Court of Appeal File No. M39587
Court File No. 296/10

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

SOUTH MARCH HIGHLANDS – CARP RIVER CONSERVATION INC.

Moving Party

- and -

THE CORPORATION OF THE CITY OF OTTAWA

Respondent

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

REPLY FACTUM

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PART I - INTRODUCTION

1. This factum of the Moving Party, South March Highlands – Carp River Conservation, is submitted in reply to the responding factum of the respondent the City of Ottawa (the "City").

2. The City's responding factum is largely devoted to the assertions that (a) the Moving Party's leave to appeal is "purely" factual and (b) that the Moving Party has mischaracterized the facts of the case.

3. Though the parties may have different views of the facts, as is to be expected in a matter of this complexity, the Moving Party disagrees that any mischaracterization occurred. The Moving Party also reiterates its position that this motion for leave to appeal is founded on questions of law and mixed fact and law.

4. Furthermore, these are questions of law and mixed fact and law with far-reaching consequences. Because there is no prior jurisprudence on the MCEA, with the exception of the *William Ashley* decision cited at paragraph 38 of the Moving Party's factum which does not address the issues raised herein, it is of significant precedential value and has the potential to define the future application of Municipal Class Environmental Assessment ("MCEA") in key areas.

PART II – STATEMENT OF ISSUES, LAW AND AUTHORITIES

5. The City submits at paragraph 9 of its factum that the Moving Party has "incorrectly implied" that the project in the present case is the Terry Fox Drive Extension ("TFDE") and not the project as a whole. It goes on to assert that the definition of "Undertaking" in the factum is an "attempt to obscure the nature of the project as scoped in the 2000 ESR."

6. The Moving Party submits several relevant facts in reply. Construction of Sections 1, 2, 3, 5 and the southernmost part (no new road) of Section 4 was commenced in or about 2003. Due to modifications in the environmental and planning context, the City deemed an Environmental Assessment (EA) Addendum necessary. The City advertised the filing of this addendum in 2005 in accordance with section A.4.2.2 of the MCEA. Because a Part II Order Request was filed after the completion of this Addendum, no construction could take place. That Addendum was only withdrawn on January 23, 2007. Subsequent to that, the City entered the detailed design stage, and construction road through the South March Highlands, or the Undertaking, ultimately commenced in February 2010. Contrasting the Study Area maps in the 2000 ESR and the 2005 EA Addendum (Tab 6-C p. 83 and Tab 11-I p. 545, Moving Party's Motion Record) clearly indicates that the project in question had narrowed to the new portion of road to be constructed through the South March Highlands. The Moving Party's focus on this area is reflective of that.

> **Cooper Affidavit; Moving Party's Motion Record, Tab 6, p. 56, para. 6 and Tab I, p. 83**
>
> **Stoddard Affidavit; Moving Party's Motion Record, Vol. 2, Tab 11, p. 466, para. 31 & Tab 11-J, p. 545 & Tab 11-M, p. 725**

7. The Moving Party's characterization of the project at issue has been consistent since the inception of this process. Its characterization was also accepted by the Divisional Court when it noted that "the applicant seeks judicial review of the decision of the City of Ottawa to approve and commence construction *of a portion* of the Terry Fox Drive Extension (TFDE)," when it noted that "the applicant's concerns relate *to a portion* of the TFDE," and when it cited the City's decision that is subject to judicial review: "Ottawa City Council approved the financing of the city portion of various

infrastructure stimulus projects, including *the last portion* of the TFDE." [Emphasis added]

Decision; Moving Party's Motion Record, Tab 2, pp. 13-14, paras. 1, 5 & 14

8. The City's objection at paragraph 9 to the definition of the "Undertaking" is connected to its submission at paragraph 12 that the Moving Party was mischaracterizing the facts in stating: "Due to the nature of the Undertaking in particular, the entire project was classified as "Schedule C" under the MCEA." The City references the MCEA "Appendix 1 – Project Schedules" in support of its view. That Appendix in fact states: "The types of projects and activities listed are intended generally to be categorized into Schedules A, B and C with reference to the magnitude of their anticipated environmental impact." [Emphasis added]

9. As has been clear throughout the history of the TFDE, it is the portion of the road between Richardson Side Road and Goulbourn Forced Road, defined by the Moving Party as the "Undertaking" which is responsible for the vast majority of the road's environmental impact. While the City is correct in its assertion that the 2000 ESR scoped the TDFE project "as a whole", it does not identify that of the five parts of the project scoped, three (2, 3 and 5) involved mere widening of the existing road while only two sections involved entirely new road construction. Although Section 1 extended the far south end of TFDE, this was through an already developed area. However, with regard to Section 4, which is separated from Section 1 by many kilometers, new road was constructed through the environmentally sensitive South March Highlands, in order to connect Sections 3 and 5.

