Court of Appeal File No.
Divisional Court File No. 296/10

COURT OF APPEAL FOR ONTARIO

BETWEEN:

SOUTH MARCH HIGHLANDS – CARP RIVER CONSERVATION INC.

Appellant
(Moving Party)

- and -

THE CORPORATION OF THE CITY OF OTTAWA

Respondent
(Responding Party)

APPLICATION UNDER the *Judicial Review Procedure Act*, R.S.O. 1990, J.1. and Rule 68 of the Rules of Civil Procedure

NOTICE OF MOTION

THE APPELLANT will make a motion to the Court of Appeal 36 days after service of the moving party's motion record, factum and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier, at 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard in writing.

THE MOTION IS FOR:

(a) an Order granting leave to the moving party to appeal to the Court of Appeal from the decision of the Divisional Court dated December 14, 2010, wherein the moving party's application for judicial review was dismissed; and

(b) such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

The Undertaking

(a) The applicant South March Highlands - Carp River Conservation Inc. (the "applicant") sought judicial review of the decision of the respondent, The Corporation of the City of Ottawa (the "City"), to approve and commence construction of the Terry Fox Drive Extension (the "TFDE") between Richardson Side Road and the realigned Goulbourn Forced Road;

(b) In October of 2000, the then Region of Ottawa-Carleton and then City of Kanata completed a Class Environmental Assessment (the "2000 Class EA") under the Class Environmental Assessment for Municipal Road Projects (Municipal Engineer's Association, 1993)("MCEA") for the extension and widening of Terry Fox Drive in Ottawa;

(c) The 2000 Class EA divided the overall planning and construction of TFDE into five sections. The part of TFDE that is at issue in this application falls within Section 4 of the 2000 Class EA, and is the last section of TFDE to be constructed (the "Undertaking");

(d) The Undertaking travels through one of the most ecologically significant and diverse areas in the City of Ottawa, which is home to hundreds of species of plants and wildlife, including a minimum of 17 species-at-risk;

(e) Due to the nature of the Undertaking, it was classified as a "Schedule C" project under the MCEA. An Environmental Study Report was completed in 2000 (the "2000 ESR");

(f) Changes in the planning landscape necessitated an addendum to the original 2000 ESR, the filing of which was advertised by the City in January 2005 in accordance with section A.4.2.2 of the MCEA (the "First Addendum"). MCEA section A.4.2.2. 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. 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.

(g) Thereafter, members of the public requested additional orders under Part II under the *Environmental Assessment Act*, ("EAA") in respect of the First Addendum. Part II Order

requests are made to the Minister of the Environment ("Minister"). They permit the Minister to direct a full panel hearing before the Ontario Environmental Review Tribunal ("ERT") of issues raised in the environmental assessment process. A Part II Order is the only mechanism available whereby a full panel *viva voce* environmental assessment hearing of a project can occur;

(h) In 2007, the City commissioned an additional addendum regarding the Undertaking, which was released in April 2007 (the "Second Addendum"). However, to date the City has not completed a Notice of Filing of Addendum for the Second Addendum. Consequently, the ability of the public to request Part II Order(s) under the EAA in respect of the Second Addendum has never been engaged;

(i) Most significantly, it appears there have been major substantive changes to both the Undertaking itself and to its environmental context since the completion of the Second Addendum. Pursuant to section A.4.2.2 of the MCEA, these changes ought to have resulted in a further Addendum;

(j) The possibility of such changes and the ensuing need for further environmental assessment is also addressed by the lapse-in-time provision in section A.4.2.2 of the MCEA in force at the relevant time, which automatically requires a review of the Undertaking when five years from approval of the Class EA has lapsed:

> … 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. …;

(k) More than five years has passed between the date when the First Addendum came into effect and the start of construction of the Undertaking;

(l) Construction of the Undertaking in fact commenced in April 2010. Therefore, the applicant sought judicial review of the City's decision to proceed, notwithstanding:

(i) the City's apparent failure to issue a Notice of Filing of Addendum in relation its Second Addendum in 2007 as required pursuant to section A.4.2.2 of the MCEA;

(ii) the City's apparent failure to issue a further addendum despite significant modifications to the project and significant changes in the environmental setting for the Undertaking since 2007 as required pursuant to section A.4.2.2. of the MCEA; and

(iii) the City's apparent failure to begin construction within five years of approval as required pursuant to section A.4.2.2 of the MCEA.

