

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

AUTHORITY MEETING

Tuesday, May 18, 2021 - 5:30 P.M.

AGENDA ADDENDUM

AGENDA ITEM:

**SUPPORTING
DOCUMENTS**

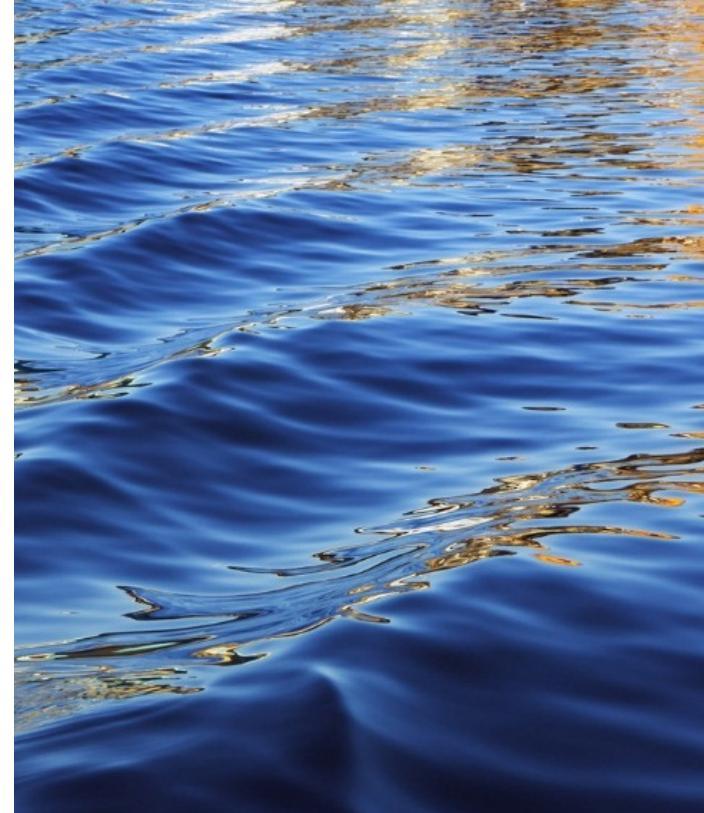
HEARING UNDER SECTION 28 (12) OF THE CONSERVATION AUTHORITIES ACT

- | | |
|---|-----------------------|
| (1) Staff Presentation – Revised to May 17, 2021 | H-1 to H-35 |
| Re: Development Application 46 West Beach Road, Clarington | |
| (2) 46 West Beach, Municipality of Clarington | H-36 to H-107 |
| Re: Applicant's Material | |
| (3) Upper Thames River Conservation Authority and City of London et al. | H-108 to H-131 |
| Re: Applicant's Book of Authorities [1989] OJ No. 393 | |
| (4) CLOCA's Book of Authorities | H-132 to H-306 |
| Re: Application Development of 46 West Beach Road | |



CLOCA Staff Presentation

Development Application
46 West Beach Road, Clarington
Section 28 (12) Hearing, May 18, 2021





Presentation Overview

1. Safety Law Has Evolved
2. Natural Hazards
3. The Proposal
4. Applicable Legislation and Policy
5. Summary Analysis
6. Recommendation



Safety Law Has Evolved

**28. (25) In this section,
“development” means,**

- (a) the construction, reconstruction, erection or placing
of a building or structure of any kind,**
- (b) any change to a building or structure that would
have the effect of altering the use or potential use of the
building or structure, increasing the size of the building
or structure...”**

Statutes of Ontario 1998, c. 18



What Are Natural Hazards?

“Natural, physical environmental processes that can produce unexpected events of unusual magnitude or severity.”

Catastrophic outcomes: damage to property, injury to people and potential loss of life (natural disasters)



Natural Hazards at West Beach Rd.



H-5

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



Natural Hazards at West Beach Rd.

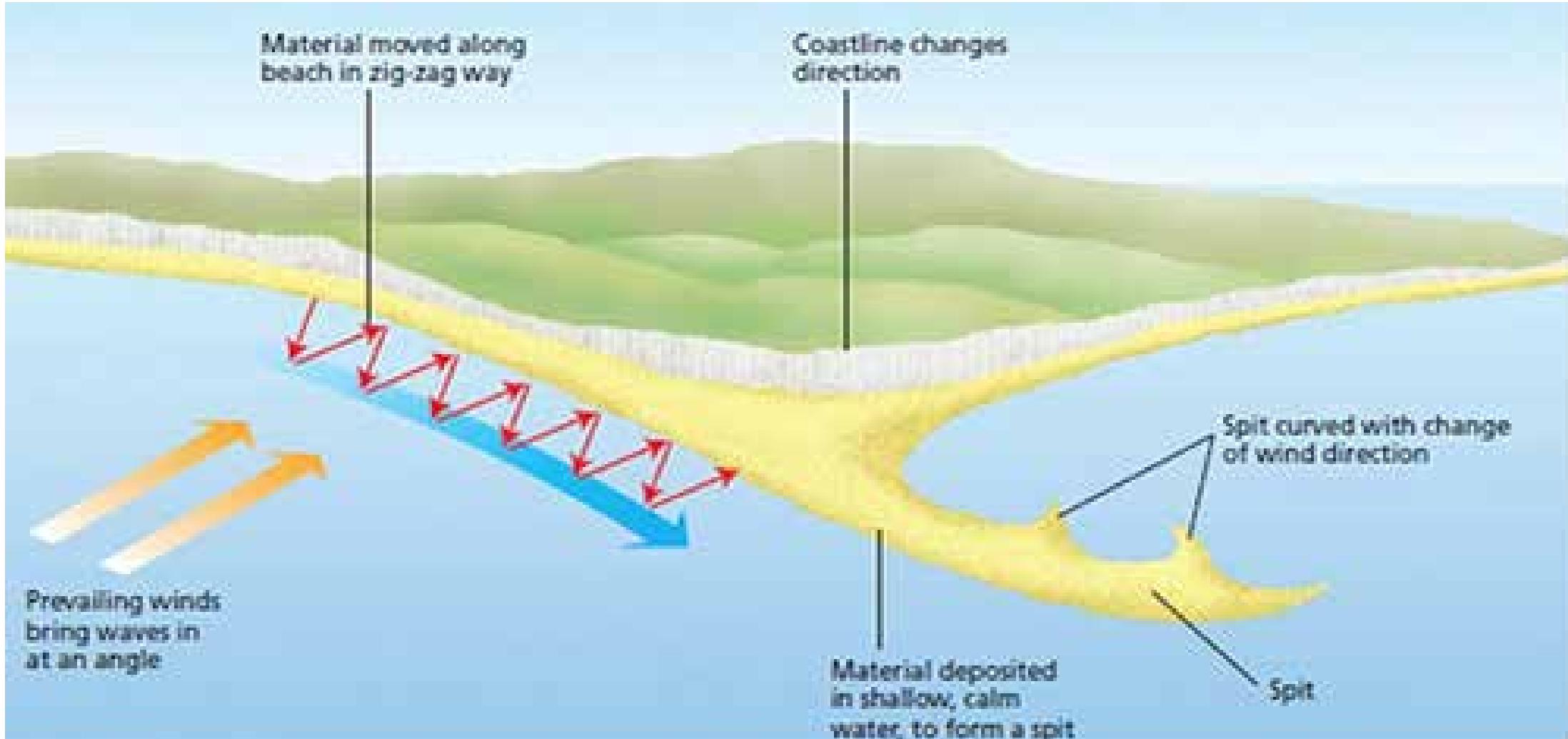


H-6

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



Barrier Beach Dynamic Beach Hazard



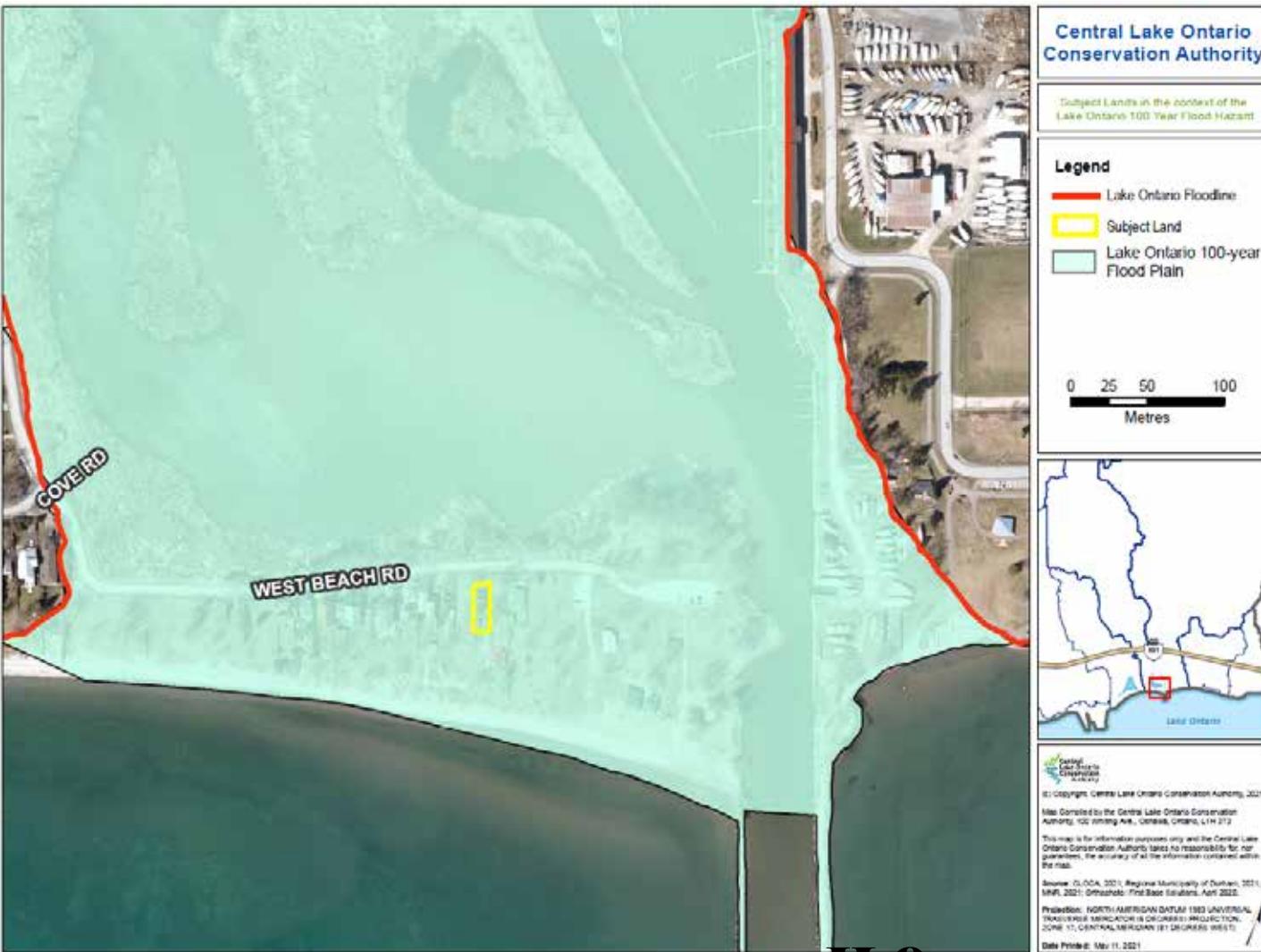


Barrier Beach Dynamic Beach Hazard





Lake Ontario 100-year Flood Plain Hazard



H-9



Natural Hazards at West Beach Rd.



H-10

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



Natural Hazards at West Beach Rd.



