Court File No. T-1572-11

FEDERAL COURT

BETWEEN:

GREENPEACE CANADA,
LAKE ONTARIO WATERKEEPER, NORTHWATCH and
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT,
CANADIAN NUCLEAR SAFETY COMMISSION, and
ONTARIO POWER GENERATION INC.

Respondents

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APPLICANTS' MEMORANDUM OF FACT AND LAW

PART I – CONCISE STATEMENT OF FACTS

A. Overview

1. This is an application for judicial review in relation to a federal environmental assessment ("EA") conducted by a Joint Review Panel ("JRP" or "Panel"). The respondents Minister of the Environment ("Minister") and Canadian Nuclear Safety Commission ("CNSC") established the JRP to conduct an EA and licencing review for the Darlington New Nuclear Power Plant Project ("the Project") proposed by Ontario Power Generation ("OPG").

2. The applicants' overall position is that in conducting the EA, the JRP failed to comply with the mandatory requirements of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA") and the JRP's own Terms of Reference.

3. As a matter of law, the JRP failed to conduct an EA of a "project" within the meaning of the CEAA, and further failed to consider the mandatory factors prescribed by section 16 of the CEAA and the JRP's Terms of Reference. In addition, the JRP failed to comply with the legal duties imposed by section 34 of the CEAA in relation to information-gathering, public participation, and reporting. Moreover, the JRP has unlawfully attempted to defer or delegate its section 34 duties to other entities and agencies in the post-EA period. Accordingly, the applicants respectfully request that this Honourable Court, *inter alia*, issue an order remitting the EA back to the JRP for further consideration in accordance with the legal requirements of the CEAA.

B. The Provincial Project and the Federal EA Process

4. In 2006, OPG's sole shareholder (the Government of Ontario) directed it to seek federal approvals for the development of new nuclear units "at an existing site",

which was later specified by the Government of Ontario as the Darlington Nuclear Generating Station ("NGS").

Applicants' Record ["AR"], Vol. 1, Tab 2: JRP Report, p.1

5. OPG's proposed nuclear "new build" is a plan for the site preparation, construction, operation, decommissioning and abandonment of "up to" four new nuclear reactors at the Darlington NGS, which is located on the Lake Ontario shoreline in the Municipality of Clarington, Ontario. Among other things, this will include nuclear power reactor buildings, containment structures, nuclear fuel management and storage, electrical turbine systems, condenser cooling technology, lake infilling, fish habitat alteration, stormwater management, air and water discharge systems, management of conventional and hazardous wastes, on-site storage of radioactive wastes, and ancillary buildings.

AR, Vol. 1, Tab 2: JRP Report, pp.1, 13-16; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.48-52; and Exhibit A: OPG Project Description (April 12, 2007), pp.11-19

6. After OPG filed an application for a Licence to Prepare a Site under the *Nuclear Safety and Control Act*, S.C. 1997, c.9 ("NSCA") in 2006, the CNSC advised OPG that a CEAA assessment was required because the *Law List Regulations* (SOR/94-636) prescribe the NSCA licence under the CEAA. The Project also required other federal approvals that are prescribed by the CEAA *Law List Regulations* as triggers for EA (i.e. authorizations under subsection 35(2) of the *Fisheries Act,* R.S.C. 1985, c.F-14, and subsection 5(1)(a) of the *Navigable Waters Protection Act*, R.S.C. 1985, c.N-22). While parts of the Project will require future additional licences under the NSCA (e.g. to construct, operate, decommission, and abandon the facility), the federal EA at issue in this case is the only EA that will be carried out for this Project as a whole.

AR, Vol. 1, Tab 2: JRP Report, p.5; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper,

paras.55-57; AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, para.52

7. In 2008, the Minister, acting on the request of the CNSC, referred the Project to a review panel pursuant to section 29 of the CEAA.

AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.59-61

8. In January 2009, the Minister and the CNSC signed an Agreement to establish the JRP for the Project pursuant to section 40 of the CEAA. Under the Agreement, two panel members were to be appointed by the CNSC, and one panel member was to be proposed by the Minister to the President of the CNSC. The Agreement also fixed the Terms of Reference for the JRP pursuant to section 41 of the CEAA, and fulfilled the Minister's duty to determine the factors that the JRP was to consider pursuant to subsection 16(3)(b) of the CEAA. The Agreement further specified that it did not limit the JRP's consideration of the matters listed in subsections 16(1) and (2) of the CEAA (see below). In short, the dual mandate of the JRP was to conduct the EA required under the CEAA, and to review OPG's application under the NSCA for a licence to prepare the Darlington site. For this latter purpose, the JRP was also constituted as a panel of the CNSC for the purposes of section 24 of the NSCA.

AR, Vol. 1, Tab 2: JRP Report, p.6; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.65-66; Exhibit I: JRP Agreement, sections 2.2, 3.1, 3.2, 4.1, 4.2 and Appendix - Terms of Reference (January 2009)

9. In September 2009, OPG filed an Environmental Impact Statement ("EIS"), supporting documents, and a revised application for the NSCA site licence. The EIS is not the EA that the JRP was required to conduct under the CEAA; instead, the EIS is the proponent's written report provided to the JRP during the EA.

AR, Vol. 1, Tab 2: JRP Report, p.6; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.64, 68; Exhibit G: EIS Guidelines for the Project (March 2009); Respondent's Record (OPG): Affidavit of Lauri Swami, Exhibit 10: OPG EIS (September 30, 2009)

10. When OPG filed its EIS, no specific nuclear reactor type had been selected for

the Project. Nor was the overall site development set out completely in the EIS because development requirements (and other factors) are unique to each reactor type, and therefore cannot be identified without first determining the reactor type. Instead, OPG undertook what it called a "bounding approach" (or "plant parameter envelope" or "bounding scenario") to evaluate a hypothetical hybrid based upon the three reactor technologies under consideration at the time (i.e. ACR-1000, US EPR, and AP1000). The Enhanced CANDU-6 reactor technology (EC-6) was not included or assessed in the EIS. As described below, the "bounding approach" contributed to the JRP's failure to meet its legal duties under the CEAA.

AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, para.69; Respondent's Record (OPG): Affidavit of Lauri Swami, Exhibit 10: OPG EIS (September 30, 2009), pp.ES2-ES3, 1-15-1-16, 2-10, 2-13

11. In October 2009, three persons were appointed to the JRP in accordance with the Agreement. The JRP members undertook various review activities, including a public hearing in relation to the Project, as described below.

AR, Vol. 1, Tab 2: JRP Report, pp.7-8; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.70-98

12. The applicants, which are non-profit public interest organizations with a lengthy history of involvement and demonstrated interest in nuclear issues and environmental protection, participated as interveners during the JRP's pre-hearing proceedings and the JRP's public hearings on the Project.

