Court File No. 380/12

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N :

CLEAN TRAIN COALITION INC.

Applicant

and

METROLINX

Respondent

APPLICATION UNDER Rule 68 and the
*Judicial Review Procedure Ac*t, R.S.O. 1990, c. J.1., s. 2 *as amended*

FACTUM OF THE APPLICANT CLEAN TRAIN COALITION INC.

PART I – OVERVIEW

1. The Clean Train Coalition Inc. (the "Applicant or "CTC") requests judicial review of decisions by Metrolinx to use diesel technology on a new, express rail service between Union Station in downtown Toronto and Lester B. Pearson International Airport ("LBPIA"). Using diesel instead of electric trains for the flagship project will result in an increase in carcinogenic diesel exhaust in communities adjacent to the rail corridor, which include over 300,000 residents. Diesel trains are louder, slower and more expensive to operate and maintain than electric trains.

2. Metrolinx identified electric trains as the "right technology" for the Air Rail Link ("ARL"), yet it contracted to purchase diesel trains from a Japanese company on March 31, 2011. Metrolinx traded the benefits of electric trains for expediency. The "Province" provided Metrolinx with an instruction to have the ARL operating in time for

the 2015 Pan Parapan American Games ("Pan Am Games") and Metrolinx perceived that only diesel trains could be implemented by that date.[1]

3. Metrolinx lacked statutory authority to accept the instruction. Metrolinx is required by its empowering statute to lead transportation planning. It must not be led by unidentified government representatives. Metrolinx's decision-making must promote the policies and objects of its enabling legislation, to deliver projects that support a high quality of life, a healthy, sustainable environment and a strong, prosperous and competitive economy. Metrolinx is required by statute to be guided by long-term vision and long-term goals and to make decisions that sustain a robust economy. Metrolinx is not authorized to prioritize the short-term goal of providing transportation services for a three-week sporting event over the long-term health, environmental and economic interests of the people of Ontario. Metrolinx is not authorized by statute to abdicate its leadership responsibility and implement decisions that fail to advance the objects of its empowering statute and interfere with its own Regional Transportation Plan.

4. Hosting the Pan Am Games is a consideration irrelevant to Metrolinx's statutory mandate. Metrolinx failed to consider implementing electric trains in the first instance because it perceived that would risk missing delivery by early 2015. Metrolinx prioritized an arbitrary deadline and fettered its own discretion to consider electric trains.

5. The *Metrolinx Act*, 2006, S.O. 2006, c.16 ("*Metrolinx Act*, 2006") and the *Places to Grow Act*, 2005, S.O. 2005, c. 13 ("*Places to Grow Act*, 2005") reflect Parliament's will that long-term vision and goals guide decision-making about transit and growth.

[1] The ARL includes a "spur" to connect the airport to the Georgetown South corridor. The project involves building new tracks in the Georgetown corridor to accommodate new express trains and also massively expanded regular GO service between Union Station and Georgetown or Kitchener.

Provincial agencies charged with implementing the will of the legislature cannot be permitted to cast aside mandatory legislative values in the name of expediency.

PART II - FACTS

6. On February 18, 2011, the Metrolinx Board of Directors voted to approve a $75 million purchase of up to 18 Diesel Multiple Units ("DMUs") from a Japanese company, Sumitomo Corporation ("Sumitomo"), for deployment on the ARL.[2]

7. The Board considered high-level studies on electrification and environmental assessments of the Sumitomo DMUs. The Board did not have before it a direct comparison of the economic, social, and health costs and benefits of proceeding with Electric Multiple Units ("EMUs") versus DMUs in the first instance. The Board was advised it could not consider EMUs in the first instance because the Province required the service by 2015 and only DMUs could be deployed by that date.[3]

Irrelevant Considerations

8. Metrolinx's Regional Transportation Plan and internal studies identified electric trains as the "right technology" for the ARL.[4] Yet the Metrolinx Board voted to invest in diesel infrastructure based on instructions from "the Province."

9. Prior to the vote to approve negotiations with Sumitomo, the Board heard the Clean Train Coalition "would prefer we not proceed with purchasing convertible DMUs

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[2] Affidavit of Gary McNeil ("McNeil Affidavit"), Exhibit 14, Respondent's Record ("R.R.") at p. 145.
[3] Board Presentation entitled "Air Rail Link Vehicle", dated February 18, 2011, Tab 1O, at p. 7 (CTC 543), stating "EMU operation is 7-9 years away; we need vehicles in 3.5 years"; *see also* Transcript of Public Board of Directors Meeting, dated February 18, 2011, Tab 1P, at p. 2:4-9, 3:16-17 (CTC 550-51), and dated November 16, 2010, Tab 1H, at p. 15:11-14 (CTC 312).
[4] The Big Move: Transforming Transportation in the Greater Toronto and Hamilton Area ("GTHA") ("The Big Move") adopted on November 28, 2008,Tab 1B, at p. 24, 28 (CTC 82, 86), *see also* Environmental Project Report ("EPR") entitled "Georgetown South Service Expansion and Union-Pearson Rail Link", dated July 30, 2009, Tab 1F, at pp. 89-90 (CTC 224-25), Metrolinx stated "Metrolinx's Regional Transportation Plan calls for the Georgetown Corridor to be electrified."

and instead go immediately to electric vehicles, even if that meant the opening of the air rail service would have to be delayed past 2015 to begin with the Pan Am Games."[5]

10. Metrolinx staff advised the Board:

> [i]t is [Metrolinx's] instruction and intention to have the service open in time for the Pan Am Games.[6]
>
> . . . .
>
> [W]e've actually got a hard opening date. This service has to be in place by the 2015 Pan Am Games. At least that's what the Province has indicated to us.[7]

11. Metrolinx staff reiterated the deadline in a February, 2011 report stating "[t]he successful bid for the PanAm Games has accelerated the need for this service to be operational in early 2015. DMU vehicles . . . meet the operational start date."[8] Metrolinx staff further advised the Board:

> . . . to meet both the Pan Am needs, as well as introduce what is a very vital link really between downtown Toronto and Pearson that's been discussed for decades, a DMU solution is currently a viable solution.[9]

12. During cross examination, Gary McNeil deposed Metrolinx and the Province committed to deliver the ARL in time for the Pan Am Games well before the Board vote in November, 2010. At some point between June, 2010 and July 30, 2010, Gary McNeil and then-Chair of Metrolinx, Rob Pritchard, undertook to meet the deadline, with the approval of the Board.[10] Further, without consulting Metrolinx, the Province undertook to deliver the ARL by 2015 in the bid book for the Pan Am Games in 2009.[11]

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[5] Transcript of November 16, 2010 Public Board Meeting, Tab 1H, at p. 1:3-2:3 (CTC 298-99).
[6] *Id*.
[7] *Id*. at p. 15:11-12 (CTC 312).
[8] Board Report entitled "Purchase of Metrolinx Equipment for the Airport Rail Link – Information Update", dated February 18, 2011, Tab 1N, at p.1 (CTC 534).
[9] Transcript of February 18, 2011 Public Board Meeting, Tab 1P, at p. 2:7-9 (CTC 550).
[10] McNeil Affidavit, at para. 37.
[11] McNeil Cross, at p. 210, q. 659-61.

13. No one considered the implications of the 2015 deadline for Metrolinx's plan to electrify the corridor.[12] No one explored alternative transportation arrangements for the Pan Am Games before promising the ARL in the bid book.[13] No one considered the extra costs to electrifying one day before promising to launch diesel trains first.[14]

14. "Instructed" to implement by 2015, informed that electric trains could not be implemented by that date, and advised that funding was not available for electrification, one Metrolinx board member remarked:

> This is a controversial matter and it's been around for an awful long time and I've given a lot of thought to this. And from my perspective, here's where I see it. It's a service that's been promised and planned for decades - to connect Canada's two largest transportation terminals - it's finally on the horizon. I would love to see it start as electric - no question about that - and I think probably most people would. But I don't think it's real - I don't think that's reality. And I'm quite prepared to see this move ahead and have these DMU's run for three years assuming that the EA gets approved and it gets converted to electric.[15]

15. Metrolinx compromised its vision to electrify the Georgetown corridor in order to provide transit for the Pan Am Games. Since then, Metrolinx has prepared a contingency plan to provide transit for the Pan Am Games if the ARL is delayed.[16]

High Level Electrification Studies

16. Metrolinx has long promoted electrification as a way to reduce smog-related emissions and greenhouse gases and to provide transit benefits to riders. In 2008, Metrolinx adopted a Regional Transportation Plan, (entitled "The Big Move") pursuant to its statutory mandate. The Big Move calls for the Georgetown corridor to be electrified.[17]

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[12] Cross Examination of Gary McNeil, October 2, 2012 ("McNeil Cross"), at p. 130, qq. 401-04.
[13] *Id*. at p. 131, q. 408.
[14] *Id*. at p. 134, q. 417.
[15] Transcript of February 18, 2011 Public Board Meeting, Tab 1P, at p.10 (CTC 558).
[16] McNeil Cross, at p. 131, q. 409.
[17] The Big Move, Tab 1B, at pp. 21, 28, 86 (CTC 79, 86, 144),; *see also* EPR, Tab 1F, at pp. 89-90 (CTC 224-25), in response to concerns by Toronto Medical Officer of Health, Metrolinx stated "Metrolinx's Regional Transportation Plan calls for the Georgetown Corridor to be electrified."

