TABLE OF CONTENTS

PAGE No

PART I - Facts 471

Overview 471

Navigation History and the Applicant 472

The Environmental Screening Process and Environmental Effects 474

NWPA Permit Approvals 481

The Responsible Authorities Consultation Process and Applicant Participation 482

PART II - Issues 485

PART III - Submissions 486

Issue 1: Standing 486

Issue 2 - The Public Right of Navigation and Navigability 488

ISSUE 3: Jurisdictional Errors by the Ministers of the Responsible Authorities under the CEAA... 490

Issue 4: Did the Ministers of PWGSC and TC violate the Applicant's natural justice rights denying it meaningful participation in the process contrary to 18(3) and 20 of the CEAA? 494

Issue No. 5 Did the Ministers of PWGSC and TC commit reviewable error in reaching the joint decision of February 9, 2006 498

PART IV - Orders Requested 499

PART V - List of Authorities 502

PART I - Facts

Overview

1. This is a judicial review of the environmental assessment and screening process (the EA) and decision rendered under the *Canadian Environmental Assessment Act* ("CEAA") jointly by three responsible authorities, Public Works and Government Services Canada ("PWGSC"), Transport Canada ("TC") and Fisheries and Oceans Canada ("FOC"). The EA process was coordinated by PWGSC. It was also the Project proponent. This Application focuses on the conduct and decisions of TC and PWGSC, not FOC.

2. The decision required the Minister of TC grant a permit approval under Section 5(1)(a) of the *Navigable Waters Protection Act (NWPA)*, in effect authorizing PWGSC to demolish a dam built in about 1911 and replace it ("the Laniel Dam" or "the Project") at the outflow of Lake Kipawa, located in Laniel, Quebec, flowing into the Kipawa River. The decision, released February 9, 2006 states the Project is "***not likely to cause significant adverse environmental effects***" however one of the Project's **de facto** effects is to destroy future navigation from the lake into the river. The decision excludes any reference to the fact of the elimination of marine navigation and the common law right of navigation caused by the proponent and riparian dam owner PWGSC as a consequence of the decision and permit granted under Section 5(1) of the NWPA.

Decision dated February 9, 2006, Applicant's Application Record, Vol. I, Tab B2.

3. Over the past 19 years, the Kipawa River has become an increasingly popular whitewater recreation and tourism destination and is recognized as a premier whitewater destination in

Canada, navigated by kayakers, rafters and canoeists ("whitewater paddlers") from Lake Kipawa to Lake Temiscaming. Known navigation of the Kipawa River by whitewater paddlers dates back to 1968.

Affidavit of Doug Skeggs, par. 35 and 59, and Exhibit J, Applicant's Application Record, Vol. I, Tab B, p. 38 and 43, and Tab B10.

Navigation History and the Applicant

4. The Kipawa River is part of the Ottawa River watershed and flows approximately 16 kilometers from Lake Kipawa into Lake Temiscaming. The Applicant was started by whitewater paddlers in 1998. It is volunteer-run and its purpose is to promote the preservation and conservation of the Kipawa by promoting it as a whitewater tourism destination and to oppose threats to the river such as the diversion of the river proposed by Hydro Quebec development plans in 1998. It began hosting the annual Kipawa River Rally festival in 1998, originally started by a recreational paddling club known as the Northern Ontario Liquid Adventurers Club (NOLAC) in or about 1987. The Applicant became a non-profit corporation in 2004.

Affidavit of Doug Skeggs, par. 4 and 41 and Exhibit J , Applicant's Application Record Vol. I, Tab B, p. 24 and 39 and TabB10.

5. The Applicant enhances public awareness and informs people about the important historical, ecological, recreational tourism and heritage values of the river. The Applicant promotes the river through its website www.kipawariver.ca . The river rally festival is held on the Jean Baptiste weekend in June each year. Through the website it posts information to the public about the recreational and ecological values of the river, threats facing the river and identifies, explains and rates the difficulty of the rapids found along its length to interested paddlers traveling to the

Kipawa. The annual river rally began approximately 20 years ago and is known to be the second oldest river rally in eastern North America, pre-dated only by the Gauley River festival in West Virginia. The Applicant also participates in and addresses conferences relevant to river use and preservation.

Affidavit of Doug Skeggs, par. 5, 6, 7 and Exhibit J, Applicant's Application Record Vol. I, Tab B, p. 24-25 and Tab B10.

6. Traditionally, navigation of the Kipawa River by whitewater paddlers starts on Lake Kipawa. The run of the river starts through the spillway of the Laniel Dam. Navigation through the spillway has been carried out openly for decades as seasonal water levels permit. Up until the meeting with the PWGSC representative in March 2005 at the consultation in Laniel, Quebec, the Applicant had historically enjoyed the cooperation of PWGSC in ensuring appropriate water levels for the annual river festival and was unaware that there was any issue about the history of safe navigation from the lake into the river or the exercise of the public common law right of navigation.

7. Throughout its length, the river has numerous rapids ranging from Class II up to Class VI in level of difficulty (using the internationally accepted rating scale for rapids in moving water). The rapids, including the spillway, were individually described, identified and rated for level of difficulty in 1986 by Mr. Doug Skeggs and Mr. Peter Karwacki. From 1988 onward until the Project, whitewater paddlers openly and publicly navigated from the lake into the river via the spillway. PWGSC cooperated with the Applicant in providing water releases to ensure sufficient level and flow for a successful rally. The deponent for the proponent PWGSC, Mr. Yvon Morin, denied specific knowledge of this history of cooperation. On cross-examination, however, he

acknowledged he was not personally involved with the Laniel Dam management until the year 2000 and conceded that he was aware that the Applicant had been in contact with others within PWGSC and had no idea whether or contrary information to that of Mr. Skeggs that requests to PWGSC date back to the 1980s.

