

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

GRASSY NARROWS FIRST NATION
and
SHERRY FOBISTER,
WILLIAM FOBISTER, SENIOR, CHIEF SIMON FOBISTER
and
former CHIEF ROGER FOBISTER, SENIOR
on their own behalf and on behalf of all other members of
GRASSY NARROWS FIRST NATION

Applicants

-and-

MINISTER OF NATURAL RESOURCES AND FORESTRY (ONTARIO),
and MINISTER OF THE ENVIRONMENT AND CLIMATE CHANGE (ONTARIO),
and THE ATTORNEY GENERAL OF ONTARIO

Respondents

APPLICATION UNDER Section 2(1)
of the *Judicial Review Procedure Act*
R.S.O. 1990, c. J.1

FACTUM

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FACTUM

I. PART I – STATEMENT OF THE APPLICATION

1. This is an Application for judicial review brought by the Grassy Nations First Nation (“Grassy Narrows”) and four individual members of Grassy Narrows regarding a provincial decision: (1) approving clearcut logging activities; and (2) refusing to order an individual environmental assessment (“IEA”) regarding anticipated mercury contamination and adverse human health effects, arising from the approved activities.

2. The decision consists of two inter-related stages: (1) a December 2013 decision by the Minister of Natural Resources and Forestry, or the Minister’s designate (the “Natural Resources Minister”), approving a forest management plan (“Plan” or “FMP”), which allows clearcut logging of the Whiskey Jack Forest (“WJF”) in northwestern Ontario under section 9 of the *Crown Forest Sustainability Act* (“CFSA”); and (2) a December 2014 decision by the Minister of the Environment and Climate Change, or the Minister’s designate (the “Environment Minister”) refusing, under section 16 of the *Environmental Assessment Act* (“EAA”), to grant a Part II order (or “bump-up”) requested by the Applicants that would have required an IEA to be conducted on whether clearcut logging authorized under the Plan could: (a) release mercury to the watersheds of and adjacent to the English-Wabigoon river system, which system runs through the WJF most of which is part of the traditional territory of Grassy Narrows, (b) contaminate fish therein, and (c) harm, or increase the risk of harm, to humans consuming the fish.

Third Supplementary Application Record (“TSAR”), Vol. 1, Tab 1, Further Amended Notice of Application for Judicial Review, pages 4-5; **Application Record (“AR”), Vol. 1, Tab 2**, Approval of FMP for WJF for the 10-year period April 1, 2012 to March 31, 2022 by OMNR, page 28; **AR, Vol. 1, Tab 3**, Decision and Reasons of the MOECC, dated December 22, 2014, pages 29-37; **Applicants’ Factum, Sch. B**, *Crown Forest Sustainability Act* (“CFSA”), S.O. 1994, c. 25, s. 9; *Environmental Assessment Act* (“EAA”), R.S.O. 1990, c. E.18, s. 16.

3. The Applicants challenge the approval of the Plan and the refusal of their request for a bump-up with respect thereto (collectively the “Decision”) on the basis that the exercise of these statutory powers of decision violate the rights of their members: (1) to life, liberty and security of the person as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), c. 11 (the “*Charter*”); and (2) to equality under s. 15(1) of the *Charter*. The Applicants also challenge the Decision as unreasonable and in conflict with federal law.

TSAR, Vol. I, Tab 1, Further Amended Notice of Application for Judicial Review, page 5; **Applicants’ Factum, Sch. B**, *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, Sch. B to *Canada Act 1982* (U.K.), c. 11, ss. 7, 15(1) (“*Charter*”).

II. PART II – THE FACTS

A. Overview

4. Grassy Narrows, a First Nation recognized under s. 35 of the *Constitution Act, 1982*, has the status of a “band” within the meaning of the *Indian Act*. Members of Grassy Narrows, such as the individual Applicants, one of whom is the current Chief, and two others of whom are former Chiefs and band Council members, live on and off the English River 21 Reserve (hereinafter the “Grassy Narrows Reserve”). The members of Grassy Narrows, whose ancestors signed Treaty No. 3, are Anishinabe (Ojibway) men, women, and children. Many members of Grassy Narrows engage in traditional Anishinabe activities in their traditional territory, which are central to their identity, diet, culture, and economy, including: (a) fishing in the English-Wabigoon river system watershed, or adjacent watersheds, in the area that includes the WJF; and (b) consuming fish caught from those waters.

TSAR, Vol. 1, Tab 1, Further Amended Notice of Application for Judicial Review, pages 8-9; **AR, Vol. 1, Tab 4**, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraphs 3-7, and **Exhibit “A”**, Excerpts from trial judgment in *Keewatin v. Ontario*, at page 46; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraph 4; **AR, Vol. 4, Tab 7**, Affidavit of Joseph Fobister, affirmed August 26, 2015, at paragraph 2; **AR, Vol. 4, Tab 8**, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 3-4; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraph 2.

5. The Respondent Natural Resources Minister is responsible for the *CFSA*, Ontario’s primary statute permitting logging of, and development and approval of forest management plans for, the Crown forests of Ontario. The Respondent Environment Minister is responsible for the *EAA*, Ontario’s primary statute for gathering information, and making decisions about the direct and indirect effects of proposed undertakings on the natural environment, human life, and social, economic, and cultural conditions.

TSAR, Vol. I, Tab 1, Further Amended Notice of Application for Judicial Review, page 9.

6. The Applicants rely on fishing in the watershed of the English-Wabigoon river system as a significant part of their way of life, and on the consumption of area fish as a significant part of their diet. Existing mercury pollution dating from the discharge of mercury by a Dryden, Ontario chlor-alkali plant into the same river system in the 1960s has had, and continues to have, a significant adverse impact, due to the consumption of mercury-contaminated fish, on the health and well-being of members of Grassy Narrows. Some of the individual Applicants have been diagnosed with, or their children have been diagnosed with, symptoms consistent with mercury poisoning. The Applicants fear, based on the scientific literature studying this problem, that clearcut logging authorized under the Plan poses a serious risk of additional harm to the health and well-being of community members because it will trigger new releases of mercury to the watershed, increase the accumulation of mercury in the food chain, and prolong and exacerbate the existing mercury problem.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 8; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraphs 16-17; **AR, Vol. 4, Tab 7**, Affidavit of Joseph Fobister, affirmed August 26, 2015, at paragraph 12; **AR, Vol. 4, Tab 8**, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 8-14, and **Exhibit “A”** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 1561-1562; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraphs 4-13, and **Exhibit “A”** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 1570-1571.

B. Background: Industrial Mercury Discharges in English-Wabigoon River System

7. In the 1960s, a chlor-alkali plant at Dryden, Ontario began discharging mercury into the English-Wabigoon river system, eventually discharging approximately 9,000 kilograms of mercury into the river system, which flows into and through the traditional lands and territory of the Applicants.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 9 and **Exhibit “F”** Letter to Hon. Kathleen Wynne, Premier of Ontario from Chief Simon Fobister of Grassy Narrows, October 24, 2013, page 77; **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, **Vol. 3, Exhibit “C”**, Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 Whiskey Jack Forest Management Plan, January 22, 2014, page 1249.

8. Once in the water, the mercury is transformed by chemical-biological processes into methylmercury, a nerve poison capable of bio-accumulating up the food chain, being ingested by fish, and adversely impacting humans consuming methylmercury-contaminated fish caught from waters in the aforementioned area.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 9; **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 18, and **Vol. 3, Exhibit “C”**, Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1247, 1249-1252.

9. The consumption of methylmercury-contaminated fish by members of Grassy Narrows resulted over the decades in serious, and well-documented, neurological harm and other adverse health impacts, many of which continue to afflict many members of Grassy Narrows to this day.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 9; **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 18, and **Vol. 3, Exhibit “C”** Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on

2012-2022 WJF FMP, January 22, 2014, pages 1251-1252, and **Vol. 4, Exhibit “H”** September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, at pages 1377-1378.

10. Litigation by Grassy Narrows against the federal and Ontario governments, and the successor company to the original industrial discharger, was settled in the 1980s. Grassy Narrows was paid some compensation and a mercury disability board was established to evaluate and compensate members of Grassy Narrows suffering on-going neurological harm and other adverse health impacts consistent with mercury poisoning arising from the industrial discharges of mercury into local bodies of water.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 10, and **Exhibit “C”** *English and Wabigoon River System Mercury Contamination Settlement Agreement Act, 1986*, S.O. 1986, c. 23, and **Exhibit “D”** *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act, S.C. 1986*, c. 23.

11. The watershed of the English-Wabigoon river system where the industrial discharges of mercury took place encompasses most of the WJF.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraphs 5-7; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraph 3.

12. Fish within this watershed continue to have levels of mercury above, or near, the limit for safe human consumption.

AR, Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 8(c), and **Vol. 3, Exhibit “C”** Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1249-1251.

13. Grassy Narrows Reserve is located within the WJF itself.

AR, Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, **Vol. 3, Exhibit “C”** Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, page 1306.

C. The Whiskey Jack Forest Management Plan

14. Starting in or about 2010 and continuing to late 2013, the Ministry of Natural Resources and Forestry (“MNRF”) gave periodic public notice of its intention to develop

a forest management plan that would authorize logging for the WJF, and sought from time to time public comment on what eventually became the approved Plan.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 11, and **Exhibit “E”** Environment Registry MNR composite notices from February 19, 2010 to December 23, 2013, at pages 72-75.

15. Over this same 2010 to 2013 period, Grassy Narrows and other groups raised publicly through the media, and directly with the provincial government, their concern that the sole method of harvesting trees under the Plan, clearcut logging, would interfere with the rights of the members of Grassy Narrows and risked the release of new, or additional, sources of mercury into the region’s watershed system, the potential for increased methylmercury contamination of fish, and further harm to the health and well-being of members of Grassy Narrows consuming the fish.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraphs 12-15; **Exhibit “F”** Letter to Hon. Kathleen Wynne, Premier of Ontario from Chief Simon Fobister of Grassy Narrows, October 24, 2013, pages 76-77; and **Exhibit “G”**, Summary of 2012-2022 MNR WJF FMP, page 81 (100% of 10-year harvest of 53,471 hectares to be by clearcut logging); **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015; **Vol. 3, Exhibit “C”**, Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1253-1255.

16. During the 2010 to 2013 period, and earlier, MNR also was independently aware, through its own research and investigations, of the mercury problem arising from clearcut logging and the challenge of preventing or mitigating it. Notwithstanding these concerns, the Natural Resources Minister approved the Plan in December 2013.