17. The ARL is part of the Georgetown South Expansion Project (the "Project"). The Project entails construction of new rails in an existing corridor, introduces 140 daily trips by DMU trains and increases the number of diesel GO locomotives in the corridor by a factor of 15, on new and existing tracks.[18] Electric infrastructure would permit the purchase of not just EMU trains, but also electric locomotives for traditional GO service.

18. The Big Move describes how Metrolinx will choose technology:

> technologies will be developed during the project level Benefits Case Analysis that Metrolinx will carry out in partnership with municipalities and transit agencies for individual projects. When it comes to making decisions on new transit projects, the costs and benefits of all reasonable alternatives need to be evaluated so that the best possible transit projects are built. The Metrolinx Benefits Case Analysis will provide decision-makers with a robust and consistent "triple bottom line" evaluation of the relative environmental, economic and social impacts of each RTP transit project. Each benefits case will evaluate the relative merits and costs of alternative project options, which may include variations in the alignment, technology, performance, stations and/or [19]

19. In a 2008 study, Metrolinx concluded that electric trains eliminate fumes and oil dispersion; accelerate faster than diesel trains; reduce maintenance costs and provide journey-time savings; reduce noise from trains and at layover sites; reduce energy costs and are "less prone to erratic price fluctuation."[20] Diesel trains contribute to greenhouse gas emissions, have shorter economic life, and are noisy and slow to accelerate.[21] The 2008 study did not evaluate the feasibility of using electric trains in the first instance.

20. Subsequently, a more detailed study (the "Electrification Study") evaluated EMUs and electric locomotives on the Georgetown South Corridor, including the ARL. The results of that study were similar to the 2008 study and in January 2011, the Board

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[18] EPR, Tab 1F, at p. 11 (CTC 220); Appendix 8D to Electrification Study: Air Quality and Health Impacts ("AQHI Report"), Tab 1J, at p. 23 (CTC 445).
[19] The Big Move, Tab 1B, at p. 78 (CTC 136).
[20] GO Transit – Lakeshore Corridor Electrification Update of 2001 Addendum to 1992 Study, Final Report, dated April 17, 2008, Tab 1A, p. 4-11, ss. 4.3.2 - 4.3.4 (CTC 48).
[21] *Id.*

adopted a staff recommendation "to begin the process for electrification now".[22] The business case for electrifying the corridor stemmed from transportation benefits including long-term operational cost and journey-time savings – not just to the airport, but also for regular GO service.

21. Metrolinx staff reported to the Board on barriers to electrification in the past. Historically, despite many studies recommending electrification, investment in new technologies was rejected because of the preference to allocate scarce funding to base infrastructure improvements and service expansion.[23] Waiting to electrify increases the cost of electrification and prolongs construction timelines because of the disruption of constructing in working rail corridors with frequent service.[24]

22. The Electrification Study did not evaluate the feasibility of proceeding with EMUs in the first instance on the ARL. It did not contain a "triple bottom line" analysis of the relative costs and benefits of using electric versus diesel trains in the first instance.

23. Instead, in quantifying the cost of electrifying the corridor:

- Metrolinx staff presumed an initial investment in diesel technology followed by an overhaul, dismantling some diesel improvements and then building electric infrastructure.[25]
- Costs of dismantling diesel improvements were considered electrification expenses.[26]
- The Electrification Study assumed DMUs would be converted to EMUs and did not contemplate purchasing EMUs – currently available – in the first instance.[27]

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[22] Board Report entitled "GO Electrification Study", by Leslie Woo *et al*., dated January 26, 2011, Tab 1L, at p. 7, 12 (CTC 521, 526), adopted by Resolution on January 26, 2011; *see* "Metrolinx Board recommends phased electrification plan" Canada Newswire, January 26, 2011, Tab 1M (CTC 533).
[23] Board Report entitled "GO Electrification Study", Tab 1L, at p. 7 (CTC 521).
[24] *Id*.
[25] "Metrolinx Electrification Public Meeting, Draft Summary Report For Participant Review" ("Electrification Meeting Summary"), dated June 27, 2012, Tab 1V, qq. 21, 22, 26 & 27 (CTC 630).
[26] *Id*. *See also* "Electrification Study - Stakeholder Workshop #4 Summary Report" ("Summary #4"), dated December 15, 2010, Appendix A, Presentation, Tab 3A, at p. 5 (CTC 673).
[27] *Id*. at q. 40a-44a, p. 51-52 (CTC 714-15); *see also* GO Electrification Study ("Electrification Study"), dated December 2010, Tab 1I, at pp. 35, 51-52, 69-70 (CTC 364, 380-81, 398-99).

24. The study assumed new GO locomotives for the expansion would be diesel and not electric. Metrolinx acted on this assumption and purchased 30 diesel locomotives for the corridor, delivered in 2010 and 2011.[28]

Environmental Assessment of Diesel Multiple Units

25. With respect to diesel technology, the Board had available to it an Environmental Project Report ("EPR") indicating threshold levels for nitrogen dioxide – a contaminant of concern ("COC") – would be exceeded by implementing DMUs and that sensitive individuals residing in the corridor had potential to experience adverse health impacts.[29] The Board had no corresponding air quality information about electric trains.

26. The Board had an Air Quality & Health Impacts Report ("AQHI Report"),which showed mitigation of some impacts through Tier 4 filtering technology.[30] The AQHI Report illustrates that with Tier 4 trains, nitrogen dioxide has annual average levels that may exceed the World Health Organization ("WHO") annual guideline at some locations within the Greater Toronto and Hamilton Area ("GTHA").[31] Even at levels below the guideline, nitrogen dioxide is possibly linked to respiratory symptoms in children.[32]

27. Over 300,000 people live within 450 metres of the Georgetown corridor, which is the distance considered the "zone of influence", where rail operations have a measurable impact on air quality. The Project impacts 37 schools, 40 childcare centres, and four

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[28] EPR, Tab 1F, at pp. 89-90 (CTC 224-25).
[29] *Id*. at pp. 423-24 (CTC 267-68). *See also subsequent study updating the EPR:* Draft Human Health Mitigation Plan – Findings, August 2012, Tab 1X, *see* NO2 Annual Results, at p.3 (CTC 640).
[30] "Tier 4" refers to an emissions standard established by the U.S. Environmental Protection Agency that applies to locomotives manufactured after 2015; *see* AQHI Report, Tab 1J, at p. vi (CTC 421). Tier 4 compliant trains should be on the market by 2015. *See* Summary #4, Tab 3A, at p. 48, q. 20a (CTC 711).
[31] AQHI Report, Tab 1J, at p. 18 (CTC 440). The World Health Organization is the United Nations public health arm responsible for providing leadership on global health matters and whose air quality guidelines are based on an extensive body of scientific evidence for air pollution and its health effects. *Id.* at p. vii and p. 18 (CTC 422 and CTC 440).
[32] *Id.* at p. 41 (CTC 463).

long-term care facilities.[33] The AQHI Report concluded people in the "zone of influence" would experience a measurable air quality improvement with electrification.[34]

28. The health costs of running diesel trains across the entire GO system was quantified at nearly $18 million per year.[35] The AQHI Report concluded there were air quality and health benefits associated with electrifying the ARL. The AQHI Report did not quantify the health costs, including costs of care, of electrifying versus proceeding with diesel infrastructure in the Georgetown corridor in the first instance.[36]

Limitations of Studies Before the Board

29. Prior to voting to build new diesel infrastructure – and to reject electric infrastructure in the first instance – the Board was not advised of the incremental costs associated with doing so. Other than the $18 million cost to convert DMUs to EMUs, the Board lacked figures to quantify:

- The increased cost and construction timeline of implementing electric infrastructure later, after increasing service by a factor of over 15, where "it is more difficult to construct in rail corridors that have more frequent service."[37] This cost will be significant. It involves either (i) disrupting service to string catenary wires and other works to put in electric infrastructure, or (ii) paying to do that work during a 4-hour window at night when trains are not running.[38] During cross examination, Mr. McNeil stated he still "couldn't put a price to it."[39]

- The duplication of mobilization costs – by dispatching crews once to build diesel infrastructure and later dispatching a second time to build electric infrastructure.

- Deferring electric infrastructure limits technology choice for locomotives. Metrolinx continues to invest in new diesel locomotives when electric locomotives might have been considered.[40] They will have to be retrofitted with

[33] EPR, Tab 1F, at p. 412 (CTC 256), AQHI Report, Tab 1J, at p. 48 (CTC 470).
[34] AQHI Report, Tab 1J, at p. 33 (CTC 455).
[35] *Id*. at pp. 45-47; Table 15 (CTC 465-67).
[36] *Id*. at p. 45 (CTC 465).
[37] Board Report: GO Electrification Study, January 26, 2011, Tab 1L, S.3, at p. 7 (CTC 521).
[38] McNeil Cross, at p. 111-12, qq. 332-34.
[39] *Id*. at p. 112, q. 335-36.
[40] EPR, Tab 1F, at p. 90 (CTC 225).