Cooper Affidavit; Moving Party's Motion Record, Tab 6, p. 56, para. 6

10. This is substantiated by the City's own Report to Council in 2004 which states: "In order for Terry Fox Drive to complete the link between Richardson Side Road and Goulbourn Forced Road it is necessary for it to pass through a portion of the South March Highlands, one of the most significant land forms in the City." In fact, the City defined a "secondary study area" for the purpose of "documenting and evaluating the surrounding environmental issues" – the area bounded on the south by Richardson Side Road and on the east by Goulbourn Forced Road.

Cooper Affidavit; Moving Party's Motion Record, Tab 6-D, pp. 94-96

11. The City states at paragraph 20 of its factum that "[t]he MCEA process is intended to balance the social and natural environments." No reference is provided for this characterization, which the Moving Party disputes. The MCEA is in fact concerned with the satisfaction of the Ontario *Environmental Assessment Act*, R.S.O. 1990, Chapter E. 18 as amended (the "EA Act"), and specifically quotes the purpose of the EA Act: "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 (Part I – Section 2)."

MCEA; Moving Party's Book of Authorities, Tab 13, p. A-1

12. The City asserts in paragraph 21 that "the Moving Party's 'backers' did not involve themselves in the MCEA process" and attempts to support this assertion by setting out a purported chronology of the project "including many opportunities for public review".

13. The Moving Party notes in reply that the significant changes to project design that are, *inter alia*, of concern to the Moving Party (cited in the Moving Party's Factum at

paragraph 15a – e) only became known to the public when the City filed its CEAA reports with federal authorities in February and April 2010. Because such information is critical to the validity of public consultations, the lack of this information negates the effectiveness of any public consultations held prior to that date including those held on June 22 and Nov. 23, 2009.

> **Cooper Affidavit; Moving Party's Motion Record, Tab 6, p. 61, para. 20;**
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> **Transcript of the Cross Examination of Steven Stoddard (the "Stoddard Cross-Ex"); Moving Party's Motion Record, Vol. 5, Tab 19, p. 1745, Q. 164**
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> **Transcript of the Cross Examination of Shawn Ross Taylor (the "Taylor Cross-Ex"); Moving Party's Motion Record, Vol. 5, Tab 18, p. 1893, Q. 151-154**
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> **Taylor Cross-Ex; Moving Party's Motion Record, Vol. 5, Tab 19 (Exhibit 10), p. 1928**

14. It was when the CEAA reports were filed, as noted in the City's factum (see table at paragraph 21, February – March 2010), that "a number of individuals wr(o)te letters to MOE raising the very same issues as were raised in the application for judicial review." In other words, the "public," some of whom were members of the South March Highlands Coalition, became quickly engaged in the process once it became known, for example, that the large eco-passage was to be downgraded to a system of untested culverts and fencing, and that the flooding risk in the Carp River watershed would be exacerbated by the proposed changes to floodplain storage strategy. It is not reasonable to expect the public, as the City appears to do, to engage on issues until the public knows what those issues are. Finally, what is obscured on the respondent's chart is the fact that the mitigation measures being implemented are not those proposed and known to the public prior to February and March 2010.

15. At paragraph 42 of its factum the City states that the issue of the lapse in time provision is just factual. The Moving Party has, in its respectful submission, put to the

Court a purposive interpretation of the lapse in time provision, which is a question of law, which would lead to the conclusion that an Addendum "restarts" the clock. If the Legislature saw fit to approve a provision that required an Addendum five-years after the completion of an ESR if no construction had taken place, for reasons of environmental protection and public protection, it is only reasonable to conclude that five years after an Addendum on the Undertaking's environmental impact (an Addendum focused *specifically* on the Undertaking, that is, the portion of the TFDE between Richardson and Goulbourn Roads) the lapse in time provision would also apply.

16. At paragraph 47 the City takes issue with the reference to Ms. Mitchell's cross-examination without reference to the transcript. Ms. Mitchell's comments at the portions of the transcript quoted by the City were not in fact responsive to the question of which lapse in time provision (the 2007 MCEA or the 2000 MCEA) applied to the TFDE. Rather, as is clear from her commentary, she is emphasizing her opinion that the start date of construction of Phases 1-3 and 5 in 2003 be understood to apply to the entire project. Her only comment with respect to the change in the lapse in time provision was that if construction of the project "within the scope defined in the ESR has started within five years, now within ten, then the lapse in time provision does not apply." She does not stipulate in her answer which version applies. In fact, her use of the word "now" indicated, in the Moving Party's submission, her understanding that the provision had only recently changed.

