Hamilton Wentworth (Regional Municipality Of) v. Canada (Mininister of The Environment), 2001 FCT 381 (CanLII)

Date: 20010424

Dockets: T-1400-99

T-1993-99

Neutral citation: 2001 FCT 381

BETWEEN:

REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH

Applicant

- and -

THE MINISTER OF THE ENVIRONMENT,

THE MINISTER OF FISHERIES AND OCEANS,

and NICK MULDER, RAY EFFER, and SALLY LERNER in their capacities as members of a review panel appointed under the

Canadian Environmental Assessment Act

Respondents

and

Docket: T-1401-99

BETWEEN:

HAMILTON AND DISTRICT CHAMBER OF COMMERCE

Applicant

- and -

THE MINISTER OF THE ENVIRONMENT,

THE MINISTER OF FISHERIES AND OCEANS,

and NICK MULDER, RAY EFFER, and SALLY LERNER in their capacities as members of a review panel appointed under the

Canadian Environmental Assessment Act

Respondents

REASONS FOR JUDGMENT

DAWSON J.

1. INTRODUCTION

[1] These three applications for judicial review flow from the decision of the respondent Minister of the Environment ("Environment Minister") made at the request of the respondent Minister of Fisheries and Oceans ("Fisheries Minister"), to have a proposed expressway project referred to a review panel under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA" or "Act"). The respondents, Nick Mulder, Ray Effer and Sally Lerner were appointed as members of the review panel.

[2] The expressway project, as defined in the terms of reference of the review panel, is "the construction and operation of an expressway proposed by the Regional Municipality of Hamilton-Wentworth to link two existing east-west limited access expressways in Hamilton, Ontario (Lincoln Alexander Parkway and the Queen Elizabeth Way)" ("project" or "RHCE").

[3] By consent, applications T-1400-99 and T-1993-99 were heard together, and by order of prothonotary Lafrenière application T-1401-99 was heard at the same time as T-1993-99.

(i) The proceedings and the parties

(a) T-1400-99 and T-1993-99

[4] In these two applications the Regional Municipality of Hamilton-Wentworth ("Region") challenges the request of the Fisheries Minister that the Environment Minister refer the project to a review panel, the decision of the Environment Minister to refer the project to a review panel, the appointment of the review panel (particularly whether the panel is disqualified by virtue of the appointment of Nick Mulder), the establishment of the panel's terms of reference, and the issuance by the review panel of Environmental Impact Statement Guidelines ("EIS Guidelines").

[5] The Region served in these proceedings notices of constitutional questions, giving notice of its intention to question the constitutional applicability of the CEAA. The Attorney General of Ontario ("Ontario") intervenes in these proceedings pursuant to section 57 of the *Federal Court Act*, R.S.C. 1985, c. F-7 and the notices of constitutional questions. Ontario, in substance, supports the Region's position.

[6] By order of the Court, the Friends of Red Hill Valley ("Friends") were granted intervener status. The Friends, an unincorporated association whose objectives include the preservation, protection and enhancement of the Red Hill Valley, in substance oppose the Region's applications and support the position of the respondent Ministers.

(b) T-1401-99

[7] In this proceeding, the Hamilton and District Chamber of Commerce ("Chamber") challenges the appointment of Sally Lerner to the review panel on the ground that her appointment raises a reasonable apprehension of bias. The Chamber and its members promote the social, economic and industrial interests of the Hamilton-Wentworth regions. It supports the project.

[8] All three applications were responded to by the Deputy Attorney General of Canada on behalf of all of the respondents.

(ii) Summary of conclusions

[9] After a careful consideration of the evidence adduced and the submissions of all counsel I have concluded that the CEAA does not apply to the project and that, in the alternative, the referral of the project to a review panel was not supported by a valid head of federal jurisdiction. In the following reasons I review the factual background, the preliminary issues raised by the parties, the applicable standard of review and provide my analysis with respect to the applicability of the CEAA and the existence, or otherwise, of a valid head of federal jurisdiction.

[10] These conclusions make it unnecessary to deal with a number of the issues raised. Where wholly academic in view of my conclusions, in the interest of the more timely release of my reasons, I have not dealt with such issues. Where I consider it advisable in the circumstances, I also comment upon what my conclusions would have been had it been necessary for me to deal with those issues.

2. FACTUAL BACKGROUND

[11] The project has generated, and continues to generate, controversy.

[12] The Region describes the Red Hill Creek Expressway ("Expressway") to be a major transportation corridor undertaking which extends along the south and east of the City of Hamilton from Highway 403 in Ancaster, across the Mountain Urban Area of the Region, turning north to follow the Red Hill Creek Valley to a new interchange with the Queen Elizabeth Way ("QEW").

[13] Since the release of the Hamilton Area Transportation Plan in 1963 the Red Hill Creek Valley has been a recommended location of the north-south portion of a freeway connecting the QEW with Highway 403.

[14] The Red Hill Valley runs in a north-south direction starting on top of the Niagara Escarpment and ending at Lake Ontario. It is generally defined by the course of the north portion of Red Hill Creek and its tributaries. The Ontario Ministry of Natural Resources has identified a number of areas of natural and scientific interest in the Red Hill Valley and has identified the Van Wagner's Ponds and Marshes areas as provincially significant class one wetland. A biological inventory of the valley prepared in 1995 identified the presence of three nationally or provincially rare bird species, and the presence of the nationally vulnerable southern flying squirrel.

[15] In May of 1977, the Region assumed responsibility for major arterial roads within the Region. In December of 1977, the Region authorized a study of all alternate alignments for the north-south portion of the Expressway. The study in due course recommended as the preferred route the now proposed route through the Red Hill Valley to the QEW. The Region approved this preferred route in 1979.

[16] At that time, municipal undertakings were not subject to the Ontario *Environmental Assessment Act*, S.O. 1975, c. 69, but the Region requested that the provincial Minister of the Environment designate the expressway undertaking under the provincial *Environmental Assessment Act,* provided that the resultant environmental assessment hearing would be consolidated with all other required approval hearings. This request was approved.

[17] Pursuant to that designation the Region submitted an environmental assessment submission and a public assessment hearing followed. After a lengthy, 99-day, hearing before a Joint Board comprised of members

of the Ontario Municipal Board and the Ontario Environmental Assessment Board, the majority of the Joint Board approved the proposed freeway, and the project received all required provincial approvals. Unsuccessful challenges to the decision of the Joint Board were taken to the provincial cabinet and to the Ontario Divisional Court. The Court challenge was dismissed in February of 1990, the challenge to the cabinet having failed earlier.

[18] The Region says that based on these approvals, and previously completed studies, large areas of the City of Hamilton and Stoney Creek were authorized for development. The relevant evidence with respect to things such as the purchase and expropriation of lands in the road corridor, demolition of properties and building restrictions will be reviewed in some detail later in these reasons.

[19] On June 26, 1990, a sod-turning ceremony took place for the Red Hill Creek Expressway at the King Street interchange in the Red Hill Valley. However, on December 17, 1990, the then recently elected provincial government withdrew the province's funding commitment to fund the north-south portion of the Expressway through the Red Hill Valley. In consequence, the Region states that it suspended construction of the north-south portion of the Expressway located below the Niagara Escarpment in the Red Hill Valley, but proceeded to construct the east-west segment of the Expressway and the north-south portion of the Expressway above the Niagara Escarpment. The Region also completed construction of the King Street and Queenston Road interchanges and a rail grade separation, all in the Red Hill Valley, because those projects had been commenced before funding was withdrawn.

[20] In 1997 that portion of the Expressway which the Region had continued to build from Highway 403 to Dartnall Road opened, and in 1999 the extension from Dartnall Road to Mud Street opened. This portion of the Expressway is now known as the Lincoln M. Alexander Parkway.

[21] In late 1995, the province restored funding for the project. Upon restoration of the funding, the Region initiated consultations to see whether and how the original design could be improved.

[22] During that consultative process at a meeting with representatives of the Region which took place on January 18, 1996, the federal Department of Fisheries and Oceans ("DFO") informed the Region that the CEAA would apply to the north-south portion of the Expressway. This was because, in the opinion of the DFO, the proposed works would impact on the fish habitat. Therefore authorization under subsection 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14 would be required in respect of the proposed works. Representatives of Environment Canada ("EC") also noted at that meeting that under the "Migratory Birds Convention Act, EC requires information describing the possible effects roadway construction may have on migratory nesting, staging, feeding and rearing areas".

[23] On March 5, 1997, the Ontario Cabinet granted an exemption order under the Ontario*Environmental Assessment Act* (which order was later called a declaration order) exempting the project from section 5 of the provincial Act. The project was described as: "[t]he development and implementation of improvements to the north-south alignment of the Red Hill Creek Expressway as approved by a Joint Board on October 24, 1985, and the detailed design and construction of an interchange connection to the Queen Elizabeth Way as outlined in the exemption order submission dated May 6, 1996".

[24] In that exemption order the Ontario Minister of Environment and Energy noted that: "[a]lthough The Regional Municipality of Hamilton-Wentworth can construct the original project as approved in 1985 this will result in significant impacts to the Niagara Escarpment and the sensitive Red Hill Creek and Van Wagner's marsh and will not result in a needed interchange with the Queen Elizabeth Way being built. The Regional Municipality of Hamilton-Wentworth now has an opportunity to construct this interchange and implement improvements to the 1985 project which will reduce its environmental impact."

[25] The Ontario Minister of Environment and Energy indicated in the exemption order that the Minister was of the opinion that it was in the public interest to order that section 5 of the Ontario *Environmental Assessment Act* not apply to the undertaking for a number of reasons including:

- The Region had agreed to implement an assessment process to establish a forum for government agencies, community groups and the public to exchange ideas and information, clarify positions and expectations, and work co-operatively to develop an Expressway design that reduced impacts to the Red Hill Creek watershed.

- If the exemption order was not approved the Regional Municipality of Hamilton-Wentworth had indicated that it would use the approval granted in 1985 by the Joint Board to construct the currently approved version of the project exclusive of the QEW interchange. Although no *Environmental Assessment Act* approval existed for the QEW interchange, its location (based on the 1985 proposal) would have a serious impact on the sensitive Red Hill Marsh and Van Wagner's Marsh by requiring its construction on top of this wetland complex and in close proximity to two existing landfill sites.

- Both the need for, and justification of, an interchange with the QEW were demonstrated as part of the original environmental assessment submission and the hearing before the Joint Board. The only issue not reviewed by the Board was the detailed location and ultimate design of the interchange. By imposing the full requirements of the Ontario *Environmental Assessment Act*, the Regional Municipality of Hamilton-Wentworth would be required to re-justify this connection despite the fact that construction on the remainder of the project was well under way. The assessment process proposed by the Regional Municipality of Hamilton-Wentworth would provide an opportunity for interested and affected parties to participate in the locating and detailed design of this facility.

[26] The exemption order did impose environmental requirements on the Region, although the Region understood that it was not precluded from commencing construction on components of the project before completing the assessment process.

[27] In late 1997, the Region submitted volume 1 of a Draft Summary Report ("DSR") to DFO which described options for the construction of the RHCE to connect Highway 403 to the QEW.

[28] The DSR stated, among other things, that the Region contemplated realigning a five kilometre section of the Red Hill Creek and associated flood plain along the west side of the Expressway and that the Expressway would cross Red Hill Creek eight times.

[29] The DSR also stated that:

- Approximately 25% (or 75 hectares) of the Red Hill Valley between Mud Street and Brampton Street would be cleared as a result of project construction. Some of that area consisted of habitat considered significant and known to support rare species of vegetation and wildlife.

