CITATION: South March Highlands-Carp River Conservation Inc. v. Ottawa (City), 2010 ONSC 6725
DIVISIONAL COURT FILE NO.: 296/10
DATE: 2010/12/14

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

M. Brown R.S.J., Sachs J. and Herman J.

BETWEEN:	
South March Highlands-Carp River Conservation Inc. Applicant	Eric K. Gillespie, for the Applicant
– and –	
The Corporation for the City of Ottawa Respondent	Ben A. Jetten; Iris Antonios, for the Respondent
	HEARD at Toronto: October 6, 2010

THE COURT

[1] The applicant seeks judicial review of the decision of the City of Ottawa to approve and commence construction of a portion of the Terry Fox Drive Extension (TFDE).

[2] The basis of the applicant's objection is that the City did not file an Addendum addressing changes to the proposed project. The filing of such an Addendum would have triggered a process under the Municipal Class Environmental Assessment and the *Environmental Assessment Act*, R.S.O. 1990, c.E.18 (*EAA*).

[3] The applicant claims that an Addendum should have been filed for three reasons: (i) the project proposal lapsed because construction was not proposed to begin within the required five years; (ii) there were changes to the project in 2007; and (iii) there have been significant modifications to the project and to the environmental setting.

[4] The City disputes the applicant's claim that it was required to file an Addendum. In addition, it has raised several preliminary objections: (i) the Applicant lacks standing; (ii) the Minister of the Environment exercised a statutory power of decision, but has not been made a

party; (iii) the City did not exercise a statutory power of decision; (iv) the applicant delayed in bringing this application; and (v) the issues raised are moot given the advanced state of construction of the road.

The Background

[5] The TFDE is a project undertaken by the respondent City of Ottawa. The applicant's concerns relate to a portion of the TFDE.

[6] In October 2000, the former Region of Ottawa-Carleton and the City of Kanata completed a Class Environmental Study Report for the extension and widening of Terry Fox Drive. Since amalgamation in 2001, the project has been the responsibility the City of Ottawa.

[7] The project was undertaken as a Municipal Class Environmental Assessment under the Class Environmental Assessment process provided for in the *Environmental Assessment Act*.

[8] Construction on the TFDE began in 2003.

[9] In December 2004, the City of Ottawa completed an Addendum to the 2000 Environmental Study Report to reflect changes to the road project. The Addendum was filed pursuant to the Class Environmental Assessment process.

[10] On February 10, 2005, the Minister of the Environment received a Part II Order Request from Mr. Edward Balys, representing certain landowners.

[11] In October 2005, the City of Ottawa came to an agreement in principle with Mr. Balys. Mr. Balys withdrew his Part II Order Request and, as part of the agreement, the City of Ottawa made changes to the 2004 Addendum. The City also prepared a written document that reflected those changes.

[12] The applicant claims that the changes were significant and that the document that reflected those changes was a new Addendum. This new Addendum should have triggered the public review required under the Class Environmental process. The City claims that the changes were minor and, accordingly, this revision did not constitute a new Addendum requiring public review.

[13] In June 2009, the governments of Canada and Ontario decided to provide stimulus funding to subsidize the completion of the TFDE project under the Infrastructure Stimulus Fund.

[14] On June 24. 2009, Ottawa City Council approved the financing of the city portion of various infrastructure stimulus projects, including the last portion of the TFDE.

[15] A Canadian Environmental Act Assessment was prepared. Studies, evaluations and mitigation strategies were conducted and developed in consultation with Infrastructure Canada, Environment Canada, the Ministry of the Environment, the Ontario Ministry of Natural Resources, the Mississippi Valley Conservation Authority and the Department of Fisheries and

Oceans. These various agencies were satisfied with the proposed plans and provided all relevant permits.

[16] The City undertook various mitigation measures to address certain environmental issues with respect to the wetlands, species at risk and certain plants.

[17] In late 2009 and early 2010, several individuals wrote letters of complaint to the Minister of the Environment.