Cross-examination of Vicki Mitchell ("Mitchell Cross-ex"), September 23, 2010; Moving Party's Motion Record, Tab 20, p. 1957

17. The Moving Party's submission with respect to Ms. Mitchell is reasonable in light of the letter of Agatha Garcia-Wright, put to Ms. Mitchell in her cross-examination. Ms.

Garcia-Wright, Director, Environmental Assessment and Approvals, Ministry of the Environment stated in a letter to the Municipal Engineers Association with respect to the Phase In Provision of the MCEA, as amended in 2007: "The ministry's interpretation of Section A.1.4 is that proponents who issue a Notice of Completion prior to September 6, 2007 are subject to the 2000 version of the Class EA." The City issued its Notice of Completion prior to this date, and so must be subject to the 2000 Class EA, which stipulates a five-year lapse in time provision. On cross-examination, Ms. Mitchell stated as follows with respect to the Garcia-Wright letter:

> Q. The letter deals with which version of the municipal class EA process a proponent should be looking to depending on the date that their Notice of Completion was filed, and it deals specifically with the system or application of either the 2000 or the 2007 versions of the municipal class EA. I'm assuming that those are concepts that your work was causing you to have to think about around this time; would that be correct?
>
> A. Well, this letter basically confirms my understanding at the time that I reviewed the emails from various concerned parties, and it basically reflects my understanding at the time that if a Notice of Completion was issued prior to September 5th, 2007 there would be a five-year lapse of time between the issuance of the Notice of Completion and the start of Construction or otherwise an addendum would be required.
>
> Q. I'll just ask for your understanding, then… which version should the proponents be looking or at that point in time in your mind which version?
>
> A. Yes, at that point in time it looks like they should have been using the 2000 version if the notice was issued prior to that date, September 2007.
>
> Q. And that would be for not ony the lapse in time provision, but all of the other provisions under the MCEA?
>
> A. According to this, yes.
>
> Q. And you agree with Ms. Garcia-Wright?
>
> A. Yes.
>
> **Mitchell Cross-ex, September 23, 2010; Moving Party's Motion Record, Tab 20, p. 1939-41, Q's 24-27**
>
> **Cross-ex; Exhibit 1, p. 1984-5**

18. At paragraph 49 of its factum the City asserts that any discussion of the wider policy context is irrelevant to these proceedings. The Moving Party notes in reply the Divisional Court's own finding that "the City's decision to proceed with construction

without filing an Addendum that was available for public review has broad public interest implications." The environment is a matter of significant public interest, and it is appropriate for the court to consider the broader public interest context when applying a document that seeks to engage the public and protects the environment on its behalf.

19. At paragraph 50 the City asserts that the evaluation of what is a "significant change" under the MCEA is a question of fact not of law, to be determined by individual engineers & cities. With respect, the Moving Party very much disagrees. Courts and tribunals, in the first instance and on appeal, have considered the meaning of "significant" or "significance" in conjunction with terms such as "unfair," "economic contribution" and "modified." In *Reid v. Strata Plan LMS 2503,* for example, the British Columbia Court of Appeal considered the meaning of the term "significantly unfair" at some length, noting that the word "significant" indicated something "of great importance or consequence."

> ***Reid v. Strata Plan LMS 2503*, [2003] B.C.J. No. 417 (C.A.) (QL); Moving Party's Supplementary Book of Authorities, Tab 1, pp. 7-8. See also *Liu v. Canada (Minister of Employment and Immigration)*, [1991] I.A.D.D. No. 47 (I.R.B. – A.D.) (QL); Moving Party's Supplementary Book of Authorities, Tab 2, pp. 18-21 for analysis of the term "significant economic contribution".**

20. In a decision of the Alberta Court of Appeal, the court went to definitions of the term "significant" and "significantly" when evaluating a lower court's interpretation of "significantly modified" in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, finding that it implies an impact on "the basic physical characteristics of the property in such a way as to have a lasting effect… as impacting the property in a material way. Considered this way, both qualitative and quantitative considerations arise."

