PART I - OVERVIEW

1. The applicant South March Highlands - Carp River Conservation Inc. seeks judicial review of the decision of the Respondent to approve and commence construction of the Terry Fox Drive Extension ("TFDE") between Richardson Side Road and March Road (the "Project").

2. The Project is part of a much larger TFDE undertaking that was reviewed under the Municipal Class Environmental Assessment ("MCEA") process in 2000. Construction began in 2003. However, section A.4.2.2. of the MCEA provides that where there are significant modifications to a project or changes in its environmental setting an addendum must be issued.

3. On January 7, 2005, the Respondent issued an addendum (the "First Addendum"). Section 12 of the *Environmental Assessment Act* ("EAA") deems any change to an undertaking to itself be an undertaking. The operative portion of section MCEA A.4.2.2 at the time required that construction be proposed to commence within five (5) years. The Respondent did not propose to commence construction until February 15, 2010. As a result, the Project lapsed.

4. In April of 2007 the Respondent released an additional addendum (the "Second Addendum"). It addressed the same undertaking as the First Addendum, was triggered by the same three changes to the Project and was expressly identified internally and in subsequent assessment documents as "an addendum". However, no Notice of Filing, as also required under MCEA A.4.2.2 has ever been issued for the Second Addendum.

5. Since the release of the First Addendum in 2005, there have also been a large number of significant changes to the Project. These include: moving the preferred flood compensation works from the east to the west side of the Carp River; removal of four large stormwater management ponds; realignment of the road to intersect one third of a kilometer from its original

location; removal of a +- $2 million eco-passage to be replaced with a system of culverts that have never been assessed under the MCEA. Cost of the Project has also risen by $8.6 million.

6. Since the First Addendum there have also been a large number of significant changes to the environmental setting of the Project. These include: approval of a restoration plan for the Carp River directly affecting the Project area; designation of more than 200 hectares upstream for additional urban development; the discovery of major errors in the hydrogeological modeling and choice of models used to predict flood levels; the introduction of the *Endangered Species Act, 2007* and the recent discovery of Threatened Species directly within the Project area such as the Western Chorus Frog and Blanding's Turtle. Taken individually each of these modifications to the Project or changes to the environmental setting was likely sufficient to require an addendum. Together, the need for further addendum(s) appears strikingly clear.

7. Overall, the MCEA establishes a detailed process whereby undertakings can be assessed. Initially, the process is conducted and approved exclusively by the proponent. Other agencies such as the Ministry of Environment may comment but have no regulatory role at this first stage.

8. Instead, the process requires the proponent to issue its assessment or addendum, as was initially done here, thereby opening a period of public comment and the right to request that the Minister of Environment issue an EAA Part II Order under the EAA.

9. The MCEA process, leading to the ability to seek Part II Orders provides for many other assessment options not available through any other mechanism. The ability to make submissions to the proponent and other relevant entities, which the MCEA encourages and which both supporters of and experts called by the Applicant have done, does not replace all of the other steps in the process, including filing addenda which are made mandatory under MCEA s. A.4.2.2.

10. By not issuing further addendum(s) statutorily triggered by (i) the lapse in time (ii) the recent characterization of the Second Addendum as an "update" (a option not referenced or described in the MCEA), and (iii) the very widespread modifications and changes to the Project and its environmental setting since 2005, the rights of all members of the public to participate in the MCEA process have been denied.

11. The evidence filed in this proceeding clearly demonstrates that there is scientific controversy regarding many aspects of the Project. The Applicant is not seeking to have this resolved by the courts. Instead, the Applicant requests relief requiring the Respondent to comply with the MCEA process already in place and intended to address such issues.

12. The Applicant, with the consent of the Respondent also requests that this matter be heard under section 6(2) of the *Judicial Review Procedure Act*. Paving of the Project is about to or may already have commenced. The evidence of the Applicant's ecology expert is that this is likely to cause irreversible harm. The Respondent has filed evidence of substantially increased costs as time progresses. Therefore, leave for this motion is also respectfully requested.

PART II – FACTS

Terry Fox Drive Extension

13. The Corporation of the City of Ottawa (the "Respondent") is the primary municipal authority responsible for authorizing and constructing the Terry Fox Drive Extension (the "TFDE") in the western suburban area of the City of Ottawa known as Kanata.

> **Affidavit of Ted Cooper sworn June 17, 2010 (the "Cooper Affidavit"); Application Record, Vol. 1, Tab 3, pp. 28-29, para. 4**

14. Terry Fox Drive exists as two separate sections. The first is a continuation of Kanata Avenue which travels south, crosses Highway 417 and ends at Eagleson Road. The smaller section of Terry Fox Drive is located in Kanata's north end. It is an extension of Goulbourn Forced Road and ends at the Kanata North Business Park.

Affidavit of Steven Stoddard sworn July 6, 2010 (the "Stoddard Affidavit"); Application Record, Vol. 2, Tab 6-C, p. 406

15. Between the two sections of Terry Fox Drive lies part of the South March Highlands, one of the most ecologically significant and diverse areas in Ontario, and home to hundreds of species of plants and wildlife, including seventeen species-at-risk.

Affidavit of Jeremy Kerr sworn August 18, 2010 (the "Kerr Affidavit"); Application Record, Vol. 1, Tab 5, p. 246, para. 17

16. In October of 2000, the then Region of Ottawa-Carleton and then City of Kanata completed an Environmental Study Report (the "ESR") under the Class Environmental Assessment for Municipal Road Projects (Municipal Engineer's Association) (the "MCEA") of the TFDE, a project to widen and extend Terry Fox Drive. A Notice of Completion was posted on November 3, 2000.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, pp. 28-29, para. 4
Stoddard Affidavit, Application Record, Vol. 3, Tab 6, p. 381, para. 22(h)

17. Under the Class EA process the TFDE qualified as a "Schedule C" project, which requires the most detailed level of assessment. The planning and construction of the TFDE was divided into five sections. Work on Sections 1, 2, 3, 5 commenced in 2003. It is important to note that this was not new construction but work on already existing sections of the road. Construction of a limited portion of Section 4 of the TFDE also commenced in 2003. However,

construction of Section 4 from Richardson Side Road to Realigned Goulbourn Forced Road (the "Project") that is the subject of this application did not commence until years later.

Stoddard Affidavit, Application Record, Vol. 3, Tab 6, p. 376, para. 9 & Tab 6-C, p. 406

The First EA Addendum

18. After amalgamation in 2001, the new City of Ottawa adopted its first Official Plan in 2003 (the "2003 OP"). Two components of the 2003 OP were particularly relevant to the TFDE: 1) revised population and employment projections for Kanata, and 2) the identification of a "Special Study Area" in north Kanata.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 29, para. 7

19. Substantial modifications to the Project and its setting necessitated an Addendum to the ESR, which was released in December 2004 (the "First Addendum").

