CITATION: City of Hamilton v. Attorney General et al, 2011 ONSC7128
COURT FILE NO.: C-383/04
DATE: 2011-12-01

City of Hamilton

v.

Attorney General of Canada, ChristineStewart, David Anderson, Herb Dhaliwal, Sheila Copps, Nancy Adams, Paul Bernier, W. Bill Bien, Edwin R. De Bruyn, Steve Burgess, Mike Cadman, Paula Caldwell, Robert Connelly, Rob Dobos, Margit Doneit, John Fischer, Rosline Frith, Nicole Gagnier, Denise Gibbs, Cathy Gee, Jonathan H. Gee, Sid Gershberg, D. V. Gillman, Carole Giroux, Ian Glen, Michael Goffin, Francois Guimont, Len Good, Keith Grady, Barbara Hennessy, Michaela Huard, Wayne Hyatt, Louise Knox, Mary Komarynsky, Janice Kotash, Olivier Lalande, Deb Lauder, Patrice Leblank, Sharon Leonhard, Simon Llewellyn, Nancy Maguire, Laud Matos, Clair Michaud, John Mills, Tom Muir, Brad Parker, L. S. Parsons, Raymond Pierce, Richard Pratt, Ulana Perovic, Kim Ray, David Robinson, Michael Rayner, Guy Riverin, David Robinson, Craig Ryan, Nathalie Seguin, Michael Shaw, Ron Shimizu, Mike Shiomi, Jeff Stein, Rob Stevens, Donna Stewart, John Struger, Gerry E. Swanson, Lucie Tessier, Lisa Vitols, Wayne Wouters and Bruce Young

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
City of Hamilton	for the Plaintiff: David Estrin, Ross F. Earnshaw and Scott Smith
– and –	
Attorney General of Canada, Christine Stewart, David Anderson, Herb Dhaliwal, Sheila Copps, Nancy Adams, Paul Bernier, W. Bill Bien, Edwin R. De Bruyn, Steve Burgess, Mike Cadman, Paula Caldwell, Robert Connelly, Rob Dobos, Margit Doneit, John Fischer, Rosline Frith, Nicole Gagnier, Denise Gibbs, Cathy Gee, Jonathan H. Gee, Sid Gershberg, D. V. Gillman, Carole Giroux, Ian Glen, Michael Goffin, Francois Guimont, Len Good, Keith Grady, Barbara Hennessy, Michaela Huard, Wayne Hyatt, Louise Knox, Mary Komarynsky, Janice Kotash, Olivier Lalande, Deb Lauder, Patrice Leblank, Sharon Leonhard, Simon Llewellyn, Nancy Maguire, Laud Matos, Clair Michaud, John Mills, Tom Muir, Brad Parker, L. S. Parsons, Raymond Pierce, Richard Pratt, Ulana Perovic, Kim Ray, David Robinson, Michael Rayner, Guy Riverin, David Robinson, Craig Ryan, Nathalie Seguin, Michael Shaw, Ron Shimizu, Mike Shiomi,	for the Defendants: Barney Brucker, Glynis Evans and Dale Yurka
	HEARD: December 13, 14, 15, 16, 2010; February 1, 2011;

Jeff Stein, Rob Stevens, Donna Stewart, John Struger, Gerry E. Swanson, Lucie Tessier, Lisa Vitols, Wayne Wouters and Bruce Young	)))	June 6, 7, 8, 9 and 10 2011; November 28 and 29.

REASONS FOR JUDGMENT

I Introduction

[1] The City of Hamilton ("the City") has brought an action against three federal cabinet ministers and 44 of their advisors for misfeasance in public office. This is a motion brought by the City for certain orders as a result of concessions and admissions made by the defendants. The City also submits that it is entitled to certain orders as a result of issues in the lawsuit being res judicata based on of the decision of Justice Dawson of the Federal Court in *Hamilton-Wentworth v. Canada*, [2001] F.C.J. No. 627 and the dismissal of the appeal from Justice Dawson's decision by the Federal Court of Appeal, [2001] F.C.J. No. 1700 ("Hamilton Wentworth"). The City relies on the doctrines of issue estoppel and abuse of process. The City submits that the defendants are estopped from litigating certain findings made by Justice Dawson or in the alternative that it would be an abuse of process to permit the defendants to relitigate these findings.

II The Facts

[2] In May 1963, the Hamilton Area Transportation Plan recommended that a freeway be constructed connecting the Queen Elizabeth Way with Highway 403 running east from Highway 403 south of Hamilton and north through the Redhill Valley to the Queen Elizabeth Highway.

The proposed freeway became known as the Redhill Creek Expressway ("RHCE" or "the Expressway"). On March 14, 1967, the City of Hamilton amended its official plan to include the Expressway. The amendment was approved by the Minister of Municipal Affairs of Ontario on September 19, 1969. There were many studies of the project. The City expropriated land in the route planned for the Expressway. In 1985, a joint board consisting of representatives from the Ontario Municipal Board and the Ontario Environmental Assessment Board, after a 99 day hearing, approved the building of the Expressway in a 2 to 1 decision dated October 24, 1985. On June 26, 1990, a sod turning ceremony took place for the construction of the Expressway. On December 17, 1990, the provincial government withdrew its funding commitment to the north-south portion of the Expressway through the Redhill Valley. In 1995, the province restored funding for this portion of the Expressway. In the interim, the City had constructed the east-west portion of the Expressway south of Hamilton, which became known as the Lincoln Alexander Parkway or "The Link".

[3] The City revised its plans for the construction of the north-south portion of the Expressway through the Redhill Valley. It planned to move about 7 km of the Redhill Creek. This could potentially result in the "harmful alteration, disruption or destruction of fish habitat" as provided by section 35 (1) of the *Fisheries Act*. This required that the City apply to the Minister of Fisheries for an authorization under the *Fisheries Act*. It also resulted in the *Canadian Environmental Assessment Act* ("CEAA" or "the Act") applying to the Expressway, provided of course that CEAA applied at all to the Expressway.

[4] On May 4, 1999, the Minister of Fisheries and Oceans, David Anderson, sent a letter to the Minister of Environment, Christine Stewart, in which he requested that she refer, pursuant to section 25 of CEEA, the north-south portion of the RHCE to a review panel. He stated his reasons for doing so. One was that he had been advised by Environment Canada that the Expressway may have adverse environmental effects on migratory birds. The second was the level of public concerns surrounding the project. On May 6, 1999, Minister Stewart, in a press release, announced that she had complied with the request. She purported to make the referral pursuant to section 29 of the *Act*.

[5] The City of Hamilton brought an application for judicial review of the decision of the Minister of Environment to refer the completion of the RHCE to a review panel under the CEAA and for the appointment of the members of the review panel. The parties in the judicial review application consisted of the Regional Municipality of Hamilton-Wentworth (referred to throughout as the "City of Hamilton" or "the City") as Applicant and the Minister of the Environment, the Minister of Fisheries and Oceans and members of the review panel appointed by the Minister of the Environment under CEAA as Respondents. The Friends of Redhill Valley ("Friends") were granted intervenor status.

[6] In a judgment dated April 24, 2001, Justice Dawson allowed the application for judicial review of the decision of the Minister of Environment to refer the completion of the Expressway to a review panel under the *Act*. She held that the *Act* does not apply to the Expressway. This made it unnecessary for her to consider the application for judicial review of the members

appointed to the review panel. The Federal Court of Appeal upheld her decision on November 14, 1991.

