavit, he states that he was disappointed that the Lighthouse and surrounding property was sold and he would have liked the opportunity to bid on it. Effectively, the Applicant knew about the transfer, was disappointed because he felt he had missed the boat so to speak, but decided he "had no problem with it" based on certain assumptions he made regarding the designation of a heritage lighthouses. The Applicant appears to have had no continuing intention to pursue the Application and only investigated the decision to transfer the Lighthouse and the surrounding property once he became aware of the construction of a septic system taking place in November 2020.

[58] As to the "relevant facts" uncovered through the access to information request in 2021, had the Applicant wished to investigate the matter further in 2018, he was free to do so. The business plan submitted to DFO in 2013 contained multiple references to tourist accommodation, along with a lighthouse information center and kiosk, and a parking area. The Applicant's failure to appreciate and/or investigate the ramifications of the transfer of the Lighthouse and its surrounding property in 2018 does not excuse his lack of a continuing intention to pursue the Application.

(b) *Does the Applicant have a reasonable explanation for the delay?*

[59] While this question is the fourth question listed by the Federal Court of Appeal in *Larkman*, I consider that it is best addressed at this stage, as the issues it raises are not dissimilar to those raised in subsection (a) of this judgment and reasons above.

[60] The Applicant pleads that he has a reasonable excuse for the delay because the “supporting facts of the case were not publicly available” and once he became aware of those facts, he promptly filed the present application. The Respondent Island Lights pleads that the only excuse provided by the Applicant for the years of delay is his mistaken and uninformed belief that the heritage designation of the Lighthouse would prohibit the development of the land around it as a tourist site. Once the Applicant became aware of the development of a tourist site in 2020, then he acted to seek further information, and then he sought a review of the sale.

[61] I find the Applicant has not provided a reasonable explanation for the delay. From the record, it appears that the Applicant relied on his mistaken understanding that the preservation of the Lighthouse was akin to a prohibition of tourism related development on the property. During the cross-examination of the Applicant, he confirmed that he was aware of the divestiture program and that the Lighthouse property had been transferred in 2018, and then the following exchange took place:

Q. And you didn't take any action at that point, is that correct?

A. I – I didn't know what action I could take.

Q. Did you make any inquiries with regard to any action you could take?

A. Again, I was assured that this was a federal protected heritage lighthouse. It was my understanding that federal protected heritage lighthouses were protected. I never in a million years thought federal heritage lighthouses could be developed into RV Parks.

Q. Right, but you were assured of that without reading the legislation or any of the materials surrounding the divestiture process, is that right?

A. I – I did read a little bit of the fer – Federal Heritage Lighthouse Protection Act. I’m not a lawyer, so I, you know, the language seems pretty clear that protection of the lighthouse as well as the environment and the – around the lighthouse, is – is important. And I also in reading it, there was a strong sense that the community was to be part of anything that was ever done with those lighthouses.

So, I felt very confident that I had the law on my side that the people who acquired it were interested in preserving the lighthouse. Certainly not interested in disrupting the community, certainly not interested in doing things without community involvement, and I fully expected that this was going to be a positive thing for me and for my neighbours.

[62] To re-iterate, the Applicant stated “I felt very confident that I had the law on my side...”

A lack of legal awareness or ignorance of the law have been found by this Court to not constitute a reasonable explanation (*Yee Tam v Canada (Transport)*, 2016 FC 105, at para 14; *Minéraux Midatlantic Inc c Administration Portuaire de Québec*, 2021 CF 688 at para 54).

[63] The Applicant had the tools available in 2018 to uncover additional information surrounding the sale and further inform himself as to the legal position had he wished to. He did not do so until late in 2020. I conclude that the Applicant has not provided a reasonable explanation for the delay.

(c) *Is there some potential merit to the Application?*

[64] As noted above, the Applicant raises a number of issues in this judicial review. In order to consider whether the present application has sufficient merit to favour the granting of an extension of time, I will consider them. As guided by the Federal Court of Appeal in *Larkman* at para 75, however, my consideration is for the purpose of whether an extension of time should be granted, rather than a full assessment on the merits, given my conclusions on the preliminary issue of timeliness.

