

10# |

FILED	FEDERAL COURT COUR FÉDÉRALE	DÉPOSÉ
	MAY 08 2024	
	ADAM YOUNG	
	HALIFAX, NS	

FORM 301

Court File No. T-1085-24

FEDERAL COURT

BETWEEN:

INSTITUTE FOR OCEAN RESEARCH ENTERPRISE

APPLICANT

– and –

**HIS MAJESTY THE KING (MINISTER OF TRANSPORTATION) and 4197847
NOVA SCOTIA LIMITED**

RESPONDENT

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant.

The applicant requests that this Application be heard at Halifax, Nova Scotia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application, you or a solicitor acting for you must prepare a Notice of Appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this Notice of Application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May 8, 2024.

ORIGINAL SIGNED BY
ADAM YOUNG
ORIGINAL SIGNÉ PAR

Issued by:

Registry Officer

Address of local office:

1720-1801 Hollis Street, 17th Floor
Halifax, Nova Scotia B3J 3N4

TO:

Attorney General of Canada
Atlantic Regional Office
Department of Justice Canada
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

AND TO:

Minister of Transportation
The Honourable Pablo Rodriguez
Minister of Transport
Transport Canada | NPP
330 Sparks St.
Ottawa, Ontario K1A 0N5

AND TO:

4197847 Nova Scotia Limited
c/o Peter Thomson
2741 Windsor St,
Halifax, Nova Scotia, B3K 5E3

APPLICATION FOR JUDICIAL REVIEW

This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 in respect of the decision of the Minister of Transportation (the "**Minister**") dated April 8, 2024 in file 2022-206446 (the "**Decision**") under the *Canadian Navigable Waters Act*, RSC, 1985, c. N-22 (the "**Act**") to allow for infilling at a private water lot (the "**Work**") that occupies approximately 2.7 hectares (ha), in Halifax Regional Municipality, in the Province of Nova Scotia (bearing PID 00114132) (the "**Water Lot**") owned by the Respondent 4197847 Nova Scotia Limited ("**419 NSL**"). The Work as approved by the Minister will materially interfere with navigation in the vicinity of the lot occupied by the Applicant (bearing PID 00130492) (the "**Applicant's Lot**"), and will in turn have a material and negative impact on the Applicant's operations.

The Applicant seeks an order:

1. In the nature of *certiorari* quashing and setting aside the Decision to approve the Work at the Water Lot issued under section 7(6) of the *Act*;
2. If necessary, confirming the Applicant's standing to bring this Application;
3. Costs in favour of the Applicant; and
4. Such other relief as this Honourable Court may determine appropriate.

GROUNDS FOR APPLICATION

The grounds for this Application are as follows:

Background of the Parties

1. The Applicant, Institute for Ocean Research Enterprise ("**IORE**") is a not-for-profit corporation established pursuant to the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. IORE operates using the trade-mark "Centre for Ocean Ventures & Entrepreneurship" ("**COVE**") pursuant to an October 1, 2023 Trade-Mark Agreement (hereafter, the Applicant being referred to as "**COVE**").
2. COVE operates a facility at the Applicant's Lot that is composed of a land and water lot with extensive berthage for vessels of varying sizes and applications. COVE's facility is used by more than 350 affiliated organizations in the marine sector collaborating with other industry players, Federal and provincial governments, and academia. COVE is dedicated to the advancement of marine technology.

3. The Respondent, 419 NSL, is the owner of the Water Lot, a pre-Confederation parcel. The Respondent 419 NSL sought approval from the Minister to deposit fill in the Water Lot to extend the land within the area of the broader parcel for, amongst other things, real property development.
4. The Applicant's Lot, where COVE operates its facility, is 8.14 ha and includes both land and a pre-Confederation water lot extending into Dartmouth Cove, and abutting the Water Lot, which is the subject of the Decision.
5. Pre-Confederation water lots were granted by the Crown in Nova Scotia before Confederation. These Crown grants could include not just property located on dry land but also property located in the adjoining sea bed.