Cooper Affidavit, Application Record, Vol. 1, Tab 3, pp. 29-30, para. 8

20. It is important to note that the First Addendum applied to the section of the TFDE that is at issue in these proceeding, that being the portion of Section 4 between Richardson Side Road and Realigned Goulbourn Forced Road that was not constructed in 2003 i.e. the Project.

Stoddard Affidavit, Application Record, Vol. 2, Tab 6-I, p. 455

21. It is also important to note the basis for the First Addendum:

> The study team indentified three significant changes to the October 2000 ESR roadway that have driven the need for an Addendum. These changes are:
>
> - Modifications to the road-way cross section;
> - Modifications to the roadway alignment; and
> - Identification of property requirements for rail grade-separation.

Stoddard Affidavit, Application Record, Vol. 2, Tab 6-I, p. 456

22. The First Addendum was approved by Ottawa City Council on October 27, 2004, triggering further procedural requirements under section A.4.2.2 of the MCEA:

> The addendum shall be filed with the ESR and Notice of Filing of Addendum (see Sample Notice, Appendix 6) shall be given immediately to all potentially affected members of the public and review agencies as well as those who were notified in the preparation of the original ESR.
>
> A period of 30 calendar days following the issue of the Notice of Filing of Addendum shall be allowed for review and response by affected parties. The Notice shall include the public's right to request a Part II Order within the 30-day review period. If no request is received, the proponent is free to proceed with implementation and construction…

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 30, para. 9

23. The Respondent circulated a Notice of Filing of Addendum in relation to the First Addendum. On February 10, 2005, the Minister of the Environment received a Part II Order Request in respect of the First Addendum from Mr. Edward Balys, representing the landowners of the Kanata Highlands Properties (the "Balys Part II Order Request").

Stoddard Affidavit, Application Record, Vol. 2, Tab 6, p. 382, para. 27

24. Pursuant to the *Environmental Assessment Act*, R.S.O. 1990, c. E.18 ("the EAA"), once a Part II Order has been submitted a proponent is prohibited from implementing any part of the project under review, including site preparation, until the Minister makes a decision or the request is withdrawn. On January 23, 2007, the Balys Part II Order Request was withdrawn.

Stoddard Affidavit, Application Record, Vol. 2, Tab 6-M, p. 633
Stoddard Affidavit, Application Record, Vol. 2, Tab 6, p. 383, para. 31

The Second EA Addendum

25. Shortly thereafter the City commissioned an additional addendum regarding the Project, which was released in April 2007 (the "Second Addendum").

Stoddard Affidavit, Application Record, Vol. 3, Tab 6-Q, p. 643-814

26. The Second Addendum is identified throughout as the "Terry Fox Drive Environmental Assessment Addendum" … the same identification as the First Addendum. It applies to the same, and only unconstructed area of the road as the First Addendum, i.e. the Project.

Stoddard Affidavit, Application Record, Vol. 3, Tab 6-Q, p. 647

27. The authors of the Second Addendum indicate it was required because of changes to the Project. They state "(t)hese changes relate to the roadway cross-section, alignment and rail grade separation property requirements and together, required the preparation of an Addendum to the ESR." These are identical to the changes that resulted in the First Addendum.

Stoddard Affidavit, Application Record, Vol. 3, Tab 6-Q, p. 647

28. As recently as April 2010, the Respondent continued to refer to the Second Addendum as an "Addendum" in lengthy and detailed submissions related to work on the TFDE submitted under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the "CEAA Report").

Stoddard Cross Examination, Exhibit Book (Cross Examinations), Tab 1, p. 2 & Tab 2, p. 5

29. However, unlike the First Addendum, the City has never completed a Notice of Filing of Addendum for the Second Addendum. Consequently, the public has never had the opportunity to comment on the Second Addendum, nor to request Part II Order(s) under the EAA regarding it.

30. The City recently began referring to the Second Addendum as the 2007 "Update to the Addendum". Nowhere in the MCEA is an "Update to an Addendum" referenced or described.

Lapse In Time

31. The Notice of Filing of the 2004 Addendum was issued and publicly advertised beginning on January 7, 2005. On June 25, 2009, the City approved the Project.

Stoddard Affidavit, Application Record, Vol. 1, Tab 3, p. 381, para. 25
Decision of the City dated June 25, 2009; Application Record, Tab 2, p. 14

32. At some time in 2005, hydro poles were installed in a portion of the Project area. However, this work took place either (i) prior to the Notice of filing, (ii) during the period for public submissions following the filing, or (iii) during the time that the Balys Part II Order Request was still outstanding. No work of any kind is permitted during these periods.

Stoddard Cross Examination, p. 17, Q. 28-30
Stoddard Affidavit, Application Record, Vol. 2, Tab 6-M, p. 633

33. Further construction was not proposed to commence until February 15, 2010, more than five (5) years after the Notice of Filing.

Stoddard Cross Examination, p. 46, Q. 95

34. Section A.4.2.2 of the MCEA states:

> … if the period of time from filing of the Notice of Completion of ESR in the public record to the proposed commencement of construction for the project exceeds five (5) years, the proponent shall review the planning and design process and the current environmental setting to ensure that the project and the mitigation measures are still valid in the current planning context. …

<u>Significant Modification or Change to the Project</u>

35. Section A.4.2.2 of the MCEA also provides:

> Due to unforeseen circumstances, it may not be feasible to implement the project in the manner outlined in the ESR. Any significant modification to the project or change in the environmental setting for the project which occurs after the filing of the ESR shall be reviewed by the proponent and an addendum to the ESR shall be written. The addendum shall describe the circumstances necessitating the change, the environmental implications of the change, and what, if anything can and will be done to mitigate any negative environmental impacts…

36. A large number of significant modifications to the Project have occurred since the filing of the Second Addendum. These include:

a) Documentation - for the first time - of changes to the preferred floodplain storage compensation strategy and alternative floodplain storage compensation strategies.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 34, para. 20

b) Location of the preferred floodplain compensation work to the *west* side of the Carp River, instead of the *east* side previously assessed.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 34, para. 20

c) Realignment of the Project to intersect with Realigned Goulbourn Forced Road instead of Second Line Road as planned and assessed, a relocation of almost one third (1/3) of a kilometer.

Stoddard Cross Examination, p. 76, Q. 164

d) Removal of a large eco-passage (cost $2 million +/- $500,000) to be replaced by a system of culverts not previously proposed or assessed.

Taylor Cross Examination, Exhibit Book (Cross Examinations), Tab 9, p. 134

Taylor Cross Examination, p. 60, Q. 151-154

e) Installation of more than 4 kilometres of "Wildlife Guide Fencing" along the route of the Project not previously proposed or assessed.

Taylor Cross Examination, Exhibit Book (Cross Examination), Tab 9, p. 134

f) Increases in costs of the Project totaling at least 8.6 million dollars.

Stoddard Affidavit, Application Record, Vol. 2, Tab 6-I, p. 496 (Table 5-3, internal to document p. 42) XX this shows changes to alignment options?

