Court File No.: A-4-08

FEDERAL COURT OF APPEAL

B E T W E E N:

LES AMIS DE LA RIVIÈRE KIPAWA incorporated as
1162209036 QUEBEC INC.

Appellant

and

THE ATTORNEY GENERAL OF CANADA and
THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA,
THE MINISTER OF FISHERIES AND OCEANS, and
THE MINISTER OF TRANSPORT

Respondents

APPELLANT'S MEMORANDUM OF FACT AND LAW

(Pursuant to sections 70 and 346 of the Federal Court Rules)

April 14, 2008

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OVERVIEW

1. Les Amis de la Rivière Kipawa (hereafter “Les Amis” or the “Appellant”), a not-for-profit corporation under the laws of Québec, brings this appeal to set aside the Reasons for Judgment and Judgment of Mr. Justice Noël, dated December 4, 2007 (the “Trial Judgment”). The Trial Judgment dismissed the *Les Amis* application for judicial review against, principally, the Minister of Public Works and Government Services Canada (“Public Works”) and the Minister of Transport (“Transport”), respecting the proposed reconstruction of the federally-owned Laniel Dam on the Kipawa River in the Province of Québec, near the Ontario border. The Honourable Judge rejected the submissions of *Les Amis* that the project was in breach of the *Navigable Waters Protection Act* (“NWPA”) and the *Canadian Environmental Assessment Act* (“CEAA”).

2. The Appellant was incorporated to protect ecological and recreational interests in the Kipawa River, an internationally recognized whitewater river. The Appellant brings this appeal to reverse three major legal errors that limit rights of navigation on this River:

(1) The judgment was wrong to conclude that no common law right of navigation through the Laniel Dam (the “Dam”) was demonstrated or created: (i) it failed to apply any recognized test of navigability;(ii) it failed to appreciate the legal significance of its findings that the Dam was designed to allow some navigation through it, had been navigated safely for decades, and had been navigated commercially since 1987; (iii) it failed to recognize that navigability is a jurisdictional condition precedent to issuing a permit under the NWPA; and it applied considerations to this navigation question that are not part of Canadian navigation law.

(2) The judgment was wrong to conclude that a permit issued under ss. 6(4) of the NWPA to authorize the existing Dam legally changed the operation of the Dam to prohibit navigation through it. The NWPA permit showed no change to the operation of the existing Dam, public notice on the permit advised of no change, and any such operational change would have triggered federal EA under ss. 5(1)(d) or ss. 74(4) of the CEAA, and no EA was done.

(3) The judgment was wrong to conclude that the federal EA carried out in respect of the proposed Dam complied with the CEAA: the EA ignored the federal interest in navigation, failed to consider adverse effects on navigation as required by ss. 16(1)(a), and failed to consider the significance of adverse navigation effects as required by ss. 16(1(b), in a situation where the proposed project would make a navigable waterway non-navigable.

3. Acting in the public interest, the Appellant brings this appeal to have this Court affirm that longstanding public navigation law applies to this project and setting. The Appellant thus requests that this Court: (1) grant the appeal; (2) quash the decisions of the Respondent Ministers and Departments under the CEAA and the NWPA; and (3) declare that the Kipawa River from Laniel to Temiscamingue, including the existing Laniel Dam, is navigable.

PART I: CONCISE STATEMENT OF FACT

Undisputed facts from the Trial Division Judgment

4. The Laniel Dam is located at the head of the Kipawa River, approximately 16 km from the River's outfall into Lake Temiscaminingue, in the Province of Québec.

Ref.: **(1)** Trial Division judgment (hereafter "TDJ"), ¶8 [Appeal Book (hereafter "AB"), Vol. 1, Tab 2, p. 10];
(2) Environmental Assessment, dated January 25, 2006 (hereafter "EA/06"), s. 2.0 [AB, Vol. 8, Tab 4C 4, p. 1420]

5. The Dam was constructed in 1911 by the Government of Canada, on federal lands. In 1918, the operation of the Dam was transferred to the Province of Québec.

Ref.: **(1)** TDJ, ¶12 [AB, Vol. 1, Tab 2, p. 11];
(2) EA/06, s. 2.0 [AB, Vol. 8, Tab 4C 4, p. 1420]

Logging interest in the Dam

6. The Dam was designed with a spillway to allow the free passage of logs from Lake Kipawa into the Kipawa River. From 1918 to 1965, the operation of the Dam was controlled by the pulp and paper industry. Logging usage continued until the mid-1960s.

Ref.: **(1)** TDJ, ¶13 [AB, Vol. 1, Tab 2, p. 11];
(2) EA/06, s. 2.2 [AB, Vol. 8, Tab 4C 4, p. 1420];
(3) *A Brief History of Modern Commercial and Recreational Navigation on the Laniel-to Lake-Temiscaming Section of the Kipawa River in Northwest Quebec* (March 2005), 2nd page, within Annexe F to EA/06 (hereafter "*Brief History*") [AB, Vol. 9, Tab 4C F, p. 1681]

Whitewater navigation interest in the Dam

7. The earliest known navigation of the Kipawa River by individuals (kayaking, rafting, or canoeing) was in 1968. This navigation has recurred every year since.

Ref.: **(1)** TDJ, ¶s 13, and 75 [AB, Vol. 1, Tab 2, pp. 11, 42];
(2) *Brief History, supra* [AB, Vol. 9, Tab 4C F, p. 1682];
(3) *Les Amis* letter to Minister of Transport, dated April 6, 2005, 1st page, Annexe F to EA/06 [AB, Vol. 9, Tab 4C F, pp. 1695-97]

8. Since 1987, the River has been used for commercial rafting.

Ref.: **(1)** TDJ, ¶14 [AB, Vol. 1, Tab 2, p. 12];
(2) *Brief History, supra,* 4th page [AB, Vol. 9, Tab 4C F, p. 1683]

9. The major whitewater event each year is the Kipawa River Rally. It attracts more than 150 kayakers and rafters each year from Québec, Ontario, and the United States.

Ref.: **(1)** TDJ, ¶14 [AB, Vol. 1, Tab 2, p. 12];
(2) *Brief History, supra* [AB, Vol. 9, Tab 4C F, p. 1683];
(3) Public Works estimates an annual average of 320 kayakers and more than 500 participants in 2006: see its *Rapport de consultation publique ciblée à Laniel et Kipawa*, Annexe E to EA/06 [AB, Vol. 9, Tab 4C E, p. 1669];
(4) English version of Annexe E to EA/06 [AB, Vol. 10, Tab 4C 13, pp. 1917-37 at 1933]

10. Today, the Kipawa River is recognized as one of North America's top white-water rivers. All of its whitewater areas are named and classified according to an International classification standard setting out the level of difficulty. In this system, the Dam is identified as Class III, which indicates it can be safely run by intermediate paddlers.

Ref.: **(1)** TDJ, ¶s 13, and 70 [AB, Vol. 1, Tab 2, pp. 11, 39];
(2) *Brief History, supra,* 2nd and 5th pages [AB, Vol. 9, Tab 4C F, pp. 1681, 1684]

11. Throughout this period of 40 years, *Les Amis* have used the Dam without incident. From Public Works, the only reported injury was a 2005 ankle injury.