Affidavit of Doug Skeggs, par. 41-48, Applicant's Application Record, Tab B, p. 39-41.
Examination of Yvon Morin, par. 16-17, 104-118, 132-134 (see Respondent Record).

8. Over that time, attendance at the river festival has grown annually, from 30 participants at the inception of the festival to approximately 400 in 2005. Commercial rafting companies also now use the river, one in 1995 and a second company started running trips in 2005. Whitewater tourism to the area has grown steadily. The Applicant raised $35,000.00 in 2000 for the construction of a hiking trail along the river in co-operation with the local municipality.

Affidavit of Doug Skeggs, par. 49-62, Applicant's Application Record, Vol. I, Tab B, p. 41-44.

9. Navigation from the lake into the river through the spillway is considered a Class III rapid and is a safe and integral part of the whitewater navigation of the Kipawa. It forms a safe but exciting initiation into Kipawa River for whitewater paddlers new to the river and is in part responsible for it achieving the recognition as a premier whitewater tourism destination.

Affidavit of Doug Skeggs, par. 63-65, Applicant's Application Record, Vol, I, Tab B, p. 44-45.
Affidavit of Jim Coffey, par. 15, 16, 23 and 24 and Exhibit B, Applicant's Application Record Vol. II, Tab H, p. 407-408, 412-413, and Tab H-B.

The Environmental Screening Process and Environmental Effects

10. The Laniel Dam has been operational since approximately 1911. The plan to demolish and replace the dam triggered the requirement for an environmental assessment. That assessment, an

environmental screening, included a targeted public consultation. The Applicant received written invitation to the targeted consultation.

Affidavit of Doug Skeggs, par. 66-69, and Exhibits M,N and O, Applicant's Application Record Vol. I, Tab B, p. 46-47 and Tab B13-15.

11. The targeted consultation meeting was held in Laniel, Quebec on March 16, 2005. The Applicant participated in that meeting. TC did not. The Applicant sought to address the Project's design and its negative impact on marine navigation from the lake into the river as a significant environmental effect of the Project. The Applicant attempted to engage the PWGSC Project manager, Mr. Robert Laporte, in a discussion concerning the merits, possibility and feasibility of the Project not interfering with or causing a negative impact to whitewater tourism and the Kipawa's status as a premier whitewater paddling destination. It attempted to engage PWGSC in a review of the possibility and feasibility of preserving navigation from the lake to the river. First Nations representatives at the meeting also noted the loss of kayaking through the spillway was a concern for them in the Project.

Affidavit of Doug Skeggs, par. 70-74, Applicant's Application Record Vol I, Tab B, p.47-48. Affidavit of Kim Turnbull sworn 2006, par. 51, Exhibit KT, Appendix E, table 2.1, (see Respondent Record).

12. At this meeting PWGSC announced, for the first time, the position that navigation from the lake into the river through the spillway was illegal, unsafe and not permitted. It maintained that position steadfastly throughout the screening process. That meeting in March 2005 was the first and last time Mr. Laporte directly addressed any representative to the Applicant.

13. On April 5, 2005, the Applicant provided written submissions to PWGSC detailing its concerns in a document dated April 4, 2005. The Applicant advised that it was unaware of any law or regulation denying the public right of navigation and confirming the long standing exercise of that right and providing a further document entitled *A Brief History of Modern Commercial and Recreational Navigation on the Laniel to Lake-Temiscaming Section of the Kipawa River in Northwest Quebec (the History of Navigation).* This document traces paddling back 40 years.

Affidavit of Doug Skeggs, par. 77 and Exhibits P and J, Applicant's Application Record Vol. I, Tab B, p. 49 and Tab B10 and B16.

14. The Applicant requested proof of the assertion of illegality. None was ever provided. In fact, the PWGSC deponent, Mr. Morin, stated, on cross-examination, that no law, statute or regulation demonstrating the claim of illegality was produced or available as the sport was relatively new.

Transcript of Examination of Yvon Morin, par. 268-270 (see Respondent Record).

15. The Applicant further attempted to engage the relevant responsible authorities by writing directly to the Minister of TC on April 6, 2005 and supplying the same document it supplied to PWGSC seeking protection from TC of the common law right of navigation under the *NWPA.*

Affidavit of Doug Skeggs, par. 81-84 and Exhibit R, Applicant's Application Record Vol. I., Tab B, p. 51-52 and Tab B18.

16. On May 27, 2005, representatives of the Applicant met with the manager of marine engineering responsible for the Laniel Dam, Mr. Yvon Morin, at PWGSC. Mr. Morin was shown a DVD video showing whitewater paddlers navigating from the lake to the river safely. Mr. Morin commented that the activity was extreme. The Applicant raised the accommodation made for snowmobiles to cross the deck of the dam and questioned the rationale of facilitating the ongoing

activity of snowmobiling while at the same time not preserving navigation rights. The Applicant offered to put PWGSC in contact with insurance industry professionals familiar with the sport to assist in assessing the relative risks of the navigation.

Affidavit of Doug Skeggs, par. 81-84 and Exhibit R, Applicant's Application Record Vol. I, Tab B, p. 50-52 and Tab B18.