- Approximately 25% (or 74 hectares) of the Red Hill Valley might be negatively impacted by Expressway construction activities, although the full extent of the impact would be monitored and mitigated after construction.

- It was estimated that 40,000 trees would be removed.

- Impacts to eco-system functions along the Niagara Escarpment and along the Red Hill Valley would be high (i.e., could not be mitigated) because of the permanent loss of vegetation and wildlife habitats and the severance of a primary wildlife corridor which connects the Lake Ontario shoreline to the Niagara Escarpment and beyond.

[30] DFO subsequently advised the Region that based upon the information contained in the DSR and upon discussions with the Region, the proposal might have harmful impact upon fish and fish habitat in both the Red Hill Creek Marsh and in Van Wagner's Marsh. The harmful alteration of fish habitat was noted by DFO to be prohibited under subsection 35(1) of the *Fisheries Act* necessitating the issuance of an authorization under subsection 35(2) of that Act. DFO further noted that in turn this would trigger the application of the CEAA.

[31] At a meeting on May 5, 1998, the Region advised DFO that the Region would be applying to DFO for a *Fisheries Act* authorization. In consequence DFO advised that it would initiate the required screening process. In

July of 1998, the Region submitted its application for authorization under the *Fisheries Act*.

[32] DFO prepared a draft scoping document which set out what the scope of the project and the scope of the assessment would be for a CEAA review of the construction of the Expressway. On October 30, 1998 a copy of the draft scoping document was provided to the Region for comment. The Region did provide comments and on January 28, 1999 DFO released the scoping document for the Environmental Assessment Screening Report of the project.

[33] Meanwhile, on December 16, 1998, representatives of DFO and the Canadian Environmental Assessment Agency ("Agency") met with representatives of the Region. Minutes of the meeting indicate that the status of matters under the CEAA, potential harmonization with the provincial process, and the potential for the referral of the project to panel review were discussed. A further meeting was held on February 19, 1999 and notes prepared by one of the Region's representatives show that the Region was told that a panel hearing was becoming "a distinct possibility" but "we are not there yet".

[34] On May 4, 1999, the Fisheries Minister wrote to the Environment Minister requesting that the Environment Minister refer the project, as scoped by DFO, to a review panel pursuant to subsections 25(*a*) and 25 (*b)* of the CEAA. On May 6, 1999 following receipt of that letter, the Environment Minister referred the project to panel review. The only document before the Court evidencing the decision of the Environment Minister is a news release issued on May 6, 1999 by the Agency.

[35] On May 25, 1999, the Agency issued a public notice and draft terms of reference for the review panel. The public notice sought comment from all interested parties on the terms of reference.

[36] On July 5, 1999 after receiving comment on the draft terms of reference the Environment Minister issued the panel's terms of reference and appointed panel members.

[37] Prior to being appointed, resumes of members of the review panel were reviewed by the vice president of project delivery for the Agency and the Agency's director of project assessment, and the potential panel members were interviewed by telephone by the Agency's director of project assessment and a project assessment staff member.

[38] On July 9, 1999, the Region wrote to the Environment Minister advising that the Region would not participate in a CEAA process "with your terms of reference" and that the Region had instructed counsel to apply for "judicial review in order to obtain a court ruling that the CEAA has no application to our project".

[39] On August 4, 1999, the Region filed its application in T-1400-99 challenging the decision of the Environment Minister of July 5 appointing panel members and setting the panel's terms of reference.

[40] On August 4, 1999, the Chamber filed its application in T-1401-99 challenging the decision of the Environment Minister of July 5, 1999 to appoint Sally Lerner to the review panel.

[41] On August 11, 1999, the review panel released draft EIS Guidelines for public comments, and in September of 1999 the panel held public meetings in the Hamilton area to receive comments on the draft guidelines. On October 15, 1999, the panel released its final EIS Guidelines.

[42] On September 14, 1999, the Region, through its counsel, wrote to DFO requesting that consideration of the Region's request for an authorization under subsection 35(2) of the *Fisheries Act* be suspended in light of the pending Court application, recent information provided to the Region by its fisheries consultant, and DFO's prior advice that DFO required further information before the application could be processed.

[43] On November 4, 1999, the Region wrote to the Environment Minister asking that the appointment of Nick Mulder to the review panel be revoked.

[44] On November 15, 1999, the Region filed its application in T-1993-99, in essence challenging the consideration of the project under the CEAA, the appointment of Nick Mulder, and the issuance of the EIS Guidelines.

[45] On January 12, 2000, the Region, through its counsel, advised the panel that it would not participate in the panel's process of review while its applications for judicial review were before the Court.

[46] On February 3, 2000, the panel suspended its review until the Region submitted its Environmental Impact Statement.

3. PRELIMINARY ISSUES: T-1400-99 AND T-1993-99

[47] Three preliminary matters were raised in the context of these two applications. They were:

(i) the permissible scope of the applications;

(ii) the admissibility of certain affidavit evidence filed by the applicant; and

(iii) the use of evidence said to relate to confidences of the Queen's Privy Council.

[48] Each preliminary issue will be dealt with in turn.

(i) The permissible scope of these applications

[49] During the course of the proceedings the respondents moved on an interlocutory basis successfully before the learned prothonotary Lafrenière for an order striking out significant portions of the notice of application filed in T-1400-99 so as to substantially reduce the scope of the judicial review. The Region appealed that order and, in the alternative, moved for leave to amend the application and for an extension of time. Concurrent with that appeal the respondents moved to strike out significant portions of the notice of application filed in T-1993-99.

[50] Those motions were heard together. The appeal from the prothonotary's order was allowed, and the motion to strike out significant portions of the application in T-1993-99 was dismissed. The resultant orders specifically reserved to the respondents the right to argue at the hearing of the judicial review applications that the application for judicial review of the May 4 and May 6, 1999 decisions was brought out of time and should be dismissed, and to otherwise argue that delay is a bar to the claim for prerogative remedies.

[51] The motion brought by the Region for an extension of time and for leave to amend the notice of application filed in T-1400-99 to specify that it included a review of the request of the Fisheries Minister on May 4, 1999 and of the decision of the Environment Minister on May 6, 1999 was adjourned *sine die*.

[52] In view of the fact that the appeal from the order striking portions of the notice of application was successful, it was not necessary for the Court to rule on the motion to amend. However, at the request of the parties I, as the judge who dealt with the interlocutory motions, indicated what my decision would have been had the appeal not been allowed. I indicated that, applying the principles set out in *Grewal v. Minister of Employment and Immigration*, reflex, [1985] 2 F.C. 263 (F.C.A.) and *Independent Contractors and Business Association v. Canada (Minister of Labour)* (1998), 225 N.R. 19 (F.C.A.), I would have granted leave to amend, the necessary extension of time, and leave pursuant to Rule 302 of the *Federal Court Rules, 1998* in respect of the Fisheries Minister's request of May 4, 1999 and the decision of the Environment Minister on May 6, 1999. I indicated, however, that I would not have granted leave to assert that authorization was not required under subsection 35(2) of the *Fisheries Act*. It would follow, because subsection 35(2) is included in the list of laws which trigger the application of the CEAA, that the Region would be obliged to accept as a matter of law that the consequence of having made an application to DFO for an authorization under subsection 35(2) would be to trigger the application of the CEAA.

[53] No appeal was taken from those orders.

[54] The Region and the respondents did pursue these matters as preliminary matters at the hearing into the merits of the applications.

[55] It was the position of the respondents that, subject to preserving their rights of appeal, they were content to proceed in the application in accordance with the disposition indicated in my earlier reasons, subject to clarification as to whether the Region could assert that the CEAA did not apply to the project.

[56] In response, the Region advised that, subject to its appeal rights, it too did not seek to revisit the earlier decision. It sought leave, if necessary, so that the Court could consider the propriety of the May 4 and May 6 ministerial actions, but did not seek leave for any extension of time with respect to any "decision" prior to May 4, 1999. The Region advised that it did not take issue with the prior indication that the Court would not have granted leave to consider the need for a *Fisheries Act* authorization. However, the Region did assert its right to rely upon jurisdictional arguments to the effect that the CEAA could not be applied in excess of its statutory limits, regardless of any initial assumption by the Region that it would apply.

[57] After hearing argument, I reserved my decision on the preliminary issue so as to allow the parties to argue all of the issues fully before the Court.

[58] The issues which the Region sought to raise in these applications are:

i) whether the Minister's referral of the matter to panel review and the panel's terms of reference are constitutionally or statutorily *ultra vires*;

ii) whether the EIS Guidelines are statutorily *ultra vires*;

iii) whether there was jurisdiction to refer the matter to panel review, to appoint the panel, and to set the panel's terms of reference;

iv) whether the CEAA applies to the project; and

v) whether the panel is disqualified by reason of Mr. Mulder's appointment.

[59] As noted above, the project was referred to a review panel on May 6, 1999, the panel members were appointed and the panel's terms of reference were set on July 5, 1999 and the EIS Guidelines were issued on October 15, 1999.

[60] The first notice of application was issued on August 4, 1999, within thirty days of July 5, 1999. That application was expressed to be an application for judicial review in respect of the decision of the Environment Minister on July 5 to appoint the members to the review panel to conduct a full public review of the need for, alternatives to and the environmental effects of the Region's completion of the Expressway, and the decision setting the terms of reference for the panel review. This was a timely challenge to the panel's terms of reference and to the appointment of the panel members.

[61] The second notice of application was issued on November 15, 1999 and it challenged, among other things, Mr. Mulder's appointment, the continuing failure to remove Mr. Mulder, and the issuance of the EIS Guidelines. This was not alleged to be other than a timely attack upon the EIS Guidelines.

[62] What is substantially in dispute as a preliminary issue is whether the challenges to the decisions of May 4, 1999 and May 6, 1999 are barred by the provisions of subsection 18.1(2) of the *Federal Court Act*, and whether the issues which the Region asserts as to the applicability of the CEAA to the project are barred due to delay.

[63] In arguing that the CEAA is not applicable to the project, the Region seeks to assert that the project is

excluded from the operation of the CEAA by virtue of subsection 74(4) of the CEAA, that the project was not a "project" to which the CEAA applied, and that there was no valid trigger for the application of the CEAA.

[64] The respondents say that clarification is required of my earlier remarks, made at paragraph 52 of my prior reasons reported at 2000 CanLII 15219 (FC), (2000) 187 F.T.R. 287 (F.C.T.D.) allowing the Region's appeal from the order striking portions of the notice of application in T-1400-93, to the effect that while if necessary I would have allowed some amendments I would not have granted "leave to assert that authorization is not required for the Expressway Project under subsection 35(2) of the *Fisheries Act*, or to assert that the need for that authorization did not trigger the application of the CEAA" [underlining added].

[65] Neither consent nor delay can confer any power to act beyond limits imposed by legislation (see, for example, *Merck Frosst Canada Inc. v. Apotex Inc.*, 1997 CanLII 4806 (FCA), [1997] 2 F.C. 561 (F.C.A.); leave to appeal denied [1997] S.C.C.A. No. 113). Thus, the respondent Ministers could not refer the project to panel review, or apply the CEAA, in excess of its statutory limits. Arguments directed to the statutory limits of the CEAA are therefore, in my view, not barred. If the CEAA, as a matter of law, is inapplicable to the project, any referral made under that Act is a nullity because the referring Minister would have no jurisdiction to refer the project to panel review. The Region's apparent assumption that the CEAA applied and the Region's failure to challenge the May 4 or May 6 decisions could not confer jurisdiction on the referring Minister.

[66] That statutory requirements must be met and that the failure to challenge an earlier step does not change those requirements was recognized by the Court of Appeal in *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, 1998 CanLII 9122 (FCA), [1999] 1 F.C. 483 (F.C.A.).

