

Federal Court



Cour fédérale

**Date: 20230731**

**Docket: T-1809-21**

**Citation: 2023 FC 1042**

**Ottawa, Ontario, July 31, 2023**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**VERONICA ANDREA PIATKA-WASTY and  
JOHN SYMON WASTY**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS AND JUDGMENT**

**I. INTRODUCTION**

[1] By a Notice of Application filed on November 26, 2021, Ms. Veronica Piatka-Wasty and Mr. John Symon Wasty (the “Applicants”) seek judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, of a decision (the “Decision”) made by Fishery Officer Wilhelmina Jansen (the “Officer” or “Ms. Jansen”) on October 27, 2021. The Officer is employed with the Department of Fisheries and Oceans (“DFO”).

[2] The Applicants seek the following relief [*sic* throughout]:

1. The following declarations:
  - a. The Decision that a harmful alteration, disruption or destruction of fish habitat (a “HADD”) has occurred and continues to occur as a result of the construction and existence of the dock, pilings, and ramp on the foreshore of the Property (the “Works”) is unreasonable and was made without any objective evidentiary basis, resting entirely on a speculative, uninformed opinion that is itself capricious and unreasonable, and unsupported by any science or measurable assessment of consequence to the “critical habitat”.
  - b. Contrary to section 18.1(4)(b) the Decision and the Direction breach the requirements of natural justice, procedural fairness or other procedures that were required to be observed in making the Decision in the following respects:
    - i. By directing the Applicants to engage in a self assessment and determine if the proposed installation would create HADD of fish habitat, and thereafter ignoring or failing to consider this assessment in its consideration of the dock, pilings and ramp;
    - ii. Failing to provide the Applicants with notice that an assessment resulting in the Decision was being undertaken, and failing or refusing to provide them an opportunity to make submissions regarding the Applicants’ initial assessments and installation of the of the dock, pilings and ramp;
    - iii. Failing to obtain or consider the relevant background information, including but not limited to the existing approvals and opportunities for review of the dock, pilings and ramp by provincial and federal agencies and the system of self assessment directed by DFO in the context of and in relation to section 35 of the Fisheries Act;

- iv. Denying the legitimate and reasonable expectations of the Applicants by:
    - 1. Purporting to engage in a regulatory course of conduct, then reverting to a unilateral prohibition;
    - 2. Singling the Applicants' dock, pilings and ramp out when there are hundreds of similar docks in the designated critical habitat; and
    - 3. Disregarding the Interim Sanctuary Measures found in the 2021 management measures to protect Southern Resident killer whales and the areas identified in that plan as "high traffic";
  - v. Demonstrating bias in the making of the Decision including, but not limited to receiving submissions and complaints from other agencies or persons and failing or refusing to disclose the same or provide an opportunity to be heard in order for the Applicants to reply or rebut the complaints and information assumed;
  - vi. Requiring immediate action on the Direction in the absence of any evidence of emergency so as to limit, prevent or preclude due process in all of the circumstances;
  - vii. Failing or refusing to provide the Applicants with notes, records or observations purporting to form the basis for the Decision, despite request;
  - viii. Such further and other failures as counsel may advise at the hearing and this Court may permit.
- c. Contrary to section 18.1(4)(c) of the Federal Court Act, DFO has misconstrued section 35 of the Fisheries Act, and failed to undertake the process and assessment required by section 34.3, erring in law.

- d. Contrary to section 18.1(4)(d) DFO has based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it:
  - i. the Decision lacks an evidentiary basis, or in the alternative any material opinion or any observations formed after the Works were installed in and about August 14, 2020, or more particularly since June 4, 2021 or thereafter is not a reasonable assessment of the actual site conditions and is incomplete and inconsistent with the professed management of killer hales by the Minister and instead brings the DFO in its management role into disrepute;
  - ii. DFO process with respect to the installation of private moorages requires applicants to self assess if a proposed installation will create a HADD of fish habitat. The self assessment undertaken in this case, at the invitation of the DFO was substantive engaging site-specific data and professional review, and remains correct that there is no HADD impact from the Works. It is unreasonable for DFO to challenge that assessment without obtaining the self assessment, evidence and rationale in support and without undertaking a considered, or any assessment of it;
  - iii. the Decision was biased, made using information and assessment based on supposition supplied by third parties with unrelated interests to whale conservation;
  - iv. the Decision fails to engage section 35 of the Fisheries Act as there is no work, undertaking or activity in relation to the placement or siting of the dock, pilings and ramp all of which are considered and approved by provincial and federal agencies;
  - v. Such further and other grounds as counsel may advise at the hearing and this Court may permit.

2. An order quashing the Decision;
3. Without prejudice to the Applicants' position that the dock, pilings and ramp do not offend any part of the Fisheries Act, and with a view to providing legal certainty, an interim and/or interlocutory injunction suspending and/or staying the Decision pending the determination of this application, retroactive to November 18, 2021;
4. Costs in favour of the Applicants; and
5. Such further and other relief as counsel may advise and this Court may permit.

## II. THE DECISION

[3] The Decision provides as follows:

**This is a legal direction pursuant to subsection 38(7.1) of the *Fisheries Act*.**

**Description of Occurrence:**

Fisheries and Oceans Canada - Conservation and Protection (DFO - C&P) has reasonable grounds to believe that a harmful alteration, disruption or destruction of fish habitat has occurred and continues to occur as a result of the construction and existence of the dock, pilings, and ramp, on the foreshore of the property located at 1301 MacKinnon Road, North Pender Island, British Columbia (BC). These works, undertakings or activities have resulted in a contravention of subsection 35(1) of the *Fisheries Act*.

[...]

Based on observations made during the site visit on June 4, 2021, Fisheries and Ocean Canada Science (DFO-Science) and DFO-C&P, has determined that the following harmful alteration, disruption or destruction of fish habitat has occurred and will continue if immediate corrective measures are not taken:

- **The construction of the dock, pilings and ramp has occurred in an area of significant importance to both the Threatened Biggs (Transient) Killer Whale population and falls within the endangered Southern Resident Killer Whale (SRKW) critical habitat, and**

**represents an ongoing physical impediment to the general movement patterns and behaviour of Killer Whales.**

**It is DFO's opinion that these structures are a physical impediment to both Bigg's and SRKW movement in an area of high frequency of occurrence and constitutes destruction of SRKW critical habitat.**

**Immediate Corrective Measures to be Taken:**

Fishery Officer Wilhelmina Jansen is satisfied on reasonable grounds that immediate action is required to take corrective measures consistent with public safety and with the conservation and protection of fish and fish habitat to prevent the occurrence or to counteract, mitigate or remedy any adverse affects that result from the occurrence or might reasonably be expected to result from it.

Pursuant to subsection 38(7.1) of the *Fisheries Act*, you are hereby Directed by Fishery Officer Jansen to take the following corrective measures pursuant to subsection 38(7.1) of the *Fisheries Act*:

- Retain a Qualified Environmental Professional (QEP) with expertise in marine waters/Species at Risk (SARA) Critical Habitat to assess, develop, implement and oversee a removal plan for the dock, pilings, and ramp on the foreshore of the property located at 1301 MacKinnon Road, North Pender Island, BC by November 18, 2021 at 14:00 hrs.
- The QEP shall develop a removal plan that also takes into account the DFO timing windows for the removal works, and includes on site Marine Mammal monitoring to ensure during corrective measures work that there are no Marine Mammals present and no further impacts to SRKW.
- The removal plan must be submitted to Fishery Officer Jansen by December 2, 2021 at 1400hrs.

[...]

[*Emphasis in original*]

[4] At the hearing, the parties advised that the operation of the decision would be stayed pending the outcome of this application.