Stoddard Affidavit, Application Record, Vol. 2, Tab 6, p. 384, para. 34

37. Furthermore, a very large number of significant changes to the environmental setting of the Project have also occurred since the filing of the Second Addendum. These include:

a) Approval of the Carp River Restoration Plan ("CRRP"), that falls within the primary study area of the TFDE.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, pp. 31-32, para. 15

b) Approval of other Kanata West Class EAs and four Part II Order Requests that were filed with the MOE Minister for the CRRP.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 33, para. 18

c) Designation of 200 additional hectares of urban land upstream of the TFDE in the Fernbank Community.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 33, para. 19

d) A Minister's Order under Section 16(3) of the EAA that applies to the primary and secondary study areas of the TFDE.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, pp. 35-36, para. 24

e) Discovery of egregious errors in the Respondent's floodplain modeling that undermine its understanding of flood levels affecting the design of the TFDE.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 36, para. 25-26

f) Use of the incorrect hydrogeological model to predict flood levels.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, pp. 36-37, para. 27-29

g) A major flood in the Carp River watershed in 2009.

Cooper Affidavit, Application Record, Vol. 1, Tab 3, p. 37, para. 30-31

h) Introduction of the *Endangered Species Act, 2007*, S.O. 2007, c. 6.

Taylor Cross Examination, p. 52-53, Q. 128-130

i) Discovery for the first time in 2009 of Threatened Species such as Western Chorus Frog and Blanding's Turtle.

Taylor Cross Examination, p. 39, Q. 103, p. 48, Q, 119

j) Major changes in the greenness and wetness of the Project area that have not been identified or assessed.

Kerr Affidavit, Application Record, Vol. 1, Tab 5, pp. 252-254, para. 42-47

Kerr Cross Examination, p. 56-58, Q. 180-184

38. None of these modifications or changes have been documented or addressed through the MCEA process. No further addenda have been produced.

The Applicant

39. The Applicant, South March Highlands – Carp River Conservation Inc., is an incorporated entity that represents the interests of the Coalition to Protect South March Highlands (the "Coalition"), a public interest body of organizations and citizens who are concerned about the impact of development on the South March Highlands and Carp River.

Affidavit of Paul Renaud (the "Renaud Affidavit"); Application Record, Vol. 1, Tab 4, pp. 193-194, para. 2

40. The Coalition formed on March 29, 2010 and formalized its strategic plan on April 5, 2010. This plan emphasizes the importance of raising awareness of the significance of the SMH and communicating on numerous levels with the goal of the "preservation and conservation of the South March Highlands and the Carp River Corridor." The coalition has support from a number of existing environmental groups such as the Ottawa Valley Field Naturalists, the Ottawa Riverkeeper, Ottawa Carleton Wildlife Centre, and the Greenbelt Coalition of Canada's Capital Region (itself a coalition of 14 member organizations who unanimously support the Coalition).

Renaud Affidavit, Application Record, Vol. 1, Tab 4, p. 194, para. 4 & Exhibits C & E
Renaud Cross Examination, p. 31-32, Q. 134

41. The Coalition's position also has the support of the Sierra Club of Canada, Ecology Ottawa, The David Suzuki Foundation and the Federation of Citizens' Associations of Ottawa-Carleton (representing all the community associations in Ottawa). By the end of May 2010 the Coalition had approximately 4,500 members. It currently has approximately 5,500 members.

Renaud Affidavit, Application Record, Vol. 1, Tab 4, pp. 197-8, para. 14-17 & Exhibits G-J
Renaud Cross Examination, p. 16-17, Q. 79-80

42. On April 26, 2010 the City of Ottawa's Forest and Greenspace Advisory Committee passed a unanimous resolution recommending that the City of Ottawa reexamine the rationale for the TFDE and halt its construction until an in-depth ecological analysis is undertaken. Despite this, the Respondent continued to move forward with the Project.

Renaud Affidavit, Application Record, Vol. 1, Tab 4, pp. 196-197, para. 13 & Exhibit F

43. The Coalition has also made numerous attempts to engage the Respondent in dialogue through correspondence and meetings from the date of its inception onwards. In or about May 2010 it became clear to the Coalition that discourse would not result in the re-evaluation of the Class EA related to the Project. In order to more practically pursue its goals of preservation and

conservation of the South March Highlands the Coalition made the decision to incorporate. There is also a clear record of persons associated with or supporting the Applicant/Coalition's position communicating their concerns to the Respondent.

Renaud Cross Examination, p. 17-18, Q. 83-86
Renaud Affidavit, Application Record, Vol. 1, Tab 4, pp. 194-5, para. 5-7
Stoddard Cross Examination, Exhibit Book (Undertakings etc.), Tab 3

Expert Witnesses

44. The Applicant has provided expert affidavit evidence from Ted Cooper, a professional engineer and Dr. Jeremy Kerr, conservation biologist. In response, the Respondent has provided affidavit evidence from Stephen Stoddard, a professional engineer and Shawn Taylor, aquatic biologist. Cross examinations have been conducted, undertakings given etc. No consensus has been reached on many of the central issues such as hydrogeology/flooding and eco-connectively.

Cooper Affidavit, Application Record, Vol. 1, Tab 3
Kerr Affidavit, Application Record, Vol. 1, Tab 5
Stoddard Affidavit, Application Record, Vol. 3, Tab 6
Affidavit of Shawn Taylor sworn September 3, 2010
Transcripts of cross examinations of Kerr, Stoddard and Taylor
Exhibit Book (Cross Examinations)
Exhibit Book (Undertakings etc.)

Role of the Ministry of Environment and Other Agencies

45. The Ministry of the Environment ("MOE") has reviewed and commented positively at various times on the TFDE and the Respondent's MCEA work. Supporters of the Applicant and experts participating in this proceeding have also had extensive exchanges with MOE staff and Minister regarding many of the issues raised. However, both the Respondent's expert Shawn Taylor and the MOE staff member summonsed in this matter, Vicki Mitchell (Regional

Environmental Assessment Coordinator (East Region)), concurred that the MCEA is a proponent based process that does not involve approvals of any other agency(s) including the MOE:

> Q. And at the same time, again it's not your role, as you said a number of times, to approve the project; correct?
> A. Correct.
> Q. And ultimately it's not your role to make the decision about whether a change in the project is or isn't significant; correct?
> A. Correct.
> Q. And it's not your role to make determination of whether the change an (sic) environmental setting is significant?
> A. Correct.

Mitchell Cross Examination, p. 35, Q. 75-77

Taylor Cross Examination, p. 9-10, Q. 14-16

Stoddard Cross Examination, Exhibit Book (Cross Examinations), Tab 7, p. 29

46. The Minister of the Environment also concurs, that "(i)t is the proponent's responsibility to determine if an addendum is required" etc. Consequently, under the MCEA the views of commenting agencies are not given legal standing and are not determinative of the issues here.