[67] Further I find that, as argued by the Region, the primary relief which is sought is prohibition of the panel from proceeding with the panel review. The applications are in respect of present acts and intended future acts implementing the prior decision to refer this matter to panel review. Pursuant to the principle articulated by the Court of Appeal in *Krause v. Canada*, 1999 CanLII 9338 (FCA), [1999] 2 F.C. 476 (F.C.A.) those implementing actions are reviewable.

[68] This conclusion makes the motion to amend redundant.

[69] The Region is entitled to argue that the CEAA does not apply either because of the effect of subsection 74(4) of the Act or because the project was not a "project" to which the CEAA applies. These arguments are available because the CEAA cannot be applied in excess of its statutory limits.

[70] Nothing in this conclusion allows the Region now to challenge on other than jurisdictional grounds the need for a *Fisheries Act* authorization. It is simply too late to raise this issue and there is, in my view, no basis for allowing any extension of time for the matter to be reviewed because it was never the intention of the Region to challenge the need for a *Fisheries Act* authorization.

[71] I reach this conclusion because in July of 1998 the Region forwarded to DFO an application for a *Fisheries Act* authorization. In its covering correspondence, the Region stated that:

This early submission will facilitate the approval process by providing DFO with the ability to initiate a screening under the Canadian Environmental Assessment Act.

[72] Section 35 of the *Fisheries Act* has been in force for many years. Notwithstanding whether the CEAA applies to the project, I have concluded that the Region must comply with the process required under the *Fisheries Act* absent a jurisdictional reason. I will comment later upon the Region's argument that no permit is required under the *Fisheries Act*.

(ii) The admissibility of certain affidavit evidence tendered by the applicant

[73] At the commencement of the hearing the respondents moved for an order:

a) striking out the affidavits of Tony Battaglia, Nicolas Catalano, Stephen Janes, Ronald Marini, Sharon Fortis, Cameron Portt, Hart Solomon, Ian Williams and Tony Yarranton;

b) in the alternative, striking out portions of those affidavits as set out in a schedule to the notice of motion; and

c) striking out portions of other affidavits also as particularized in the schedule to the notice of motion.

[74] As a result of discussions with the case management officer it was agreed by the parties that this motion would not be argued in oral argument as a preliminary motion, but rather, so that the impugned material could be reviewed in the proper factual matrix, counsel would argue the admissibility of the impugned evidence in the course of their submissions on the substantive issues. Due to time constraints it developed at the hearing that the respondents did not make oral argument on their motion, but rather relied upon their written motion record. As well, on the final day of the hearing, the respondents indicated that they were narrowing the scope of their objections as set out in correspondence to be delivered following the conclusion of the oral hearing. That correspondence when delivered indicated that while the respondents still sought the relief set out in paragraph (a) above, the number of matters within items (b) and (c) above was reduced.

[75] The impugned evidence is voluminous. The bases for the objection are that the affidavits contain argument or opinion and that irrelevant facts and exhibits are not properly in evidence before the Court.

[76] I do not think it necessary in these reasons to deal *seriatim* with the respondents' objections. Rather, I have noted the evidence which the respondents impugned and will deal in these reasons with their objections to the extent that I find the impugned evidence in any way potentially relevant to the matters that I reach conclusions upon. Where that is the case my ruling on admissibility of the evidence and the related analysis will be set out in these reasons.

(iii) The use of evidence relating to confidences of the Queen's Privy Council

[77] At the outset of the hearing, counsel appeared on behalf of the Privy Council advising that five documents in respect of which a claim to cabinet confidence had been asserted have found their way into the applicant's record. Counsel did not seek an order expunging the material at issue from the record, but rather sought an order precluding counsel and the Court from referring to the material at issue. A temporary order was made for the duration of the time required by counsel for the Region to respond to this request. After hearing further argument, in the absence of a motion to expunge and in the absence of evidence as to inadvertent disclosure, for reasons given orally, the temporary order was set aside and I declined to make an order of the nature requested. However, counsel were asked to be mindful of the claims. Subsequently no reference was made by counsel to any of the material in the record in respect of which a claim had been made under section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and no reference to that material is contained in these reasons.

4. STANDARD OF REVIEW

[78] Case law from this Court has held that the interpretation of the CEAA raises a question of law, so that the standard of review on issues involving jurisdiction or the proper interpretation of the Act is correctness (*Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, 1999 CanLII 9379 (FCA), [2000] 2 F.C. 263 (F.C.A.) at paragraph 10, leave to appeal dismissed [1999] S.C.A.A. No. 585).

[79] Similarly, the Federal Court of Appeal has recently held that with respect to discretionary decisions of substance made pursuant to authority granted under sections 15 and 16 of the CEAA, the standard of review is reasonableness (*Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 18, A-642-99 (January 10, 2001) (F.C.A.) at paragraph 55). This reflects, particularly, the absence of a privative provision and the minimal level of expertise in administering the Act.

[80] The parties made widely disparate submissions with respect to the standard of review applicable to the Minister's decision to appoint specific members of the review panel. The respondents submitted that due to the political status and the level of accountability of the decision-maker, the discretionary nature of the decision, and the fact that an appointee deals with broad conceptions of public interest, the standard of review is closer to the deferential end of the continuum. Not surprisingly, the applicants in all of the proceedings submitted that the decision to appoint individual members is not deserving of any deference due to the fact that the CEAA grants no discretion to the Minister with respect to the requirement that panel members be unbiased and free from any conflict of interest.

[81] Had it been necessary for me to consider the issue, I would have concluded that the standard of review is near correctness. This standard reflects the fact that the question of an appointee's eligibility is not one of policy and the absence of a privative clause. This also recognizes that discretionary decisions must be made within the jurisdiction conferred by the statute. As noted by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paragraph 53:

... it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis* [citation omitted], in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson,* [citation omitted]).

5. DOES THE CEAA APPLY TO THE COMPLETION OF THE RHCE?

[82] As noted above, the Region argues that the CEAA does not apply to the completion of the RHCE because of the operation of subsection 74(4) of the Act; because the construction is not a "project" as contemplated by the CEAA; and because there was no valid trigger to its application. I will now address these arguments in the order presented.

(i) Is application of the CEAA excluded by operation of subsection 74(4) of the Act?

[83] The CEAA received royal assent on June 23, 1992 and came into force on days fixed by order of the Governor in Council. Sections 61 to 70, 73, 75 and 78 to 80 came into force on December 22, 1994, while the remaining provisions came into force on January 19, 1995. The CEAA replaced the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 ("EARPGO").

[84] The transitional provisions are set out in section 74 of the CEAA and provide:

- in subsection (1), that the EARPGO would continue to apply in respect of any proposal that prior to the coming into force of section 74 was referred to the Minister for public review and for which an environmental assessment panel was established;

- in subsection (2), that the EARPGO would continue to apply in respect of any proposal for which an environmental screening or initial assessment had been commenced before the coming into force of section 74 unless the proposal is referred to a panel, at which time the CEAA will apply; and

- in subsection (3), that where a proponent proposed to carry out in whole or in part a project for which an environmental screening or an initial assessment had been conducted in accordance with EARPGO, but that the project did not proceed or different work was proposed, or the manner in which the project was to be carried out had changed, or where the renewal of a licence, permit, approval or the like was sought, the responsible authority might use or permit the use of the earlier environmental screening.

[85] Subsection (4) is the subsection of potential application to the present facts, and it states:

74(4) Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply in respect of the issuance or renewal of a licence, permit, approval or other action under a prescribed provision in respect of the project unless the issuance or renewal entails a modification, decommissioning, abandonment or other alteration to the project, in whole or in part.

74(4) Dans les cas où la construction ou l'exploitation d'un ouvrage ou la réalisation d'une activité concrète a été entamée avant le 22 juin 1984, la présente loi ne s'applique à la délivrance ou au renouvellement d'une licence, d'un permis, d'une autorisation ou à la prise d'une autre mesure en vertu d'une disposition désignée par règlement à l'égard du projet que si telle mesure entraîne la modification, la désaffectation ou la fermeture d'un ouvrage en tout ou en partie.

I accept the submission of the respondents that the words "construction or operation of a physical work" and the words "carrying out of a physical activity" as used in this subsection reflect the fact that "project" is defined in the CEAA in subsection 2(1) to mean:

"project" means

(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

(b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59 (b). [underlining added]

« _projet_ » Réalisation -- y compris l'exploitation, la modification, la désaffectation ou la fermeture -- d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59b).

[86] The RHCE is a "physical work". Therefore, the second part of the definition of a project has no application. It follows, in my view, that the phrase "or the carrying out of a physical activity" found in subsection 74(4) of the Act equally has no application to a "physical work".

[87] Thus the questions to be answered are whether with respect to the RHCE:

(a) the construction or operation of a physical work was initiated before June 22, 1984; or

(b) the issuance of any permit, approval or the like involves a modification, or other alteration of the project, in whole or in part.

(a) Was construction of the RHCE initiated before June 22, 1984?

[88] Neither "construction" nor "initiated" are defined in the CEAA. Relying on dictionary definitions the respondents argue that construction of a physical work means its building or erection, and that the initiation of such construction simply refers to its beginning or start. Because, the respondents say, the project was commenced in June of 1990 (with the official sod-turning ceremony) subsection 74(4) of the CEAA has no application to this matter.

[89] This view is supported by the Friends who argue that the plain language of subsection 74(4) of the CEAA is specific. There is no reference to preparatory work or planning so that construction means "shovel in the ground".

[90] The Friends also say that this interpretation is supported by section 4 of the Act and by the definition of "project". With respect to section 4 of the Act, the Friends argue that the purposes of the CEAA are stated to

include to "ensure that the environmental effects of projects receive careful consideration" and to "ensure that there be an opportunity for public participation in the environmental assessment process". While these purposes are clearly compromised if a project is already physically constructed, the Friends say that the application of the CEAA to projects still in the planning stage, including land acquisition and approval processes, would not compromise the statute's purposes. With respect to the definition of a project, the Friends note that the definition includes "any proposed construction" while subsection 74(4) applies to situations "where the construction or operation of a physical work" has been initiated prior to June 22, 1984. The absence of the word "proposed" is said to indicate that the subsection must refer to actual physical construction.

[91] To opposite effect, the Region argues that with an infrastructure program such as the Expressway "construction" cannot be reduced to a "shovel hitting the ground". The Region points to such things as the need to purchase land, procure funding, obtain approvals, expropriate land and demolish buildings. Thus, the Region asserts, construction of a physical work is initiated through a series of sequential steps. This meaning is said to be consistent with dictionary definitions of "initiate" which the Webster's Third New International Dictionary defines to include "to begin or set going: make a beginning of; perform or facilitate the first actions, steps, or stages of" and which the Ninth New Collegiate Dictionary defines as including "to cause or facilitate the beginning of: set going (~ a program of reform) (enzymes that ~ fermentation)".

[92] In order to determine the correct interpretation to be given to subsection 74(4) of the CEAA, I begin from the premise that "... the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (Driedger, *Construction of Statutes* (2nd ed. 1983)) as quoted by the Supreme Court of Canada in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-secours*, 1994 CanLII 58 (SCC), [1994] 3 S.C.R. 3 at page 17.

[93] The CEAA begins with a preamble, the second recital of which provides:

WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development.	que l'évaluation environnementale constitue un outil efficace pour la prise en compte des facteurs environnementaux dans les processus de planification et de décision, de façon à promouvoir un développement durable.