Ref.: **(1)** TDJ, ¶s 62, 68, and 76 [AB, Vol. 1, Tab 2, pp. 36, 39, 43];
(2) *Les Amis* letter to Public Works, dated April 7, 2005, Annexe F to EA/06 [AB, Vol. 9, Tab 4C F, p. 1698]

Other interest in the dam

12. From 1965 to 1986, Hydro-Québec operated the Dam.

Ref.: **(1)** TDJ, ¶6 [AB, Vol. 1, Tab 2, p. 9]
(2) EA/06, s. 2.2 [AB, Vol. 8, Tab 4C 4, p. 1420]

Resumed federal management of the dam

13. In 1986, Public Works assumed operation of the Dam from Hydro-Québec.

Ref.: **(1)** TDJ, ¶12 [AB, Vol. 1, Tab 2, p. 11]
(2) EA/06, s. 2.2 [AB, Vol. 8, Tab 4C 4, p. 1420]

Federal EA

14. Because of the Dam's age and limts on flood control management, Public Works determined that the Dam required reconstruction. In early 2004, Public Works determined that this proposed reconstruction triggered the CEAA because of the size and possible impact of the project. It then hired an EA consultant, who provided preliminary recommendations in September 2004.

Ref.: **(1)** TDJ, ¶20 [AB, Vol. 1, Tab 2, p. 14];
(2) EA/06, s. 2.2 [AB, Vol. 8, Tab 4C 4, p. 1420]

15. In March 2004, Public Works learned that the existing Dam was not approved under the NWPA, and required such approval to start rehabilitation work.

Ref.: **(1)** TDJ, ¶46 [AB, Vol. 1, Tab 2, p. 23]
(2) DFO letter to Public Works, Annexe A to EA/06 [AB, Vol. 9, Tab 4C A, pp. 1532-3]

16. In June 2004, Public Works applied to Transport for approval of the existing Dam.

Ref.: **(1)** TDJ, ¶47 [AB, Vol. 1, Tab 2, p. 24];
(2) Transport letter to Public Works, Oct 6/04 [AB, Vol. 6, Tab 4B 4, p. 1017]

17. In March 2005, Public Works commenced public consultation on the project. On March 3, 2005, *Les Amis* responded to this invitation by emailing Public Works to ask that the Dam remain navigable, "if this is at all feasible". On March 16, 2005, at a scheduled consultation, Public Works told *Les Amis* that passage through be spillway was prohibited.

Ref.: **(1)** TDJ, ¶s 24-26 [AB, Vol. 1, Tab 2, pp. 16-17];
(2) *Les Amis* letter, dated March 3, 2005, Annexe F to EA/06 [AB, Vol. 9, Tab 4C F, pp. 1677-78];
(3) Annexe E to EA/06 [AB, Vol. 9, Tab 4C E, p. 1667];
(4) English version of Annexe E to EA/06 [AB, Vol. 10, Tab 4C 13, pp. 1930-31]

18. In late June 2005, Public Works sent a representative to observe the annual Kipawa River Rally hosted by *Les Amis*, including the activities through and around the Dam.

Ref.: **(1)** TDJ, ¶37 [AB, Vol. 1, Tab 2, p. 21];
(2) Report of Guy Lafond, Transport Canada [AB, Vol. 6, Tab 4B 1, pp. 925-98]

19. In September 2005, Public Works published notice of its NWPA application for approval of the existing Dam.

Ref.: **(1)** TDJ, ¶49 [AB, Vol. 1, Tab 2, p. 25];
(2) Canada Gazette Notice [AB, Vol. 6, Tab 4B 6, pp. 1027-31]

20. In October 2005, Public Works received NWPA approval for the existing Dam.

Ref.: **(1)** TDJ, ¶49 [AB, Vol. 1, Tab 2, p. 25];
(2) NWPA, s. 6(4) approval [AB, Vol. 6, Tab 4B 7, pp. 1033-41]

21. Also in October 2005, Public Works sent an excerpt of the 'near-final' EA to *Les Amis*. The excerpt set out the analysis and the mitigation measures section of the EA.

Ref.: **(1)** TDJ, ¶29 [AB, Vol. 1, Tab 2, p. 18];
(2) EA excerpts, translated, Oct 14/05 [AB, Vol. 10, Tab 4C 7, pp. 1734-54]

22. On October 31, 2005, *Les Amis* made a written request for access to the public registry on the EA, which is a mandatory registry of all EA documents maintained pursuant to section 55 of the CEAA.

Ref.: **(1)** TDJ, ¶33 [AB, Vol. 1, Tab 2, p. 19];
(2) Emails on access to registry information [AB, Vol. 10, Tab 4C 10, pp. 1857-61]

23. Public Works finalized the EA on February 9, 2006.

Ref.: **(1)** TDJ, ¶30 [AB, Vol. 1, Tab 2, p. 18];
(2) EA/06, s. 10.0 [AB, Vol. 8, Tab 4C 4, pp. 1528-29]

24. On February 10, 2006, Public Works and Transport Canada gave approval to proceed with the project. The decision provides the following:

> "As detailed in the environmental assessment report, mitigation measures have been required for the project to address:
> • air quality
> • water quality
> • water quantity
> • sedimentation
> • soil quality
> • vegetation
> • noise levels
> • birds and/or their habitat
> • structure, site or thing of historic, archaeological, paleontological or architectural significance
> • socio-economic impacts
> …."

Ref.: **(1)** TDJ, ¶s 44, 51, and 56 [AB, Vol. 1, Tab 2, pp. 23, 26, 31-32];
(2) EA/06, s. 7.0 [AB, Vol. 8, Tab 4C 4, p. 1521]

Additional Facts not in the Trial Judgment

25. From March 2006 to the end of October 2006, the appellant made several submissions to Public Works to ask for specific responses on several topics including:

(1) legal authority to prohibit navigation;

(2) other projects in the area that may affect navigation of the Kipawa River; and

(3) lack of consideration of navigation in the draft EA.

Ref.: **(1)** Annexe E to EA/06 [AB, Vol. 9, Tab 4C E, pp. 1667-68];
(2) English version of Annexe E to EA/06 [AB, Vol. 10, Tab 4C 13, pp. 1930-31];
(3) July 4/05 email to Public Works in Annexe F to EA/06 [AB, Vol. 9, Tab 4C F, p. 1698];
(4) *Les Amis* letter, April 6, 2005, Annexe F to the EA/06 [AB, Vol. 9, Tab 4C F, pp. 1695-97], with Public Works reaction to same [AB, Vol. 10, Tab 4C 9, p. 1784];
(5) *Les Amis* Oct/05 response to the EA excerpts [AB, Vol. 10, Tab 4C 9, pp. 1787-89], with Public Works reaction to same [AB, Vol. 10, Tab 4C 9, p. 1790]

PART II: STATEMENT OF THE POINTS IN ISSUE

26. As set out in its notice of appeal, the Appellant submits that the judgment of the Trial Division raises the following legal points in issue:

(1) Did the Court err in law in failing to use the correct legal test to determine whether waters are navigable?