AR, Vol. 5, Tab 10, Affidavit of David Sone, sworn August 21, 2015, at paragraphs 6-8, 13-16, and **Exhibit “C”**, Email and attachment to among others Kurt Pochailo, MNR from Roy Sidders, MNR on Forest Practice Subjects, dated December 13, 2008, pages 1588, 1591 (Kurt Pochailo, author of Plan, assigned responsibility to conduct literature search on methylmercury release following harvest operations); **Exhibit “D”**, Slide Presentation by Rob Mackereth, MNR on “How Forest Disturbance Influences Mercury Dynamics in Watersheds” undated, pages 1605, 1613 (mercury flow almost doubled following harvest; for Ontario Boreal forest region with a 1%/year logging rate this equates to approximately 15% to 20% of the mercury runoff for this region being attributable to forest management activities); **Exhibit “E”**, Craig J. Allan, Andrew Heyes, Robert J. Mackereth “Changes to groundwater and surface water Hg [mercury] transport following clearcut logging: a Canadian case study” published in 2009 report on 2006 Royal Swedish Academy of Agriculture and Forestry workshop on “Does forestry contribute to mercury in

Swedish fish?”, page 1638 (estimate of 81% methylmercury and 116% mercury increase in transport from catchment of Ontario logged lake researched in the first 22 months after logging with increased mercury transport to persist at site as a result of increased run-off yield for at least a decade; these increases from clearcut catchments explain elevated methylmercury concentrations observed in studies in Quebec by various researchers including Carignan); **Exhibit “P”**, Summary of MNR Criticisms of Stand and Site Guide Measures Related to Mercury, pages 1693-1698 (MNR staff critical of SSG measures SSG authors had otherwise suggested can mitigate mercury releases, with MNR staff suggesting measures either not effective or not enforceable; MNR staff also critical of reduction of proposed protective measures in SSG because recent paper by Dr. R. Mackereth indicated mercury finding its way into watercourses from cutover areas even with current reserves and areas of concern in place; MNR staff also noting that “public and especially First Nations are very sensitive to mercury entering our water systems and they are not going to like the idea that it might be increased!”; MNR staff also questioned why SSG proposed clearcut logging of entire shorelines when the task team that developed latest recommendations for protecting aquatic habitat, which included very knowledgeable MNR research scientists, did not propose that); **Exhibit “J”**, Exchange of MNR communications on MNR Staff Internal Review of the Draft Stand and Site Guide, pages 1699-1701; **Exhibit “K”**, Raveena Aulakh, “Ontario’s biologists called clear-cut plan ‘big step backwards’”, The Toronto Star, January 17, 2015; **Exhibit “L”**, Letters to David Sone, Earthroots from MNR with attachments, dated March 2 and 3, 2015, pages 1704-1710; **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 20(a) and (c); **Vol. 4, Exhibit “P”**, Fourth Supplementary Submission by Grassy Narrows and Earthroots to MOECC on IEA Request, November 14, 2014, pages 1488-1510; **AR, Vol. 1, Tab 2**, Approval of FMP for WJF for the 10-year period April 1, 2012 to March 31, 2022 by OMNR, page 28.

D. The Bump-up Request

17. The notice of decision approving the Plan indicated that persons objecting to the decision could apply to the Ministry of the Environment and Climate Change (“MOECC”) requesting a bump-up under the *EAA* that would, if approved, authorize an IEA to be performed to determine whether the Plan should be allowed to go into effect, or whether modifications would be required in order to safeguard the environment and human health.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 16, and **Exhibit “E”** Environment Registry MNR composite notices from February 19, 2010 to December 23, 2013, at page 74.

18. Grassy Narrows, in conjunction with an environmental non-governmental organization not party to this application, filed a bump-up request in January 2014, as well as supplementary submissions with supporting material in May, July, September, and November 2014.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 17, and **Exhibit “B”**, Letter to MOECC from Chief Simon Fobister, Grassy Narrows and Amber Ellis, Executive Director, Earthroots, dated January 22, 2014; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraphs 7, 9-10; **AR, Vol. 4, Tab 7**, Affidavit of Joseph Fobister, affirmed August 26, 2015, at paragraphs 8-12; **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraphs 7, 11-12, 18, 20; **Vol. 3, Exhibit “C”**, Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1241-1307; **Exhibit “F”**, Grassy Narrows and Earthroots Reply to MOECC respecting MNRFF Response to IEA Request, dated May 22, 2014, pages 1347-1369; **Exhibit “G”**, Earthroots Supplementary Submission to MOECC respecting IEA Request, dated July 22, 2014, pages 1370-1376; **AR, Vol. 4, Exhibit “H”**, Grassy Narrows and Earthroots Third Supplementary Submission to MOECC on IEA Request, dated September 8, 2014, at pages 1377-1487; **Exhibit “I”**; Fourth Supplementary Submission by Grassy Narrows and Earthroots to MOECC on IEA Request, November 14, 2014, pages 1488-1510.

1. The Grassy Narrows Submissions Demonstrated the Need for an IEA

19. The initial request, the supplementary submissions of Grassy Narrows, and the response of MNRFF demonstrated the need for an IEA, including:

- (a) since the industrial discharges of mercury in the 1960s, clinical evaluations show that many members of Grassy Narrows have suffered from, and continue to suffer from, a variety of neurological health problems attributable to eating methylmercury contaminated fish caught in area waters;

AR Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraphs 8(e), 18; **AR Vol. 3, Exhibit “C”**, Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1251-1252; **AR, Vol. 4, Tab 5, Exhibit “H”**, Grassy Narrows and Earthroots Third Supplementary Submission to MOECC on IEA Request, dated September 8, 2014, at pages 1377-1487; **Supplementary Application Record, (“SAR”) Vol. 1, Tab 4**, Affidavit of Donna Mergler, sworn November 6, 2015; **Exhibit “A”**, Expert Report of Dr. Mergler on Grassy Narrows General Mercury and Health Facts, pages 104-151; **Further Supplementary Application Record (“FSAR”), Vol. 1, Tab 2**, Affidavit of Shigeru Takaoka, sworn May 28, 2016, and **Exhibit “A”**, Expert Report of Dr. Takaoka, et al on Response to Questions on Medical-Psychological/Psychiatric Issues Pertaining to Mercury Exposure at Grassy Narrows, pages 14-19, 22-29.

- (b) peer-reviewed scientific studies show clearcut logging in boreal forests at latitudes similar to the WJF, leads to the presence, or increased presence, of methylmercury in fish in watersheds where the logging takes place;

AR, Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraphs 8(a)(b); **AR, Vol. 3, Exhibit “C”**, Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1246-1248; **SAR, Vol. 1, Tab 2**, Affidavit of Richard Carignan, sworn February 18, 2016, and **Exhibit “A”**, Expert Report of Dr. Carignan on Potential Effects of the December 2013 OMNR Approved WJF FMP

on Mercury Contamination in Fish, pages 32-56; **Tab 3**, Supplementary Affidavit of Richard Carignan, sworn February 18, 2016, and **Exhibit “A”**, Supplementary Expert Report of Dr. Carignan on Potential Effects of the December 2013 OMNR Approved WJF FMP on Mercury Contamination in Fish, pages 72-82.

- (c) members of Grassy Narrows fear the health risks posed by eating mercury-contaminated fish but continue to do so for a variety of complex reasons, including because fishing and consuming fish caught has always been part of their traditional way of life, diet, and culture, which they do not wish to lose, and because it is an affordable source of food in an impoverished community;

AR, Vol. 4, Tab 8, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 8-14, and **Exhibit “A”** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 1561-1562; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraphs 4-13, and **Exhibit “A”** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 1570-1571; **SAR, Vol. 2, Tab 8**, Affidavit of Steven Fobister, Senior, affirmed March 24, 2016, **Exhibit “A”**, Selected Maps, pages 405-406; and **Exhibit “B”** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 407-410; **SAR, Vol. 2, Tab 5**, Affidavit of Anna Willow, sworn February 18, 2016; and **Exhibit “A”**, Expert Report of Dr. Willow on the Importance of Fishing and the Consumption of Fish as Part of the Traditional Cultural Activity and Identity of the People of Grassy Narrows First Nation: An Anthropological Perspective, pages 188, 193-196, 198-219.

- (d) MNRF admitted that it makes no claims regarding the effectiveness of the only measures it proposes for the mitigation of mercury impacts to water from clearcut logging authorized under the Plan;

AR, Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 11; **SAR, Vol. 3, Tab 9**, Supplementary Affidavit of David Sone, sworn March 9, 2016, at paragraph 18; and **Exhibit “C”**, MNR Response to MOECC on 2012-2022 WJF FMP IEA Request, April 23, 2014 (complete version), pages 617, 626-627 (there are no claims that SSG direction will mitigate or eliminate mercury mobilization; the potential for forest management activities to result in mobilization of terrestrial mercury into aquatic systems is well documented and a serious concern; the best available evidence shows that fish in lakes with disturbed watersheds had higher mercury levels than those in undisturbed watersheds; because there are no studies which identify or evaluate mitigation measures to minimize mercury mobilization following disturbance there are no mitigation measures specific to mercury in the SSG); **SAR, Vol. 1, Tab 3**, Supplementary Affidavit of Richard Carignan, sworn February 18, 2016, and **Exhibit “A”**, Supplementary Expert Report of Dr. Carignan on Potential Effects of the December 2013 OMNR Approved WJF FMP on Mercury Contamination in Fish, pages 72-82.

- (e) MNRF personnel involved in the preparation of, or comment with respect to, the SSG guidance materials for the Plan raised concerns that key measures proposed

for use with the Plan would not be enforceable and would not adequately mitigate mercury releases to water and could, in fact, exacerbate them.

AR, Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraphs 12-17; **AR, Vol. 3, Exhibit “G”**, Earthroots Supplementary Submission to MOECC respecting IEA Request, dated July 22, 2014, pages 1370-1376; **AR, Vol. 5, Tab 10**, Affidavit of David Sone, sworn August 21, 2015, at paragraphs 13-15; and **Exhibit “T”**, Summary of MNR Criticisms of Stand and Site Guide Measures Related to Mercury, pages 1693-1698; **Exhibit “J”**, Exchange of MNR communications on MNR Staff Internal Review of the Draft Stand and Site Guide, pages 1699-1701; **Exhibit “K”**, Raveena Aulakh, “Ontario’s biologists called clear-cut plan ‘big step backwards’”, The Toronto Star, January 17, 2015.

20. Despite the submissions and material filed by Grassy Narrows and the admissions by MNRF, the Environment Minister, or his designate, refused the bump-up request of Grassy Narrows in December 2014, allowing implementation of the Plan to proceed. In doing so, the refusal decision specifically relied on the mitigation measures that MNRF disclaimed the effectiveness of in mitigating or eliminating mercury impacts, and simply imposed requirements for monitoring such measures during clearcut logging activity authorized under the Plan.

AR, Vol. 1, Tab 3, Decision and Reasons of the MOECC, dated December 22, 2014, page 33; **SAR, Vol. 1, Tab 3**, Supplementary Affidavit of Richard Carignan, sworn February 18, 2016, and **Exhibit “A”**, Supplementary Expert Report of Dr. Carignan on Potential Effects of the December 2013 OMNR Approved WJF FMP on Mercury Contamination in Fish, pages 79-81.

2. Other Information from FIPPA Process Showed Need for an IEA

21. As a result of various requests made to the MOECC by, or on behalf of, the Applicants under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), the Applicants became aware of additional critical information in existence before the December 2014 decision but not available to the Applicants until after the MOECC decision to reject their IEA request. The information showed that: (1) MOECC officials had concerns respecting the release of mercury from clearcut logging; and (2) MOECC and MNRF collaborated with each other during the decision-making process on the IEA request without the knowledge, or participation, of the Applicants.

SAR, Vol. 3, Tab 9, Supplementary Affidavit of David Sone, sworn March 9, 2016, at paragraphs 3-31.

a. MOECC Concern that Clearcut Logging Releases Mercury

22. Information obtained under *FIPPA* showed that MOECC officials had serious concerns that in a community that has experienced historical and continuing adverse effects from mercury industrial discharges, clearcut logging could release additional mercury to the environment, yet the Minister, or his designate, rejected the request of Grassy Narrows for an IEA of the Plan.