17. During the EA process prior to the June 24-27, 2005 river rally, the Applicant contacted the president of the municipal council of Laniel, Mr. Yvon Gagnon, to inquire about water levels and was informed that the water levels in the lake were high. The Applicant then contacted Mr. Morin to confirm cooperation by PWGSC to release sufficient water from the lake for the river rally that year. Mr. Morin advised, in contrast, that water levels were low. The Applicant contacted Mr. Morin again on June 23rd. By the time of the river rally the level of the lake had been lowered by PWGSC by a significant release the week before. Mr. Morin acknowledged in cross-examination that there was significantly more water released in the week before the river rally than the weekend of the rally. He acknowledged that the higher water release of the week before could have coincided with the rally weekend with no measurable negative impact to the water management regime.

Affidavit of Doug Skeggs, par. 88-96, Applicant's Application Record, Vol. I, Tab B, p. 53-56. Examination of Yvon Morin, par. 178-179 (see Respondent Record).

18. On or about June 23, 2005 the Applicant received a draft of the public consultation report and responded to it under letter dated July 14, 2005 repeating that it had demonstrated 40 years of navigation safely from the lake into the river via the spillway and that its elimination will significantly impact users and potential new commercial whitewater rafting on the river and that

no rationale had been provided as to why snowmobiling was being accommodating by the dam owner but not marine navigation.

Affidavit of Doug Skeggs, par. 92, 100-102 and Exhibit Y, Applicant's Application Record, Vol. I, Tab B, p. 54, 57-59 and Tab B25.

19. The responsible authorities PWGSC and TC received numerous communications requesting that navigation from the lake into the river be preserved and attesting to its importance and its relative safety. In particular, the responsible authorities received letters from two rafting companies attesting to the significance of preserving navigation to the conduct of their operations on the Kipawa.

Affidavit of Doug Skeggs, par. 56 and Exhibits K and L, Applicant's Application Record Vol. I, Tab B, p. 42 and Tab B11 and B12.

20. The Applicant again wrote directly to the manager of the NWPA program and the department responsible for protection of navigation rights under the NWPA on August 19, 2005. The environmental officer of PWGSC, confirms in her affidavit, that TC is the competent department concerning navigation rights. Despite this fact, the response from the NWPA program at the time bluntly advised the Applicant that the Project will be studied under the Act but referred the Applicant back to PWGSC to get more information on the Project. The Applicant replied that it was not receiving any information from PWGSC about protection of the public right of navigation in the Project.

Affidavit of Doug Skeggs, par. 88-103 and Exhibit AA, Applicant's Application Record, Vol. I, Tab B, p. 53-39 and Tab B27.
Affidavit of Kim Turnbull, par. 37 (see Respondent Record).

21. Although FOC confirmed its role as a responsible authority in February 2005, TC did not confirm its status as a responsible authority until June 2005, months after the targeted consultation was held. The timing of its decision followed the Applicant sending correspondence directly to TC that had not initially participated in the ea consultation process. The evidence from the responding deponents conflicts as to the reason for that, the timing of the acknowledgement and the cause of the TC decision in June. PWGSC environmental officer Kim Turnbull did not acknowledge that the Applicant played any role in the June 2005 decision. However, PWGSC deponent Mr. Morin said the Applicant did.

Affidavit of Kim Turnbull, par. 26-30 (see Respondent Application Record).
Affidavit of Yvon Morin, par. 108 (see Respondent Record).

22. Marine navigation through the spillway was witnessed and recorded at the June 2005 river rally by an officer with NWPA branch of TC, Mr. Guy Lafond. He completed a site visit on June 25, 2005, taking digital photographs, a video and preparing a site report No injuries were observed.

Affidavit of Richard Jones, par. 31-33 (see Respondent Record).

23. When questioned about the site visit and report prepared by TC and the fact of navigation at the June 2005 festival, Mr. Morin stated he never read the report, just looked at a couple of pictures.

Examination of Yvon Morin, par. 230 (see Respondent Record).

24. Mr. Morin also acknowledged that he never read the *History of Navigation Document* that was submitted to PWGSC.

Examination of Yvon Morin, par. 227 (see Respondent Record).

25. Consistent with the above, the PWGSC Environmental Regulations Officer, Kim Turnbull attests and underlines what she states to be all of the documents used by PWGSC to determine the significance of impact on navigation. She identifies none of the following documents as being considered by the PWGSC or reviewed by it on the issue of the significance of impacts on navigation: the *History of Navigation Document* supplied by the Applicant; the DVD supplied by the Applicant; the site report, pictures and video taken June 25, 2005 by the NWPA officer from TC; the letters from the affected rafting companies running trips on the Kipawa.

Affidavit of Kim Turnbull, par. 71-72 (see Respondent Record)

26. On October 14, 2005 PWGSC released select portions of the screening report, translated from French to English, to the Applicant. The full report is in French only. The Applicant was given two weeks to respond. It responded to the screening report by letter dated October 25, 2005 detailing the failure of the report to address marine navigation issues from the lake into the river and the failure to address the project's impact on rafting companies and recreationally paddlers who navigate the river and the fact that the authorities were relying on letters from organizations not directly involved in marine navigation or the river rally. The Applicant specifically noted that the permanent elimination of marine navigation from the lake into the river cannot be construed as a temporary impact.

Affidavit of Doug Skeggs, par. 112 – 120, Applicant's Application Record Vol. I, Tab B, p. 62-64.

27. Approximately two weeks later, PWGSC publicly announced, November 7, 2005, that the contract for the project had been awarded to David S. Laflamme Construction Ltd., almost three months prior to the environmental assessment decision and before the necessary approval from TC under the NWPA.

Affidavit of Doug Skeggs, par. 112 – 120, Applicant's Application Record Vol I. Tab B, p. 62-64.