### III. BACKGROUND

[5] The following facts and details are taken from the Certified Tribunal Record (“CTR”) filed by the Respondent pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), the affidavits filed by the parties, together with the attached exhibits; and the transcripts of cross-examinations undertaken upon those affidavits.

[6] The Applicants live on Pender Island, one of the “Gulf Islands” of British Columbia. In 2009, an area of the Southern Gulf Islands was designated as Critical Habitat for Southern Resident Killer Whales (“SRKW”), pursuant to the *Species at Risk Act*, S.C. 2002, c. 29 (“SARA”).

[7] Protection of the SRKW under the SARA involves development of a Recovery Strategy. A goal of the Recovery Strategy is to protect the transit of marine life in water.

[8] Although many of the documents filed in this application refer to “Critical Habitat” and the Recovery Strategy, the focus here is upon the Decision made by the Officer, and the process and procedures she chose in arriving at that Decision.

#### A. *The Parties*

[9] The Applicants are the owners of waterfront property at 1301 MacKinnon Road, North Pender Island, British Columbia. In 2020, between May and August, they installed a dock along the waterfront of their property. This waterfront is on the east side of Swanson Channel. That body of water is transited by vessels and by fish.

[10] The Respondent represents the Minister of Fisheries and Oceans. Pursuant to the Rules, the Attorney General of Canada is the Respondent (the “Respondent”) in this proceeding.

B. *The Affidavits*

[11] Each party filed affidavits as part of their respective application records.

[12] The Applicants filed the following affidavits:

- Affidavit of Dr. Andrew Trites, sworn on December 29, 2021;
- Affidavit of Mr. Dean Johnson, sworn on December 23, 2021;
- Affidavit of Ms. Melody Parker, sworn on November 26, 2021;
- Affidavit of Mr. David McKerrell, sworn on December 21, 2021;
- Affidavit #1 of Mr. Corey Johnson, sworn on December 21, 2021; and
- Affidavit #2 of Mr. Corey Johnson, sworn on December 21, 2021.

[13] The Respondent filed the following affidavits:

- Affidavit of Dr. Sheila J. Thornton, affirmed on February 4, 2022; and



- Affidavit of Ms. Wilhelmina Jansen, affirmed on February 3, 2022.

C. *The Deponents*

[14] Dr. Trites is a professor and director of the Marine Mammal Research Unit at the Institute for Oceans and Fisheries at the University of British Columbia. He attached, as an exhibit to his affidavit, a review of the Impact Statement prepared for the Officer by Dr. Thornton. In this document, Dr. Trites described the physical characteristics of the area that is the subject of the Decision. He also commented on the movement of killer whales (*Orcinus orca*) in this area.

[15] Mr. Dean Johnson is the marine Department Manager at Terra Remote Sensing Inc. He provided a survey report, dated December 23, 2021, together with renderings of the undersurface and shorelines at various points on North Pender Island.

[16] Mr. D. Johnson also provided maps and charts that included visualizations of the Applicants' dock.

[17] Ms. Parker is a legal assistant at Cox Taylor, lawyers for the Applicants. In her affidavit, she provided a printout from a Government of Canada website titled "2021 management measures to protect Southern Resident killer whales". She also attached maps and several screenshots of Swanson Channel and North Pender Island from Google Maps.

[18] Mr. McKerrell is a permit agent at Island Marine Construction Services Ltd. ("Island Marine"), and acted as such for the Applicants. He described his familiarity with marine life in

the Gulf Islands and his work in the construction of private docks over a number of years, including consultations with the Ministry of Forests, Lands and Natural Resource Operations (“FLNRO”) and Rural Development of the Province of British Columbia. He also referred to his interactions with DFO over the years.

[19] Mr. McKerrell provided a chronology of relevant events, including his interactions with the former owners, the selection of the site for the dock, and the steps taken to obtain a “Specific Permission for Private Moorage” from British Columbia’s FLNRO. His chronology also included details about his dealings with DFO and the construction of the Applicants’ dock.

[20] Mr. McKerrell also deposed about a Baseline Habitat Assessment dated September 30, 2016, that had been obtained by Island Marine, and the steps taken to ensure that there was no HADD, that is the “harmful alteration, disruption or destruction of fish habitat” (“HADD”).

[21] Mr. McKerrell also referred to information received from Mr. Corey Johnson, another employee of Island Marine, of a complaint on July 30, 2020 from a woman who appeared on the site and “yelled at the construction crew to stop”.

[22] Mr. McKerrell deposed about a public process of advertising that was engaged following receipt of a letter by Island Marine from FLNRO. That letter, dated January 27, 2016, also set out that the application review would include referrals to First Nations, other government agencies, local government, and the public.

[23] Mr. Corey Johnson is a managing partner at Island Marine. He provided two affidavits, each sworn on December 21, 2021.

[24] In his first affidavit, sworn on December 21, 2021, Mr. Johnson provided general information about Island Marine and commented on its approach to the construction of docks in the Southern Gulf islands. He also discussed his direct involvement with the Applicants' dock.

[25] Mr. Johnson outlined the safety measures and best management practices that the Island Marine crew used to avoid issues with marine mammals. He expressed his opinion that the dock was not a HADD. He acknowledged intermittent communications from Islands Trust between August 2020 and October 2021, about the location of the dock within applicable set backs.

[26] Mr. Johnson described the components of the dock. He also deposed that the cost of installing the Applicants' dock was "well in excess of \$200,000" and that the estimated cost of removal is "in excess of \$100,000, or more depending on the scope of environmental/consultants reporting required."

[27] Mr. Johnson deposed that he is unaware that any of the "approximately 600 private moorage docks in the service area" had received more or "better permitting" than the Applicants' dock.

[28] As well, Mr. Johnson deposed about his dealings with DFO regarding the Applicants' dock.

[29] In Mr. Johnson's second affidavit, he gave particulars of the site and the considerations taken into account in the placement and installation of the Applicants' dock. He provided his observations of the site's undersurface and shoreline and commented on the depth of water in the area surrounding the dock.

[30] Mr. Johnson attached photographs of the dock, during its installation and after completion, as exhibits to his affidavit.

[31] Dr. Thornton is a research scientist with DFO. In her position, she primarily evaluates anthropogenic impacts on cetaceans with a focus on SRKW.

[32] Dr. Thornton presented an overview of the issues she considered when she prepared her impact statement and the process and considerations that led to her conclusion that the Applicants' dock is a destruction of SRKW critical habitat. She deposed that she was requested by the Officer to provide an "opinion as to whether the Dock constituted destruction of critical habitat".

[33] In her affidavit, Dr. Thornton commented on the frequency of SRKW sightings in the relevant area and deposed that the location of the Applicants' dock is in SRKW's preferred habitat from June to October. She also provided information about the bathymetric profile and the substrate of the area around the Applicants' dock.

[34] Dr. Thornton also reviewed Dr. Trites' affidavit and expressed the opinion that he was "incorrect" about the transit of SRKW in the area of the dock. She gave information about the identification of SRKW critical habitat in Swanson Channel and outlined the reasons underlying her conclusion.

[35] Ms. Jansen is the Officer who made the Decision that is the subject of this application. She works as a fishery officer in the Whale Protection Unit. She described her duties and daily activities.

[36] Ms. Jansen attached a copy of "Canada's Action Plan and Recovery Strategy for the Northern and Southern Resident Killer Whales" as an exhibit to her affidavit. She also deposed to the efforts undertaken by Canada to protect the SRKW.

[37] Ms. Jansen gave a timeline and overview of her investigation into the status of the Applicants' dock, and whether it caused a HADD. She mentioned her communications with Mr. McKerrell on October 20, 2021, and referred to the documents she received from him later that day.