SAR, Vol. 3, Tab 9, Supplementary Affidavit of David Sone, sworn March 9, 2016, at paragraphs 10-15, 19-31; **Exhibit “A”**, Various emails of MOECC/MNRF for January 2014 to January 2015 – MOECC File A-2015-00157 (MOECC acknowledgement that: WJF is traditional territory of Grass Narrows – page 455; fish is main food source for Grassy Narrows community – 454; there have been historic impacts of mercury on Grassy Narrows – page 454, 543; mercury is toxic, inherently persistent, and bioaccumulative – pages 531, 533-534; **Exhibit “B”**, Various emails of MOECC/MNRF for January 2012 to January 2015 – MOECC File A-2015-00158 (MOECC acknowledgement that: mercury has had an impact on human health at Grassy Narrows as confirmed by Japanese medical researchers who have periodically visited the community since 1975 – pages 577, 593; declines of mercury levels may have slowed down because of logging – pages 597-599, 593; “Yes, logging introduces mercury”; “on-going logging will increase Hg [mercury] mobilization and nobody is tracking the downstream implications”; logging releases mercury into the aquatic environment and it accumulates in fish – pages 597-601; the need for a study of clearcut logging on mercury levels in fish, particularly in the English-Wabigoon River system, was discussed for years with MNRF both before and after the IEA request but was not undertaken, even though “there is a general body of knowledge illustrating that logging practices promote mercury release to rivers”; “any impacts to the English-Wabigoon River system [are] unclear and could not be evaluated without analysis” – pages 597-600, 570-580, 589-590; adequacy of mercury monitoring under approved WJF FMP questioned; “Note the ‘monitoring’ is of soils and not the aquatic ecosystem. Just curious – were we approached by EAAB for any input to the decision re: impacts on mercury in fish?”– pages 603-606).

b. MOECC-MNRF Collaboration During IEA Request Process

23. Information obtained under *FIPPA* showed that during the IEA request process, the MOECC, the decision-making authority in the process, collaborated with MNRF, the approval authority for the Plan that was the subject of the IEA request, on both MNRF’s substantive submissions to MOECC, and the decision itself, all without the knowledge of Grassy Narrows or the individual Applicants.

SAR, Vol. 3, Tab 9, Supplementary Affidavit of David Sone, sworn March 9, 2016, at paragraphs 5(a)-(j), 17(a)-(d), 18; and **Exhibit “A”**, Various emails of MOECC/MNRF for January 2014 to

January 2015 – MOECC File A-2015-00157 (MNRF seeking to commence dialogue with MOECC on issues raised by IEA request – page 433; MNRF sharing a document with MOECC about mercury that Grassy Narrows not apprised of – pages 437-440; MOECC and MNRF planning teleconference to chat about bump-up issue so they are on same page and can convey ideas on how to proceed – page 442; **MNRF wanting to facilitate MOECC and MNRF science folks getting together for a discussion on the mercury issues involved in IEA request to see what support they can provide to each other** – page 443; **MNRF providing MOECC with a draft science perspective on the issues raised in the IEA request and seeking an initial response from MOECC on whether MOECC believes this response is helpful and whether MOECC suggests “any changes/additions/deletions” and MOECC sending its completed review of MNRF’s draft science perspective back to MNRF for its review** – page 493 [the “draft science perspective” is the draft of what MNRF filed with MOECC one week later in April 2014 as MNRF’s official response to the Grassy Narrows January 2014 IEA request]; MOECC forwarding to MNRF the Grassy Narrows May 2014 reply submissions and scheduling a meeting with MNRF so that an “open discussion of relevant information may occur” – pages 500-502; **MOECC indicating internally that a July 2014 response it received from MNRF to the May 2014 Grassy Narrows reply submissions would be considered by the MOECC director in coming to a decision on the IEA request and Grassy Narrows could go through the FIPPA process “to gain access” to the response document** – pages 512, 508; **MNRF confirming with MOECC conditions respecting IEA request MOECC proposed during a telephone call with MNRF and MNRF confirming that the conditions were feasible to implement** – pages 520, 517; **MNRF requesting an update from MOECC on the status of the IEA request as it “has been sometime since we had out teleconference on the approach MOECC was taking with making a decision on this request”** – page 537; **Exhibit “B”**, Various emails of MOECC/MNRF for January 2012 to January 2015 – MOECC File A-2015-00158 (MOECC confirming its intention to attend a meeting with MNRF referred to above respecting the WJF FMP – page 545; MNRF setting up a March 20, 2014 meeting between MOECC and MNRF managers to discuss mercury issues anticipating that the scientists would meet prior to that date and their outcomes/thoughts would be basis for MNRF/MOECC meeting at which the managers could “discuss gaps in our knowledge” – page 546; reference to meeting between MOECC and MNRF that took place in March 2014 relating to IEA request where discussion included “hearing another perspective on mercury” than just “focusing so much on water” and considering the “balance between political sensitivity for a specific watershed/community and the implications for forestry management on a broader provincial scale” – page 547); **SAR, Vol. 3, Tab 11**, Supplementary Affidavit of Roger Fobister, Senior, affirmed March 9, 2016, at paragraphs 3-4; and **Tab 12**, Supplementary Affidavit of Simon Fobister, affirmed March 22, 2016, at paragraphs 3-4.

III. PART III – ISSUES AND LAW

A. The Decision Violates the Section 7 Charter Rights of the Applicants

24. In light of the past health consequences of the Applicants’ exposure to mercury from industrial discharges, the Decision to approve the Plan and to not first study under an IEA, the anticipated release of more mercury to the local environment from clearcut logging authorized under the Plan, violates the Applicants’ rights under s. 7 of the *Charter*. The conduct of the Respondents in a context where they will as a matter of law and policy expect, if not require, logging licensees to comply with the Plan, which calls

exclusively for clearcut logging of the WJF, constitutes government-sponsored harm that attracts application of the *Charter*.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 15; **Exhibit “G”**, Summary of 2012-2022 MNR WJF FMP, page 81 (100% of 10-year harvest of 53,471 hectares to be by clearcut logging); **Applicants’ Factum, Sch. B, Charter**, ss. 7, 32(1)(b) (*Charter* applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province); **Applicants’ Book of Authorities’ (“BOA”), Tab 1**, Nathalie J. Chalifour, “Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?” (2016) 28.1 J.E.L.P. 89, 104-105 (s. 7 about ensuring state’s actions do not unreasonably increase one’s risk of death, or interfere with people’s right to make important decisions, or their bodily or psychological integrity; s. 7’s purpose well aligned with environmental justice since both strive to protect people from serious state-imposed harm).

25. The purpose of s. 7 is to protect the core of human dignity and autonomy. It declares that everyone has (1) the right to life, liberty and security of the person and (2) the right not to be deprived thereof except in accordance with the principles of fundamental justice. The Applicants meet both requirements.

Applicants’ Factum, Sch. B, Charter, s. 7; **Applicants’ BOA, Tab 2, Godbout v. Longueuil (Ville)**, [1997] 3 S.C.R. 844 at para 69; **Tab 3, R. v. Clay**, [2003] 3 S.C.R. 735 at para 31.

1. Depriving Applicants of Right to Life, Liberty and Security of the Person

26. Section 7 protects three distinct interests: (1) life; (2) liberty; and (3) security of the person. The Decision interferes with each of them.

Applicants’ BOA, Tab 4, Reference re s. 94(2) of Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 489 at para 28.

a. Right to Life

27. The right to life includes the individual’s entitlement to continue to exist. Government action that results in a clear increase in the risk of death may result in a deprivation of that right. The Decision violates the s. 7 *Charter* rights of the Applicants by increasing their risk of death, illness or disease as a result of the approval and expected implementation of the Plan and refusal to examine beforehand, through an IEA,

the anticipated impacts to them posed by consumption of mercury-contaminated fish arising from, or exacerbated by, clearcut logging authorized by the Plan in the WJF.

Applicants' BOA, Tab 5, *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at para 124; **FSAR, Vol. 1, Tab 2**, Affidavit of Shigeru Takaoka, sworn May 28, 2016, and **Exhibit "A"**, Expert Report of Dr. Takaoka, et al on Response to Questions on Medical-Psychological/Psychiatric Issues Pertaining to Mercury Exposure at Grassy Narrows, page 29 ("data collected from methylmercury-exposed Indigenous residents of Grassy Narrows suggest that they were poisoned by methylmercury"); **SAR, Vol. 1, Tab 4**, Affidavit of Donna Mergler, sworn November 6, 2015; **Exhibit "A"**, Expert Report of Dr. Mergler on Grassy Narrows General Mercury and Health Facts, pages 111-117, 146-147 (at the levels of exposure experienced in Grassy Narrows, many people have suffered and are suffering from mercury poisoning); **AR, Vol. 1, Tab 4**, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 8; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraphs 16-17; **AR, Vol. 4, Tab 7**, Affidavit of Joseph Fobister, affirmed August 26, 2015, at paragraph 12; **AR, Vol. 4, Tab 8**, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 8-14, and **Exhibit "A"** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 1561-1562; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraphs 4-13, and **Exhibit "A"** Excerpts from September 2014 Third Supplementary Submission filed by Grassy Narrows and Earthroots with MOECC, pages 1570-1571 (people of Grassy Narrows have fished in the area since time immemorial and it is integral to the identity of their descendents to continue to fish and consume fish caught there); **SAR, Vol. 1, Tab 2**, Affidavit of Richard Carignan, sworn February 18, 2016, and **Exhibit "A"**, Expert Report of Dr. Carignan on Potential Effects of the December 2013 OMNR Approved WJF FMP on Mercury Contamination in Fish, pages 38-39, 41-48; **Tab 3**, Supplementary Affidavit of Richard Carignan, sworn February 18, 2016, and **Exhibit "A"**, Supplementary Expert Report of Dr. Carignan on Potential Effects of the December 2013 OMNR Approved WJF FMP on Mercury Contamination in Fish, pages 76, 79-82 (based on his studies in Quebec, Dr. Carignan found there is a clear risk of increased mercury contamination in nearby lakes following clearcut logging in the WJF. A site-specific study, as requested by the Applicants through the IEA process, would be necessary to confirm the likely increased mercury load. MNRF cannot rely on mitigation measures for which there is no experimental evidence. The mitigation measures proposed in the SSG ignore the likely cause of increased mercury contamination, which is a rise in the water table, the flooding of organic soil layers, and the failure to limit the size of the clearcut relative to the size of the lake watershed being cut).

b. Right to Liberty

28. The right to liberty includes the individual's right to "make decisions of fundamental importance free from state interference", and includes the right to choose the environment in which one wishes to live free from government interference. The Decision violates the Applicants' s. 7 *Charter* rights by seriously compromising their individual freedom to choose an environment in which to reside and in which to practice their way of life, including fishing in their traditional territory. The Decision forces the Applicants to face serious risks of neurological or other harm, or further harm, as a result

of eating fish caught in local waterways contaminated by methylmercury caused by clearcut logging authorized by the Plan, and not studied beforehand, through an IEA.

Applicants' BOA, Tab 6, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para 49; **Tab 2**, *Godbout* at para 66 (right to liberty encompasses those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence) and para 68 (right to liberty includes ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy).

c. Right to Security of the Person

29. Security of the person encompasses “a notion of personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress”, and is violated if the impugned government conduct “adversely affects” individual security. Accordingly, security of the person consists of both: (1) physical security; and (2) psychological security.