Stoddard Affidavit, Application Record, Vol. 3, Tab 6-AA, p. 888

Urgency and Failure of Justice

47. It was initially understood by the parties that paving of the Project would not commence until sometime in October. On September 1, 2010, it was determined that paving of at least some portions of the Project could commence at early as late September. In the view of the conservation biologist called by the Applicant, irreparable harm will be caused by paving.

Stoddard Cross Examination, p. 54, Q. 116

Kerr Affidavit, Application Record, Vol. 1, Tab 5, p. 243, para. 9

Kerr Cross Examination, p. 13-14, Q. 41-47

48. The Respondent has also led evidence that as the Project proceeds the costs associated with any possible alterations or changes to the timing of the Project will significantly increase.

Affidavit of Doug Onishi sworn September 3, 2010

49. The earliest available date for a full panel hearing is January 2011. The parties have consented and, as directed by the Honourable Justice Swinton subject to the discretion of the Judge hearing the matter, respectfully request that this matter be heard under JRPA ss. 6(2).

PART III – ISSUES AND LAW

Applicable Statutory Provisions

50. The Applicant relies of subsection 6(2) of the *Judicial Review Procedure Act,* R.S.O. 1990, J.1. (the "JRPA") in seeking leave for this matter to be heard by a single judge of the Superior Court on an urgent basis.

51. The Applicant also relies on section 2(1) of the JRPA and Rule 68 of the Rules of Civil Procedure in seeking judicial review of the decisions of the respondent the Respondent to approve and construct the Project.

52. The remedies sought in the Applicant's notice of motion are available under section 2(1) of the JRPA if the Respondent's decisions with respect to the Project under the MCEA are an exercise of statutory power – "the power or right conferred by or under a statute to make a decision deciding or prescribing ... the legal rights, powers, privileges, immunities, duties or liabilities of any person or party ...".

53. As noted, on June 25, 2009 ,the Respondent approved the Project after receiving Federal Infrastructure Financing. This decision to pursue the construction of a road is an exercise of

statutory power under section 11 of the *Municipal Act*, 2001, S.O. 2001, c 25, and is consequently reviewable under the JRPA.

Decision; Application Record, Tab 2

Leave Under ss. 6(2) JRPA

54. To bring an application for judicial review under ss. 6(2) of the Act before a single judge it must be shown that there is urgency and that the delay required to apply to the Divisional Court for a hearing before a panel is likely to involve a failure of justice.

Liberman v. College of Physicians and Surgeons of Ontario, **[2010] O.J. No. 227 (Div. Ct.)(QL); Applicant's Authorities, Tab 1, p. 3, paras. 4-6**

55. As indicated above, the Project is currently under construction, and paving has or shortly will commence. The evidence of the conservation biologist appearing on behalf of the Applicant is that paving will result in irreparable harm. The evidence of the Respondent is that it will be exposed to significant additional costs as the Project continues to proceed.

56. The earliest hearing date available before a full panel is in or about January 2011. In light of the foregoing both the Applicant and Respondent have consented to this application being heard pursuant to ss. 6(2) of the JRPA subject to the discretion of this Honourable Court.

57. It is submitted that in light of the foregoing circumstances the delay required to bring this application to a full panel of the Divisional Court is likely to result in a failure of justice. Consequently, the parties respectfully request that the application be permitted to proceed at this time.

Issues For Judicial Review

58. If leave is granted the Applicant respectfully submits that the Respondent's decision to approve and construct the Project was not in accordance with the EAA and the MCEA and was consequently *ultra vires* given that:

Issue 1 – More than five (5) years passed between the latest of any filings related to the Project's Environmental Study Report ("ESR") and the proposed start of construction;

Issue 2 – Notice of Filing of the Second Addendum was never issued; and

Issue 3 – The Respondent failed to file further addendum(s) to the ESR and post a Notice of Filing of Addendum, despite:

(i) Significant changes to the Project; and

(ii) Significant changes to the environmental setting of the Project.

Standing of the Applicant

59. Public interest standing has been granted in Canada in many cases determining issues of constitutionality as well as in cases involving non-constitutional challenges to administrative action. The Supreme Court of Canada has established that standing will be granted to a public interest group to challenge the exercise of administrative authority where a serious issue is raised, the applicant shows a genuine interest as a citizen or group, and there is no other reasonable and effective manner in which the issue may be brought before the court.

> ***Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (QL); Applicant's Authorities, Tab 2**
>
> ***Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (QL); Applicant's Authorities, Tab 3, p. 13, para. 26**

60. In *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)*, this Honorable Court found that the applicants seeking a stay of the responding Minister's decision until a judicial review application was heard had public interest standing. The Court considered the evidence of the applicants' history of responsible involvement in forest and land use planning as well as the uncontradicted evidence that members of the applicants include persons who either live in or frequent the area at issue. Saunders J. stated:

> …it seems to me that unless someone, like the applicants, bring these issues to the court, the court will not be asked to address them. Accordingly if the applicant can overcome the hurdle that these are serious issues to be tried, I would be prepared to grant them standing to bring the application.
>
> ***Algonquin Wildlands League v. Ontario (Minister of Natural Resources),*** **[1996] O.J. No. 3355 (Gen. Div.)(QL); Applicant's Authorities, Tab 4, p. 3, para. 3**

61. As set out above, members of the public, including individuals associated with the Applicant, became involved shortly after the Respondent's decision to proceed with the Project. They have remained involved since that time. In addition, the Applicant itself has been involved since its inception. The Applicant is also supported directly by thousands of individuals and its concerns are supported by numerous credible and well established environmental organizations. Supporters and witnesses called by the applicant are also users of the Project site.

62. There are serious issues to be tried. Particularly at this juncture, it is also most unlikely that this Honourable Court would consider these important issues without granting standing.

The Standard of Review

63. As with any application for judicial review, the court must initially consider the standard of review. For the reasons set out below, it is respectfully submitted the standard of review in the present case is correctness regarding Issues 1 and 2 and reasonableness regarding Issue 3.

64. In *Dunsmuir v. New Brunswick*, the leading decision of the Supreme Court of Canada on this issue, the standard of review regarding administrative actions was clarified. The Court determined that one of two standards will apply, that of correctness, or that of reasonableness. The factors that would lead to a finding that reasonableness is the applicable standard are:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate….

***Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 (QL); Applicant's Authorities, Tab 5, p. 22-24, para. 55 & 62**

D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, 2nd ed. (Toronto: Canvasback Publishing, 2009); Applicant's Authorities, Tab 6, § 15:1211, p. 15-2

***Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 (QL); Applicant's Authorities, Tab 7, p. 10-11**

Issues 1 & 2 - Correctness

65. The applicable standard of review on a question of statutory interpretation such as the procedural requirements is one of correctness:

> In *West Vancouver (District) v. British Columbia (Ministry of Transportation*) (2005), 14 C.E.L.R. (3d) 157 (F.C.), Mr. Justice Lemieux examined a decision of federal "responsible authorities" under the *Canadian Environmental Assessment Act* [S.C. 1992, c. 37]. The "responsible authorities" determined that a highway project would not cause significant adverse environmental impact, without consulting the public, a process that the applicant claimed was mandatory under the Act. Mr. Justice Lemieux adopted the reasoning of Mr. Justice Rothstein, then of the Federal Court of Appeal, in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 (C.A.). Justice Rothstein, at paragraph 10, held that the standard of review was one of correctness.