NWPA Permit Approvals

28. TC notified PWGSC in June 2005, but not the Applicant, that the Kipawa was navigable. This declaration, in fact, was not disclosed to the Applicant or contained in the environmental registry. It was disclosed only as a result of the disclosure obligations imposed on the responding authorities. The NWPA TC official to the June 2005 river rally also never notified the Applicant of the site visit. Further, at no time did the TC official or anyone from TC directly address with the Applicant. The issue of safe navigation was demonstrably a primary concern and one directly affecting the Applicant. The Applicant even requested a meeting to no avail. The Applicant sought explanation from the NWPA marine manager as to the approval process. The Applicant did not understand why a permit was being obtained for the old structure and requested a meeting to address its concerns on or about September 16, 2005. The response from TC did not answer the request for a meeting and described its mandate to enhance safety of navigation, not protection of navigation rights.

Affidavit of Doug Skeggs, par. 17, 103 - 110, Exhibits BB and CC, Applicant's Application Record Vol. I, Tab B, p.11, 59-61, Tab B28 and B29.

29. At the time the contract for the Project was announced publicly on November 7, 2005, TC had not yet granted to PWGSC a permit under section 5(1) of the NWPA, for the new structure. In fact the almost 100-year-old existing dam structure had never been authorized under the NWPA until the EA screening was conducted. The permit authorizing the existing structure, in operation since 1911, was not obtained by PWGSC until October 2005, shortly prior to the awarding of the

contract for its demolition and replacement. This approval was granted pursuant to subsection 6(4) of the NWPA. This approval was excluded from the EA process altogether.

Affidavit of Doug Skeggs, par. 133 and Exhibit PP, Applicant's Application Record Vol. I, Tab B, p. 68 and Tab B42.
Affidavit of Richard Jones, par. 39 (see Respondent Record).

30. Richard Jones of the NWPA program in TC signed the subsequent approval for the new dam under paragraph 5(1) on behalf of the TC Minster on February 10, 2006.

Affidavit of Richard Jones, par. 68 (see Respondent Record).

The Responsible Authorities Consultation Process and Applicant Participation

31. As reviewed above, PWGSC did not disclose to the Applicant any documentary support for the position that the public right of navigation asserted by the Applicant was illegal. PWGSC was specifically asked verbally and in writing for it. Although relevant to the issue was the TC declaring the Kipawa to be navigable, again the Applicant was never directly advised.

32. Further, on or about November 1, 2005 a representative of the Applicant, Mr. Peter Karwacki, visited the EA public registry in Ottawa at the offices of PWGSC. It is mandatory for the registry to be conveniently accessible pursuant to paragraph 55 of the CEAA. Rather than simply providing access to the Applicant, PWGSC demanded that the representative specify what he wanted to see, but did not provide a listing and description of what was contained in the registry. With the Applicant having no prior experience with the EA process was left to guess what documents to request.

Affidavit of Doug Skeggs, par. 128, Applicant's Application Record Vol. I, Tab B, p. 66.

33. The next day, a formal request by email was made for all documents concerning risk analysis, safety and evidence of injury associated with marine navigation from the lake to the river.

Affidavit of Doug Skeggs, par. 129 and Exhibit MM, Applicant's Application Record Vol. I. Tab B, p. 67 and Tab B39.

34. The Applicant did review an opinion letter, in French only, provided by an engineer with the Tecsult firm to PWGSC, the same firm retained by PWGSC for the project design, expressing the opinion on the safety of navigating the spillway. When the Applicant contacted the engineer to assess the basis for his opinion and conclusion and to provide him with evidence demonstrating safe marine navigation that he had not considered. But he refused. He advised the Applicant to speak to PWGSC. On November 4, 2005, the Applicant requested that if PWGSC intended to rely on this opinion, it must also provide opportunity to the Applicant to provide a balanced view from a specialist in whitewater safety. The request for such an opportunity was not acknowledged or granted.

Affidavit of Doug Skeggs, par. 14, 129 and Exhibit C and MM, Applicant's Application Record Vol. I, Tab B, p. 29, 167 and Tab B3 and Tab B39.

35. PWGSC labeled Peter Karwacki ("Karwacki"), as harassing. The basis of the allegation is not on direct communications between PWGSC and Karwacki directly in the EA process. Rather the affidavit sworn by Kim Turnbull discloses that PWGSC downloaded extraneous Karwacki commentary that he posted on a public internet chat board used by paddlers where he editorialized to interested paddlers in the community about his frustrations dealing with the non-responsive PWGSC and TC authorities in the EA screening process.

Affidavit of Kim Turnbull , par. 76 and Exhibit KT-9 (see Respondent Record).

36. At the time the Applicant learned of the engineer opinion, it had no time to obtain and provide the opinion of a specialist in whitewater navigation safety. The Applicant has obtained, for the purposes of this Application, the sworn affidavit of an expert in whitewater safety navigation, Mr. Jim Coffey. He is also the proprietor of Esprit Rafting one of the companies commercially navigating the Kipawa River since 1995. Mr. Coffey assesses the spillway as a Class III rapid and ideal for commercial rafting because it appears to present a level of high risk to the untrained eye, but is considered a low risk rapid.

Affidavit of James Frederick Coffey, par. 1 – 15, Applicant's Application Record Vol. II, Tab H, p. 401-407.

37. Shortly before February 9, 2006 EA decision was released, the Applicant was advised on February 1 and 2, 2006 by the ADM of PWGSC, after almost a year of the Applicant participating in the EA process and attempting to ensure that the common law right of navigation was adequately considered in that process, that PWGSC considered the denial of navigation, in fact, never part of the EA screening process by PWGSC in any event. PWGSC advised that denying navigation was an operational decision apparently based on risk and public safety concerns.