Applicants' BOA, Tab 7, *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para 21; **Tab 8**, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para 3.

i. Physical Security

30. Government conduct that results in health damage, including an increased risk of death or disability, violates the physical aspect of security of the person. The Decision violates the s.7 *Charter* rights of the Applicants by increasing the risk to their physical security by exposing them to health damage, or further health damage, including death or disability. The MNR/MOECC admissions make it clear that members of Grassy Narrows will likely be exposed to, and harmed by, increased mercury in fish as a result of clearcut logging authorized by the Plan. An IEA could have examined the issue and suggested possible solutions. The work of Drs. Carignan, Mergler, and the Japanese medical research team (Drs. Takaoka, Fujino, and Shimoji) is merely confirmatory of

that. In the context of this case, such government conduct is not consistent with ensuring the “right to a safe environment”, does not accord with the precautionary principle, nor is it consistent with Supreme Court of Canada jurisprudence on the importance of environmental protection.

Applicants’ BOA, Tab 5, *Chaoulli* at paras 111-115, 124; **Tab 9**, *Ontario v. Canadian Pacific*, [1995] 2 S.C.R. 1031 at para 55 (“a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment” - adopted from Law Reform Commission of Canada’s report *Crimes Against the Environment*); **Tab 10**, *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 at para 124 (same); **Tab 11**, *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 at para 20; **Tab 12**, *114957 Canada Ltee. (Spraytech, Societe d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para 31; **Tab 13**, Jerry V. DeMarco, “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?” (2007) 17 J.E.L.P. 159, 161 (protection of environment has become one of the major challenges of our time).

ii. Psychological Security

31. The Decision violates s. 7 because it constitutes “serious state-imposed psychological stress” arising from the Applicants’ well-founded fear that clearcut logging in the WJF will exacerbate mercury-contamination of fish, and neurological and other health problems experienced by members of Grassy Narrows consuming the fish. Anxiety in the community regarding past mercury exposure is recognized in government reports, and confirmed by the Japanese medical team.

Applicants’ BOA, Tab 6, *Blencoe* at para 57 (psychological harm must be state imposed; i.e. must result from actions of the state, and the psychological prejudice must be serious); **Tab 14**, *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para 60 (serious psychological effect “need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety”); **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 20(b); **Vol. 4, Exhibit “C”, Exhibit “T”**; Fourth Supplementary Submission by Grassy Narrows and Earthroots to MOECC on IEA Request, November 14, 2014, pages 1492-1493 (fear and anxiety from knowing they were contaminated was debilitating to many members of Grassy Narrows community; threat of mercury poisoning clearly affected their mental health); **FSAR, Vol. 1, Tab 2**, Affidavit of Shigeru Takaoka, sworn May 28, 2016, and **Exhibit “A”**, Expert Report of Dr. Takaoka, et al on Response to Questions on Medical-Psychological/Psychiatric Issues Pertaining to Mercury Exposure at Grassy Narrows, pages 14-19, 22-29; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraph 11; **AR, Vol. 4, Tab 8**, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 8-9, 12; **Applicants’ Factum**, paras 16, 19(b)(c)(e) and references.

2. The Deprivations are not in Accordance with Principles of Fundamental Justice

32. The deprivations identified are not in accordance with the principles of fundamental justice. To qualify as a principle of fundamental justice, three criteria must be met: (1) it must be a legal principle; (2) there must be sufficient consensus that the alleged principle is vital to our societal notion of justice; and (3) the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Principles of fundamental justice also may be procedural or substantive in nature. Several are discussed below.

Applicants' BOA, Tab 8, *Canadian Foundation* at para 8; **Tab 4**, *Reference re s. 94(2)* at para 28.

a. Failure to Respect Sanctity of Human Life

33. Given the history of mercury impacts on the members of Grassy Narrows, the Decision fails to respect the sanctity of human life, a substantive principle of fundamental justice, by risking further harm to human health and well-being of the Applicants, if not loss of human life, from anticipated increased mercury exposure due to approval and implementation of the Plan, and failure to examine the risks before-hand through an IEA.

Applicants' BOA, Tab 7, *Rodriguez* at para 58 (sanctity of human life a substantive principle of fundamental justice; human life must be respected and we must be careful not to undermine the institutions that protect it).

b. Denial of Procedural Protections

34. Principles of fundamental justice include the obligation of procedural fairness, but also are context specific. In the case at bar, acting in accordance with the principles of fundamental justice would require that any potential for government-sponsored harm from mercury under, or arising from, the Plan depriving s. 7 rights should be examined

through an independent and robust process that contains procedural safeguards such as the right to be heard in an appropriate forum.

Applicants' BOA, Tab 15, *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at para 39; Tab 16 *R. v. Lyons*, [1987] 2 S.C.R. 309 at para 85.

35. The Decision, however, denied the Applicants procedural protections as it was made without their being able to appear before an independent body that could have considered the effects of the Plan on their health because:

- MNRF failed to promulgate a regulation setting out an appeal process for forest management plans as authorized under section 12 of the *CFSA*;

Applicants' Factum, Sch. B, *CFSA*, s. 12 (Act allows a person to appeal a decision by the Minister to approve a FMP, if authorized by the regulations – no such regulations have been promulgated under the Act);

- MNRF and/or MOECC also failed to classify by regulation forest management plans as instruments that are eligible for third party appeals under the *Environmental Bill of Rights, 1993*, which could have led to an independent public hearing with respect to the Plan; and

Applicants' Factum, Sch. B, *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, ss. 38-48 (“*EBR*”); and *Classification of Proposals for Instruments*, O. Reg. 681/94, s. 10.4.1 (no listing of *CFSA* FMPs as subject to leave to appeal provisions of *EBR*).

- as a result of the Environment Minister refusing to grant the bump-up request, the Applicants were denied an opportunity to: (1) obtain an IEA that could have provided in-depth study and consideration of the issue of mercury release to area waters and resulting health implications from the Plan's authorization of clearcut logging, matters of vital concern to their life, health, and well-being as consumers of fish from these waters; and (2) request an independent public hearing before the Environmental Review Tribunal under sections 9.1-9.3 of the *EAA* with respect to the resulting IEA.

Applicants' Factum, Sch. B, EAA, R.S.O. 1990, c. E.18, ss. 16, 9.1-9.3.

36. In addition, the substitution of a notice, comment, consultation, and IEA request opportunity offered by the Respondents was totally inadequate in comparison to a hearing before an independent body because of: (1) the health threats posed by mercury to members of Grassy Narrows arising from clearcut logging authorized under the Plan; and (2) the information known only to MNRFP at the time respecting the limitations of its mercury mitigation measures and only learned of later by the Applicants through the *FIPPA* process [see factum paragraph 19(e) and references].

37. Moreover, the MOECC, as the decision-maker in the IEA process, did not act in accordance with principles of fundamental justice in that it collaborated with MNRFP, the Plan proponent, on both MNRFP's substantive submissions to it, and on its ultimate decision, all without the knowledge of Grassy Narrows [see factum paragraph 23 and references]. Grassy Narrows was entitled to robust procedural protections to ensure an appropriate independent review commensurate with the severe health risks faced by the community arising from clearcut logging authorized under the Plan. The conduct of the Respondents on this issue alone vitiates any argument that the Decision was made in accordance with principles of fundamental justice.

c. Offends Basic Tenet of Legal System

38. Principles of fundamental justice are to be found in "the basic tenets of our legal system". Rights set out in the *Charter* constitute such basic tenets. Government conduct in violation of another provision of the *Charter* cannot be regarded as in accordance with principles of fundamental justice. The government sponsored environmental harm anticipated by mercury releases from clearcut logging approved under the Plan, and the

refusal to study those effects beforehand in an IEA, will disproportionately affect an enumerated or analogous group under s. 15(1) of the *Charter*; i.e. the Ojibway people of Grassy Narrows. Accordingly, the Decision is not in accordance with principles of fundamental justice because it offends a basic tenet of the legal system by violating the equality rights of the Applicants under s. 15(1), as set out below.

Applicants' BOA, Tab 4, Reference re s. 94(2) at para 30.

3. The Decision Disproportionately and Unreasonably Interferes with Section 7 Charter Guarantees

39. The Decision, in seeking to meet statutory objectives, disproportionately and unreasonably interferes with protections guaranteed to the Applicants under s. 7 of the *Charter*. The effects of the Decision on the s. 7 rights of members of Grassy Narrows due to anticipated additional exposure to mercury and the failure to study that exposure through an IEA before proceeding, are disproportionate to the Decision's economic objectives of allowing the harvesting of trees in the Crown forest by clearcut logging.

Applicants' BOA, Tab 17, Dore v. Barreau du Quebec, 2012 SCC 12, [2012] 1 S.C.R. 395 at paras 6-7, 24, 35, 55-57.

B. The Decision Violates the Section 15(1) Charter Rights of the Applicants

40. Section 15(1) of the *Charter* declares that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The purpose of s. 15 is to: (1) prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice; and (2) promote a society in which all persons enjoy equal recognition at law as human beings or as

members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Applicants’ Factum, Sch. B, Charter, s. 15(1); Applicants’ BOA, Tab 18, Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para 51.

41. Scrutiny for constitutionality under s. 15(1) is not limited to distinctions set out in legislation. The term “law” in s. 15(1) includes programs, policies, and activities undertaken pursuant to statutory authority, and applies to omissions as well. The Decision constitutes “law” that is subject to challenge under s. 15(1) of the *Charter*.

Applicants’ BOA, Tab 19, Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at paras 20-21; Tab 20, Ardoch Algonquin First Nation & Allies v. Ontario, 2000 SCC 37 at para 56; Tab 21, Vriend v. Alberta, [1988] 1 S.C.R. 493 at para 61.

42. The Decision violates the s. 15(1) *Charter* rights of the Applicants by: (1) creating a distinction based on grounds enumerated in, or analogous to, s. 15(1); and (2) creating a disadvantage based on the distinction.

Applicants’ BOA, Tab 22, Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 at para 185; Tab 23, Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396 at para 30; Tab 24, R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483 at para 17.

43. Reasonable persons in a situation similar to that of the Applicants would find that that Decision discriminates against them in violation of s. 15(1) of the *Charter*.

Applicants’ BOA, Tab 25, Egan v. Canada, [1995] 2 S.C.R. 513 at para 56; Tab 18, Law at para 60; Applicants’ BOA, Tab 26, Lavoie v. Canada, 2002 SCC 23, [2002] 1 S.C.R. 769 at para 47.

1. Creating a Distinction

44. The Decision violates section 15(1) of the *Charter* by creating a distinction that: disproportionately burdens members of Grassy Narrows who live within the watershed and who are identifiable by their Aboriginality, their place of residence, their historical and ongoing practice of traditional fishing activities in their traditional territory, which are all characteristics that are actually or constructively immutable, and which the

government has no legitimate interest in expecting the people of Grassy Narrows to change in order to receive substantive equality under the law.