COVE's Operations at the Applicant's Lot

6. Operations at COVE's facility began in 2018 with funding from both Provincial and Federal Governments. In 2021, further capital investment into the Applicant's Lot was made and substantial improvements were completed at COVE's facility, including the development of floating docks at the north section of its facility.
7. More recently, in or around October 2023, COVE secured a 20-year lease for the Applicant's Lot from the title holder, Nova Scotia Crown Corporation, Build Nova Scotia.
8. COVE presently has 60 onsite tenants, many of whom access the subject floating docks and other marine facilities on a daily basis year-round.
9. At the north section of COVE's facility is approximately 134 meters of pile-driven floating docks used to berth smaller vessels and launch marine technology from the dockside and which is actively used for training students in post secondary programs. The floating docks are used year-round by tenants of COVE's berthing vessels varying in length from 5.18-28 meters in length, and depths of 0.75- 3.8 meters.
10. In addition to catering to tenants operating smaller vessels, the northern section of COVE's facility houses a subsea platform the "Stella Maris", approved by Transport Canada on or about February 25, 2021 under file number 2021-203626. The coordinates of the location of the Stella Maris subsea platform, per Transport Canada's approval, are 44°39'45.0"N 63°33'31.0"W. The Stella Maris subsea platform is located 10 meters below the surface and is used for testing and commercializing marine sensors.

11. The floating docks are also used to sample and characterize water conditions including the presence of chemical and biological nutrients and components, physical conditions (i.e. temperature and turbidity) and the measure of underwater sound by acoustic devices in the northern section of the Applicant's Lot.
12. Vessels which berth at the floating docks include those affiliated with the Halifax Pilotage Authority, Canadian Coast Guard Search and Rescue, Halifax Fire and Halifax Regional Police. There are also several research vessels affiliated with Dalhousie University and Nova Scotia Community College and a number of working vessels used in research and survey activities.
13. Larger vessels, those between 18 and 103 meters in length and 1.5 to 9 meters in depth dock at the southern "terminal" area consisting of marginal wharves and finger piers. The terminal is similarly utilized year-round.
14. Vessels which berth at the floating docs include those affiliated with the Canadian Military, Canadian Coast Guard Search and Rescue and Halifax Transit Ferry Services. Additionally, there are large research vessels, tugboats, and other workboats which regularly berth at the terminal.
15. The Applicant's Lot is specifically suitable for vessel berthage due to its ability to accommodate vessels with a depth of up to 12 meters. Additionally, the location of COVE's facility, which is sheltered within Dartmouth Cove provides natural protection against potential impediments to navigation such as significant wind, wave and weather conditions. COVE's sheltered berths, and especially those berths at the floating docks, are sought after for smaller craft and for high-tech applications carrying sensitive equipment. Additionally, the layout of the area of the Applicant's Lot in which COVE is situated presently accommodates vessels of up to 103 meters in length overall to navigate into the terminal, berthing at either the marginal wharf or finger piers.
16. Further, COVE has been designated as a maritime test partner to evaluate and validate marine assets under the NORAD intercontinental defence programs. As well, in or around March of 2024, COVE was designated as 1 of 23 "accelerators" in NATO's Defence Innovation Accelerator the North Atlantic (DIANA) program. As an accelerator in NATO's DIANA program, COVE is a part of a global network promoting technological advances, fostering mentorship and collaboration from scientists, engineers, industry partners, end

users, and government procurement experts. In addition to accelerators, within the DIANA program there are more than 183 test centres globally.

Respondent 419 NSL's Application to the Minister

17. On or about March 24, 2022, 419 NSL, as proponent, applied to the Minister through Transport Canada's "Navigation Protection Plan" seeking approval for the Work at the Water Lot (the "Application"). Pursuant to this application, 419 NSL described the Work as follows:

The Project Area will be infilled with approximately 99,700 cubic metres (m³) of material, including approximately 41,900 m³ of sulphide-bearing material (i.e., pyritic slate) from local excavation projects and approximately 57,800 m³ of non-acidic quarry rock. The resultant sloped infill area will be entirely contained within the Project Area (see figure). Sulphide-bearing rock will be placed only below the lowest low tide level (-1.281 m CGVD 2013 vertical datum) and limited to a maximum water depth of 1.0 m below lowest low tide (i.e., -2.281 m CGVD 2013 vertical datum). This material will then be capped with non-sulphide rock, which will be placed on a depth of 1.0 m below lowest low tide to a geodetic elevation of 2.1 m (Figure 2). All material to be used for fill will be free of polluting substances.