AR, Vol. 1, Tab 3: Affidavit of Shawn-Patrick Stensil, paras.16-81; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras. 6, 47, 63, 74, 77, 79, 82, 84, 87, 89, 91, 95, 96; AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, paras.22-80; AR, Vol. 7, Tab 6: Affidavit of Brennain Lloyd, paras. 13-39

13. Just before the close of the JRP's pre-hearing public comment period on OPG's EIS, the applicants learned that the EC-6 reactor technology would be added as a fourth design to be assessed within the EA conducted by the JRP. Since the EC-6 technology

poses health and environmental risks which significantly differ from those arising from the three reactor designs addressed in the EIS, the applicants objected to the late inclusion of the EC-6 design on fairness grounds and other reasons. However, these objections were overruled by the JRP. The JRP thus permitted OPG to revise its "plant parameter envelope" (after the public comment period on the EIS) to include the EC-6 option.

AR, Vol. 1, Tab 2: JRP Report, p.12; AR, Vol. 1, Tab 3: Affidavit of Shawn-Patrick Stensil, paras.56-60, 65-77; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.76-78, 84-85, 87; Exhibit P: Joint Letter to JRP (October 5, 2010); Exhibit W: Joint Letter to the JRP (March 3, 2011); Exhibit Y: CELA Letter to the JRP (March 14, 2011)

14. From March 21 until April 8, 2011, the JRP held a 17 day public hearing. After the hearing ended, the JRP accepted further evidence from two participants (OPG and the Ontario Ministry of Energy) provided through answers to Undertakings 75 and 76, to which other participants (including the applicants) were not provided an opportunity to file responding evidence. In June 2011, the JRP announced that it had obtained and made public all of the information needed to prepare its Report, and the JRP closed the record for the EA.

AR, Vol. 1, Tab 2: JRP Report, pp.8, 23-25; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.98-99; and Vol. 5, Exhibit JJ: JRP Announcement (June 3, 2011)

C. Release of the JRP Report on the Project

15. On August 25, 2011, the JRP published its EA Report regarding the Project. The Report identified numerous significant gaps in the data, information, methodology and analysis needed to fully assess the Project's environmental effects or to identify specific mitigation measures or the requirements of follow-up programs. The Report made a number of recommendations in an effort to fill these gaps in information through processes other than an EA under the CEAA.

AR, Vol. 1, Tab 2: JRP Report, pp. (i) to (x); AR, Vol. 4, Tab 4: Affidavit of Kathleen

Cooper, paras.100-133

16. The Report further noted, *inter alia*, that no specific reactor technology, site design layout, cooling system option, used nuclear fuel storage option, radioactive waste management option, or other key components had been selected for the Project to date. Despite the absence of these and other critical details, the Report purported to conclude that the Project is not likely to cause significant adverse environmental effects, provided that OPG's commitments, proposed mitigation measures, and the Panel's 67 recommendations are implemented.

AR, Vol. 1, Tab 2: JRP Report, pp.(i), 1, 12-13, 31, 39-40, 45-46, 48-49, 51-53, 59-60, 63-75, 77-78, 80-81, 86, 88-89, 106, 116-118, 124-25, 131-135; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.100-133

17. Since the JRP has now submitted its Report to the Minister, the CEAA requires the respondents CNSC, Minister of Fisheries and Oceans, and Minister of Transport to consider and respond to the Report with the approval of the Governor in Council. The CEAA further requires them to make a "course of action" decision under section 37 of the CEAA that conforms with the approval of the Governor in Council. To date, neither the Governor in Council nor the federal respondents have announced any responses or decisions in relation to the JRP Report or the Project.

AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.131-35

18. On September 23, 2011, the applicants commenced this application for judicial review.

AR Vol. 1, Tab 1, Notice of Application for Judicial Review (T-1572-11)

PART II – POINTS IN ISSUE

19. The applicants submit that the main points in issue in these proceedings are as follows:

(a) Did the EA conducted by the JRP comply with the CEAA and the JRP's Terms of Reference?

(b) What is the applicable standard of review?

(c) What is the appropriate remedy?

(d) Do the applicants have standing to seek judicial review in this case?

PART III – CONCISE STATEMENT OF SUBMISSIONS

A. The EA Conducted by the JRP did not Comply with the CEAA

(i) CEAA Purposes: Sustainable Development, Public Participation and Precaution

20. The overall aim of the CEAA is to achieve sustainable development by integrating environmental considerations into federal governmental decision-making in relation to projects subject to the Act. "Sustainable development" is defined under the CEAA as "development that meets the needs of the present, without compromising the ability of future generations to meet their needs." In addition, section 4 of the CEAA requires "careful and precautionary" consideration of projects, and emphasizes "timely and meaningful public participation throughout the environmental assessment process".

> **CEAA, preamble, subsections 2(1), 4(1) and 4(2); Beverly Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora: Canada Law Book, 2011) at II-2 (AR, Vol.9, Tab B29) ["Hobby et al."]**

21. Similarly, subsection 4(2) of the CEAA imposes a positive legal duty upon "all bodies subject to the provisions of this Act," including the JRP and federal authorities, to "exercise their powers in a manner that protects the environment and human health and applies the precautionary principle." The CEAA is essentially the federal "look

before you leap" law. The Supreme Court has endorsed the precautionary principle, adopting a definition from international law that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

> **CEAA, subsection 4(2); *R. v. Hydro-Québec* [1997] 3 S.C.R. 213 at para.86 (AR, Vol.8, Tab B1); *114597 Canada Ltée (Spraytech, Societé d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para.31 (AR, Vol.8, Tab B2) ["*Spraytech*"]; *Sierra Club of Canada v. Canada,* 2002 SCC 41 at para. 84 (AR, Vol.8, Tab B3); *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 at paras.29-31 (AR, Vol.8, Tab B8) ["*Pembina Institute*"]**

22. The Federal Court of Appeal has held that "the precautionary principle states that a project should not be undertaken if it *may* have serious adverse environmental consequences, even if it is not possible to prove with any degree of certainty that these consequences will in fact materialize" (original emphasis).

> ***Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage),* 2003 FCA 197 at para.24 (AR, Vol.8, Tab B4)**

(ii) The Statutory Scheme under CEAA

23. The Supreme Court of Canada has described EA "as a planning tool that is now generally regarded as an integral component of sound decision-making," and that "has both an information-gathering and decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development."

> ***Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 at para. 103 (AR, Vol.8, Tab B5) ["*Friends of the Oldman River*"]**

24. The CEAA defines EA as follows:

> "environmental assessment" means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations (emphasis added)
>
> **CEAA, subsection 2(1)**

25. The obligation to conduct an EA in accordance with CEAA arises, *inter alia,* when a prescribed permit, licence, or approval is required to enable a project to be carried out. In this case, the federal EA was triggered by the Project's need for certain federal approvals which are prescribed in the *Law List Regulations*, as described above.