Applicants' BOA, Tab 23, *Withler* at paras 61 (distinction denotes the carrying of a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds), 64 (indirect distinction may be shown when although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds); **Applicants' BOA, Tab 27**, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paras 60 (analogous grounds include individual characteristics that are immutable, or essentially unchangeable except at great cost or difficulty), 13 (government has no legitimate interest in expecting group to change characteristics in order to receive equal treatment under the law), 61 (classes of analogous grounds that have been recognized are not exhaustive), 14 (Aboriginality-residence an analogous ground because it is a distinction that goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship); **Applicants' BOA, Tab 28**, *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, [2003] 3 F.C.R. 233, 2002 FCA 485 at paras 40 (connection of the Nawash people with particular land and waters in their geographic region, militates against their leaving the community, and for that reason the analogous ground of Aboriginality-residence recognized in *Corbiere* might be expanded), 33 (most fundamental of their rights is the right to their identity as Aboriginal people derived largely from the land they used and occupied before the arrival of the Europeans and that they believe they still have for continuing habitation and use including for fishing); **AR, Vol. 1, Tab 4**, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraphs 3-8; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraphs 3-4, 16-17; **AR, Vol. 4, Tab 7**, Affidavit of Joseph Fobister, affirmed August 26, 2015, at paragraphs 2, 12; **AR Vol. 4, Tab 8**, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 3-14; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraphs 2-13; **SAR, Vol. 3, Tab 9**, Supplementary Affidavit of David Sone, sworn March 9, 2016, **Exhibit "A"**, Various emails of MOECC/MNRF for January 2014 to January 2015 – MOECC File A-2015-00157 (MOECC acknowledgement that: WJF is traditional territory of Grass Narrows – page 455; fish is main food source for Grassy Narrows community – 454; there have been historic impacts of mercury on Grassy Narrows – page 454, 543; mercury is toxic, inherently persistent, and bioaccumulative – pages 531, 533-534; **Exhibit "B"**, Various emails of MOECC/MNRF for January 2012 to January 2015 – MOECC File A-2015-00158 (MOECC acknowledgement that: people of Grassy Narrows rely on fish from the river system for food and are concerned about fish mercury levels from historical contamination – page 564; mercury has had an impact on human health at Grassy Narrows as confirmed by Japanese medical researchers who have periodically visited the community since 1975 – pages 577, 593; **SAR, Vol. 2, Tab 5**, Affidavit of Anna Willow, sworn February 18, 2016; and **Exhibit "A"**, Expert Report of Dr. Willow on the Importance of Fishing and the Consumption of Fish as Part of the Traditional Cultural Activity and Identity of the People of Grassy Narrows First Nation: An Anthropological Perspective, pages 202-211 (fishing remains essential to the culture, economy, and sustenance of Grassy Narrows residents).

45. Women of childbearing age in the community must avoid consumption of methylmercury-contaminated fish or risk exposing their unborn children to serious adverse health effects.

AR, Vol. 4, Tab 5, Exhibit "H", Grassy Narrows and Earthroots Third Supplementary Submission to MOECC on IEA Request, dated September 8, 2014, at pages 1395-1396, 1400-1401, 1408-1412, 1450, 1478; **SAR, Vol. 2, Tab 5**, Affidavit of Anna Willow, sworn February 18,

2016; and **Exhibit “A”**, Expert Report of Dr. Willow on the Importance of Fishing and the Consumption of Fish as Part of the Traditional Cultural Activity and Identity of the People of Grassy Narrows First Nation: An Anthropological Perspective, pages 215-216; **SAR, Vol. 1, Tab 4, Tab 6**, Affidavit of Donna Mergler, sworn November 6, 2015; **Exhibit “A”**, Expert Report of Dr. Mergler on Grassy Narrows General Mercury and Health Facts, pages 112-113, 115, 132-137; **AR, Vol. 4, Tab 9**, Affidavit of Sherry Fobister, affirmed August 26, 2015, at paragraphs 6-13.

46. The Decision ignores the Applicants pre-existing health disadvantage as a result of past consumption of methylmercury-contaminated fish from local waters.

AR, Vol. 1, Tab 4, Affidavit of Simon Fobister, affirmed July 30, 2015, at paragraph 8; **AR, Vol. 4, Tab 6**, Affidavit of Roger Fobister, Senior, affirmed August 26, 2015, at paragraphs 16-17; **AR, Vol. 4, Tab 8**, Affidavit of William Fobister, Senior, affirmed July 30, 2015, at paragraphs 3-14; **AR, Vol. 4, Tab 5, Exhibit “H”**, Grassy Narrows and Earthroots Third Supplementary Submission to MOECC on IEA Request, dated September 8, 2014, at pages 1420-1421, 1437-1444, 1462, 1480-1482; **SAR, Vol. 3, Tab 9**, Supplementary Affidavit of David Sone, sworn March 9, 2016, **Exhibit “A”**, Various emails of MOECC/MNRF for January 2014 to January 2015 – MOECC File A-2015-00157 (MOECC acknowledgement that: WJF is traditional territory of Grass Narrows – page 455; fish is main food source for Grassy Narrows community – 454; there have been historic impacts of mercury on Grassy Narrows – page 454, 543; and **Exhibit “B”**, Various emails of MOECC/MNRF for January 2012 to January 2015 – MOECC File A-2015-00158 (MOECC acknowledgement that Grassy Narrows community advised MOECC in January 2014 that community is already sensitive to the effects of mercury and that this should be recognized when logging being considered for the area and that a precautionary approach should be considered – page 601); **SAR, Vol. 2, Tab 5**, Affidavit of Anna Willow, sworn February 18, 2016; and **Exhibit “A”**, Expert Report of Dr. Willow on the Importance of Fishing and the Consumption of Fish as Part of the Traditional Cultural Activity and Identity of the People of Grassy Narrows First Nation: An Anthropological Perspective, pages 193, 212; **SAR, Vol. 1, Tab 4**, Affidavit of Donna Mergler, sworn November 6, 2015; **Exhibit “A”**, Expert Report of Dr. Mergler on Grassy Narrows General Mercury and Health Facts, pages 123, 125-126, 146-151; **FSAR, Vol. 1, Tab 2**, Affidavit of Shigeru Takaoka, sworn May 28, 2016, and **Exhibit “A”**, Expert Report of Dr. Takaoka, et al on Response to Questions on Medical-Psychological/Psychiatric Issues Pertaining to Mercury Exposure at Grassy Narrows, pages 19, 22-29.

47. The effect of the Decision creates different and greater burdens on the Grassy Narrows community than would be borne by other communities facing the same decision. The personal characteristics upon which the Applicants have been differentiated is their continued traditional way of life. This may be viewed as a branch of the Aboriginality-residence ground recognized in *Corbiere*, and their special relationship with fishing in the WJF area, which constitutes an integral part of their identity as a people. In addition, the Applicants are identifiable by their pre-existing health disadvantage as a result of past consumption of methylmercury contaminated fish, which

also disproportionately harms women. The characteristics are actually or constructively immutable. The government has no legitimate interest in expecting Grassy Narrows to change (such as ceasing to eat fish caught in area waters) in order to receive substantive equality under the law.

2. Creating a Disadvantage

48. The Decision further violates section 15(1) by creating a disadvantage on the basis of the above distinction that perpetuates the history of prejudice experienced by Aboriginal peoples in Canada in general, and the exposure to mercury suffered by members of Grassy Narrows in particular. The Decision does this by authorizing, and refusing to examine beforehand through an IEA anticipated impacts to the Grassy Narrows community posed by, clearcut logging. This activity will trigger new releases of mercury into the local water system, thus effectively putting the members of Grassy Narrows in the position of either: (1) giving up the fishing and other traditional activities in their traditional territory that are of significant importance to a band member's personal identity; or (2) further exposing themselves and their unborn children to harm due to consumption of fish contaminated by new releases of mercury to area waters.

Applicants' BOA, Tab 23, Withler at paras 34 (second step of test requires showing the law has discriminatory impact in terms of prejudicing or stereotyping), 35 (discrimination may be established by showing impugned law, in purpose or effect, perpetuates prejudice or disadvantage to members of a group on the basis of personal characteristics within s. 15, and such perpetuation of disadvantage typically occurs when law treats historically disadvantaged group in a way that exacerbates the situation of the group), 39 (focus of inquiry on law's impact is on substantive equality taking into full account social, political, economic, and historical factors concerning the group); **Applicants' BOA, Tab 18, Law** at paras 39, 53, 88 (does the differential treatment discriminate by imposing a burden on claimant in a manner that reflects stereotyping; more severe and localized the consequences of the law for the affected group the more likely that the differential treatment responsible for these consequences is discriminatory under s. 15(1)); **Applicants' BOA, Tab 27, Corbiere** at para 66 (legacy of stereotyping and prejudice against Aboriginal peoples); **Applicants' BOA, Tab 24, Kapp** at para 59.

49. Thus, the Decision puts the Applicants in the untenable position of choosing between: (1) giving up their traditional lifestyle, central to their identity, of fishing and eating fish caught, in order to protect their health; or (2) continuing with their traditional lifestyle of fishing and eating fish caught and thereby further exposing themselves and their unborn children to the toxic effects of mercury contamination. This choice is not faced by other residents of Ontario. The Respondents do not have a legitimate interest in expecting the Grassy Narrows community to turn away from their traditional lifestyle in order to protect their health and well-being. The disadvantage to the Applicants caused by the Decision would continue the history of prejudice experienced by Aboriginal peoples in Canada in general, and the historical exposure to mercury suffered by this community in particular.

3. The Decision Disproportionately and Unreasonably Interferes with Section 15(1) Charter Guarantees

50. The Decision, in seeking to meet statutory objectives, disproportionately and unreasonably interferes with protections guaranteed to the Applicants under s. 15(1) of the *Charter*. The effects of the Decision on the equality rights of members of Grassy Narrows in terms of continuing traditional activity at the risk of their health, or discontinuing traditions central to their identity as individuals and a people in order to avoid harm, are disproportionate to the Decision's economic objectives of allowing the harvesting of trees in the Crown forest by clearcut logging.

Applicants' BOA, Tab 17, *Dore v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paras 6-7, 24, 35, 55-57.

C. The Decision Violates Administrative Law Principles

1. No Evidence

51. A court on a judicial review application may set aside a government decision on the ground that there is no evidence on an essential point to support a finding of fact in relation to any decision made in the “exercise of any statutory power of decision”.

Applicants’ Factum, Sch. B, *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(3).

52. In making the Decision, the Ministers, or their designates, erred in law, and acted unreasonably, in that there was no evidence that the mercury mitigation measures proposed pursuant to, or in conjunction with, the Plan would mitigate mercury impacts to the river system, avoid contamination of fish, or prevent serious risk of harm to members of Grassy Narrows consuming contaminated fish. Moreover, there was substantial evidence to the contrary, including from the Respondents’ own staff.