[65] As a preliminary and overarching point, I agree with the Respondent Ministers' submission that this application "appears to have neighbor issues at its heart".

[66] In the Applicant's affidavit, his complaints relate to the landscaping and the noise of construction, but there is no allegation that the Lighthouse itself has not been repaired and maintained. In the cross-examination, the Applicant agreed that the siding and the roof of the Lighthouse was repaired after the sale to Island Lights. All indications are that the Lighthouse is indeed being preserved.

[67] In the Applicant's affidavit, he attests to wanting to purchase the Lighthouse and the surrounding property, and if given the opportunity would do so at the appraised price. During the cross-examination, the Applicant stated that he would have been interested in purchasing the Lighthouse property "to protect it for my – integrity of my own property" and he "wanted the integrity of my property preserved".

[68] In the Applicant's letter of December 5, 2020, to Island Lights, he raised the concern that developments to the Lighthouse "will significantly diminish the value of my home and the quality of my life and that of my neighbors...I have already been harmed by the actions you have taken on this property with its defacement, including the cutting down of ancient trees, beautiful wildflowers, and natural hedges that added considerable charm to the property and helped to stabilize the bank from erosion. Moreover, the incessant noise that is ongoing from the construction and mowing has disturbed a once very peaceful and tranquil place to live."

[69] Ms. MacDonald-Ryan's property includes the Black Rock Light Road, the road which leads to a number of properties including the Lighthouse property and the Applicant's property. Ms. MacDonald-Ryan attests to the Applicant calling her personally on at least two occasions in 2019 to request that she place "No Trespassing" signs to prevent people traveling down the road and passing his driveway. Ms. MacDonald-Ryan attests that in or around 2020, the Applicant called her again offering to pay for a gate halfway down the road that would prevent cars from passing. Ms. MacDonald-Ryan attests that she refused the Applicant's offer, indicating that she was not willing to put a gate to block access to the Lighthouse property.

[70] The Application record contains three affidavits from members of the surrounding community who attest to only becoming aware of the sale recently and object to the possibility of a recreational vehicle park. Other than hearsay contained in the Application record regarding a possible RV park, there is no confirmation as to the nature of future accommodation, if any, on the site. In the Respondent Island Lights' record, affidavit evidence by Ms. MacDonald-Ryan

attests to having begun the process of constructing a septic system for bathrooms and a well for drinking water, but states that future plans remain under development.

[71] The foregoing goes to, using the Respondent Ministers' point, the heart of the matter. The Applicant's desire to protect the value and tranquility of his own property, by avoiding development and tourism on the adjacent property, has spawned this application for judicial review. I have no doubt the Applicant wishes to purchase the Lighthouse and the surrounding property, however, his neighbour beat him to it in 2018. The Applicant I find this overarching point favours the Respondents on the question of potential merit.

i. Public notice

[72] On the question of potential merit, the Applicant submits "that it would be unjust for a judicial review application alleging lack of public notice, public consultation and public tendering to be prevented from proceeding due to an expired limitation period resulting from the applicant's lack of knowledge." As noted above, the Application record contains three affidavits from individuals in the local area who attest to only becoming aware of the transfer recently.

[73] I find that there was in fact public notice in December 2017, in the regional press, advertising the upcoming sale, in both official languages. The Applicant admits to being aware to the lighthouse divestiture program at the time and to having seen the 2017 news release that the Lighthouse had been designated a heritage lighthouse. The Applicant was a resident of the area and the opportunity to respond to the advertisements was available to him, as it was to any other interested parties. The fact that the Applicant did not avail himself of the opportunity to follow

local affairs or inform himself about the program at the time, does not mean that the process was unjust or there was a lack of public notice. Furthermore, the sale was subsequently recorded in the Registry of Deeds in April 2018, which, as the Respondents plead, was also official notice to the public at large. As to the Applicant's lack of knowledge, it is uncontested that he admitted to having become aware of the sale in June 2018, and as noted above, I find that he had the tools at his disposal to make further enquiries.