(2) Did the Court err in law or on a matter of mixed law and fact in finding that the Laniel Dam is not navigable?

(3) Did the Court err in law in interpreting the term, "navigable", in a way that is inconsistent with the purpose, scope, and meaning of the NWPA?

(4) Did the Court err in law in limiting its review of compliance with the CEAA to the terms of subs. 20(1)?

(5) Did the Court err in law in failing to review compliance with the duty of procedural fairness at common law and/or under the NWPA, not just the CEAA?

(6) Did the Court err in providing findings of fact that are not supported by or inconsistent with the record and reasons?

Ref.: Notice of Appeal [AB, Vol. 1, Tab 1, pp. 3-5]

27. The Appellant organizes these points at issue into the following submissions.

PART III: CONCISE STATEMENT OF SUBMISSIONS

Standard of Review

28. The present appeal seeks relief respecting errors of law, errors of mixed fact and law, and erroneous findings of fact. According to recent jurisprudence, there are two standards of judicial review: correctness and reasonableness. Deference will apply to the reasonableness standard, but not the correctness standard. A question of law of general importance would be subject to the correctness standard. Deference will usually apply automatically where the question is one of fact, discretion or policy or where the facts cannot be "readily separated" from the law. It is submitted that this change will also affect appellate review, where there is presently a standard of "palpable and overriding error"; as these two types of judicial scrutiny are intertwined and a reform in one must inform the other. It is also submitted that, if the most deferential standard of review in a judicial review, which may have no legislative sanction, is "reasonableness" and not "patent unreasonableness", it is not appropriate to provide a more deferential standard in appellate review where the Legislature has clearly sanctioned some kind of appeal.

> **Ref.:** **(1)** *Dunsmuir v. New Brunswick* [unreported] [2008] S.C.J. No. 9, ¶s 27-30, 34, 45-47, 53, 55-56, 60, and 161 (Bastarache and LeBel JJ. (for the majority))
> **(2)***Cushman and Wakefield, Inc. v. Wakefield Realty Corp.* [2004] F.C.J. No. 2081 at 295
> **(3)** *Housen v. Nikolaisen* [2002] 2 S.C.R. 235 at 256-258, following *Canada (Director of Investigation and Research) v. Southam Inc.* (1997) 144 D.L.R. (4th) 1 at 12-13 (S.C.C.)

Submission (1): the Court erred in law in failing to use the correct legal test to determine whether waters are navigable

29. In two related findings, the Trial Judgment decided that a right of navigation through the Dam was neither "demonstrated" or "created" by usage for the past 40 years.

> **Ref.:** TDJ, ¶s 60, and 62 [AB, Vol. 1, Tab 2, pp. 35, 36]

30. It is submitted that these two findings involve a question of law of general importance and are therefore subject to the correctness standard: *Dunsmuir*, ibid, para.

60. It is further submitted that the Trial Judgment erred in law by failing to cite any legal authority from navigation law or other law in support of its conclusion on common law navigability.

31. The leading case on Canadian navigation law is the Supreme Court of Canada decision of *Friends of the Oldman River Society v. Canada (Minister of Transport)*. In this case, the former author of *Water Law in Canada* (Ottawa: Information Canada, 1973), Mr. Justice La Forest, spoke for eight members of the Court (Stevenson J. dissenting) on the application of the NWPA and federal environmental assessment to a provincial dam on the Oldman River in Alberta. In his judgment, La Forest J. made the following points about navigation law:

> (1) Navigation law has two fundamental dimensions: the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation – both of which are interrelated by virtue of s.91¶10 of the *Constitution Act, 1867*, which assigns exclusive legislative authority over navigation to Parliament.
>
> (2) In Canada, the ancient common law of England has been modified everywhere except in Atlantic Canada to abandon the distinction between tidal and non-tidal waters. The rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists.
>
> (3) The right of navigation is not a property right, but simply a public right of way.
>
> (4) The right of navigation is not an absolute right, but must be exercised reasonably so as not to interfere with the rights of others; however, the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown.
>
> (5) There is a practical necessity for a uniform regulatory regime for navigable waters involving a single body of maritime law within federal jurisdiction.
>
> **Ref.:** **(1)** *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 7 C.E.L.R. (N.S.) 1 at 38-39, 44 ("Oldman");
> **(2)** Record of June 17/06 meeting between Transport and Public Works [AB, Vol. 1, Tab 3B 8, p. 177]

32. The Trial Judgment acknowledges the authority of the *Oldman* decision on navigation law at para. 66, where it quotes two distinct paragraphs from this decision. Nevertheless, the *Oldman* decision has no influence on the Trial Judgment's approach to

the first issue it purports to address – the question whether *Les Amis* had demonstrated a common law right of navigation. On this topic, the Trial Judgment cites no jurisprudence on what makes a "waterway" navigable.

Ref.: TDJ, ¶66 [AB, Vol. 1, Tab 2, pp. 37-38]

33. Beyond the overview set out above (para. 31) provided by La Forest J. in *Oldman*, a useful summary of the existing, voluminous caselaw on the topic of navigability was provided by Henry J. from the Ontario Supreme Court in 1983:

> **"15** In Canada the leading jurisprudence has evolved in decisions of the Supreme Court of Canada in the early part of the century with respect to waters in the Province of Quebec. The principles emerging from the cases may, for our purposes, be briefly stated without much elaboration.
>
> (1) A stream, to be navigable in law, must be navigable in fact. That is, it must be capable in its natural state of being traversed by large or small craft of some sort - as large as steam vessels and as small as canoes, skiffs and rafts drawing less than one foot of water. *A.G. Quebec v. Fraser* (1906), 37 S.C.R. 577, aff'd. sub nom *Wyatt v. A.G. Quebec*, [1911] A.C. 489 (P.C.), A.*G. Quebec v. Scott* (1904), 34 S.C.R. 603, and *Keewatin v. Town of Kenora,* supra.
>
> (2) In the context of the Canadian economy where the timber trade has developed, "navigable" also means "floatable" in the sense that the river or stream is used or is capable of use to float logs, log-rafts and booms. *Leamy v. The King* (1916), 54 S.C.R. 143, and *Fraser* case, *supra*. (I note here that this development follows the corresponding development of the law in the United States.)
>
> (3) A river or stream may be navigable over part of its course and not navigable over other parts; its capacity for navigation may therefore be determined by the courts independently at different locations. The *Fraser* case, *supra*, and the *Leamy* case, *supra*.
>
> (4) To be navigable in law and river or stream need not in fact be used for navigation so long as realistically it is capable of being so used. The *Keewatin* case, *supra*, and *The Tadenac Club Ltd. v. Hebner*, [1957] O.R. 272 (Gale J., Obiter).
>
> (5) To be navigable in law, according to the Quebec decisions, the river or stream must be capable of navigation in furtherance of trade and commerce; the test according to the law of Quebec is thus navigability for commercial purposes. *Leamy v. The King, supra; A-G. Quebec v. Fraser, supra.* This was also the test in some of the earlier United States cases. So far as the law of Ontario is concerned, the commercial test was alluded to in *Gordon v. Hall, supra*, per McRuer C.J.H.C. obiter, but as I shall indicate, I do not consider the "commercial" test an element of the law of Ontario.
>
> (6) The underlying concept of navigability in law is that the river or stream is a public aqueous highway used or capable of use by the public. This concept does not embrace uses such as irrigation, power, fishing, or other commercial or non-commercial uses that do not depend upon its character as a public

aqueous highway for passage. In law a river or stream is not navigable if it is used only for the private purposes, commercial or otherwise, of the owner: See *Gordon v. Hall, supra,* citing U.S. authorities at pages 382-3.