Two Watersheds

- Bowmanville Creek 92.1 km²
- Soper Creek 77.2 km²
- Total 169.3 km²



Bowmanville/Soper Flood Plain Hazard

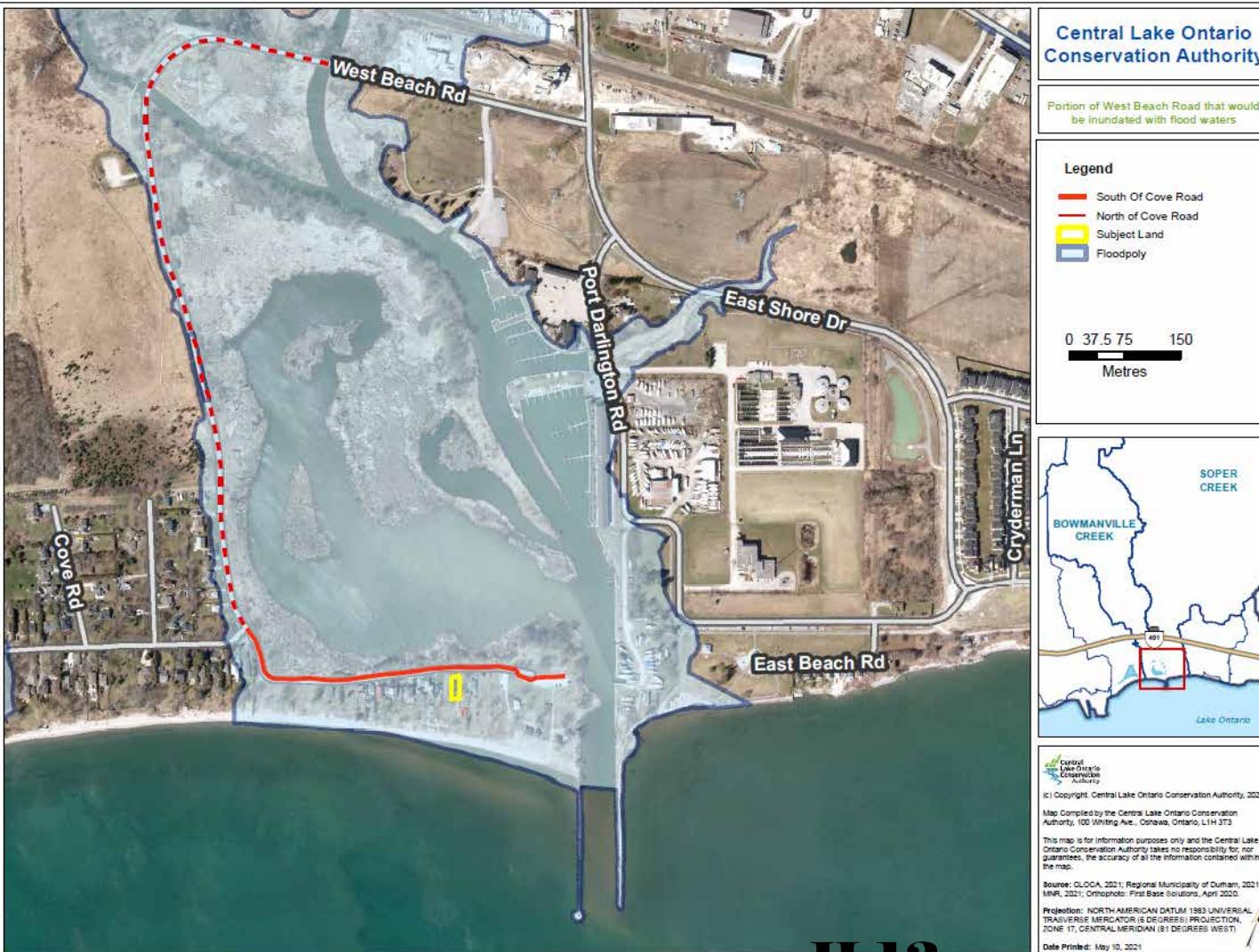


H-12

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



Lack of Safe Access in Emergency



H-13

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



Natural Hazards at West Beach Rd.



H-14

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Natural Hazards Video



H-15

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



Regulated Area (O. Reg. 42/06)