[7] In this action, the City of Hamilton has named the Attorney General of Canada pursuant to *The Crown Liability and Proceedings Act* as the designated defendant in an action against the Federal Crown. Also named as defendants are David Anderson, the Minister of Fisheries and Oceans; Christine Stewart, the Minister of the Environment and Sheila Copps, a senior cabinet minister at the relevant times and 44 of their advisors. All of the defendants are represented by one set of counsel from the Department of Justice. The City alleges misfeasance in public office by the defendants. The City claims that as a result of the delay caused by the referral of the Expressway to a review panel that it suffered losses. The City claims $50 million in general damages and aggravated, exemplary and punitive damages in the amount of $25 million.

III History of the Proceedings

[8] The City issued a statement of claim dated September 29, 2004. The defendants filed a statement of defence dated February 2, 2006. The City filed a res judicata motion dated January 26, 2009. The City filed a lengthy factum in support of its motion dated December 21, 2009. It filed an amended motion record dated December 22, 2009, which it described as a res judicata, estoppel and abuse of process motion. The defendants filed a factum dated August 27, 2010. The City filed a reply factum dated November 15, 2010. In its reply factum, the City focused the relief that it sought in its motion on six defendants, namely, the Minister of the Environment, Christine Stewart; the Minister of Fisheries and Oceans, David Anderson; Edwin R. DeBruyn

("DeBruyn"), a senior advisor to Mr. Anderson and Paul Bernier, Michael Shaw and Simon Llewelyn, senior advisers to Ms. Stewart. It filed a further amended res judicata, estoppel and abuse of process motion dated December 16, 2010, in which it sought multiple orders listed in three schedules. The City brought a further motion dated March 4, 2011 in which it abandoned the relief that it sought in schedule 3 in its motion dated December 16, 2010. It is this motion dated March 4, 2011 that is before the court. The City has filed a factum in support of this motion dated October 3, 2011 in which it has modified some of the relief that it seeks. The defendants filed a factum dated November 4, 2011 in response.

IV Justice Dawson's Judgment

[9] The proceedings before Justice Dawson were applications for judicial review. The following sections of the *Federal Court Act* gave her the authority to make the decisions that she did:

> 2. (1) In this Act,
>
> "federal board … means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament …
>
> 18.1 (1) An application for judicial review may be made by … anyone directly affected by the matter in respect of which relief is sought.
>
> (3) On an application for judicial review, the Federal Court may
>
> (b) declare invalid or unlawful, or quash, set aside … a decision, order, act or proceeding of a federal board…
>
> (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction …
>
> (c) erred in law in making a decision or an order, …;

[10] Justice Dawson held that the standard of review for the interpretation of the *Act* is correctness. She held that CEAA did not apply to the Expressway for three reasons. First, CEAA section 74(4), which was the transitional provision applied. This was as a result of the initiation of construction being before June 22, 1984 and the referral by Minister Stewart not being a referral of a modification of the original project but a consideration of the need for and alternatives to the entire Expressway. Second, the City had made irrevocable decisions prior to the coming into effect of CEAA on January 19, 1995. Third, there was no head of federal power to support the application of CEAA to the Expressway. What follows is a summary of her reasoning under the questions that she posed.

[11] **Is application of the CEAA excluded by the operation of section 74(4) of the *Act*?**

[12] In order to determine whether s. 74 (4) of the Act applied she analyzed the relevant sections of the Act based on the principle 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" (para. 92). She engaged in the analysis that follows.

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

[13] She referred to the following sections of the Act:

Preamble

WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;

2. (1) In this Act,

> "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);

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.

Factors to be considered

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

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

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

[14] The RHCE is a physical work. The words "construction or operation of a physical work" and "carrying out a physical activity" in s. 74(4) reflect the words in the definition of project in s. 2 (1). Since the RHCE is a physical work the second part of the definition of project which relates to a "proposed physical activity" has no application to the Expressway. What is relevant is s. 2(1) (a) which states that "project means … in relation to a physical work, any proposed construction … modification … in relation to that physical work …". Justice Dawson held that construction was not initiated within the meaning of section 74 (4) of the *Act* when

actual physical construction began or "when the shovel hit the ground". She held that construction had begun long before June 22, 1984.

[15] She stated the following:

> 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"[6]. These provisions make it clear that the CEAA is intended only to apply to proposed projects which are still in the planning stageson or after January 19, 1995, and for which irrevocable decisions have not been made.
> [6] See Sections 8(1), 9, 10(1), 11(1), 54(1) and 54(2).

and:

> 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.

(2) 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?

[16] The proposed construction to the RHCE was a continuation rather than a modification of the original project. The plan for the construction of the Expressway from Highway 403 to the Queen Elizabeth Way was a plan for a single continuous roadway rather than a plan for two roadways – the Lincoln Alexander Parkway (the Link) and the part through the Redhill Valley. The construction of the Expressway through the Redhill Valley was a continuation rather than a modification of the project. She stated the following:

> 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.

(3) Summary

[17] CEAA s. 74 (4) reduced to its essentials relevant to whether CEAA applied to the Expressway is the following:

> Where the construction ... of a physical work ... was initiated before June 22, 1984, this Act shall not apply in respect of the issuance ... of a ... permit ... in respect of the project unless the issuance ... entails a modification ... to the project ....

Based on an analysis confined to relevant sections of the Act she concluded that the application of the CEAA to the RHCE was excluded by section 74 (4) of the *Act* - construction began before June 22, 1984 and the issuance of a permit under the *Fisheries Act* did not entail a modification of the project.

2. Is application of the CEAA excluded because irrevocable decisions were made before the CEAA came into force?

[18] She also held that irrevocable decisions regarding the construction of the Expressway through the Red Hill Valley had been made long before January 19, 1995, which was when the *Act* came into effect.

[19] She stated the following:

> 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....

[20] She then reviewed the evidence of a number of specific decisions that had been made concerning the Expressway before January 19, 1995. She then stated the following:

> 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.

3. <u>Was there a valid referral of the project to panel review?</u>

[21] Justice Dawson commenced her analysis as follows:

> 156 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [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.

[22] The Act states the following:

Decision of responsible authority following a screening

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

> (a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;
>
> (b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or
>
> (c) where
>
> > (i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,
> >
> > (ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or
> >
> > (iii) public concerns warrant a reference to a mediator or a review panel,
>
> the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

25. Subject to paragraphs 20(1)(b) and (c), where at any time a responsible authority is of the opinion that

> (a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or
>
> (b) public concerns warrant a reference to a mediator or a review panel,
>
> the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.

Referral by Minister

28 (1). Where at any time the Minister is of the opinion that

> (a) a project for which an environmental assessment may be required under section 5, taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environmental effects, or
>
> (b) public concerns warrant a reference to a mediator or a review panel,

the Minister may, after offering to consult with the jurisdiction, within the meaning of subsection 12(5), where the project is to be carried out and after consulting with the responsible authority or, where there is no responsible authority in relation to the project, the appropriate federal authority, refer the project to a mediator or a review panel in accordance with section 29.

Initial referral to mediator or review panel

29. (1) Subject to subsection (2), where a project is to be referred to a mediator or a review panel, the Minister shall

> (a) refer the environmental assessment relating to the project to
>
> (i) a mediator, or
>
> (ii) a review panel; or
>
> (b) refer part of the environmental assessment relating to the project to a mediator and part of that assessment to a review panel.

[23] In a letter dated May 4, 1999, the fisheries Minister Anderson set out the basis on which he was making a request to the environment Minister Stewart that the Expressway be referred to a review panel. He rejected the proposal that had been made to him that the expressway be referred to a review panel because of an application that the City had made under the *Fisheries Act*. He explained the basis on which he was making a request in a passage from his letter quoted by Justice Dawson as follows:

> 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:
>
> ...
>
> 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.