[38] Ms. Jansen also deposed that she spoke with Mr. "Cory [sic] Johnson" on October 27, 2021. She deposed that she "contacted" Mr. McKerrell on October 27, 2021 and "obtained a telephone number for the Applicants so that I could contact them personally".

[39] As well, Ms. Jansen deposed that she “made a long distance telephone call” to Ms. Piatka-Wasty on October 27, 2021. She deposed that she intended to “communicate the details of the corrective measure and to discuss the New Dock Development with her”.

[40] In her affidavit, Ms. Jansen purported to outline the reasoning that underlay her issuance of the Decision on October 27, 2021.

[41] Only Dr. Thornton and the Officer were cross-examined upon their affidavits. The transcripts of those cross-examinations were filed by the Applicants as part of their Application Record.

D. *The Certified Tribunal Record*

[42] The Officer’s Decision was based upon her review of the documents contained in the CTR that was produced pursuant to Rule 318 of the Rules.

[43] The CTR includes the following certificate that was signed on December 16, 2021:

I, Wilhelmina Jansen, Fishery Officer, Department of Fisheries and Oceans Canada, hereby certify that the documents attached to this certificate are true copies of the documents that were considered when I provided the direction pursuant to subsection 38(7.1) of the Fisheries Act dated October 27, 2021 to Veronica Andrea Piatka-Wasty and John Symon Wasty.

[44] The CTR consists of the following documents:

- The Officer’s Notes;

1. Scanned notes about her site visit with FFHPP Biologist Mr. Andrew MacInnis, dated August 5, 2020.
  2. Scanned notes about her site visit with Mr. MacInnis, dated October 6, 2020.
  3. Scanned notes about her site visit with Dr. Sheila Thornton, dated June 4, 2021.
  4. Scanned notes about her conversation with Mr. McKerrell, dated October 20, 2021.
  5. Scanned notes about her conversation with Dr. Thornton, dated October 22, 2021.
  6. Scanned notes about her conversation with Mr. McKerrell, dated October 26, 2021.
  7. Scanned notes about her conversation with Mr. Corey Johnson and Ms. Wasty, dated October 27, 2021.
  8. Scanned notes about her conversation with the Applicant, Ms. Wasty, dated October 28, 2021.
- Correspondence with Habitat Biologists;
9. Emails between the Officer and Donald Koop, dated May 19, 2020.
  10. Email from the Officer to Mr. MacInnis, dated July 21, 2020. This document includes the Pacific Region Fish Habitat Occurrence Screening Form (“Annex 4”).
  11. Emails between the Officer and Mr. MacInnis, dated July 28, 2020.
  12. Emails between the Officer and Mr. MacInnis, dated July 28, 2020.
  13. Emails between the Officer and Mr. MacInnis, dated July 28, 2020.
  14. Emails between the Officer and Mr. MacInnis, dated September 9, 2020.
  15. Emails between the Officer and Mr. MacInnis, dated October 2, 2020.
  16. Emails between the Officer and Mr. MacInnis, dated October 2, 2020.
  17. Emails between the Officer and Mr. MacInnis, dated October 23, 2020.
  18. Email from the Officer to Mr. MacInnis, dated November 17, 2020.
  19. Email from the Officer to Mr. MacInnis, dated November 30, 2020.

20. Emails between the Officer and Mr. MacInnis, dated February 3, 2021. This document includes Mr. MacInnis' completed Annex 4.
  21. Emails between the Officer, Ms. Brenda Rotinsky, Mr. Brad Wattie, Mr. Dustin DeGagne, Mr. Donald Koop, Mr. Derek Chung, Ms. Holly Pulvermacher, Mr. MacInnis and Mr. Vince Harper, dated February 3, 2021.
  22. Email from the Officer to Mr. MacInnis, dated February 15, 2021. This documents the Officer's comments on the draft of Annex 4.
  23. Emails between the Officer, Mr. MacInnis, Mr. Koop, and Ms. Rotinsky, dated March 1, 2021. This document includes an updated Annex 4 draft.
  24. Email from the Officer to Mr. MacInnis, dated March 17, 2021.
- Correspondence with Island Marine Construction Services Ltd.;
25. Email from Mr. McKerrell to the Officer and Mr. Corey Johnson, dated October 20, 2021. This document includes several email attachments from Mr. McKerrell. In particular, it includes an approved Management Plan; Notice of Final Review; Specific Permission; Crown Land Tenure Application; Client Acknowledgment Letter; emails; the Foreshore Study; and the General Permission Document.
  26. Emails between the Officer and Mr. McKerrell, dated October 22, 2021.
- Correspondence with Dr. Sheila Thornton; and
27. Emails between the Officer and Dr. Thornton, dated March 19, 2021. This document includes Mr. MacInnis' Annex 4 draft.
  28. Emails between the Officer and Dr. Thornton, dated August 5, 2021.
  29. Emails between the Officer and Dr. Thornton, dated September 16, 2021. This document includes Dr. Thornton's Impact Statement and an article titled "Natural Entrapment of Killer Whales (*Orcinus orca*): A Review of Cases and Assessment of Intervention Techniques.
  30. Emails between the Officer and Dr. Thornton, dated October 21, 2021.
  31. Emails between the Officer and Dr. Thornton, dated October 22, 2021.
  32. Emails between the Officer and Dr. Thornton, dated October 27, 2021. This document also includes Dr. Thornton's Impact Statement and the article attached to her email to the Officer on September 16, 2021.



33. Email from the Officer to Dr. Thornton, dated November 18, 2021.
  34. Tab 34: Emails between the Officer, Dr. Thornton, Mr. Thomas Doniol-Valcroze, and Sean MacConnachie, dated November 22, 2021.
  35. Emails between the Officer, Dr. Thornton, Mr. Thomas Doniol-Valcroze, and Sean MacConnachie, dated November 22, 2021. This document includes the final Impact Statement.
- Correspondence with the Applicants and Applicants' Counsel.
36. Email from the Officer to Ms. Wasty, dated October 27, 2021. This document includes the Direction to take Immediate Corrective Measures.
  37. Letter to Applicants' Counsel, dated November 12, 2021.

#### IV. PROCEDURAL HISTORY

[45] By a Notice of Motion filed on February 16, 2022, the Applicants sought the production of further materials pursuant to Rule 317 of the Rules, that is about the contents of the CTR, as well as leave to file a supplementary affidavit following receipt of the requested material.

[46] After a hearing on February 22, 2022, the Motion was dismissed by Order of Associate Judge Coughlan. In her reasons, the Associate Judge found that there were sufficient materials available in the CTR that had been produced to permit the Applicants to advance their arguments about bias and procedural fairness relative to the Officer.

[47] The Applicants did not appeal this Order.

[48] On June 1, 2022, the Applicants filed a Notice of Motion seeking leave to file two more affidavits from Dr. Trites, for leave to file a supplemental Application Record and for the production of more documents to supplement the material produced in the CTR.

[49] By Order issued on August 10, 2022, the Motion was dismissed. In her Reasons, Justice Pallotta determined that the supplemental affidavits would not be relevant or helpful in the disposition of the within proceeding.

[50] Justice Pallotta was not persuaded that the request for further documents to supplement the CTR were relevant and admissible. She also expressed a view that this request from the Applicants was in the nature of a “fishing expedition”.

[51] No appeal was taken from this Order.

#### V. OBJECTION TO AFFIDAVITS

[52] Both parties moved to strike the affidavits filed by the opposing party.

[53] On September 13, 2022, the Applicants filed a Notice of Motion seeking to strike, in whole or in part, together with attached exhibits, the affidavits filed by the Respondent.