***Canada (Minister of the Environment) v. Custom Environmental Services Ltd.* (F.C.), [2009] 1 F.C.R. 565 (F.C.)(QL): Applicant's Authorities, Tab 8, p. 10, para. 26**

66. The CEAA requires the environmental assessment of projects when "a federal authority" is the proponent of the project, or is providing funding, land, or a permit for a project. Its application is analogous to that of the MCEA, as is the standard of review applied.

67. Issues 1 and 2, in the applicant's submission, are procedural in nature – were the steps in the MCEA followed – and are consequently questions of law.

68. The Respondent has no special expertise regarding these determinations, which are issues of statutory interpretation, and are properly for the Court to decide on a standard of correctness.

Issue 3 - Reasonableness

69. Issue 3 is a question of mixed fact and law that can be set out as follows:

a) What were the modifications/changes to the project and its environmental setting between 2005 and present?

b) Are these modifications/changes "significant" under the MCEA?

70. The standard of reasonableness appears to apply. In the Applicant's respectful submission the question for the court then becomes: is there a rational basis for the Respondent's failure to complete a further addendum, given the modifications/changes which have occurred?

71. In *Inverhuron & District Ratepayers' Assn v. Canada (Minister of the Environment)*, Sexton J. A. stated with respect to a review, on a standard of reasonableness, of a decision by the Minister of Environment to approve an environmental assessment:

> This does not mean, however, that the Court's approach to viewing the Minister's decision ought to be so deferential as to exclude all inquiry into the substantive adequacy of the

environmental assessment. To adopt this approach would risk turning the right to judicial review of her decision into a hollow one….

The Court is not required to agree with the Minister's decision. It must merely be able to perceive a rational basis for it.

***Inverhuron & District Ratepayers' Assn v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1008 (C.A)(QL); Applicant's Authorities, Tab 9, pp. 12-13, para. 38 & 40**

Applicable Principles of Statutory Interpretation

72. A fundamental tenet of statutory interpretation is that legislation should be read as a whole having regard to its overall context and purpose(s).

To achieve a sound interpretation of a legislative text, interpreters must identify and take into account the purpose of legislation. This includes the purpose of the provision to be interpreted as well as larger units – parts, divisions, and the Act as a whole.

R. Sullivan, "Statutory Interpretation", (Irwin Law, 1997); Applicant's Authorities, Tab 10, p. 135

73. In addition, the use of the word "shall" (as is employed throughout MCEA section A.4.2.2) is presumed to be mandatory unless this interpretation would lead to unacceptable consequences or is otherwise inappropriate.

R. Sullivan, *supra*; Applicant's Book of Authorities, Tab 10, p. 87

EAA/MCEA - Purposes and Requirements

74. The EAA is designed for "the protection, conservation and wise management in Ontario of the environment" (s. 2). It applies to Projects by provincial and municipal governments, public bodies and as designated by regulation (s. 3).

75. The principle of public consultation is deeply entrenched in the EAA. It is the first of the key principles identified in the MCEA's summary at A.1.1:

> Consultation with affected parties early in and throughout the process, such that the planning process is a cooperative venture.
>
> **MCEA; Applicant's Authorities, Tab 11, p. A-2**

76. The right of the public to file Part II Order requests is also a substantive right that is part of the ability of the public to participate and is integral to the EAA/MCEA process.

> **Mitchell Cross Examination, Exhibit Book (Cross Examinations), Tab 7, p. 194**
>
> **Mitchell Cross Examination, p. 9, Q. 18-19**

77. Individual approval for specific Projects is not required for certain classes of Projects approved by the Minister of Environment *as long as* the Project proceeds in accordance with the approved class environmental assessment. Subsection 13(3)(a) provides:

> No person shall proceed with an undertaking with respect to which an approved class environmental assessment applies ... unless the person does so in accordance with the class environmental assessment.
>
> ***William Ashley China Ltd. v. Toronto (City),*** **[2008] O.J. No. 4371 (Div. Ct.)(QL); Applicant's Authorities, Tab 12, p. 6, para. 17**

78. Subsection 12 of the EAA provides:

> **Proposed change to an undertaking**
>
> 12. If a proponent wishes to change an undertaking after receiving approval to proceed with it, the proposed change to the undertaking shall be deemed to be an undertaking for the purposes of this Act.

79. The MCEA was prepared by the Municipal Engineers Association on behalf of Ontario municipalities. The MCEA was first approved under the EAA by Order-in-Council in 2000 and was updated in 2007. The 2000 version of the MCEA applied to the Project up until March 12, 2010, at which time a limited number of amendments came into force.

> **Mitchell Cross Examination, Exhibit Book (Cross Examinations), Tab 1, p. 161-2 & Tab 2, p. 163-4**
>
> **Mitchell Cross Examination, p. 14, Q. 36 to p. 21, Q. 43**

80. The Class EA establishes a process which allows certain municipal projects, such as the Project, to be planned, designed, constructed, operated and so on without having to obtain project-specific approval under the EA Act "**provided the approved environmental assessment planning process is followed"** (emphasis in original).

MCEA section A.1.2.1; Applicant's Authorities, Tab 11, p. A-3

81. "Failure to follow the process outlined in this document is a breach of the EA approval under which this Class EA was authorized and therefore places the proponent in contravention of the EA Act."

MCEA section A.1.2.3; Applicant's Authorities, Tab 11, p. A-5

Analysis by the Courts

82. The Applicant has been able to locate only a single instance in which the courts have considered the MCEA by way of judicial review. In that case, the question of whether the proponent had appropriately classified a project as under schedule A/A+ was an issue of mixed fact and law and reviewable on a standard of reasonableness. MCEA A.4.2.2 was not considered, rendering the case of little assistance in the interpretation of these procedural requirements.

***William Ashley, supra*; Applicant's Authorities, Tab 12.**

83. At the same time as previously noted, there are marked similarities between the CEAA and EAA/MCEA processes. Both set out the need for public consultation and other procedural requirements in their respective environmental assessment processes.

84. Subsections 18(3) and 55(1) of the CEAA relate to public participation in the screening or environmental assessment of a project and the need to post notices etc.:

> **18(3)** Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by

> regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.
>
> **55(1)** For the purpose of facilitating public access to records relating to environmental assessments and providing notice in a timely manner of the assessments, there shall be a registry called the Canadian Environmental Assessment Registry, consisting of an Internet site and project files.