> **CEAA, subsection 5(1)(d); *Law List Regulations*, SOR/94-636, Schedule I, paras. 6(e), 11, 12.1; *Bow Valley Naturalists Society v. Canada* [2001] 2 F.C. 461 at paras.14-23 (AR, Vol.8, Tab B6) ["*Bow Valley Naturalists*"]; Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham: LexisNexis, 2008) at 87-91 (AR, Vol.9, Tab B30)**

26. Section 11 of the CEAA provides that an EA shall be conducted as early as practicable in the planning stages of a project and before irrevocable decisions are made. However, the EA must be conducted at a stage when the project's environmental implications can be fully considered, and when it can be determined, with public and agency input, whether the project may potentially cause adverse environmental effects.

> ***Friends of the Island Inc. v. Canada (Minister of Public Works),* [1993] 2 F.C. 229 at paras.41, 47, 53-54, 99 (AR, Vol.8, Tab B7) ["*Friends of the Island*"]; CEAA, section 11**

27. In this case, the Minister referred the Project to a review panel. This Honourable Court has described review panels as the most "stringent" form of EA under the CEAA while the Supreme Court has called it the most "rigorous" form of EA requiring the highest level of "intensity".

> **CEAA, sections 14, 29, 33; *Pembina Institute,* at para.17 (AR, Vol.8, Tab B8); *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2 at paras.14-17 (AR, Vol.8, Tab B11) ["*MiningWatch*"]**

28. Section 34 of the CEAA imposes mandatory duties upon a review panel in relation to information-gathering, public participation, and reporting:

> 34. A review panel shall, in accordance with any regulations made for that purpose and its terms of reference,

> (a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;
>
> (b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;
>
> (c) prepare a report setting out:
>
> > (i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up programs; and
> >
> > (ii) a summary of any comments received from the public; and
>
> (d) submit the report to the Minister and the responsible authority (emphasis added).

CEAA, section 34

29. Section 41 of the CEAA stipulates that the agreement establishing a JRP "shall provide that the environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2)" of the CEAA.

CEAA, subsection 2(1), definition of "assessment by a review panel", and section 41

30. Subsections 16(1) and (2) of the CEAA, set out mandatory factors that must be considered by a review panel and certain factors that are to be established by the Minister in project-specific terms of reference:

> 16**.** (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
>
> (b) the significance of the effects referred to in paragraph (a);
>
> (c) comments from the public that are received in accordance with this Act and the regulations;
>
> (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
>
> (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the

> project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.
>
> (2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> (a) the purpose of the project;
>
> (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
>
> (c) the need for, and the requirements of, any follow-up program in respect of the project; and
>
> (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future (emphasis added).
>
> **CEAA, subsections 16(1) and (2)**

31. In this case, the above-noted mandatory considerations were expressly adopted in Part IV of the Terms of Reference in the JRP Agreement, which specified that the scope of the EA and factors to be considered "will include" the various matters listed under subsections 16(1) and (2) of the CEAA.

> **AR, Vol. 1, Tab 2: JRP Report, pp.6-7; AR, Vol.4, Tab 4: Affidavit of Kathleen Cooper, Exhibit I: JRP Agreement and Terms of Reference**

32. There is nothing in the CEAA, the JRP Agreement or the Terms of Reference that allows the JRP in this case to waive, vary or dispense with the mandatory requirements of subsections 16(1) and (2), even if other statutory approval processes may also be applicable to the Project.

> ***Quebec (Attorney General) v. Moses*, 2010 SCC 17 at paras. 40, 50, 53 (AR, Vol.9, Tab B12); *MiningWatch*, at paras. 1, 14-18, 42 (AR, Vol.8, Tab B11)**

33. While reviewing courts should refrain from opining which projects should be approved (or not) under the CEAA, they must nevertheless ensure that there has been compliance with statutory requirements under the CEAA.

***Bow Valley Naturalists,* at para.78 (AR, Vol.8, Tab B6); *West Vancouver (District) v. British Columbia (Ministry of Transportation)*, 2005 FC 593 at para. 53 (AR, Vol.9, Tab B13)**

(iii) The JRP Failed to Conduct an EA of a "Project"

34. A defining feature of the CEAA is that "projects" must undergo EAs. The term "project" is therefore central to the CEAA's statutory scheme. As set out in the CEAA, a project is either: (a) an undertaking in relation to a physical work; or (b) an activity listed in the *Inclusion List Regulations* made under section 59(b) of the Act.

CEAA, subsection 2(1), definition of "project"

35. In the case of OPG's Project, it is the first branch of the definition that is relevant: an undertaking in relation to a physical work. This means that the Project assessed in this case must: (a) be a physical activity by humans; (b) be in the proposal stage and prior to construction actually starting; and (c) have identifiable, concrete characteristics and results. Furthermore, in light of subsections 2(1) and 15(3) of the CEAA, the term "project" necessarily encompasses all stages in the life of OPG's Project.

Hobby et al., at II-19, 20-21 (AR, Vol.9, Tab B29); *Bennett Environmental Inc. v. Canada (Minister of the Environment),* 2005 FCA 261 at para. 77 (AR, Vol.9, Tab B14) ["*Bennett Environmental Inc*."]; *Canadian Transit Company v. Canada (Minister of Transport),* 2011 FC 515 at paras. 139, 141 (AR, Vol.9, Tab B15) ["*Canadian Transit Company*"]; CEAA, subsections 2(1) and 15(3)

36. The CEAA definition of "project" as an undertaking in relation to a "physical work" necessarily excludes plans, policies, and programs from EA requirements. This is in contrast to other EA statutes in Canada, several of which apply to plans, policies, and programs. In enacting the CEAA, Parliament specifically defined the word "project" to describe the type of undertakings subject to the CEAA. "Project" replaced the less precise and open-ended term "proposal" that had been used in the former

Environmental Assessment and Review Process Guidelines Order, which the CEAA replaced.

> **Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Toronto: Carswell, 1995) at 631-32 (AR, Vol.9, Tab B31); See, e.g., *Environmental Assessment Act,* R.S.O. 1990, c.E.18, subsection 1(1), definition of "undertaking", section 3; Hobby et al., at II-19 (AR, Vol.9, Tab B29)**

37. In order for there to be a "project" for the purposes of the CEAA, a proponent must identify the specific nature of the proposed physical work from start to finish. This is one way in which a "project" differs from plans, programs, and policies, since the latter initiatives are broader and vague, and involve "various processes of reforming, adding, and subtracting different elements."