[94] Subsection 11(1) of the CEAA speaks to the timing of an environmental assessment and provides:

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.	11. (1) Dans le cas où l'évaluation environnementale d'un projet est obligatoire, l'autorité fédérale visée à l'article 5 veille à ce que l'évaluation environnementale soit effectuée le plus tôt possible au stade de la planification du projet, avant la prise d'une décision irrévocable, et est appelée, dans la présente loi, l'autorité responsable de ce projet.

[underlining added]

[95] Section 16 of the CEAA deals with factors to be considered in an assessment. Subsections (1) and (2) are to the following effect:

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:	16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants_: a) les effets environnementaux du projet, y compris

(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);

ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

b) l'importance des effets visés à l'alinéa a);

(c) comments from the public that are received in accordance with this Act and the regulations;

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

(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.

e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, -- dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

(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:

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants_:

(a) the purpose of the project;

a) les raisons d'être du projet;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

(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.

d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

[96] From these provisions I take that the overarching purpose of the legislation is to require a proponent of a project to consider, and to be prepared to justify, things such as the need for the project, alternatives to the project, and alternative means of carrying out the project, all in the planning stages of a project, and before irrevocable decisions are made concerning the project.

[97] An interpretation of subsection 74(4) of the CEAA that equates the initiation of construction with a shovel hitting the ground does not, in my view, accord with the scheme and object of the Act, or the intent of Parliament, all as evidenced by the provisions referred to above.

[98] An interpretation of subsection 74(4) of the Act that leads to the conclusion that no matter what approvals or actions have taken place, a project may be reviewed from first principles as long as actual physical construction had not begun is not, in my view, to be preferred. The respondents' argument that the purpose of the project, or alternative means of carrying out the project (which are both required to be considered by a review panel) or the need for the project and alternatives to the project (factors which the Minister may require a review

panel to consider) can be re-examined so long as no shovel hit the ground before June 22, 1984 accords neither with logic nor the requirement in subsection 11(1) of the Act that the relevant federal authorities shall ensure that any environmental assessment is conducted "as early as is practicable in the planning stages of the project and before irrevocable decisions are made".

[99] In *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 27 C.E.L.R. (N.S.) 177 (F.C.T.D.) by Richard J., as he then was, reached a similar conclusion, determining that the Deltaport Container Terminal was not a "project" within the meaning of that term under the CEAA, so that the Act did not apply because, as stated at paragraph 61 of his reasons:

The CEAA specifies that environmental assessments, where required, must be completed "before irrevocable decisions are made" and "as early as possible in the planning stages" of a "project" [See Note 6 below]. These provisions make it clear that the CEAA is intended only to apply to proposed projects which are still in the planning stages on or after January 19, 1995, and for which irrevocable decisions have not been made.

Note 6: See Sections 8(1), 9, 10(1), 11(1), 54(1) and 54(2).

This decision was recently affirmed on appeal: see (2001) FCA 58. I did not consider it necessary to seek supplementary submissions on the effect of the judgment of the Court of Appeal.

[100] Further, the interpretation of a statute by an administrative body charged with its implementation and application may be used as an aid to the interpretation of that statute: see *Canada Post Corp. v. Canada (Minister of Public Works)*, 1993 CanLII 2970 (FC), [1993] 3 F.C. 320 (F.C.T.D.) at paragraph 43; affirmed 1995 CanLII 3574 (FCA), [1995] 2 F.C. 110 (F.C.A.).

[101] In October of 1998 the Agency, whose logo extols "Environmental assessment ... Before you decide", published an Operational Policy Statement (see: Exhibit C to the affidavit of Paul Bernier, the Vice-President, Program Delivery of the Agency) for the stated purpose of providing "clarification and guidance to responsible authorities (RAs) conducting environmental assessments under the *Canadian Environmental Assessment Act* (the Act)". The policy statement addresses environmental assessment under the CEAA as "a decision-making planning tool, rather than as a project impact assessment tool". The statement goes on to say:

The approach links considerations of "need for" the project, "purpose of" the project, "alternatives to" the project and "alternative means" of carrying out the project, in the early stages of project planning, and before irrevocable decisions on the project are made. In this way, the RA and/or proponent will be in a better position to define potential solutions to a problem, and to establish the viability of alternatives. Importantly, their consideration will also help to establish the conditions under which certain effects may or may not be justified under the circumstances, should such a determination be subsequently required.

[102] This policy statement illustrates the Agency's position and understanding that the purpose of environmental assessment is to force consideration of the need for a project, alternatives to the project, and alternative means of carrying out the project at early stages of project planning. This I find is consistent with interpreting "construction" as used in subsection 74(4) of the CEAA to include a series of steps by which a project is irrevocably implemented and not just simply a point in time when the "shovel hits the ground".

[103] I therefore conclude that "construction" as used in subsection 74(4) of the CEAA includes a whole series of events such as acquiring and clearing land, imposing building restrictions, and securing funding and approvals, all dedicated to, and prerequisites to, the actual physical step of construction. Crucial, in my view, to the determination of whether a step is part of the initiation of construction within subsection 74(4) of the CEAA is whether the action is both a necessary prerequisite to a "shovel hitting the ground" and is dedicated to a particular

project so that it evidences an irrevocable decision to proceed with the project.

[104] DFO's understanding of the potential application of the CEAA to the RHCE is instructive, and is reflected in draft correspondence prepared by Edwin R. DeBruyn in June of 1998 for the Fisheries Minister. Mr. DeBruyn at all material times was employed by DFO as the Senior Habitat Advisor for the Fisheries Management Program in the Ontario area of the Central and Arctic Region of the DFO. He was put forward by the respondents as DFO's representative in these proceedings. The draft correspondence stated in part:

The Department of Fisheries and Oceans has discussed with the Regional Municipality of Hamilton-Wentworth and other interest groups the requirements under the *Canadian Environmental Assessment Act,* the Law List Regulations and the *Fisheries Act*.

Section 11(1) of the *Canadian Environmental Assessment Act* requires a project to undergo a review as early in the planning stages as possible by a Responsible Authority as defined under CEAA. Various proposals for the construction and completion of the Red Hill Expressway has been under consideration since the late 1950's. The *Canadian Environmental Assessment Act* was promulgated January, 1995.

The basis for DFO to issue a permit or grant an approval under the *Fisheries Act* is an application under the *Fisheries Act.* Without an application for authorization under section 35(2) of the *Fisheries Act* DFO has no basis to trigger the CEAA and become a Responsible Authority as defined in CEAA for a project which has been under consideration for over 30 years. Furthermore, the decision to issue a *Fisheries Act* authorization (... issues a permit or grants and approval ... under CEAA) is contingent upon the applicant to ensure that there is no net less of fish habitat according to the guiding principle of the Policy for the Management of Fish Habitat. Applying a CEAA (promulgated in January 1995) environmental assessment on a project which has been planned for over 30 years can, unfortunately, never be considered to have been applied 'as early as practicable in the planning stages'.

[105] This represents, I find, DFO's assessment, made before the current controversy arose, that for all practical purposes it was too late for any meaningful environmental assessment to be conducted of a project "planned for over 30 years" and is also a recognition that the CEAA is premised upon application as early as practicable in the planning stages.

[106] Parenthetically I have noted that the letter does contemplate application of the CEAA in the event that an application was made for an authorization under subsection 35(2) of the *Fisheries Act*. However, as a matter of statutory interpretation, that would only be the case if on the evidence construction of the project was initiated after June 22, 1984. That is the issue to be addressed next.

[107] Before turning to that issue, further comment is required upon certain submissions made on behalf of the respondents and the Friends.

[108] The respondents argue that the test as to the applicability of the CEAA is to be made when a federal authority is required to exercise a power, or to perform a duty or a function in relation to a project. Reliance is placed upon the decision of the Federal Court of Appeal in *Cdn. Parks and Wilderness Soc. v. Banff Nat. Pk. (Superintendent) et al.* (1996), 202 N.R. 132 (F.C.A.), leave to appeal dismissed [1996] S.C.C.A. No. 498, where the Court considered the applicability of the EARPGO, which predated the CEAA. However, I find the case of little assistance to the issue of the proper interpretation to be given to the express transitional provisions of the CEAA found in section 74.

[109] The respondents also argue that the phrase "irrevocable decisions" found in subsection 11(1) of the CEAA refers to decisions of a responsible authority under the CEAA and not to decisions made by the proponent. Such interpretation does not make a great deal of sense to me: it would mean that subsection 11(1) simply mandates federal authorities not to make their final decision with respect to the exercise of their powers before a required environmental assessment is conducted. That interpretation would make subsection 11(2) of the Act, which deals with the timing of the exercise of federal powers, largely unnecessary. Further, the respondents' interpretation of subsection 11(1) is not consistent with that applied by Richard J. in *Tsawwassen, supra.* It is also inconsistent with the Agency's understanding, evidenced in its operational policy statement, where in dealing with

environmental assessment as a planning tool the Agency refers to both responsible authorities and/or the proponent being better placed to "define potential solutions to a problem, and to establish the viability of alternatives".

[110] As for the Friends' argument that their interpretation of subsection 74(4) of the CEAA is supported by the definition of a "project" in section 2 of the CEAA, I do not find this argument persuasive for the interpretation of the express wording of a transitional provision which references the "initiation" of construction. Further, when looking at section 74 as a whole it is clear that some provisions deal specifically with proposed construction, for example where proposed construction has been referred for public review as in subsection 74(1).

[111] I now turn to consider whether the evidence supports the contention that "construction", as I have interpreted that word, of the RHCE was initiated before June 22, 1984.

[112] The Region points to a number of steps it or its predecessor took which it alleges establish the initiation of construction, including the following:

a) In May of 1963, the Hamilton Area Transportation Plan ("HAT Plan") recommended a freeway connecting the QEW with Highway 403. On February 25, 1964, the City of Hamilton approved in principle that recommendation. On March 14, 1967, the City of Hamilton enacted the Official Plan Amendment 228 ("OPA 228"). This incorporated plans for a freeway based on the route recommended in that HAT Plan. The Minister of Municipal Affairs of Ontario approved OPA 228 on September 19, 1969. Included in OPA 228 is the following statement:

"It will be essential in the immediate future to have a functional design prepared of both the proposed Highway 53 Freeway and the Red Hill Creek Freeway so as to ensure an appropriate correlation between the location and operation of these major highways and adjacent land use development".

Schedule F to the OPA 228 entitled "Major Roads" designated the location and right of way width for a freeway extending west from Highway 403, and turning north through the Red Hill Valley to the QEW. Pursuant to section 24 of the Ontario *Planning Act,* R.S.O. 1990, c. P.13, no public work could thereafter be undertaken for any purpose not conforming therewith.

b) To control the effects of freeway noise from the Expressway on October 9, 1973, the City of Hamilton approved the establishment of a development standards policy which restricted the construction of all new plans of subdivisions and lands to be used for residential purposes adjacent to the Expressway, and which required the owners to convey an easement over their land for the construction of a berm. This policy was subsequently amended on December 9, 1975, June 29, 1976, September 27, 1977 and April 11, 1978.

c) On March 27, 1973, the City of Hamilton adopted a report which recommended that the city take specific actions related to the "Mountain Freeway and Red Hill Creek Freeway", including:

A. proceeding with the acquisition of property for various freeway purposes, all at an estimated cost of 1.4 million dollars as provided for in the 1973-1977 Budget;

B. applying to the Ontario Municipal Board for approval of the project; and

C. applying to the Ontario Municipal Board for authority to finance the city's share of the cost through the issuance of 20 years debentures.