Tier 4 technology. The Board was not provided with costs of these trains plus retrofit against the costs and benefits of electric locomotives in the first instance.

30. Many electrification costs might be avoided if the corridor were electrified in the first instance.[41]

31. The Board was further advised EMUs would take 7-9 years to implement.[42]

32. Subsequent studies showed that timeframe could be accelerated.[43]

33. The cost of electrifying the Georgetown corridor was estimated to be $440 million.[44] The avoidable costs of overhaul were not categorized as costs associated with investing in diesel in the first instance. They were categorized as electrification costs.[45]

34. Metrolinx has yet to conclude any studies to determine the feasibility of electrifying prior to 2015. Metrolinx determined to wait to "complete the Georgetown South corridor expansion infrastructure" before initiating an Environmental Assessment for electrifying.[46] Metrolinx decided to defer electrification until the organization established "implementation credibility".

35. On cross-examination, Mr. McNeil was asked about a 2008 Draft Investment Strategy. He deposed:

> 15 170 Q. The third line, it says:
> 16 "Results first. Move forward
> 17 with new projects first, funded by
> 18 existing resources."

[41] Electrification Meeting Summary, Tab 1V, at qq. 21, 22, 26 & 27 (CTC 630).
[42] *Id*. at p. 3:16-17 (CTC 551).
[43] Exhibit 1 to McNeil Cross, Letter from Bruce McCuaig to MPP Laura Albanese, dated August 14, 2012, advising electrification possible by 2017; McNeil Cross, at p. 174, qq. 536-37; Electrification Meeting Summary, Tab 1V, at p. 4, qq. 2-3 (CTC 628).
[44] Board Report entitled "GO Electrification Study" dated January 26, 2011, Tab 1L, at p. 6, 14 (CTC 520, 528).
[45] Electrification Meeting Summary, Tab 1V, at p. 6, qq. 21, 22, 26 & 27 (CTC 630); *see also* Summary #4, Appendix A, Presentation, Tab 3A, at slide 5 (CTC 673); *Id*. at p. 51, q. A40a (CTC 714).
[46] McNeil Affidavit, at para. 76 (R.R. 20); *see also* Exhibit 1 to McNeil Cross, Letter from Bruce McCuaig to MPP Laura Albanese, dated August 14, 2012, at p. 2, stating "We have consistently stated that electrification of the Kitchener rail corridor . . . cannot begin until the Georgetown South Project infrastructure is completed near the end of 2014."

19 Then there is another bullet. Can you
20 read that for me, please.
21 A. "Build implementation
22 credibility and track record first
23 before seeking new revenue and
24 financial tools."
25 171 Q. So I am wondering how this relates 00060
1 to the two statements I read to you from paragraph
2 76 of your affidavit and Mr. McCuaig's letter, and
3 I'm going to ask you a question. Does this
4 language on the third page reflect a decision by
5 Metrolinx to build implementation credibility and a
6 track record first before seeking new financial and
7 revenue tools?
8 A. That's what this document says, yes.

36. Minister approval is not required to conduct a feasibility study.[47] There were no impediments to Metrolinx seeking funding for electrification in the 2009-2010 timeframe.[48] Metrolinx still has not done so. Metrolinx authorized further investment in diesel infrastructure without considering the feasibility of electrifying first. At around the same time, Metrolinx approved electrifying the Georgetown corridor.[49]

37. In public statements, Metrolinx promoted the new ARL as a way to shift automobile passengers to lower-emitting modes of transportation to reduce smog and greenhouse gases across the region.[50] The Big Move, which includes the ARL, promises to reduce greenhouse gas emissions.[51]

38. There was no analysis before the Board demonstrating air quality improvements before it voted to approve diesel infrastructure. Metrolinx staff advised the Board

[47] McNeil Cross, at p. 75, q. 221.
[48] *Id*. at p. 46, q. 134.
[49] Exhibit 8 to McNeil Cross, "Metrolinx Board approves electrification", dated March 2011.
[50] News release entitled "Metrolinx launches project to expand GO and build rail link to Pearson Airport", by Canada Newswire, dated January 21, 2009, Tab 1C (CTC 163).
[51] Exhibit 6 to McNeil Cross, The Big Move, Executive Summary, at p. 3.

further analysis would be required to confirm any presumed greenhouse gas reduction benefit, particularly as service levels increase.[52]

39. GO Transit's President, Gary McNeil, admitted during cross examination, DMUs do not deliver greenhouse gas emission reduction over cars they are intended to displace:

> 258 Q. Okay. And is it your understanding that greenhouse gas emissions are about equal between DMUs between the airport and Union Station and the cars they are intended to displace?
> A. Yes, in general it's my understanding.[53]

40. During a February 2011 presentation, the Metrolinx Board heard "noise issues are relatively equal between a DMU and an EMU."[54] The comment was based on studies focusing on average noise levels across the GTHA, which do not capture the improvement electrification delivers for those who live immediately adjacent to the corridor. At a 15-metre distance, DMUs are 4 dB louder – over twice as loud – compared to EMUs.[55] Electrifying the corridor would further permit the use of electric locomotives, which are also 4 dB quieter than their diesel counterparts.[56]

41. 3,500 households affected by this Project are located in homes too high off the ground to benefit from the construction of 5m high noise walls.[57] For them, a 3+ dB noise reduction from electrification is a benefit that cannot otherwise be achieved.

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[52] *Id*. For information about greenhouse gas reduction, *see* Summary #4, Appendix A, Presentation, Tab 3A, at p. 33 (CTC 686-87); *and see* EPR at s. 6.2.4.3, Tab 1F, at p. 406 (CTC 250), and at s. 6.2.4, at p. 387 (CTC 238). Electrifying the corridor will reduce greenhouse gas emissions by 50,000 tonnes.
[53] McNeil Cross, at p. 82, q. 258.
[54] Transcript of February 18, 2011 Public Board Meeting, Tab 1P, at p. 2:11-13 (CTC 550).
[55] Appendix 8E to Electrification Study: Noise and Vibration Impacts, December, 2010, Tab 1K, at p. 24 (CTC 500); Georgetown South Rail Corridor Expansion – Operational Noise and Vibration Assessment, February 2012, Tab 1S, at p. 13 (CTC 585).
[56] *Id*. at p. 24 (CTC 500).
[57] Exhibit 10 to McNeil Cross, EPR, Table 6.2.2-2: Number of Residences Affected Before and After Proposed Mitigation, at p. 344.

42. In February, 2012, Metrolinx decided to build sound walls for the "full build" diesel scenario.[58] In many areas, mitigation is not required on opening day. Metrolinx previously contemplated staging construction of walls as warranted by service levels.[59]

43. Many affected residents object to noise walls on aesthetic, social and other grounds.[60] The Board did not know whether electrifying in the first instance would eliminate the need for noise walls because studies did not look at any noise walls associated with electrifying the corridor.[61] A recent study likewise lacks analysis about whether electrification requires mitigation with "sound walls".[62]

44. Electrification might eliminate the need for mitigation in locations where noise levels minimally exceed the noise threshold in the full build diesel scenario.[63] Yet Metrolinx recently decided to mitigate in these areas as though either (i) electrification will require mitigation, or (ii) it will not electrify the corridor.

45. The Board did not consider the possibility that noise mitigation might be an added electrification expense associated with proceeding with diesel trains in the first instance.[64]

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[58] Operational Noise and Vibration Assessment, dated February, 2012, Tab 1S, at p.9 (CTC 581); *see also* Affidavit of Timothy Noronha, dated August 17, 2012, Tab 2, paras. 5-6 (CTC 647); *see also* Exhibit A to Noronha Affidavit, (CTC 651-52).

[59] *Id.*, Tab 1S, at pp. 9-10 (CTC 581 – CTC 582).

[60] *See generally*, Affidavit of Timothy Noronha, dated August 17, 2012.

[61] Exhibit 10 to McNeil Cross, EPR, at p. 332; *see also* Electrification Meeting Summary, Tab 1V, at pp. 4-5, q. 9 (CTC 628 – CTC 629).

[62] Electrification Meeting Summary, Tab 1V, at qq. 9, 49-50, and p. 13 (CTC 632); Operational Noise and Vibration Assessment, dated February, 2010, Tab 1S, at p. 10, s. 4.3 (CTC 582).

[63] For example, in an area near the West Bend Community Garden, referred to by Metrolinx as location "A07a", noise mitigation would not be required on opening day as the noise impact is 4.1 dB, which is under the 5 dB threshold. CTC591. As train frequency increases over 15 years, mitigation would be required at A07a with the full build diesel scenario as noise levels reach 7.9 dB, exceeding the 5 dB threshold. The full build scenario in the EA contemplates no electric infrastructure improvements. Noise walls might not be required in this location if the corridor were electrified as EMUs and electric locomotives are each 2-4 dB quieter than their diesel counterparts. Further analysis would be required to determine any mitigation requirements with electrification. CTC 582.