> ***Canadian Transit Company,* at paras. 34-35 (AR, Vol.9, Tab B15); Stephen Hazell and Hugh Benevides, *Federal Strategic Environmental Assessment: Towards a Legal Framework* (1998), 7 J.E.L.P. 349 at 371 (AR, Vol.9, Tab B33) ["Hazell and Benevides"]**

38. When a proponent is still considering "alternative means" (or has not selected the preferred means of carrying out the project), there is not yet a specific "physical work" that can practicably be assessed as to whether its construction, operation or decommissioning will cause significant adverse environmental effects. While the CEAA requires the consideration of alternatives, it must be noted that alternatives *per se* are not part of the "project" to be assessed, but are instead an integral part of the EA planning process that leads to the selection of the specific means of carrying out the project. In short, alternatives analysis is a crucial benchmark for assessing and deciding upon the environmental acceptability of the particular "project" being advanced by the proponent.

> ***Canadian Transit Company,* at paras. 139, 141 (AR, Vol.9, Tab B15); CEAA, subsection 16(2)(b); Hazell and Benevides, at 371 (AR, Vol.9, Tab B33); *Friends of the Island,* at paras.41, 53, 99 (AR, Vol.8, Tab B7)**

39. In this case, the EA under the CEAA must therefore assess a specific project, not a conceptual collection of generic nuclear reactors, competing cooling water options, different site development or infill scenarios, or other alternative means that have been identified – but not selected – for the Project. As Reed J. held in *Friends of the Island,* an EA decision should occur at a time when the proponent selects a specific project and describes it at a reasonable level of detail, in order to facilitate meaningful agency and public review of potential environmental effects, rather than at the "concept stage." As further noted by Reed J.: "Public hearings on a generic proposal are not a substitute for a specific evaluation of the actual project which it is planned to construct."

> ***Friends of the Island,*** **at paras 53, 99 (AR, Vol.8, Tab B7);** ***Canadian Transit Company,*** **at paras. 53, 54, 139, 141 (AR, Vol.9, Tab B15)**

40. It is notable that in *Friends of the Island*, there were three distinct bridge proposals under evaluation, whereas in the present case the EA initially purported to generically assess three reactor technologies via the "bounding approach." The JRP later allowed the addition of a fourth reactor technology (EC-6) at the end of the public comment period on OPG's EIS, and the JRP's Report appears to have left the door open to yet more unassessed reactor technologies in the future. The applicants submit that the EA in this case was supposed to carefully assess the construction, operation and decommissioning of an identifiable new nuclear power plant. Such a plant will cost billions of public dollars, and potentially poses adverse environmental and health risks over countless generations. These factors highlight the importance of conducting a rigorous EA in this case, and underscore the need to ensure that the JRP complied with the CEAA.

> ***Friends of the Island,*** **at para. 49 (AR, Vol.8, Tab B7); AR, Vol.1, Tab 2: JRP Report, pp. (iv), 11-12, 21-22, 45-46, 50; AR, Vol.1, Tab 3: Affidavit of Shawn-Patrick Stensil, paras.78-80**

41. The CEAA and JRP Terms of Reference are abundantly clear that the JRP must address the mandatory considerations in section 16. In order to ensure that the JRP meaningfully analyzes each component, the proponent must identify a particular "project" with a sufficient level of specificity.

> **CEAA, section 16;** ***Canadian Transit Company,*** **at paras. 139, 141 (AR, Vol.8, Tab B7); AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, para. 58**

42. The JRP's Report defers or delegates the evaluation of a specific reactor design and other alternative means (and related environmental implications) to bodies other than the JRP. This does not satisfy the requirements set out in sections 16 and 34 of the Act or the JRP Terms of Reference, as described below. The applicants recognize that after an EA of a specific "project" has been properly completed, it is not unusual for the project's final design specifications to evolve in an iterative manner in subsequent licencing processes, provided that the specific "project" does not materially change from what was assessed under the CEAA.

> ***Bennett Environmental Inc.,*** **at paras. 77-80 (AR, Vol.9, Tab B14);** ***Friends of the Island,*** **at paras. 41, 44, 47 (AR, Vol.8, Tab B7)**

43. In this case, however, the applicants submit that the EA conducted by the JRP should have obtained specific and reasonably detailed information regarding OPG's proposed construction, operation, modification, decommissioning, abandonment or other undertakings that form part of the life cycle of the physical work itself, or that are subsidiary or ancillary to the physical work. In essence, OPG has presented an over-generalized collection of conceptual options and vague site development choices that it would make in the post-EA period, but without further assessment under the CEAA.

Thus, what the JRP purported to assess was a plan – a proposed or tentative course of future action – rather than a "project" within the meaning of the CEAA.

> **CEAA, subsection 15(3); *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 at para. 17 (AR, Vol.9, Tab B16) ["*Friends of the West Country*"]; *MiningWatch,* at paras. 28-29, 39-40 (AR, Vol.8, Tab B11)**

44. As identified in the Report, the JRP itself found that key information about the proposed Project was absent from the EA documentation. For example, the Panel found that no specific nuclear reactor technology, site design layout, cooling water option, used nuclear fuel storage option, or radioactive waste management option has been selected. Thus, at the present time, federal decision-makers still do not know: (a) the particulars of the specific project to be implemented at the Darlington site; (b) the full range of site-specific or cumulative environmental effects; or (c) whether there are feasible mitigation measures over the project's full lifecycle. These and other fundamental gaps are attributable to the fact that what the JRP had before it was not a "project", but merely a plan for future planning, assessment, and decision-making.

> **AR, Vol. 1, Tab 2: JRP Report, pp. (i), 1, 12-13, 31, 39-40, 45-46, 48-49, 51-53, 59-60, 63-75, 77-78, 80-81, 86, 88-89, 106, 116-118, 124-125, 131-35**

45. Finally, it is submitted that the applicants' interpretation of the word "project" is consistent with the precautionary principle of international law enshrined in subsection 4(2) of the CEAA, as described above and adopted by the Court in the *Spraytech* case. Conducting an EA of OPG's Project when the main components of the proposal remain at a conceptual level has prevented the JRP (and the public) from meaningfully assessing the Project's specific environmental effects.

> ***Spraytech*, at para.31 (AR, Vol.8, Tab B2)**

46. Despite the profound lack of critical information regarding the Project's design and specific means by which the radioactive waste it generates will be managed, the

JRP Report purports to conclude that no significant environmental effects are likely to result, provided that the sizeable information gaps are eventually addressed by other bodies, and that numerous to-be-determined mitigation measures are implemented. The applicants submit that this represents a "leap before you look" approach that is the antithesis of the precautionary principle, and should not be upheld by this Honourable Court.

(iv) The JRP Failed to Consider the "Environmental Effects" of the Project

47. In assessing a plan rather than a specific project, the JRP employed a "plant parameter envelope" or "bounding scenario" to conduct the EA. However, the CEAA does not include either of these phrases or any similar concepts, and this approach prevented the JRP from assessing the "environmental effects" of OPG's Project.