[24] Minister Stewart announced in a news release that at the request of Minister Anderson she had referred the expressway to a review panel under the Act because of "the potential for significant adverse environmental effects" and "public concern surrounding the issue". Justice Dawson stated the following:

> 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.

[25] The federal government has jurisdiction over migratory birds. Justice Dawson quoted from an Environment Canada analysis paper dated July 31, 1998 which stated that there was no scientific basis to conclude that the loss of bird habitat in the Redhill Creek Valley would have an adverse effect on migratory birds. The federal government did not have jurisdiction over the

habitat of birds. This was a provincial matter. The focus of public concern related to the need for the project which in turn related to highways. This was also in the exclusive jurisdiction of the province.

[26] She reached the following conclusion:

> 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.

4. Result

[27] She answered the first two questions in the affirmative and the third question in the negative. She held that the CEAA did not apply to the RHCE.

V. Decision of the Federal Court of Appeal

[28] The only issue dealt with by the Federal Court of Appeal was whether CEAA applied to the Expressway. Chief Justice Richard delivered an oral judgment from the bench. He confirmed Justice Dawson's findings that the CEAA did not apply to the Expressway because s. 74 (4) applied and irrevocable decisions had been made when the Act came into effect on January 19, 1995. He stated the following:

> **5** The first issue is whether the project was exempted from the CEAA by subsection 74(4). We agree with the Applications Judge's conclusion that the construction of the expressway was initiated prior to June 22, 1984, even though actual building had not at that time started. In a project of this complexity, it is simplistic to attach undue significance to when "the shovel hit the ground". The steps taken by the Region before June 22, 1984 amply support the conclusion that

the expressway's construction had been initiated before that date, a question that, as counsel for the respondent correctly argued, is largely one of fact.

6 Second, we are not persuaded that the design changes made by the Region in 1998 amount to a "modification ... or other alteration to the project in whole or in part" so as to bring the project back into the CEAA. These changes were made to mitigate the impact of the road upon fish habitat in a creek that the road crossed: they involved realigning part of the creek and placing it within natural borders, rather than in a concrete bed. There was no alteration to the route taken by the road.

9 Third, we agree with Dawson J.'s further conclusion that the application of the CEAA is excluded by subsection 11(1). In our opinion, the decision in Tsawwassen Indian Band v. Canada (Minister of Finance) et al., (1998) 145 F.T.R. 1; affirmed, [2001] F.C.J. No. 515, 2001 FCA 58, cannot be distinguished from the facts of this case. Here, too, the advanced stage of the project, including its partial construction, meant that by January 1, 1995, there was no "project" in existence within the meaning of the Act for which an environmental assessment was required. We do not regard as a material distinction the fact that, in the case at bar, minor changes had been made to the design of the project.

VI. Orders Sought by the City

[29] In schedule 1 of its motion the City seeks orders based on what it alleges are admissions and concessions made by the defendants in their statement of defense and in their factum dated August 27, 2010. The City also submits that Justice Dawson in *Hamilton Wentworth* decided a number of issues relevant to this action. In schedule 2 of its motion it requests orders in relation to these issues. It submits that these issues are res judicata and the doctrine of issue estoppel or in the alternative the doctrine of abuse of process applies to prevent the defendants from relitigating these issues. The relief which the City seeks relates to the requirement in this action that it prove the constituent elements of the tort of misfeasance in public office against the defendants. The Minister of Fisheries and Oceans and the Minister of the Environment in their institutional

capacity were parties in *Hamilton Wentworth*. In this action they are parties in their personal capacity. The other defendants were not parties and all in *Hamilton Wentworth*. It is, therefore, necessary to examine the law set out by the appellate courts on misfeasance in public office, issue estoppel and abuse of process.

VI. The Law

1. Misfeasance in Public Office

[30] In *St. Elizabeth Home Society v. City of Hamilton*, [2010] O.J. No. 1515, The Court Of Appeal in the judgment of Justices Laskin and Rouleau stated the following:

> **20** Misfeasance in public office is an intentional tort. The tort is meant to provide a measure of accountability for public officials who do not exercise their duties of office in good faith. To make out this tort, a plaintiff must prove four elements:
>
> The public official deliberately engaged in unlawful conduct in the exercise of public functions;
>
> The public official was aware that the conduct was unlawful and was likely to injure the plaintiff;
>
> The public official's tortious conduct was the legal cause of the plaintiff's injuries; and
>
> The injuries suffered are compensable in tort law.
>
> See *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 32.
>
> **21** At its core, the tort targets officials who act dishonestly or in bad faith. As Iacobucci J. said in *Odhavji*, public officials who deliberately engage in conduct that they know to be inconsistent with the obligations of their office risk liability for the tort. Conversely, public officials who honestly believe their acts are lawful, and do not intend to cause harm or know that harm would likely result from their actions, fall outside the ambit of misfeasance in public office. In this way, the required mental element achieves a balance between curbing unlawful, dishonest behavior and enabling public officials to do their jobs free from claims by those adversely affected by their decisions.

[31] In *Odhavji*, the Supreme Court of Canada in the judgment of Justice Iacobucci with regard to the essential elements of the tort of misfeasance in public office, stated the following:

> **32** To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.
>
> **38** ... misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct... (citations omitted)

2. Issue Estoppel

(1) The Doctrine

2. In *Danyluk v. Ainsworth Technologies* [2001] s S.C.R. 460 the Supreme Court of Canada in the judgment of Justice Binnie stated the following:

> **18** The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen (1894), 22 S.C.R. 553, at p. 558; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of Action thus adjudicated (variously referred to as claim or cause of Action or Action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel) … (Citations omitted)

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of Action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of Action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.[i]

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

(2) Two Step Process

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: (citations ommitted)

(3) Same Question

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law

> that are necessarily bound up with the determination of that "issue" in the prior proceeding.

(4) Privies

> **60** The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. …

[32] There is no definitive statement of the factors which make a person a privy to another person and hence bound by findings of a court made against that person. The City, in its factum, sets out a summary of the case law on factors that may make a person a privy. It states the following:

> 52. The case law indicates that the following factors are strong indicia that persons are the "same in substance" or that there is a "community of interest" between them such that it is fair and just for a court to hold that a relationship of privity exists between the two parties:
>
> (a) The parties share a parallel interest in the proceedings;
>
> (b) The potential to add the privy to the previous Action in circumstances that would make relitigation duplicative of the previous proceeding;
>
> (c) Representation by the same solicitor and assertion of joint defences;
>
> (d) Inability to proffer any evidence that was not before the court in the earlier proceeding;
>
> (e) Opportunity to conduct full and fair litigation previously, whether substantively, procedurally, or evidentially; and
>
> (f) Knowledge of, participation in, and degree of control over previous proceeding;

(5) Exercise of Discretion

[33] In *Almrei v. Attorney General of Canada*, 2011 ONSC 1719 the plaintiff was held in custody for seven years on the basis of a security certificate that he was a security risk. On the application of the plaintiff against the Attorney General of Canada under the Immigration and Refugee Act Justice Mosley of the Federal Court quashed the security certificate on the grounds that it was unreasonable. The plaintiff commenced an action against the Attorney General of Canada in which he alleged misfeasance in public office against members of CSIS who had alleged that he was a security risk based on their investigation of him. Justice Mosley held that the allegations CSIS made against the plaintiff were not based on credible evidence. He found that the security certificate was unreasonable and quashed it. The plaintiff sued the Attorney General of Canada for misfeasance in public office. The plaintiff moved for summary judgment. He relied on the doctrine of issue estoppel in support of the proposition that the issues in the civil action were res judicata based on the decision of Justice Mosley. Justice Lederman dismissed his application. He held that although the parties in the 2 proceedings were the same and the proceedings before Justice Mosley were final the issues in the 2 proceedings were different.[ii] He also held that if issue estoppel had applied he would have exercised his discretion to deny the motion. Justice Lederman held that it was an error in principle for a judge before whom an application was brought to apply the doctrine of issue estoppel not to discuss relevant factors in the exercise of his discretion whether to apply it (para 51).