AR, Vol. 1, Tab 5, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 11; **SAR, Vol. 3, Tab 9**, Supplementary Affidavit of David Sone, sworn March 9, 2016, at paragraph 18; and **Exhibit “C”**, MNR Response to MOECC on 2012-2022 WJF FMP IEA Request, April 23, 2014 (complete version), pages 617, 626-627 (SSG clearly acknowledges potential for forest management activities to mobilize mercury; there are no mitigation measures specific to mercury in the SSG; MNR makes no claims that SSG direction will mitigate or eliminate mobilization of mercury); **AR, Vol. 3, Tab 5, Exhibit “G”**, Earthroots Supplementary Submission to MOECC respecting IEA Request, dated July 22, 2014, pages 1370-1376 (MNRF biologists concerned about reduced protections to water bodies from logging contained in SSG noting that First Nations are very sensitive to mercury entering the water systems and are not going to like the idea that it might be increased); **AR, Vol. 5, Tab 10**, Affidavit of David Sone, sworn August 21, 2015, at paragraphs 6-8, 13-16, and **Exhibit “C”**, Email and attachment to among others Kurt Pochailo, MNR from Roy Sidders, MNR on Forest Practice Subjects, dated December 13, 2008, pages 1588, 1591; **Exhibit “D”**, Slide Presentation by Rob Mackereth, MNR on “How Forest Disturbance Influences Mercury Dynamics in Watersheds” undated, pages 1605, 1613 (mercury flow almost doubled following harvest; for Ontario Boreal forest region with a 1%/year logging rate this equates to approximately 15% to 20% of the mercury runoff for this region being attributable to forest management activities); **Exhibit “E”**, Craig J. Allan, Andrew Heyes, Robert J. Mackereth “Changes to groundwater and surface water Hg [mercury] transport following clearcut logging: a Canadian case study” published in 2009 report on 2006 Royal Swedish Academy of Agriculture and Forestry workshop on “Does forestry contribute to mercury in Swedish fish?”, page 1638 (estimate of 81% methylmercury and 116% mercury increase in transport from catchment of Ontario logged lake researched in the first 22 months after logging with increased mercury transport to persist at site as a result of increased run-off yield for at least a decade; these increases from clearcut catchments explain elevated methylmercury concentrations observed in studies in Quebec by various researchers including Carignan); **Exhibit “P”**, Summary of MNR Criticisms of Stand and Site Guide Measures Related to Mercury, pages 1693-1698

(MNR staff critical of SSG measures SSG authors had otherwise suggested can mitigate mercury releases, with MNR staff suggesting measures either not effective or not enforceable; MNR staff also critical of reduction of proposed measures in SSG because recent paper by Dr. R. Mackereth indicated mercury finding its way into watercourses from cutover areas even with current reserves and areas of concern in place; MNR staff also noting that “public and especially First Nations are very sensitive to mercury entering our water systems and they are not going to like the idea that it might be increased!”); **Exhibit “J”**, Exchange of MNR communications on MNR Staff Internal Review of the Draft Stand and Site Guide, pages 1699-1701; **Exhibit “K”**, Raveena Aulakh, “Ontario’s biologists called clear-cut plan ‘big step backwards’”, The Toronto Star, January 17, 2015; **Exhibit “L”**, Letters to David Sone, Earthroots from MNR with attachments, dated March 2 and 3, 2015, pages 1704-1710; **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 20(a) and (c); **Vol. 4, Exhibit “T”**, Fourth Supplementary Submission by Grassy Narrows and Earthroots to MOECC on IEA Request, November 14, 2014, pages 1488-1510.

2. Non-compliance with Statutory Conditions Precedent

53. A condition precedent to the exercise of any discretionary administrative action must be fulfilled if the action in question is to be upheld; that is, statutory preconditions to the exercise of public powers must be met before the powers can be exercised.

Applicants’ BOA, Tab 29, Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, looseleaf) at 15:3250; **Applicants’ BOA, Tab 30**, *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)*, [1998] O.J. No. 419, 26 C.E.L.R. (N.S.) 163 (Ont. Ct. Gen. Div. (Div. Ct.)), at paras 140-143.

54. The Natural Resources Minister failed to meet the purposes, duties, and conditions precedent imposed upon the Minister pursuant to the *CFSA* and various manuals and guides promulgated thereunder, requiring the Minister to only approve a Plan that provides for the sustainability of the Crown forest ecosystem by meeting the social, economic, and environmental needs of present and future generations, as well as minimizing adverse effects to animal life and water.

Applicants’ Factum, Sch. B, CFSA, ss.1 (purpose of *CFSA* to provide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations), 2 (sustainability to be determined by the Forest Management Planning Manual - FMPM), 8 (FMP must have regard to the plant life, *animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the management unit*), 9 (before approving a FMP Minister must be satisfied that it provides for the sustainability of the Crown forest, having regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the Crown forest), 68 (Plan cannot be approved until it complies with FMPM); **AR, Vol. 1, Tab 5**, Affidavit of Amber Ellis and David Sone, sworn August 21, 2015, at paragraph 18, and **Exhibit “B”**, MNR 2012-2022 FMP for WJF: Plan Text, pages 179-180 (Plan states that the fisheries resources on this forest management unit are diverse as many lakes, rivers

and streams are found throughout the WJF...There are over 1,700 lakes with a total surface area of approximately 500,000 hectares within the boundaries of Kenora District. There are over 200,000 hectares of water in the WJF. Lake of the Woods and three major river systems, the English River, Wabigoon River and Winnipeg River systems encompass 50% of the total water area of Kenora District and concludes that the quantity and quality of these fisheries resources are not likely to be affected by forest operations); **Vol. 3, Exhibit "C"** Bump-up Request Submitted by Grassy Narrows and Earthroots for IEA on 2012-2022 WJF FMP, January 22, 2014, pages 1256-1257 (although FMPM requires that Plan discuss degree to which fisheries resources could be affected by forest management operations, both the Plan and FMPM silent on the word mercury and no evidence issues respecting mercury in fish identified, evaluated, or addressed in Plan); **SAR, Vol. 3, Tab 9**, Supplementary Affidavit of David Sone, sworn March 9, 2016, at paragraph 18; and **Exhibit "C"**, MNR Response to MOECC on 2012-2022 WJF FMP IEA Request, April 23, 2014 (complete version), pages 617, 626-627 (SSG acknowledges potential for forest management activities to mobilize mercury; there are no mitigation measures specific to mercury in the SSG; MNR makes no claims that SSG direction will mitigate or eliminate mobilization of mercury).

55. In short, the *CFSA* states the Minister must protect animal life and water in the course of approving FMPs and must do so through the mechanisms of the FMPM and various guides authorized under the Act. However, the FMPM and the Plan are silent on mercury and the SSG, the only guide produced by MNRF that mentions mercury, says that it makes no claims as to the effectiveness of its measures in relation to mitigating mercury impacts. Accordingly, the Minister did not meet the statutory condition precedent requiring him to only approve an FMP that protects animal life and water in compliance with the purposes and substantive provisions of the Act.

3. Unfair Procedures

56. Unfair procedures, including hearing extensively from only one party in the absence of the other and not giving the other side the opportunity to challenge comments it was not made privy to, will vitiate a decision of an administrative decision-maker.

Applicants' BOA, Tab 31, *Trinh v. Acadie-Bathurst Health Authority*, 2005 NBQB 103 at paras 32, 36, 38-49; **Tab 32**, *1657575 Ontario Inc. v. Hamilton (City)*, 2008 ONCA 570 (CanLii), paras 24-28.

57. In the case at bar, the Environment Minister, in refusing to grant the bump-up request and order that an IEA be conducted and in allowing, without the knowledge of Grassy Narrows, MOECC to collaborate with MNRF during the decision-making process

with respect thereto, or failing to ensure such collaboration did not occur, acted unfairly and/or unreasonably, and thereby failed to meet the purposes and duties imposed by the *EAA* and declaration orders promulgated thereunder related specifically to forest management on Crown lands, to protect the environment, including human life (see factum paragraph 23 and references).

D. The Plan Conflicts, or is Inconsistent, with the Federal Fisheries Act

58. Where there are inconsistent, or conflicting, but equally valid federal and provincial laws dealing with the same subject matter, the federal law prevails to the extent of the inconsistency or conflict. A federal law is paramount where there is an express contradiction between the federal and provincial law such that compliance with one law would involve violation of the other. A second type of inconsistency also has been recognized; i.e. where a provincial law would frustrate the purpose of a federal law. Where there are overlapping federal and provincial laws and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law, this also been characterized as a case of inconsistency.

Applicants' BOA, Tab 33, Peter W. Hogg, *Constitutional Law of Canada*, 5th ed supp. (Toronto: Carswell, looseleaf) at 16-2 to 16-3, 16-7 to 16-6, and 16-20 to 16-21; **Tab 34**, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 168, 187, 190-191 (impossibility of dual compliance; paramountcy applies where there is actual conflict in operation between two otherwise valid federal and provincial laws).

59. In authorizing the Plan under s. 9 of the *CFSA*, which will allow clearcut logging operations causing or permitting the deposit of mercury, a deleterious substance, into water frequented by fish, including the watersheds of and adjacent to, the English-Wabigoon river system, the Natural Resources Minister's decision conflicts or is inconsistent with the prohibition in s. 36(3) of the *Fisheries Act* prohibiting such deposits and is thereby, pursuant to the federal paramountcy doctrine, inoperative to the extent of

the conflict or inconsistency. No regulations have been promulgated under the *Fisheries Act* authorizing the deposit of mercury as an exception to the s. 36(3) prohibition.

Applicants' Factum, Sch. B, CFSA s. 9; Fisheries Act, R.S.C. 1985, c. F-14, ss. 34, 36(3); Applicants' BOA, Tab 35 *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292 at 301 (predecessor provision to s. 36(3) upheld as *intra vires* the Parliament of Canada pursuant to s. 91(12) of the *Constitution Act, 1867* because the definition of "deleterious substance" in the *Fisheries Act* ensures that the scope of the section is restricted to a prohibition of the deposit, or the permitting of a deposit, of such substances in water frequented by fish that threaten fish, fish habitat, or the use of fish by humans).

60. If the paramountcy doctrine is limited to express conflicts between two statutory provisions (one federal and one provincial), this would allow provincial administrative decision-making, such as approval of the Plan operating under the general authority of a provincial statute, to do indirectly what a provision in a provincial statute could not do directly – i.e. be in express conflict or inconsistent with, or frustrate the purpose of, the federal law on its face, as applied, or as to result.

IV. PART IV – ORDER REQUESTED

61. The Applicants respectfully request an Order granting the Application with costs if requested or, in the alternative, an order that all parties shall bear their own costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

September 23, 2016

Joseph F. Castrilli
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Richard D. Lindgren
Counsel for the Applicants

Jacqueline Wilson
Counsel for the Applicants

V. SCHEDULE “A” – LIST OF AUTHORITIES

	<u>Tab</u>
Nathalie J. Chalifour, “Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?” (2016) 28.1 J.E.L.P. 89, 104-105.	1
<i>Godbout v. Longueuil (Ville)</i> , [1997] 3 S.C.R. 844 at paras 69, 66, 68.	2
<i>R. v. Clay</i> , [2003] 3 S.C.R. 735 at para 31.	3
<i>Reference re s. 94(2) of Motor Vehicle Act (British Columbia)</i> , [1985] 2 S.C.R. 489 at paras 28, 30.	4
<i>Chaoulli v. Quebec (Attorney General)</i> , [2005] 1 S.C.R. 791 at paras 124, 111-115.	5
<i>Blencoe v. British Columbia (Human Rights Commission)</i> , [2000] 2 S.C.R. 307 at paras 49, 57.	6
<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519 at paras 21, 58	7
<i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i> , [2004] 1 S.C.R. 76 at paras 3, 8.	8
<i>Ontario v. Canadian Pacific</i> , [1995] 2 S.C.R. 1031 at para 55.	9
<i>R. v. Hydro-Quebec</i> , [1997] 3 S.C.R. 213 at para 124.	10
<i>Castonguay Blasting Ltd. v. Ontario (Environment)</i> , 2013 SCC 52 at para 20.	11
<i>114957 Canada Ltee. (Spraytech, Societe d’arrosage) v. Hudson (Town)</i> , [2001] 2 S.C.R. 241 at para 31.	12
Jerry V. DeMarco, “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?” (2007) 17 J.E.L.P. 159, 161.	13
<i>New Brunswick (Minister of Health & Community Services) v. G. (J.)</i> , [1999] 3 S.C.R. 46 at para 60.	14
<i>Ruby v. Canada (Solicitor General)</i> , [2002] 4 S.C.R. 3 at para 39.	15