The Ontario Municipal Board approved the city's application, and on October 16, 1974 made an order approving the expenditure of 1.4 million dollars for the acquisition of land for highway purposes and the borrowing of money for that purpose and for the issuance of the necessary debentures by the Region. In March of 1978, the City of Hamilton obtained approval from the Ontario Municipal Board for an increase in expenditure on land acquisition from 1.4 million dollars to 1.9 million dollars, to be financed through roadway subsidies.

d) In 1977, the Region took over the responsibility for major arterial roads. On April 3, 1979, the Region tabled an application for a proposed "Battleridge Sub-division" because the location proposed was potentially within the Expressway corridor. This evidence comes from the affidavit of Stephen Janes. While the specific paragraph containing this evidence is not one which the respondents seek to strike, they do seek to strike the whole of Mr. Janes' affidavit.

Mr. Janes is registered as a professional engineer in Ontario and as a professional planner. He swore to extensive experience with project planning and management. He was engaged by counsel for the Region to review background information on the development of the Expressway and to provide commentary. He swore to having reviewed much of the very considerable documentation related to the RHCE. Based on his qualifications and expertise, and his evidence that he reviewed relevant documents, I am not prepared to strike out either his affidavit in total or his statement of fact with respect to the tabling of an application for subdivision.

e) On August 28, 1979 and September 18, 1979, the City of Hamilton and the Region respectively approved, as the preferred route for the Expressway, "an arterial roadway alignment south of Limeridge Road and a freeway alignment along the southerly portion of Mt. Albion Road and then northerly through the Red Hill Creek Valley to the QEW". At the same time the Region approved the following activities in furtherance of the construction of the Expressway:

(a) identify and protect additional lands required for future interchanges on the east-west portion of the Expressway;

(b) notify home owners whose lands will be required for the Expressway as soon as detailed plans are prepared showing the affected lands.

f) On November 20, 1979, the Region passed resolutions amending the Region's official plan and requiring area municipalities to amend their official plans and secondary plans to designate the Expressway and protect lands for future interchanges, and requesting that the City of Hamilton continue to enforce development standards for development immediately adjacent to the Expressway.

g) On August 15, 1980, the Lieutenant Governor-in-Council of Ontario approved Regulation 675/80 under the provincial *Environmental Assessment Act, 1975* which exempted the Red Hill Creek Expressway from the application of the Act. The Red Hill Creek Expressway was defined in the regulation to mean:

... a proposed regional roadway to run easterly from that part of the King's Highway known as the No. 403 where it intersects with a roadway known as Mohawk Road in the Town of Ancaster in the Region through an area known as the Redhill Creek Valley to that part of King's Highway known as the Queen Elizabeth Way near the boundary of the City of Hamilton and the Town of Stoney Creek to serve the transportation needs of the area, and any alternatives thereto which have been made an undertaking to which the Act applies.

h) In August of 1983, the Province of Ontario published its "Review under the Environmental Assessment Act" which concluded that the Region's environmental assessment met the requirements of the *Environmental Assessment Act*. In this report the project was described as follows:

The proposed facility connects Highway 403 in Ancaster to the Queen Elizabeth Way in the eastern portion of the City of Hamilton. The roadway link is made up of two integrated facilities with a controlled access roadway in the north-south direction and a limited access arterial in the east-west direction.

The proponent of this undertaking is the Regional Municipality of Hamilton-Wentworth.

A freeway is proposed to extend from the Queen Elizabeth Way at a new interchange and remain within and follow the Red Hill Creek Valley south to a point just north of Greenhill Avenue. At this point, the roadway ascends from the Valley following the general alignment of existing Mount Albion Road to connect with the east-west roadway in the vicinity of Mud Street and Pritchard Road. Throughout the north-south segment, access would be controlled through interchanges at Barton Street, Queenston Road, King Street, Greenhill Avenue, Mud Street

and Dartnall Road. All other road and rail crossings would be grade separated.

In the east-west direction, an at-grade arterial roadway extends from the Mud Street interchange through to the existing Mohawk Road interchange at Highway 403. The east-west facility generally follows the 60 m vacant corridor positioned immediately south of existing Limeridge Road.

i) By June 22, 1984, the city and the Region had acquired land necessary for the Red Hill Creek Expressway to the extent that nearly 100 land acquisitions and expropriations had taken place by June 22, 1984. Three of those expropriations dealt with property in the north-south portion of the Red Hill Creek Expressway.

j) Prior to June 22, 1984, the city and the Region had required the demolition of private homes and businesses in preparation of the Red Hill Creek Expressway corridor. One of those three demolitions occurred within the north-south corridor of the Red Hill Creek Expressway.

k) In addition to the property acquisitions, the city and the Region had acquired a 50 foot berm easement from the private owners of property immediately adjacent to the RHCE. The easement allowed for the construction of a berm to act as a landscape noise barrier between the Expressway and adjoining properties. Thirty-five berm easements were acquired prior to June 22, 1984.

l) The costs related to the construction of the Red Hill Creek Expressway prior to June 22, 1984 included at least 8.9 million dollars spent to acquire land necessary for the project.

m) Over 1.5 million dollars was expended acquiring land specifically located in the north-south portion of the Red Hill Creek Expressway corridor, and over $700,000 was spent in respect of the portion of the Red Hill Creek Expressway below the escarpment. The Region's five-year capital budget approved on December 20, 1983, contemplated spending 67.7 million dollars on the Red Hill Creek Expressway between 1984 and 1988, such funding being dedicated to the continuing purchase of land and to construction costs. The Ministry of Transportation of Ontario subsidized the costs of land acquisition and construction, and prior to June 22, 1984 that Ministry had paid or committed to pay to the Region almost 3 million dollars for land acquisition.

[113] In response, it is asserted that this evidence said to evidence the initiation of construction is irrelevant because:

(i) What is relevant is consideration only of the project as scoped under the CEAA. This is said to be the unbuilt portion of the expressway below the escarpment so that the Region is relying upon construction activity which is not part of the project as scoped.

(ii) Additionally, the Friends assert that by 1995 the project had so changed that it was a new undertaking.

I shall deal with those submissions in reverse order.

[114] In support of its assertion that the project was a new undertaking the Friends point to the fact that the changes proposed to the project in 1995 caused the Region to seek an exemption under the *Environmental Assessment Act* of Ontario. The resultant order is said to be "clear evidence that the project was no longer part of the 1985-approved project, as it required independent consideration".

[115] I am not persuaded that the request for an exemption order is of the import submitted by the Friends. The Ontario Minister of Environment and Energy in the declaration order characterized the proposal simply as one where "[t]he Regional Municipality of Hamilton-Wenworth now has an opportunity to [...] implement improvements to the 1985 project which will reduce its environmental impacts". This is not consistent with a new undertaking.

[116] Of more significance, I find the evidence to be that DFO did not understand the Region's proposed work to be a new undertaking, nor did it treat the project as a new undertaking. Rather, Mr. DeBruyn's draft

correspondence prepared for the Fisheries Minister in June of 1998 previously referenced reflects DFO's understanding that:

The Regional Municipality of Hamilton-Wentworth has been at various stages of planning the construction of a Red Hill Expressway in the Red Hill Creek Valley since the late 1950's. The North-South Expressway (a portion of the Red Hill Expressway) is planned for construction through the Red Hill Creek Valley to join an existing East-West Expressway ('The Link') situated on the west side of Hamilton. The North-South Expressway portion is proposed to complete the Red Hill Expressway from the Queen Elizabeth Way on the east side of Hamilton to Highway 403 on the west side of Hamilton. The Red Hill Valley portion will connect to the Queen Elizabeth Way between Centennial Parkway and Burlington Street on the east side of Hamilton near Lake Ontario. [underlining added]

Mr. DeBruyn concluded the correspondence by referring to the project as one which had been "planned for over 30 years". This is a clear acknowledgement, I find, that DFO understood and treated the uncompleted work to be work to complete the Red Hill Creek Expressway and not to be a new undertaking.

[117] Therefore, I do not accept the Friends' submission that the scope of the Region's proposed work was a new undertaking.

[118] What then of the assertion that what is at issue is only the unbuilt portion of the Expressway below the escarpment so that much of the Region's evidence about construction is irrelevant?

[119] The scope of the project was set out in the review panel's terms of reference as follows:

The proposed expressway would link two existing east-west limited access expressways in Hamilton, Ontario (Lincoln Alexander Parkway and the Queen Elizabeth Way). The project includes the construction and operation of the expressway and any required ancillary works.

In Annex 2 to the terms of reference the scope of the project was expanded upon:

The proponent's proposal is the Valley portion of the Expressway from the Dartnall Road interchange (at the eastern terminus of the Mountain portion of the Expressway, now referred to as the "Linc") through the Red Hill Creek Valley to the interchange connect with the QEW between the Burlington Street/QEW overpass (in the west) and the Centennial Parkway/QEW overpass (in the east).

[120] It is therefore, I find, inaccurate on the evidence to state that the project at issue is only the unbuilt portion of the Expressway below the escarpment because:

(i) the project as defined in the terms of reference was already constructed from the Dartnall Road interchange east through to Mud Street, and some grading had been done for the interchange at Mud Street;

(ii) overpasses for interchanges at King Street and Queenston Road, also part of the project as scoped, had already been constructed in 1991;

(iii) concrete channels, part of the project as scoped, to convey the Red Hill Creek past Queenston Road and King Street were, as noted in the EIS Guidelines, "previously completed works".

[121] What in my view is fundamental to the determination of whether construction was initiated before June 22, 1984 is whether the steps pointed to by the Region as evidencing the initiation of construction were in fact steps in the construction of the completion of one continuous highway corridor which was, in substance, the subject of review before the Ontario Joint Board in 1985. If so, in my view, it follows that the pre-June 22, 1984 steps relied upon by the Region may properly be characterized as the initiation of construction of the project now at issue.

[122] It was strenuously argued by the respondents and the Friends that, notwithstanding Mr. DeBruyn's

reference to a single project in the planning stages for 30 years and to the completion of that project, what is at issue is, in effect, a free-standing north-south corridor. As succinctly argued by the Friends in their memorandum of fact and law:

86. Between 1990 and 1996, the Mountain East-West and North-South Transportation Corridor, as envisioned during the 1985 provincial environmental assessment hearings, was, for both practical and planning purposes, severed into an east-west corridor and a north-south corridor.

[...]

87. After 1990, the Region put its efforts and resources into designing and constructing the east-west corridor. This expressway was opened in 1997 from Highway 403 to Dartnall Road and in 1999 from Dartnall Road to Highway 20. The latter is a roadway that provides access to the QEW. This new east-west expressway is called the Lincoln Alexander Parkway, or the "Linc". It is not called the Red Hill Creek Expressway. The Linc connects the east end of the region to the west end of the region. It is in full operation. It is an independent project that is completed.

[...]

90. The Region argues that construction of the "Red Hill Valley Expressway" began before June 22, 1984, thereby exempting the project from CEAA, by authority of section 74(4). However, the north-south corridor project was proposed in 1996, at the time of the application for the Declaration Order. Consequently, construction of this project could not possibly have begun in 1984.

[123] Notwithstanding the vigour of those submissions, I have concluded that the project as scoped in the review panel's terms of reference is the completion of one continuous corridor.

[124] I reach this conclusion for the following reasons.

[125] First, since 1967 the whole of the Red Hill Creek Expressway has been designated on official plans of the City of Hamilton and the Region approved under the Ontario*Planning Act*. OPA 228 identified the location of the freeway which linked the QEW to Highway 403 and the north-south portion passed through the Red Hill Creek Valley.

[126] Second, the Region and its predecessor sought and received approval for debenture financing of the project as a whole, and imposed development standards for that project as a whole.