[54] For his part, the Respondent seeks to strike the affidavits of Dr. Trites, Ms. Parker, Mr. Dean Johnson, the two affidavits of Mr. Corey Johnson, and parts of the affidavit of Mr. McKerrell.

[55] A Case Management Conference was held before Associate Judge Ring on August 30, 2022. The Associate Judge ordered that the Applicants could file a Notice of Motion to strike out all or portions of the Respondent's affidavits and that the Motion would be heard at the hearing of the underlying application for judicial review.

[56] Although initially these Motions were due to be argued at the beginning of the hearing, the parties made their submissions in the course of arguments upon the substance of the judicial review application.

[57] It is well known that, generally, only the evidence that was before the decision-maker is admissible upon an application for judicial review. I refer to the decision in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (F.C.A.). However, there are exceptions to that rule, as discussed in this case, at paragraph 20 as follows:

[20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (*[reference omitted]*). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

- (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: *[citations omitted]*. [...]
- (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative

decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness: [*citation omitted*]. [...]

- (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: [*citation omitted*].

[58] The Applicants object to the affidavit of the Officer on the basis that it improperly expands upon her Decision. They object to the affidavit of Dr. Thornton on the basis that it supplements the original Decision and does not conform with Rule 52.1, which addresses expert witnesses.

[59] The Respondent complains that the affidavit of Mr. McKerrell includes, as exhibits, documents that were not before the Officer. These documents bear dates between February 2014 and November 2021.

[60] I agree with some of the objections of the parties about the respective affidavits, for example, that the opinion of Dr. Trites cannot be accepted as “competing” science. However, it is acceptable as background information and for clarification as to the site of the dock.

[61] The evidence of Mr. McKerrell, Mr. Dean Johnson and Mr. Corey Johnson is likewise admissible as background information. Had the Applicants been given notice of the investigation, they would have had the opportunity to submit relevant documents.

[62] The affidavit of Ms. Parker, including the exhibits, is essentially factual information.

[63] I agree with the criticism leveled by the Applicants about the affidavits of Ms. Jansen and Dr. Thornton.

[64] The Applicants complain that Ms. Jansen supplemented her Decision by presenting “further and better” reasons.

[65] In my opinion, the affidavit of the Officer strays into “bootstrapping”, a practice that was criticized by the Federal Court of Appeal in its decision in *Leahy v. Canada (Citizenship and Immigration)*, [2014] 1 F.C.R. 766 at paragraph 145:

[145] In this regard, counsel should be mindful of the limitations of supporting affidavits on judicial review. They cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker. They may point out factual and contextual matters that are not evident elsewhere in the record that were obviously known to the decision-maker. They can also provide the reviewing court with general orienting information, such as how the request for information was handled, how the documents were gathered, and how the task of assessment was conducted. [...]

[66] I agree with the Applicants that the affidavit of Dr. Thornton is a disguised opinion affidavit. She went further than simply describing the process that she followed in preparing the Impact Statement. The Impact Statement was reviewed several times before a final version was produced on November 22, 2021. This was some weeks after delivery of the Decision.

[67] Although the affidavits filed by the Applicants stray beyond the strict requirements set out in Rule 81(1), in the exercise of my discretion, I will not strike them. The affidavits meet one of the exceptions to the rule, insofar as they provide background information. To the extent that the affidavits go beyond that exception, they will be given less weight.

[68] Much the same observations apply to the affidavits filed by the Respondent. To the extent that Ms. Jansen purports to augment the record about the steps she took in making the Decision, the evidence is improper and will be weighed accordingly.

## VI. ISSUES

[69] The Applicants raise the following issues:

1. Are the Decision and resulting Direction unreasonable, and are the Decision and resulting Direction contrary to section 18.1(4)(d) having been based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?
2. Were the Decision and resulting Direction contrary to section 18.1(4)(b) of the *Federal Courts Act* by breaching the requirements of natural justice, procedural fairness or other procedures that were required to be observed in making the Decision?
3. Are the Decision and resulting Direction contrary to section 18.1(4)(c) of the *Federal Courts Act*, erring in law and misconstruing section 35 of the *Fisheries Act* including the following:
  - a. Misconstruing the test under s. 35 of the *Fisheries Act*;
  - b. Disregarding the process and assessment required by section 34.3; and
  - c. Proceeding without jurisdiction?
4. What remedy is appropriate in the circumstances of this case?

[70] The Respondent characterizes the issues as follows:

- A. Preliminary issue: Should the Applicants' affidavits be struck in full or in part?
- B. What is the applicable standard of review?

C. Was the October 27, 2021 Decision unreasonable?

D. Was there a breach of procedural fairness and/or natural justice?

E. What is the appropriate remedy?

## VII. SUBMISSIONS

[71] In addition to the written submissions included in the application records filed by the parties, by a Direction issued on December 22, 2022, the parties were given the opportunity to make further submissions on the issue of bias.

### A. *The Applicants' Submissions*

[72] The Applicants argue that the Decision was made without regard to the evidence, including the evidence about the physical characteristics of the waterway where the dock was installed, and the transit of SRKW and the Threatened Biggs (Transient) Killer Whales in that area.

[73] They submit that the decision fails to meet the standard of reasonableness identified by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653.

[74] The Applicants also argue that the Decision was made in breach of their rights to procedural fairness, including lack of notice, lack of opportunity to make submissions, and real or apparent bias on the part of the decision-maker, that is the Officer.

B. *The Respondent's Submissions*

[75] The Respondent submits that the Officer acted with an open mind and respected the required elements of procedural fairness. He argues that she gave notice to the Applicants' agent and received information about steps undertaken before construction of the dock.

[76] The Respondent further argues that considering the statutory context and the overriding need for protection of the SRKW, a species known to be at risk, the Decision meets the required standard of reasonableness.

[77] In his further submissions filed in January 2023, the Respondent contends that the Officer acted in an impartial manner at all times.

VIII. LEGISLATION

[78] The Decision was made under the authority of the *Fisheries Act* R.S.C. 1985, c. F-14 (the "Act"). The purpose of the Act is found in section 2.1 as follows:

<b>Purpose of Act</b>	<b>Objet de la loi</b>
<b>2.1</b> The purpose of this Act is to provide a framework for	<b>2.1</b> La présente loi vise à encadrer :
<b>(a)</b> the proper management and control of fisheries; and	<b>a)</b> la gestion et la surveillance judiciaires des pêches;



**(b)** the conservation and protection of fish and fish habitat, including by preventing pollution.

**b)** la conservation et la protection du poisson et de son habitat, notamment par la prévention de la pollution.

[79] Section 35 addresses harmful alteration, disruption or destruction of fish habitat.

Subsection 35(1) and paragraph 35(2)(d) are relevant and provide as follows:

**Harmful alteration, disruption or destruction of fish habitat**

**35 (1)** No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.

**Exception**

**(2)** A person may carry on a work, undertaking or activity without contravening subsection (1) if

[...]

**(d)** the harmful alteration, disruption or destruction results from the doing of anything that is authorized, permitted or required under this Act;

**Détérioration, destruction ou perturbation de l'habitat**

**35 (1)** Il est interdit d'exploiter un ouvrage ou une entreprise ou d'exercer une activité entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.

**Exception**

**(2)** Il est permis d'exploiter un ouvrage ou une entreprise ou d'exercer une activité sans contrevenir au paragraphe (1) dans les cas suivants

[...]

**d)** la détérioration, la destruction ou la perturbation est entraînée par l'accomplissement d'un acte requis, autorisé ou permis sous le régime de la présente loi;

[80] The Officer was designated pursuant to subsection 38(1) of the Act which provides as follows:

**Power to designate**

**Pouvoir de désignation**

**38 (1)** The Minister may designate persons or classes of persons as inspectors for the purposes of the administration and enforcement of this Act and may limit in any manner he or she considers appropriate the powers that an inspector may exercise under this Act.