The Decision Below

(m) On December 14, 2010, the Divisional Court released its decision;

(n) Notwithstanding on review the City's assertion that the applicant had no standing, the court held that the applicant had a genuine interest in the matter; that there was a serious issue to be tried, and; there was no other reasonable and effective manner for the issue to be resolved;

(o) Notwithstanding on review the City's assertion that the Minister of the Environment in addition to the City should have been a party to the case, the court held that the City on its own exercised a statutory power of decision that was subject to judicial review;

(p) Notwithstanding on review the City's assertion to the contrary, the court held that the City's decision to proceed with construction of the road was a statutory power of decision and thus subject to review;

(q) Furthermore, the court held that the City's decision to proceed without filing an Addendum that was available for public review had broad public interest implications because of the lack of opportunity for public review;

(r) Notwithstanding on review the City's assertion that the application was moot because the Undertaking was nearing completion, the court agreed that it is not too late to address items such as environmental mitigation;

(s) However, the court went on to hold there had been no lapse in time under the MCEA between the granting of the requisite approvals and the start of construction of the Undertaking;

(t) The court also held that the Second Addendum in 2007 was not in fact an addendum for the purposes of the MCEA because there had not been significant modifications to the Undertaking or changes in its environmental setting;

(u) The court also held that between 2007 and the present there had not been significant modifications to the Undertaking or changes in its environmental setting. As a result, no further addendum was required;

(v) At the same time, the court noted in its decision:

> [72] According to the applicant, significant changes to the project include: location of the preferred floodplain compensation work to the west side of the Carp River, instead of the east side; realignment of almost one-third of a kilometer of the road; removal of a large eco-passage to be replaced by a system of culverts; and installation of more than four kilometers of wildlife

> fencing. Changes to the environmental setting include: designation of 200 additional hectares of urban land upstream of the TFDE; a major flood in the Carp River watershed in 2009; introduction of the *Endangered Species Act, 2007,* S.O. 2027. c. .6; discovery in 2009 of threatened species such as Blanding's Turtle; and major changes in the greenness and wetness of the project area.

(w) Most of these and numerous other events that occurred since the First Addendum was filed in 2004 were not disputed by the City. The court made no contrary findings. The court also acknowledged that reputable experts had expressed opinions on both sides. The court also acknowledged that the decision as to whether the City complied with the necessary MCEA requirements was not for the Ministry of Environment ("Ministry") to make;

(x) However, the court held that the Ministry's review of the Undertaking was a significant indicator of the reasonableness of the City's decision that there was no need to file a further Addendum requiring public review. The court also held that in its view there was no evidence that would allow the court to conclude that the City's decision was an unreasonable one and that "the nature of the changes does not speak for itself";

Grounds For Which Leave Is Sought

(y) The applicant respectfully submits that the court below erred in finding that the Undertaking had lapsed. More specifically the court erred in law in finding:

(i) that the First Addendum in 2004 did not recommence the MCEA lapse in time provisions in relation to the Undertaking;

(ii) that construction of the Undertaking commenced in 2003; and

(iii) that the lapse in time provisions related to the Undertaking had been extended from 5 to 10 years;

(z) The applicant also respectfully submits that the court below erred in finding that there had not been any significant modifications to the Undertaking or changes in its environmental setting. More specifically, the court erred in law:

(i) in finding that the review of the Ministry, which the court recognized had no jurisdiction in this matter, was sufficient to conclude the City had acted reasonably;

(ii) in finding that the review of the Ministry, which did not examine the ecological matters raised by the applicant regarding species at risk issues etc., was sufficient to conclude the City had acted reasonably;

(iii) in finding that there was no evidence that would allow the court to conclude the City's decision was unreasonable, while at the same time recognizing there was conflicting expert evidence before the court that it did not review;

(iv) by having acknowledged the numerous modifications to the Undertaking and changes to the environmental setting identified by the applicant, but proceeding without independent review by the court; and

(v) by not acknowledging that the remedy sought is modest, merely the completion of the statutorily mandated procedure set out in MCEA section A.4.2.2;

(aa) The MCEA through section A.4.2.2 provides a clear and accountable process whereby all members of the public can participate in the environmental assessment of projects where changes occurred. The MCEA is used by municipalities across Ontario thousands of times each year;

(bb) If the court's decision is left intact, it represents a major alteration of the addendum requirements of the MCEA, transforming it into a process directed by the Ministry, removing all public notice requirements and limiting participation to *ad hoc* submissions by a few individuals;

(cc) If the court's decision is left intact, it also *de facto* removes the ability to seek full panel reviews of major projects under the EAA and Part II order process;

(dd) If the court's decision is left intact, it effectively establishes a system that discourages public participation in other parts of the environmental assessment process and renders the public participation rights under the MCEA addendum provisions nugatory;

(ee) As a result, there is good reason to doubt the correctness of the order in question;

(ff) This Honourable Court has not considered these or any other provisions of the MCEA. Consequently, there is a need to clarify the correct interpretation and application of the MCEA;

(gg) In light of the consequences of permitting the decision to stand, the matter is of sufficient importance to require that leave be granted;

(hh) Rule 61.03.1 of the Rules of Civil Procedure; and

(ii) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) the moving party's motion record; and

(b) such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

December 29, 2010

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