[127] Third, in the 1980 regulation approved by the Lieutenant Governor-in-Council under the provincial *Environmental Assessment Act*, in the 1983 review under the *Environmental Assessment Act*, and in the 1985 Ontario Joint Board approval, the undertaking was described as a single corridor connecting Highway 403 with the QEW.

[128] Fourth, both prior to and after the Joint Board approval, land acquisition, expropriation and demolition were carried on throughout the entire RHCE corridor. Detailed evidence was led through the Region's Manager of Finance and Administration for the Road Department that:

· the city and Region acquired and expropriated land concurrently throughout the RHCE corridor;

· the city and Region demolished buildings and structures throughout the RHCE corridor.

[129] Fifth, I accept as accurate the characterization of Mr. Gary Moore, the Region's Manager of Engineering for the Freeway Project Office, that:

[...] almost 72 lane km or 60% of the total Expressway has been constructed to date and is in use, including 22.1 lane km of 37% of the north/south portion of the Expressway. The portion of the Expressway which extends from

Highway 403 in Ancaster to Dartnall Road is more than 62 lane km and opened to traffic on October 15, 1997. The extension from Dartnall Road to Mud Street is almost 10 lane km and opened to traffic in July 1999.

[130] This evidence was very much contested by the Friends in particular stating that the north-south corridor was not 37% complete but rather was "0% complete". The Friends submitted that one project, the east-west corridor, was 100% complete while the other project, the1997 north-south corridor was, practically speaking, 0% complete.

[131] This controversy appears to stem from a dispute as to where the north-south and east-west portions of the project begin and end.

[132] I accept Mr. Moore's conclusions because I find they are properly founded in the evidence. In this regard, I rely upon these factors:

- In 1982, in its Environmental Assessment Submission, the Region described the north-south segment as commencing from Dartnall Road, stating "[i]n the north-south segment of the facility, a basic six lane freeway facility will be required to accommodate the projected volumes from Dartnall Road through to Barton Street. North of Barton Street to the Queen Elizabeth Way, a four lane freeway section is proposed." The transition between the Mountain East-West Arterial and the north-south Parkway sections was said to be east of Upper Gage Avenue. Exhibit 1 to Mr. Moore's affidavit shows the road is now built east from Upper Gage Avenue through Dartnall Road to Mud Street.

- A further review of the Region's submission shows that the first stage of the project was to have been from Upper Gage Avenue to King Street. The final stage was to have been from Upper Gage Avenue to Highway 403. Completion of the first stage was to have included the T.H. & B. Railway grade separation and the King Street realignment and interchange construction. Those elements of what was to have been the first stage have been completed.

[133] I also accept Mr. Moore's evidence that in 1990/1991 the Region was forced to suspend construction of the portion of the north-south Expressway located below the Niagara Escarpment when the provincial government announced that it would not continue to fund that portion of the Expressway. Thus, the Region continued only with the north-south portion of the Expressway above the escarpment and with construction of what was to have been stage three of the project. In the Red Hill Valley below the Niagara Escarpment construction contracts had been initiated with respect to the King Street realignment, the Queenston Road reconstruction and the T.H. & B. Railway grade separation. Those contracts were carried to completion. The bridges at King Street, Queenston Road, and the T.H. & B. Railway crossing were designed and constructed specifically for the Expressway at a cost in excess of 20 million dollars, each bridge costing in the order of 8 million dollars, and the railway crossing costing in the order of 4 million dollars.

[134] While it was suggested that the work at King Street and Queenston Road was not in furtherance of the Red Hill Creek Expressway below the Niagara Escarpment, but rather was required in any event, it was Mr. Moore's evidence on cross-examination, which I accept, that those works could have been left as they were, and that the improvement resulting from this new construction did not improve the overall operation of either King Street or Queenston Road.

[135] It was conceded that without the completion of the Red Hill Creek Expressway the T.H. & B. Railway overpass was wholly unnecessary.

[136] Finally, I have had regard to the funding history:

- On May 1, 1991, the Ontario Ministry of Transportation wrote to the Region stating: "an allocation has been approved in 1991 to complete the north-south portions of the Red Hill Creek Expressway under active construction prior to December 17, 1990 as noted below. In addition the minister has approved a supplementary

allocation for work on the east-west portion of the expressway as shown below".

- On November 29, 1995, the Ministry of Transportation again wrote to the Region stating: "[...] the government recognizes the importance of the Red Hill Creek expressway to Hamilton-Wentworth's future prosperity. Accordingly, the province will provide $100 million over the next five years towards the projected $200 million cost of completing the expressway and its interchanges with Highway 403 and the QEW. This level of commitment will allow the road to be completed by 2001."

- On October 22, 1998, a further funding agreement was entered into. The agreement noted in its opening lines that "[o]n November 29, 1995 the Province announced an important program to assist the Region of Hamilton-Wentworth in the completion of the Red Hill Creek Expressway" and described the scope of the project, in article 6, to be: "[t]he Region as proponent, plans to complete, own, and operate the RHCE from the Highway 403 to the south limit of the interchange with the Q.E.W. [...]". [underlining added]

[137] These agreements, all pre-dating the commencement of this litigation, reflect and support the conclusion that what is now at issue is the completion of a single transportation corridor to connect the QEW with Highway 403.

[138] Having so concluded, and interpreting the initiation of construction of a physical work to include necessary prerequisite post-planning steps, I find that the actions taken by the Region or its predecessor to designate the location and right of way of the highway on the official plan, to acquire land for freeway purposes, to demolish buildings in preparation of the highway corridor, to restrict development, to acquire easements and to impose development standards with respect to that corridor, together constitute the initiation of construction of the physical work including the project at issue. I also find that such construction was initiated before June 22, 1984.

(b) Is the requested *Fisheries Act* authorization in respect of a modification of the project within subsection 74(4) of the CEAA so as to oust the "grandfathering" effect of that provision?

[139] The respondents submit, in the alternative, that the *Fisheries Act* authorization is in respect of a modification or the alteration of the project in whole or in part.

[140] Neither term is defined in the CEAA. The respondents point to the DSR, which compared the 1985 and 1998 project designs, to argue that what is now proposed is a different project: 8 expressway crossings are proposed, not the originally proposed 14, and a natural channel design is put forward to minimize what was originally 4 km of creek bank in concrete. The respondents also point to the Region's submission in support of the exemption order which listed three categories of change to the approved Expressway: the design and location of the QEW interchange, the Niagara Escarpment crossing location and structure, and community access opportunities.

[141] The respondents argue that any change in design is an alteration or modification of the project within subsection 74(4) of the CEAA.

[142] The Region responds that the changes alter neither the nature of the undertaking nor the intended corridor. The Region argues that what is proposed is not a modification of the project, but changes to the proposed environmental mitigation measures.

[143] What I find to be of greatest assistance in interpreting and applying subsection 74(4) of the Act in this regard is the manner in which the respondents have dealt with the project in respect of which the *Fisheries Act* permit is said to be required.

[144] A fair review of the scope of that project as evidenced by the terms of reference of the review panel and the EIS Guidelines lends no air of reality to the submission that what is at issue is only the modification of the uncompleted portion of the Expressway, as those modifications are described in the DSR and exemption order submission. It is fundamentally inconsistent with the submission that what is in issue is only an alteration or

modification within the contemplation of subsection 74(4) that the review panel's terms of reference include the consideration of the need for the project and alternatives to the project. I accept the submission of the Region that for the purpose of interpreting the applicability of subsection 74(4) of the CEAA the respondents are bound by their scoping of the project.

[145] I therefore find that the proposed panel review is not in respect of any "modification" or "alteration" so as to oust the grandfathering effect of subsection 74(4) of the CEAA.

(ii) Is application of the CEAA excluded because irrevocable decisions were made before the CEAA came into force?

[146] If I am wrong in my interpretation of subsection 74(4) of the Act, I nonetheless conclude that the CEAA has no application to the proposed work because prior to the coming into force of the CEAA, irrevocable decisions were made by the Region about the proposed transportation corridor. I adopt, respectfully, the analysis of Richard J., as he then was, in *Tsawwassen, supra,* that the CEAA is intended only to apply to proposed projects still in the planning stages on or after January 19, 1995 and for which irrevocable decisions have not been made.

[147] That is not the case here. The irrevocable decisions made by the Region which I rely upon include:

(i) Prior to December 31, 1994, the city and the Region had expanded over $10 million acquiring land in the north-south corridor, of which $1.5 million related to land in the Red Hill Creek Valley below the escarpment. On 24 occasions land had been expropriated, and on 94 properties structures were demolished in anticipation of construction of the Expressway. Nineteen of those demolitions took place on properties in the north-south corridor;

(ii) The day after the Joint Board hearing began, to use the words of the Region's Manager of Finance and Administrator for the Roads Department, "in earnest", the Region resolved that it would allocate $44,638,000 to the Expressway's capital financing over a ten-year period from 1985 to 1994. This resolution was forwarded to the Joint Board hearing to substantiate the level of funding approved for the Expressway. In part to finance those capital costs, on June 19, 1990, the Region enacted a by-law imposing development charges on residential and non-residential development;

(iii) After the sod-turning ceremony for the first stage of the Expressway, held on June 26, 1990 at the King Street interchange in the Red Hill Creek Valley, physical construction commenced on Stage 1 in June of 1990 and on Stages 2 and 3 later in the year;

(iv) Even after the withdrawal of provincial government funding, the Region, as discussed above, completed the King Street realignment, the Queenston Road reconstruction and the T.H. & B. Railway grade separation. These were located in Stages 1 and 2 of the Expressway;

(v) By December 31, 1994, the Region had spent in the order of $58.9 million on construction costs for the Expressway, including $20.4 million in the Red Hill Creek Valley below the escarpment in 1990/1991, and $38.5 million from Highway 403 to Mud Street. In the north-south portion of the Expressway bridges had been constructed at Upper Gage Avenue and Upper Ottawa Street at a cost of 5.3 million, and 1 million dollars of grading work was completed east of Upper Gage Avenue;

(vi) Mr. Janes swore that:

138. At the time when the Expressway corridor was first defined, much of the land on top of the Mountain was undeveloped, a factor indicated in the 1967 City Official Plan Amendment 228. As the Expressway route was firmed up and land acquisition proceeded there was a steady process of infrastructure decisions based on the defined route that affected local and collector road patterns, the design of residential subdivisions, the location of noise attenuation berms and a myriad of other actions.

139. Major decisions were also made with respect to the location of new sewage collection systems, water

distribution systems and storm drainage, with much of this illustrated in the Official Plan Amendment #228 in 1968.

Again I note that the respondents seek to have the whole of Mr. Janes' affidavit struck, although they do not specifically challenge these paragraphs of his affidavit.

A copy of a certified true copy Amendment 228 to the Official Plan of the Hamilton Planning Area as approved by the Minister of Municipal Affairs and a certified copy of the City of Hamilton's By-Law adopting OPA 228 are in evidence and are admissible pursuant to section 24 of the *Canada Evidence Act*. Given that, and Mr. Janes' qualifications and expertise, I am not prepared to strike the evidence set out above. I find it relevant and admissible; and

(vii) Mr. Ronald Marini swore that:

7. The Official Plan for the Regional Municipality of Hamilton-Wentworth, in 1980, designated part of the West Mountain planning district lands as Stage 1 (ready for development) (1,218 acres) and part of the lands as Stage 2 (deferred development) (1,560 acres) pending additional north-south transportation capacity: see Exhibits 5 and 6 attached.

8. The Stage 2 lands referred to in paragraph 7 were to be redesignated to Stage 1 when the north-south transportation facility (Red Hill Creek Freeway) had received all necessary approvals: see Exhibit 6 attached.

[...]