[64] Affidavit of Richard A. Ciccarelli, dated August 21, 2012, at paras. 11-12 (CTC 657).

46. The Board authorized a contract with Sumitomo for diesel trains – just one month after approving electrification of the Georgetown Corridor.[65] Metrolinx acted on the approval to engage Sumitomo on March 31, 2011.[66]

47. Fourteen months later, in June, 2012, the World Health Organization ("WHO") classified diesel exhaust as a known human carcinogen ("Group 1 carcinogen").[67] It had previously been classified as probably carcinogenic to humans ("Group 2A carcinogen").

48. The WHO reclassification prompted Toronto's Medical Officer of Health to reiterate his request to the Province to immediately electrify the Georgetown corridor.[68] He said "[a]ny increase in local air concentrations of diesel exhaust will act as an additional stressor in communities already burdened with a higher than average incidence of ill health."[69] He identified electrification as the most health protective option.[70]

49. Community members brought the WHO Report to the attention of Metrolinx representatives on June 27, 2012. In response, Metrolinx affirmed its decision to use diesel trains, stating that diesel technology performs well according to WHO standards.[71]

50. Many organizations and individuals have voiced concerns about diesel noise and pollution. Toronto City Council passed two motions urging the Province to electrify the

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[65] Exhibit 8 to McNeil Cross, Georgetown South Project Community Update, "Metrolinx Board approves electrification", March 2011.
[66] McNeil Affidavit, at para. 54, (R.R.13)
[67] World Health Organization, International Agency for Research on Cancer, Press Release No. 213 "IARC: Diesel Engine Exhaust Carcinogenic", dated June 12, 2012, Tab 1U.
[68] Letter from Medical Officer of Health Dr. David McKeown to Minister of Transportation, "Funding the electrification of the GO rail service", dated July 5, 2012, Tab 1W (CTC 637).
[69] City of Toronto Staff Report entitled "Air Quality Impact Assessment – Metrolinx Georgetown South Service Expansion and Union-Pearson Rail Link", dated June 3, 2009, Tab 1E, at p. 7 (CTC 176).
[70] *Id*. at p. 16 (CTC 185).
[71] "Electrification Meeting Summary, Tab 1V, at qq. 14, 16 (CTC 629).

corridor.[72] The Toronto District School Board ("TDSB"), Members of Parliament, and Members of Provincial Parliament have also voiced opposition to Metrolinx's plan.[73]

51. In response, Metrolinx representatives distanced themselves from the decision to proceed with DMUs. They stated "this is not our decision."[74]

52. At a recent stakeholders meeting, the following exchange occurred:

> Q: . . . we are here to raise our concerns about health impacts. We know about background smog, we know there are related issues, but can you just acknowledge that being near diesel is dangerous?
>
> A: Yes, we acknowledge that air quality is an issue . . . . We are here to advance electrification. Your concerns have not gone unnoticed, we will be sure to deliver the clear message you are delivering tonight."[75]

53. Metrolinx representatives committed to relaying feedback to the government and to "find out what the right mechanism is for conveying feedback."[76]

54. Metrolinx is the "mechanism". The Government of Ontario delegated leadership of planning transit infrastructure in the GTHA to Metrolinx in the *Metrolinx Act*, 2006 and the *Places to Grow Act*, 2005.

PART III - LAW

55. On March 31, 2011, Metrolinx purported to exercise statutory powers of decision, as defined in the *Judicial Review Procedure Act*, R.S.O. 1990, C.J. 1 ("*JRPA*").

56. A statutory power of decision means:

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[72] *See* Letter from Councillor Frances Nunziata to Honourable Dalton McGuinty, "Union-Pearson Air Rail Link", dated March 20, 2012, Tab 1T, at p.2 (CTC 619), stating (i) on January 28, 2009, Council voted to request Metrolinx use electric trains for the ARL; and (ii) on March 8, 2011 Council voted to request Metrolinx to expedite the electrification process to meet the 2015 deadline or, if not possible, for the deadline to be abandoned so electric trains could be deployed in the first instance.
[73] *Id*. *See also* "Additional materials" appended to Agenda for Metrolinx Board Meeting, dated February 18, 2011, Tab 1Q (CTC 561-68).
[74] Electrification Meeting Summary, Tab 1V, at p.4, q. 5 (CTC 628).
[75] *Id*. at p. 6, q. 30 (CTC 630).
[76] *Id*. at p. 8, q. 41 (CTC 632).

> a power or right conferred by or under a statute to make a decision deciding or prescribing (a) the legal rights [or] privileges . . . of any person . . . .
>
> R.S.O. 1990, c.J.1, s.1; 2002, c.17, Sched. F, Table; 2006, c.19, Sched. C, s.1 (1).

57. The *Metrolinx Act*, 2006, ss. 16 (2)(a) – (d), confers on Metrolinx the power to purchase trains and to implement a transit strategy. The Sumitomo purchase is a "decision" under the JRPA.

CTC Diligently Advanced the Community Rights and Privileges Affected

58. Metrolinx's decision affects the right of the people residing near the Georgetown corridor to a healthful environment.[77] Diesel trains will introduce carcinogenic diesel exhaust in communities adjacent to the corridor, as well as fumes, odours, and noise requiring mitigation in the way of 5-m high "sound walls", which may interfere with vegetation and access to sunlight and obstruct the view between east and west Toronto.[78]

59. Metrolinx's decision to run DMUs on the ARL abridges privileges enjoyed by communities along the corridor with respect to noise, air quality, and shadow impacts. CTC is a volunteer, non-profit corporation representing these communities and as such is a legal person within the meaning of the *JRPA*.[79]

60. Gary McNeil alleged CTC delayed bringing its application. Metrolinx only recently decided to build sound walls and only recently affirmed its decision in light of the WHO's reclassification of diesel exhaust as carcinogenic.

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[77] *See* Preamble to the *Environmental Bill of Rights*, S.O. 1993, C. 28 ("EBR"); The EBR further provides the people of Ontario should have the means to ensure environmental goals are achieved in an effective, timely, open and fair manner. Pursuant to s. 7 of the EBR, the Minister of Transportation prepared a Ministry Statement of Environmental Values explaining how the EBR would be integrated with Ministry decision-making. The Minister of Transportation is the Minister responsible under the *Metrolinx Act*, 2006. In the Statement, the Minister of Transportation promised to improve transit to reduce transportation-related air emissions. The Statement further provides the environment will be an integral component of transportation planning.

[78] Affidavit of Timothy Noronha, dated August 17, 2012, Tab 2.

[79] *Legislation Act*, 2006, c. 21, Sched. F, s. 87.

61. Delays are excusable where the applicant demonstrates a concerted and sustained effort to challenge a decision with broad, public interest implications.[80] CTC was involved throughout the consultation process; Metrolinx staff recognized CTC as a stakeholder and informed the Board about its genuine interest in the Project.[81] Prejudice, if any, can be addressed with the remedy. Metrolinx continues to defer initiating the environmental assessment for electrification until late 2014.[82] A court order might hasten Metrolinx's consideration of electrification, which may reduce its ultimate cost.

62. CTC's delay was not unreasonable. As explained in the Affidavit of Carina Cojeen (CTC 744-52), CTC was unable to mobilize support for this legal challenge any sooner than it did because a Metrolinx flyer in March, 2011 misled CTC supporters to believe the Project would launch as electric in the first instance. It was difficult to mobilize support and raise funds for a legal challenge when supporters thought CTC had "won". Any delays stem from the distribution of misinformation by Metrolinx.

Standard of Review

63. Whether reasonableness or correctness applies depends on the degree of deference owed to the decision-maker, which is a determination made in view of the following factors: (1) the presence or absence of a privative clause; (2) the purpose of the decision-making body as determined by interpretation of enabling legislation, (3) the nature of the question in issue, and (4) the expertise of the decision-maker.[83]

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[80] *Friends of the Oldman River Society* v. *Canada (Minister of Transportation)*, [1992] 1 S.C.R. 3; *see also South March Highlands-Carp River Conservation Inc.* v. *Ottawa (City)*, 2010 ONSC 6725; [2010] O.J. No. 5495.

[81] Transcript of November 16, 2010 Public Board Meeting, Tab 1H, at pp. 1:3-2:3; *see also* Letter from Carina Cojeen and Mike Sullivan, dated January 25, 2011; *see* "Additional materials" appended to Agenda for Board Meeting, dated February 18, 2011, Tab 1Q.

[82] Exhibit 1 to McNeil Transcript: Letter from Bruce McCuaig to MPP Laura Albanese, dated August 14, 2012, advising electrification will not begin until current construction is complete.

[83] *Dunsmuir* v. *New Brunswick* , [2008] 1 SCR 190 at paras. 45, 62-64.

64. The Applicant submits the appropriate standard of review is correctness.

65. The *Metrolinx Act*, 2006 lacks a privative clause, indicating a correctness standard of review.

66. With respect to the second and fourth factors, no deference is owed to Metrolinx's interpretation of its statutory purpose because Metrolinx was acting in an administrative – and not an adjudicative – capacity at the time it purchased the Sumitomo DMUs.