> **AR, Vol. 1, Tab 2: JRP Report, p.11; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, para.103; AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, para.19; CEAA, subsection 2(1), definition of "environmental effect"**

48. The JRP was under a mandatory duty to subject all components of the "physical work" to EA scrutiny, pursuant to subsection 15(3) of the CEAA. The CEAA imposes a mandatory duty on the JRP to consider the factors set out in subsections 16(1) and (2) in relation to these components, including their environmental effects.

> ***MiningWatch,* at para.39 (AR, Vol.8, Tab B11); *Friends of the West Country,* at para.25 (AR, Vol.9, Tab B16); *Pembina Institute,* at paras.21, 33 (AR, Vol.8, Tab B8)**

49. The JRP recognized that employing a bounding approach was a "departure" from the normal EA process "where the major components of a project are defined in advance of an environmental assessment." However, this departure resulted in a fundamental failure to fulfill the JRP's various duties under subsections 15, 16 and 34 of the CEAA.

> **AR, Vol. 1, Tab 2: JRP Report, p.45**

50. In assessing environmental effects, the JRP was obliged to first define and describe the environmental effects associated with various aspects of the Project under subsection 16(1)(a). Secondly, subsections 16(1)(b) and (c) oblige the JRP to make a finding respecting the significance of those effects and the weight to be placed on each effect in consideration of mitigation measures which may be technically and economically feasible.

> **CEAA, subsection 2(1), definition of "environmental effect", subsections 16(1) (a), (b), (c); *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 FC 425 at paras.54-56 (AR, Vol.9, Tab B17) [*"Alberta Wilderness Assn."*]**

51. However, the JRP itself found it particularly problematic to evaluate the Project's environmental effects, or to ascribe significance and weight to such effects, because of the bounding approach employed in the assessment. In particular, the JRP's failure to assess a specific reactor technology, in turn, undermined its ability to properly evaluate the environmental effects, and to otherwise fulfill its duties under the CEAA and the JRP Terms of Reference. For example, the JRP Report found that:

a. the Panel's assessment of potential environmental effects "was conducted without specific knowledge of potential releases. OPG explained that certain parameters of the bounding scenario, such as hazardous substance emissions and on-site chemical inventories, could not be developed until a specific reactor technology has been selected by the Government of Ontario" (page 39);

b. "in the absence of a choice of reactor technology for the Project, OPG did not undertake a detailed assessment of the effects of liquid effluent and stormwater runoff to the surface water environment." Instead, OPG committed to comply with regulatory requirements and to use best practices, which the JRP concluded was contrary to the "expectations given in the EIS Guidelines" (page 65);

c. in answering a Panel request for information on the "sources, types and quantities of non-radioactive wastes predicted to be generated by the Project," OPG stated that it could not provide such details until a specific reactor technology was selected for the Project (page 78); and

d. the JRP did not conduct an "assessment of the off-site effects of a severe accident" because a specific reactor design had not been selected for the Project (page 124).

AR, Vol. 1, Tab 2: JRP Report, pp.39, 65, 78, 124

52. In light of these and other gaps, the JRP failed to meet its section 16 duties to assess the environmental effects of critical components of the Project, and failed to ascribe necessary weight to any such effects as a result. Those components of the Project for which environmental effects were not fully assessed by the JRP included: (a) a specific reactor technology; (b) a specific site design layout; (c) a specific water cooling option; (d) a specific used nuclear fuel storage option; and (e) a long-term radioactive waste management option. With respect to OPG's "conceptual" decommissioning plan, the JRP noted that the plan did not reflect the possibility of long-term on-site storage of used nuclear fuel. Nevertheless, the JRP accepted the proponent's optimistic and non-precautionary prediction that "effective and practical mitigation options would be available when required in the future." However, this Honourable Court has held that "vague hopes for future technology," or "the possibilities of future research and development," do not constitute proper mitigation measures under the CEAA.

AR, Vol. 1, Tab 2: JRP Report, pp.12-13, 31, 39-40, 45-46, 48-49, 51-53, 68-75, 78, 88, 116-118, 124-125; AR, Vol. 1, Tab 3: Affidavit of Shawn-Patrick Stensil, para. 88; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras. 63, 103-130; AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, paras.43, 57, 74, 101; AR, Vol. 7, Tab 6: Affidavit of Brennain Lloyd, paras.36-37; *Pembina Institute,* at paras.25-26, 69 (AR, Vol.8, Tab B8)

53. Although used nuclear fuel will require long-term storage and monitoring for thousands of years as a hazardous substance, the JRP failed to conduct an assessment of the effects of radioactive waste management before making a conclusion regarding the significance of the adverse environmental effects of the Project. In particular, the JRP erred in law by failing to consider whether the radioactive waste from the project will have significant adverse environmental effects, and whether there are any

technically and economically feasible measures which would mitigate any significant adverse environmental effects arising from the Project in accordance with subsection 16(1)(d) of the CEAA.

AR, Vol. 1, Tab 3: Affidavit of Shawn-Patrick Stensil, paras.78-81; Exhibit F-3: Report of Dr. Marvin Resnikoff; AR, Vol. 7, Tab 6: Affidavit of Brennain Lloyd, paras. 30, 33; and Exhibit K: Transcripts of Northwatch presentation to the JRP

54. The JRP found that the radioactive waste generated by the Project could result in significant cumulative effects "related to doses to workers, the public and the environment if it is not properly managed should it remain permanently on-site." The JRP also acknowledged that a number of gaps in information regarding long-term radioactive waste management exist. Rather than requiring OPG to provide this information at the hearing, the JRP merely recommended future study and analysis be conducted. The JRP erred by failing to assess the environmental effects of radioactive waste, and therefore had no factual basis to conclude that "radioactive and used fuel waste is not likely to result in significant adverse environmental effects."

AR, Tab 1, Tab 2: JRP Report, pp.116-118, 132; AR, Vol. 1, Tab 3: Affidavit of Shawn-Patrick Stensil, paras.81, 90; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, para.123; AR, Vol. 7, Tab 6: Affidavit of Brennain Lloyd, paras.36-37

55. Even if this Honourable Court finds that there was a "project" within the meaning of the CEAA, the applicants submit when the JRP applied the bounding approach, it committed an error that is fatal to its overall assessment, *viz.,* the JRP failed to fully assess the environmental effects of the OPG Project as required by subsections 15(3), 16(1) and (2), and 34(a) of the CEAA.

56. This error was compounded by the JRP's refusal to: (a) extend the public comment period on the EIS; (b) allow cross-examination on evidence or undertaking

answers; or (c) adjourn the public hearing, so that the missing information could be obtained, publicly disclosed and carefully assessed by the Panel.

AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, paras.34-36, 40-60, 76-80, 83-88

57. The Panel additionally failed to fulfill its duty under subsection 16(1)(a) to specifically consider the cumulative effects that may arise from the Project in conjunction with the existing Darlington NGS. This is especially germane given OPG's intention to refurbish the existing Darlington reactor units. While the proposed refurbishment is mentioned in OPG's EIS, the JRP Report does not address the likelihood or significance of cumulative effects from the refurbished NGS and the Project. In addition, OPG did not present a cumulative effects assessment of a "common cause" severe accident scenario involving the existing and proposed new nuclear reactors at the Darlington site.