85. In *Sierra Club of Canada*, the Federal Court considered an application for judicial review of the Minister of Fisheries and Oceans approval of a project under the CEAA on the grounds that the Minister failed to make the screening report adequately available and had failed to comply with the requirements of subsections 8(3) and 55(1). The Court concluded that "the Minister's failure to fully comply with the requirements of subsections 18(3) and 55(1) of the CEAA is an error that justifies setting aside the decision under review."

> ***Sierra Club of Canada v. Canada (Minister of Fisheries and Oceans),*** **[2003] F.C.J. No. 366 (T.D.); Applicant's Authorities, Tab 13, p. 8, para. 42, p. 24, para 70 and p. 28, para. 88**

<u>Issue 1 – Analysis - Time Lapsed</u>

86. As noted above, section A.4.2.2 of the MCEA provides:

> … if the period of time from filing of the Notice of Completion of ESR in the public record to the proposed commencement of construction for the project exceeds five (5) years, the proponent shall review the planning and design process and the current environmental setting to ensure that the project and the mitigation measures are still valid in the current planning context. …

87. As also noted, the initial Notice of Completion of ESR was filed in 2000. Construction of various portions of the TFDE commenced in 2003. However, the Notice of Filing of the First Addendum was issued on January 7, 2005.

88. Again, subsection 12 of the EAA states:

Proposed change to an undertaking

> 12. If a proponent wishes to change an undertaking after receiving approval to proceed with it, the proposed change to the undertaking shall be deemed to be an undertaking for the purposes of this Act.

89. With the filing of the First Addendum, by operation of statute an undertaking was deemed to be established. Consequently, the City had until January 7, 2010 to propose commencement of construction of the undertaking i.e. the Project. The proposed commencement date was February 15, 2010, more than 5 years later. The MCEA provides no "saving" provision.

90. As also indicated above, the only construction that the Respondent has suggested took place in the intervening years was the installation of some hydro poles in 2005. However, this work would have taken place either during the time where no approval had been granted, during the time for public comment, or after the Balys Part II Order Request had been filed. No construction of any kind was permitted to proceed during these periods. The Respondent cannot rely on work conducted in contravention of the MCEA to now contend work had commenced.

91. The Respondent also cannot rely on the 10 year lapse in time amendment to the MCEA, as this did not come into force until March 12, 2010, after the Project lapsed. On this basis, it is respectfully submitted that the Respondent has been proceeding to construct without authority.

Issue 2 – Analysis - No Notice of Filing for Second Addendum

92. Again, section A.4.2.2 of the MCEA provides:

> The addendum shall be filed with the ESR and Notice of Filing of Addendum (see Sample Notice, Appendix 6) shall be given immediately to all potentially affected members of the public and review agencies as well as those who were notified in the preparation of the original ESR.
>
> A period of 30 calendar days following the issue of the Notice of Filing of Addendum shall be allowed for review and response by affected parties. The Notice shall include the

> public's right to request a Part II Order within the 30-day review period. If no request is received, the proponent is free to proceed with implementation and construction…

93. There is then also a direct obligation to issue a Notice of Filing once an addendum has been completed. The Second Addendum was clearly such an addendum:

(a) it applies exclusively to the Project, as did the First Addendum;

(b) it was triggered by the same three considerations as the First Addendum: changes to the roadway cross-section, alignment and rail grade separation property requirements;

(c) it is identified by its authors as an 'Addendum";

(d) subsequent authors of other major reports have continued to identify it as an "Addendum";

(e) an "Update" to an addendum, to which the Respondent now refers, in not referenced or described anywhere in the MCEA.

94. Neither the EAA nor the MCEA contemplate a project progressing without the completion of the required Notices and Addendums. In fact, as noted section A.1.2.3 of the 2000 MCEA clearly identifies that the failure to follow the process is a breach of the EA approval, placing the proponent in contravention of the EAA.

95. In the Applicant's submission the facts here are directly analogous to those in *Sierra Club of Canada* (see para. 85 *supra*). The Respondent's failure to fully comply with the requirements of section A.4.2.2 of the MCEA is an error that justifies setting aside the approval of the Project until such time that the procedural requirements under the MCEA are met.

Issue 3 – Analysis – Modifications/Changes Are Clearly "Significant"

96. The Respondent has also failed to order a further addendum to the ESR of the Project despite the *very* significant modifications to the Project and changes to its environmental setting in the years following the Second Addendum.

97. “Significant” is not a defined term in the MCEA or the EAA. It is defined in the Oxford Online Dictionary as “sufficiently great or important to be worthy of attention; noteworthy”.

Oxford Dictionaries, April 2010, Oxford University Press, April 2010, <http://www.oxforddictionaries.com/view/entry/m_en_gb0772380>; Applicant’s Authorities, Tab 14

98. As outlined above, in the five years since the filing of the First Addendum, there have been a plethora of modifications/changes to the Project and its environmental setting including:

a) Documentation - for the first time - of changes to the preferred floodplain storage compensation strategy and alternative floodplain storage compensation strategies.

b) Location of the preferred floodplain compensation work to the *west* side of the Carp River, instead of the *east* side as previously assessed.

c) Realignment of the Project to intersect with Goulbourn Forced Road instead of Second Line Road as planned and assessed, a relocation of almost one third (1/3) of a kilometer.

d) Removal of a large eco-passage (cost $2 million +/- $500,000), to be replaced by a system of culverts not previously proposed or assessed.

e) Installation of more than 4 kilometres of “Wildlife Guide Fencing” along the route of the Project not previously proposed or assessed.

f) Increases in costs of the Project totaling at least 8.6 million dollars.

g) Approval of the Carp River Restoration Plan (“CRRP”), that falls within the primary study area of the TFDE.

h) Approval of other Kanata West Class EAs and four Part II Order Requests that were filed with the MOE Minister for the CRRP.

i) Designation of 200 additional hectares of urban land upstream of the TFDE in the Fernbank Community.

j) A Minister's Order under Section 16(3) of the EAA that applies to the primary and secondary study areas of the TFDE.

k) Discovery of egregious errors in the Respondent's floodplain modeling that undermine its understanding of flood levels affecting the design of the TFDE.

l) Use of the incorrect hydrogeological model to predict flood levels.

m) A major flood in the Carp River watershed in 2009.

n) Introduction of the *Endangered Species Act, 2007*, S.O. 2007, c. 6.

o) Discovery for the first time in 2009 of Threatened Species such as Western Chorus Frog and Blanding's Turtle.

p) Major changes in the greenness and wetness of the Project area that have not been identified or assessed.

99. The Applicant respectfully submits that not only are many of these modifications/changes in and of themselves highly significant, their cumulative effect is overwhelming. There is no rational or statutory basis for excluding any let alone all of these considerations from the MCEA.

100. In completing the First Addendum, the Respondent provided an example of modifications to the TFDE and its environmental context that it has considered significant in the past. The changes/modifications since 2005 are *far more significant* than those which resulted in the First Addendum. This inconsistency also supports the Applicant's submission that the Respondent is clearly in default under the MCEA as a result of proceeding without a further addendum.