67. The Federal Court of Appeal recently held that the Minister of Fisheries and Oceans could claim expertise in the management of fish and fish habitat, but this did not confer on the Minister expertise in the interpretation of statutes.[84]

68. Likewise, Metrolinx may claim expertise in the planning and implementation of regional transit projects, but it lacks the expertise tribunals possess. Metrolinx is not an adjudicator and this Court has expertise superior to Metrolinx in determining the scope of a Crown corporation's jurisdiction. The presumption in *Dunsmuir* that adjudicators hold expertise in the interpretation of their statutory mandate does not apply.[85] This Court owes no deference to Metrolinx's interpretation of its jurisdiction and authority.

69. Finally, with respect to the third factor, the Court is asked to determine a pure question of law about whether Metrolinx exceeded its jurisdiction by failing to exercise its statutory decision-making powers and instead unlawfully ceding its authority to other decision makers. The standard of review is correctness.[86]

70. Alternatively, if Metrolinx did not deprive itself of its decision-making power, the Applicant requests a declaration that Metrolinx unreasonably exercised its discretion to

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[84] *Georgia Strait Alliance* v. *Canada (Ministry of Fisheries and Oceans)*, 2012 FCA 40, [2012] F.C.J. No. 157, at para. 104.
[85] *Dunsmuir*, at para. 68.
[86] *Algonquin Wildlands League and Friends of Temagami* v. *Ontario (Minister of Natural Resources)*, [1998] O.J. No. 419 (Gen. Div.) at para. 234, *aff'd in part* [1998] O.J. No. 4331; *Dunsmuir*, at para. 59.

choose technology for the ARL. Buying diesel trains without studying the feasibility of buying EMUs lacks justification and intelligibility within the decision-making process.[87]

71. In permitting the diesel contract with Sumitomo, Metrolinx prioritized expediency over its own goals with respect to air quality, noise, greenhouse gas reduction, speed and transportation benefits. It relied on improper considerations and ultimately made its decision in the absence of appropriate information, which Metrolinx had identified as including a robust "triple bottom line" evaluation of the relative environmental, economic and social impacts of reasonable alternatives.

72. Any exercise of public authority that does not find its source in law; draws upon something other than law; is the product of fettered discretion; or is based predominantly on irrelevant considerations, is *per se* unreasonable.[88]

Accepting Instructions was *Ultra Vires* Metrolinx's Statutory Authority

73. It is a fundamental principle of administrative law that when a statute empowers the Crown to act, the "thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been."[89]

74. Prior to the Board votes in November 2010 and February 2011, Metrolinx staff advised the Board they had instructions from the Province to deliver the ARL by 2015 and DMUs were required to meet that constraint.[90] While the *Metrolinx Act* provides for

[87] *Dunsmuir*, at para. 47.
[88] *Stemijon Investments Ltd.* v. *Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710, at para. 24.
[89] *Delivery Drugs Ltd.* v. *British Columbia (Deputy Minister of Health)*, [2007] B.C.J. No. 2424, at para. 40, 55; citing *Attorney General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L).
[90] Transcript of February 18, 2011 Public Board Meeting, Tab 1P, at pp. 2:7-9, 3:16-17; Transcript of November 16, 2010 Public Board Meeting, Tab 1H, at pp. 1:3-2:3, 15:11-12.

directives in writing from the Minister, Gary McNeil deposed there was no directive.[91] The "instruction" came from a speech and other conversations with the Minister or Ministry of Transportation.[92] Yet Metrolinx proceeded as though it was a directive.

75. Instead of planning, Metrolinx repeatedly implemented the vision of government officials. Government officials do not have the power to suspend the application of a statute duly enacted by the Legislative Assembly that is fully in force.[93]

76. In a draft investment strategy dated September, 2008, Metrolinx determined to spend nearly $12 billion of available funding to gain "implementation credibility" before seeking new revenue tools or proposing financing for new projects.

77. Mr. McNeil admitted on cross-examination that seeking revenue and financial tools is part of Metrolinx's role as regional transit planner.[94] He took a narrow view of Metrolinx's ability to arrange financing for its operations and described a procedure that does not permit long-term planning.[95] He said the Province arranges for financing and Metrolinx does not borrow money. It submits budget requests.[96] Funding occurs on an annualized basis. Metrolinx seeks a one-year approval and the Province might even cut back on funding for projects spanning several years after projects have been started.[97]

78. Contrary to Metrolinx's practice, the *Metrolinx Act* provides the corporation with expansive powers to enter a variety of commercial arrangements (s. 19(1)), to establish subsidiary holding, management or funding companies (ss. 16(3), 17(1)-(3)), and to

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[91] McNeil Cross, at p. 127, qq. 391-92.
[92] McNeil Affidavit, at paras. 31, 35-37 (R.R. 7-8).
[93] *Algonquin Wildlands League and Friends of Temagami* v. *Ontario (Minister of Natural Resources)*, [1998] O.J. No. 419 (Gen. Div.), *rev'd in part* [1998] O.J. No. 4331 (C.A.).
[94] McNeil Cross, at pp. 19-20, q. 44.
[95] McNeil Cross, at pp. 19-20, qq. 45-46.
[96] McNeil Cross, at p. 20, q. 46.
[97] McNeil Cross, at p. 54, q. 160; pp. 71-72, q. 216.

prescribe fees for its service (s. 21(c)). Metrolinx may borrow money, issue securities and incur liabilities by passing bylaws approved by the Minister (s. 27(1)).

79. Metrolinx did not consider any of these options before it decided to invest in diesel and to defer feasibility studies for electrifying the Georgetown Corridor. It still has not even prepared a budget for capital costs associated with electrification.[98]

80. Metrolinx documents show it uncritically accepted the Province's authority to set transit planning priorities in 2009. According to a Metrolinx business plan, the Premier of Ontario identified the initial Metrolinx projects for implementation.[99] In April 2009, Toronto's bid for the Pan Am Games promised an ARL by 2015, without input from Metrolinx, and before Metrolinx had prepared its EPR or received approvals.[100] The *Metrolinx Act*, s. 6(1)(a) provides Metrolinx shall set priorities for the implementation of projects. Unauthorized commitments made by the Province prompted Metrolinx to invest in an expensive environmental assessment process for diesel trains, which did not include assessing electric trains as a reasonable alternative, as required by The Big Move.

81. No one had legal authority to issue transit planning instructions to Metrolinx. Only Metrolinx is authorized by s. 5(1) of the *Metrolinx Act*, 2006 to provide leadership in the planning, financing and implementation of transit projects and to ensure technology choices (i) promote policies and objects in the *Metrolinx Act*, 2006 and *Places to Grow Act*, 2005; and (ii) conform with the decision-making process in The Big Move.

82. The *Places to Grow Act*, 2005, s. 1(a)-(d) requires Metrolinx to ensure that "long-term vision and long-term goals guide" its transportation planning and decision-making

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[98] McNeil Cross, at p. 118, q. 363.
[99] Exhibit 7 to McNeil Affidavit, September 24, 2012 "2010-2011 Business Plan, Final Draft February 19, 2010", at p. 5 (R.R. 73)
[100] McNeil Cross, at p. 210, q. 659-61.

about growth. Metrolinx is obligated to plan transportation to support a high quality of life, a sustainable environment, and a strong, prosperous and competitive economy. Metrolinx is responsible for setting priorities and arranging funding for the planning and implementation of a multimodal transportation network.

83. Metrolinx did not seek funding for electrification and it did not prepare a business case for investing in electrification out of existing funds. It decided to build implementation credibility first. The decision to "build first" and "plan later" is not authorized by its statute. The short-term goal of providing a transit plan for a sporting event in 2015 contradicts Metrolinx's object and purpose under law to plan and implement transit projects with long-term vision and goals.

84. As revealed by comments in a recent meeting, Metrolinx remains unclear about spheres of decision-making authority as between Metrolinx and the Province:

5. Is there any possibility of delaying the ARL until electrification is in place? *The short answer is no, this is not our decision.*

41. You say you are going to be relaying our feedback regarding the health issue to government. How are you going to share our concerns with those making the decisions? Can you make a firm commitment to this room? *Yes, I make that commitment. We will have to find out what the right mechanism is for conveying the feedback.*

42. What is the right mechanism? *I don't know, we need to figure it out. We have clearly heard you.* [101]

85. By accepting the Province's instructions, Metrolinx deprived itself of jurisdiction that was conferred on it by the *Metrolinx Act*, 2006. Metrolinx lacked the discretion to allow the Province to lead transit-planning decisions.

Metrolinx was Required to Comply with The Big Move

86. Accepting instructions represents Metrolinx's failure to be guided by subordinate legislation in The Big Move and was *ultra vires* Metrolinx's jurisdiction and mandate.

[101] Electrification Meeting Summary, Tab 1V.

87. In *Algonquin Wildlands*, the Minister of Natural Resources exceeded his statutory jurisdiction by approving timber and forest management plans which were not compliant with (i) sustainability standards articulated in the *Crown Forest Sustainability Act*, 1994, S.O. 1994, c. 25 ("CFSA"); and (ii) the Ministry's Forest Management Planning Manual, which was adopted pursuant to the CFSA to provide direction for forest management planning for Ontario Crown lands.