Fill will be placed by end-dumping from tandem trucks. An excavator will be used to push the infill material into the water lot, working seaward from the existing shoreline. A silt curtain will be installed around the Project Area prior to the commencement of inwater Project activities. Infilling activities will be visually monitored, and additional mitigation will be implemented as necessary in the event that a visible sediment plume migrates beyond the silt curtain. No dredging is expected to be conducted prior to infilling.

To access the Project Area, a temporary gravel access road is proposed on the western side of the property to Maitland Street. The intention is for the infilled Project Area to provide enhanced waterfront access and land that will eventually enable future development. Although the design of the future development structure is contingent upon infill approval, it is anticipated that it will have a minimum geodetic elevation of 3.17 m (CGVD 2013 vertical datum).

[...]

18. With respect to anticipated impacts, 419 NSL stated, in part:

Once complete, Project infilling activities will result in the permanent loss of water column and benthic fish habitat within the approximately 2.7 ha Project Area. This will be partially offset through the addition of sloped backfill consisting of hard substrate (i.e., pyritic slate and non-acidic quarry rock). The existing benthic habitat within the Project Area is of relatively poor quality and low productivity. The majority of the infill area is

predominantly covered by soft silty sand, with localized areas of mixed substrate and hard substrate. Benthic macrofauna were found to be present in lower abundances in areas with soft substrates and in higher abundances in areas dominated by hard substrates. Marine macroflora were generally concentrated in areas with hard substrates, although a small eelgrass patch approximately 3 m in diameter was encountered on substrate consisting of silt and sand.

[...]

Transport Canada Consultation Process

19. At or around the time of 419 NSL's application for approval was filed, and up until June 10, 2022, Transport Canada opened a period to submit comments. During this period submissions were made by interested parties.
20. On June 8, 2022, COVE wrote Transport Canada providing insight into the effect the Work would have on COVE's operations. More specifically, COVE advised that the Work would prohibit or significantly impede safe navigational access to the floating docks area on the Applicant's Lot.
21. On or about April 8, 2024, the Minister issued the Decision to approve the Work pursuant to section 7(6) of the *Act*, subject to certain conditions.
22. Pursuant to section 7(7) of the *Act*, the Minister must consider the following when determining whether to issue an Approval:
 - (a) the characteristics of the navigable water in question;*
 - (b) the safety of navigation in that navigable water;*
 - (c) the current or anticipated navigation in that navigable water;*
 - (d) the impact of the work on navigation, including as a result of its construction, placement, alteration, rebuilding, removal, decommissioning, repair, maintenance, operation or use;*
 - (e) the impact of the work, in combination with other works, on navigation, if the Minister is provided with, or has in his or her possession, information relating to that cumulative impact;*
 - (f) any Indigenous knowledge that has been provided to the Minister;*
 - (g) any comments that he or she receives from interested persons within the period provided for under subsection (4);*
 - (h) the record of compliance of the owner under this Act; and*
 - (i) any other information or factor that he or she considers relevant.*

23. In subsequent meetings with Transport Canada on or about May 3, 2024, COVE was informed that the Work would in fact impact navigation unless the Work was changed, or COVE's facility was altered.
24. During the period of consultation and after, a significant number of submissions were made by COVE and other interested persons. COVE highlighted the significant and material negative impact the Work would have on navigation in the area of the Water Lot. Despite these concerns, the Minister, or someone on his behalf, issued the approval.
25. The area of proposed infill will directly interfere with navigation in and around the area of COVE's heavily utilized floating docks which encroach within the Water Lot. COVE has a license to encroach on a portion of this area pursuant to a June 11, 2014 Encroachment Agreement with 419 NSL's predecessor in title.
26. In the event the Work, as proposed, is allowed to proceed, tenants of COVE's facility will be restricted in their ability to navigate the Applicant's Lot and the Water Lot with vessels that provide a public service such as those affiliated with the Canadian Military and Coast Guard, emergency services, transportation and academia. Such vessels will be impaired with respect to navigation as a result of restricted ability to safely dock and depart COVE's facility.
27. In particular, for those vessels and research operations using the floating docks at COVE's facility, in the event the Work is allowed to proceed, these operations may cease all together at COVE's facility.
28. Further, the location of the Work as originally proposed by 419 NSL is 44°39'51.0"N 63°33'29.0"W. The Work will directly interfere with COVE's already approved Stella Maris subsea platform, which directly abuts the proposed location of the Work, and is located at 44°39'45.0"N 63°33'31.0"W. If the Work is carried out as approved by the Minister, it will prevent the ongoing operation of the Stella Maris subsea platform in the location as previously approved by the Minister.
29. Additionally, infilling in the area of the Water Lot will further restrict the navigable area larger vessels utilize when accessing COVE's terminal.