AR, Vol. 1, Tab 2: JRP Report, p.133; AR, Vol.1, Tab 3: Affidavit of Shawn-Patrick Stensil, para.62; AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, para.102; Respondent's Record (OPG): Affidavit of Lauri Swami, Exhibit 10: OPG EIS (September 30, 2009), pp.1-3, 2-83; *Bow Valley Naturalists,* at paras.39-41 (AR, Vol.8, Tab B6)

58. In failing to gather necessary information about the environmental effects of the Project, the JRP failed to discharge its duties under subsections 34(a) and (b) of the CEAA to gather, disclose, and hold public hearings on information required by subsections 16(1) and (2) and the JRP Terms of Reference. This non-delegable duty falls upon the JRP itself, and does not depend upon the success or failure of the proponent, public agencies or interveners in producing information at the public hearing. Moreover, it is impossible to have a meaningful public hearing on a "project" that lacks specificity or where fundamental information is absent. Thus, it is not sufficient for the purposes of subsections 34(a) and (b) for the JRP to identify missing information, but then simply recommend future studies, information-gathering, and

analysis to fill these gaps after the EA process has concluded. By establishing the "stringent" review panel process, Parliament clearly intended that such steps take place, and be fully subject to public involvement, as part of the EA process itself.

> ***Alberta Wilderness Assn.,*** **at paras. 39-41 (AR, Vol.9, Tab B17)**

59. In order to produce a valid Report which may be relied upon for a course of action decision under section 37 of the CEAA, the JRP Report must contain the results of an EA of a "project" conducted in compliance with all requirements of the Act. Therefore, unless and until the JRP addresses the above-noted evidentiary gaps relating to environmental effects, mitigation measures, and other matters, the Panel lacks the necessary jurisdiction under subsection 34(c)(i) of the CEAA to make any recommendations to the Minister. In short, the JRP did not provide federal decision-makers with the evidentiary basis required to make an informed decision under the CEAA about the environmental effects of the Project.

> ***Alberta Wilderness Assn.,*** **at paras. 40-41, 43, 51 (AR, Vol.9, Tab B17);** ***Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),*** **[1999] 1 F.C. 483 at paras.17-21 (AR, Vol.9, Tab B18)**

(v) The JRP Failed to Assess "Need" and "Alternatives to" the Project

60. The CEAA allows the Minister to decide that a particular environmental assessment must consider the "need" for the proposed project and "alternatives" to the proposed project. In this case, the Minister decided that the JRP would be required to assess these two factors, by identifying these factors in the Terms of Reference for the JRP.

> **CEAA, subsection 16(1)(e); AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, para.67; Exhibit G: EIS Guidelines; and Exhibit I: JRP Agreement – Terms of Reference**

61. However, the applicants submit that the JRP gave these mandatory requirements, at best, short shrift in the EA. The JRP's evaluation of these factors was

so fundamentally incomplete and lacking in information, evidence or analysis as to not amount in law to compliance with the CEAA or the JRP Terms of Reference.

62. For example, OPG stated in its EIS and at the hearing that the purpose of, and the need for, the Project, was to fulfill a Directive issued by Ontario's Minister of Energy to instruct OPG to seek federal approval of new nuclear reactors. The JRP erroneously accepted and repeated these statements as a substitute for a "need" analysis in its Report.

AR, Vol. 1, Tab 2: JRP Report, pp.1, 41-42, 106; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.69, 97-98, 101; Respondent's Record (OPG): Affidavit of Lauri Swami, Exhibit 10: OPG EIS (September 30, 2009), pp.1-3 to 1-7

63. The Applicants submit that the provincial Minister's Directive does not in law amount to a proper analysis or demonstration of the "need" for the Project pursuant to the CEAA. If accepted by this Honourable Court, such an approach will allow the JRP to avoid its legal duty to fully consider the mandatory factors required by section 16 of the CEAA in combination with the Terms of Reference, including "purpose" and "need". Moreover, as a matter of law, a provincial Minister or project proponent cannot constrain or bind the JRP in the exercise of its statutory responsibilities under federal law. Thus, the applicants submit that the JRP declined its jurisdiction by erroneously treating the Directive as dispositive of the "need" issue under the CEAA.

***Innisfil (Township) v. Vespra (Township),* [1981] 2 S.C.R. 145 at 173 (AR, Vol.9, Tab B19)**

64. The applicants submit that "need" and "purpose" are two of the most important CEAA considerations in this case, particularly in light of the significant public costs and environmental risks posed by OPG's Project. It is a tenet of sound EA planning that where a project poses environmental risks, the proponent must present detailed evidence and analysis demonstrating that the project is actually needed.

Re West Northumberland Landfill Site **(1996), 19 C.E.L.R. (NS) 181 (Ont.Jt.Bd.), paras.88, 90 (AR, Vol.9, Tab B20);** ***Canadian Transit Company,*** **at paras.5, 27, 28, 78, 111, 115-18, 120, 122, 125 (AR, Vol.9, Tab B15)**

65. The applicants submit that the JRP did not address "alternatives to" the Project (i.e. functionally different ways of achieving the Project's objective), contrary to both section 16 of the CEAA and the JRP Terms of Reference. For example, OPG argued in the EIS and at the hearing that any alternative other than new nuclear power generation did not warrant evaluation because of the Minister's Directive. Thus, having claimed that the need and purpose was merely to fulfill the Minister's Directive, OPG assumed – and the JRP erroneously accepted – that a serious consideration of non-nuclear "alternatives to" did not have to be included in the EA conducted by the JRP. As a result, the JRP did not fulfill its section 16 duty to meaningfully consider "alternatives to" OPG's Project.

AR, Vol. 1, Tab 2: JRP Report, pp.42-44; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras.97-98, 102

66. OPG's EIS briefly listed four so-called "alternatives to", but summarily rejected all of them without meaningful analysis on the grounds that they were "unacceptable" and "inconsistent" with the Minister's Directive. This approach was erroneously accepted by the JRP during its hearings and in its final Report.

Respondent's Record (OPG): Affidavit of Lauri Swami, Exhibit 10: OPG EIS (September 30, 2009), section 1.1.4; AR, Vol. 7, Tab 7: JRP Transcript, Vol. 13, pp.227-32; AR, Vol. 1, Tab 2: JRP Report, pp.42-44

67. The JRP failed to correctly characterize the functional purpose of the Project (e.g. to supply a proportion of "base load" electricity to Ontario for a specified period) for the purposes of its assessment. Instead, the JRP accepted that the purpose was merely to implement the Minister's Directive. Moreover, the JRP further failed to examine whether additional base load is, in fact, "needed" and, if so, whether that base

load should come only from nuclear power (as opposed to other sources of energy). In short, the JRP should have assessed OPG's justification for the purpose of the Project, and should have compared and weighed the various "alternatives to" on the basis of their environmental effects, their ability to achieve the purpose of the Project, and the objects and purpose of the CEAA of promoting sustainable development.