ii. Public Purpose

[74] The Applicant's allegation of a lack of public consultation stems from the requirement of the *Act* that a public meeting be held prior to the sale of a heritage lighthouse "unless the sale is to a person or a body that is acquiring the heritage lighthouse for a public purpose." (subsection 13(2), emphasis added). The Applicant submits that Island Lights did not acquire the Lighthouse for a "public purpose", and thus a public meeting on the matter in the area where the Lighthouse is located ought to have been held. The Applicant alleges that had there been such a meeting, members of the community would have been given an opportunity to acquire the property or bid for it, and "members of the public could have provided community input into the preservation of the Black Rock Point Lighthouse, including a plan that respects its 'community values' of its former isolated forested setting."

[75] The Respondents submit that the sale of the Lighthouse and the surrounding property to Island Lights for a nominal sum was the *quid pro quo* for Island Lights' assumption of the ongoing public purposes of the maintenance and operation of the Lighthouse, namely providing a navigational aid and maintaining its heritage character at Island Lights' own risk and expense.

The Respondents argue that there is no evidence on the record that Island Lights has not complied with the aforementioned public purposes, as it is obliged to under the Memorandum of Agreement. In fact, the evidence in the record demonstrates that the CCG retains access to the Lighthouse, that it has been repaired, and that it is being maintained.

[76] The Respondents submit that tourism and tourist related activities assist in fulfilling the public purpose. Tasha Andrews, the Acting Director of the Real Property Safety and Security branch of the DFO, had oversight over the sale. As part of this application for judicial review, she swore an affidavit and was cross-examined in the context of this application. During her cross-examination, Ms. Andrews explained that the intent of transferring the lighthouses and their surrounding lands in the context of lighthouse property transfers is that these sites become public purpose tourist sites and attract tourism to the area. The Respondents rely on Ms. Andrews' testimony that the lighthouses require maintenance to protect the public purpose, such as a safe building structure for access, and repairs to the navigational equipment. As such, "it is imperative" that the DFO work with community groups "that have some kind of plan of how they're going to generate revenue to keep that lighthouse in good condition".

[77] The parties disagree as to the definition of "public purpose". The Respondent Island Lights submits that because "public purpose" is not defined in the *Act*, it was the intention of parliament to not limit the Respondent Ministers' discretion when evaluating whether plans submitted by a prospective purchaser fulfill a public purpose and thus not limit the procedure by which a lighthouse may be divested.

[78] Island Lights pleads that the due diligence conducted by the DFO following the receipt of the business plan in 2013 was sufficient to satisfy itself that Island Lights intended to operate the Lighthouse for a public purpose. Island Lights highlights Ms. Andrews' statement that, based on her experience at the DFO with other groups interested in the surplus lighthouses, "this group was very involved, very interested, and very passionate. More so than probably any other community group that I've been working with over the years." Island Lights pleads that the DFO had ample material in its possession to determine that Island Lights' plans qualified as having a public purpose and that, accordingly, the DFO was best placed to make such a determination. Island Lights further submits that, to date, it has continued to fulfill the public purpose that it committed to fulfill in the Memorandum of Agreement.

[79] The Respondent Ministers note that section 3 of the *Act*, entitled Purpose, requires that "heritage lighthouses be reasonably maintained" and facilitates their sale or transfer "in order to ensure the lighthouses' public purpose." The *Act* defines a lighthouse as "a tower or other structure, including its fixtures, that was built to contain, contains, or once contained a beacon light or other signal to warn or guide marine vessels, whether or not it is now in use as an aid to navigation." The Respondents plead that it is only the structure, i.e. a lighthouse itself, and not the surrounding land, that is at issue when considering the public purpose.