(7) Navigation need not be continuous but may fluctuate seasonally. See *Gordon v. Hall, supra*.

(8) Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points. See *Keewatin, supra*, and *Stephens v. MacMillan*, [1954] O.R. 133 (H.C.).

(9) It would seem that a stream not navigable in its natural state may become so as a result of artificial improvements - see per Mulock C.J.O. in *Rice Lake Fur Company Ltd. v. McAllister* (1925), 56 O.L.R. 440 at pp. 449-50, cited obiter by Gale J. in the *Tadenac* case, supra, at p. 275. See also, *Stephens v. MacMillan, supra*.

Ref.: *Coleman v. Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608 at 613-15 (ONHCJ); see also the supporting decision of Doherty J. (as he then was) in *Canoe Ontario v. Reed* (1989), 69 O.R. (2d) 494 at 501-03.

34. This summary of the common law from *Oldman* and *Coleman* were both fully considered by Mr. Justice MacKay of the Federal Court Trial Division in the case of *International Minerals & Chemicals v. Canada* (hereafter, "*IMCC*"), which dealt with a request for a declaration that a waterway was not "navigable" under the NWPA. As stated by MacKay J.:

> "¶29 ….Navigable waters within the Act implicitly include the concept of an aqueous highway, as Mr. Justice Henry described the underlying concept of navigability in law. That concept in turn implies, to me, that the waters be more than a small pond or lake isolated from other waters, and more than a prairie slough that fills with spring melt and virtually dries up in late summer. It implies as well that the waters connect places which in the normal course would facilitate travel, even recreational travel, on a route that would have a likelihood of reasonably appeal to members of the public as a route to be traveled. The fact that a body of water will carry a canoe or other vessel is not in itself sufficient as a basis for considering the waters navigable and subject to regulation under the Act.
>
> ¶30 Conditions affecting navigation particularly on rivers, streams and creeks may vary over time. One thing would seem clear in light of the purpose of the Act, that is, that waters in their natural state are navigable waters continue to be so even though conditions change either by the forces of nature or by the construction of works affecting navigation."

Ref.: *International Minerals & Chemicals Corp. (Canada) v. Canada (Minister of Transport)* (1992), 10 C.E.L.R. (N.S.) 85 at 94-95, 99-100 (F.C.T.D.) ("IMCC")

35. In sum, it is submitted that the Trial Judgment erred in law in failing to consider or apply existing jurisprudence on navigability.

Submission (2): the Court erred in law or on a matter of mixed law and fact in finding that the Laniel Dam is not navigable

36. As set out above (para. 29), the Trial Judgment concluded that no right of navigation through the Dam was demonstrated or created.

> **Ref.:** TDJ, ¶s 60, and 62 [AB, Vol. 1, Tab 2, pp. 35, 36]

37. In *IMCC*, ibid., Mr. Justice MacKay concluded that the application of the correct legal test of navigability to a specific body of water involved a question of mixed fact and law. Mr. Justice MacKay reached this conclusion after reviewing a guide published by the Canadian Coast Guard in 1989 entitled, *Navigable Waters Protection Guide*, which provided a definition of navigability as follows:

> "Navigable Waters" includes any body of water capable, in its natural state, of being navigated by floating vessels of any description for the purpose of transportation, recreation or commerce; it also includes a canal and any other body of water created or altered for public use, as a result of the construction of any work, as well as any waterway where the public right of navigation exists by dedication of the waterway for public purposes, or by the public having acquired the right to navigate through long use."
>
> "Note: The preceding definition is used for administrative purposes only and is not to be construed as a legal definition of navigability; navigability is a matter of fact and not of law. The authority to determine navigability of waterways rests with the Minister of Transport."
>
> **Ref.:** *IMCC*, *ibid.* at 89

38. As stated by Mr. Justice MacKay on this point:

> "In my view the issue before the Court is a mixed question of fact and law, not simply a question of fact to be determined within the exercise of discretion by the Minister."
>
> **Ref.:** *IMCC*, *ibid.* at 90

39. Based on the most current jurisprudence, it is submitted that the standard of review for findings of mixed fact and law is "unreasonableness" if the issue is more factual than

legal; however, if the issue is more legal than factual, the standard of review may be correctness.

Ref.: **(1)** *Dunsmuir, supra*, at ¶s 51, 60-2; **(2)** *Cushman, supra,* at 295; **(3)** *Housen, supra,* at 256-8

40. It is also submitted that the standard of appellate review for reviewing a conclusion on navigability that contains no reference to any legal authority on navigation law is correctness.

41. As set out above (para. 31), the most basic test of navigability is found in *Oldman*: if, as a statement of fact a waterway is navigable, then it is navigable in law. It is undisputed by the Trial Judge that as a statement of fact, persons have navigated through the Dam for decades. It is therefore submitted that the Dam is, in law, a navigable waterway and the Honourable Judge erred in law in failing to reach this conclusion.

42. It is also submitted that Canadian jurisprudence on navigation law addresses any unusual aspects of the Laniel Dam navigation situation and supports the conclusion that the Laniel Dam is navigable in fact and law:

(1) Floatable means navigable: the Dam was designed to permit the floating of logs from above the Dam to below the Dam, was used for this purpose for several decades, and remains capable of being so used.

(2) Artificial improvements to navigation do not eliminate navigability; they may assure it.

(3) Commercial navigation of the Dam began and continued from 1987 forward.

Ref.: **(1)** *Leamy v. The King* (1916), 54 S.C.R. 143 at 146-147 (majority); **(2)** *A.G. Quebec v. Fraser* (1906), 37 S.C.R. 577 at 593-599; **(3)** *Gordon v. Hall* [1958] O.J. No. 330 at ¶12-16 (Ont. S.C.); **(4)** *Rice Lake Fur Company Ltd. v. McAllister* (1925), 56 O.L.R. 440 at 449-50 (A.D.); **(5)** *Stephens v. MacMillan* [1954] O.R. 133 at 137-146 (H.C.); **(6)** *Tadenac Club Ltd. v. Hebner* [1957] O.R. 272 at 274-78 (S.C.)

43. On the other hand, it is also submitted that the Honourable Judge's reasons in support of his conclusion that the Dam was not navigable in law have no support in existing jurisprudence:

(1) There is no basis in Canadian navigation law to assert that, although many persons have navigated a body of water, the body of water is not navigable because it may be dangerous for other persons to navigate it: para. 62.