**38 (1)** Le ministre peut désigner toute personne — à titre individuel ou au titre de son appartenance à une catégorie déterminée — à titre d'inspecteur pour l'exécution et le contrôle d'application de la présente loi et peut restreindre, de la façon qu'il estime indiquée, les pouvoirs que ce dernier est autorisé à exercer sous le régime de la présente loi.

[81] The Decision was made pursuant to subsection 38(7.1) which provides as follows:

**Corrective measures**

**(7.1)** If an inspector or fishery officer, whether or not they have been notified under subsection (4), (4.1) or (5) or provided with a report under subsection (7), is satisfied on reasonable grounds that immediate action is necessary in order to take any measures referred to in subsection (6), the inspector or officer may, subject to subsection (7.2), take any of those measures at the expense of any person described in paragraph (4)(a) or (b), (4.1)(a) or (b) or (5)(a) or (b) or direct that person to take the measures at their expense.

**Mesures correctives**

**(7.1)** Même en l'absence de l'avis exigé par les paragraphes (4), (4.1) ou (5) ou du rapport mentionné au paragraphe (7), l'inspecteur ou l'agent des pêches peut, sous réserve du paragraphe (7.2), prendre ou faire prendre, aux frais de la personne visée aux alinéas (4)a) ou b), (4.1)a) ou b) ou (5)a) ou b), les mesures mentionnées au paragraphe (6), ou ordonner à cette personne de le faire à ses frais lorsqu'il est convaincu, pour des motifs raisonnables, de l'urgence de ces mesures.

IX. DISCUSSION AND DISPOSITION

[82] The first matter for consideration is the applicable standard of review. The Decision in question is administrative, made by an Officer acting under the authority of the Act. Following the decision of the Supreme Court of Canada in *Vavilov, supra*, the presumptive standard of review is that of reasonableness.

[83] In considering reasonableness, the Court is to ask if the decision under review “bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”; see *Vavilov, supra* at paragraph 99.

[84] Any issue of procedural fairness will be reviewed on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.).

[85] I refer also to the decision in *C.B. Powell Limited v. Canada (Border Services Agency)*, [2011] 2 F.C.R. 332 at paragraph 33.

[86] I will begin by addressing the arguments about procedural fairness.

[87] In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court of Canada considered the duty of procedural fairness arising under a particular regulatory regime, that is the *Penitentiary Service Regulations*. However, at paragraph 14 it acknowledged the general common law principle that there is “a duty of procedural fairness lying on every public

authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.”

[88] In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at paragraph 50, the Supreme Court of Canada commented on the circumstances when the duty of fairness arises:

Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.

[...]

This was underlined again very recently by this court in *Syndicat des employés de production du Qué. & de l'Acadie v. Can. (Can. Human Rights Comm.)*, *supra*, where Sopinka J. was writing for the majority at pp. 895-96:

*Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.* The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates. [*Emphasis added*]

[89] I refer to the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21 to 28, where the Supreme Court presented a non-exhaustive list of factors that affect the content of procedural fairness. The Supreme Court identified the following factors:

1. The nature of the decision and the process followed in making it;

2. The nature of the statutory scheme and the statutory terms under which the decision maker operates;
3. The importance of the decision to the person or persons affected;
4. The legitimate expectations of the individuals challenging the decision; and
5. The choices of procedure made by the decision maker.

[90] The Applicants focus on the third and fourth factors, although reference was also made to the fifth factor.

[91] The “statutory scheme” is the Act. The purpose of the Act includes providing a framework for “the conservation and protection of fish and fish habitat”.

[92] The availability of discretion allows the Officer freedom in her choice of process, but it does not give free rein to ignore the fundamental obligations of notice to the Applicants, with the opportunity to respond, and the obligation to maintain an open mind, until the end of the investigative process.

[93] In my opinion, the Officer failed on all counts here.

[94] Upon considering the contents of the CTR and the submissions of the parties, I am satisfied that the Decision here was made in breach of the procedural fairness owed to the Applicants.

[95] The Respondent argues that the Applicants are entitled to a minimal degree of procedural fairness and were not entitled to notice of the investigation carried out by the Officer.

[96] I disagree.

[97] The Applicants complain that Ms. Jansen “directed” Mr. MacInnis, an employee of DFO in the preparation of Annex 4, a document that is entitled “Pacific Region Fish Habitat Occurrence Screening Form”. According to the CTR, Ms. Jansen first contacted Mr. MacInnis about an Annex 4 for the Applicants’ property by email on July 21, 2020. She referred to a site visit to that property, planned for August 5, 2020. Her email provides, in part, as follows:

If is *[sic]* aids your search (as per 1.4 of the attached Annex) the old owners were David and Pixie Riddle, and apparently they had applied to install a dock back in 2016 (the complainant indicated that *[redacted in original]* had seen this in an advertisement in the “Island Tides” newspaper). I have no further details to this other than it was in February of 2016 when Shona Smith (FPP) was going to contact the complainant about this, but I do not know where it went from there. If you find any background on this, you can either fill it in to the Annex, or let me know what any Path searches are and I can fill it out.

[98] The version of the Annex 4 sent by Ms. Jansen to Mr. MacInnis refers to a complaint received by DFO on May 11, 2020. No details are given about the complaint.

[99] According to an email from Mr. MacInnis to Ms. Jansen on July 28, 2020, a review of departmental records showed that neither the previous owners nor the Applicants had submitted a plan or proposal to DFO for review.

[100] A version of the Annex 4, as found at pages 46 to 55 of the CTR, was apparently sent to Ms. Jansen by email on February 2, 2021 at 4:41 PM.

[101] By email sent on February 3, 2021 at 9:53 AM, Ms. Jansen advised Ms. Brenda Rotinsky, DFO, that she would not attend a meeting with the FFHPP team without first having had the opportunity to review the Annex 4.

[102] It seems that this email from Ms. Jansen was in response to an email from Ms. Rotinsky sent on February 2, 2021 at 3:14 PM. That email, found at page 57 of the CTR, provides in part as follows:

[...] We would like to communicate our analysis as a result of discussions with Science Brach and through peer review of the file. This has taken longer than we would have liked due to the complexities of how SRKW CH is defined. We provide advice related to docks in the marine (and freshwater) environment frequently and have some suggestions on how to move forward with the owner on how to mitigate if you are interested. However, in order to have a proper discussion, we are looking to meet to go through the annex. FFHPP would love to share our knowledge on the subject and understand your position as well.

[103] On February 15, 2021, Ms. Jansen sent an email to Mr. MacInnis which provides in part as follows:

[...]

I do however have some concerns with the wording of the Annex 4, and our ability to proceed with any type of Corrective Measures, Warning or Prosecution, as the decision contained within this Annex 4 is not defensible.

I have attached the Annex 4 with some comments and highlighted areas that layout some of my concerns.

Please review the attached Annex 4 and my comments, and revise the Annex 4 to reflect the fact that you have considered it not only a “Harmful Alternation [*sic*] to Fish Habitat” but also a “Destruction of Critical Habitat of an Aquatic SARA-listed Endangered or Threatened species” to wit; SRKW (as per 4.2).

**This decision must be very clear and decisive.**

If you are not able to support your decision, with more decisive findings, then I will assume you cannot and will move towards contracting out to get an expert in SRKW Critical Habitat.

**Please let me know as soon as possible if you are able to do this or not. If you are, then please also complete the updated Annex 4 by March 1, 2021.**

I have put a tight timeline as this decision and Annex 4 completion has gone on too long.