The Decision should be Quashed and Set Aside

30. The Decision of the Minister, or that which was made on his behalf, should be quashed and set aside for the following reasons:

- a. When considering the information submitted or available to him when approving the Respondent 419 NSL's application, the Minister's decision was unreasonable as he failed to consider:
 - i. the geographic and environmental setting at the Water Lot;
 - ii. the land use information at the Water Lot;
 - iii. the project activities as proposed by the Respondent 419 NSL including the planned period of time of operational disruption to place the Work.
 - iv. the cumulative impact of the Work on navigation when considered in combination with other works, and specifically, the impact of the Work in combination with work approved under file number 2021-203626 relating to the Stella Maris subsea platform given the Minister was directly familiar with file number 2021-203626, having approved it on or about February 25, 2021;
 - v. the characteristics of the navigable water in question and specifically the enterprises, including the Applicant's, which rely on unimpaired navigation of the area surrounding the Applicant's Lot and the Water Lot, as that area exists presently;
 - vi. the impact the Work would have on the safety of navigation by vessels of varying sizes which utilize the navigable waters surrounding the Applicant's Lot and the Water Lot year-round; and
 - vii. the impact of the work on navigation, as a result of the Work including the hazards, both temporary and permanent created by construction, placement, alteration, rebuilding, removal, decommissioning, repair, maintenance, operation or use of the Water Lot as the Work proceeds;
- b. The Decision did not reach a reasonable conclusion in light of the facts presented to the Minister by the Applicant and other interested parties;

- c. The Decision is unreasonable as it lacks justification and transparency;
- d. The Minister did not consult, or did not appropriately conduct, consultation with Indigenous First Nations in order to obtain and consider any Indigenous knowledge regarding the Water Lot;
- e. The Minister failed to discharge his duty of procedural fairness by failing to provide sound, or any, substantive reasons justifying the Decision given the particularly harsh consequences the Decision has on the Applicant's current and future operations, the analytical nature of the statutory scheme and the Applicant's legitimate expectations that the consultation process would consider the factors set out at section 7(7) of the Act;
- f. Such other grounds as may appear on receipt of the Certified Record.

Materials Relied Upon

This Application will be supported by:

1. This Notice of Application;
2. Such affidavits of the Applicant and/or other deponents as this Honourable Court may permit;
3. The Certified Record as requested below; and
4. Other material as counsel may advise and this Honourable Court may permit.

Rule 317 Request – Certified Tribunal Record

The Applicant requests, pursuant to Rule 317(1) of the *Federal Court Rules*, that the Minister send to the Applicant and to the Registry certified copies of all material that was before the Minister or his delegate when he made the Decision including, without limiting the generality of the foregoing, all material in relation to file 2022-206446, copies of all comments, internal and external reviews, notes, memoranda, analyses, correspondence, electronic communications or other records disclosing, containing or underlying the reasons for which the Minister made the Decision (the "Certified Record").

DATED at Halifax, Nova Scotia this 8th day of May, 2024.

DYLAN A.F. MacDONALD
A Barrister of the Supreme
Court of Nova Scotia

Nancy G. Rubin, K.C.
and Dylan A.F. MacDonald
Stewart McKelvey
Queen's Marque
600-1741 Lower Water Street
Halifax, NS B3J 2X2
Tel: 902.420.3200
Fax: 902.420.1417
**Solicitors for the Applicant,
INSTITUTE FOR OCEAN RESEARCH
ENTERPRISE**

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the 8

day of May A.D. 2024

Dated this 8 day of May 2024

**Adam Young
Registry Officer
Agent du greffe**