Affidavit of Doug Skeggs, par. 146, Exhibits VV and WW, Applicant's Application Record Vol. I, Tab B, p. 72 and Tab B48 and B49.

38. Yvon Morin and Richard Jones both stated in their examinations that in their past experience with environmental assessments concerning projects on navigable waterways, never before had they dealt with the issue of historical demonstrated navigation through the spillway of a water control structure.

Examination of Richard Jones, par. 42-46 and 68-69 (see Respondent Record).

Examination of Yvon Morin, par. 271 (see Respondent Record).

39. Mr. Morin acknowledged in his examination that that it was not technologically impossible to build a new water control structure that could preserve navigation rights.

Examination of Yvon Morin, par. 346 and 347 (see Respondent' Record).

PART II - Issues

40. Issue No. 1: Does the Applicant have standing to bring this Application?

41. Issue No. 2: Has the Applicant demonstrated that the Kipawa River, including the spillway connecting the lake to the river was navigable and navigated by long usage, therefore protected by the common law right of navigation requiring the responsible authorities to consider the effect on that protected right as an environmental effect of the Project?

42. Issue No. 3 Did the Ministers of PWGSC and TC commit jurisdictional errors in the EA screening process. In particular did the Ministers fail to observe mandatory requirements of the CEAA, as follows: (a) failing to consider all environmental effects under 16(1)(a), principally failing to consider the elimination of the public right of navigation as an environmental effect caused by the Project; (b) failing to consider the significance of that effect pursuant to 16(1) (b); (c) then failing to consider measures that are technical and economically feasible that would mitigate against the significant adverse environmental effect - preserving the public right of navigation- contrary to 16(1)(d);

43. Issue No. 4: Pursuant to the CEAA section 18(3) a discretion was exercised to include public participation as part of the environmental screening process. Having exercised the discretion under 18(3) to include public participation in the EA process, did the Ministers of the responsible authorities, PWGSC and TC, or their delegates then undermine the Applicant's participation?

44. Issue No. 5: Is the decision dated February 9, 2006 by the responsible authorities unreasonable?

PART III - Submissions

Issue 1: Standing

45. The Applicant was invited to the consultation meeting as a stakeholder and recognized as such by PWGSC during the EA screening. The Applicant has a demonstrated history of commitment to the preservation and promotion of the Kipawa. As host of the river rally, it is directly affected by the Project. Standing should not be an issue in this case, however, if it is, the Applicant submits that it meets the three-part test for public interest standing: (1) there is a serious issue to be tried; (2) the Applicant has a genuine interest in the matter; and (3) there is no other reasonable and effective way to bring this matter before the Court.

> ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration),*** **[1992]1 S.C.R. 236.**
> ***Citizen's Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)*** **[1999] F.C. J. No 273, paragraphs 29-37.**

46. The Applicant submits that it meets all of the criteria. There is a serious issue to be tried. The Applicant is concerned with the CEAA process used to deny the public right of navigation on a

Canadian navigable waterway and the attempts by the responsible authorities to frustrate public participation in the environmental screening.

47. The Applicant has a genuine interest in the proposed project. As reviewed in the facts, the Applicant is a not-for-profit volunteer-run organization incorporated by whitewater paddlers to promote the Kipawa as a whitewater tourism destination so as to conserve and preserve it. The membership in the Applicant is comprised of whitewater paddlers. Extinguishing navigation rights from the Lake Kipawa into the river strikes at the core interest of the Applicant and its members.

48. The Applicant has a genuine concern that the Ministers of the responsible authorities failed or refused to discharge their statutory obligations under the CEAA. The Applicant was deliberately marginalized by the responding authorities and its submissions ignored in contravention of the CEAA.

49. This judicial review Application brought by the Applicant is the most effective way to bring before the Court the question of preserving or extinguishing navigation rights as a significant adverse environmental effect affecting the interests of whitewater paddlers generally. This review is also the most effective way to challenge whether responsible authorities designated under the CEAA have discharged their statutory obligations.

Issue 2 - The Public Right of Navigation and Navigability

50. The navigability of a river is a question of fact and law and an elementary condition for the *Navigable Waters Protection Act, R.S.C.1985, c. N-22* to apply.

> ***Eastmain Band v. Canada*** **[1992] F.C.J No. 1041 (FCA) at page 19 of 22.**

51. The Act itself does not define navigable waters and for purposes of administering the Act, TC applies the following definition:

> **"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 or 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.**
>
> ***International Minerals & Chemicals Corp (Canada) v. Canada (Minister of Transport)*** **[1992] F.C.J. No. 1071(F.C.) at 2.**

52. The rule is that if waters are navigable in fact, the public right of navigation exists.

> ***Friends of the Oldman River v. Canada (Minister of Transport)*** **[1992] 1 SCR 3 at para 68 ("Oldman")**

53. The public right of navigation is recognized by the Supreme Court as a paramount right, even to that of the owner of the bed and even when the owner is the Crown. It can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation.

> ***Oldman, supra,*** **at paras 69-70.**

54. In June 2005, TC gave notice to PWGSC that the entire Kipawa is navigable and that the NWPA applied, thus answering the question of navigability in the submission of the Applicant. Noteworthy, however, is that no permit had ever been obtained by the dam owner for the existing structure under the NWPA.

55. Additionally rivers that were formerly aqueous highways for log drivers were recognized by the courts as providing a form of easement, a right exercised concurrently with the rights of riparian owners to build dams on their property. The exercise of concurrent rights must be done reasonably without unnecessary interference one with the other.

Upper Ottawa Improvement Company v. Ontario* [1961] S.C.J No. 26 at 11 *("Upper Ottawa").