CEAA, subsections 16 (1) and (2); AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, Exhibit I: JRP Agreement - Terms of Reference

68. In addition, the applicants submit that the JRP misdirected itself and erred in law by concluding that the threshold issues of "need", "purpose" and "alternatives to" under the CEAA constituted "provincial energy policy" that was better left to future hearings before the Ontario Energy Board in relation to the province's as-yet undrafted (and unapproved) Integrated Power System Plan.

AR, Vol. 1, Tab 2: JRP Report, pp.41-42, 44

69. Thus, the JRP was left with an untested and brief overview of narrow aspects of Ontario energy planning, as provided by the provincial Ministry of Energy. As noted above, this overview was essentially presented in the form of an undertaking answer provided after the JRP hearing concluded, and the applicants were not given an opportunity by the JRP to file responding evidence, contrary to the administrative law principle of *audi alteram partem*. However, even at its highest, this overview of Ontario energy planning did not demonstrate "need" for two or four new nuclear reactors, and the JRP did not assess the environmental effects of building two reactors versus four reactors. Even if "need" for additional base load is assumed, the JRP obtained no evidence that the new nuclear reactors "needed" to be built at the Darlington site, as OPG refused to conduct a site selection process in light of the Minister's Directive. In addition, the Ministry's overview did not remedy the JRP's

failure to assess "alternatives to" the Project. As a result of the JRP's failure to assess "need" and "alternatives to", the Panel then failed to set out conclusions on these points in its Report as it was required to do.

> **AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, para.98; and Vol.5, Exhibit HH: CELA Submission to the JRP, p.3; CEAA, section 4(d);** ***Baker v. Canada (Minister of Citizenship and Immigration*****, [1999] 2 S.C.R. 817 at paras. 21-28 (AR, Vol.9, Tab B21);** ***Pembina Institute*** **at paras. 77-79 (AR, Vol.8, Tab B8)**

(vi) The JRP Unlawfully Delegated its CEAA Duties

70. The well-established administrative law principle of *delegatus non potest delegare* provides that where a statute delegates a power to a body, it cannot further subdelegate that power unless the enabling legislation explicitly or implicitly authorizes the body to do so. In determining whether a statute authorizes delegation, the courts should consider: the wording of the statutory provisions; the overall legislative scheme; whether the delegate is within the statutory control of the delegating body; and whether the delegation involves matters of substance or merely administrative issues.

> **Sara Blake,** ***Administrative Law in Canada, 5th ed.*** **(Toronto: LexisNexis, 2011) at 143-46 (AR, Vol.9, Tab B32)**

71. Under the CEAA, review panels do not make EA decisions about whether projects should be permitted to proceed. However, Parliament specifically entrusted review panels with the important, non-delegable responsibility of assessing and reporting upon major projects so that Responsible Authorities can make informed EA decisions. Since the CEAA does not expressly empower review panels to delegate their section 34 obligations, review panels must fully complete their duties under the CEAA before they can lawfully report to the Minister, or recommend that certain matters should receive further attention by other bodies, particularly those outside the statutory control of review panels (or Responsible Authorities) under the CEAA. Accordingly,

this Honourable Court has upheld limited types of "delegation" under the CEAA only where a specific project has otherwise been properly described and fully assessed under section 16, but where the EA determines that further confirmatory studies are advisable, or that monitoring or mitigation details should be fine tuned, having regard to the predictive and iterative nature of EA exercises.

> **CEAA, section 34; *Environmental Resource Centre v. Canada (Minister of the Environment),* [2001] F.C.J. No. 1937 at paras. 154-59 (AR, Vol.9, Tab B22) ["*Environmental Resource Centre*"]; *Pembina Institute,* paras.20, 60-62, 67, 69 (AR, Vol.8, Tab B8)**

72. Such situations are distinguishable from this case, where the JRP did not merely hand off minor details or secondary matters to other entities or agencies. Instead, most of the JRP's 67 recommendations are intended to generate critically important information to backfill the significant evidentiary gaps regarding: the specific Project design; baseline conditions; environmental effects; site development and layout; and other key matters that the JRP itself was legally obliged to assess, disclose, solicit public input on, and report upon pursuant to section 34. Moreover, the JRP's recommendations make no provision for remitting any of this new information back to the JRP for further consideration, which effectively shields these crucial particulars from public scrutiny.

> **AR, Vol. 1, Tab 2: JRP Report dated August 25, 2011, pp. (i) to (x)**

B. The Standard of Review is Correctness

73. In the leading *Dunsmuir* case, the Supreme Court of Canada established a two-step process for determining whether administrative tribunals should be reviewed on a correctness or reasonableness standard. First, the reviewing court must ascertain whether the jurisprudence has already satisfactorily determined the degree of deference to be accorded to the tribunal in question. If this first step does not resolve the matter,

then the reviewing court must move to the second step, which is to conduct a contextual analysis of various factors such as: (i) presence or absence of a privative clause; (ii) purpose of the tribunal as determined by the enabling legislation; (iii) the nature of the question at issue; and (iv) the expertise of the tribunal

> ***Dunsmuir v. New Brunswick,* 2008 SCC 9 at paras. 55, 57, 59, 62, 64 (AR, Vol.9, Tab B23) ["Dunsmuir"]**

74. CEAA jurisprudence establishes that the correctness standard of review applies to the question of law of whether a JRP has complied with the CEAA. The courts have held that compliance with the CEAA raises a serious and justiciable question of law, and that failure to comply with a mandatory requirement under the CEAA is an error of law reviewable on a correctness standard. In this case, determining whether the JRP met its legal duties under the CEAA is a question of law reviewable on a standard of correctness.

> ***MiningWatch Canada v. Canada*, 2007 FC 955 at para.135-37, 178 (AR, Vol.8, Tab B9); rev. on other grounds 2008 FCA 209 (AR, Vol.8, Tab B10); rev. 2010 SCC 2 (AR, Vol.8, Tab B11); *Pembina Institute*, at paras.37, 41 (AR, Vol.8, Tab B8); *Alberta Wilderness Assn.* at paras.22-24, 26 (AR, Vol.9, Tab B17); *Friends of the West Country,* at paras.9-10 (AR, Vol.9, Tab B16); *Prairie Acid Rain Coalition v. Canada,* 2006 FCA 31 at paras.9-10 (AR, Vol.9, Tab B24); *Environmental Resource Centre*, at para. 138 (AR, Vol.9, Tab B22); *Friends of the Oldman River,* at para.103 (AR, Vol.8, Tab B5)**

75. If this Honourable Court finds it necessary to undertake a contextual analysis of the *Dunsmuir* factors, then the applicants note that the CEAA contains no privative clause shielding the JRP or federal decision-makers from judicial review. The JRP itself is an *ad hoc* entity that has no institutional continuity or special expertise in interpreting the CEAA, and the JRP does not serve as an adjudicative body that Parliament has empowered to decide questions of law. The overarching legal question in this case does not involve a "choice of science", but asks whether the JRP correctly interpreted its duties under the CEAA and Terms of Reference. This constitutes a true

question of jurisdiction, and does not involve the application of policy or discretion by the JRP. Accordingly, the applicants submit that the JRP's non-compliance with the CEAA in this case is reviewable on a correctness standard.