Justice Lederman referred to the following principle:

> **49** In *Minott v O'Shanter Development Co* (1999), 42 O.R. (3d) 321 at 340 [*Minott*], the Court of Appeal stated:

> Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from re-litigating an issue.

[34] He held that the relevant factors in the case before him which would cause him to decline to apply issue estoppel were the "text and purpose" of the statute governing the original proceeding, differences in procedure between the two proceedings, the availability of an appeal, the expertise of the decision maker and potential injustice either in applying the doctrine or declining to apply it (paras. 55-59).

3. Abuse of Process

[35] In *Toronto v. Canadian Union of Public Employees (CUPE)*, [2003] 3 S.C.R. 77, the Supreme Court of Canada in the judgment of Justice Arbour set out the reasons for and the requirements of the doctrine of abuse of process. She stated the following:

> **37** In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

VIII. Analysis of Orders Requested by the City

[36] The City seeks orders or declarations that it requests in its notice of motion in schedules 1 and 2 which are attached hereto. These requested orders can be divided into "Non Knowledge Orders" and "Knowledge Orders".

1. City's Request for Non Knowledge Orders

[37] In summary in Schedule 1, the City seeks non knowledge orders as follows:

1. That the CEAA did not apply to the RHCE.
2. That Minister Stewart's decision to refer the Expressway to a CEAA review panel was not supported by a valid head of federal power and was ultra vires federal legislative authority.
3. The application of CEAA to the Expressway was unlawful.
4. That the defendants, other than the Attorney General of Canada were public officials who in the course of their duties had varying levels of involvement in either or both of the application of CEAA to the Expressway and the referral of the Expressway to a CEAA review panel.
5. That Minister Anderson acted unlawfully on May 4, 1999 by requesting Minister Stewart, pursuant to CEAA s. 25(a) and (b), refer the Expressway to be readjudicated by a CEAA review panel.
6. That Minister Stewart acted unlawfully in her decision pursuant to CEAA s. 29 on May 6, 1999 to require the Expressway to be readjudicated by a CEAA review panel.
7. That the other defendants who directly applied or who were actively instrumental in applying CEAA to the Expressway acted unlawfully i.e., without lawful authority.

[38] In summary in Schedule 2, the City seeks non knowledge orders as follows:

1. That the application of CEAA to the Expressway was excluded by s. 74(4) of the *Act*.
2. That the proposed review panel was not in respect of any modification or alteration of the Expressway so as to oust the grandfathering effect of s. 74(4) of the *Act*.

3. That the scope of the proposed review panel established by the defendants was the entire north-south Expressway between the QEW and Dartnall Road and their scoping was "fundamentally inconsistent" with the respondent ministers' submission that the review panel was in respect of any modification or alteration to the Expressway.

4. That the application of CEAA to the Expressway was excluded because irrevocable decisions were made before CEAA came into force.

5. That the respondent ministers' interpretation of CEAA S. 11(1) was inconsistent with the case law and the Agency's understanding, as evidenced in its operational policy statement, that environmental assessment is a planning tool only to be used before proponents make "irrevocable decisions".

6. That the application of CEAA to the Expressway was excluded because the Expressway was not a "project" as defined by CEAA.

7. That the Expressway had been substantially constructed before CEAA came into force in 1995.

8. That the *Migratory Birds Convention Act* did not provide the federal government with a constitutional basis to protect migratory bird habitat.

9. That Environment Canada's scientific analysis could not establish a link between loss of habitat due to the construction of the Expressway and significant impacts on migratory birds.

10. That there was a clear inconsistency between the conclusion about impacts to migratory birds in the April 9, 1999 letter from Mr. John Mills, Environment Canada Regional Director General to Mr. Raymond Pierce, DFO and the conclusions in Environment Canada's earlier July 31, 1998 ECB Analysis Paper.

11. That public concerns focused on the needs for and alternatives to the Expressway, which were matters of provincial jurisdiction.

12. That legal services advised Environment Canada that public concern was over matters that were entirely within provincial jurisdiction and recommended that Environment Canada should not refer the Expressway to a review panel.

13. That the defendants are prevented from relitigating the federal court finding that the new "scientific" conclusion that the Expressway may cause significant impacts on migratory birds materially contributed to Fisheries Minister Anderson requesting and Environment Minister Stewart referring the Expressway to CEAA Review Panel.

14. That the defendants are prevented from relitigating the federal court finding that the application of the CEAA review panel to the Expressway caused the City harm.

2. Analysis of City's Request for Non-Knowledge Orders

[39] The defendants accept the decision in *Hamilton Wentworth* that the CEAA did not apply to the Expressway for the reasons expressed by Justice Dawson. Because of this, counsel for Stewart and Anderson admit that they acted without jurisdiction in referring the Expressway to a panel review under the CEAA. What they do not admit is that they knew that they acted without jurisdiction. Justice Dawson held that the CEAA did not apply to the Expressway because both branches of section 74 (4) applied – construction began before June 22, 1984 and construction of a highway through the Redhill Valley was the completion and not a modification of the original project. It also did not apply because irrevocable decisions were made before January 15, 1995 when it came into effect Further it did not apply because the referral of the Expressway to a panel review was not supported by a head of federal power. This was because the basis for Anderson requesting the referral to a panel review was its potential effect on migratory birds and public concerns. Migratory birds were within federal jurisdiction but there was no proof that the Expressway would affect migratory birds. Public concerns related to its location in the Red Hill Valley, which was exclusively within provincial jurisdiction. These matters are all admitted by

the defendants or are settled and beyond dispute. It is my understanding that the defendants do not wish to relitigate any of this.

[40] Glynis Evans, a solicitor for the defendants, in a letter dated December 1, 2008 to Ross Earnshaw, solicitor for the City said the following:

> We remain perplexed concerning the relief sought and the grounds for your res judicata motion. We have previously asked for a copy of your draft notice of motion. If you are able to provide us with a draft, we may be able to find common ground which may simplify or even obviate the need for the motion.
>
> You have directed us to paragraph 27 of your statement of claim as an indication of the matters that you will argue are res judicata. We of course admit that the Federal Court or Federal Court of Appeal found that the Expressway was not a "project" within the meaning of the CEAA; or that alternatively if it was a "project" it was grandfathered from application of the CEAA; or that in the further alternative if the CEAA did apply, referral of the project to a federal review was ultra vires. These findings of the Court are to be taken as proven and we do not dispute them.
>
> We deny paragraph 27 of your statement of claim in that it asserts that the Federal Court found that some or all of the defendants knew that the CEAA did not apply for the reasons found by the Federal Court. While we accept the Federal Court's findings that the CEAA did not apply, we deny that these findings represent conclusions by the Federal Court of any deliberate wrongdoing on the part of any of the defendants.
>
> If it is not already clear, in paragraph 40 of our statement of defence we deny the City's allegations that the Federal Court found that "some or all of the defendants knew" that the CEAA was inapplicable for the various reasons cited. We do not deny that the Federal Court found that the CEAA was inapplicable for those reasons, and we do not argue with those findings.