56. Riparian dam owners, in years past, were required by statute to construct slides and aprons to balance the rights of users of the waterway and to permit the passage of logs.

***Upper Ottawa*, supra, at pages 7-9 of 16.**

57. The Applicant submits that rivers, such as the Ottawa River referenced above, the Kipawa River in this instance and numerous others throughout this country, that were once aqueous highways, are now used for recreational and commercial whitewater navigation in rafts, kayaks and other crafts suited to whitewater. Marine navigation on a whitewater river, such as the Kipawa, warrants, at a minimum, the same legal considerations as was once afforded loggers in years past. The Applicant submits that the responsible authorities PWGSC and TC once made aware by the Applicant of the history of navigation from the lake into the river had a legal duty to recognize the public right of navigation and to balance that right with property right of the

riparian owner as concurrent rights to be enjoyed reasonably without unnecessary interference one with the other.

58. In the current context of whitewater navigation, the Applicant submits that TC and PWGSC became statutorily obligated pursuant to the CEAA, section 16(1)(d), to at least explore and consider whether feasible options could be implemented to permit marine passage of rafts, kayaks and canoes in a manner that did not unduly interfere with dam operations, in the unique situation of the Kipawa River. PWGSC having rejected the notion of any right existing in the first place, necessarily caused a failure on the part of the responsible authorities to consider any such options.

ISSUE 3: Jurisdictional Errors by the Ministers of the Responsible Authorities under the CEAA

59. There are two standards of review involved in deciding this case (1) the standard of correctness to the extent that the decisions taken turn on an interpretation of legislation; (2) reviewing the decision on a standard of reasonableness, meaning that there is a rational basis for it. The Applicant submits that first standard, that of correctness applies to statutory interpretation of sections 16(1)(a),(b), (d), and 18(3) and 20 of the CEAA.

> ***Sierra Club of Canada v. Canada (Minister of Fisheries and Oceans)*** **[2003] F.C.J. No. 366 at paras 59-60 .**

60. Marine navigation from the lake into the river via the spillway was not considered a protected right by PWGSC. Necessarily its elimination was not considered relevant by PWGSC to the EA

process. The actions of the Ministers of PWGSC and TC, or their delegates, demonstrate that they were incapable of being persuaded otherwise of the existence of such a right.

61. The Applicant submits that the stance taken by the responsible authorities opposed to the continued exercise of the right of navigation fails to respect the expansive definition of environment that is recognized as not confined to the biophysical environment. The Applicant submits that the position taken by PWGSC not recognizing the right at first instance and the impact of the Project offends and is contrary to the generally held view that the "environment" is a diffuse subject matter. The potential consequences for a community's livelihood, health and other social considerations are integral to decision-making on matters affecting environmental quality.

***Oldman, supra,* at para 39.**

62. The failure of PWGSC to consider the right of navigation was confirmed to the Applicant in writing, after the EA screening process was essentially completed, on February 1 and 2, 2006 and after the Applicant had participated in that process for the better part of a year. PWGSC states that the denial of marine navigation through the spillway was an operational decision not affected by the EA process. Necessarily then, the Applicant submits, extinguishing the de facto public navigation right after almost 40 years of known use with no claims of injury ever being filed with PWGSC constitutes jurisdictional error by the Ministers of PWGSC and TC. The Applicant submits that the decision of the riparian owner to unilaterally extinguish the public right of navigation constitutes a significant adverse environmental effect that both Ministers of PWGSC and TC, were statutorily required to consider as part of the EA process under the CEAA sections 16(1) (a) and (b). The statutory requirement to consider that environmental change or

effect and the significance of the effect cannot be circumvented by re-characterizing the failure to consider the public right of navigation, so as to extinguish it, under the guise of an operational decision.

63. The Applicant submits that the concern for preserving the public right of navigation from the lake into the river and to address the likely negative impact of the Project on that marine navigation, on the river rally and on the recreational tourism potential of the Kipawa is clearly caught within the ambit of environmental effect under Section 2 of the CEAA and the common law recognition of the importance of the public right of navigation.

64. Here PWGSC and TC acted contrary to the legal directive of *Oldman*. In particular, the NWPA is recognized as having a more expansive environmental dimension, given the common law context in which it was enacted. The common law proscribed obstructions that interfered with the paramount right of public navigation. Several of the "works" referred to in the Act do not in any way improve navigation. Bridges do not assist navigation, nor do many dams. Thus in deciding whether a work of that nature is to be permitted, the Minister would almost surely have to weigh the advantages and disadvantages resulting from the interference with navigation.

***Oldman, ibid* at paragraph 89.**

65. TC, in granting the permit to PWGSC under 5(1) of the NWPA ignored and refused to deal directly with the Applicant and directed the Applicant to PWGSC to deal with the Project. In so doing it referred to public safety instead of preserving navigation rights. At one point TC agreed to meet with the Applicant but then cancelled. Accordingly the Minister disregarded his statutory

mandate and abdicated his independent statutory role and adopted the statements and position of PWGSC as its position that navigation was unsafe.

66. The evidence shows the 1911 structure provided no de facto barrier to whitewater navigation. Similarly the whitewater navigation caused no interference with operation of the dam. Accordingly, the Applicant submits that the 6(4) permit approving the old dam in a navigable waterway confers no greater right to impede the exercise of navigation upon PWGSC, any more than would an owner being granted a permit under 6(4) for a long existing wharf or pier. The 6(4) permit recognizes the status quo at the time of the grant and by necessary implication the balance existing to that point between the public right of navigation and the right of the owner to maintain the dam as constructed in 1911, a configuration that enabled the navigation practice then extant and evolving into navigation by whitewater craft during the last 40 years. Accordingly any argument that the 6(4) permit is the basis on which to deny the public right of navigation, is incorrect. The Applicant submits that a permit for an existing structure that did not, in fact, prohibit navigation and excluded from the EA process, in any event, cannot be used as a springboard for PWGSC to claim the right of navigation was eliminated under the prior permit and therefore there was no statutory obligation to protect navigation rights deciding to granting the 5(1) permit under the NWPA.