88. The Manual's provisions were mandatory and not directory because the statute provided the Minister "shall" ensure that every plan complies with the Manual.[102]

89. Likewise, the *Metrolinx Act*, 2006, s. 6(4.2) provides Metrolinx "shall be guided in all its decisions and actions by the transportation plan." During cross-examination, Gary McNeil stated The Big Move is "not a legislated or regulatory document. It's really just an advisory document. It has no legal status, actually."[103]

90. The language of the statute is imperative and not permissive. Contrary to Mr. McNeil's understanding, Metrolinx lacked authority to disregard The Big Move. It was legally incorrect for Metrolinx to disregard its transit plan in favour of instructions.

91. The Big Move required the Board to (i) choose a technology based on a "triple bottom line" analysis comparing environmental, economic and social benefits of both diesel and electric trains and (ii) evaluate reasonable alternatives using the Metrolinx Benefits Case Analysis so decision-makers could understand the relative merits before deciding.[104] The reasonable alternatives for the corridor are diesel and electric trains.[105]

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[102] *Algonquin Wildlands*, [1998] O.J. No. 419, at paras. 49-51.
[103] McNeil Cross, at p. 18, q. 41.
[104] The Big Move, Tab 1B, at p. 78 (CTC 136).
[105] McNeil Cross, at p. 27, qq. 68-69.

92. Metrolinx lacked critical information about costs and benefits of deferring electrification, including:

a) How long it would take to implement electric trains: Metrolinx staff advised the Board it would take between 7-9 years.[106] Recently, Metrolinx representatives advised it could be done in as little as three years.[107]

b) The cost of proceeding with EMU versus DMU technology in the first instance: Metrolinx staff advised the Board it would cost between $440 million and $900 million to electrify the ARL.[108] Those figures do not permit the making of an informed decision with respect to the cost of alternatives. Incremental costs to electrification by pursuing diesel technology first were not separately enumerated, including health costs, the costs of sound walls, increased operating and maintenance costs, increased construction costs to electrify an operational corridor with high-frequency service, mobilization costs that will be duplicated when the line is electrified in the future, and different future revenues based on choosing either diesel or electric infrastructure in the first instance.[109] Recently, Metrolinx advised the cost of electrification is $440 million.[110]

93. There was no impediment to conducting feasibility studies for electrification in the first instance. Metrolinx did not do so before undertaking to deliver the line by 2015:

401 Q. And did you do any studies of the implications for electrifying before you gave the undertaking?
A. No.
402 Q. Did you do any feasibility studies of proceeding with EMUs in the first instance?
A. Aside from the work that was being undertaken as part of the electrification study, no.
403 Q. And that study was not completed at the time you gave the undertaking?
A. No.
404 Q. And so you didn't provide the Minister with detailed information or analysis

[106] Board Presentation entitled "Air Rail Link Vehicle", dated February 18, 2011, at p. 7, stating "EMU operation is 7-9 years away; we need vehicles in 3.5 years", Tab 1O, at p. 7 (CTC 543); *see also* Transcript of Public Board of Directors Meeting, dated February 18, 2011, Tab 1P, at p. 2:4-9, 3:16-17, and dated November 16, 2010, Tab 1G, at p. 15:11-14.
[107] Electrification Meeting Summary, Tab 1V, at qq. 2-3 (CTC 628); *see also* Exhibit 1 to McNeil Transcript: Letter from Bruce McCuaig to MPP Laura Albanese, dated August 14, 2012, advising electrification possible by 2017.
[108] Board Report entitled "GO Electrification Study", dated January 26, 2011, Tab 1L, at p. 6, 14 (CTC 520, 528).
[109] *See generally*, Affidavit of Richard A. Ciccarelli, dated August 20, 2012, Tab 3.
[110] Electrification Meeting Summary, Tab 1V, at qq. 4, 8.

16 comparing the costs and benefits of proceeding with
17 diesel versus electric trains in the first instance
18 at that time?
19 A. No.

94. In the absence of this information, it was impossible for Metrolinx to comply with The Big Move, which required evaluating the relative the social, economic and environmental costs and benefits of reasonable alternatives before choosing a technology.

95. Simply "identifying potential 'alternative means'" without comparing their environmental impacts "fails to provide any useful information to decision makers."[111]

96. As in *Alberta Wilderness*, the Applicant requests this Court to declare Metrolinx was required to (i) obtain relevant information to compare proceeding with electric versus diesel technology in the first instance, (ii) determine the technical and economic feasibility and cumulative environmental effects of each, and (iii) consider this information to reach conclusions and make recommendations.[112]

97. Mr. McNeil attributed Metrolinx's failure to consider electric trains in the first instance to the origins of the Project. He stated Transport Canada and Union Pearson AirLink Group ("UPAG"), a subsidiary of SNC-Lavalin, conceived the Project. He stated when Metrolinx agreed to assume responsibility for owning and operating the Project in 2010, it included an obligation to assume the same terms and budget as had been discussed with UPAG and an obligation to deliver it by 2015.[113]

98. Mr. McNeil's explanation ignores Metrolinx's role to advance the public interest since its inception in 2006. Metrolinx was charged with implementing the Project in 2008 and any decisions prior to 2010 to use diesel technology would have required

[111] *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, at para. 80.
[112] *Alberta Wildlands*, at paras. 82, 91.
[113] McNeil Affidavit, at para. 36 (R.R. 9).

Metrolinx's approval.[114] UPAG and Transport Canada lacked authority to unilaterally make decisions to use diesel technology on a corridor impacting Ontario Crown land.

99. Metrolinx assumed electrification could not be achieved by 2015 or that it would be too expensive. Absent feasibility studies, Metrolinx's assumption lacked a basis.

100. Metrolinx staff explicitly and repeatedly stated the decision to use diesel trains to meet the 2015 Pan Am Games was not its decision – it was the Province's decision.

101. The decision to delay the ARL does belong to Metrolinx. The authority to implement transit planning in the GTHA was conferred on it by statute.

102. As in the seminal case, *Roncarelli* v. *Duplessi*, [1959] S.C.R. 121, a decision made upon the direction of a third party is not a proper and valid exercise of statutory power and it constitutes an abdication of statutory functions and powers to act on such direction. A decision made without authority must be quashed.

Metrolinx Unreasonably Departed from its Mandate

103. As discussed above, Metrolinx departed from its decision-making process before voting to approve the purchase of Sumitomo DMUs. The failure to consider alternative technology shows Metrolinx merely implemented technology and scheduling decisions reached by the Province and UPAG. Alternatively, Metrolinx unreasonably chose diesel infrastructure, and the 2015 deadline, without proper regard to its statutory mandate.

104. When government agencies exercise discretion conferred by statute, they are subject to review on a reasonableness standard.[115] Decisions lacking justification, transparency and intelligibility within the decision-making process are unreasonable.

105. As the Supreme Court of Canada recently explained:

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[114] McNeil Cross, at p. 139-40, q. 433.
[115] *Montréal (City)* v. *Montréal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at para 36.

> . . . [I]n a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework . . . . [S]tatutes and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.[116]

106. In *Montréal (City)*, the Supreme Court of Canada quashed decisions made by two Crown corporations as they failed to comply with the purpose and general scheme of applicable empowering statutes.[117]

107. The *Metrolinx Act*, 2006 and the *Places to Grow Act*, 2005, provide the framework for how the Crown shall make decisions about transit planning and growth in the GTHA. Metrolinx's Regional Transportation Plan, The Big Move – adopted pursuant to Metrolinx's empowering statute – supplements that framework with details for how provincial policies and objectives are to be attained.

108. These statutes and The Big Move "occupy the field" or "cover the ground" for how transit planning and growth decisions must be made. Legislation displaces all non-statutory Crown powers to do that which was delegated to Metrolinx.[118] There is no room for other priorities or processes to lead decisions about transit planning in GTHA.

109. As explained in *Doctors Hospital* v. *Ontario (Minister of Health) et al*:

> . . . [A] statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.[119]
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> * * *
>
> It has been held that even if made in good faith and with the best of intentions, a departure by a decision-making body from the objects and purposes of the statute to which it acts is objectionable and subject to review by the Courts.[120]

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[116] *Id.* at para. 36
[117] *Id.* at paras. 8, 32, 33, 47.
[118] *Delivery Drugs*, at para. 55.
[119] *Doctors Hospital*, [1976] O.J. No. 2098 (Div. Ct.), at para. 42 (internal citation omitted).

110. In that case, this Court set aside a decision by the Minister of Health and Lieutenant-Governor in Council to revoke approvals of hospitals as public hospitals. The decision was made in view of financial considerations, which were extraneous to and beyond the objects and policies of the *Public Hospitals Act*.

111. Legislation granted Metrolinx the authority to develop a transportation plan, to plan, co-ordinate and set priorities for its implementation and to arrange for funding for integrated transportation across the region.[121]

112. The decision to purchase diesel trains did not follow the decision-making process in The Big Move and was inconsistent with the objects in the *Places to Grow Act*, 2005. The Big Move calls for the electrifying the Georgetown Corridor.[122] The purchase of diesel technology diverts scarce funding dollars away from electrification and delay increases the costs of electrifying.[123] Increasing service in the corridor will significantly reduces the available working time for electrification.[124] The decision was not based on a triple bottom line analysis.[125] The decision was unreasonable for lack of adequate basis.