[41] The "non-knowledge orders" request in various forms what the defendants have admitted. They have made it very clear that they do not seek to relitigate any aspect of Justice Dawson's decision that finds that the CEAA did not apply to the Expressway. Apart from whether these

orders satisfy the requirements of the doctrines of issue estoppel or abuse of process, there is no need for them.

3. City's Request for Knowledge Orders

[42] The City alleges against the defendants misfeasance in public office. To prove this it must establish that the defendants engaged in deliberate acts that were unlawful in the sense that they were without statutory authority. It must also prove that they knew or were recklessly indifferent or willfully blind that their conduct was unlawful.

[43] The city requests the following "knowledge orders":

1. That the Canadian Environmental Assessment Agency knew that the purpose of environmental assessment is to force consideration of the need for a project, alternatives to a project, and alternative means of carrying out the project at early stages of project planning.
2. That the DFO and Edwin DeBruyn knew that it was too late to apply CEAA to the Expressway and that CEAA is premised upon application as early as practicable in the planning stages.
3. That the DFO and Edwin DeBruyn knew that the *Fisheries Act* authorization they used as the basis to trigger CEAA was not in respect of a new undertaking but was only to complete the Expressway, a substantial portion of which had been completed prior to 1995.
4. That Environment Canada knew that the *Migratory Bird Convention Act* did not provide legal authority for the federal government to protect bird habitat.
5. That Edwin DeBruyn and Paul Bernier knew that public concerns about the Expressway focused on the need for and alternatives to the Expressway, which are areas of exclusive provincial jurisdiction.

[44] The basis for the City requesting orders numbered 1, 2 and 3 above are passages from Hamilton Wentworth under headings as follows:

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

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

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

The passages are as follows:

(1) Order 1

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] 3 F.C. 320 (F.C.T.D.) at paragraph 43; affirmed [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.
(The City relies only on paras. 101 and 102 of Justice Dawson's judgment; para. 103 of Justice Dawson's judgment is quoted above in para.14)

(2) <u>Order 2</u>

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 (an) approval ... under CEAA) is contingent upon the applicant to ensure that there is no net less (loss) 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.

(3) Order 3

[45] She addressed the argument of the Friends that by 1995 the project had so changed that it was a new undertaking. In support of this proposition she rejected the argument of the Friends that the changes proposed by the City in 1995 which caused it to seek an exemption order by the province from the requirements of the Environmental Assessment Act of Ontario meant that it was a new undertaking. She then stated the following:

> 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.

(4) Order 4

[46] The basis for the City's request for this order is a passage from Hamilton Wentworth under the following heading:

> 6. WAS THERE A VALID REFERRAL OF THE PROJECT TO PANEL REVIEW?
>
> (i) The migratory birds power

[47] She noted that as a result of the decision of the Supreme Court of Canada in *Oldman River* referred to in para. 20 above referral of the Expressway to a review panel must be supported by a federal head of power. She referred to the reasons of the request of Minister Anderson in his letter dated May 4, 1999 that Minister Stewart refer the Expressway to a panel review was based on a concern for migratory birds and public concern.

[48] The passage on which the City relies is as follows:

> 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.

(5) Order 5

[49] The basis for the city's request for this order is a passage from Hamilton Wentworth under the following heading:

> 6. WAS THERE A VALID REFERRAL OF THE PROJECT TO PANEL REVIEW?
>
> (ii) Public concern

[50] The passage relied upon by the City is as follows:

> 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 focused 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 focused 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."

4. Analysis of City's Request for Knowledge Orders

(1) Order 1

[51] The Canadian Environmental Assessment Agency was created pursuant to the following section of the CEAA:

> *Agency established*
>
> 61. (1) There is hereby established an agency, to be called the Canadian Environmental Assessment Agency, which shall advise and assist the Minister in performing the duties and functions conferred on the Minister by this Act.
> *Responsibility of Minister*
>
> (2) The Minister is responsible for the Agency.

[52] It is not a person and it is not a legal entity. In a court of law it cannot be said to "know" anything. Further, Justice Dawson did not find that it "knew" anything. She said in paragraph 102 of her decision which the City relies upon for this requested order being res judicata that its policy "illustrates the agency's position and understanding".

(2) Orders 2, 3 and 4

[53] DFO and Environment Canada are government departments. Likewise, they are not legal entities or persons. In a court of law they cannot be said to "know" anything. Moreover, Justice Dawson did not find that they "knew" anything. Paragraphs 104, 105, 116 and 168 of Justice Dawson's decision are the paragraphs which the City relies upon for the orders that it requests being res judicata. Justice Dawson, in these paragraphs, speaks of DFO's "understanding" and "assessment" and that Environment Canada "recognized".

[54] Apart from whether these orders satisfy the requirements of issue estoppel and abuse of process, I agree with the defendants that Justice Dawson did not find what is requested. Moreover the granting of these orders against these government departments would not advance the action. The City does not advance a claim again them. The claim of the City is against individuals.

(3) Order 5

[55] Paragraph 179 in Justice Dawson's reasons is obviously copied from paragraph 74 of the City of Hamilton's factum filed in the judicial review application. The full paragraph contained a preamble and reads as follows:

> 74. Numerous internal government documents indicate that the main focus of public concern about the project related to "need" for the RHCE and "alternatives" to it.
>
> (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)."
>
> (e) "... The project is situate on provincial lands and most issues of public concern relate to areas of provincial jurisdiction." (footnotes omitted)

[56] None of (b) to (d) can be attributed to DeBruyn.

[57] (b) is derived from an e-mail from Laud Matos dated January 29, 1999 to four people including DeBruyn. The subject of the e-mail is "Red Hill Creek Expressway – Media" and "'need' for and 'alternatives' to the project". Mr. Matos points out that need for and alternatives to the Expressway are required to be considered by a panel review pursuant to section 16 (2) of CEAA but are not required the considered in a screening. The full paragraph containing the quote is as follows:

> The Canadian Environmental Assessment Agency has advised DFO regional officials not to include the "need for" and "alternatives to" as factors to be assessed in this case. However**, 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 Shareholders Committee and the public, on the draft scoping document have focused on the absence of these two issues**. (bolded portion is quoted in (b))

(c) is from an e-mail dated May 19, 1999 from Rob Stevens to five persons including DeBruyn. The full e-mail is as follows:

> With regards to means and alternatives for the project, I understand that there is concern with including a consideration of the need for, and alternative to, the Expressway, as these are areas of provincial jurisdiction. However the referral to a panel was based in part on a consideration of public concern. Given that **the public concern was largely based on a lack of consideration of needs and alternatives in the regional municipality's own substitute review process** would it not place the Minister of the Environment in the awkward position of having to defend the decision not to include these factors in a federal review? (bolded portion is quoted in (c))

(d) is taken from an e-mail dated May 18, 1999 from Gordon McCallum to three persons including DeBruyn. The subject is "Red Hill terms of reference". The full paragraph containing the quoted passage is as follows:

> I worry about a broad terms of reference. **This panel is not joint with the province, but the public concern is more with provincial matters (needs, rationale, alternatives)**. Hence if broad matters are assigned to the panel, it will be barraged with evidence and submissions on matters that federal regulators cannot control. We will raise expectations and ensure great disappointments. There will be more openings for court challenges to federal approvals like s. 35(2) authorizations. (bolded portion is quoted in (d))