67. The logical consequence of PWGSC assumptions from the start, shared in by TC, precluded consideration by either TC or PWGSC of technically and economically feasible alternatives that might mitigate against the significant adverse environmental effect of eliminating the public right

of navigation and preserving that right. The Applicant submits this offends section 16(1)(d) of the CEAA.

Issue 4: Did the Ministers of PWGSC and TC violate the Applicant's natural justice rights denying it meaningful participation in the process contrary to 18(3) and 20 of the CEAA?

68. The Applicant submits that short time frames imposed on the Applicant to respond to the screening report coupled with the withholding of information relevant to the process and exacerbated by the failure of the responsible authorities to demonstrate that the information supplied by the Applicant was even considered (such as *the History of Navigation Document*) violates procedural fairness. In determining whether an individual has been accorded a duty of procedural fairness, the court must consider the purpose of the participatory rights contained in that duty. The purpose of the right is to ensure that those affected by the decision have sufficient opportunity to put foreword their views and evidence and to have them considered by the decision-maker.

> ***Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.) at paragraph 22.**

69. One of the legislative purposes identified in the CEAA, section 4(d) is to **"ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process."** The immutable position of PWGSC disclosed at the outset of the EA process denying that any public right of navigation existed and its clear hostility against the Applicant's position, necessarily means that the environmental screening process controlled by PWGSC excluded any fair or adequate consideration of the common law right of navigation. The

process could result in no other conclusion but the denial of future navigation from the lake into the river.

70. Other examples of the denial of procedural fairness is that PWGSC supports its view that navigation was unsafe based on an opinion letter it obtained from an engineer at Tecsult, the same firm responsible for the dam design, and having no expertise in river safety and navigation. This opinion letter was obtained in June 2005 about the same time as TC declared the river navigable. Neither of these facts was disclosed to the Applicant in a timely manner. The Applicant was necessarily deprived of a meaningful notice or opportunity to present contrary opinion or expert evidence. PWGSC did not seek the opinion of an expert in the field or river safety and navigation, or provide notice or opportunity to the Applicant to do so. The lack of notice and opportunity to the Applicant to identify independent experts in whitewater safety who might address their safety concerns in a balanced fashion reveal that PWGSC was never interested in considering the question of safety in a balanced and *bona fide* manner.

71. Discussions were carried out between TC and PWGSC concerning navigation issues, but the Applicant was never invited to participate in those discussions, or apprised of those discussions during the process at all. Despite request for information on the process and actions being taken affecting the interests of the Applicant, it was not treated as an interested and affected party to whom PWGSC or TC owed any duty to assist in understanding the process so that the Applicant could meaningfully participate in the screening within the applicable timelines and be satisfied that its concerns about the public right of navigation was fairly considered in the EA process, despite PWGSC creating a legitimate expectation that such consultation would be carried out after inviting the Applicant into the process as a targeted stakeholder. The failure to then

maintain direct contact with the Applicant and to leave the Applicant to discover by chance when the responsible authorities would publish notices in the general press and to not directly notify the Applicant constitutes a denial of effective notice to the Applicant.

> ***Nisga'a Tribal Council v. British Columbia (Environmental Appeal Board)*** **[1998] B.C.J. No 3110 (B.C.S.C.) at paras 8-11.**

72. PWGSC withheld information. It did not respond to questions in a timely manner. It left the Applicant to guess as to how it could meaningfully participate, to what information it was entitled, when it was entitled to it and what would be considered and how it would be considered. The actions of PWGSC and the fact that there were three responsible authorities involved with the EA process cumulatively created a confusing and impenetrable maze for lay persons representatives of the Applicant.

73. The difficulties faced by the Applicant were exacerbated by PWGSC deciding what it would translate into English and what it would not, knowing that English-speaking representatives couldn't read French. Concerning access to the registry maintained under CEAA, PWGSC demanded first that the Applicant request specific documents from the registry. PWGSC did not identify or describe for the Applicant the nature of what was contained in the registry or supposed to be in the registry in the first place and therefore was left to guess as to what might be contained in the registry. PWGSC agreed with TC to censor what information it would share with the Applicant.

74. PWGSC did not provide any information about any record of injury associated with navigation until February 2006, well beyond the deadline given to the Applicant in October 2005 to comment on the screening report and long after the contract was signed with the contractor and

publicly announced on November 7, 2005. The Applicant submits that the Minister of PWGSC took a course of action as described under Section 20 of the CEAA before the Applicant had any notice of or actual opportunity as mandated by section 18(3) of the CEAA requiring the Applicant be provided adequate opportunity to comment on the records in the Registry and after being provided adequate notice of that opportunity.

75. Further the PWGSC characterization of Karwacki as a harasser, together with its intention from the outset to deny navigation and the other acts recited above, cumulatively demonstrate the responsible authority PWGSC possessed actual bias against the Applicant. It had had pre-judged the matter. All representations and attempts by the Applicant to examine and comment on the screening report in the EA process and to have any confidence that its comments were fairly considered under the CEAA 8(3) before the Ministers took a course of action under section 20(1) were futile.