Here is the timeline thus far:

- May 11, 2020 – C&P was notified of two pilings that had been placed within SRKW Critical Habitat near 1301 MacKinnon Road, North Pender Island
- July 21, 2020 – Annex 4 submitted to FFHPP Biologist Andrew MacInnis
- August 5, 2020 – Site visit and inspection of pilings and area with FFHPP Biologist Andrew MacInnis
- September 9, 2020 – while on patrol in area, Fishery Officers observed that a dock and associated infrastructure had been installed at site.
- October 6, 2020 – Site visit and inspection of dock and associated infrastructure with FFHPP Biologist Andrew MacInnis
- February 2, 2021 – received completed Annex 4

Please also note that this email, and all emails, notes and drafts are all subject to full disclosure.

[...]

*[Emphasis in original]*



[104] In the email of February 15, 2021, sent at 9:46 AM, Ms. Jansen sent Mr. MacInnis several pages of notes upon the version of Annex 4 that he sent on February 2, 2021. These notes can be found in the CTR as follow:

- Page 67, commenting on page 5 of Annex 4;
- Page 69, commenting on page 6 of Annex 4;
- Page 71, commenting on page 7 of Annex 4;
- Page 73, commenting on page 8 of Annex 4;
- Page 75, commenting on page 9 of Annex 4; and
- Page 77, commenting on page 10 of Annex 4.

[105] The notes that the Officer sent to Mr. MacInnis include the following comment about the section of the Annex 4 regarding the impact of the dock's float and anchors on SRKW:

This section is the most important part of the Annex 4. It is really the "meat and potatoes". The wording contained in this section is the wording that would be used by me to write a "Corrective Measure" that would be given to the owner to compel them to mitigate any impact to SRKW Critical Habitat. The ambiguity of the entire section does not give me the ability to write such a document. It needs to be definitive... the words "Likely" "Potentially" and "Expected" introduce a lack of clarity of any impact.

[106] According to an email sent on March 1, 2021 at 1:51 PM, Mr. MacInnis provided a "slightly updated version of this Annex to provide some additional clarity".

[107] By email sent on March 17, 2021 at 1:18 PM from Ms. Jansen to Mr. MacInnis, she said the following:

I am aware that there has been discussions at a higher level than You and I, about next steps with respect to SARA Critical Habitat, and works that have been conducted, or may be carried out, and that certainly needs to happen; however I need to move forward with the File that we (both You and I) have on North Pender Island at 1301 McKinnon Road.

Given that the Annex 4 that you provided still gives us no “teeth” to follow through with any type of Compel Measures – Corrective Measures or Court Proceedings and given the feedback that was presented to you, and the oversight committee that you submitted and discussed the Annex 4 with, I want to draw up a Sole Source contract with Dr. John Ford so that we can bring him on as an ‘Expert’ in not only SRKW, but SRKW Critical Habitat.

If we can bring on Dr. John Ford, I would also like to propose that You come out on a site inspection so that there is some sort of mentorship between FFHPP and someone who actually had a hand in the writing of the SRKW Recovery Plan and the designation of SRKW Critical Habitat, and can speak to the Form, Function and Attributes of SRKW Critical Habitat.

We really need to focus the Annex 4 on SRKW, and whether or not this particular work constituted a HADD/Destruction of SRKW Critical Habitat.

[108] By email sent on March 18, 2021, Ms. Jansen asked Dr. Thornton for assistance. In her email, Ms. Jansen provided the following context:

[...]

I was speaking with Sean yesterday about some issues that we are having with works being done within SRKW Critical Habitat, and more specifically and [*sic*] issue we are having with respect to a dock that has been installed within the Critical Habitat of SRKW, and Sean suggested that I contact yourself to see whether you would be interested and able to provide an opinion on whether this “work” would have resulted in destruction of SRKW Critical Habitat. I have been working with FFHPP (Fish and Fish Habitat Protection Program) on this issue. I have done 2 site visits with one of their biologists, as per their policy, to determine whether there has been “destruction” of SRKW Critical Habitat, but the information in the Annex 4 (the Annex 4 is basically the Report of

their findings) does not give us an answer as to whether there had been destruction of the SRKW Critical Habitat.

Would this be something that you could help us with?

I would also like to propose that You come out on a site inspection so that there is some sort of mentorship between FFHPP and someone who actually had a hand in the writing of the SRKW Recovery Plan and the designation of SRKW Critical Habitat, and can speak to the Form, Function, and Attributes of SRKW Critical Habitat.

We really need to focus the Annex 4 on SRKW, and whether or not this particular work constituted a Destruction of SRKW Critical Habitat.

I can provide you with more details and a copy of the Annex 4 if you feel that this is something that you would be willing to look at, or if you want to give me a call to discuss further, please give me a shout on my cell phone @ [*telephone number omitted*].

[109] The focus of this email is upon a finding that there has been destruction of SRKW Critical Habitat.

[110] By email sent on March 19, 2021, at 8:00 AM, Ms. Jansen provided Dr. Thornton with the “latest Annex 4” in her possession; this document is dated February 26, 2021.

[111] By email sent on March 22, 2021, at 12:56 PM, Dr. Thornton advised that she had reviewed the Annex 4. She advised as follows:

Thomas and I reviewed the Annex (very well written and researched) and agree that there is destruction of SRKW CH. In addition, there may be impacts to TKW, as they and other marine mammals would be forced to divert their path westward into areas of high vessel traffic, leading to acoustic impacts by moving them closer to the sound source, increased risk of ship strike, and an overall change in behaviour.

If C&P is interested in pursuing action under the SARA and the FA, let us know how we can support you (I am assuming an impact statement would be the first step).

[112] By an email sent on March 30, 2021 at 2:08 PM, Ms. Jansen outlined what she wanted from Dr. Thornton:

Hi Sheila... Than You so much to both yourself and Thomas for reviewing the Annex.

I am not looking for the Annex 4 to state something that You, Thomas or whomever cannot ultimately defend; however we really need the Annex 4 and determination of Destruction of SRKW Critical Habitat to be more decisive... You say in your email that you agree that there has been destruction of SRKW CH, and that statement needs to be supported in this Annex 4.

You will notice on page 9; which is the most important part of the Annex 4 that there is a lot of ambiguity of the entire section given that the words "Likely" "potentially" and "expected" are used multiple times and therefore introduce a lack of clarity of any possible impact of the works, and ultimately the determination that there has been Destruction of SRKW CH.

The wording contained in this section is the wording that would be used by to write a "Corrective Measure" that would be given to the owner to compel them to mitigate any impact to SRKW Critical Habitat, of if we need to go the route of Court.

The ambiguity of the entire section does not give me the ability to write such a document. It needs to be definitive... the words "Likely" "Potentially" and "Expected" introduce a lack of clarity of any impact.

We/C&P would like to pursue this issue under both SARA and the FA if the works are deemed to be Destruction of SRKW Critical Habitat. It would also be really great to inspect the site with one of you and have the FFHPP Biologist there at the same time so that there is some mentorship when it comes to SRKW CH so that they can better speak to what can be supported and what cannot.  
*[Emphasis in original]*

Is that something that you would be willing to do? Certainly we would take whatever COVID protection measures needed for you

to be comfortable, of if you feel confident that you could review the video and further pictures that Andrew McInnis took, and from the Annex 4 you reviewed and give us a more definitive answer as to whether there has been Destruction of SRKW CH.

Thank you again for reviewing the document, and ultimately what we want to achieve is protection of the SRKW CH as per the Recovery Plan, and in doing that will also give better understanding and protection for other species.

*[Emphasis in original]*

[113] In my opinion, Ms. Jansen is going further than asking Dr. Thornton to look at a question.