11. Pending the redesignation of Stage 2 lands to Stage 1 in the West Mountain Area, the Stage 1 lands were not to exceed 16,500 persons: see Exhibits 6 & 7 pages 66, 67 and Map No. 7 attached. This figure has been revised to 21,000 persons, in accordance with a resolution passed by the Regional Municipality of Hamilton-Wentworth on October 1st, 1996, a copy of which is hereto attached as Exhibit 8.

12. On October 24, 1985, a Consolidated Hearing Board approved the Project. This decision was upheld by the Provincial Cabinet on March 12, 1987.

13. As a consequence of the approval of the Project, the Hamilton-Wentworth Regional Council passed a Resolution on May 19, 1987 to change the designation of the Stage 2 lands in the west mountain area of the city to Stage 1: Resolution attached as Exhibit 9.

The Region's Economic and Planning Committee Report 10-87 considered and adopted by Regional Council on May 19, 1987 recommended that Regional Council allow Stage 2 land to be redesignated to Stage 1 based on the following recitals:

"Whereas Policy 14.4.4 of the Hamilton-Wentworth Official Plan provides for redesignation of the Stage 2 areas on Map No. 7 in Stoney Creek without amendment to the Plan once Provincial approval and financial commitments have been made for the North-South Transportation Facility; and

Whereas the Province has approved the North-South Transportation Facility subject to certain conditions; and

Whereas the Province and Region have committed funds for the construction of this Facility".

14. As a consequence of the Regional Council Resolution and the Cabinet decision to approve the Project, the Council of the City passed a Resolution on August 26, 1987, redesignating the Stage 2 lands in the West Mountain to Stage 1: Resolution attached as Exhibit 10.

15. On December 8, 1987, the Council of the City enacted a by-law to adopt Official Plan Amendment No. 11 to the City's Official Plan, which was approved by the Regional Chairman on April 5, 1988, establishing a secondary plan for urban development on part of the lands in the West Mountain Area. Extracts of Official Plan

Amendment 11 are attached as Exhibit 11.

The Official Plan Amendment contains a section "Basis of this Amendment" which states in part

"...This Amendment is considered to be desirable due to the following reasons:

i) Recent approval by the Lieutenant Governor-in-Council on March 12, 1987, of the North-South Transportation Facility (Red Hill Creek) resulted in the incorporation of this site within Stage 1 of Development thus allowing Development to proceed at this time."

16. On September 26, 1989, the Council of the City enacted a by-law to adopt Official Plan Amendment No. 22 (O.P.A. 22) to the City's Official Plan, which was approved by the Regional Chairman on December 19, 1989, establishing a secondary plan for urban development on part of the lands in the West Mountain Area. Extracts of O.P.A. 22 are attached as Exhibit 12.

17. On July 25, 1989, the Council of the City enacted a by-law to adopt Official Plan Amendment No. 23 (O.P.A. 23), which Amendment was approved by the Regional Commissioner of Planning and Development on December 15, 1993. This Amendment comprises most of the lands on the West Mountain and includes the lands under O.P.A. 11 and O.P.A. 22 and is intended to supersede the lands under O.P.A. 70. Extracts from O.P.A. 23 are attached as Exhibit 13.

18. O.P.A. 23 was based on the approval by the Lieutenant Governor-in-Council of the north-south transportation facility (Red Hill Creek Expressway) which resulted in the incorporation of the lands affected by this Amendment within Stage 1 of development, therein allowing development to proceed: See Exhibit 13, page 6.

[...]

20. On July 24, 1990, the Council of the City enacted a by-law to adopt Official Plan Amendment No. 33 (O.P.A. 33), which was subsequently approved by the Regional Chairman on December 15th, 1993. The lands under this Amendment are included in the lands covered by O.P.A. 23, and provide for a secondary plan for urban development. Extracts from this Amendment are attached as Exhibit 14.

21. The lands under O.P.A. 11, 22, 23 & 33 have been partially implemented for development purposes pursuant to numerous zoning by-laws of the City, enacted from time to time since 1987.

22. The planning by the City for the West Mountain Area was premised on the Red Hill Creek portion of the Project proceeding. This statement is in part based on a report by J.D. Thoms, at that time being the Regional Commissioner of Planning and Development, which report is dated January 25, 1991, and was received by me and is attached hereto as Exhibit 15. This report, page 1, recommends tabling of O.P.A. 23 and 33 of the City for six months until "the implications of the cancellation of the Provincial funding for the north-south portion of the Red Hill Creek Expressway have been assessed". See Exhibit 15, page 1 attached.

23. The report referred to in paragraph 23 was adopted by the Regional Economic Development and Planning Committee on February 19, 1991, and by Regional Council on March 5, 1991. The Council Resolution is attached hereto as Exhibit 16.

[...]

29. Any failure to proceed with the north-south portion of the Project results in:

(a) a major portion of the City's significant developable West Mountain Area being at risk of becoming undevelopable owing to transportation concerns; and

(b) the City being in conflict with Section 1.2 Housing of the Provincial Policy Statement, due to the loss of dwelling units, because the City will have less than a ten-year supply of land for housing purposes: See Exhibit 19, Page 4.

The respondents seek to strike all of Mr. Marini's affidavit. From August of 1977 until 1999 Mr. Marini was the Director of Planning for the Corporation of the City of Stoney Creek. In 1999, he became its General Manager of Planning and Development. In those positions he was responsible for providing planning and development advice to that city's Council. In view of his position and prior involvement, I find the evidence set out above to be relevant and admissible.

[148] While individually I find these decisions to evidence irrevocable decisions made prior to the enactment of the CEAA, I also find that the cumulative effect of this evidence establishes that prior to the enactment of the CEAA an irrevocable decision was made to construct the entire Expressway, including the project at issue.

[149] While I reach this conclusion on the basis of the weight of the evidence set out above, my conclusion is re-enforced by the opinion of Mr. Janes to the following effect:

143. While these various land use planning and infrastructure actions are not solely part of the Expressway planning process and are associated with the process of urbanization that was ongoing at that time in undeveloped areas of the City, nevertheless, the process of refining the Expressway route through the setting of Official Plan designations, the finalization of individual community plans and the implementation of supporting zoning by-laws and subdivision plans all create an irrevocable land use pattern. In numerous instances roads were dead-ended or rear yards of lots planned to dead end abutting the Expressway so that housing does not directly front on the Expressway.

144. The definition of the local street access systems to the Expressway, decisions on the routing of storm drainage systems that must also utilize the Valley corridor, the inclusion of the growth-related share of the Region's capital costs for the Expressway in the setting of Regional Development Charges, the initiation of land purchases including the exercise of expropriation by the City and the Region, and the amending of the Official Plans are all some of the actions that irrevocably finalize the Expressway's implementation. Each of these actions reinforces the irrevocable nature of the Expressway being completed insofar an many of these auxiliary actions are premised on the Expressway being available to serve the fundamental transportation function set out in the City, the Region and the City of Stoney Creek Official Plans. The approved designation of the Expressway in these Official Plans and the permanent nature of the actions taken to implement the Expressway are irrevocable decisions and when taken together signify an irrevocable decision has been made to proceed with the entire Expressway from Highway 403 to link with the QEW.

[150] The respondents moved to strike those paragraphs as inadmissible opinion evidence, and argued that opinion evidence is not admissible unless that of an expert and the conditions of Rule 482 (now Rule 279) of the *Federal Court Rules, 1998* are met. I reject that submission. Rule 279 is not applicable to proceeding brought by notice of application. Where proceedings are commenced by application I conclude that expert opinion evidence is admissible if it meets the requirements articulated by the Supreme Court of Canada in *R. v. Mohan,* 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, of being relevant, necessary, and given by a properly qualified expert.

[151] I find the evidence in the impugned paragraphs set out above of Mr. Janes' affidavit to meet those requirements. The evidence is legally relevant, provides information about planning matters outside of the experience and knowledge of the Court and is given by a qualified witness with special knowledge of project planning, as specified in paragraphs 13 to 18 of his affidavit.

(iii) Was there a valid trigger to the operation of the CEAA?

[152] In view of my conclusion above, I will deal only briefly with what is characterized by the Region to be its final jurisdictional argument concerning the applicability of the CEAA. The Region's argument is premised on two points. First, it argues that pursuant to DFO's policy, authorizations pursuant to subsection 35(2) of the *Fisheries Act* are not required for works or undertakings that ultimately, after mitigation, prove beneficial to fish habitat. Second, the Region relies upon evidence, the admissibility of which is challenged by the respondents, to argue that in the opinion of its expert, the natural channel design of the proposed works so alleviates potential adverse effects that there is no requirement for an authorization to trigger the application of the CEAA, and the CEAA does not apply.

[153] While characterized as a jurisdictional argument, I conclude that what the Region in substance seeks to do is to argue that in requiring a *Fisheries Act* authorization the respondents are applying their policy unreasonably. I do not find this to be properly an argument going to jurisdiction. It is too late, I have concluded, for the Region to raise this issue.

(iv) Conclusion on the issue of the applicability of the CEAA

[154] It follows from my conclusion that the CEAA does not apply to the completion of the RHCE that the applications for judicial review in T-1400-99 and T-1993-99 will be allowed and declaration issued that the CEAA does not apply to the completion of the project and that no review is required under the CEAA. It further follows that the application for judicial review in T-1401-99 will be dismissed on the ground that the issue there raised has been rendered moot.

[155] I have considered carefully the desirability of proceeding in the alternative to deal with the balance of the issues raised in these applications. As I have also concluded that the referral to panel review was not validly supported by an appropriate head of federal power I propose to give brief reasons for that conclusion. I believe, however, that it is in all of the circumstances unnecessary to deal with the balance of the issues raised.

6. WAS THERE A VALID REFERRAL OF THE PROJECT TO PANEL REVIEW?

[156] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 ("Oldman"), the Supreme Court of Canada considered the nature and extent of federal and provincial jurisdiction over the environment, noting that the *Constitution Act, 1867* did not assign the matter of "environment" *sui generis* to either level of government. The environment was said, at page 64 of the decision, to be "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty". Any exercise of legislative power must be linked to an appropriate head of power. Because the nature of various heads of power differ, the extent to which environmental concerns may be taken into account in the exercise of a power may differ from one head of power to another.

[157] In *Oldman, supra,* the Supreme Court also cautioned that it is not helpful when dealing with the respective levels of constitutional authority to characterize a project as a provincial or local project. While local projects generally fall within provincial responsibility, federal participation is required if the project impinges on an area of federal jurisdiction. This was the case in respect of the Oldman River dam. However, as stated at page 71 of the decision, the federal government may not use "the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction".

[158] The basis on which the Fisheries Minister requested that the Environment Minister refer the project, as scoped by DFO, to a review panel was stated in the Minister's letter to be as follows:

Recently we discussed the conservation and protection of those fisheries and migratory birds potentially at risk owing to the proposed construction of the Red Hill Creek Expressway in the Regional Municipality of Hamilton-Wentworth. As you are aware, the Regional Municipality requested an authorization pursuant to subsection 35(2) of the *Fisheries Act*, to allow for the relocation and reconfiguring of Red Hill Creek. DFO believes that, should this project proceed, mitigation may be possible that could ultimately benefit fish habitat. Nevertheless, an authorization for the "harmful alteration, disruption or destruction of fish habitat" will be required, owing to the relocation of much of Red Hill Creek. Consequently, the department is required to complete a screening of the project pursuant to the *Canadian Environmental Assessment Act*. In that regard, DFO has assumed the role of Responsible Authority for this assessment.

I was satisfied with both the process and DFO's progress in conducting the screening.

[...]