> ***Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities*** **[1992] 1 S.C.R. 623 at paragraphs 27-29.**

76. Accordingly, the Applicant submits that the EA screening process conducted by the responsible authorities fails to achieve two principal purposes of the CEAA as set out in 4(1):

a. **Purpose (a): to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects and**
b. **Purpose (d). To ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.**

Issue No. 5 Did the Ministers of PWGSC and TC commit reviewable error in reaching the joint decision of February 9, 2006

77. Ministerial decisions in environmental matters are subjected to a "reasonableness simpliciter" standard of review.

> ***Inverhuron & District Ratepayers Assn v. Canada (Minister of the Environment),*** **[2000] F.C.J. No 682 (Fed T.D.).**
> ***Environmental Resources Centre v. Canada (Minister of the Environment),*** **[2001 F.C.J. No 1937 (Fed T.D.).**

78. Review on a reasonableness standard requires the court to "…look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or the logical process by which the conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference."

> ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.,*** **[1997] 1 S.C.R. 748 at paragraph 56.**

79. The Applicant submits that PWGSC started with an incorrect legal assumption that there was no public right of navigation from the lake to the spillway and that it was operationally permitted to deny navigation for reasons of safety, risk and liability. If no right of navigation existed, therefore no right was being eliminated by the Project. It determined that it had the operational right to eliminate navigation and that it was unnecessary for it to consider the de facto elimination of navigation rights exercised from the lake into the river dating back some 40 years in the EA process. The Applicant states this starting assumption is fatal to the entire EA process in light of the paramountcy of navigation rights articulated by the Supreme Court in *Oldman.*

80. Ample first-hand evidence demonstrating navigation, in fact, was supplied by the representatives of the Applicant and confirmed in the site visit by the TC official. In the face of overwhelming contrary evidence, PWGSC characterized the navigation as unsafe. PWGSC characterized the navigation as extreme. It further relied upon a letter from its own consultant engineer having no expertise in navigation safety issues or risk assessment in whitewater. It did not seek the opinion of a qualified expert in whitewater navigation risk and safety once it learned of the history of navigation. PWGSC was repeatedly requested to produce any risk assessment analysis and report it commissioned or performed. No such risk analysis or report was ever produced and the affidavit of PWGSC officer Kim Turnbull indicates none was ever performed.

81. The decision reached that the Project is unlikely to cause significant adverse environmental effects and the Minister's decision to grant the NWPA permit relying on the EA screening report is therefore an unreasonable conclusion. It discloses improper evidentiary foundation in the face of overwhelming contrary evidence and is an unreasonable decision necessarily following from an incorrect starting legal assumption of illegality.

PART IV - Orders Requested

82. The Applicant respectfully requests that the this Court allow the Application and make the following orders:

(i) An Order in the nature of certiorari to quash and a declaration of illegality in the course of action and decision of February 9, 2006 taken by the Respondent Ministers under

CEAA authorizing the Project to proceed, on the basis that the Project is not likely to cause significant adverse environmental effects;

(ii) A declaration that a valid environmental assessment is a legal condition precedent to and an Order in the nature of prohibition restraining the Respondent Ministers from taking any action or authorizing any action that would permit the Project or any related undertaking to proceed, until they comply with their statutory obligations under CEAA;

(iii) A declaration of and an Order in the nature of certiorari quashing approval granted under Sections 6(4) and 5(1) of *Navigable Waters Protection Act* ("NWPA");

(iv) A declaration of the duty upon the Respondent Ministers and an Order in the nature of mandamus requiring the Ministers to duly consider the environmental effects of the Project on the Applicant and its members and their use of the affected waterway for navigation, pursuant to CEAA subsections 18(3), 16(1), and 2(1) in respect of the definitions of "environment" and "environmental effect", including through ensuring "that studies and information … necessary for that purpose are undertaken or collected" pursuant to CEAA subsection 18(2);

(v) An Order in the nature of mandamus requiring the Respondent Ministers to order and ensure the adoption and undertaking of all technically and economically feasible mitigation measures to preserve navigability of the affected waterway and to minimize risks to users of the waterway, pursuant to CEAA subsections 16(1)(d) and 20(1), as a condition for the Ministers' approval of the Project, should such approval be forthcoming after due consideration of the effects as stated in paragraph 4 above;

(vi) An Order declaring that the Kipawa River, including, at the Laniel Dam constitutes a navigable waterway; and

(vii) Costs in this application.

All of which is respectfully submitted this 4th day of January, 2007.

Robert Monti
Solicitor for the Applicants

PART V - List of Authorities

1. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992]1 S.C.R. 236
2. *Citizen's Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)* [1999] F.C. J. No 273
3. *Eastmain Band v. Canada* [1992] F.C.J No. 1041 (FCA) at page 19 of 22.
4. *International Minerals & Chemicals Corp (Canada) v. Canada (Minister of Transport)* [1992] F.C.J. No. 1071(F.C.)
5. *Friends of the Oldman River v. Canada (Minister of Transport)* [1992] 1 SCR 3
6. *Upper Ottawa Improvement Company v. Ontario* [1961] S.C.J No. 26
7. *Sierra Club of Canada v. Canada (Minister of Fisheries and Oceans)* [2003] F.C.J. No. 366
8. *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.)
9. *Nisga'a Tribal Council v. British Columbia (Environmental Appeal Board)* [1998] B.C.J. No 3110 (B.C.S.C.)
10. *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities* [1992] 1 S.C.R. 623
11. *Inverhuron & District Ratepayers Assn v. Canada (Minister of the Environment),* [2000] F.C.J. No 682 (Fed T.D.)
12. *Environmental Resources Centre v. Canada (Minister of the Environment),* [2001 F.C.J. No 1937 (Fed T.D.)
13. *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748