Timing of the Application

101. In *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)* the court recognized that "(n)either consent nor delay can confer any power to act beyond limits imposed by legislation." While in that case the applicant was unsuccessful in demonstrating that mitigation was a modification or alteration that triggered further assessment, here, the Respondent has included mitigation directly in both the First and Second Addenda. The court also accepted that work on that project had commenced many years early, barring further assessment. However, no provision analogous to EAA section 12 existed under CEAA.

> ***Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*, 2001 FCT 381, CarswellNat 775 (F.C.T.D.); Applicant's Authorities, Tab 15, p. 14, para. 65**
>
> ***Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*, 2001 FCA 347, CarswellNat 2515 (F.C.A.); Applicant's Authorities, Tab 16**
>
> **Stoddard Affidavit, Application Record, Vol. 2, Tab 6-I, p. 533-544 & Vol. 3, Tab 6-Q, p. 721-742**

102. In *Friends of the Oldman River Society v. Canada (Minister of Transport)* the Supreme Court of Canada considered whether delay and futility lent the court the discretion to refuse the Applicant prerogative relief, specifically, an order requiring an environmental assessment to be conducted although the Oldman Dam was already more than 40% complete.

> ***Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1 (QL); Applicant's Authorities, Tab 17**

103. The timelines of the Society's opposition to the Oldman Dam resemble those of the Applicant's opposition to the Project. The Society was incorporated on September 8, 1987 to oppose the project and became aware of the approval granted by the Minister of Transport on February 16, 1988. Earlier efforts to check the progress of the development had been made by certain individuals who later became members of the Society on its formation.

> ***Friends of the Oldman River, supra*; Applicant's Authorities, Tab 17, p. 12-13, paras. 14-16**

104. Requests were made directly to the Ministries involved asking that an assessment be conducted. The Society also opposed certain provincially awarded permits during this time. The contract for construction of the dam was awarded in February 1988, and as of March 31, 1989 the dam was 40 percent complete. The application for judicial review was commenced in the Trial Division of the Federal Court on April 21, 1989.

> ***Friends of the Oldman River, supra*; Applicant's Authorities, Tab 17, p. 12-13, paras. 14-16**

105. While "unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment", "the question of unreasonableness will turn on the facts of each case."

> ***Friends of the Oldman River, supra*; Applicant's Authorities, Tab 17, p. 44, para. 105**

106. In the present case, as in *Friends of the Oldman River*, the "concerted and sustained efforts" of the Applicant explains the delay in bringing an application. In the Applicant's respectful submission it consequently does not form a ground to refuse relief.

***Friends of the Oldman River, supra*; Applicant's Authorities, Tab 17, p. 45, para. 108**

107. With respect to futility, prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory.

***Friends of the Oldman River, supra*; Applicant's Authorities, Tab 17, pp. 45-46, para. 109**

108. In the case of *Friends of the Oldman River*, it was not obvious that an environmental assessment even at a late stage would not have "some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam". That finding convinced the court that a prerogative order was not futile.

***Friends of the Oldman River, supra*; Applicant's Authorities, Tab 17, p. 45-46, para. 109**

109. Here, a large amount of evidence has been adduced by both parties regarding issues and mitigative measures, in relation to hydrogeology/flooding and environmental impacts in particular. As stated, the gravamen of this application turns on the fact that the Legislature put in place, through the EAA and MCEA, a process to allow these types of issues to be addressed. It is clear from the evidence that very significant concerns and controversies still exist. It is also clear that mitigation opportunities continue to exist.

110. However, by not complying with the MCEA mandated procedures and requirements, the Respondent has precluded the Applicant and all other members of the public from participating in this process. Therefore, the Applicant respectfully requests that this Honourable Court direct that the process envisioned by the Legislature issues be followed.

PART IV – ORDER SOUGHT

111. The Applicant respectfully requests:

a) Leave for this application to be heard by a single judge of the Superior Court on an urgent basis pursuant to ss. 6(2) of the JRPA.

b) A declaration the Respondent is in contravention of section A.4.2.2 of the MCEA for:

(i) commencing construction of the Project more than five (5) years after the latest of any filings related to the Project's Environmental Study Report, the ESR;

(ii) failing to issue a Notice of Filing of Addendum in relation its Addendum dated April 2007, the Second Addendum;

(iii) failing to file a further addendum to the ESR and post a Notice of Filing of Addendum, despite significant changes to the Project and significant changes to the environmental setting of the Project.

c) An order that pursuant to section A.4.2.2 of the MCEA, the Respondent shall;

(i) file a Notice of Filing of the Second Addendum; and

(ii) complete an Addendum with respect to the significant changes to the Project and to the environmental setting of the Project.

d) The Applicant's costs of this application on a substantial indemnity basis.

e) Such further relief as counsel may request and this Honourable Court permit.

All of which is respectfully submitted this 27th day of September, 2010.

_____

Eric K. Gillespie
Of counsel for the Applicant

_____

Julia A.S. Croome
Of counsel for the Applicant

SCHEDULE A

Case Law

Algonquin Wildlands League v. Ontario (Minister of Natural Resources) [1996] O.J. No. 3355, 93 O.A.C. 2228, 7 C.P.C. (4th) 151 (Gen. Div.) (QL)

Canada (Attorney General) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735 (QL)

Canada (Minister of the Environment) v. Custom Environmental Services Ltd. (F.C.) [2009] 1 F.C.R. 565 (QL)

Canadian Council of Churches v. R. [1992] 1 S.C.R. 236, 2 Admin. L. R. (2d) 229 (S.C.C.) (QL)

Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9 (QL)

Finlay v. Canada (Minister of Finance) [1986] 2 S.C.R. 607 (S.C.C.) (QL)

Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] S.C.J. No. 1 (QL)

Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment), 2001 FCT 381, CarswellNat 775 (F.C.T.D.)

Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment), 2001 FCA 347, CarswellNat 2515 (F.C.A.)

Inverhuron & District Ratepayers' Assn v. Canada (Minister of the Environment), (2001) 273 N.R. 62, [2001] F.C.J. No. 1008 (F.C.A) (QL)

Liberman v. College of Physicians and Surgeons of Ontario, [2010] O.J. No. 227 (Div. Ct.) (QL)

Sierra Club of Canada v. Canada (Minister of Fisheries and Oceans), [2003] F.C.J. No. 366 (F.C.T.D.) (QL)

William Ashley China Ltd. v. Toronto (City), [2008] O.J. No. 4371 (QL)

Treatises and Statutes

D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, 2nd ed. (Toronto: Canvasback Publishing, 2009)

Oxford Dictionaries, April 2010, Oxford University Press, April 2010, <http://www.oxforddictionaries.com/view/entry/m_en_gb0772380>

R. Sullivan, "Statutory Interpretation", (Irwin Law, 1997)

SCHEDULE B

***Judicial Review Procedure Act* R.S.O. 1990, c J.1**

2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Application to Divisional Court

6. (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice. R.S.O. 1990, c. J.1, s. 6 (2); 2006, c. 19, Sched. C, s. 1 (1).