[18] Mr. Ted Cooper, an individual associated with the applicant, wrote the Minister in February 2010. He requested that the Minister issue an Order to the City to require an Addendum. Mr. Cooper also wrote Mr. Steven Stoddard, Senior Project Engineer at the City and requested the City to withdraw its approval and prepare an Addendum.

[19] A representative of the Ministry of the Environment contacted Mr. Stoddard on March 5, 2010 and again on April 9, 2010 asking for the City's response to the concerns that had been raised with the Ministry and the City's rationale for not filing a further Addendum.

[20] Mr. Stoddard responded to the Ministry on April 14. He indicated that the changes were minor and did not require an Addendum. He provided a detailed response to the various areas of concern mentioned in the Ministry's correspondence.

[21] By letter dated April 29, 2010, a response was provided to Mr. Cooper on behalf of the Minister. The letter indicated that Ministry staff had reviewed the matter, they were satisfied that the City had met the provincial environmental assessment requirements and there was nothing further that the Ministry would do.

[22] Construction of the TFDE project is at an advanced state. Infrastructure funding only covers work completed by March 31, 2011.

Preliminary Issues

Standing

[23] The City submits that the applicant does not have standing to apply for judicial review of its decision.

[24] Standing may be granted to a public interest group where a serious issue is raised, the applicant shows a genuine interest as a citizen or a group and there is no other reasonable and effective manner in which the issue may be brought before the court. In deciding whether to grant standing, the court should interpret the principles in a liberal and generous manner (*Canadian Council of Churches v. Canada (Minister of Employment and Immigration*, [1992] 1 S.C.R. 236).

[25] The applicant is an incorporated entity that represents the interests of the Coalition to Protect South March Highlands, a public interest body of organizations and citizens who are concerned about the impact of development on the South March Highlands and Carp River.

[26] The Coalition formed on March 29, 2010 and formalized its strategic plan on April 5, 2010. Its goal is the "preservation and conservation of the South March Highlands and the Carp River Corridor". It is supported by a number of environmental groups.

[27] Although the Coalition was not formed until recently, individuals associated with the Coalition have been involved since the inception of the project and have, in 2009 and 2010 requested the Minister to require the City to file an Addendum.

[28] Given this history, we are satisfied that the applicant has a genuine interest in the matter. We are also satisfied that there is a serious issue to be tried; and there is no other reasonable and effective manner for the issue to be resolved.

The Minister of the Environment Should be a Party

[29] The City submits that it is the Minister of the Environment who has the statutory power of decision that relates to the matters in issue and it is therefore the Minister who should be the respondent in this case.

[30] Whether the Minister has a statutory power of decision that may be the subject of judicial review is, however, not the point. The issue is whether the City exercised a statutory power of decision that can be the subject of judicial review.

The City's Statutory Power of Decision

[31] The City and the applicant have both framed the decision that is being challenged as the City's decision in 2009 to commit funds to undertake continued construction.

[32] The City submits that its decision to approve funding for the construction of the TFDE project was not an exercise of a statutory power of decision under the *Judicial Review Procedure Act*, R.S.O., 1990, c.J.1 and therefore cannot be the subject of judicial review.

[33] Section 1 of the *Judicial Review Procedure Act* defines a "statutory power" to include the power or right conferred by statute to exercise a "statutory power of decision". A "statutory power of decision" is defined as:

> a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court.

[34] The City refers to the case of *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 O.R. (3d) 716 (Div. Ct.). In that case, Callaghan C.J.O.C. stated that the disbursement of public funds was not subject to judicial review.

[35] There have, however, been decisions since that date which suggest that certain funding decisions are reviewable. In two cases of this court, the court concluded that the tendering decisions of public agencies were subject to judicial review: *J.P. Towing Service and Storage Ltd. v. Toronto (Metropolitan) Police Services Board*, [1999] O.J. No. 3959 (Div. Ct.); and *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, [2009] O.J. No. 3590 (Div. Ct.).

[36] In the *Bot Construction* case, the court concluded that the Ministry had exercised a power of decision to award a road construction contract as part of its broad general power for public roads construction. The court added that the tendering decision had broad public interest implications and, as such, the public law interests were sufficient to require the availability of judicial review.