The Proposal – Existing Condition

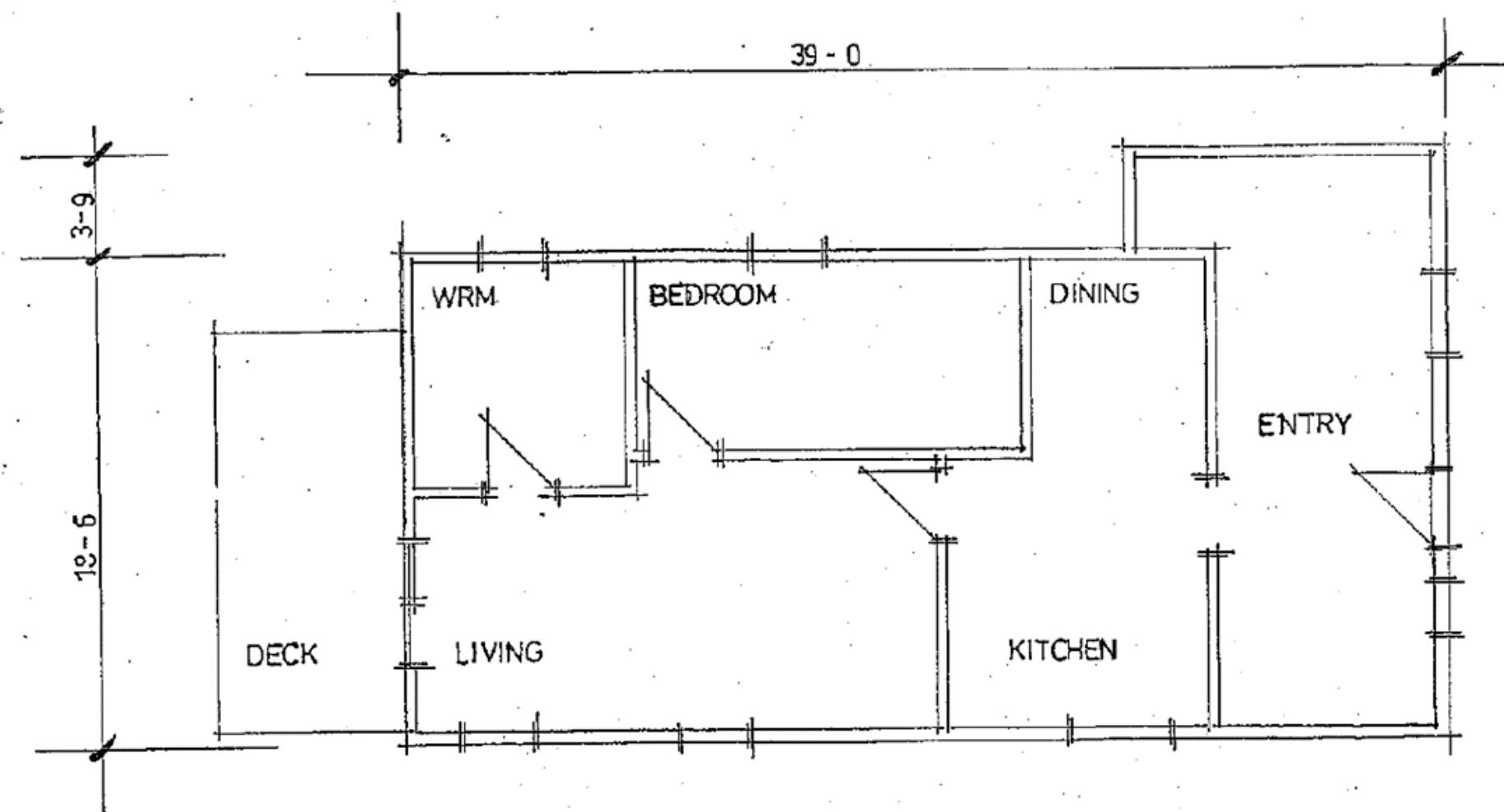


H-17

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

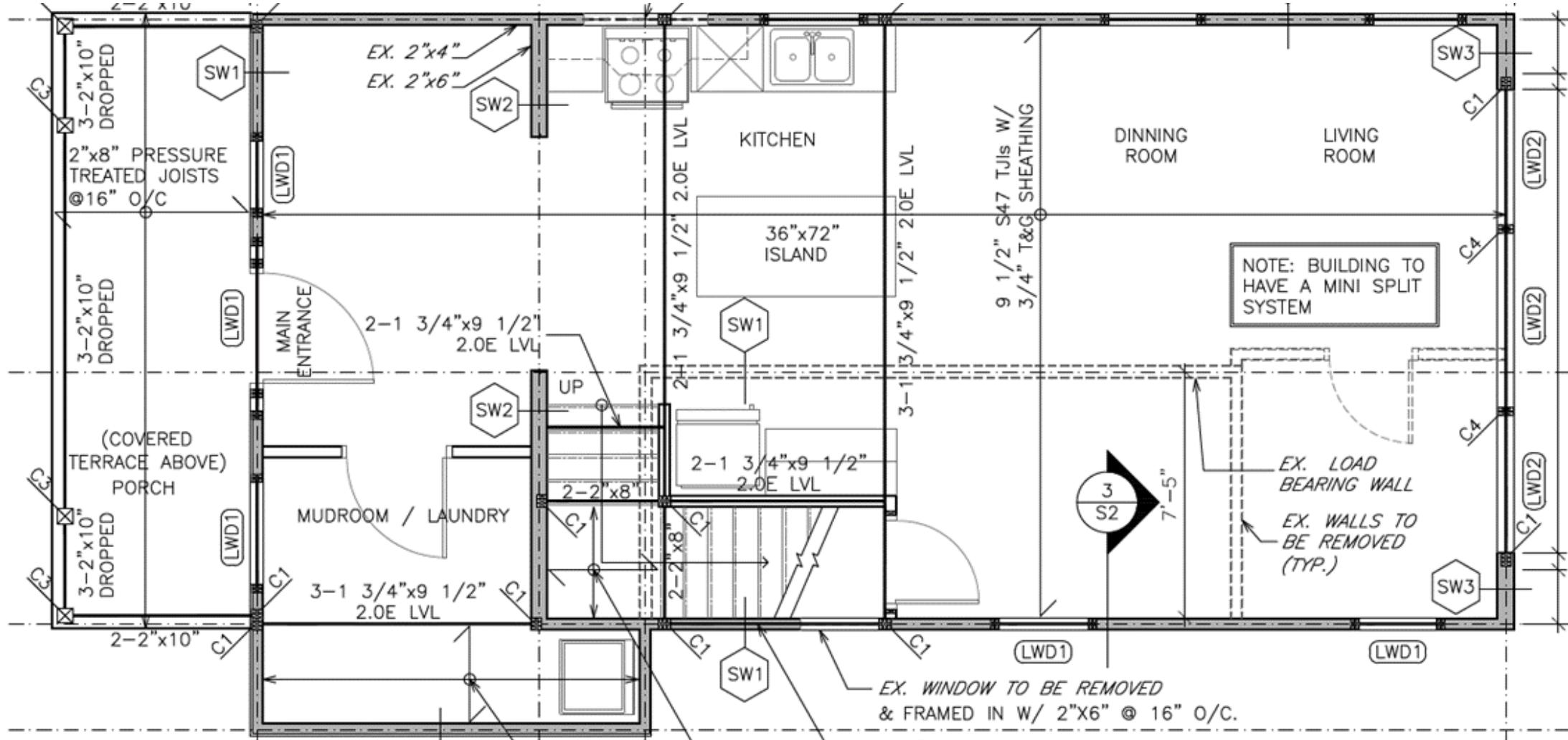


The Proposal - Existing Floor Plan



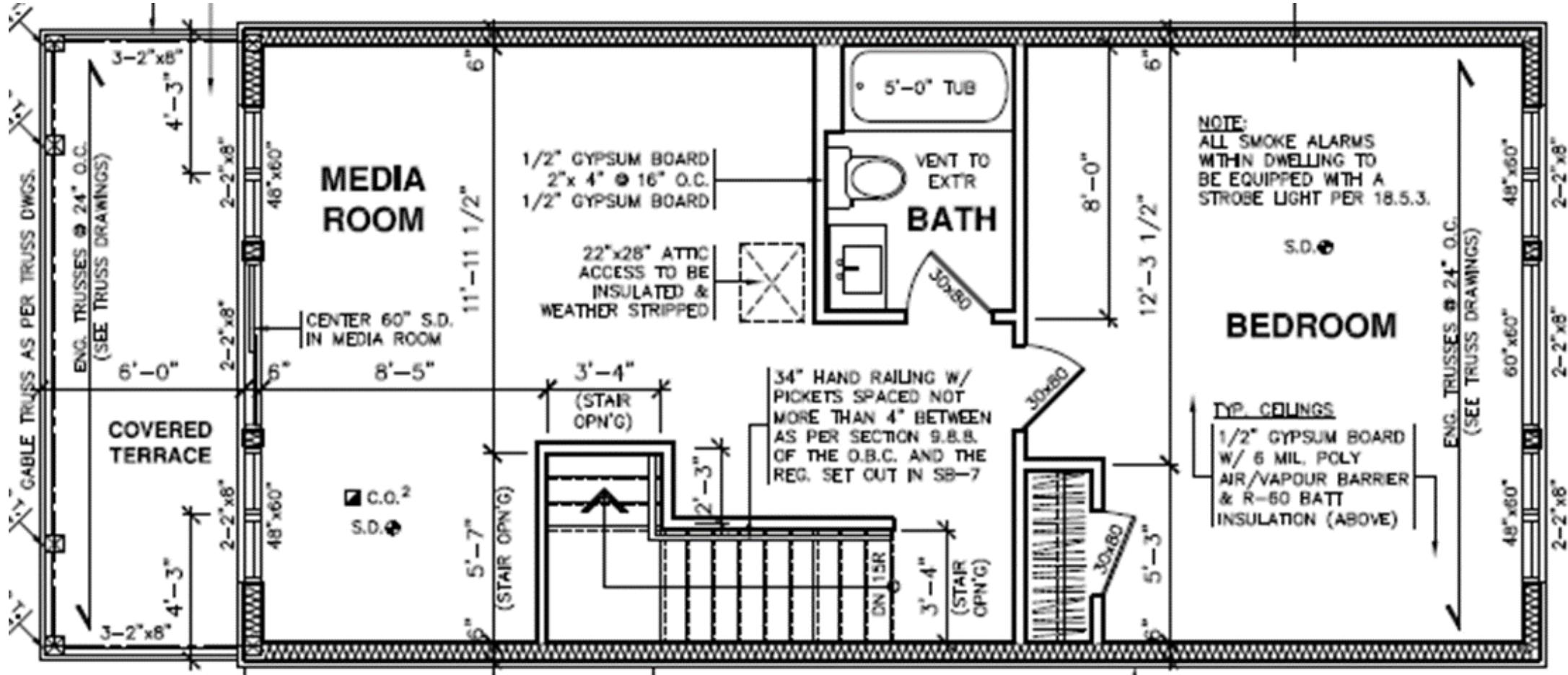


The Proposal – Reconstructed First Floor



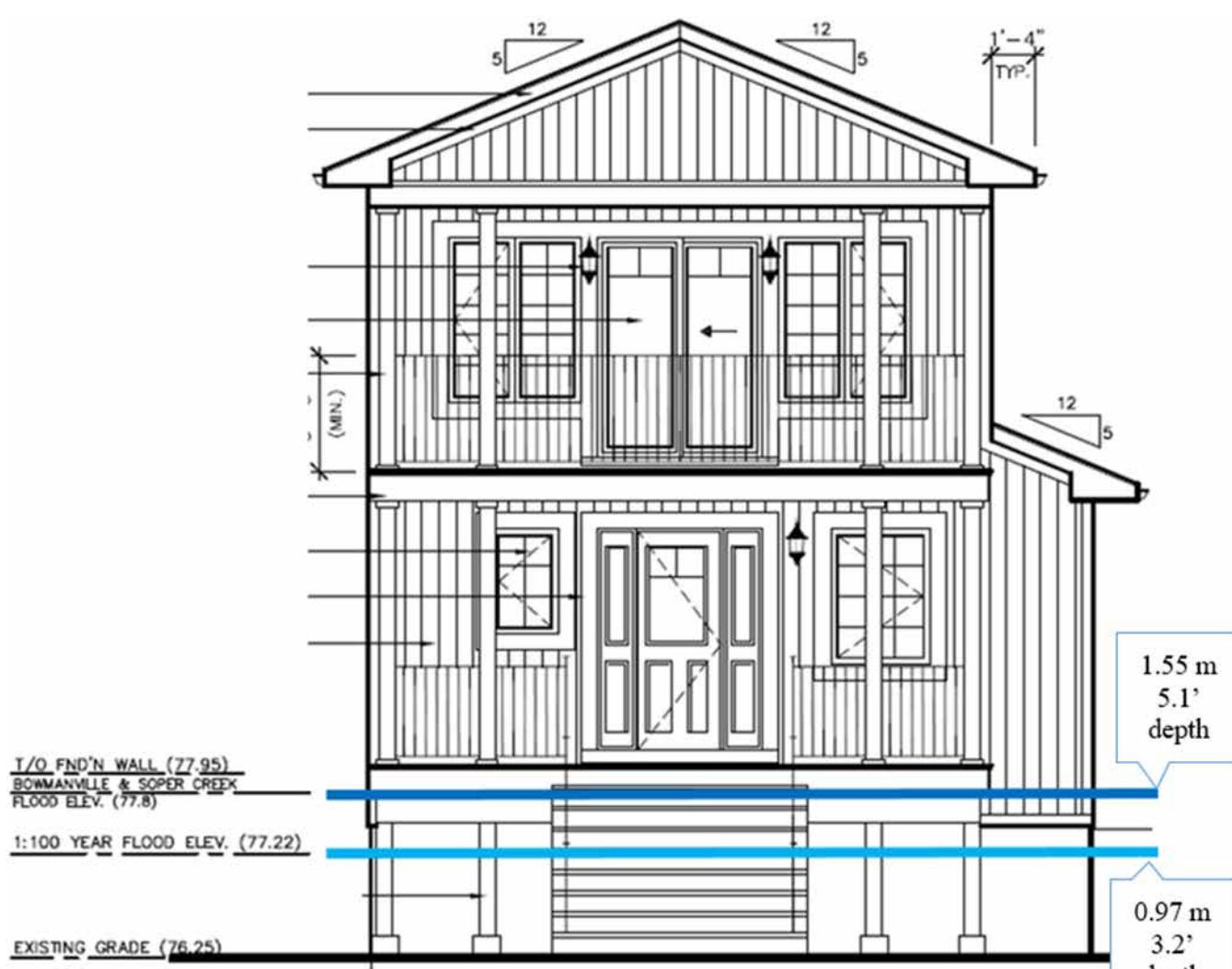


The Proposal – Additional Second Floor





The Proposal – Additional Second Floor

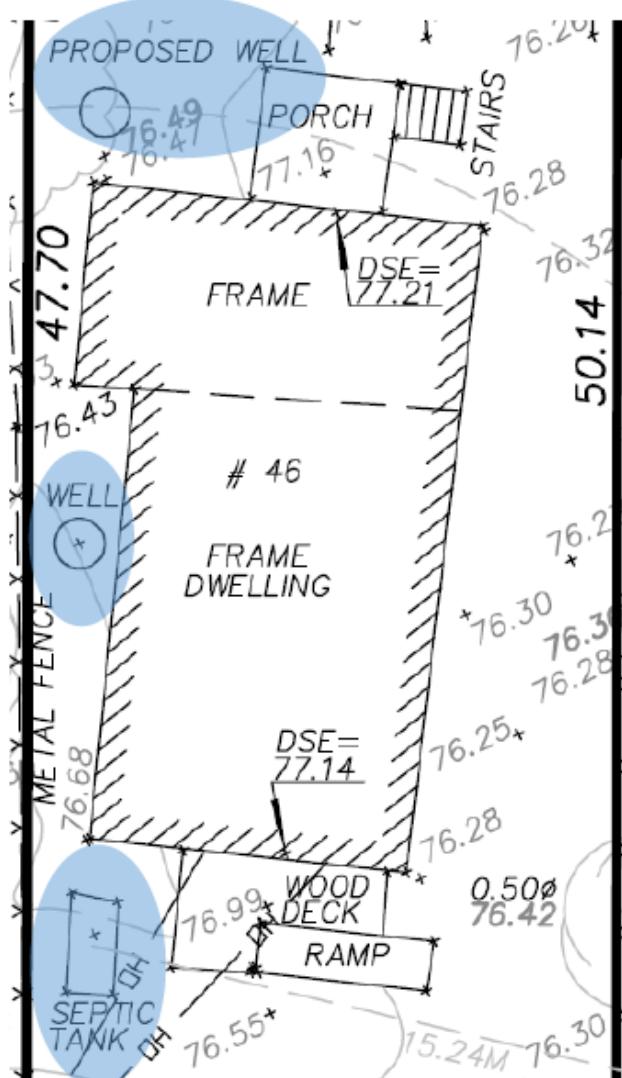


H-21

CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY



The Proposal – Servicing



- No information submitted regarding the size, location, or condition of the weeping bed
 - Both well and septic systems are vulnerable during flooding events



“Development” Under Conservation Authorities Act

Subsection 28 (25):

“Development,” means,

- (a) the construction, reconstruction, erection or placing of a building or structure of any kind,
- (b) any change to a building or structure that would have the effect of altering the use or potential use of the building or structure, increasing the size of the building or structure ...” (emphasis added)



5 Tests: Ontario Regulation 42/06 s. 3(1)

“The Authority may grant permission for development ... if, in its opinion, (1) the control of flooding, (2) erosion, (3) dynamic beaches, (4) pollution or the (5) conservation of land

will not be affected by the development.”



The “Control of Flooding” Test

Policy 4.3.1.5 – Lake Ontario Flooding

g) ... the reconstruction does not exceed the original habitable floor area ... and the use of the reconstructed dwelling/structure does not increase the risk to property and public safety.”



The “Dynamic Beaches” and “Erosion” Tests

Policy 4.5.1.5

- “c) no development located within the 100 year flood level; ...
- e) the proposed development will not exceed the original habitable floor area ... of the previous structure...”



The “Control of Flooding” Test

Policy 5.4.1.7 - River based flooding

“... the proposed development is located in an area of least (and acceptable) risk...”



Transition Policy

Policy 2.14

"... apply to all permit applications received on or After April 16, 2013."



Other Historical Approvals

52 West Beach Road

- Approved *prior to* Board Approval of Policy Document (i.e. Before April 16, 2013)
- Approved *Prior to* Extreme Flood Events of 2017, 2019 and Shoreline Hazard Studies
- Not Precedent Setting



Other Historical Approvals

121 Cove Road

- Located on highland not subject to flood risk
- Appropriately set back from all coastal hazards
(outside of all on-site hazards)
- Conformed to planning and zoning



Other Historical Approvals

67 Cedar Crest Beach Road

- Destroyed from 2017/19 Flooding
- Insurance financed replacement:
limited to existing habitable floor
space, conformed to CLOCA Policy
- Conformed to zoning



Transparency and Timeliness of Staff

- Advised of Lands in Dynamic Beach:
 - At July 28, 2019 Preconsultation Meeting
 - First Comment Letter June 28, 2020 and subsequent correspondence
- Provided updated mapping at first opportunity (April 28th, following April 13th submission)



Transparency and Timeliness of Staff

- May 12, 2020: application submitted with required fee
 - CLOCA response on June 29 (**48 days**)
- December 22, 2020: second submission
 - CLOCA response on Jan. 29 (**38 days**)
- April 13, 2021: third submission
 - CLOCA response on April 28 (**15 days**)



Summary Analysis

The proposed development:

1. Is not safe: in terms of risk to people and property due to natural hazards and lack of access in emergency
 2. Does not Meet the 5 Tests
 3. Does not Meet CLOCA's Policy
-
- CLOCA's policy must be effectively applied to proactively address and minimize risks



Recommendation

That:

The Application for Development at 46
West Beach Road, Municipality of
Clarington (File No. RPRG5870) be
Refused.

NOTICE OF HEARING
IN THE MATTER OF The Conservation Authorities Act,
R.S.O. 1990, Chapter C.27
AND IN THE MATTER OF an application by
Mr. Sarto Provenzano
FOR THE PERMISSION OF
THE CONSERVATION AUTHORITY
Pursuant to Ontario Regulation 42/06
made under Section 28 of the said Act

46 West Beach, Bowmanville, Ontario



I) CHRONOLOGY OF EVENTS

April 5, 2019

Mr. Provenzano purchases 46 West Beach. Of note is a competing offer from Faye Langmaid, Municipality of Clarington, Acting Director Planning Services Department.

Thereafter, I spoke with the Clarington Planning Department and was that no pre-consultation was required. I then contacted John Hetherington, who advised that a pre-consultation was required. I later spoke with Faye Langmaid and the owner of 45 West Beach.

July 26, 2019

The pre-consultation was held regarding the proposed reconstruction at 46 West Beach. Mr. Provenzano attended with Cindy Strike, Amy Burke, Brent Rice, and Adam Dunn from the Municipality of Clarington. Also in attendance was Chris Jones and John Hetherington from the Central Lake Ontario Conservation Authority (“CLOCA”).