[114] Dr. Thornton replied to Ms. Jansen on March 30, 2021 by email sent at 2:45 PM and her email provides, in part, as follows:

Hi Willi – I would like to support this to the best of our abilities. As mentioned in my previous email, the area in discussion falls into one of the high frequency of occurrence polygons for SRKW – if we can't protect these areas, we are really failing in our role to uphold the intent of the SARA.

I'll have a look at the sections you have noted below – as scientists, we always speak in terms of uncertainty and likelihood, which I know is problematic for enforcement. However, when it comes to a permanent installation (as opposed to an action resulting in a temporary reduction in the quality of the habitat), we should be able to have more definitive language.

[115] According to the reply from Ms. Jansen, sent on March 30, 2021 at 2:55 PM, she shared Dr. Thornton's opinion about the SARA.

[116] Dr. Thornton made a site visit on June 4, 2021. According to the transcript of her cross-examination, she was on-site, in a Zodiac craft, for approximately four (4) minutes. The Officer could not recall how long she stayed at the site, in a different water craft.

[117] Dr. Thornton worked on the Impact Statement and by email sent on September 14, 2021 at 2:31 PM, she provided a copy to co-workers. In part, she said the following in this email:

[...]

I've drafted up an impact statement for the dock that was constructed on North Pender Island – Thomas, if you could please review and add in anything pertinent to TKW, any references that may support this, and ruthlessly edit, I'd appreciate it.

I'll work with Willi to fill in the first part re: Information on Activities, and it will go to the lawyers who will ensure the wording is defensible (you will notice that I'm not using "likely to" or "high probability", neither of which they appreciate). I'll add in more photos/location information, but remove that this will be one part of a package of information and should be viewed as the "Impact Statement", not the entire description of the activity under investigation.

[...]

[118] This email was apparently forwarded to Ms. Jansen by Dr. Thornton in an email dated September 16, 2021, sent at 3:55 PM. She asked Ms. Jansen for some information and passed on some observations as follows:

[...] I've sent out my draft Impact Statement to Thomas and Sean for comment and would appreciate some information for the first section "Information on Activities Under Investigation" before we finalize the document.

[...] In just a few short years, we've noticed an increase in vessels approaching the whales and experienced some hostility/lack of

respect from the boaters we approached in Johnstone Strait this year (particularly kayaks, who seem to believe they're exempt).

Let me know if there is information you would like to see in the Impact Statement – I'm sure there will be a few more iterations.

[119] A draft of the Impact Statement is found at pages 157 to 177 of the CTR. By email sent on October 21, 2021, Ms. Jansen asked Dr. Thornton to give her “a quick call”, to ask “a quick question about it”.

[120] By email sent on October 22, 2021 at 10:57 AM, Ms. Jansen acknowledged receipt of the Impact Statement and provided Dr. Thornton with details for the background “Information on Activities Under Investigation” as follows:

[...]

Here is some background for the “Information on Activities Under Investigation”

The dock was installed between May and September 2020, and is located adjacent to the property of 1301 MacKinnon Road on North Pender Island, and more specifically at approximately 48 48.43'N and 123 19.63'W. The dock consists of two 0.3m diameter steel piles that are installed 15m offshore from the high water mark (HWM), and into the seabed, a two part suspended gangway, and a 12m X 4m concrete mooring float that is anchored about 2m from the offshore side of the two steel piles and is anchored by four chains with a chain extending from each corner of the float to the seabed.

The entire dock structure runs perpendicular to the shore and extends approximately 29m, from the HWM, and offshore into Swanson Channel.

[121] By email sent on November 16, 2021 at 3:00 PM, Ms. Jansen asked Dr. Thornton if she had made “any updates to the Impact Statement you provided on September 16, 2021”. She also advised that a request had been made for a copy of the Impact Statement.

[122] On November 18, 2021, by an email sent at 12:08 PM, Ms. Jansen asked Dr. Thornton for another “quick call” about the Impact Statement.

[123] Dr. Thornton replied to the Jansen email of November 16, 2021, by email on November 22, 2021 at 10:13 AM, as follows:

I’ve attached the Impact Statement with the added narrative that you provided re: description of the dock, but I never received a document with edits from you. If there were further edits, please let me know. Otherwise, please accept this as the final copy, reviewed by Sean, Thomas and myself, and now containing a more detailed description of the activity.

[124] Ms. Jansen responded by an email sent on November 22, 2021 at 10:42 AM, as follows:

[...] I did not amend your document... I only provided the paragraph to fill in. Thank you to all. This is such an important statement and hopefully we can properly protect Critical Habitat for SRKW and all Killer Whales

[125] In her email of November 22, 2021, Dr. Thornton describes the Impact Statement attached “as the final copy”. The version that appears in the CTR at pages 209 to 216 is dated November 15, 2021.



[126] In my opinion, these entries from the CTR disclose a breach of the Applicants' right to procedural fairness, arising from the lack of notice and the deprivation of the opportunity to participate in the decision-making.

[127] The Respondent argues that the Officer enjoyed a broad discretion in designing the process leading up to the Decision, relying in this regard upon the decision in *Knight, supra* at page 685. However, the fundamental principle of procedural fairness is knowing the case to be met.

[128] The Respondent submits that the Applicants had no right to a specific process and that undertakings, implicit or otherwise, were given. In support, he relies on the decision in *Foster Farms LLC v Canada (International Trade Diversification)*, 2020 FC 656.

[129] In my opinion, these arguments are misplaced. The Applicants do not argue that they were entitled to a specific process but rather, that their fundamental right to notice and the opportunity to participate in the decision-making process were ignored.

[130] I agree.

[131] The CTR shows that the Officer was aware of the dock construction from at least May 5, 2020. Yet no contact was made with the Applicants until October 27, 2021. Contact was made with Mr. McKerrell on October 20, 2021 and with Mr. Corey Johnson on October 27, 2021.

[132] Contrary to the submissions of the Respondent, the last-minute calls to Mr. McKerrell and Mr. Johnson did not constitute “notice” to the Applicants and did not allow them the opportunity to make submissions to the Officer.

[133] In *Conesa v. Canada (Attorney General)*, 2021 FC 632 at paragraph 20, Justice Shore commented on the content of the duty of procedural fairness as follows:

[20] Given the urgency and the role of DFO, balancing the above, the present context gives rise to a lesser duty of procedural fairness. The party affected by a decision must, however, know what it is facing and be given an opportunity to respond, regardless of any deference that may be afforded to the choice of procedure (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 68 at para 56).

[134] The Officer was aware of other docks and structures in the area. There is no evidence that any of those owners were the subject of any investigations by DFO.

[135] The Respondent argues that the Officer acted with due diligence in carrying out her duties pursuant to section 38 and that she enjoyed a broad discretion in doing so.

[136] The arguments about “due diligence” are puzzling. As a public servant, the Officer enjoys the benefit of the presumption that she is properly fulfilling her duties.

[137] The words “due diligence” belong to the domain of negligence law, as an aspect of satisfying the duty of care, as discussed in *Coast Ferries Ltd. v. Century Ins. Co. of Canada et al.*

[1975] 2 SCR 477, or as a defence to a strict liability offence, as in *R. v. Scott*, 2017 BCPC 220

at paragraphs 145 and 293 (B.C. Prov. Ct.). There are no issues of negligence raised in this matter. There is no issue of a charge under the Act.

[138] The Respondent pleads that the telephone conversation between the Officer and Mr. McKerrell at 1:38 PM on October 20, 2020, asking about the construction of the dock and about the permits, if any, obtained for that construction satisfied the Officer's duty to notify the Applicants. According to the Officer's notes, found in the CTR, she advised Mr. McKerrell that the "pile driving and dock were considered destruction of critical habitat of SRKW".