(2) There is no basis in Canadian navigation law to assert that navigation exists only where the owner of the bed of a river or property surrounding the navigable waterway grants permission for public navigation use: para. 62. Indeed, as set out in the judgment of LaForest J. in *Oldman*:

> "¶62…[T]he right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown" [para.69].

Ref.: TDJ, ¶s 62, and 69 [AB, Vol. 1, Tab 2, pp. 36, 39]

44. In sum, the appellant submits that the Honourable Judge erred in law by failing to apply the recognized Canadian test of navigability to the Laniel Dam and by applying considerations to this question that are not part of Canadian navigation law.

Submission (3): the Court erred in law in interpreting the term, "navigable", in a way that is inconsistent with the purpose, scope, and meaning of the NWPA

45. As set out above (para. 29), the Trial Judgment concluded that a right of navigation through the Dam was neither “created” or “demonstrated” through usage for the past 40 years.

Ref.: TDJ, ¶s 60, and 62 [AB, Vol. 1, Tab 2, pp. 35, 36]

46. The appellant’s third submission on navigability is that, as a matter of law, the site of the existing and proposed Dam is navigable because of the uncontested application of the NWPA to the existing and proposed Dam. This submission begins with the Trial Judgment’s acknowledgement that the existing and proposed Dam require approval

under the NWPA. For example, as concerns the existing Dam, the Court advises that the NWPA provides:

> **Ministerial orders respecting unauthorized works**
>
> *Approval after construction commenced*
> 6.(4) The Minister may, subject to deposit and advertisement as in the case of a proposed work, approve a work and the plans and site of the work after the commencement of its construction and the approval has the same effect as if given prior to commencement of construction of the work.

Ref.: **(1)** TDJ, ¶46 [AB, Vol. 1, Tab 2, pp. 23-24];
(2) *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22, subs. 6(4) (“NWPA”)

47. Similarly, as concerns the proposed Dam, the Court advises that the NWPA provides:

> **Construction of works in navigable waters**
> 5.(1) No work shall be built or placed in, on, over, under, through or across any navigable water unless
>
> (a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;

Ref.: **(1)** TDJ, ¶51 [AB, Vol. 1, Tab 2, p. 26]
(2) NWPA, subs. 5(1)

48. By these statutory terms, particularly those set out in ss. 5(1), the NWPA applies to a work and requires approval of the same if the work is "built or placed in, on, over, under, through or across any navigable water".

49. It is thus submitted that the existence of “navigable water” is a legal condition precedent to the jurisdiction of Transport to issue a permit under the NWPA. This point is made clear, it is submitted, in the judgment of MacKay J. in *IMCC*, where, following review of the NWPA and the common law, the Honourable Judge concluded that the waters before the Court in that case were <u>not</u> navigable, and thus did <u>not</u> require approved under the NWPA.

Ref.: *IMCC, supra*, at 101-102

50. It is further submitted that this condition precedent is legally significant for both NWPA approvals. As concerns the NWPA permit for the existing Dam, it must be required because the Kipawa River is, absent the Dam, navigable at this location. Similarly, as concerns the NWPA permit for the proposed Dam, it must be required because the existing Dam is navigable. Put another way, it is submitted that, in law, the need for both NWPA permits means that the Dam was and remains in a navigable waterway. A public right of navigation existed prior to the construction and operation of the existing Dam, and a public right of navigation existed after the construction of the existing Dam by virtue of its design and long-term operation.

51. In sum, reviewing the NWPA regime, it is submitted that the Trial Judgment erred in law in its interpretation of navigability by failing to interpret correctly the purpose, scope and meaning of this regime. The NWPA applies only where navigable water exists. Thus, the need for NWPA approval for the existing and proposed Dam indicates that, in law, both are located in navigable waters. The EA also makes this point.

Ref.: EA/06, s. 1.3.1 [AB, Vol. 8, Tab 4C 4, p. 1416]

52. As concerns the standard of review, it is submitted that this error of law is an error of general importance which demands correctness as it is "of central importance to the legal system as a whole".

Ref.: *Dunsmuir*, *supra,* at ¶60; quoting *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77

Submission (4): the Court erred in law in limiting its review of compliance with the CEAA to the terms of subs. 20(1)

53. The Trial Judgment concludes that pursuant to subsection 20(1) of the CEAA, the decision that the project does not constitute a significant adverse environmental effect is "reasonable".

Ref.: TDJ, ¶81 [AB, Vol. 1, Tab 2, p. 45]

54. Respectfully, the appellant submits that the Trial Judgment made two errors of law in its review of compliance with CEAA:

(1) the Honourable Judge erred in law in his consideration of how the CEAA related to the NWPA authorization of the existing Dam; and

(2) the Honourable Judge erred in law in his consideration of how the CEAA applied to the proposed Dam by failing to apply existing jurisprudence on federal EA which demands that an EA assess all federal interests that may be affected by a project: the CEAA assessment for the proposed Dam failed to provide any focus on the federal interest in navigation: navigation was not judged a valued environmental component in scoping the EA, effects on navigation were not considered to be "environmental effects" and nor were they assessed for their significance.

55. It is further submitted that both arguments involve the interpretation of a statute of general application like the CEAA and are "of central importance to the legal system as a whole". Thus, the standard of review should be "correctness".

Ref.: *Dunsmuir*, *supra,* at ¶60; quoting *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77

Re (1): the Trial Judgment erred in law in its review of the application of CEAA to the existing Dam

56. The Trial Judgment seeks to address the need for the s.6(4) NWPA permit for the existing Dam and boom. According to the Court, the permit not only authorized the existing Dam and boom, it had a further effect:

> "¶49 … As such this decision was for the purpose of approving the dam built in 1911 and its upstream boom on Kipawa Lake. For Les Amis also, it meant that their navigation rights were now formally prohibited."

Ref.: TDJ, ¶49 [AB, Vol. 1, Tab 2, p. 25]

57. The Trial Judgment then explains why this s. 6(4) approval did not trigger the CEAA::

> "¶50 The 6(4) [note: NWPA] licensing process did not require public consultation under the *CEAA* because the existing dam was built prior to June 22, 1984, as stipulated by subsection 74(4) of the *CEAA*. Similarly, no environmental screening, including an analysis of potential mitigation measures, and an EA decisions pursuant to the *CEAA* were necessary prior to the issuance of the subsection 6(4) permit."
>
> **Ref.:** TDJ, ¶50 [AB, Vol. 1, Tab 2, p. 25]

58. Subsection 74(4) of the CEAA provides:

> "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."
>
> **Ref.:** *Canadian Environmental Assessment Act,* 1992*,* c. 37, subs. 74(4)

59. Reviewing subsection 74(4), it is submitted that this provision does not exempt the existing Dam from the CEAA, as was concluded by the Trial Judgment. Rather, there is an exemption from CEAA for the construction or operation of an existing physical work that requires an approval such as the s. 6(4) NWPA approval if and only if there is no modification or other alteration to the project.