At this time, Mr. Provenzano proposed the following improvements to the property:

- Increasing the height of the structure from 1.5 to 2 storey
- Foundation, structural improvements
- Addition of a deck to the south side of the structure
- Relocation of the bathroom
- Foundation work, including underpinning the foundation by 3 feet (adding depth to the existing foundation, not including existing entry foundation)

It was found that building permits would be required for all proposed construction and could not be issued until all applicable laws had been met, in compliance with Clarington Zoning By-law 84-63., Conservation authority permit requirements and Durham Region Public Health Requirements. It was also noted that the engineer would need to address whether underpinning or benching would be done, and whether foundation works are also required to be done under the existing entry. We were advised that foundation work must be done from the inside of the structure as there is inadequate setback from the interior property lines. Engineering drawings were requested.

Shortly thereafter, Mr. Provenzano had subsequent conversations with Mr. Jones and Mr. Hetherington. He was advised to submit two applications: one for the main floor and a second application for the second floor. He was then advised that the applications were again incomplete.

February 13, 2020

Mr. Provenzano received an email from Faye Langmaid, stating that the Municipality was interested in purchasing 46 West Beach from him. A true copy of this email is attached hereto at **Tab “A”**. Mr. Provenzano did not respond to this request.

March 2020

Mr. Provenzano makes a request under the Municipal Freedom of Information and Protection of Privacy Act for the application for 51 West Beach Road. The application was received in July 2020. A copy of this application is attached hereto at **Tab “B”**.

May 11, 2020

Mr. Provenzano submits his application for a permit for 46 West Beach and paid a fee of \$1,675.

June 25, 2020

Mr. Provenzano receives a letter from Cynthia Strike with respect to the 46 West Beach Application. A true copy of this letter is attached hereto at **Tab "C"**.

November 25, 2020

Mr. Hetherington emails Mr. Provenzano with a list of additional requirements from CLOCA in order to approve the application. A copy of this correspondence is attached hereto at **Tab "D"**.

December 22, 2020

Mr. Provenzano resubmits his application for 46 West Beach.

January 29, 2021

Mr. Provenzano receives correspondence from Mr. Hetherington indicating that his application remains incomplete.

April 13, 2021

Mr. Provenzano submits application for 46 West Beach in accordance with issues pointed out in January 2021 letter from Mr. Hetherington. The updated application is attached hereto at **Tab "E"**.

April 28, 2021

Mr. Provenzano receives a Notice of Refusal letter from Mr. Hetherington. Enclosed in the letter was a copy of the new Dynamic Beach Hazard Map. The letter of refusal is attached hereto at **Tab "F"**.

II) ISSUES

CLOCA has raised the following concerns with respect to the 46 West Beach application:

1. The Central Lake Ontario Conservation Authority Lake Ontario Shoreline Management Plan Hazard Map

In his correspondence of April 28, 2021, Mr. Hetherington advised that the map on which the survey is based is incorrect. An “updated” map was provided at this time, long after the survey had been completed, the plans had been drafted and the application submitted.

The “updated” map, which is indicated as revised in April 2021, was not available to the public. Furthermore, there is no engineer seal on the document.

It is Mr. Provenzano’s position that his application should be “grandfathered” in with the existing map as his application was submitted prior to the release of the new map. A copy of the existing map and the only map available to the public on the CLOCA website is attached hereto at

Tab“G”.

2. The IBW Surveyors Site Plan Grading Plan

Mr. Gord Wallace and Mr. Dave Comery of IBW Surveyors will address the Site Plan Grading Plan. This Plan was based on the map that was available to the public. The April 2021 revised map is not available to the public and was only provided to Mr. Provenzano after he received the Notice of Refusal from Mr. Hetherington.

3. The Revised Building Plans by DA Drafting & Design

Mr. Rob Laroque and Mr. Tim Rupert will speak to the Revised Building Plans. Mr. Larocque and Mr. Rupert will state that with the improvements to the foundation and the addition of the second storey, the property will be safer than its current state. The building plans allow the property to remain on the same footprint. There are no additional safety risks posed by the proposed improvements. It is Mr. Provenzano’s position that the *Conservation Authority Act* does not permit CLOCA to refuse the application if the improvements remain on the existing footprint and there are no increased safety concerns that arise. There is no new construction being performed as all renovations are being performed on the existing footprint of the building. As the proposed improvements remain on the existing footprint and pose no safety concerns, the application should be approved.

It is Mr. Provenzano’s position that the extensive delay in approving his application is unacceptable. For nearly two years, Mr. Provenzano has been impeded from using and enjoying his property. He has been forced to maintain his belongings in storage and reside with his elderly mother. As Mr. Provenzano is a teacher, he recently contracted COVID-19. As he was unable to reside in his property at 46 West Beach, his mother also contracted the disease and suffers to date. Mr. Provenzano purchased 46 West Beach for his retirement. Since the purchase, he has lost the use and enjoyment of the property. He has incurred significant expense in storage fees and application submission fees. Mr. Provenzano has provided everything requested by CLOCA in order to complete his application. Mr. Provenzano’s surveyor and engineers have advised that there are no safety concerns with the plans. The plans remain on the existing footprint. It is therefore Mr. Provenzano’s position that his application for a building permit should be approved. Continued delay of this process will only increase Mr. Provenzano’s damages with respect to the use and enjoyment of his property, and the significant monetary expenses incurred in application and storage fees as a result of this delay. At a minimum, the review fee of \$3,125 should be waived and the application fee of \$1,675 reimbursed.

Mr. Provenzano also states that the Municipality of Clarington has intentionally contributed to the delay of this application as it has always been their intention to acquire 46 West Beach as part of the Municipal Land Acquisition Strategy. This is evidenced by the fact that Mr. Provenzano’s offer to purchase 46 West Beach was accepted over that of the Municipality’s, and the fact that Ms. Langmaid contacted Mr. Provenzano on behalf of the Municipality thereafter seeking to acquire the property and suggesting that Mr. Provenzano purchase another property along West Beach road. Mr. Provenzano was contacted by the Municipality via telephone on other occasions, again attempting to pressure him into selling his property.

The Municipality of Clarington CAO Report of June 17, 2019 states:

“2.2 Long-term incremental voluntary land disposition refers to an approach to gradually shift the land from private ownerships to public ownership by paying fair market value at the time the land owner chooses to sell. Voluntary disposition was recommended as the long term solution to resolve unacceptable risk from natural hazards... ”

2.3 *The majority of respondents who provided comments on the studies did not favour a voluntary disposition program, primarily due to fear that actual value of the property will not be realized in the process and loss of community vibrancy... ”*

The residents of Cedar Crest Beach do not support the Land Acquisition Strategy nor do they want their private properties to be expropriated and converted into municipal lands. Similarly, Mr. Provenzano asks that CLOCA approve his application so that he may begin to enjoy the use of his property. He has no intention of selling 46 West Beach to the municipality for any expropriation or municipal land use purposes.

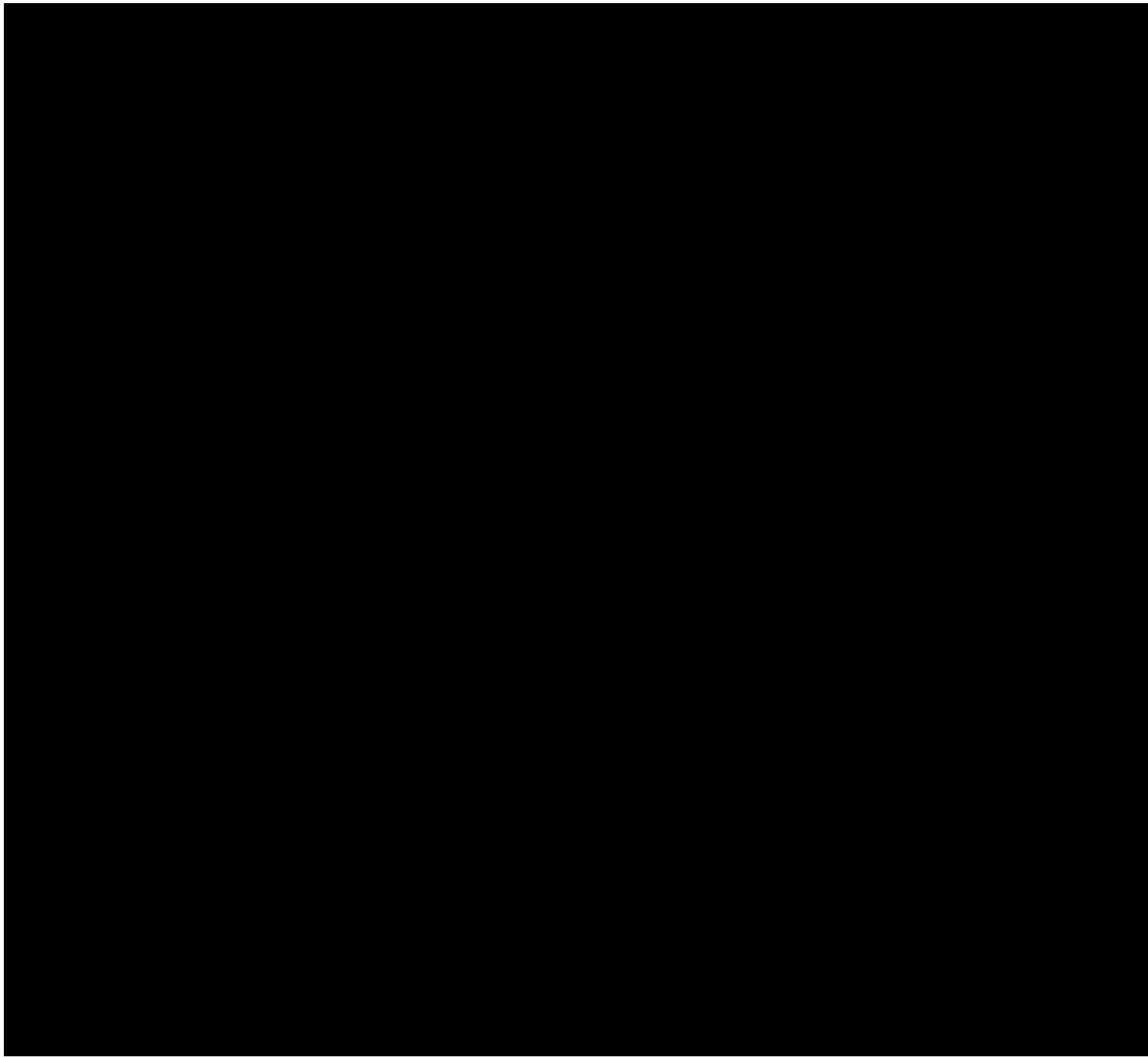
III) LIST OF EXPERT WITNESSES

- 1) Gord Wallace, IBW Surveyors (gord.wallace@ibwsurveyors.com)
- 2) Dave Comery, IBW Surveyors (dave.comery@ibwsurveyors.com)
- 3) Rob Larocque, D.G. Biddle & Associates Limited (Robbie.larocque@dgbiddle.com)
- 4) Tim Rupert, D.G. Biddle & Associates Limited (tim.rupert@dgbiddle.com)

IV) APPENDIX

Tab A	Email from Faye Langmaid to Sarto Provenzano dated February 13, 2020
Tab B	Application for 51 West Beach Road, Bowmanville
Tab C	Letter from Cynthia Strike dated June 25, 2020
Tab D	Email from John Hetherington to Sarto Provenzano dated November 25, 2020
Tab E	Updated application for 46 West Beach Road, Bowmanville
Tab F	Letter of Refusal from John Hetherington dated April 28, 2021 and enclosure with “updated map”
Tab G	March 2020 map available on cloca.com
Tab H	Photos of new construction at West Beach, Cove Road and Cedar Crescent

TAB A



From: [Langmaid, Faye](#)
Sent: Thursday, February 13, 2020 9:31 AM
To: [REDACTED]
Cc: [Neil Ryan](#); [Neil Ryan \(nryan@trebnet.com\)](mailto:nryan@trebnet.com)
Subject: 48 West Beach Road

Hello Sarto

You are most likely aware the 48 West Beach is currently listed for sale. When I met with our realtor Neil Ryan yesterday one of the comparables we discussed was your property. Neil does not know where you are in your approval process

to obtain permits to upgrade. He is well aware of the condition of 46 as he inspected it prior to the Municipality's offer and he has also visited 48 West Beach.

When we met last year you mentioned that should the municipality be interested you may be interested in selling. I am wondering if you have had a look at 48 West Beach it has an open house schedule for this weekend. It is listed at \$585,000 It is a two storey and appears to have been renovated with nice finishes.