[80] The Respondent Ministers submit that, while the meaning of the phrase "public purpose" was not defined in the *Act*, reference may be had to the Treasury Board of Canada Secretariat's *Directive on the Sale or Transfer of Surplus Real Property*, a directive that defines performance expectations for the disposal of real property by the Federal Government. The Respondent

Ministers refer to its section 4 (Definitions) where “public purpose” is defined as “non-commercial and for the ‘common good’ of all citizens”. The Respondent Ministers plead that they are entitled to deference on their decision that Island Lights was acquiring the Lighthouse for a “public purpose”, and that in any event, both the record and the obligations contained in the Memorandum of Agreement demonstrate that the Lighthouse itself has been and will be maintained for the public purpose.

[81] The Applicant submits that aspects of the sale and of the subsequent projects by Island Lights are not in line with a “public purpose”. The Applicant pleads that Island Lights is a for profit corporation incorporated under the *Companies Act*, RSNS 1989, c 81, as opposed to a non-profit organization or a registered society. The Applicant pleads that the development of the site for tourism (i.e. the alleged RV park) is not related to the CCG’s Navigational Aid Program, and that Island Lights has not conducted any public consultation for its planned use of the property. The Applicant pleads that there are no restrictions on Island Lights’ business plans or on the use of its profits.

[82] I agree with the Respondent Ministers that there is no restriction in the *Act* to the effect that a “public purpose” may only be fulfilled by a non-profit organization. Rather, the *Act* refers to “a municipality or a person or a body”. Moreover, the factual and policy matrix in the present case supports the absence of such a restriction given that the Form and business plan guide prepared by the DFO for those wishing to acquire a surplus lighthouse under the *Act* refer to possible ownership structures as “Public”, “Non-Profit Organization” and “Private”.

[83] I disagree with the Applicant's allegation that the sale and the actions taken by Island Lights are not in line with a public purpose. I agree with the Respondents that the public purpose requirement in the *Act* applies to a lighthouse as defined in the *Act*, being its structure and not the surrounding land. I find no evidence in the record that the Lighthouse itself is not being maintained or does not continue to fulfill its public purpose. On the contrary, the evidence is that it has been repaired, its heritage character continues to be maintained, and it continues to act as a navigational aid. The Memorandum of Agreement between Island Lights and DFO contained undertakings in this regard and there is no allegation that they have not been complied with.

[84] As to the development of the property surrounding the Lighthouse for tourism, I find it not prohibited by the *Act* nor is it inconsistent with ensuring a lighthouse's public purpose. The evidence on the record is such that heritage lighthouses require upkeep, maintenance, and repairs over time. The DFO works with groups in order to have a plan in place as to how revenue will be generated to preserve and maintain the heritage lighthouses. In the matter at hand, Ms. MacDonald-Ryan, initially, and now Island Lights, are seeking to do just that. The business plan submitted to DFO in 2013 by Ms. MacDonald-Ryan included plans for development and tourist accommodation, combined with continued fund raising efforts, in order to maintain the site for the community and visitors. The events in the record since 2018 are not inconsistent with the business plan submitted in 2013 and the Memorandum of Agreement. The evidence in the record also speaks to Ms. MacDonald-Ryan and Island Lights efforts to maintain access for the public to the Lighthouse and the surrounding property, rather than restrict it.

[85] Finally, contrary to what the Applicant pleads, I find it was not incumbent upon Island Lights to conduct public consultation as to its planned use of the property surrounding the Lighthouse.

iii. Whether the Respondent Ministers breached their internal policies

[86] The Applicant relies upon a Treasury Board Policy, the *Real Property Circular, 96-1*, [1996 *Circular*] in support of his position that the DFO was not permitted to sell the Lighthouse and the property for a nominal value unless it was to a non-profit association. The Applicant argues that the sale was in breach of the Respondent Ministers' policy as contained in the 1996 *Circular*.

[87] The Respondent Ministers plead that the policy contained in the *Circular* lacks the binding status of the law, and in any event, was drafted in 1996 and was overtaken by the *Act*. Ms. Andrews, who had oversight over the sale of this matter for DFO, stated during her cross-examination that when the *Act* came out DFO used that rather than the 1996 *Circular*. The Respondent Island Lights pleads that the policy directives are not binding on the DFO, and relies upon *Skycharter Limited v Canada (Minister of Transport) (1997)*, 125 FTR 307 [*Skycharter*].