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<i>R. v. Lyons</i> , [1987] 2 S.C.R. 309 at para 85.	16
<i>Dore v. Barreau du Quebec</i> , 2012 SCC 12, [2012] 1 S.C.R. 395 at paras 6-7, 24, 35, 55-57.	17
<i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497 at paras 51, 60, 39, 53, 88.	18
<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624 at paras 20-21.	19
<i>Ardoch Algonquin First Nation & Allies v. Ontario</i> , 2000 SCC 37 at para 56.	20
<i>Vriend v. Alberta</i> , [1988] 1 S.C.R. 493 at para 61.	21
<i>Quebec (Attorney General) v. A</i> , 2013 SCC 5, [2013] 1 S.C.R. 61 at para 185.	22
<i>Withler v. Canada (Attorney General)</i> , 2011 SCC 12, [2011] 1 S.C.R. 396 at paras 30, 61, 64, 34, 35, 39.	23
<i>R. v. Kapp</i> , 2008 SCC 41, [2008] 2 S.C.R. 483 at paras 17, 59.	24
<i>Egan v. Canada</i> , [1995] 2 S.C.R. 513 at para 56.	25
<i>Lavoie v. Canada</i> , 2002 SCC 23, [2002] 1 S.C.R. 769 at para 47.	26
<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 S.C.R. 203 at paras 60, 13, 61, 14, 66.	27
<i>Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)</i> , [2003] 3 F.C.R. 233, 2002 FCA 485 at paras 40, 33.	28
Brown and Evans, <i>Judicial Review of Administrative Action in Canada</i> (Toronto: Carswell, looseleaf) at 15:3250.	29
<i>Algonquin Wildlands League v. Ontario (Minister of Natural Resources)</i> , [1998] O.J. No. 419, 26 C.E.L.R. (N.S.) 163 (Ont. Ct. Gen. Div. (Div. Ct.)), at paras 140-143.	30
<i>Trinh v. Acadie-Bathurst Health Authority</i> , 2005 NBQB 103 at paras 32, 36, 38-49.	31

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<i>1657575 Ontario Inc. v. Hamilton (City)</i> , 2008 ONCA 570 (CanLii), paras 24-28.	32
Peter W. Hogg, <i>Constitutional Law of Canada</i> , 5 th ed supp. (Toronto: Carswell, 2011) at 16-2 to 16-3, 16-7 to 16-8 and 16-20 to 16-21.	33
<i>Multiple Access Ltd. v. McCutcheon</i> , [1982] 2 S.C.R. 161, at 168, 187, 190-191	34
<i>Northwest Falling Contractors Ltd. v. The Queen</i> , [1980] 2 S.C.R. 292 at 301.	35

VI. SCHEDULE “B” – LIST OF STATUTORY AND REGULATORY PROVISIONS

Constitutional Documents

1. *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Sch. B to Canada Act 1982 (U.K.), c. 11, ss. 7, 15(1), 24(1), 32(1)(b):*

PART I

...

Legal Rights

Life, liberty and security

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

....

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

...

Application of Charter

Application of Charter

32. (1) This Charter applies

...

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

2. ***Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35(1)(2):***

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

...

Federal Statutes

3. ***Fisheries Act, R.S.C. 1985, c. F-14, ss. 34(1), 36(3)(4):***

Fisheries Protection and Pollution Prevention

Definitions

34. (1) For the purposes of sections 35 to 43,

“deleterious substance” means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

...

“deposit” means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

“water frequented by fish” means Canadian fisheries waters.

...

Deposit of deleterious substance prohibited

36. (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

Deposits authorized by regulation

(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of

...

(b) a deleterious substance of a class and under conditions – which may include conditions with respect to quantity or concentration – authorized under regulations made under subsection (5) applicable to that water or place or to any work or undertaking or class of works or undertakings; or

(c) a deleterious substance the deposit of which is authorized by regulations made under subsection (5.2) and that is deposited in accordance with those regulations.

4. *Indian Act, R.S.C. 1985, c. 27, s. 2(1) (definitions of “band”, “band list” “band member”, “reserve”):*

Definitions

2. (1) In this Act,

“band” means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

“Band List” means a list of persons that is maintained under section 8 by a band or in the Department;

...

“Indian” means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

...

“member of a band” means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

...

“reserve”

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(b) except in subsection 18(2), sections 20 to 25, 28, 37, 42, 44, 46, 48 to 51 and 58 to 60 and the regulations made under any of those provisions, includes designated lands;

Provincial Statutes

5. *Crown Forest Sustainability Act, S.O. 1994, c. 25, ss. 1, 2, 3, 8, 9, 12, 68(1)-(7):*

Purposes

1. The purposes of this Act are to provide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations. 1994, c. 25, s. 1.

Sustainability

2.(1) In this Act,

“sustainability” means long term Crown forest health. 1994, c. 25, s. 2(1).

Determination

(2) For the purpose of this Act and the regulations, sustainability of a Crown forest shall be determined in accordance with the Forest Management Planning Manual. 1994, c. 25, s. 2(2).

Principles

(3) The Forest Management Planning Manual shall provide for determinations of the sustainability of Crown forests in a manner consistent with the following principles:

1. Large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved.

2. The long term health and vigour of Crown Forests should be provided for by using forest practices that, within the limits of silvicultural requirements, emulate natural disturbances and landscape patterns while minimizing adverse effects on plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values. 1994, c. 25, s. 2(3).

...

Definitions

3. In this Act,

...

“Crown forest” means a forest ecosystem or part of a forest ecosystem that is on land vested in Her Majesty in right of Ontario; (“foret de la Couronne”)

“forest ecosystem” means an ecosystem in which trees are or are capable of being a major biological component; (“ecosysteme forestier”)

...

“forest health” means the condition of a forest ecosystem that sustains the ecosystem’s complexity while providing for the needs of the people of Ontario; (“vitalite d’une foret”)

“Minister” means the Minister of Natural Resources or any other member of the Executive Council to whom responsibility for the administration of this Act may be assigned or transferred under the *Executive Council Act*; (“minister”)

“Ministry” means the ministry of the Minister (“ministere”)

...

Forest management plans

8.(1) The Minister shall ensure that a forest management plan is prepared for every management unit. 1994, c. 25, s. 8(1).

Contents

(2) A forest management plan shall, in accordance with the Forest Management Planning Manual,

- (a) describe the forest management objectives and strategies applicable to the management unit; and
- (b) have regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the management unit. 1994, c. 25, s. 8(2).

Certification

(3) A forest management plan shall be certified by a professional forester in accordance with the Forest Management Planning Manual. 1994, c. 25, s. 8(3).

...

Approval by Minister

9.(1) A forest management plan is of no effect unless it is approved by the Minister. 1994, c. 25, s. 9(1).

Criteria for approval

(2) The Minister shall not approve a forest management plan unless the Minister is satisfied that the plan provides for the sustainability of the Crown forest, having regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the Crown forest. 1994, c. 25, s. 9(2).

...

Appeals

12. If authorized by the regulations, a person may appeal a decision by the Minister to approve a forest management plan or to amend a forest management plan that the Minister previously approved. 1994, c. 25, s. 12.

...

Manuals

68. (1) The Minister shall require the following manuals to be prepared by the Ministry:

1. Forest Management Planning Manual.
2. Forest Information Manual.
3. Forest Operations and Silviculture Manual.
4. Scaling Manual. 1994, c. 25, s. 68(1).

Forest Management Planning Manual

(2) The Minister shall ensure that every forest management plan complies with the Forest Management Planning Manual. 1994, c. 25, s. 68(2).

Same

(3) The Forest Management Planning Manual shall contain provisions respecting,

- (a) the contents and preparation of forest management plans, forest operations prescriptions and work schedules, including public involvement and decision-making processes;
- (b) determinations of the suitability of Crown forests for the purposes of this Act and the regulations in accordance with section 2;
- (c) the requirement that management objectives in each forest management plan be compatible with the sustainability of the Crown forest; and
- (d) the requirement that indicators be identified in each forest management plan to assess the effectiveness of activities in achieving management objectives and to assess the sustainability of the Crown forest. 1994, c. 25, s. 68(3).

Same, amendments

(4) An amendment to the Forest Management Planning Manual shall be subject to review and comment by the public in accordance with the regulations. 1994, c. 25, s. 68(4).

Same

(5) The Forest Management Planning Manual shall require that every forest management plan contain,

- (a) a description of the current structure, composition and condition of the Crown forest;
- (b) management objectives relating to,
 - (i) Crown forest diversity objectives, including consideration for the conservation of natural landscape patterns, forest structure and composition, habitat for animal life and the abundance and distribution of forest ecosystems,
 - (ii) social and economic objectives, including harvest levels and a recognition that healthy forest ecosystems are vital to the well-being of Ontario communities,
 - (iii) objectives relating to the provision of forest cover for those values that are dependent on the Crown forest,
 - (iv) silviculture objectives for the harvest, renewal and maintenance of the Crown forest; and
- (c) a description of the future structure, composition and condition of the Crown forest. 1994, c. 25, s. 68(5).

Forest Information Manual

(6) The Forest Information Manual may contain provisions respecting information systems, inventories, surveys, tests and studies that may be required by the Minister in respect of Crown forests and respecting information to be provided to the Minister in respect of Crown forests. 1994, c. 25, s. 68(6).

Forest Operations and Silviculture Manual

(7) The Forest Operations and Silviculture Manual shall contain provisions respecting forest operations, including,

- (a) standards for forest operations;
- (b) standards for silvicultural practices;
- (c) minimum qualifications for persons specified in the manual who are engaged in forest operations; and
- (d) assessment procedures and standards to be used in the evaluation of forest operations and forest management. 1994, c. 25, s. 68(7).

...

6. *Environmental Assessment Act*, R.S.O. 1990, c. E.18, ss. 1, 2, 9, 9.1(1)-(3), 9.2(1)-(5), 9.3, 16:

Interpretation

1. (1) In this Act,

...

“environment” means,

- (a) air, land or water,
 - (b) plant and animal life, including human life,
 - (c) the social, economic and cultural conditions that influence the life of humans or a community,
 - (d) any building, structure, machine or other device or thing made by humans,
 - (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
 - (f) any part or combination of the foregoing and the interrelationships between any two or more of them,
- in or of Ontario; (“environment”)

...

“Minister” means the Minister of the Environment; (“minister”)

“Ministry” means the Ministry of the Environment; (“ministere”)

...

“proponent” means a person who,

- (a) carries out or proposes to carry out an undertaking, or
- (b) is the owner or person having charge, management or control of an undertaking; (“promoteur”)

...

“Tribunal” means the Environmental Review Tribunal; (“Tribunal”)

...

“undertaking” means,

- (a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities,
- (b) a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity of

a person or persons other than a person or persons referred to in clause (a) that is designated by the regulations, or

- (c) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause (a), if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program; {"enterprise"}

...

Purpose of Act

2. The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment. R.S.O. 1990, c. E.18, s. 2.

...

Decision of Minister

9(1) The Minister may decide an application and, with the approval of the Lieutenant Governor in Council or of such ministers of the Crown as the Lieutenant Governor in Council may designate, the Minister may,

- (a) give approval to proceed with the undertaking;
- (b) give approval to proceed with the undertaking subject to such conditions as the Minister considers necessary to carry out the purpose of this Act and in particular requiring or specifying,
 - (i) the methods and phasing of the carrying out of the undertaking,
 - (ii) the works or actions to prevent, mitigate or remedy effects of the undertaking on the environment,
 - (iii) such research, investigations, studies and monitoring programs related to the undertaking, and reports thereof, as the Minister considers necessary,
 - (iv) such changes in the undertaking as the Minister considers necessary,
 - (v) that the proponent enter into one or more agreements related to the undertaking with any person with respect to such matters as the Minister considers necessary,
 - (vi) that the proponent comply with all or any of the provisions of the environmental assessment that may be incorporated by reference in the approval,
 - (vii) the period of time during which the undertaking or any part thereof shall be commenced or carried out; or
- (c) refuse to give approval to proceed with the undertaking. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

...