60. Thus, Public Works was exempt from CEAA for its 6(4) approval as long as the approval merely addressed the existing Dam construction and its operation. Since Public Works did not seek CEAA authorization, the only correct conclusion is that it did not seek or obtain approval of any changes to the construction or operation of the existing Dam.

61. It is thus submitted that the Trial Judgment erred in law in finding that the s. 6(4) approval did not trigger the CEAA, but did change the operation of the Dam to prohibit navigation.

Re (2): the Trial Judgment erred in law in its review of the application of the CEAA to the proposed Dam

62. There has been considerable litigation on how federal environmental assessment relates to federal interests like navigation.

63. The first major decision on this point is the Supreme Court of Canada decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*. The *Oldman* case first explained the law regarding the scope of assessment under federal EA (referring to the terminology of the former EARPGO regime):

> "¶98 I should make it clear, however, that the scope of assessment is not confined to the particular head of power under which the government of Canada has a decision-making responsibility within the meaning of the term "proposal". Such a responsibility, as I stated earlier, is a necessary condition to engage the process, but once the initiating department has thus been given authority to embark on an assessment, that review must consider the environmental effects on all areas of federal jurisdiction."
>
> **Ref.:** *Oldman, supra*, at 53

64. Following *Oldman*, the most current decision on the scope of assessment of federal interests is, it is submitted, from this Court in *Friends of the West Country Assn. v. Canada (Minister of Fisheries).* In this judgment, the Court was asked to rule on the proper scope of federal environmental assessment under the CEAA. The Court cited the above passage from *Oldman* and then provided as follows:

> "¶38 … Although the Court in *Oldman River* was dealing with the federal environmental assessment regime which the *CEAA* replaced [footnote: *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467], the principle is equally applicable here notwithstanding the different terminology of the current legislation. However, given the divided constitutional jurisdiction over environmental assessments between the federal government and the provinces, it follows that the federal responsible authority is to focus its environmental assessment on effects within federal jurisdiction – such as in this case, the effects on "Navigation and Shipping Sea Coast", "Inland Fisheries", and "Indians, and Lands reserved for the Indians" [footnote: *Constitution Act, 1867*, s.91(10), (12) and (24)]."
>
> **Ref.:** *Friends of the West Country Assn. v. Canada (Minister of Fisheries)* [2000] 2 F.C. 263 at 286-7 (F.C.A.)

65. On the basis of these two appellate decisions, it is submitted that, as concerns federal environmental assessment, the fundamental <u>focus</u> of the assessment must be upon effects within federal jurisdiction, such as navigation.

66. It is submitted that the EA carried out on this project fails in a fundamental way to satisfy this legal guidance. The Trial Judgment referenced an English summary of the

"almost-final" EA that was provided to *Les Amis* in September 2005. It sets out the focus of the assessment upon what it calls "valued environmental components" (VECs), and provides the following:

> "The valued environmental components (VECs) identified are: vegetation, water quality and fish habitat, wildlife and terrestrial habitats, air quality, noise, aesthetics, archaeological and heritage resources and land use."

Ref.: **(1)** EA/06, English excerpts, p. 1 [AB, Vol. 10, Tab 4C 7, p. 1735];
(2) Annexe B to EA/06, EA Table of Contents, s. 4.3 [AB, Vol. 9, Tab 4C B, p. 1607]

67. It is submitted that this list of the key factors of the assessment fails to meet the minimum requirements of federal environmental assessment because it provides no mention of, let alone focus on, navigation.

68. Further, turning to the full French version of the August 2005 almost-final EA (the "EA/05"), it provides no consideration of "navigation" in its sections "2.0 Description du Projet", "3.0 Description de l'environnement existent", "4.0 Méthodologie de l'évaluation des effets sur l'environnement", or "5.0 Évaluation des effets sur l'environnement". Thus, the EA/05 does not advise how the Dam has been used for navigation, the years of navigation usage, the seasonal range of usage, or the future potential of this usage.

Ref.: Public Works Évaluation environnemental Barrage Laniel, dated August 31, 2005 (hereafter "EA/05") [AB, Vol. 8, Tab 4C 2, pp. 1287-1400]

69. Within the Aug/05 EA, the only consideration of the Kipawa River Rally is under "Land Use". Similarly, in its consideration of the significance of effects, the Aug/05 EA limits its consideration of concerns raised by *Les Amis* to "Land Use". In particular, an interruption of the festival would be a significant impact, but there is no criterion that addresses the significance of interrupting navigation, and no other evaluation of the significance of this effect.

Ref.: EA/05, pp. 63-64, 68-70, 94-95 [AB, Vol. 8, Tab 4C 2, pp. 1356-7, 1361-3, 1387-8]

70. These flaws with the Aug/05 EA are maintained in the final EA done in the January 2006 EA (the "EA/06").

Ref.: EA/06, pp. 80-81, 86-87, 111-114 [AB, Vol. 8, Tab 4C 4, pp. 1405-1529 at pp. 1480-81, 1486-87, 1511-14]

71. Similarly, the decision by the federal Government lacks any recognition of impacts of navigation. It provides:

> "As detailed in the environmental assessment report, mitigation measures have been required for the project to address:
> - air quality
> - water quality
> - water quantity
> - sedimentation
> - soil quality
> - vegetation
> - noise levels
> - birds and/or their habitat
> - structure, site or thing of historic, archaeological, paleontological or architectural significance
> - socio-economic impacts
>
> …."

Ref.: **(1)** TDJ, ¶56 [AB, Vol. 1, Tab 2, pp. 31-32]
(2) EA/06, s. 7.0 [AB, Vol. 8, Tab 4C 4, p. 1521]

72. Returning to law, it is submitted that existing jurisprudence provides no legal authority for an EA to altogether skip a factor concerning a key federal interest such as navigation, particularly the factors setting out the duty to, under paragraph 16(1)(a), consider a likely, adverse, and environmental effect and, under paragraph 16(1)(b), consider the significance of the effect. It is further submitted that, as concerns federal interests, the failure to address or carefully assess such an interest is legally fatal to an EA: see *Union of Nova Scotia Indians v. Canada*.

Ref.: **(1)** *Union of Nova Scotia Indians v. Canada* (1996), 22 C.E.L.R. (N.S.) 293 at 311-13 (F.C.T.D.);
(2) TDJ, ¶ 87 [AB, Vol. 1, Tab 2, pp. 47-48]

73. The appellant further submits that these failings with the EA cannot be corrected by post-facto analysis by a court. Reviewing the Trial Judgment, it is submitted that it appears to carry out its own assessment of the significance of certain effects instead of examining the completed EA that formed the basis for their decision under review. In

particular, the Trial Judgment appears to carry out this kind of post-facto assessment from paragraphs 69 to 81. However, none of these paragraphs contain any reference to the EA and, it is submitted, none of the conclusions reached by the Honourable Judge in these paragraphs rely on the EA. It is therefore submitted that the Trial Judgment erred in law by failing to apply the general rule that a judicial review must be based on the material before the decision-maker.