[88] I agree with the Respondents concerning the Applicant's alleged breach of the policy contained in the 1996 *Circular*. Policies do not have force of law, are not binding on an authority, and are not enforceable by members of the public (*Skycharter* at para 39; *Harnum v Canada (Attorney General)*, 2009 FC 1184 at para 38-39 [*Harnum*]).

[89] The Applicant submits that *Skycharter* is old law. The Respondent submits that it is nevertheless applicable and that in any event the policy relied upon by the Applicant is older. I find the principles set out in *Skycharter*, and in the judgment of my colleague Justice Heneghan in *Harnum*, to be applicable to the matter at hand. The 1996 *Circular* is not enforceable by the Applicant.

[90] The Applicant also alleges a breach of the policy contained in the *Directive on the Sale or Transfer of Surplus Real Property*, namely that the DFO did not consider the interests of the surrounding community. It is common ground that the DFO circulated the opportunity for acquisition of the Lighthouse and the surrounding property to other federal departments, other levels of government, including the municipal government, and local First Nations, prior to moving forward with Island Lights and advertising sale to the local community. In any event, this argument also suffers from the same shortcomings as the Applicant's prior policy based argument. I see no potential merit in it.

iv. Whether the Respondent Ministers breached natural justice and procedural fairness

[91] The Applicant asserts that the Respondent Ministers failed to observe a principle of natural justice and procedural fairness, namely the doctrine of legitimate expectations. For this argument, the Applicant relies on the 1996 *Circular*. The Applicant submits that there was a legitimate expectation that the DFO would publicly tender the sale of the Lighthouse if any of the five requirements for a nominal sale listed in the 1996 *Circular* were not met.

[92] The Respondents submit that the policy was not binding on the DFO, was not in the public domain, and was not intended as a representation to the public. Furthermore, if there was a duty of procedural fairness, it was met through the advance public advertising of the sale and, more generally, media coverage in relation to the surplus lighthouse divestiture program.

[93] The Supreme Court of Canada in *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paragraph 68 describes the doctrine of legitimate expectations as follows:

Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous, and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a prerequisite.

[94] My colleague Justice Kane notes that a “key requirement is that the ‘representations’ relied on must be made ‘to an individual’ – i.e., to the individual seeking to enforce the promise. Policies of general application are not sufficient to give rise to a legitimate expectation” (*Canadian Union of Public Employees v Canada (Attorney General)*, 2018 FC 518 [CUPE] at para 169).

[95] I find that the Applicant does not have a reasonable chance of succeeding on this point. The Applicant obtained a copy of the 1996 *Circular* in February 2021 in the response package to his access to information request. It can hardly be said that the 1996 *Circular*, of which the Applicant was not aware at the time of the sale in 2018, gave rise to a legitimate expectation by the Applicant. Moreover, this policy document which does not impose binding obligations upon

the Respondent Ministers, and in fact the Respondent Ministers plead actually permitted the nominal sale by way of a special disposal regime, is insufficient, in my view, to raise a legitimate expectation on the part of the Applicant (*CUPE* at para 169).

v. Reasonableness of the DFO's decision

[96] Finally, the Applicant pleads that the decision by the Respondent Ministers to sell the Lighthouse and its surrounding property for a nominal sum was unreasonable on the basis that the Respondent Ministers departed from the two Treasury Board policies referenced above. As noted above, the Respondent Ministers plead that, after considering the relevant factors and undertaking a process of due diligence, the DFO made a reasonable decision to transfer the Lighthouse property "at a nominal value to a benevolent corporation under the auspices of a contractual framework that provides for enduring protection for shared public purpose goals".