I am aware that the proponent has been critical of the rate of progress of this screening. However, I am also aware

that the Regional Municipality has not been entirely forthcoming with information necessary, at least from a fish habitat standpoint, to conclude the screening. This, I believe, is a matter that would typically be resolved between the proponent and DFO regional officials and there would be little need to warrant my involvement. Circumstances have changed that require me to reconsider this matter.

DFO has received advice from Environment Canada officials that the project as described may have significant adverse environmental effects on migratory birds, owing to significant adverse environmental effects on terrestrial and wetland habitat that provides important ecological functions for migratory birds. Additionally, I am informed, from Environment Canada's perspective, it is unlikely that this advice will be altered upon concluding the screening, given the project's potential impacts on terrestrial and wetland habitat, and its subsequent repercussions to migratory birds.

Faced with this information, and also considering the level of public concern surrounding this project, I request that you refer this project, as scoped by this department, to a review panel, pursuant to subsections 25(a) and 25(b) of CEAA. I am advised that Environment Canada, the National Energy Board and the Canadian Environmental Assessment Agency all support a referral for a panel review.

[159] The decision of the Environment Minister to refer the matter to a review panel was reflected in a news release issued on May 6, 1999 by the Agency. In that release the Minister is quoted as saying:

"I have concluded that, based on Minister Anderson's request, the public concern surrounding this issue, and the potential for significant adverse environmental effects, this project warrants a public review panel."

[160] It is therefore necessary to determine whether the purported exercise of federal authority to refer the matter to panel review under the CEAA was linked to the Minister's jurisdiction with respect to migratory birds, or was otherwise properly grounded because of the level of public concern.

[161] I have had regard to the respondents' argument that the requirement for the conduct of an environmental assessment was triggered by the Region's request for a *Fisheries Act* authorization. However, this was not the stated basis for the Environment Minister's decision to refer the project to panel review. Nor, it would seem, could it have been the basis at the relevant time because the DFO had advised that it could not process the Region's application without further details being provided.

[162] The Region and Ontario assert that the referral was *ultra vires* because, among other reasons, the jurisdiction to regulate in relation to migratory birds is narrowly circumscribed and does not support the referral, and because any referral based on public concern must be linked to some federal head of power.

(i) The migratory birds power

[163] The respondent Ministers contend that the decision to refer the project to panel review was linked to and supported by section 132 of the *Constitution Act, 1867*. It was argued that the Migratory Birds Convention ("MBC"), a schedule to the *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22 ("MBA") confers jurisdiction upon the federal government with respect to habitat protection to the extent that some effects on habitat can constitute a direct threat to migratory birds, their nests and eggs.

[164] This submission requires close attention to the nature of this head of federal power to determine the extent to which it supports regard to environmental concerns.

[165] Section 132 of the *Constitution Act, 1867* authorizes legislation implementing Imperial treaties and includes jurisdiction to enact legislation going beyond the narrow terms of the treaty, so long as that legislation is ancillary to the treaty (see: *The King v. Stuart*, [1925] 1 D.L.R. 12 (Man. C.A.)).

[166] In *Animal Alliance of Canada v. Canada (Attorney General),* 1999 CanLII 8154 (FC), [1999] 4 F.C. 72 (F.C.T.D.) Gibson J. considered both the MBC and the *Migratory Birds Convention Act*. He concluded, and I

respectfully agree, at paragraph 12 that the purpose of the Convention is directed to the "saving from indiscriminate slaughter and to ensuring the preservation of certain migratory birds that 'traverse' parts of Canada and the United States in their annual migration". This is done through the establishment of a "close season" and the protection of nests and eggs. The MBA was enacted for the purpose of implementing the MBC "by protecting migratory birds and nests" as stated in section 4 of that Act.

[167] The Region and Ontario correctly note that nothing in the MBC specifically refers to the protection of migratory bird habitat. They therefore submit that nothing in the MBC or the MBA founds jurisdiction to protect bird habitat, and that any general power to protect habitat is not constitutionally ancillary to the power to protect migratory birds.

[168] Environment Canada recognized that the MBA does not provide a juridical basis for the general protection of bird habitat. The Environment Control Branch set out its understanding of federal authority in its Draft Red Hill Expressway ECB Analysis Paper dated July 31, 1998 as follows:

The *MBCA* does not provide the legal authority to prevent or take action concerning the loss, degradation or disruption of migratory bird habitat, including nesting and breeding habitat, if this occurs outside of the nesting season.

[169] Notwithstanding, habitat destruction can be linked to a deleterious effect on migratory birds. Thus in *Alberta Wilderness Association v. Cardinal River Coals Ltd.* (T-1790-98, April 17, 2000 (F.C.T.D.)) a joint review panel was able to conclude that the permanent loss of two probable nesting areas would cause reductions in the current size of the breeding population of certain migratory birds, and that there was a significant risk that the population might not be restored due to the permanent loss of some habitat. In that case, Campbell J. concluded that the MBA and associated regulations evidenced a clear intention to provide wide protection to migratory birds.

[170] I conclude that in order to determine whether the federal power relating to migratory birds supports the reference of the project to a panel review one must search for a linkage to concern for migratory birds, not simply their habitat.

[171] The advice on which the Fisheries Minister relied when making his request to the Environment Minister is contained in the April 9, 1999 letter from the Regional Director General of the Ministry of Environment. In it, concerns are set out regarding adverse effects upon migratory birds and their habitat. However, the report expressly acknowledged that "there are no scientific data or studies available to evaluate how the local loss of habitat and ecological functions may impact on overall migratory bird populations".

[172] The scientific evidence supporting that advice is contained in the Environment Canada ECB Analysis paper dated July 31, 1998. As noted by the Region and Ontario, the conclusions in this document are, at best, equivocal. The following are significant excerpts:

While there is concern that habitat loss and fragmentation have reduced the amount of good stop-over habitat generally in North America, there is little data on how the reduction in habitat affects individuals or populations of migrating birds. We know that birds concentrate near the edges of barriers such as the Great Lakes, and so can assume that habitats in these areas have special significance, but we do not have any means of knowing how important they are. That is, we do not know if the loss of these habitats is affecting population levels of birds, but such information will likely not be available for a long time, if ever.

[...]

This does not necessarily mean that removal of the site will have an effect on provincial bird populations, but rather that development will likely affect the use of the site.

[...]

Unfortunately, there is a total absence of literature on the effects of these types of developments on migrating

birds, so it will be difficult to make a strong case whether or not the proposal will have significant effects after attempts at mitigation are taken.

[...]

Migratory Bird Breeding Habitat

[...]

This suggests the site is not provincially significant with respect to breeding birds, and is probably of low significance within the RMHW. [Regional Municipality of Hamilton-Wentworth]

[...]

In conclusion, the RHV [Red Hill Valley] is the most important site for breeding birds in eastern Hamilton, but it is not of regional or provincial significance. Small numbers of significant species have occurred as breeders or possible breeders, however, the urban and linear nature of the site, and large numbers of nest predators and brood parasites, make it likely that the reproductive success of most bird species is low.

[...]

Recommended ECB Position:

We have never had such a detailed data set to review in the context of an EA. Despite the existence of such an excellent baseline data set, it is not possible for DOE to accurately predict the effects of the RHC Expressway, on Valued Ecosystem Components (VECs), such as the narrow and locally significant migratory bird corridor. The science associated with predicting such effects is extremely weak, and the effects of similar local projects, such as the Don Valley Parkway, in Toronto, have not been documented. In addition, there are no examples from other jurisdictions in the literature, of the effects of such projects on migratory birds.

It is equally difficult to accurately predict the effects of a reduction in wetland areain the Van Wagner's Ponds and Red Hill Marsh area, on VECs such as Least Bittern breeding habitat, and potential Black Tern breeding habitat. [underlining added]

[173] Given that habitat in the area of the project was not of regional or provincial significance, I find that no link has been demonstrated between concerns about the loss of habitat due to the construction of the project and matters affecting migratory bird preservation.

[174] This is not to say that scientific certainty is required as to the existence of a deleterious effect on migratory bird populations in order for a referral to panel review to be properly grounded. However, there must be a valid basis on which to conclude that a real possibility exists that a panel would be able to conclude that, in this case, there would be a significant adverse effect on migratory bird preservation. That necessary condition to engage the process was absent. The necessary relevant information was noted to likely be unavailable for a long time and might never be available.

[175] I have previously quoted from the ECB Analysis Paper. With respect to the recommended ECB position the report concludes:

The main purpose of the panel review would be to independently explore the need for the project, 'alternative means' to completing the project (i.e. interchange modifications), and alternatives to the project (i.e. alternative routings).

[...]

If the panel independently determined there is a genuine need for the project, and there are alternative routes that are technically and economically feasible, the environmental effects of these alternatives would be compared to the

design currently proposed.

[176] Given that the main purpose of the panel review was stated to be to explore independently the genuine need for the project, I cannot find sufficient proximity between migratory bird concerns and establishing independently the need for the Expressway. Environmental assessment must be connected to the regulatory authority which is capable of triggering the CEAA.

[177] In the result, I find that the federal power in respect of migratory birds did not support the referral of the project to panel review.

(ii) Public concern

[178] As noted, jurisdiction over environmental matters must be linked to a head of power. I accept that this principle applies to the provisions found in the CEAA which authorize the Environment Minister to refer a project to panel review based on public concerns. Any referral on this ground, I therefore conclude, must be based upon public concern about environmental effects that are linked to some federal head of power.

[179] I accept the Region's evidence that the focus of public concern about the project related to the need for the project and alternatives to it. On cross-examination Mr. DeBruyn testified as follows:

(a) "Much of the public concern is focussed on the needs and alternatives to the project. Needs and alternatives to the project are related to transportation issues which I believe are a provincial responsibility."

(b) "... Many of the opponents to the project are requesting that the project be referred immediately to the Minister of Environment for a panel review, because of the need to include ‘need for' and ‘alternatives to' in the federal assessment. Further, many of the comments from the community stakeholders committee and the public on the draft scoping document have focussed on the absence of these two issues."

(c) "... The public concern was largely based on a lack of consideration of needs and alternatives in the Regional Municipality's own substitute review process ..."

(d) "This Panel is not joint with the province, but the public concern is more with provincial matters (needs, rationale, alternatives)."

Additionally Paul Bernier on cross-examination testified:

(e) "... The project is situate on provincial lands and most issues of public concern relate to areas of provincial jurisdiction."

[180] Public concern focussed on the need for and alternatives to the project, areas of exclusive provincial jurisdiction, could not in my view support the exercise of federal authority referring the project to panel review. As legal services advised the Department of the Environment:

Where public concern is over topics that fall within provincial jurisdiction, the Act does not prohibit referral, but practical considerations do - to wit, the RA would likely be unable to implement the panel's recommendations; and the province may see the referral as an unjustified intrusion into its jurisdiction.

In my experience, the practice of the Agency has been to not refer projects to the public review stage where the federal government lacks the legislative authority to implement any recommendations that may result from the review. Based upon the facts that you have provided to me, it appears that public concern is over matters that are entirely provincial. In such a case, I would not recommend referral to public review.

[181] In the result, I conclude that the Environment Minister's decision to refer this project to panel review was not supported by a valid head of federal power and was thus *ultra vires*.

7. CONCLUSION

[182] For the reasons set out herein, the application for judicial review in T-1400-99 and T-1993-99 will be allowed and it will be declared that the CEAA does not apply to the completion of the project so that no review is required under the CEAA. The application for judicial review in T-1401-99 will be dismissed.

[183] The matter of costs is reserved for further submissions by the parties.

"Eleanor R. Dawson"

Judge

Ottawa, Ontario

April 24, 2001