> ***R. v. Gisby*, [2000] A.J. No. 1145 (C.A.) (QL); Moving Party's Supplementary Book of Authorities, Tab 3, pp. 14-15. paras. 49-53 and 55.**

21. According to the TFDE EA Addendum itself, "[i]t is important to note that the interpretation of "significant changes" is subject to public scrutiny. Members of the public can object to the above-notes list of significant changes and suggest, with supporting arguments, that other changes to the October 2000 ESR are significant, and should be included within the EA Addendum." On this basis, the Moving Party would respectfully submit that a determination of what is a "significant modification" under the MCEA clearly cannot be viewed a question of fact alone.

Affidavit of Steven Stoddard, Exhibit I; Moving Party's Motion Record, Tab 11-I, p. 546.

22. In reply to the City's paragraph 51, it was not the intent of the Moving Party to allege that the summary of evidence was not a summary of its own argument. This was clear in the Decision itself, which the Moving Party directly referenced. It is relevant, however, that the Divisional Court focused on certain items listed by Moving Party in its argument. The list of changes to the Undertaking put forward by Moving Party to the Divisional Court have been reproduced in its factum on the motion to this Honourable Court at paragraphs 15 and 16. The Divisional Court chose to reference several of those changes above the others. It was on this basis that the Moving Party characterized the ensuing summary of evidence as the "Panel's own."

23. In reply to the City's paragraph 56, the Moving Party takes issue with the statement that the characterization of the Divisional Court's decision at paragraph 83 is "blatantly wrong." In fact, in its decision the Divisional Court set out a contrast between (a) the Ministry's decision, a significant indicator of reasonableness and (b) "no evidence" that the decision was unreasonable. The manner in which this contrast is set out indicates a ranking or prioritization of the Ministry's decision over the opinion of

experts who scrutinized the project and its environmental context in great detail. This is further evidenced by the absence of any detail or summary of the evidence put forward by each of the experts.

24. In reply to the City's assertion at paragraph 57 of its factum regarding judicial review, the Moving Party submits that it did not misapprehend the role of the court. As noted by the Divisional Court directly in its decision, the Moving Party acknowledged that the applicable standard of review was reasonableness.

25. It is the Moving Party's respectful submission, however, that the court, while deferring to a decision-maker below with expertise in the matter concerned, must nonetheless carefully examine the evidence. 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 (QL)(C.A); Moving Party's Supplementary Book of Authorities, Tab 4, pp. 12 & 13, paras. 38 & 40**

26. At paragraph 58 of its factum the City references *William Ashley* in support of its assertion that the Divisional Court has previously acknowledged that large cities have expertise in respect of projects under the MCEA. The moving party notes in reply that *William Ashley* was concerned with the question of categorizing a project as Schedule A, B or C. That categorization is made on the basis of detailed charts and guidelines

contained in the MCEA. No equivalent to the interpretation of a provision such as A.4.2.2 – the lapse in time, change and/or modification provision – is raised by the question of assigning a project to a Schedule. Thus, while the moving party does not dispute that the relevant test is reasonableness, the comments of the Divisional Court in *William Ashley* cannot be held out as guidance on the questions before this Honourable Court.

MCEA, Appendix 1 – Project Schedules; Responding Party's Book of Authorities, Tab 10, p. 1-5

PART III - CONCLUSION

27. This case raises issues regarding the application of the MCEA, and specifically the lapse in time, "significant modification" and "change in environmental setting" provisions. These provisions apply to a large number of infrastructure projects across Ontario each year and have never previously been considered by either the Divisional Court or this Honourable Court.

28. If this decision is permitted to stand, in terms of substance, given the breadth of modification and change to this project, it is difficult to envision any project meeting the test to trigger an addendum.

29. In terms of process, it appears the need for EAs in future may well be effectively decided, not by the statutory exigencies of the MCEA but rather through non-public, non-transparent communications between the municipal proponent and MOE staff, inherently enabling the former to forego engagement in the public process set out in the MCEA. The legislative regime of the MCEA, the essential foundation of which is transparency, wide public notice requirements and consultation, will be effectively bypassed.

30. The Moving Party respectfully submits that given the importance of these issues this Honourable Court can and ought to provide its guidance regarding their resolution.

All of which is respectfully submitted this 28th of March, 2011.

_____
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_____
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SCHEDULE A

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

Liu v. Canada (Minister of Employment and Immigration), [1991] I.A.D.D. No. 47 (I.R.B. – A.D.) (QL)

Reid v. Strata Plan LMS 2503, [2003] B.C.J. No. 417 (C.A.) (QL)

R. v. Gisby, [2000] A.J. No. 1145 (C.A.) (QL)