[37] We conclude that the City was exercising a statutory power of decision when it decided to proceed with the construction. Furthermore, the City's decision to proceed with construction without filing an Addendum that was available for public review has broad public interest implications. In these circumstances, judicial review should be available.

Delay/Mootness

[38] The City submits that the court should not exercise its discretion to grant judicial review due to unreasonable delay by the applicant. Furthermore, in the City's submission, the issues raised by the Coalition are largely moot given the fact that the road is near completion.

[39] Although this application was not brought until recently, individuals associated with the applicant have raised concerns with the Minister of the Environment and the City since July 2009.

[40] As well, the claim that there have been significant changes since the 2007 revision document is a moving target. Changes to the environmental setting may have taken place at any point up to June 2009 when the City decided to commit funds to the completion of the road.

[41] The applicant concedes that there are some matters that cannot be addressed given the state of completion of the road. However, it submits that it is not too late to address other items, such as ecological passageways and fencing.

[42] We are not satisfied that it would be too late to address at least some of the applicant's concerns.

[43] In these circumstances, the court should not decline to exercise its discretion for reasons of delay or mootness.

Requirement to file an Addendum

[44] The applicant claims that the City failed to file an addendum as required. As a result, the applicant and others were denied the opportunity to request the Minister to issue an order under Part II of the *EAA*.

[45] There are three grounds for the applicant's claim that the City was required to file an Addendum: (i) the 2004 Addendum lapsed because construction was not proposed to begin within the required five years; (ii) there were significant changes to the project in 2007 that should have been the subject of an Addendum but were not; and (iii) there have been significant changes to the project and the environmental setting which require the filing of an Addendum.

[46] Before discussing these grounds, it would be helpful to outline the process for class environmental assessment.

The Municipal Class Environmental Assessment Process (MCEA)

[47] The purpose of the *Environmental Assessment Act* is to provide for "the protection, conservation and wise management in Ontario of the environment" (s. 2). It applies, amongst other things, to undertakings of provincial and municipal governments (s. 3).

[48] Part II.I of the *EAA* provides for "Class Environmental Assessments". The purpose of a class environmental assessment is to provide a uniform and streamlined process for projects, such as road projects, that are repetitive and similar.

[49] The Municipal Class Environmental Assessment (MCEA) for municipal infrastructure road, water and wastewater projects was prepared by the Municipal Engineer Association and approved by Order-in-Council in 2000 (MCEA 2000). It was updated in 2007 (MCEA 2007).

[50] The MCEA process is proponent-based. The proponent, in this case the City, runs the process. The proponent of a project has to comply with a class environmental assessment. Project-specific approval under the *EAA* is not required. The role of the Ministry of the Environment is primarily to provide advice and guidance.

[51] The proponent of a project is required to prepare and file an Environmental Study Report.

[52] The MCEA 2000 provides that where there is any significant modification to the project or change in the environmental setting for the project after the filing of the Environmental Study Report, the proponent must review the modification or change and write an Addendum to the Report. The Addendum must be filed and a Notice of Filing must be given to all potentially affected members of the public and review agencies.

[53] There is a 30-day period following the issue of the Notice of Filing of Addendum for review and response by the affected parties. No work may be undertaken during this period that will adversely affect the matter under review.

[54] A member of the public may request the Minister to make an order under Part II under the *EAA* within that 30-day period. Under Part II of the *EAA*, the Minister has various options: give approval to proceed with the undertaking; give approval to proceed subject to conditions; refuse to give approval; or refer the matter to a Tribunal for a hearing.

[55] If no request is received within the 30 days, the proponent may proceed with the implementation and construction.

[56] In addition to the process triggered by the filing of an Addendum, an individual may request the Minister to make an order requiring the proponent to comply with Part II of the Act. This request may be made at any time.