If you would be interested in discussing how we could work out a deal for 46 that would low you to purchase 48 please give me a call or Neil Ryan. Neil works on contract for the Municipality with regard to real estate offers and advise.

Faye Langmaid
Acting Director
Planning Services Department
Municipality of
Clarington
40 Temperance Street, Bowmanville ON L1C 3A6
905-623-3379 ext. 2407 | 1-800-563-1195
www.clarington.net

TAB B



51 West Beach

FOR OFFICE USE ONLY			
FILE #	C13-004-GBFH	X-REF:	
IMS:		Fee Received:	900.00
Date Received:	Jan 21/13	Date Deemed Complete:	Jan 29/13
Pre-consultation Date: owing			

100 Whiting Avenue
Oshawa, Ontario
L1H 3T3
Phone (905) 579-0411
Fax (905) 579-0994

APPLICATION FOR DEVELOPMENT, INTERFERENCE WITH WETLANDS & ALTERATIONS TO SHORELINES & WATERCOURSES (CONSERVATION AUTHORITIES ACT - ONTARIO REGULATION 42/06, UNDER O.REG.97/04)

Note: If the owner is not making this application, then a written authorization from the owner(s) is mandatory and must be included with the application.

S.21 (1)

Owner's Name:

Address:

Applicant's Name:

Address:

Contractor & Site Contact:

Location/Address where Development, Interference with Wetlands & Alterations to Shorelines and Watercourses is proposed (provide Registered Plan and lot number, if known): 51 WEST BEACH ROAD

Lot: 18

Concession: BFC

Municipality: CLARINGTON

Watershed: BOWMANVILLE

Description of Proposed Works: 2ND STOREY ADDITION + RAISED FOUNDATION

Type and approximate quantity of Fill:

EXCESS FILL TO BE REMOVED FROM SITE

Dates when work is to be carried out:

Proposed commencement of work: MAR '13

Proposed completion of work: SEPT '13

I, DAVID VENSTRA, declare that the above information is correct to the best of my knowledge, and I agree to abide by Ontario Regulation 42/06. By signing this application I agree to allow Central Lake Ontario Conservation Authority (CLOCA) staff to enter onto the subject property as part of the review process. I also acknowledge and agree to abide by conditions of any permit issued pursuant to this application. Further, any permit issued pursuant to this application may be revoked if it is issued on the basis of false, inaccurate or misleading information.

S.21 (1)

Date: JAN 25/13

Signat

Owner

Authorized Applicant/Agent

NOTE: All applications to the Federal Department of Fisheries and Oceans for authorization for works or undertakings affecting fish habitat shall be submitted to the Conservation Authority for processing.

FOR OFFICE USE ONLY

Application is hereby made, to (check appropriate boxes).

- | | | |
|---|--|--|
| <input type="checkbox"/> Site Grading, Place, Dump or Remove Fill | <input type="checkbox"/> Place, Dump or Remove Fill in Flood Plain | <input type="checkbox"/> Interference with Wetland |
| <input type="checkbox"/> Alter, Add to, Reconstruct, Renovate Building | <input type="checkbox"/> Development within Hazardous Land | <input type="checkbox"/> Alteration to Shorelines |
| <input type="checkbox"/> Erect, Place, Construct a New Building/Structure | <input type="checkbox"/> Alter an Existing Watercourse | <input type="checkbox"/> Large Fill Site |

CLOCA
RPRG4158-24120
-02-04-2013
900.00/mile
PAID

CLOCA
RPRG4158-1
-01-29-2013
RECEIVED

SPECIFICATIONS OF PROPOSED WORKS

In order for the application to be deemed complete, the application must be completely filled out, the required fee must be submitted and all technical information requirements must be submitted. It is recommended that the owner/applicant contact CLOCA prior to making an application so that detailed information requirements can be determined. This application must be accompanied by four copies of detailed plans for the proposed works. The detailed plans must include the following, where applicable:

- Location map of property, in relation to surrounding buildings, roads, lands etc.
- Site plan indicating the property boundary and the proposed location(s) of work(s)
- Location of any waterways, ponds, wetlands and shorelines either on or near the subject property
- Construction techniques and access
- Cross-section(s) of the proposed work(s) showing existing grade and final grade
- Complete engineering drawings of proposed work(s)

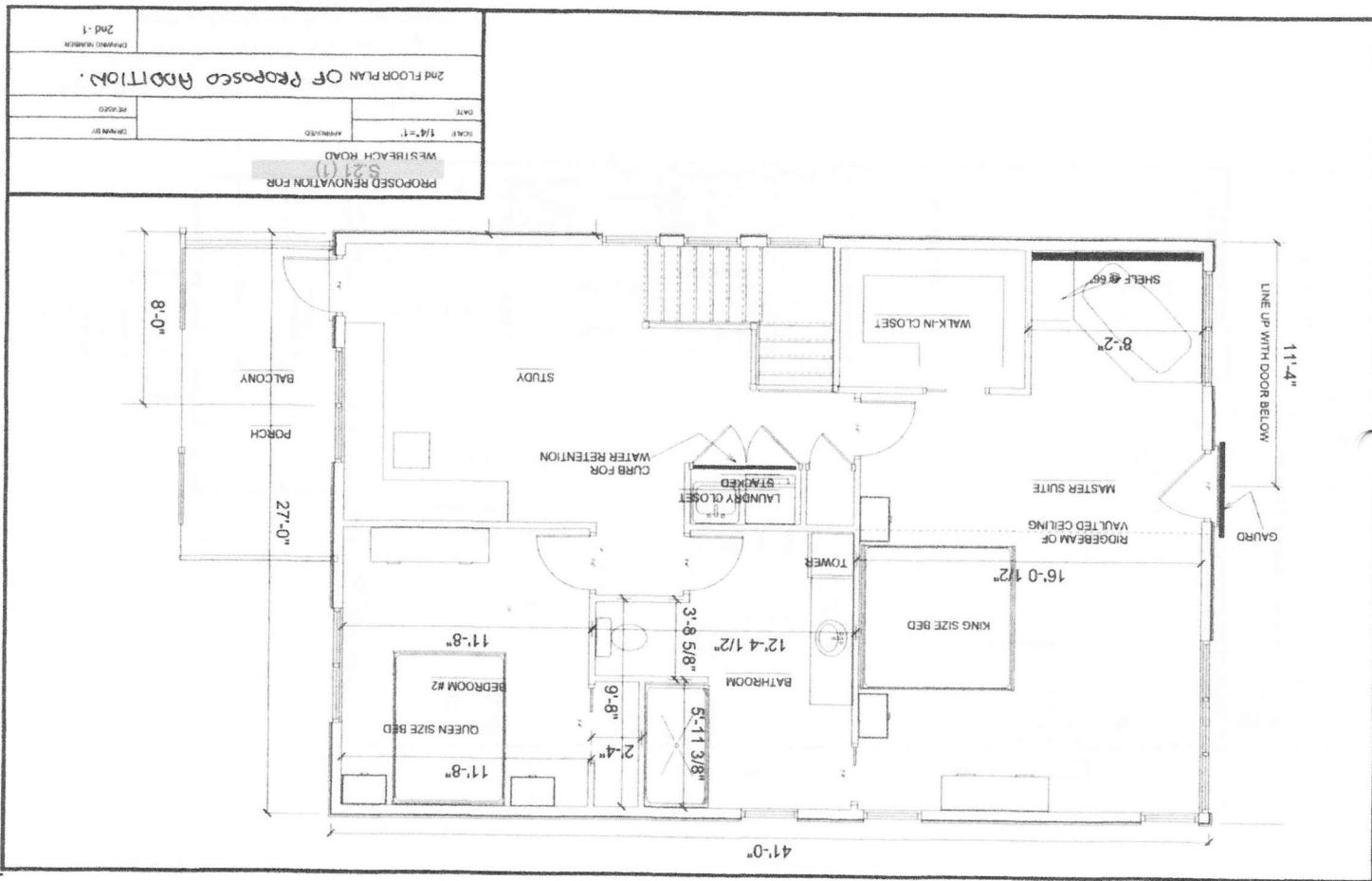
Other technical information requirements that may be required with the application include:

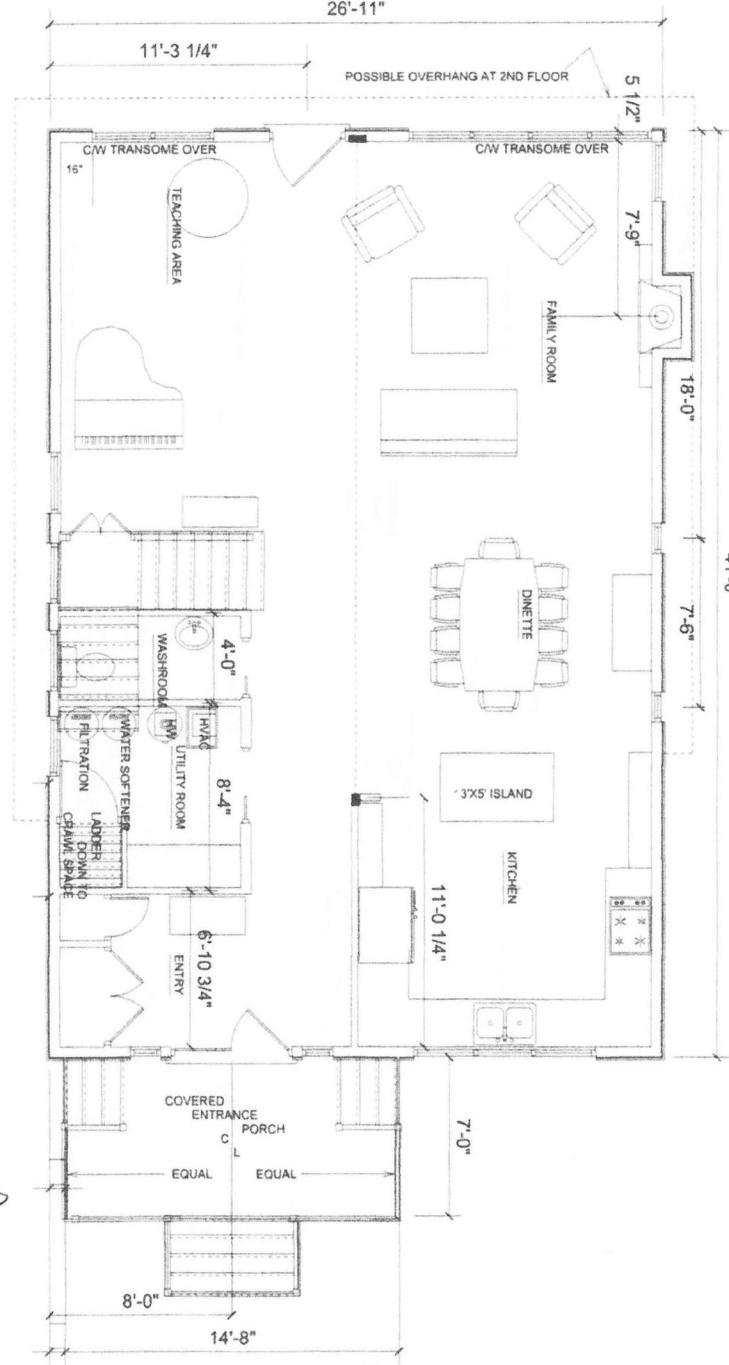
- Legal Survey
 - Pre-post metric geodetic elevations
 - Geodetic elevations of the lowest opening(s) in any new building or additions to buildings
 - Structural Elevations and Construction Details
 - Erosion and Sediment Control Plans
 - Grading Plans
 - Landscaping/Site Rehabilitation Plan
 - Functional Servicing Plan
 - Topsoil Stripping Review
 - Geotechnical/Slope Stability Study
 - Coastal Stability Assessment
 - Headwater Drainage Feature Evaluation
 - Hydrogeological Assessment
 - Floodline Delineation Study/Hydraulic Assessment
 - Natural Systems Map (natural hazards and natural heritage features with requisite buffers, overlaid with existing site conditions, property boundaries, and proposed development and site alteration)
 - Scoped or Full Environmental Impact and Enhancement Study
 - Stormwater Management Facility Design
 - Stormwater Management Study
 - Channel Crossings Assessment
 - Water Balance Analysis
 - Watercourse Erosion Analysis
 - Soil Quality Report
- Other reports/studies identified through the checklists or staff consultation

Please note that insufficient information may delay the processing of your application. Please allow 21 working days for processing.