> ***MiningWatch Canada v. Canada*, 2007 FC 955 at paras.135-37 (AR, Vol.8, Tab B9); rev. on other grounds 2008 FCA 209 at paras.34-35 (AR, Vol.8, Tab B10); rev. 2010 SCC 2 (AR, Vol.8, Tab B11); *Environmental Resource Centre,* at para.153 (AR, Vol.9, Tab B22); *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, at paras.88-90, 96-105 (AR, Vol.9, Tab B25)**

76. In the alternative, if this Honourable Court finds that the standard of review is reasonableness, then *Dunsmuir* makes it necessary to consider whether the JRP's Report "fits comfortably" with the principles of justification, transparency and intelligibility. The applicants submit that the JRP's interpretation of its CEAA duties is not "rationally supported" and does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Accordingly, the applicants submit that the JRP's interpretation of the CEAA is neither reasonable nor correct.

> ***Dunsmuir,* at paras. 41, 47 (AR, Vol.9, Tab B23); *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12 at para.54, 59 (AR, Vol.9, Tab B26)**

C. The Appropriate Remedies in this Case

77. There are no factual, legal or practical reasons which disentitle the applicants to the prerogative remedies claimed in the application for judicial review pursuant to section 18.1 of the *Federal Courts Act*. By granting the relief requested by the applicants, this Honourable Court would send a strong and unmistakable signal to the JRP, the CNSC and other Responsible Authorities that compliance with the CEAA is mandatory.

> ***Federal Courts Act,* R.S.C. 1985, c.F-7, subsections 18.1(3) and (4); *Alberta Wilderness Assn.,* at paras. 86-87, 91 (AR, Vol.9, Tab B17); *Friends of the Island*, para.96 (AR, Vol.8, Tab B7)**

D. The Applicants have Standing to Seek Judicial Review

78. The test for public interest standing examines three factors: (a) there must be a serious issue to be tried; (b) the applicants must show a genuine interest in the subject matter; and (c) there must be no other reasonable and effective manner for the case to come before the Courts.

> ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 at paras.34, 37 (AR, Vol.9, Tab B27)**

79. Given the serious issues that have been raised in this case, the applicants' ongoing interest in environmental protection, environmental assessments generally and this project specifically, and the fact that no other applicant has come forward to seek judicial review in this matter, it is respectfully submitted that this Honourable Court ought to recognize the applicants' standing to bring this judicial review application.

> **AR, Vol. 1, Tab 3: Affidavit of Shawn-Patrick Stensil, paras.4-23; AR, Vol. 4, Tab 4: Affidavit of Kathleen Cooper, paras. 7-46, 137; AR, Vol. 6, Tab 5: Affidavit of Mark Mattson, paras.2-97, 107-110; AR, Vol. 7, Tab 6: Affidavit of Brennain Lloyd, paras. 4-41; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 at paras.52, 54, 57-58, 66, 68 (AR, Vol.9, Tab B28)**

PART IV – ORDER REQUESTED

80. For the foregoing reasons, the applicants respectfully request this Honourable Court to allow the application with costs, and to grant the declaratory, prohibitory, and *certiorari* orders requested in the Applicants' Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 9, 2012

_____	_____
Theresa A. McClenaghan	Justin Duncan
_____	_____
Richard D. Lindgren Counsel for the Applicants	Kaitlyn Mitchell Counsel for the Applicants

PART V – AUTHORITIES TO BE REFERRED TO

Schedule "A"

1. *Canadian Environmental Assessment Act,* S.C. 1992, c.37
2. *Law List Regulations*, SOR/94-636
3. *Environmental Assessment Act,* R.S.O. 1990, c.E.18
4. *Federal Courts Act,* R.S.C., c.F-7
5. *Environmental Assessment Act*, R.S.O. 1990, c.E.18

Schedule "B"

Cases

1. *R. v. Hydro-Québec,* [1997] 3 S.C.R. 213
2. *114597 Canada Ltée (Spraytech, Societé d'arrosage) v. Hudson (Town)*, 2001 SCC 40
3. *Sierra Club of Canada v. Canada,* 2002 SCC 41
4. *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage),* 2003 FCA 197
5. *Friends of Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3
6. *Bow Valley Naturalists Society v. Canada,* [2001] 2 F.C. 461
7. *Friends of the Island Inc. v. Canada (Minister of Public Works),* [1993] 2 F.C. 229
8. *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302
9. *MiningWatch Canada v. Canada*, 2007 FC 955
10. *MiningWatch Canada v. Canada*, 2008 FCA 209
11. *MiningWatch Canada v. Canada*, 2010 SCC 2
12. *Quebec (Attorney General) v. Moses,* 2010 SCC 17

13. *West Vancouver (District) v. British Columbia (Minister of Transportation)*, 2005 FC 593

14. *Bennett Environmental Inc. v. Canada (Minister of the Environment)* 2005 FCA 261

15. *Canadian Transit Company v. Canada (Minister of Transport),* 2011 FC 515

16. *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263

17. *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425

18. *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483

19. *Innisfil (Township). v. Vespra (Township),* [1981] 2 S.C.R. 145

20. *Re West Northumberland Landfill Site* (1996), 19 C.E.L.R. (NS) 181 (Ont.Jt.Bd.)

21. *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817

22. *Environmental Resource Centre v. Canada (Minister of the Environment),* [2001] F.C.J. No. 1937

23. *Dunsmuir v. New Brunswick,* 2008 SCC 9

24. *Prairie Acid Rain Coalition v. Canada,* 2006 FCA 31

25. *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40

26. *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12

27. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236

28. *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211

Texts

29. Beverly Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (Aurora: Canada Law Book, 2011)

30. Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham: LexisNexis, 2008)

31. Rodney Northey, *The 1995 Annotated Canadian Environmental Assessment Act* (Toronto: Carswell, 1995)

32. Sara Blake, *Administrative Law in Canada, 5th ed.* (Toronto: LexisNexis, 2011)

Articles

33. Stephen Hazell and Hugh Benevides, *Federal Strategic Environmental Assessment: Towards a Legal Framework* (1998), 7 J.E.L.P. 349