[57] In response to this second kind of request, the Minister may do one of the following: refuse to make an order; require the proponent to comply with Part II of the Act, that is, prepare an environmental assessment before proceeding with the project; impose conditions in addition to those imposed in the class environmental assessment; or refer a matter to mediation (s. 16).

[58] The practical difference between the two processes is that the process triggered by the filing of an Addendum has the potential to result in the Minister referring the matter to a tribunal. This option is not available if an individual requests the Minister to make an order under s. 16, Part II.I of the *EAA*.

Lapse

[59] The applicant contends that there was a lapse in the period between the Environmental Status Report and construction such that an Addendum was required.

[60] Section 4.2.2 of the Municipal Class Environmental Assessment, 2000 (MCEA 2000) provides that an excessive time lapse may occur between the filing of the Environmental Status Report and the implementation of the project. In such a case, the proposed project and environmental mitigation measures may no longer be valid.

[61] If the period of time between the filing of the Environmental Status Report and the proposed commencement of the project is greater than five years, the proponent must review the process and environmental setting. The review shall be recorded as an Addendum.

[62] The MCEA 2007 changed the five-year period to ten years.

[63] The applicant argues that the five-year period applies to the project in question and that the five-year clock started to tick when the 2004 Addendum was issued on January 7, 2005. The construction that was the subject of that Addendum (which affected only a portion of the TFDE) was not proposed to begin until February 15, 2010. This time period is more than five years. In the applicant's submission, a review and a new Addendum were therefore required.

[64] The applicant's argument that the clock started to tick when the 2004 Addendum was issued is based on s. 12 of the *EAA*. That section provides that a change to an undertaking is

deemed to be an undertaking. The applicant submits that the 2004 Addendum therefore constituted a new undertaking and the clock started to tick anew.

[65] S. 15 states that various sections of the Act apply with necessary modifications to class environmental assessments under Part II.I. S. 12 is not one of the sections listed.

[66] The applicant argues that s. 15 addresses only those sections that require modifications to apply to class environmental assessments. Otherwise, the other sections of the Act apply without modification. This argument does not withstand scrutiny because there are other sections of the Act (for example, s. 5) which clearly do not apply to Part II.I (class) environmental assessments.

[67] In our opinion, the appropriate and logical interpretation of s. 15 is that only those sections that are listed apply to Part II.I, that is, to class environmental assessments. Therefore, s. 12, which is not listed and which deems a change to an undertaking to be an undertaking, does not apply.

[68] It would also appear that the relevant time period is now ten years, not five. The Ministry of the Environment clarified that "the 2007 provisions [of the Class EA] with regard to lapse of time, shall apply with respect to 10 years after project approval and not the 2000 version's 5 years after submission".

[69] In any case, construction of the TFDE commenced in 2003, not 2010.

Changes in the 2007 Revision and since the 2007 Revision

[70] The applicant maintains that the 2007 revision contained significant changes to the project. Furthermore, there have been significant changes to the project and to the environmental setting since that time. These changes have not been addressed through the MCEA process. Accordingly, in the applicant's submission, an Addendum should have been filed to trigger the MCEA process.

[71] The City's determination that there were no significant changes was at the heart of its decision not to file an Addendum. This is a question of mixed fact and law. As both parties acknowledged, the appropriate standard of review is therefore reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

[72] According to the applicant, significant changes to the project include: location of the preferred floodplain compensation work to the west side of the Carp River, instead of the east side; realignment of almost one-third of a kilometer of the road; removal of a large eco-passage to be replaced by a system of culverts; and installation of more than four kilometers of wildlife fencing. Changes to the environmental setting include: designation of 200 additional hectares of urban land upstream of the TFDE; a major flood in the Carp River watershed in 2009; introduction of the *Endangered Species Act, 2007*, S.O. 2027, c. .6; discovery in 2009 of threatened species such as Blanding's Turtle; and major changes in the greenness and wetness of the project area.

[73] The City disagrees with the applicant's contention that there were significant changes in the 2007 revision document. Rather, they were minor changes that arose from the settlement of Mr. Balys' Part II Order Request. The changes related to the roadway cross-section, alignment and rail grade-separation property requirements.