> **Ref:** **(1)** *Smith v. Canada*, [2001] F.C.J. No. 450 at 191;
> **(2)** *Swain v. Canada (Attorney General)* [2003] F.C.J. No. 1719 at ¶2

74. The closing submission of the Appellant on this point is that, for a federal interest like navigation, an EA cannot avoid consideration of ss. 16(1)(a) and (b) by considering mitigation measures that may have some relevance to an adverse effect. Thus, although the EA provides some consideration of mitigation measures related to portaging around the Dam, in law, these considerations involve of mitigation of "Land Use" impacts, not navigation impacts. Moroever, mitigation is a consideration under CEAA paragraph 16(1)(d), not paragraphs 16(1)(a) or (b). Thus, it does not rectify omissions under these earlier paragraphs.

75. In sum, the Appellant submits that the Trial Judgment erred in law in failing to demand compliance with the full requirements of ss. 16(1) concerning navigation impacts.

Submission (5): Did the Trial Division err in law in failing to review compliance with the duty of procedural fairness at common law and/or under the NWPA, not just the CEAA?

76. The Appellant focuses this submission on two points of common law.

77. The first point of common law is the submission that the EA, by its silence on navigation, does not respond to the navigation concerns raised by *Les Amis* in March 2005 and thereafter. Thus, it does not comply with a common law duty of fairness.

Ref.: *Crestpark Realty Ltd. V. Canada (Minister of Transport)* (1986), 1 C.E.L.R. (N.S.) 121 at 127(F.C.T.D.)

78. The second point of law is the submission that the Trial Judgment failed to follow the terms of the NWPA and common law jurisprudence respecting the legal implications of the first NWPA permit on existing navigation rights.

79. The NWPA regime applies to works in navigable waterways because its purpose is to protect navigation.

Ref.: *IMCC, supra,* at 99-100

80. The Appellant submits that this conclusion is inconsistent with the Court's subsequent conclusions at paras. 60 and 62, cited above (para. 29), that no right of navigation through the Dam was "demonstrated" or "created".

81. The appellant submits also that this conclusion is wrong in law: no aspect of the NWPA permit authorizing the existing Dam and boom expressly prohibits navigation or changes the status quo respecting navigation.

82. Reviewing the terms of the s.6(4) NWPA permit itself, it is brief and says nothing about changing the Dam or the boom or their operation. The appellant thus respectfully submits, in accordance with longstanding rules of legal interpretation, that a legal instrument such as an NWPA approval does not extinguish existing navigation rights unless it expressly provides so. As stated by the Supreme Court of Canada regarding "vested rights" generally:

> "¶32 The Principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to

Parliament and the provincial legislatures. As E.A. Driedger states in *Construction of Statutes* (2nd ed. 1983), at p. 183, these presumptions

- …were designed as protection against the interference by the state with the liberty or property of the subject…."

Ref.: **(1)** NWPA permit, dated October 24, 2004 [AB, Vol. 6, Tab 4B 7, p. 1034]
(2) *Dikranian v. Quebec (Attorney General)* [2005] 3 S.C.R. 530 at 546

83. Similarly, the public notice on this approval explicitly advises that the approval concerns the "existing dam, dyke and boom". It makes no reference to any change in these structures or their operation.

Ref.: Public Notice, dated September 10, 2005 [AB, Vol. 6, Tab 4B 6, p. 1027]

84. Lastly, it is submitted that the NWPA itself provides three further reasons why the s.6(4) permit does not prohibit navigation:

(1) First, in law, no aspect of the NWPA approval regime requires or provides that the approval of an existing or new work means that a navigable waterway has become non-navigable: the trigger for the approval is merely the existence of a work that is "in, on, over, etc." navigable water, not the extinguishment of navigation.

Ref.: NWPA, s. 5(1)

(2) Second, in the case of a dam or boom, the NWPA provides no legal basis to conclude any approval interferes "substantially with navigation". This legal conclusion applies to other works as the NWPA exempts such works from approval <u>unless</u> they interfere substantially with navigation. However, the NWPA expressly advises that this test does not apply where the work is a "bridge, boom, dam or causeway". It is thus submitted that all dams, booms, etc. require NWPA approval even if they provide no or minimal interference with navigation.

Ref.: NWPA, s. 5(2)

(3) Third, subs. 10(1) of the NWPA provides that "any lawful work" may be rebuilt or repaired if, in the opinion of the Minister, interference with navigation is not

increased by the rebuilding or repairing.. Thus, if the first NWPA permit extinguished navigation at the Dam, then the construction of the new Dam would not require approval under ss. 5(1)(a) since the new Dam would not increase "interference with navigation". As approval was required, the new Dam must not fit the terms of subs.10(1).

Ref.: NWPA, s. 10(1)

85. For all of these reasons, it is submitted that the Trial Judgment erred in law in concluding that the issuance of the NWPA approval for the existing dam and boom "extinguished" existing navigation rights at the Dam. It is also submitted that the standard of review for this error of law is correctness because of its general importance.

Submission (6): Issues with certain facts set out in the Trial Judgment

86. In its Notice of Appeal, the Appellant advised the parties and this Court that, on four matters, the Trial Judgment was internally inconsistent or inconsistent with the record before it. These four matters are:

(1) the number of days per year when the Laniel Dam is navigable;

(2) the role of safety in the government decision to prohibit navigation through the Dam;

(3) the steps taken by the government to prohibit navigation; and

(4) the adequacy of access to information for *Les Amis*.

87. Until recently, the standard of review for these matters appeared to be the existence of a "palpable and overriding error"; however, it is submitted that the current standard is simply "reasonableness", such that an unreasonable judgment is set aside.

Ref.: **(1)** *Dunsmuir*, *supra*, at ¶161
(2) *Cushman, supra,* at 295

88. Before applying this test, however, the Appellant makes the preliminary submission that the first three of these matters of "fact" should be set aside because they depend on documents and evidence that were not part of the EA that supported the government decisions at issue in this litigation. Thus, as set out above (para. 73), these matters of fact violate the general rule that a judicial review of a decision must be based on the material that was before the decision maker.

89. The Appellants were not aware of this Rule at Trial; however, the present factum has been drafted in accordance with this Rule and the Appellant submits that this Rule should be applied to this appeal.

Issue (1): the number of days in a year when the Laniel Dam is navigable

90. This is the first issue affected by the problem that the EA does not ever address this topic. For this reason, it is submitted that the findings on this topic should be set aside.

91. Alternatively, if this Court concludes that the proper record is broader than the EA, a further problem with the Trial Judgment's consideration of this point is that it includes several inconsistent statements, none of which consider the best evidence of *Les Amis.* Under cross-examination, the main affiant for *Les Amis* advised that, based on a 30-year review of flow information, the Dam has been runable, on average, thirty percent of the time from May 15 to November 15. This represents approximately 70 days per year. By contrast, in the Trial Judgment, ¶73 advises that the Dam is a Class III waterway for approximately 25 days per year (with para. 70 advising that Class III waterways can be run safely by intermediate paddlers), which implies navigability for more days per year for advanced kayakers; and paragraph 78 advises that the Dam is navigable for "less than 20 days a year" as well as "little more than 20 days per year".