[58] The only part of paragraph 179 that is attributable to DeBruyn is (a) although it does not come from DeBruyn's testimony on cross examination. Its origin is an e-mail dated June 29, 1999 from DeBruyn to Jeff Stein and to Kathy Fisher on the subject of "Red Hill: EA Legal Questions". The opening sentence in the e-mail is as follows:

> The CEAA screening of the red Hill Expressway is going to raise eyebrows no matter which way we proceed.
>
> The full paragraph containing the quote is as follows:
>
> To assist in preparing the CEAA screening report, some clarification on scope of project, scope of assessment and public concern is necessary as they relate to incursions into areas of provincial responsibility. There is considerable public concern regarding this issue. The public concern (600 or more) letters to DFO minister and a similar or greater number to DOE Minister have asked for a full federal EA. **Much of the public concern is focused on the need and alternatives to the project. Needs and alternatives to the project are related to transportation issues which I believe are a provincial responsibility**. There is some potential to have an impact on areas of federal responsibility. The main areas of federal responsibility appear to be fisheries (habitat loss), migratory birds, navigable waters, aboriginal, transboundary. The significance of the impact on areas of federal responsibility, with the possible exception of migratory birds, can be expected to be readily addressed. (bolded portion is quoted in (a))

[59] The words quoted in (e) were not stated by Paul Bernier in cross-examination. The origin of these words is an e-mail dated April 16, 1999 from Natalie Sequin to Paul Bernier. The subject of the e-mail is "28paragraph". The full passage is as follows:

> Section 28 this not constitute the sole option for referral under the Act. In addition, **the project is situated on provincial lands and most issues of public concern relate to areas of provincial jurisdiction**. The project, from a capital investment perspective, is also considered relatively small compared to other projects previously referred to a review panel. Combined these factors could be considered as limited grounds for independent ministerial referral to a review panel and could set a precedent for mutual referrals under section 28. (bolded portion is quoted in (e))

When this passage was put to Bernier in his cross examination on May 11, 2000 on his affidavit sworn January 21, 2000 he stated the following:

> it's hard for me to understand what it was … Where it fits in … Because, as you can see, it has no preamble, no contextual piece. I really don't know.

[60] Three of the quotes attributed to DeBruyn in (b) to (d) did not originate with him. The quote in (a) comes from an e-mail taken out of context. None of them come from his cross examination. The quote attributed to Bernier in (e) also does not come from his cross examination. Its origin is an e-mail to him from another person. He does not adopt it in his cross examination. What the e-mails, which are the origin of these quotes, illustrate is a struggle in the minds of federal officials as to whether or not the Red Hill Expressway should be subject to an assessment under the *Act*. They do not support what the City submits, namely, that Justice Dawson decided that "DeBruyn and Bernier knew that public concerns about the Expressway focused on the needs for and alternatives to the Expressway which are areas of exclusive

provincial jurisdiction." Even if the requirements of issue estoppel could be said to be met with respect to this requested order clearly it would be appropriate for the court to exercise its discretion not to apply it.

IX. Requested Knowledge Orders That Need to be Addressed

[61] In my view the requested knowledge orders that need to be addressed are as follows:

> 1. That Edwin DeBruyn, knew that it was too late to apply CEAA to the Expressway and that CEAA is premised upon application as early as practicable in the planning stages; (order 2 modified)
>
> 2. that Edwin DeBruyn, knew that the *Fisheries Act* authorization he and DFO used as the basis to trigger CEAA was not in respect of a new undertaking but was only to complete the Expressway, a substantial portion of which had been completed prior to 1995; (order 3 modified)

CEAA provides as follows:

> *Referral to Minister*
>
> 25. Subject to paragraphs 20(1)(b) and (c), where at any time a responsible authority is of the opinion that
>
> (a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or
>
> (b) public concerns warrant a reference to a mediator or a review panel,
>
> the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.
>
> *Initial referral to mediator or review panel*
>
> 29. (1) Subject to subsection (2), where a project is to be referred to a mediator or a review panel, the Minister shall
>
> (a) refer the environmental assessment relating to the project to
>
> (i) a mediator, or

(ii) a review panel; or

(b) refer part of the environmental assessment relating to the project to a mediator and part of that assessment to a review panel.

[62] Anderson requested of Stewart under section 25 of the CEAA that she refer the Expressway to a panel review. She did do so under section 29. DeBruyn was a senior advisor to Anderson. The City alleges that he played a large role in constructing the wording in the letter of Anderson dated May 4, 1999 to Stewart requesting that she refer the Expressway to a review panel because "the project as described may have significant adverse environmental effects on migratory birds" and "considering the level of public concern surrounding this project". Anderson could be expected to follow the advice of DeBruyn and others with whom DeBruyn worked. He would likely sign a letter drafted and presented to him by them. DeBruyn's knowledge could reasonably be attributed to Anderson. Stewart acted on the request of Anderson. A finding that DeBruyn knew that CEAA could not apply to the Expressway could easily be imputed to Anderson and then to Stewart. The granting of these orders to the City could be equivalent to granting an order to the City that Anderson and Stewart knew that the CEAA did not apply to the Expressway. Hence when they acted together to refer the Expressway to a panel review they knew that they were acting without statutory authority and hence unlawfully. The granting of these requested "knowledge orders" to the City against DeBruyn would place the City well down the path of proving misfeasance in public office against Stewart and Anderson.

X Analysis of Knowledge Orders Requested by the City against DeBruyn

[63] In summary the orders requested are as follows:

1. That DeBruyn knew it was too late to apply the CEAA to the Expressway.

2. That DeBruyn knew that the *Fisheries Act* authorization was not in respect of a new undertaking.

[64] The requirements of issue estoppel set out in *Danyluk* are as follows:

(1) that the same question has been decided;

(2) The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding;

(3) that the judicial decision which is said to create the estoppel was final; and,

(4) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[65] The analysis to be followed as required by *Danyluk* is to determine first if the City has established the preconditions required for the application of the doctrine of issue estoppel.

[66] **Same Question**

[67] The issues in Hamilton Wentworth were first whether the CEAA applied to the RHCE and if it did whether there was a valid referral to a review panel under the CEAA. Justice Dawson found that the CEAA did not apply to the Expressway for two reasons. First the transitional provision in section 74 (4) applied – construction began before June 22, 1984 and the requirement of the *Fisheries Act* authorization was not in respect of an authorization for a new undertaking. Further, CEAA did not apply because irrevocable decisions had been made with respect to the Expressway before January 19, 1995 when it came into effect. She also held that the referral to a panel review was not supported by a

valid head of federal power. The issue of whether DeBruyn knew if CEAA applied to the Expressway was not before her.

2. Fundamental to Her Decision

[68] After paragraph 99 of her decision quoted in paragraph 13 above, Justice Dawson stated the following:

> **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] 3 F.C. 320 (F.C.T.D.) at paragraph 43; affirmed [1995] 2 F.C. 110 (F.C.A.).

[69] Her conclusion that the first branch of section 74(4) applied, which is that construction began before June 22, 1984, did not depend upon her observation in para. 104 that ""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." It is this draft correspondence in which DeBruyn states the following:

> 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'. (quoted in para. 104)
>
> and:
>
> 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. (quoted in para. 116)

[70] These observations by Justice Dawson, or "findings" if you like, that DeBruyn knew it was too late to apply CEAA to the Expressway and that he knew the Expressway was not a new undertaking are not fundamental to her decision. None of the paragraphs from Justice Dawson's decision relied upon by the City to support its argument that the doctrine of issue estoppel should result in the granting of the "knowledge orders" are fundamental to her decision.

3. That the Decision Said to Create the Estoppel Is Final

[71] Justice Dawson's decision was upheld by the federal Court of Appeal. It is certainly final.