[139] According to these notes, Mr. McKerrell said that he would provide the Officer with everything he had. This appears to be in response to the Officer's inquiries about the process followed before construction, including the self-assessment process that had previously been in place.

[140] The Respondent characterizes Mr. McKerrell as the "agent" of the Applicants and argues that notice to him is notice to the Applicants.

[141] I disagree.

[142] There is nothing in the CTR that supports the idea that Mr. McKerrell was the legal representative of the Applicants for the purpose of notice from DFO.

[143] Further, and more importantly, notice of a potential or existing problem on October 20, 2020, one week before the date of the Decision, cannot be considered disclosure of a case to be met.

[144] The Respondent submits that the content of procedural fairness is minimal in the circumstances contemplated by section 38 of the Act, and that the Officer acted with due diligence in a situation of immediacy.

[145] The Applicants, with reason, question the urgency and immediacy of the Officer's actions and Decision.

[146] According to the CTR, a complaint was made on May 11, 2020, about the construction of the dock. Nothing was said to the Applicants directly until October 27, 2021, when the Officer spoke with Ms. Piatka-Wasty by telephone at 1:37 PM. According to the notes, the Officer advised Ms. Piatka-Wasty that the dock constructed at 1301 McKinnon Road "had caused destruction of Southern Resident Killer Whale habitat and so we were issuing them a corrective measure to come up with a plan for the removal of the dock".

[147] In these circumstances, there was effectively no opportunity for the Applicants to respond or to make submissions.

[148] The Respondent submits that the Officer was not obliged to give notice to the Applicants. I disagree.

[149] In *Canadian Pacific Railway Company v. Canada (Attorney General)*, [2019] 1 F.C.R. 121 at paragraph 56, the Federal Court of Appeal said the following about the basic requirements of the duty of procedural fairness:

No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. [...]

[150] According to the decision in *Baker, supra*, the importance of the interest affected by an administrative decision can affect the content of the duty of procedural fairness that is owed.

[151] The Applicants certainly enjoy proprietary rights in their property. Leaving aside the niceties of riparian rights, the fact remains that proprietary rights cannot be ignored.

[152] The Officer wrote in her notes that she wanted to take a statement from both Mr. McKerrell and Mr. Johnson. No rationale is given. One may wonder why the Officer wanted a statement after the Decision was made.

[153] The Applicants argue that the Officer showed bias and pre-judgment.

[154] In his Supplemental Submissions filed on January 25, 2023, the Respondent pleads that the test for bias is very high and that the Applicants fail to meet it. In this regard, he relies on the decision in *Burlacu v. Canada (Attorney General)*, 2022 FC 1467, where the Court said the following at paragraphs 27 and 28:

[27] Administrative decision makers are presumed to act impartially and with an open mind. Where bias is alleged, the test

is not one of actual bias, but instead a reasonable apprehension of bias: would an informed, reasonable and right minded person conclude that it more likely than not the Decision Maker, whether consciously or unconsciously, would not decide the matter fairly? (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at pages 386 and 394).

[28] The presumption that a decision maker is unbiased is not easily displaced. The threshold for finding a reasonable apprehension of bias is high and the alleging party has a correspondingly high burden. That burden is to be met with clear and concrete evidence. The inquiry to be undertaken is one that is both contextual and fact-specific (*Keita v Canada (Citizenship and Immigration)*, 2015 FC 1115 at para 1; *Grey v Whitefish Lake First Nation*, 2020 FC 949 at paras 23, 24).

[155] The Respondent submits that the Officer maintained an open mind, properly sought advice and information from qualified persons, and gave the Applicants the opportunity to respond.

[156] On the other hand, the Applicants argue that the applicable test for bias is that set out in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, [2009] 2 F.C.R. 417 at paragraph 98:

[98] The determinative test, as stated above, is whether a reasonably well-informed person, viewing the matter realistically and practically, would conclude that there is a reasonable apprehension of bias. [...]

[157] In *Baker, supra* in considering the content of the duty of fairness in a particular case, the Supreme Court of Canada observed that regard must be given to the nature of the decision and the process followed in making it, and the nature of the statutory scheme and statutory terms governing the decision maker.

[158] Here, the decision is an administrative one, made pursuant to subsection 38(7.1) of the Act. The decision requires the exercise of discretion, within the limits of the Act.

[159] The CTR shows that no notice was given to the Applicants. Mr. McKerrell was the agent of the Applicants for the permitting process. This does not mean that he was the “agent” of the Applicants for all purposes, including for the purpose of receiving notice about the investigation around the dock installation.

[160] The CTR contains many entries, records, and materials which suggest that the Officer tried to direct the approach and conclusions of Mr. MacInnis. Many examples have been referenced above.

[161] The parties availed of the opportunity to file further submissions on bias, in particular by reference to the decision in *Chrétien, supra*.

[162] Bias is an aspect of procedural fairness, dealing with the right of a person to get fair treatment in the context of administrative decision making.

[163] I agree with the Respondent that the “context” in the *Chrétien, supra* case is different from that prevailing here. However, the principles about the right to impartial, unbiased treatment remain the same.

[164] In this case, I find the arguments of the Applicants to be more persuasive. I agree that the Officer did not show that she had a “mind open to persuasion”. The record shows that the Applicants were not given the opportunity to “persuade”.

[165] It is unnecessary to show actual bias. According to the case law, the appearance of bias is enough to vitiate the fairness of an administrative decision.

[166] The CTR supports the view that the Officer had a desired goal in sight and did all that she could to achieve it. The CTR shows that she “directed” Mr. MacInnis. In my opinion, she also directed Dr. Thornton.

[167] Since I have concluded that the Decision was made in breach of procedural fairness, it must be set aside. It is not necessary for me to address the submissions made about the merits of the Decision. The Decision cannot meet the standard of reasonableness when a breach of procedural fairness has been shown.

## X. REMEDY

[168] If successful upon this application for judicial review, the Applicants seek an order quashing the Decision, without remitting the matter for re-determination.

[169] The Respondent opposes this disposition and submits that if the Decision is set aside, the matter should be sent back to another officer for re-determination. He argues that this is the “usual” remedy upon an application for judicial review.



[170] Section 18.1(3) of the *Federal Courts Act*, *supra* sets out the powers of the Court upon judicial review as follows:

**Powers of Federal Court**

**(3)** On an application for judicial review, the Federal Court may

**(a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

**(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

**Pouvoirs de la Cour fédérale**

**(3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

**a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

**b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[171] I agree with the Respondent on the question of remedy.

**XI. CONCLUSION**

[172] In the result, this application for judicial review and the Decision will be set aside. All the evidence and submissions of the parties were considered. It is not necessary to address the merits of the Decision, in order to dispose of this application.

[173] Each party asked for the opportunity to address costs, in the event of success upon this application. In the usual course, costs follow the event. A Direction will issue about costs.

**JUDGMENT in T-1809-21**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed, the Decision of the Officer is set aside and the matter is remitted to a different officer for redetermination.

A Direction will issue in respect of costs.

\_\_\_\_\_  
"E. Heneghan"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1809-21

**STYLE OF CAUSE:** VERONICA ANDREA PIATKA-WASTY and JOHN SYMON WASTY v. ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** DECEMBER 14, 15, 19, 20, 21, and 22, 2022

**FURTHER SUBMISSIONS:** JANUARY 9, 25, and 31, 2023

**REASONS AND JUDGMENT:** HENEGHAN J.

**DATED:** JULY 31, 2023

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FOR THE APPLICANTS

Department of Justice

FOR THE RESPONDENT