GENERAL INFORMATION FOR APPLICANTS

Maps that illustrate the extent of the jurisdiction of CLOCA are available at our Administration Office. The information on this form is being collected, and will be used for the purpose of administering a regulation made pursuant to Section 28, Conservation Authorities Act, R.S.O., 1990 Chapter 27. This application and supporting documents and any other documentation received relating to this application, may be released, in whole or in part, to other persons in accordance with the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990 c. M.56, as amended.

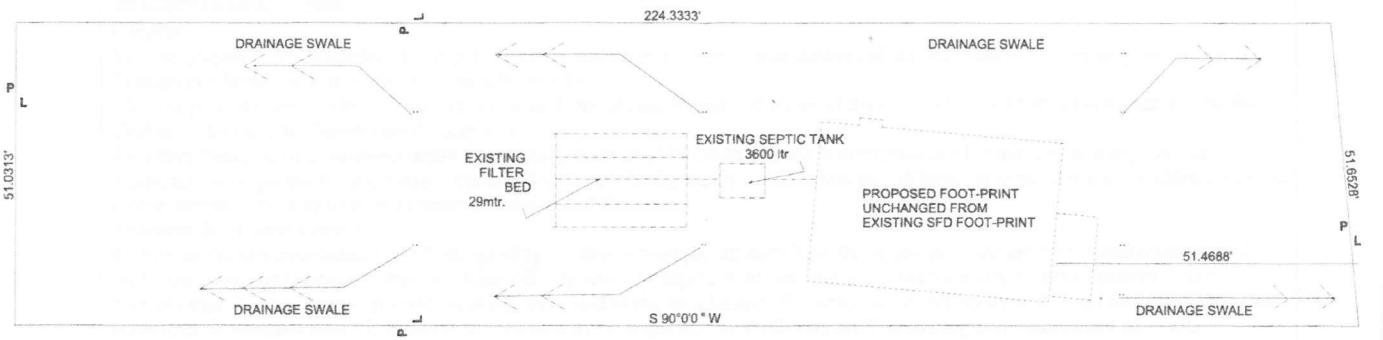




PROPOSED MAIN FLOOR
RENOVATION FOR Jeff
S.21(1)

51 WEST BEACH ROAD

SITE PLAN



INDICATES DRAINAGE DIRECTION

S.21 (1)	
51 WESTBEACH ROAD BOWMANVILLE	
SCALE	1:1000
DATE	JAN '13
NTS	REVISED
SP-1	DV
SITE PLAN FOR PROPOSED RENOVATION	



PERMIT No. C13-004-GBFH
FOR DEVELOPMENT, INTERFERENCE WITH WETLANDS &
ALTERATIONS TO SHORELINES & WATERCOURSES
(CONSERVATION AUTHORITIES ACT -ONTARIO REGULATION 42/06, UNDER O.REG.97/04)

CLOCA IMS No.: RPRG4158 x-ref: _____

100 Whiting Avenue
Oshawa, Ontario
L1H 3T3
Phone (905) 579-0411
Fax (905) 579-0994
www.cloca.com

Permission has been granted to:

Owner: S.21 (1) _____
Address: _____
Applicant: _____
Address: _____
Telephone: _____
Postal Code: _____

Location/Address of works: 51 WEST BEACH
Lot: 18 Concession: BFC Municipality: CLARINGTON DARLINGTON Watershed: BOWMANVILLE CREEK
Description of Proposed Work: DEVELOPMENT ACTIVITIES ASSOCIATED WITH THE RAISING OF AN EXISTING DWELLING AND THE ADDITION OF A SECOND STOREY ADDITION AS PER THE ATTACHED PLANS.
Type of Fill:

**This permit is valid on the above location only for the period of:
Thursday, January 31, 2013 to Friday, January 31, 2014**

This permit shall be subject to the following conditions:

The Applicant and Owner, by acceptance of and in consideration of the issuance of this permit, agrees to the following conditions:
GENERAL CONDITIONS: (SEE REVERSE SIDE OF PERMIT)

SPECIFIC CONDITIONS:

General

11. The project shall be carried out as per the plans and reports submitted in support of the application as they may be amended through conditions of this permit (see Attachment 1).
 12. This permit applies only to those activities and lands/areas Regulated under Ontario Regulation 42/06 as administered by the Central Lake Ontario Conservation Authority.
 13. Other than activities allowed under this permit, there shall be no filling nor encroachment of construction equipment or materials into adjacent natural areas, streams, flood plain lands, valley lands below top-of bank, or other setbacks established by the Conservation Authority to protect natural features and functions.
- Sediment & Erosion Control
4. Prior to the commencement of filling, grading or other development activities, the applicant shall erect sedimentation controls sufficient to prevent sediment from washing off-site and into adjacent ditches, streams, watercourses or storm sewers. These controls shall be maintained in good working order and to the satisfaction of Conservation Authority staff until disturbed areas are stabilized. Additional controls shall be erected as may be requested by Authority staff following commencement of works.
 5. All disturbed areas shall be seeded, sodded, or stabilized in some other manner acceptable to Authority staff as soon as possible and prior to the expiry of this permit.
 6. **The lowest opening of the first floor will be set at or above 77.82 metres GSC (This is to ensure floodproofing of the structure)**

I, _____ agree to abide by the conditions of this permit as indicated above and on the reverse made by the Central Lake Ontario Conservation Authority, under the Ontario Regulation 42/06. I understand that I may appeal any or all of the stated conditions and the appeal resolved prior to the issuance of this permit. This permit may be cancelled if it is issued on the basis of false, inaccurate or misleading.

This approval applies only to those lands shown on the accompanying plan which are owned by the applicant, or to those for which he/she is an authorized agent.

Date: _____ Signature: _____ Owner Authorized Applicant/Agent

Application Approved:

Date: _____ Signature: _____

Enforcement Officer: JOHN HETHERINGTON

NOTE: The information on this form is being collected, and will be used for the purpose of administering a regulation made pursuant to Section 28, Conservation Authorities Act, R.S.O., 1990 Chapter 27. This permit and supporting documents and any other documentation received relating to the application, may be released, in whole or in part, to other persons in accordance with the Municipal Freedom of information and Protection of Privacy Act, R.S.O. 1990 c. M.56, as amended.

GENERAL CONDITIONS:

The Applicant and owner, by acceptance of and in consideration of the issuance of this permit, agrees to the following conditions:

1. This application does not relieve the owner and/or applicant of the obligation of securing any other necessary approvals.
2. Authorized representatives of the Central Lake Ontario Conservation Authority may at any time enter onto the lands which are described herein in order to make any surveys, examinations, investigations or inspections which are required for the purpose of insuring that the work(s) authorized by this permit are being carried out according to the terms of this permit.
3. The owner and applicant agree:
 - to indemnify and save harmless the Central Lake Ontario Conservation Authority and its officers, employees, or agents, from and against all damage, loss, costs, claims, demands, actions and proceedings, arising out of or resulting from any act or omission of the owner and/or applicant or any of his agents, employees or contractors relating to any of the particulars, terms or conditions of this permit;
 - that this permit shall not release the applicant from any legal liability or obligation and remains in force subject to all limitations, requirements and liabilities imposed by law; and,
 - that all complaints arising from the execution of the works authorized under this permit shall be reported immediately by the applicant to the Central Lake Ontario Conservation Authority. The applicant shall indicate any action which has been taken, or is planned to be taken, if any, with regard to each complaint.
4. This permit is not assignable.
5. The owner and applicant agree that should the works be carried out contrary to the terms of this permit, the Central Lake Ontario Conservation Authority may enter on to the property and cause the terms to be satisfied, at the expense of the owner.
6. The project shall be carried out generally as per the plans submitted in support of the application as they may be amended by conditions of this permit.
7. The applicant agree, where applicable, to install and maintain all sedimentation controls as directed by Authority staff, until all disturbed areas have been stabilized
8. All disturbed areas shall be seeded, sodded, or stabilized in some other manner acceptable to the Authority as soon as possible, and prior to the expiry of this permit.
9. The applicant agrees to maintain all existing drainage patterns, and not to obstruct external drainage from other adjacent private lands.

TAB C

June 25, 2020

Chris Jones
Director of Planning and Regulation
Central Lake Ontario Conservation Authority
100 Whiting Avenue
Oshawa, ON L1H 3T3

Re: **Permit to renovate an existing single detached dwelling**
Owner: **Sarto Provenanzo**
Address **46 West Beach Road, Bowmanville Ontario**
Our File: **18-17-020-130-13900**

Proposal

To renovate an existing one and half-storey dwelling, by adding a second storey, adding a porch at the front of the dwelling, internal renovations and exterior improvements.

Background

Staff met with Mr. Provenanzo in July 2019 to discuss improvements to the existing dwelling. Staff from the Central Lake Ontario Conservation Authority were also in attendance. Mr Provenanzo proposed increasing the height of the structure from 1.5 storey to 2 storey, foundation improvements, a deck on the south side of the dwelling and relocating a bathroom. No additional washroom were proposed.

Comments

Clarington Planning Staff have reviewed the proposal in the context of the Provincial Policy Statement, Regional Official Plan, Clarington Official Plan and Zoning By-law 84-63.

Provincial Policy Statement

The 2020 Provincial Policy Statement (PPS) directs development away from hazardous lands adjacent to the Great Lakes which are affected by flooding or erosion hazards, or by dynamic beach hazards. Development is prohibited within a dynamic beach hazard or areas that would be rendered inaccessible to people and vehicles during times of flooding.

Durham Regional Official Plan

The Regional Official Plan also states that development and site alteration are not permitted within the dynamic beach hazard, or areas that would be rendered inaccessible to people and vehicles during times of flooding. Any development or site alteration in proximity to or within natural hazard lands or within hazardous lands along the shoreline of Lake Ontario requires a Natural Hazard Study and/or Coastal Engineering Study. The study must demonstrate that the proposal can occur in accordance with established standards and procedures.

The subject property is within an area designated Waterfront Areas. Policies for these areas include that development not negatively impact natural or hydrological features. Any development within these areas that requires an environmental impact study, the study should include but not be limited to addressing the development's effect on the lake water quality, shoreline, creeks, and wildlife habitat.

Clarington Official Plan

The Clarington Official Plan designates the subject property as Environmental Protection Area. Development is not permitted on lands designated Environmental Protection Area.

The Port Darlington Secondary Plan designates the site as Waterfront Greenway. This comprises lands within the Regulatory Shoreline Area. Existing residential uses are permitted to continue subject to compliance with certain policies.

The subject property is also within the Regulatory Shoreline Area. The Regulatory Shoreline Area are lands which possess characteristics which could pose threat to public health and safety or property and are considered unsafe for development. The Regulatory Shoreline Area is an area along Lake Ontario that is subject to dynamic beaches, flooding and/or erosion. The extent and exact location of the Regulatory Shoreline Area shall be identified in the implementing Zoning By-law in accordance with the detailed Lake Ontario Flood and Erosion Risk Mapping of the relevant Conservation Authority.

Once a dwelling located in the Regulatory Shoreline Area is destroyed or demolished by whatever reason, and reconstruction is not commenced within 24 months, the existing residential use is deemed to cease. The site is within regulatory flood hazard.

Zoning By-law 84-63

The lands are currently shown as being zoned "Residential Shoreline Exception (RS-1)" on Schedule 3B of Zoning By-law 84-63 of the Municipality of Clarington.

However, Section 26.3 f. of By-law 84-63 states the following:

"Where an Environmental Protection (EP) zone boundary is indicated as approximately following the flood line of a watercourse as designated on floodplain mapping prepared by a Conservation Authority having jurisdiction with the Town of Newcastle (Municipality of Clarington), then for the purposes of this By-law, the boundary shall follow such flood line as may be adjusted from time to time by the Conservation Authority having jurisdiction of same."

Conservation Authority floodplain mapping shows all of these lands within the floodplain associated with both Bowmanville Creek and Lake Ontario. Further, the dwelling is completely within the floodplain. This means that all the lands are zoned EP. All residential uses are prohibited on lands zoned EP.

Section 3.6 b. of By-law 84-63 states the following:

"Any building or structure, which as the date of passing of this By-law was lawfully used for a purpose not permissible within the Zone in which it is located, shall not be enlarged, extended,

reconstructed or otherwise structurally altered without the approval of Committee of Adjustment, unless such building or structure is thereafter to be used for a purpose permitted within such one and complies with all requirements of this By-law for such Zone."