Ref.: **(1)** TDJ, ¶s 70, 71, 73, and 78 [AB, Vol. 1, Tab 2, pp. 39, 41, 44];
(2) Cross-Examination of D. Skeggs, ¶133-142 [AB, Vol. 2, Tab 3C, pp. 397-9]

92. It is thus also submitted that the Trial Judgment findings are unreasonable.

Issue (2): by November 2005, the government had provided public access to all relevant documents

93. According to the Trial Judgment, by November 2005, Public Works had provided *Les Amis* with access to all mandatory public registry materials.

Ref.: TDJ, ¶34 [AB, Vol. 1, Tab 2, pp. 19-20]

94. It is submitted that this finding is unreasonable. The EA clearly contains the request by *Les Amis* for information on the legal authority to prohibit navigation of the Dam. Nothing in the EA addresses this request. However, through this litigation, the Appellant obtained access to two documents on navigation law not discussed in the EA, but existing at the time of the October 2005 request: (1) June 2005 meeting minutes between Public Works and Transport on navigation issues; and (2) an undated document on navigation law provided to the EA team by a team member.

Ref.: **(1)** Affidavit of D. Skeggs, ¶s 14-17, 21, 125-132, and 136-140 [AB, Vol. 1, Tab 3B, pp. 83-86, 87-88, 119-122, 123-124];
(2) July 4, 2005 email to Public Works, Annexe F to EA/06 [AB, Vol. 9, Tab 4C F, p. 1698];
(3) Compte-rendu de la reunion du 17 juin [AB, Vol. 1, Tab 3B 8, pp. 177-183];
(4) "Navigation and Safety" [AB, Vol. 9, Tab 4C 5, pp. 1728-29]

95. Among other things, these two documents provide that: (1) the Kipawa River was navigable; (2) the NWPA cannot restrict navigation across the boom; and (3) no law prohibits navigation other than the *Boating Restriction Regulations* (*BRR*) under the *Canada Shipping Act*, which involves another branch of Transport than the NWPA.

Ref.: **(1)** "Navigation and Safety" [AB, Vol. 9, Tab 4C 5, pp. 1728-29]
(2) *Navigable Waters Works Regulations*, C.R.C., c. 1232, s. 7;
(3) *Boating Restriction Regulations*, C.R.C., c. 1407, ss. 3, 3.1, and 8

96. As these points were clearly relevant to the concerns of *Les Amis* and its requests for information, it is thus submitted that the Trial Judgment is unreasonable on its findings respecting access to information.

Issue (3): Steps taken by the government to prohibit navigation

97. According to the Trial Judgment, the federal government, as owner of the Dam, had a legal responsibility to ensure the safety of its property, prohibit persons navigating the Laniel Dam, and put in place booms and signs.

Ref.: TDJ, ¶75 [AB, Vol. 1, Tab 2, p. 42]

98. The EA report is silent on all these points. On the other hand, Annexe E contains information on this point, but its information is fundamentally misleading and incomplete: it was prepared prior to the June/05 meeting with Transport that addresses these points and provides opposite conclusions. It is thus submitted that the Trial Judgment's findings on this point are unreasonable.

Ref.: Compte-rendu de la reunion du 17 juin [AB, Vol. 1, Tab 3B 8, pp. 177-183]

Issue (4): Safety concerns support the government prohibiting navigation of the Laniel Dam

99. As with Issues (1) and (3), above, the first problem with the Trial Judgment is that the EA report contains no discussion of this point because it does not consider navigation. Similarly, as with Issue (3), above, Annexe E to the EA/06 provides brief consideration of prohibiting navigation of the Dam, but, again, this consideration relies on a mistaken view of legal standards: it was written prior to the June/05 meeting on navigation law. It is thus submitted that there is no reasonable basis for the Trial Judgment's findings of fact on this point.

100. Additionally, it is submitted that the Trial Judgment is unreasonable for its inconsistency: on the one hand, it concludes that it was acceptable for Public Works to assert that safety was a major issue with navigating the Dam; yet, on the other hand, it

also acknowledges that Public Works was proposing to facilitate access to lower portions of the River below the Dam that are much more difficult to navigate.

Ref.: **(1)** TDJ, ¶s 70, 74, 75, 80, and 88-89 [AB, Vol. 1, Tab 2, pp. 39, 41, 42, 45, 48]
(2) Affidavit of J. F. Coffey, ¶s 15-25 [AB, Vol. 3, Tab 3G, pp. 444-52];
(3) Affidavit of D. Skeggs, ¶48 [AB, Vol. 1, Tab 3B, p. 95];
(4) *Brief History*, re classification of the relative ease of navigating all whitewater portions of the Kipawa River, 5th to 9th pages [AB, Vol. 1, Tab 3B 9, pp. 189-193]

PART IV: CONCISE STATEMENT OF THE ORDER SOUGHT

101. The appellant respectfully asks the Court of Appeal to:

(1) grant the appeal;

(2) quash the decisions of the Respondent Ministers and Departments, respecting the approval of the Laniel Dam Rehabilitation on or about February 8 or 9, 2006 under the *Canadian Environmental Assessment Act* (CEAA) and the *Navigable Waters Protection Act* (NWPA);

(3) declare that the Kipawa River from Laniel to Temiscamingue, including the existing Laniel Dam, is navigable;

(4) grant the Appellant its costs on the appeal and the original application; and

(5) grant such further and other relief as counsel may request and the Court consider just.

Dated: April 14, 2008

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PART V: LIST OF AUTHORITIES TO BE REFERRED TO

1. *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22;
2. *Canadian Environmental Assessment Act*, 1992, c.37;
3. *Navigable Waters Works Regulations,* C.R.C., c. 1232;
4. *Boating Restriction Regulations,* C.R.C., c. 1407;
5. *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.);
6. *Coleman v. Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608 (ONHCJ);
7. *Canoe Ontario v. Reed* (1989), 69 O.R. (2d) 494 (ONHCJ);
8. *International Minerals & Chemicals Corp. (Canada) v. Canada (Minister of Transport)* (1992), 10 C.E.L.R. (N.S.) 85 (F.C.T.D.);
9. *Leamy v. The King* (1916), 54 S.C.R. 143;
10. *A.G. Quebec v. Fraser* (1906), 37 S.C.R. 577;
11. *Gordon v. Hall* [unreported] [1958] O.J. No. 330 (Ont. S.C.);
12. *Rice Lake Fur Company Ltd. v. McAllister* (1925), 56 O.L.R. 440 (S.C.A.D.);
13. *Stephens v. MacMillan* [1954] O.R. 133 (Ont. S.C.);
14. *Tadenac Club Ltd. v. Hebner* [1957] O.R. 272 (Ont. S.C.);
15. *Friends of the West Country Assn. v. Canada (Minister of Fisheries)* [2000] 2 F.C. 263 (F.C.A.);
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Les Amis de la Rivière Kipawa incorporated as 1162209036 Quebec Inc.

v. The Attorney General of Canada and the Minister of Public Works and Government Services Canada, the Minister of Fisheries and Oceans, the Minister of Transport

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FEDERAL COURT OF APPEAL

PROCEEDING COMMENCED AT:
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