113. On cross-examination, Mr. McNeil revealed he did not understand it was Metrolinx's obligation to try to achieve provincial policies to reduce greenhouse gases:

> 246 Q. I'm referring to, on page 4, the second paragraph, there is a statement here that transit is good for the environment, and the reason why it's good is because fewer air pollutants and greenhouse gasses are produced by transit per

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[120] *Id.* at para. 43; *see also Canada (Attorney General)* v. *Berrywoods Farms Inc.*, 2006 Canlii 6079 (On. Div. Ct.), in which municipalities exceeded their statutory jurisdiction by entertaining certain land use applications that were *void ab initio* and therefore not capable of consideration.
[121] *Metrolinx Act*, 2006, s. 6.
[122] The Big Move, Tab 1B, at pp. 21, 28 (CTC 79, 86); *see also* EPR, Tab 1F, pp. 89-90, stating "Metrolinx's Regional Transportation Plan calls for the Georgetown Corridor to be electrified."
[123] Board Report dated January 26, 2011, Tab 1L, at p. 7 (CTC 521).
[124] Exhibit 22 to McNeil Cross, "Appendix 10 – Implementation of Electrification Options", dated December, 2010, at p. 2, 22(R.R. at 350, 370).
[125] The Big Move, Tab 1B, at p. 78 (CTC 136).

person-kilometre of travel.
And I found statements along those lines in many places throughout the materials from even before 2012, but it seems to be what everyone thinks, and I just want to know if you think, and 00084
by "you" if Metrolinx, as part of its objectives, aims to provide transit to achieve greenhouse gas reduction and air quality improvement goals of the province?
A. We think it's good to provide transit. **I don't think you'll actually find that there actually are specific greenhouse gas goals of the province, though,** but we do recognize that transit is good for the environment, good for the economy, good for the areas that we provide service to.

114. It is in fact a policy of the Province to reduce greenhouse gases.[126] The MoveOntario 2020 funds being spent on the Project reflect Ontario's investment in achieving greenhouse gas reduction.[127] The decision to purchase diesel trains fails to achieve that goal.[128] The Board did not consider how choosing electric trains in the first instance might help achieve this provincial policy.

115. It has long been the rule that statutory discretion must not be exercised arbitrarily or for irrelevant purposes:

> From the time of *Roncarelli* v. *Duplessi*, [1959] S.C.R. 121, it has been clear that . . . statutory discretion cannot be absolute and untrammelled but must be read in light of the policy and objects of the statute granting it.[129]

116. Meeting the Pan Am Games deadline is a consideration extraneous to Metrolinx's mandate. There is no indication the Board considered the benefit of the Games. The

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[126] Exhibit 5 to McNeil Cross, Go Green: Ontario's Action Plan on Climate Change, August, 2007.
[127] *Id*. at p. 4.
[128] Metrolinx studies show cars displaced by the new train produce greenhouse emissions measured at 1,700 tonnes per year. *See* Summary #4, Appendix A, Presentation, Tab 3A, at p. 33. The reference case produces 62,000 tonnes per year; *see* s. 6.2.4.3 of EPR, Tab 1F, at p. 406. The EPR used false assumptions, including 5-day (rather than 7-day) operation at full capacity, and zero carpooling by automobile drivers. *Id*. at s. 6.2.4, at p. 387.
[129] *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Information and Privacy Commissioner)*, 2004 CanLII 43693 (ON CA), at para 37, citing *C.U.P.E.* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paras. 91-94.

Board did not weigh the benefits of providing a transit system for the Games against the long-term health, social and economic interests of the people of Ontario. Rather, it uncritically accepted 2015 as the deadline.

PART IV – ORDER SOUGHT

117. The Applicant requests a declaration that Metrolinx fettered its discretion (i) to implement its vision for the ARL, and (ii) to reject investment in new diesel infrastructure. The Applicant requests this Court to quash and set aside Metrolinx's decision to purchase diesel trains. The Applicant requests a declaration that Metrolinx is required to reconsider its decision, based on a full comparison of the social, economic, and air quality impacts of diesel and electric trains, and based on the WHO's reclassification of diesel exhaust, unfettered by the 2015 Pan Am Games deadline.

118. The Applicant respectfully requests its costs on a substantial indemnity basis.

All of which is respectfully submitted this 29th day of October, 2012.

Saba Ahmad
Lawyer for the Applicant

SCHEDULE A

LIST OF AUTHORITIES

1. *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.*,
   [1999] 3 F.C. 425 (Fed. Ct.)

2. *Algonquin Wildlands League and Friends of Temagami* v. *Ontario (Minister of Natural Resources),*
   [1998] O.J. No. 419 (Gen. Div.),
   aff'd in part [1998] O.J. No. 4331 (C.A.)

3. *Canada (Attorney General)* v. *Berrywoods Farms Inc.*,
   2006 Canlii 6079 (On. Div. Ct.)

4. *C.U.P.E.* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539

5. *Delivery Drugs Ltd.* v. *British Columbia (Deputy Minister of Health)*,
   [2007] B.C.J. No. 2424

6. *Doctors Hospital* v. *Ontario (Minister of Health) et al.*,
   [1976] O.J. No. 2098 (Div. Ct.)

7. *Dunsmuir* v. *New Brunswick* , [2008] S.C.J. No. 9 (QL).

8. *Friends of the Oldman River Society* v. *Canada (Ministerof Transport)*
   [1992] 1 S.C.R. 3.

9. *Georgia Strait Alliance* v. *Canada (Ministry of Fisheries and Oceans)*,
   2012 FCA 40, [2012] F.C.J. No. 157

10. *Montréal (City)* v. *Montréal Port Authority*, [2010] 1 S.C.R. 427

11. *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Information and Privacy Commissioner)*,
    2004 CanLII 43693 (ON C.A.)

12. *Roncarelli* v. *Duplessi*, [1959] S.C.R. 121

13. *South March Highlands-Carp River Conservation Inc. v.Ottawa (City)*,
    2010 ONSC 6725; [2010] O.J. No. 5495.

14. *Stemijon Investments Ltd.* v. *Canada (Attorney General)*,
    2011 FCA 299, 341 D.L.R. (4th) 710

15. Ministry Statement of Environmental Values, prepared by Minister of Transportation, dated September, 2008.

SCHEDULE B

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Environmental Bill of Rights*, S.O. 1993, C. 28**

Preamble

The people of Ontario recognize the inherent value of the natural environment.

The people of Ontario have a right to a healthful environment.

Ministry statement of environmental values

7. Within three months after the date on which this section begins to apply to a ministry, the minister shall prepare a draft ministry statement of environmental values that,

(a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the ministry; and

(b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry. 1993, c. 28, s. 7.

***Judicial Review Procedure Act*, R.S.O. 1990, C.J. 1**

Definitions

1. In this Act,

"statutory power" means a power or right conferred by or under a statute,

. . .

(b) to exercise a statutory power of decision,

. . .

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

. . .

and includes the powers of an inferior court. ("compétence légale de décision") R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

***Legislation Act*, 2006**, c. 21, Sched. F, s. 87; 2009, c. 33, Sched. 2, s. 43 (30, 31).

Definitions

87. In every Act and regulation,

"person" includes a corporation; ("personne")

***Metrolinx Act*, 2006, S.O. 2006, c.16**

Objects

5. (1) The objects of the Corporation are,

(a) to provide leadership in the co-ordination, planning, financing, development and implementation of an integrated, multi-modal transportation network that,

(i) conforms with transportation policies of growth plans prepared and approved under the *Places to Grow Act, 2005* applicable in the regional transportation area,

(ii) complies with other provincial transportation policies and plans applicable in the regional transportation area, and

(iii) supports a high quality of life, a sustainable environment and a strong, prosperous and competitive economy;

(b) to act as the central procurement agency for the procurement of local transit system vehicles, equipment, technologies and facilities and related supplies and services on behalf of Ontario municipalities; and

(c) to be responsible for the operation of the regional transit system and the provision of other transit services. 2006, c. 16, s. 5 (1); 2009, c. 14, s. 5.

Duties of Corporation re leadership in transportation integration

6. (1) In carrying out its objects as described in clause 5 (1) (a), the Corporation shall,

(a) develop and adopt a transportation plan for the regional transportation area and plan, co-ordinate and set priorities for its implementation;

(b) fund, or arrange and manage the funding for, integrated transportation across the regional transportation area;

(c) promote and facilitate co-ordinated decision-making and investment in the regional transportation area among the governments of the municipalities in the regional transportation area and the federal and provincial governments in order to ensure the efficient and cost-effective resolution of matters of shared concern respecting transportation, including,

(i) the provision and the optimal use and location of transportation infrastructure, including highway and transit infrastructure,

(ii) the integration of transportation infrastructure, including highway and transit infrastructure, and

(iii) the integration of routes, fares and schedules of the regional transit system and of local transit systems in the regional transportation area; and

(d) promote the safety, efficiency and protection of transportation corridors.