The proposal shows a second storey and new covered two storey porch which exceeds the existing footprint.

Finally, it is unclear whether there is an approved sanitary waste disposal system, or there is private potable water supply system to the existing dwelling.

I trust these comments are satisfactory.



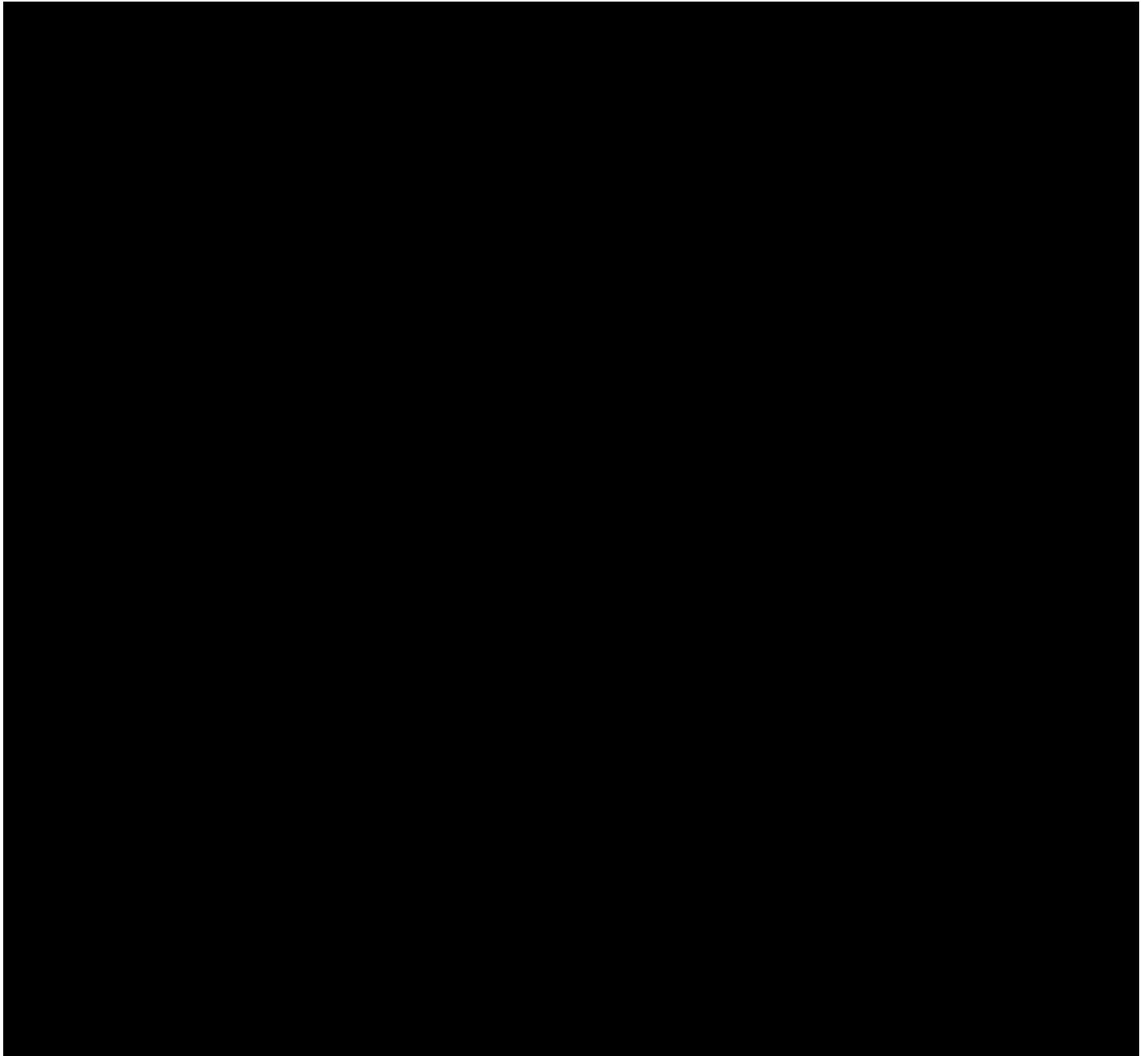
Cynthia Strike
Principal Planner
Development Review Branch

CS/nl

cc: Adam Dunn, Building Division

I:\^Department\PL Property Location\020\18-17-020-130-13900 - 46 West Beach Rd\LET_Comments to CLOCA_46 West Beach June 25.docx

TAB D



From: [John Hetherington](#)

Sent: Wednesday, November 25, 2020 11:30 AM

To: [REDACTED]

Subject: In additon to my phone message

Sarto;

In order to move forward we either require you respond in writing how you are going to address the following;

Revised Application Requested

Based on the foregoing, we ask that you revise your application to the existing habitable footprint of the existing structure, which could include work within the main floor floorplate and foundation repairs, for example.

In order to evaluate your proposal alongside the statutory tests contained in Section 28 of the Conservation Authorities Act (which include the requirement that the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development) and CLOCA's implementing policies, the following information is required:

A Site Plan prepared by a qualified professional showing, to scale:

- o Property boundaries;
- o The location of all structures;
- o The location of the Lake Ontario Flood Line;
- o The location of the Bowmanville Creek Flood Line;

Elevations for the existing ground and first floor elevation using a geodetic datum, including the location of the Lake Ontario Flood Elevation and Bowmanville and Soper Creeks Elevation;

Floor plans including location of furnace and utilities. The crawl space should not be used for utilities;

Location of existing/proposed septic system and well;

- o Please provide information on the performance of the proposed septic system and protection of the well from contamination during flooding events;

Please provide confirmation from an engineering professional that the building support structure is designed to withstand pressures from site flooding conditions. Plans must include an engineer's stamp;

Please submit the \$3,125 Drawing Set fee along with your re-submission pursuant to CLOCA's Fee Schedule for Regulation Services.

Finally, we wish to reiterate that the Municipality of Clarington has advised that residential uses on the subject lands are not permitted uses. In addition to any approvals under the Conservation Authorities Act, requirements of the Zoning By-law and Building Code Act, 1992 would need to be addressed. This is addressed, as follows, in CLOCA's Policy and Procedural Document for Regulation and Plan Review at Page 21: When proposed development is also subject to the Planning Act or other legislative approvals, the information and study requirements will be co-ordinated with the applicable agency/municipality/ministry. If CLOCA staff are of the opinion that other approvals could result in revisions to the description of proposed works/submitted plans/drawings, the application may be deemed incomplete.

Given the issues associated with necessary Planning Act approvals, it will

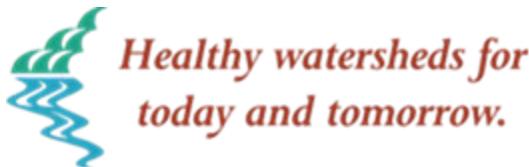
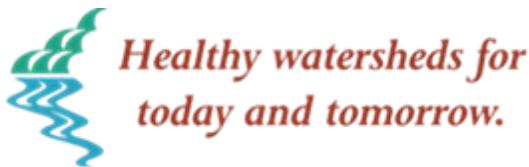
not be possible to present a complete application proposing expansions to the existing structure, as any expansion would not meet the applicable planning legislated tests, policy and zoning requirements. However, the information listed above in this letter will be required in order to advance further consideration of your application under the Conservation Authorities Act.

Again, given the context of the subject lands within several multiple hazards associated with Lake Ontario and Bowmanville and Soper Creeks, we ask that you revise your application as per the guidance provided above. Please submit the supporting information listed above in order to advance further consideration of your application.

Or if you object to these requirements please provide a letter addressing what you are objecting.

Yours truly,

John Hetherington
Regulations & Provincial Offences Officer
Central Lake Ontario Conservation Authority
jhetherington@cloca.com
905-579-0411 ext 137



TAB E

H-60

DELIVERED BY email: jhetherington@cloca.com

cdarling@cloca.com

April 13, 2021

John Hetherington
Regulations & Provincial Offences Officer
Central Lake Ontario Conservation Authority
jhetherington@cloca.com

Chris Darling
Chief Administrative Officer
Central Lake Ontario Conservation Authority
cdarling@cloca.com

Dear Sirs:

re: Ontario Regulation 42/06 Permit Application for
46 West Beach, Municipality of Clarington
CLOCA IMS No: RPRG5870

Please be advised that I have been retained by Sarto Provenzano with respect to the above-noted matter.

Further to your correspondence to Mr. Provenzano dated January 29, 2021, please find enclosed with this letter the requested documents to finalize Mr. Provenzano's application for a work permit at 46 West Beach Road.

The following documents are enclosed for your review:

- 1) Lake Ontario Shoreline Management Plan Hazard Maps;
- 2) IBW Surveyors Site Plan Grading Plan;
- 3) Flood Report prepared by Tim Rupert, M. Eng, P. Eng of D.G. Biddle & Associates Limited;
- 4) Letter from Tim Rupert dated April 9, 2021 addressing your correspondence dated January 29, 2021;
- 5) Septic Inspection letter from Thomas Houston Courtice Septic dated February 18, 2021; and
- 6) Revised building plans prepared by Tim Rupert and D.G. Biddle & Associates Limited.

In addition, please accept this letter as formal notice that Mr. Provenzano intends to be present at the Board meeting on April 20, 2021 to present his application.

I trust the foregoing is satisfactory to now render a decision with respect to Mr. Provenzano's application.

Yours very truly,

SPARK LLP

A handwritten signature in black ink, appearing to read "Francesca Provenzano".

per: Francesca Provenzano

Encls.

Lake Ontario Shoreline Management Plan Hazard Maps

Central Lake Ontario Conservation Authority (CLOCA)

LEGEND:

Hazard Mapping:

- 100 Year Flood Level
- Erosion Hazard Limit
- Flood Hazard Limit
- Dynamic Beach Hazard Limit

Base Mapping:

- Geographical Names
- Dynamic Beach (Start Pt)
- Dynamic Beach (End Pt)
- Road Network
- Topographic Contours (2 m interval)
- CLOCA Administrative Boundary

INTERPRETATION OF THE HAZARD MAPS:

The hazard maps were prepared to support the Lake Ontario Shoreline Management Plan. The hazard limits are not the official regulatory limits of the Conservation Authority. Please contact the Conservation Authority for additional details on the regulatory limit and implications for new development.

DATA SOURCES:

2018 Orthophotography provided by © First Base Solutions

2018 Digital Terrain Model provided by © First Base Solutions

2016 LiDAR Digital Terrain Model obtained from the Ministry of Natural Resources and Forestry. Contains information licensed under the Open Government Licence – Ontario.

Geographical Names obtained from Natural Resources Canada Road Network File, 2016 Census. Statistics Canada Catalogue no. 92-500-X

Inset Map: © OpenStreetMap contributors

DEFINITIONS:

100 Year Flood Level

The 100 Year Combined Flood Level considers both static lake level and storm surge, having a combined probability of being equalled or exceeded during any year of 1% (i.e., probability, P=0.01). The 100 Year Combined Flood Level elevation for CLOCA is +76.01 m IGLD85 (+75.55 m CGVD2013).

Flood Hazard Limit

The Flood Hazard Limit is defined as the 100-Year Flood Level plus an allowance for wave runup and uprush. For the exposed shoreline, wave effects are calculated based on localized nearshore conditions and waves. For embayments, the standardized 15 m setback is applied. Refer to the Lake Ontario Shoreline Management Plan for additional details.

Toe of Bluff

The Toe of Bluff is the transition from the gently sloping beach to the steep portion of the bank or bluff slope.

Stable Slope Allowance

The Stable Slope Allowance is defined as a horizontal setback equivalent to 3.0 times the height of the bank or bluff.

Erosion Hazard Limit

The landward extent of the Erosion Hazard is the sum of the 100 year erosion rate plus the Stable Slope Allowance, measured horizontally from the toe of the bank or bluff.

The Erosion Hazard Limit is not mapped in sheltered waters, however, localized shoreline/riverine erosion may occur and is subject to review by the Conservation Authority.

Dynamic Beach Hazard Limit

The Dynamic Beach Hazard Limit is defined as the sum of the Flood Hazard plus 30 metres measured horizontally. Local conditions may require a modified mapping approach if the beach is eroding and/or a barrier beach. Refer to the Lake Ontario Shoreline Management Plan report for additional details.