[97] The Applicant's position that the sale was unreasonable is rooted in the two Treasury Board policies referenced above. For the reasons stated in paragraphs 86 through 90 above, I find no potential merit in this position. Furthermore, given the evidence in the record and the enactment of the *Act* in 2008, the DFO's failure to use the 1996 *Circular* does not render the DFO's unreasonable. In addition, based on the record before me, there is no evidence that the DFO failed to put protections in place in the Memorandum of Agreement for the maintenance and preservation of the Lighthouse itself and its use as a navigational aid. Rather, the Respondents submit, and I agree, that the Applicant has failed to allege that either of these two public purposes have not being adhered to.

[98] In light of the foregoing, I find that this application does not have sufficient potential merit to weigh in favour of granting the extension of time.

(d) *Has the Crown been prejudiced from the delay?*

[99] The Respondent Ministers submit that significant time and planning went into the sale of the Lighthouse property to Island Lights. Moreover, grant funds for immediate repairs were subsequently disbursed, the Lighthouse underwent repairs, and the Respondent Ministers now rely upon Island Lights to continue to honor its obligations to maintain the Lighthouse for a public purpose. It would, in their submissions, prejudice the Respondent Ministers to have to spend the time and funds to complete the whole process once again or to be forced to now embark on a public tender. The Respondents submit that it could call into question investments made and steps taken since 2018, when the Applicant became aware of the sale. The Respondent Island Lights also submits that it would be prejudiced, having relied on the finality of the decision and made further investment.

[100] The Applicant submits that the Respondent Ministers will not suffer any prejudice; rather, if the disposition is subject to a public tender, the Respondent Ministers would receive more than the nominal sum for which the Lighthouse property was sold.

[101] I find this factor favours the Respondents. In so finding, I am mindful of the Federal Court of Appeal's guidance on the importance finality and certainty (*Larkman* at paras 87-88). The Respondent Ministers advertised the sale in advance and no one but Island Lights came forward. The Respondent Ministers then proceeded on the basis that their decision to sell the

Lighthouse property was final, disbursed grant funds, and have since then been relying on Island Lights to honor its obligations. As pled by the Respondent Ministers at the hearing, the contract was entered into, the money has been spent and the relationship has proceeded. Although the Respondent Ministers have not quantified the additional time and expense that would be incurred if the sale process had to be redone, it appears reasonable to conclude on the record before me that there would be some significant time and expense in the event that the DFO had to extricate itself from the Memorandum of Agreement with Island Lights and redo the due diligence, advertising, and sale process for the Lighthouse and the surrounding property.

(e) *Interests of Justice and Conclusion*

[102] I now return to the overriding consideration, whether the interests of justice are served. In my view, based on the foregoing, the interests of justice would not be served by granting the requested deadline extension. The answers to each of the four questions favour the Respondents. Key, in my view, the Applicant has provided no reasonable explanation for the several years of delay. The Applicant has not convinced me that the interests of justice warrant a departure from the strict approach to the thirty-day deadline.

[103] As noted above, Applicant's desire to protect the value, peace and tranquility of his property by avoiding development and tourism on the adjacent property has spawned this application for judicial review. While the Applicant is clearly concerned about the construction and landscaping taking place on property adjacent to his, a judicial review of the sale, close to three years after the sale took place, is not the appropriate vehicle to address his grievances.

[104] I therefore find that this application for judicial review, filed after the thirty-day deadline, is out of time and is dismissed with costs to the Respondents.

JUDGMENT in T-359-21

THIS COURT'S JUDGMENT is that :

1. This application for judicial review is dismissed;
2. Costs allowed to the Respondents.

"Vanessa Rochester"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-359-21

STYLE OF CAUSE: WILLIAM HARLESS v MINISTER OF FISHERIES,
OCEANS, AND THE CANADIAN COAST GUARD

PLACE OF HEARING: MONTRÉAL, QUEBEC BY VIDEOCONFERENCE

DATE OF HEARING: OCTOBER 19, 2021

JUDGMENT AND REASONS: ROCHESTER J.

DATED: MARCH 21, 2022

APPEARANCES:

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Minister of Environment and Climate Change Canada

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