Referral to Tribunal

9.1 (1) The Minister may refer an application to the Tribunal for a decision. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Powers of the Tribunal

(2) The Tribunal may make any decision the Minister is permitted to make under subsection 9(1). 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Basis for decision

(3) The Tribunal shall consider the following things when deciding an application:

1. The purpose of the Act.
2. The approved terms of reference for the environmental assessment.
3. The environmental assessment.
4. The Ministry review of the environmental assessment.
5. The comments submitted under subsections 6.4(2) and 7.2(2).
6. If a mediators' report has been given to the Minister under section 8, any portion of the report that has been made public. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

...

Referral to Tribunal of part of a decision

9.2(1) The Minister may refer to the Tribunal for hearing and decision a matter that relates to an application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Restrictions

(2) The Minister may give such directions or impose such conditions on the referral as the Minister considers appropriate and may amend the referral. 1996, c. 27, s. 3.

Proposed decision

(3) The Minister shall inform the Tribunal of decisions that the Minister proposes to make on matters not referred to the Tribunal in connection with the application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Notice of referral

(4) The Minister shall give notice of the referral to the proponent and to every person who submitted comments to the Ministry under subsection 7.2(2) and shall give them the information given to the Tribunal under subsection (3). 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Basis for decision

(5) The Tribunal shall observe any directions given and conditions imposed by the Minister when referring the matter to the Tribunal and shall consider the following things to the extent that the Tribunal considers them relevant:

1. The purpose of the Act.
2. The approved terms of reference for the environmental assessment.
3. The Ministry review of the environmental assessment.
4. The comments submitted under subsections 6.4(2) and 7.2(2).
5. If a mediators' report has been given to the Minister under section 8, any portion of the report that has been made public.
6. The decisions the Minister proposes to make on matters not referred to the Tribunal in connection with the application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

...

Request for referral to Tribunal

9.3(1) This section applies if under subsection 7.2(3) a person requests the Minister to refer an application or a matter that relates to one to the Tribunal for hearing and decision. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Referral of application

(2) If referral of the application is requested, the Minister shall refer the application to the Tribunal under section 9.1 unless in his or her absolute discretion,

- (a) the Minister considers the request to be frivolous or vexatious;
- (b) the Minister considers a hearing to be unnecessary; or
- (c) the Minister considers that a hearing may cause undue delay in determining the application. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Same, related matter

(3) If referral of a matter that relates to the application is requested, the Minister shall refer the matter to the Tribunal under section 9.2 except in the circumstances described in subsection (2). 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

Referral in part

(4) Despite subsection (2) or (3), if referral of an application or of matters relating to the application is requested but the Minister considers a hearing to be appropriate in respect of only some matters, the Minister shall refer those matters to the Tribunal under section 9.2. 1996, c. 27, s. 3; 2000, c. 26, Sched. F, s. 11(6).

...

Order to comply with Part II

16.(1) The Minister may by order require a proponent to comply with Part II before proceeding with a proposed undertaking to which a class environmental assessment would otherwise apply. 1996, c. 27, s. 3.

Same

(2) In an order under subsection (1), the Minister may do the following”

1. Set out directions with respect to the terms of reference governing the preparation of an environmental assessment for the undertaking.
2. Declare that the proponent has satisfied such requirements for the preparation of an environmental assessment. 1996, c. 27, s. 3.

Same, additional conditions

(3) The Minister may by order impose conditions in addition to those imposed upon the approval of the class environmental assessment with respect to a proposed undertaking that is to proceed in accordance with the class environmental assessment. 1996, c. 27, s. 3.

Basis for order

(4) The Minister shall consider the following matters when making an order under this section:

1. The purpose of the Act.
2. The factors suggesting that the proposed undertaking differs from other undertakings in the class to which the class environmental assessment applies.
3. The significance of the factors and of the differences mentioned in paragraph 2.
4. Any reasons given by a person who requests the order.
5. The mediators’ report, if any, following a referral under subsection (6).
6. Such other matters as may be prescribed.
7. Such other matters as the Minister considers appropriate. 1996, c. 27, s. 3.

Request for order

(5) Any person may request the Minister to make an order under this section or the Minister may make an order upon his or her own initiative. 1996, c. 27, s. 3.

Mediation

(6) The Minister may refer a matter in connection with a request to mediation and section 8 applies with necessary modifications. 1996, c. 27, s. 3.

Deadline after request

(7) If the Minister is requested to make an order, the Minister shall decide before the prescribed deadline whether to do so. 1996, c. 27, s. 3.

Refusal after request

(8) If, after receiving a request, the Minister refuses to make an order, the Minister shall notify the person who made the request of his or her decision and shall give the person reasons for the decision. 1996, c. 27, s. 3.

Notice of order

(9) The Minister shall give a copy of an order under this section, together with the reasons for it, to the proponent, to the person, if any, who requested an order and to such other persons as the Minister considers advisable. 1996, c. 27, s. 3.

7. *Environmental Bill of Rights, 1993, S.O. 1993, c. 28, ss. 38-48:*

Appeals of Decisions on Class I and Class II Instrument Proposals

Right to seek leave to appeal a decision on an instrument

38. (1) Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:

1. The person seeking leave to appeal has an interest in the decision.
2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal. 1993, c. 28, s. 38 (1).

Same

(2) For greater certainty, subsection (1) does not permit any person to seek leave to appeal from a decision about a proposal to which section 22 does not apply because of the application of section 29, 30, 32 or 33. 1993, c. 28, s. 38 (2).

Same

(3) For the purposes of subsection (1), the fact that a person has exercised a right given by this Act to comment on a proposal is evidence that the person has an interest in the decision on the proposal. 1993, c. 28, s. 38 (3).

Further rights of appeal

(4) Any person who, by virtue of this Part, is a party to an appeal about a proposal has rights of appeal from an appellate decision about the proposal equivalent to those of any other party to the appeal. 1993, c. 28, s. 38 (4).

Same

(5) For the purposes of subsection (4), an appellate decision about a proposal is not limited to a decision whether or not to implement the proposal but includes, for example, the following kinds of decisions:

1. An order to an earlier decision-maker to make a new decision about the proposal.
2. An order varying an earlier decision about the proposal.
3. An order to set aside an earlier decision about the proposal. 1993, c. 28, s. 38 (5).

Appellate body

39. (1) Subject to the regulations under this Act, the application for leave to appeal and the appeal shall be heard by the appellate body that would hear an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38 (1). 1993, c. 28, s. 39 (1).

Same

(2) For example, an appeal on a question of law from a decision to issue an instrument relates to the same proposal as and is of a similar nature to an appeal on a question of law from a decision not to issue the instrument. 1993, c. 28, s. 39 (2).

Time for appeal

40. An application for leave to appeal under subsection 38 (1) shall not be made later than the earlier of,

(a) fifteen days after the day on which the minister gives notice under section 36 of a decision on the proposal; and

(b) fifteen days after the day on which notice relating to the proposal is given under section 47. 1993, c. 28, s. 40.

Leave test

41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,

(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and

(b) the decision in respect of which an appeal is sought could result in significant harm to the environment. 1993, c. 28, s. 41.

Automatic stay if leave granted

42. (1) The granting of leave under section 41 to appeal a decision stays the operation of the decision until the disposition of the appeal, unless the appellate body that granted the leave orders otherwise. 1993, c. 28, s. 42 (1).

Same

(2) Subsection (1) applies despite any provision in or under any other Act. 1993, c. 28, s. 42 (2).

No appeal from leave decision

43. There is no appeal from a decision whether or not to grant an application for leave to appeal. 1993, c. 28, s. 43.

Grounds for appeal decision

44. The appellate body shall make its determination in an appeal under this Part on grounds similar to those that would apply to an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38 (1). 1993, c. 28, s. 44.

Powers on appeal

45. The appellate body has similar powers on an appeal under this Part to those the appellate body would have on an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38 (1). 1993, c. 28, s. 45.

Procedure

46. The appellate body hearing an application for leave to appeal or an appeal under this Part may follow procedures similar to those the appellate body would follow on an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38 (1), or may vary those procedures as appropriate. 1993, c. 28, s. 46.

Public notice of appeals under other Acts

47. (1) A person who exercises a right under another Act to appeal from or to seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22 shall give notice to the public in the registry of the appeal or application for leave to appeal. 1993, c. 28, s. 47 (1).

Same

(2) For greater certainty, subsection (1) does not require any person to give notice to the public of an application or appeal respecting a proposal to which section 22 does not apply because of the application of section 29, 30, 32 or 33. 1993, c. 28, s. 47 (2).

Delivery of notice

(3) The notice required by subsection (1) shall be given by delivering it to the Environmental Commissioner, who shall promptly place it on the registry. 1993, c. 28, s. 47 (3).

Same

(4) Delivery of the notice to the Environmental Commissioner shall be made no later than the earlier of,

(a) two days after the day on which the application was made or the appeal commenced; and

(b) the end of the time period within which the application could be made or the appeal could be commenced. 1993, c. 28, s. 47 (4).

Content of notice

(5) The notice shall include the following:

1. A brief description of the decision in respect of which an appeal is sought, sufficient to identify the decision.

2. A brief description of the grounds for the application for leave to appeal or for the appeal.

3. Any information prescribed by the regulations under this Act. 1993, c. 28, s. 47 (5).

Appellate body not to proceed without notice

(6) The appellate body hearing the application for leave to appeal or the appeal shall not proceed with the application or appeal until fifteen days after notice is given to the public

in the registry in accordance with this section, unless the appellate body considers it appropriate to proceed sooner. 1993, c. 28, s. 47 (6).

Participation in application or appeal

(7) In order to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the application or appeal, the appellate body may permit any person to participate in the application or appeal, as a party or otherwise. 1993, c. 28, s. 47 (7).

Same

(8) In reaching a determination under subsection (7), the appellate body shall have regard to the intent and purposes of this Act. 1993, c. 28, s. 47 (8).

Existing rights of appeal not affected

48. Nothing in this Part shall be interpreted to limit a right of appeal otherwise available. 1993, c. 28, s. 48.

8. *Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2(3):*

...

Lack of evidence

2. (3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.

Regulations

9. *Classification of Proposals for Instruments, O. Reg. 681/94, s. 10.4.1 (EBR):*

Class I Proposals – Crown Forest Sustainability Act, 1994

10.4.1 The following is a Class I proposal for an instrument:

1. A proposal to issue a forest resource processing facility licence under subsection 54(1) of the *Crown Forest Sustainability Act, 1994* to authorize construction of a new facility of a type described as A, C, D, E, F, H or K in Colum 1 of Schedule 3 to Ontario Regulation 167/95 (General) made under that Act. O. Reg. 234/13, s. 3.

GRASSY NARROWS FIRST NATION, *et al.*

v. **MINISTER OF NATURAL RESOURCES AND FORESTRY, *et al.***

Applicants

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

(Divisional Court)

PROCEEDING COMMENCED AT TORONTO

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