***Environmental Assessment Act* R.S.O. 1990, c E.18**

Purpose of Act

2. The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment. R.S.O. 1990, c. E.18, s. 2.

Proposed change to an undertaking

12. If a proponent wishes to change an undertaking after receiving approval to proceed with it, the proposed change to the undertaking shall be deemed to be an undertaking for the purposes of this Act. 1996, c. 27, s. 3.

13. (1) A person may apply to the Minister to approve a class environmental assessment with respect to a class of undertakings. 1996, c. 27, s. 3.

Application

(2) The application consists of the proposed terms of reference submitted under subsection 13.2 (1) and the class environmental assessment subsequently prepared in accordance with section 14 and submitted under subsection 6.2 (1). 1996, c. 27, s. 3.

Prohibition

(3) No person shall proceed with an undertaking with respect to which an approved class environmental assessment applies,

(a) unless the person does so in accordance with the class environmental assessment; or

(b) unless the Minister gives his or her approval to proceed under section 9 or the Tribunal gives its approval under section 9.1. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11 (6).

***Municipal Act,* 2001, S.O. 2001, c 25**

Spheres of Jurisdiction

Broad authority, lower-tier and upper-tier municipalities

11. (1) A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public, subject to the rules set out in subsection (4). 2006, c. 32, Sched. A, s. 8.

By-laws

(2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

1. Governance structure of the municipality and its local boards.
2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.
3. Financial management of the municipality and its local boards.
4. Public assets of the municipality acquired for the purpose of exercising its authority under this or any other Act.
5. Economic, social and environmental well-being of the municipality.
6. Health, safety and well-being of persons.
7. Services and things that the municipality is authorized to provide under subsection (1).
8. Protection of persons and property, including consumer protection. 2006, c. 32, Sched. A, s. 8.

By-laws re: matters within spheres of jurisdiction

(3) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting matters within the following spheres of jurisdiction:

1. Highways, including parking and traffic on highways.
2. Transportation systems, other than highways.
3. Waste management.
4. Public utilities.
5. Culture, parks, recreation and heritage.
6. Drainage and flood control, except storm sewers.
7. Structures, including fences and signs.
8. Parking, except on highways.
9. Animals.
10. Economic development services.
11. Business licensing. 2006, c. 32, Sched. A, s. 8

Municipal Class Environmental Assessment, 2000

A.4.2.2 Revisions and Addenda to Environmental Study Report

Change in Project or Environment

Due to unforeseen circumstances, it may not be feasible to implement the project in the manner outlined in the ESR. Any significant modification to the project or change in the environmental setting for the project which occurs after the filing of the ESR shall be reviewed by the proponent and an addendum to the ESR shall be written. The addendum shall describe the circumstances necessitating the change, the environmental implications of the change, and what, if anything can and will be done to mitigate any negative environmental impacts. The addendum shall be filed with the ESR and Notice of Filing of Addendum (see Sample Notice, Appendix 6) shall be given immediately to all potentially affected members of the public and review agencies as well as those who were notified in the preparation of the original ESR.

A period of 30 calendar days following the issue of the Notice of Filing of Addendum shall be allowed for review and response by the affected parties. The Notice shall include the public's right to request a Part II Order within the 30-day review period (see Section A.2.8). If no request is received by the Minister, the proponent is free to proceed with implementation and construction. During the 30-day addendum review period, no work shall be undertaken that will adversely affect the matter under review. Furthermore, where implementation of a project has already commenced, those portions of the project which are the subject of the addendum, or have the potential to be directly affected by the proposed change, shall cease and shall not be reactivated until the termination of the review period.

Lapse of time

A time lapse may occur between the filing of the ESR and the implementation of the project. In such cases, the proposed project and the environmental mitigation measures proposed may no longer be valid.

If the period of time from filing of the Notice of Completion of ESR in the public record to the proposed commencement of construction for the project exceed five (5) years, the proponent shall review the planning and design process and the current environmental setting to ensure that the project and the mitigation measures are still valid given the current planning context. The review shall be recorded in an addendum to the ESR which shall be placed on the public record.

Notice of Filing of Addendum shall be placed on the public record with the ESR and shall be given to the public and to the review agencies; a period of 30 calendar days shall be provided for review and response. The Notice shall include the public's right to request a Part II Order (see Section A.2.8) during the 30-day addendum review period. If no request is received, the proponent is free to proceed with implementation and construction.

A.4.3 Revisions and Addenda to Environmental Study Report

Change In Project or Environment

Due to unforeseen circumstances, it may not be feasible to implement the project in the manner outlined in the ESR. Any significant modification to the project or change in the environmental setting for the project which occurs after the filing of the ESR shall be reviewed by the proponent and an addendum to the ESR shall be written. The addendum shall describe the circumstances necessitating the change, the environmental implications of the change, and what, if anything can and will be done to mitigate any negative environmental impacts. The addendum shall be filed with the ESR and Notice of Filing of Addendum (see Sample Notice, Appendix 6) shall be given immediately to all potentially affected members of the public and review agencies as well as those who were notified in the preparation of the original ESR. It should be made clear to review agencies and the public that when an Addendum to an ESR is issued, only the items in the addendum (i.e. the changes) are open for review, i.e. only the proposed changes to the recommended undertaking are open for review.

A period of 30 calendar days following the issue of the Notice of Filing of Addendum shall be allowed for review and response by affected parties. The Notice shall include the public's right to request a Part II Order within the 30-day review period (see Section A.2.8). If no request is received by the Minister or delegate, the proponent is free to proceed with implementation and construction. During the 30-day addendum review period, no work shall be undertaken that will adversely affect the matter under review. Furthermore, where implementation of a project has already commenced, those portions of the project which are the subject of the addendum, or have the potential to be directly affected by the proposed change, shall cease and shall not be reactivated until the termination of the review period.

Lapse of time

A time lapse may occur between the filing of the ESR and the implementation of the project. In such cases, the proposed project and the environmental mitigation measures proposed may no longer be valid.

If the period of time from (i) filing of the Notice of Completion of ESR in the public record or (ii) the MOE's denial of a Part II Order request(s), to the proposed commencement of construction for the project exceeds ten (10) years, the proponent shall review the planning and design process and the current environmental setting to ensure that the project and the mitigation measures are still valid given the current planning context. The review shall be recorded in an addendum to the ESR which shall be placed on the public record.

The 10 year review will begin from the date of the Minister's or delegate's decision of any Part II Order requests, or at the end of the public review period following the posting of the Notice of Completion where there is no Part II Order request.

Notice of Filing of Addendum shall be placed on the public record with the ESR and shall be given to the public and to the review agencies; a period of 30 calendar days shall be provided for review and response. The Notice shall include the public's right to request a Part II Order (see Section A.2.8) during the 30-day addendum review period. If no request is received, the proponent is free to proceed with implementation and construction.