4. The Same Parties or Their Privies

[72] It is my opinion that none of the parties in the judicial review proceeding are parties in this action. The parties in the judicial review proceedings included the Minister of the Environment and the Minister of Fisheries and Oceans. It was the institution rather than the incumbent that were parties. If either of the incumbents had died during the proceedings they would have continued uninterrupted. It happened that the incumbents were David Anderson and Christine Stewart at the relevant time who are parties in their personal capacities in these proceedings. More important DeBruyn was not a party to judicial review proceedings. He was a senior advisor of Anderson. However, apart from being represented by the same solicitors, he does not satisfy any of the indicia of a privy set out in paragraph 52 of the City's factum set out above in paragraph 32. He did not share a parallel interest in the proceedings; he could not have been added as a party; he could not have proffered evidence; he did not have an opportunity to

participate in the proceedings apart from being cross examined on an affidavit that was filed and he did not have any control over the proceedings.

5. Exercise of Discretion

[73] Even if it could be said that the requirements of issue estoppel could be satisfied so that the doctrine applied to a finding that Justice Dawson made that DeBruyn knew it was too late to apply the CEEA to the Expressway and that he knew it was not a new undertaking, I would exercise my discretion to decline to apply it based on factors set out in *Almrei*.

(1) Text and Purpose of the Statute

[74] The City of Hamilton brought the judicial review proceedings under the *Federal Court Act*. It is sections 18.1 (1), 3(b), 4(a) and 4(c) quoted in para. 9 which gave Justice Dawson the authority to make the findings that she did. In this action the City of Hamilton seeks to establish that the defendants are liable to it for money damages based on the tort of misfeasance in public office. The two proceedings are completely different.

(2) Procedural Differences

[75] The judicial review proceedings were decided on the basis of affidavits, transcripts of cross examinations and documents. This proceeding will be decided on the basis of oral evidence of the parties, albeit, supplemented by documents.

(3) Right to Participate and the Availability Of an Appeal

[76] The defendants Anderson and Stewart had no right to participate in their personal capacity. None of the other defendants had the right to participate at all. None of them had the right to appeal.

(4) Potential Injustice

[77] For the Superior Court to find that DeBruyn advised Anderson that the CEAA applied to the Expressway when he knew that it did not would be devastating to his reputation and career. He has a right to defend himself. He has a right to have his credibility determined by a judge who hears and sees him testify. To require DeBruyn to commence defending himself under the burden of a finding that he knew that the CEAA did not apply to the Expressway, in my view, would be a terrible injustice to him.

XI Abuse of Process

[78] The plaintiff makes serious allegations against 3 cabinet ministers and their advisers of misfeasance in public office. In my view it could be not an abuse of process that the City be required to prove their allegations against the defendants without the assistance of orders on issues which the defendants have conceded. I have narrowed the requested orders that need to be addressed to 2 "knowledge orders" against DeBruyn. As I have said the consequences of these orders being granted against him would extremely serious for him. I have found that Justice Dawson did not find that he knew what the City seeks to reduce to orders. Even if she did so find in my view it would not be an abuse of process to require the City to prove that he had this

knowledge in this action. On the contrary it would be an abuse of process not to give DeBruyn an opportunity to defend himself against these allegations by way of oral evidence in open court.

XI Conclusion

[79] The City's motion is dismissed. The defendants may make submissions in writing within three weeks of their receipt of this decision and the City may have three weeks to respond.

P. B. HAMBLY J.

Released: December 1, 2011

[1] In *Millgate Financial v. BF Realty* [2003] O.J. No. 5555 Justice Cullity stated the following:

> **28** Although, in view of the statement of Cronk J.A. that the question is irrelevant, it might be argued that the finding on the question of interpretation cannot be considered to have been fundamental to the decision of Cumming J. on the issue to be tried - as stated and required for issue estoppel in authorities such as Angle v. M.N.R, [1975] 2 S.C.R. 248, at page 255 - I am not satisfied that such statements were intended to apply where there are alternative findings each of which was sufficient to decide the issue. Traditionally, each of such findings has been considered to be a ratio decidendi of the case at least for the purpose of the doctrine of precedent: Jacobs v. L.C.C.,

[1950] A.C. 361 (H.L.), at page 369; Commissioner of Taxation v. Palmer, [1907] A.C. 179 (P.C.), at page 184.

In *Jacobs* the House of Lords in the judgment of Lord Simmons state the following at p. 369 – 370:

> …But, however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing.
> …
> In that case two reason were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first: we must take both as forming the ground of the judgment.

In *Palmer* the House of Lords in the judgment of Lord MacNachton stated the following at p. 184:

> …But it is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

[ii] **42** The determination of whether the same issue requirement has been met depends on a careful analysis of the factual context and the statutory standard applied in the earlier proceeding (*Heynen v. Frito Lay Canada Ltd* (1999), 45 O.R. (3d) 776 at para. 19 (C.A.) [*Heynen*], appeal to SCC dismissed, [1999] S.C.C.A. No. 569). Justice Goudge explained further (at para. 20) in *Heynan*:

> This method of analysis is consistent with the observation of Morden A.C.J.O. in *Rasanen, [1994] O.J. No. 200*, at p. 687 that the courts have taken a "fastidious approach" to the "same question" test. Although at a high level of generalization, two proceedings might seem to address the same question, this requirement of issue estoppel is met only if on careful analysis of the relevant facts and the applicable law the answer to the specific question in the earlier proceeding can be said to determine the issue in the

subsequent proceeding. The latter two questions are not at issue in this proceeding.

43 In that case, the Court agreed that the appellant's claim for termination pay under the statute was very different than the question of misconduct necessary to find just cause in a wrongful dismissal action. Goudge J.A. concluded the issues were different and as such, issue estoppel did not apply. The "fastidious approach" has been adopted by several cases in Ontario and British Columbia, but was originally articulated in a text by Spencer-Bower and Turner, *The Doctrine of Res Judicata*, 2nd ed (1969) at p. 179.

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> …
> In that case two reason were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio

> decidendi and neglect the first: we must take both as forming the ground of the judgment.

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43 In that case, the Court agreed that the appellant's claim for termination pay under the statute was very different than the question of misconduct necessary to find just cause in a wrongful dismissal action. Goudge J.A. concluded the issues were different and as such, issue estoppel did not apply. The "fastidious approach" has been adopted by several cases in Ontario and British Columbia, but was originally articulated in a text by Spencer-Bower and Turner, *The Doctrine of Res Judicata*, 2nd ed (1969) at p. 179.

SCHEDULE 1

ORDERS REQUESTED BY THE CITY BASED ONLY ON CONCESSIONS AND ADMISSIONS BY THE DEFENDANTS

1. **THIS COURT DECLARES and finds that:**

   a. the *Canadian Environmental Assessment Act* ("CEAA") did not apply to the City's Red Hill Creek Expressway (the "Expressway");[1]

   b. the Environment Minister's decision to refer the Expressway to a CEAA Review Panel was not supported by a valid head of federal power and was *ultra vires* federal legislative authority;[2] **and**

   c. the application of CEAA to the Expressway was unlawful.[3]

---

[1] "The defendants accept Justice Dawson's finding that the CEAA did not apply to the Expressway....": parag. 10 of the Defendants' Factum, August 27, 2010.

[2] "The defendants accept Justice Dawson's finding that...the Minister of the Environment's decision to refer the Expressway to a review panel was not supported by a valid head of federal power and was thus *ultra vires*: parag. 10 of the Defendants' Factum, August 27, 2010.