(e) Repealed: 2009, c. 14, s. 6 (4).

2006, c. 16, s. 6 (1); 2009, c. 14, s. 6 (1-4).

Requirements for transportation plan

(2) The transportation plan required by clause (1) (a) must,

(a) take into consideration all modes of transportation, including highways, railways, local transit systems, the regional transit system, cycling and walking;

(b) make use of intelligent transportation systems and other innovative technologies;

(c) comply with the Minister's transportation plans, policies and strategies for the province as they apply to the regional transportation area;

(d) comply with the prescribed provincial plans and policies;

(e) conform with the growth plans prepared and approved under the *Places to Grow Act, 2005* applicable in the regional transportation area;

(f) promote the integration of local transit systems in the regional transportation area with each other and with the regional transit system;

(g) work towards easing congestion and commute times in the regional transportation area;

(h) work towards reducing transportation-related emissions of smog precursors and greenhouse gases in the regional transportation area;

(i) promote transit-supportive development to increase transit ridership and to support the viability and optimization of transit infrastructure; and

(j) Repealed: 2009, c. 14, s. 6 (8).

(k) Repealed: 2009, c. 14, s. 6 (8).

(l) address such other matters and include such other information as may be prescribed. 2006, c. 16, s. 6 (2); 2009, c 14, s. 6 (5-8).

Public consultation

(3) The Corporation shall, in the development of the transportation plan required by clause (1) (a) or in making any change to the transportation plan after the plan has been adopted,

(a) ensure that notice of its intention to develop a transportation plan or to make a change to the transportation plan is given to the relevant provincial ministers of the Crown and provincial agencies, relevant federal ministers of the Crown and federal agencies, the public, First Nations in the regional transportation area, municipalities in the regional transportation area and planning authorities having jurisdiction in the regional transportation area, as and in the manner that the Corporation's board of directors considers appropriate; and

(b) consult with the relevant provincial ministers of the Crown and provincial agencies, relevant federal ministers of the Crown and federal agencies, the public, First Nations in the regional transportation area, municipalities in the regional transportation area, planning authorities having jurisdiction in the regional transportation area and other interested persons and groups, as and in the manner that the Corporation's board of directors considers appropriate. 2009, c. 14, s. 6 (9).

Corporation guided by transportation plan

(4.2) The Corporation shall be guided in all its decisions and actions by the transportation plan. 2009, c. 14, s. 6 (10).

Powers

16. (1) Except as limited by this Act, the Corporation has the capacity, rights, powers and privileges of a natural person for carrying out its objects. 2006, c. 16, s. 16 (1).

Same

(2) Without limiting the generality of subsection (1), the Corporation has the power,

(a) to acquire, hold, lease or dispose of an interest in real or personal property for a purpose consistent with the Corporation's objects, including for the construction, alteration, extension or expansion of a transportation infrastructure project;

(b) to hold, manage, operate, fund and deliver,

(i) the GO Transit system within the GO Transit service area,

(ii) the prescribed passenger transportation systems within the regional transportation area, and

(iii) any local transit system or other transportation service within or outside the regional transportation area or the GO Transit service area by agreement with the municipalities to be served by the system or service;

(c) to develop and implement management strategies and programs relating to transit and transportation demand; and

(d) to enter into commercial arrangements with municipalities in the regional transportation area or other persons or entities for a purpose consistent with the Corporation's objects, including for designing, developing, constructing, maintaining or operating a prescribed passenger transportation system. 2009, c. 14, s. 14 (1).

Delegation to subsidiaries

(3) The Corporation may, subject to the approval of the Lieutenant Governor in Council, delegate any of its powers under subsection (2) to a subsidiary corporation established under section 17. 2009, c. 14, s. 14 (2).

Limitation re subsidiaries

17. (1) Subject to subsections (2) and (3), the Corporation may establish and dissolve subsidiary corporations within or outside Ontario. 2009, c. 14, s. 15.

Same

(2) The establishment of a subsidiary corporation under subsection (1), the structure, powers, duties, governance, constitution and management of such subsidiary corporation, the dissolution of such subsidiary corporation and the terms of its dissolution shall be subject to the approval of the Lieutenant Governor in Council. 2009, c. 14, s. 15.

Same

(3) A subsidiary corporation may be established for the purpose of designing, developing, constructing, holding, managing, funding, maintaining, operating or delivering a prescribed passenger transportation system only if the Corporation controls the subsidiary corporation at the time it is established and afterwards. 2009, c. 14, s. 15.

Agreements

19. (1) The Corporation or any of its subsidiary corporations may enter into agreements with other persons, including municipalities in Ontario, the Crown in right of Ontario and the Crown in right of Canada, for a purpose consistent with the Corporation's objects. 2006, c. 16, s. 19 (1).

By-laws regulating use of regional transit system, local transit systems

21. (1) The Corporation's board of directors may pass by-laws with respect to the regional transit system or any local transit system or other transportation service provided by agreement with a municipality under subclause 16 (2) (b) (iii),

(a) prohibiting or regulating the use of any land owned, leased, used or occupied by the Corporation and prohibiting or regulating vehicular and pedestrian traffic on any such land;

(b) prescribing the fees or rentals payable for a permit, licence or right issued or granted with respect to any of the land owned, leased, used or occupied by the Corporation;

(c) governing the terms and conditions upon which tickets may be sold;

(d) governing the conduct of passengers and governing the refusal of passage to persons who do not comply with the by-laws or the terms and conditions upon which tickets are sold;

(e) requiring and providing for the issuance of permits and licences and providing for the granting of rights with respect to the use of any of its land and providing for the revocation of such a permit, licence or right. 2006, c. 16, s. 21 (1); 2009, c. 14, s. 17 (1, 2).

Borrowing and investing

27. (1) The power of the Corporation and its subsidiary corporations to borrow, issue securities, make short-term investments of funds, manage risk associated with financing and investment or incur liabilities in order to facilitate financing by others may only be exercised under the authority of a by-law that has been approved in writing by the Minister of Finance. 2006, c. 16, s. 27 (1).

***Places to Grow Act*, 2005, c. 13**

Purposes

1. The purposes of the Act are,

(a) to enable decisions about growth to be made in ways that sustain a robust economy, build strong communities and promote a healthy environment and a culture of conservation;

(b) to promote a rational and balanced approach to decisions about growth that builds on community priorities, strengths and opportunities and makes efficient use of infrastructure;

(c) to enable planning for growth in a manner that reflects a broad geographical perspective and is integrated across natural and municipal boundaries;

(d) to ensure that a long-term vision and long-term goals guide decision-making about growth and provide for the co-ordination of growth policies among all levels of government. 2005, c. 13, s. 1.

***Rules of Civil Procedure*, RRO 1990, Reg 194**

RULE 68 - PROCEEDINGS FOR JUDICIAL REVIEW

HOW COMMENCED

68.01 (1) An application to the Divisional Court or to the Superior Court of Justice for judicial review under the *Judicial Review Procedure Act* shall be commenced by notice of application, and where the application is to the Divisional Court the notice of application shall be in Form 68A. R.R.O. 1990, Reg. 194, r. 68.01 (1); O. Reg. 292/99, s. 1 (2).

(2) If the application is made to the Divisional Court and is not commenced at a regional centre, the local registrar in the place where it is commenced shall forthwith transfer a copy of the notice of application and of any material filed in support of the application to the court office in the regional centre of the region where the application is to be heard, and all further documents in the application shall be filed there. R.R.O. 1990, Reg. 194, r. 68.01 (2).

APPLICATION RECORDS AND FACTUMS

Applicant

68.04 (1) The applicant shall deliver an application record and a factum,

(a) where the nature of the application requires a record of the proceeding before the court or tribunal whose decision is to be reviewed, within thirty days after the record is filed; or

(b) where the nature of the application does not require such a record, within thirty days after the application is commenced. R.R.O. 1990, Reg. 194, r. 68.04 (1).

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application;

(b.1) a copy of the reasons of the court or tribunal whose decision is to be reviewed, with a further typed or printed copy if the reasons are handwritten;

(c) a copy of all affidavits and other material served by any party for use on the application;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the application. R.R.O. 1990, Reg. 194, r. 68.04 (2); O. Reg. 219/91, s. 8.

(3) The applicant's factum shall be signed by the applicant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

(a) Part I, containing a statement identifying the applicant and the court or tribunal whose decision is to be reviewed and stating the result in that court or tribunal;

(b) Part II, containing a concise summary of the facts relevant to the issues on the application, with specific reference to the evidence;

(c) Part III, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue;

(d) Part IV, containing a statement of the order that the court will be asked to make, including any order for costs;

(e) Schedule A, containing a list of the authorities referred to; and

(f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws,

in paragraphs numbered consecutively throughout the factum. R.R.O. 1990, Reg. 194, r. 68.04 (3); O. Reg. 575/07, s. 30 (1).

Statutory Powers Procedure Act, RSO 1990, c S.22

Interpretation

1. (1) In this Act,

"statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not; ("compétence légale de décision")