[74] As noted, the 2007 changes came about as a result of an agreement between Mr. Balys and the City that certain changes would be made. Mr. Stoddard advised the Ministry of the Environment of the changes. Ms. Jamila Dhanji, of the Environmental Assessment and Approvals Branch of the Ministry replied to Mr. Stoddard: "Based on the information provided and the nature of the changes required to the Addendum being minor there is no requirement for additional notification and public comment".

[75] Ms. Dhanji did, however, indicate that the relevant sections of the 2004 Addendum should be revised to reflect the changes. This was done in the 2007 document.

[76] The City's engineering consultants referred to the 2007 document as the "2007 Addendum". It was subsequently entitled the "April 2007 Revision". At the beginning of the document, it states that the [2004] Addendum report was revised to reflect changes that address a Part II Order Request. This is a reference to the request of Mr. Balys.

[77] The fact that the document was titled "2007 Addendum" at one point does not make it an Addendum under the MCEA. What is required is a consideration of whether the changes in the 2007 document were significant such that an Addendum had to be filed.

[78] The Ministry of the Environment got involved again in 2009 and 2010 when the Minister received letters of concern about changes both to the project and to the environmental setting.

[79] Ministry staff asked the City for its responses to the concerns. The City provided an extensive response to the Ministry as to why an Addendum was not required.

[80] A representative of the Minister replied to Mr. Cooper on April 29, 2010. The letter addresses particular concerns and concludes with:

> In summary, MOE staff have reviewed the matter and are satisfied that the City has met the provincial environmental assessment requirements for the Terry Fox Drive Extension. Therefore, there would be no implications to provincial funding for this project. MOE staff have completed their review of the environmental assessment status of the project, and will not be pursuing this matter further at this time.

[81] It was the responsibility of the City, as the proponent, to decide whether the changes were significant and an Addendum had to be filed. It decided that there were no significant changes in the 2007 revision and that, furthermore, there had been no significant changes to the project or the environmental setting since that revision.

[82] This court can only review the City's decision if it was unreasonable. We are faced with an applicant who says the changes are significant and the City who says they are not. The

Ministry of the Environment conducted a review of the City's decision and was satisfied that the City had complied with all the provincial environmental assessment requirements. Other Ministries and agencies got involved in 2009 and 2010 and were satisfied with the plans.

[83] While we accept that the decision as to whether the City complied with all the necessary provincial environmental assessment requirements was not the Ministry's to make, the Ministry's decision does act as a significant indicator of the reasonableness of the City's decision that there was no need to file a further Addendum requiring public review. By way of contrast, there is no evidence that would allow us to conclude that the City's decision was an unreasonable one. The nature of the changes does not speak for itself. Reputable experts have expressed opinions on both sides of the question. Therefore, we cannot conclude that the decision of the City to proceed with the project without filing an Addendum was unreasonable.

Conclusion

[84] For the reasons set out above, we conclude that the project did not lapse by reason of the passage of time such that an Addendum was required to be filed.

[85] We cannot conclude that the City's decision that the changes to the project and the environmental setting were not significant so as to require the filing of an Addendum was unreasonable.

[86] The application is therefore dismissed.

[87] The respondent does not seek costs and no order as to costs is made.

M. Brown R.S.J.

Sachs J.

Herman J.

Released: December 14, 2010

CITATION: South March Highlands-Carp River Conservation Inc. v. Ottawa (City), 2010 ONSC 6725
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Applicant

– and –

The Corporation for the City of Ottawa

Respondent

REASONS FOR JUDGMENT

Released: December 14, 2010

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To:	Eric K. Gillespie	416-703-9111
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From:	Julia Bryan	**Date:** December 14, 2010
RE:	South March Highlands v. Corporation for the City of Ottawa	
Court File No.: 296/10		**Pages (including coversheet): 12**
Cc:		

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NOTE: Please find attached a copy of the Reasons for Judgment from Regional Senior Justice Brown and Justices Sachs and Herman with regard to the above-noted matter.

If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.