2. **THIS COURT DECLARES and finds that:**

a. The remaining defendants, other than the Attorney General of Canada

i. were public officials[4]

ii. who, in the course of their duties, had varying levels of involvement in either or both of:

(A) the application of the *Canadian Environmental Assessment Act* ("CEAA") to the Expressway; and

(B) the referral of the Expressway to a CEAA Review Panel.[5]

3. **THIS COURT DECLARES and finds that:**

a. defendant Christine Stewart, as Environment Minister, acted unlawfully in her decision pursuant to CEAA s. 29, announced on May 6, 1999, to require the Expressway to be readjudicated by a CEAA Review Panel;[6] **and**

b. defendant David Anderson, then Fisheries Minister, acted unlawfully on May 4, 1999 by purporting to request the Environment Minister, pursuant to CEAA

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[3] See Note 1: "The defendants accept Justice Dawson's finding that the CEAA did not apply to the Expressway....":

[4] See the Statement of Defence, parag. 3-8 where the defendants admit they were at relevant times public officials.

[5] See Statement of Defence, parag. 30 where it is admitted that all defendants "had varying degrees of involvement in the actions taken and the decisions made by the DFO, EC, and the CEAA with respect to the Valley Expressway, and in particular with respect to the decision to refer the project to a review panel."

[6] The defendants admit in parag. 28 of their Statement of Defence that "the Environment Minister did in fact refer the matter to a review panel, on or about May 6, 1999."

ss. 25(a) and (b), to refer the City's Expressway to be readjudicated by a CEAA Review Panel.[7]

4. **THIS COURT DECLARES and finds that:**

a. those remaining defendants who directly applied, or who were actively instrumental in applying CEAA to the Expressway, acted unlawfully, i.e., without statutory authority; and

b. those remaining defendants who were actively instrumental in the Expressway being referred to a CEAA Review Panel acted unlawfully i.e., without statutory authority.

SCHEDULE 2

ORDERS requested by the City to prevent the defendants from relitigating findings that were fundamental to the decision in *Hamilton-Wentworth*

1. **The City Submits**

it is Entitled to an Order declaring that all of the defendants are estopped from relitigating the following findings that were fundamental to the Federal Court's decision in *Hamilton-Wentworth* based on the doctrines of issue estoppel, abuse of process, or both:

2. **THIS COURT DECLARES and finds that:**

the defendants are prevented from relitigating that **the *Canadian Environmental Assessment Act* ("CEAA") did not apply to the Expressway** and the following findings made by the Federal Court in *Hamilton-Wentworth* that:

(a) **the application of CEAA to the Expressway was excluded by subsection 74(4) of the Act;**

[7] The defendants admit in parag. 27 of their Statement of Defence that "In or about May, 1999...the Minister of Fisheries and Oceans elected to request the Minister of Environment to refer the matter to a review panel, pursuant to s. 25 of the Act."

(i) the Canadian Environmental Assessment Agency knew that the purpose of environmental assessment is to force consideration of the need for a project, alternatives to a project, and alternative means of carrying out the project at early stages of project planning;[8]

(b) **the proposed Review Panel was not in respect of any modification or alteration of the Expressway so as to oust the grandfathering effect of subsection 74(4);**

(i) the scope of the proposed Review Panel established by the defendants was the entire North-South Expressway between the QEW and Dartnall Road, and their scoping was "fundamentally inconsistent" with the Respondent Ministers' submission that the Review Panel was in respect of a modification or alteration to the Expressway;[9]

(c) **the application of CEAA to the Expressway was excluded because irrevocable decisions were made before CEAA came into force;**

(i) the DFO and the DFO defendants, including Edwin DeBruyn, knew that it was too late to apply CEAA to the Expressway and that CEAA is premised upon application as early as practicable in the planning stages;[10]

(ii) the Respondent Ministers' interpretation of CEAA subsection 11(1) was inconsistent with the case law and the Agency's understanding, as evidenced in its Operational Policy Statement, that environmental assessment is a planning tool only to be used before proponents make "irrevocable decisions";[11]

(d) **the application of CEAA to the Expressway was excluded because the Expressway was not a "project" as defined by CEAA. The Expressway had been substantially constructed before CEAA came into force in 1995;**

(i) the DFO and the DFO defendants, including Edwin DeBruyn, knew that the *Fisheries Act* authorization they used as the basis to trigger CEAA was not in respect of a new undertaking but was only to complete the

[8] *Regional Municipality of Hamilton-Wentworth and the Minister of Environment et al.*, 2001 FCT 381 at paras. 101-102 [*Hamilton-Wentworth*].
[9] *Hamilton-Wentworth*, at para. 144.
[10] *Hamilton-Wentworth*, at paras. 104-105.
[11] *Hamilton-Wentworth*, at para. 109.

Expressway, a substantial portion of which had been completed prior to 1995.[12]

3. **THIS COURT DECLARES and finds that:**

the defendants are prevented from relitigating that **the referral of the Expressway to a CEAA Review Panel was not supported by a valid head of federal power and was thus *ultra vires*** and the following findings made by the Federal Court in *Hamilton-Wentworth*:

(a) **the *Migratory Bird Convention Act* did not provide the federal government with a constitutional basis to protect migratory bird habitat;**

(i) Environment Canada knew that the *Migratory Bird Convention Act* did not provide legal authority for the federal government to protect bird habitat;[13]

(b) **Environment Canada's scientific analysis could not establish a link between loss of habitat due to the construction of the Expressway and significant impacts on migratory birds;**

(i) Environment Canada's experts recognized and concluded in the July 31, 1998 ECB Analysis Paper that there was no scientific basis upon which to conclude that habitat loss due to construction of the Expressway may cause significant impacts on migratory birds;

(ii) there was a clear inconsistency between conclusion about impacts to migratory birds in the April 9, 1999 letter from Mr. John Mills, Environment Canada Regional Director General to Mr. Raymond Pierce, DFO and the conclusions in Environment Canada's earlier July 31, 1998 ECB Analysis Paper;[14]

(c) **public concerns focused on the needs for and alternatives to the Expressway, which were matters of provincial jurisdiction;**

(i) Edwin DeBruyn and Paul Bernier knew that public concerns about the Expressway focused on the need for and alternatives to the Expressway, which are areas of exclusive provincial jurisdiction;[15]

(ii) Legal services advised Environment Canada that public concern was over matters that were entirely within provincial jurisdiction and recommended

[12] *Hamilton-Wentworth*, at para. 116.
[13] *Hamilton-Wentworth*, at para. 168.
[14] *Hamilton-Wentworth*, at paras. 171-172.
[15] *Hamilton-Wentworth*, at para. 179.

that Environment Canada should not refer the Expressway to a Review Panel.[16]

4. **THIS COURT DECLARES and finds that:**

the defendants are prevented from relitigating the Federal Court finding that **the new "scientific" conclusion that the Expressway may cause significant impacts on migratory birds materially contributed to Fisheries Minister Anderson requesting and Environment Minister Stewart referring the Expressway to a CEAA Review Panel.**

5. **THIS COURT DECLARES and finds that:**

the defendants are prevented from relitigating the Federal Court finding that **the application of the CEAA Review Panel to the Expressway caused the City harm.**

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CITATION: City of Hamilton v. Attorney General et al, 2011 ONSC 7128
COURT FILE NO.: C-383/04
DATE: 2011-11-30

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

[16] *Hamilton-Wentworth*, at para. 180.

City of Hamilton

Plaintiff

- and -

Attorney General of Canada et al

Defendants

REASONS FOR JUDGMENT

P.B. HAMBLY J.

Released: December 1, 2011