DATUMS:

Horizontal: UTM 17N NAD1983, metres.
Vertical: CGVD2013, metres

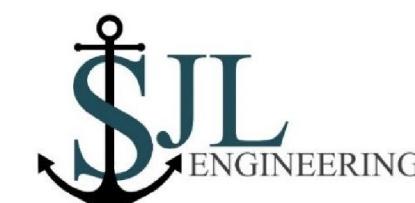
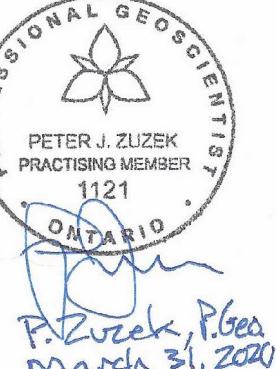
Datum Conversion:

IGLD1985 - CGVD2013 = 0.46 m (average)
To convert from IGLD85 to CGVD2013, subtract 0.46 m.

Note: There are local variations along the reaches within CLOCA. Refer to the Lake Ontario SMP for additional details.

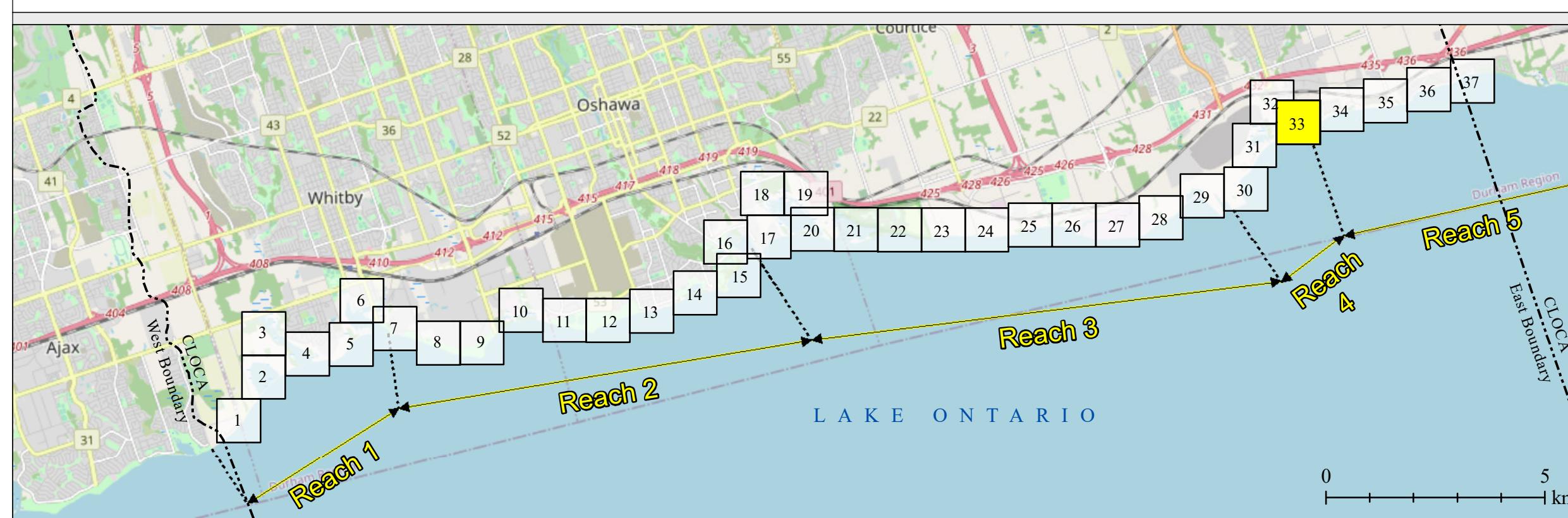
0 50 100 200 m

PREPARED BY:



This map was published March 2020 for the Central Lake Ontario Conservation Authority (CLOCA). The mapping of hazardous lands, including erosion, flooding, and dynamic beach areas, is subject to change. The proponent of a proposed development on or adjacent to the hazardous lands should contact CLOCA to discuss permit requirements.

Every reasonable effort has been made to ensure the accuracy of this map. However, neither CLOCA, Zuzek Inc., SJL Engineering, or any other affiliated party assume any liability arising from its use. This map is provided without warranty of any kind, either expressed or implied.



Mapping prepared by Zuzek Inc. for the Central Lake Ontario Conservation Authority, with support from Durham Region.
MAP PUBLISHED MARCH 2020

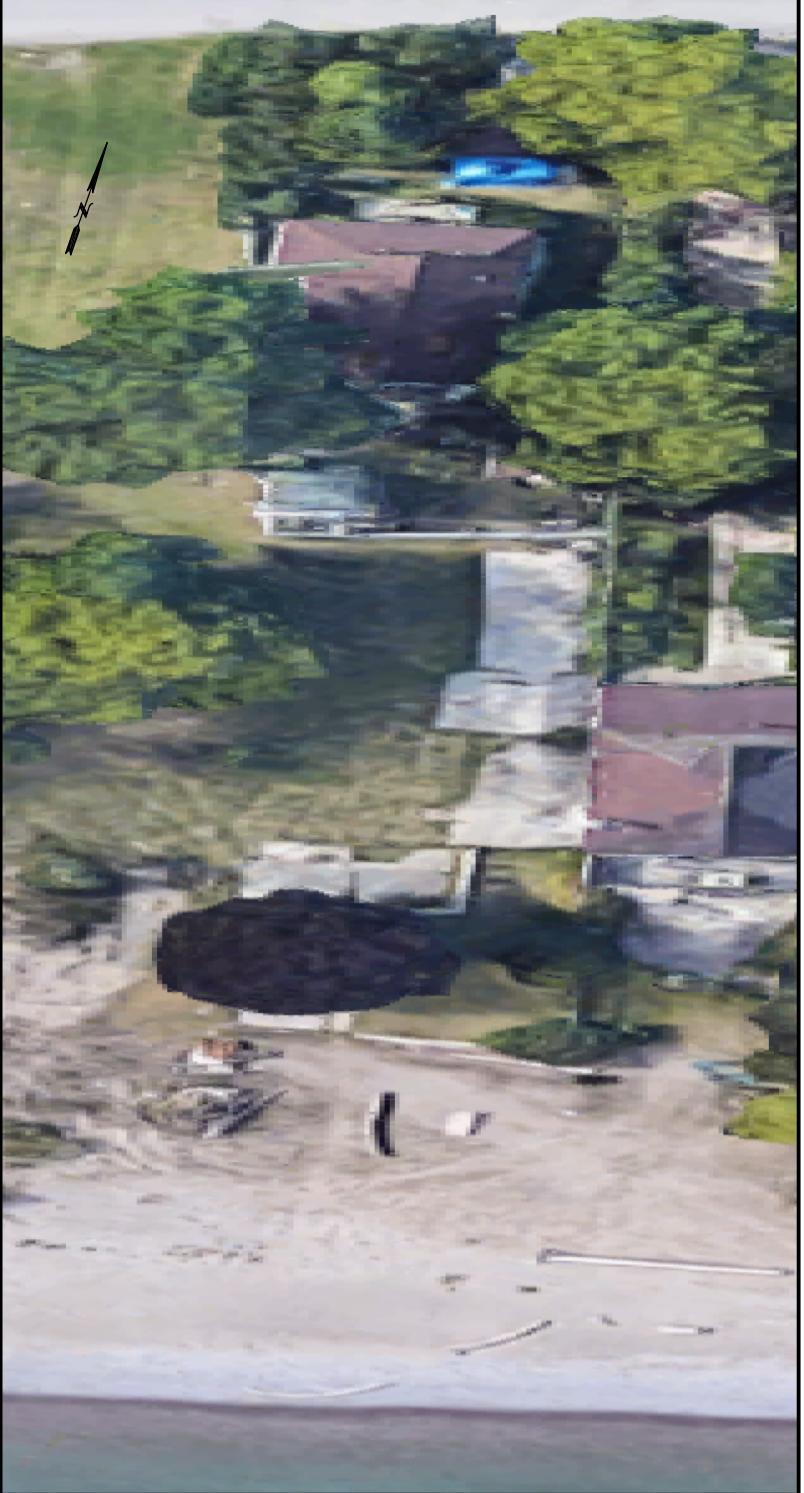
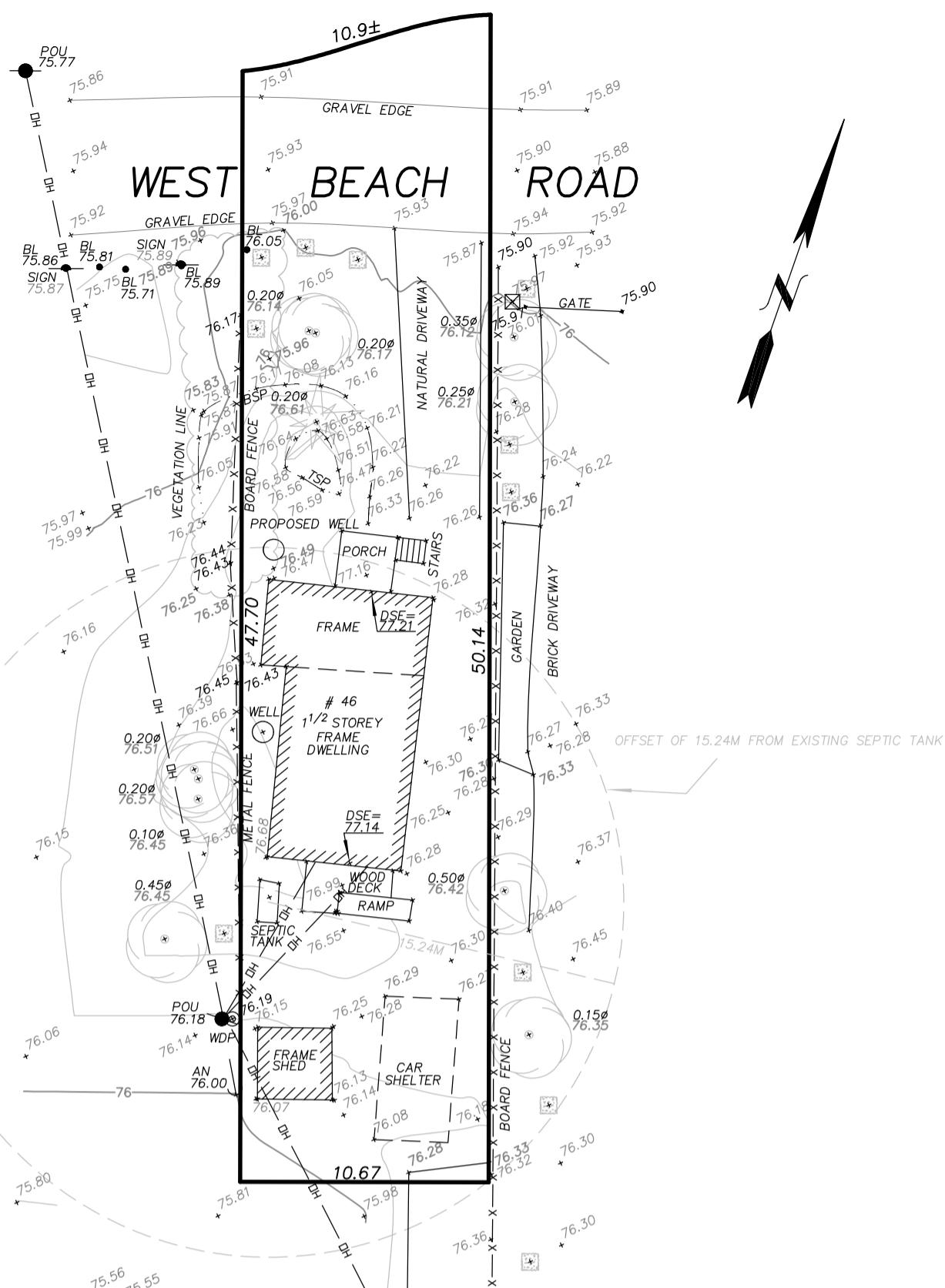


CLOCA
100 Whiting Avenue
Oshawa, Ontario L1H 3T3
Phone: 905-579-0411
Web: www.cloca.com/



Durham Region
605 Rossland Road East
Whitby, Ontario L1N 6A3
Telephone: 905-668-7711
Toll-Free: 1-800-372-1102
Web: www.durham.ca

CLOCA Map
33 of 37



LEGEND

- | LEGEND | |
|---|-------------------------------------|
| DSE | DENOTES DOOR SILL ELEVATION |
| • BL | DENOTES BOLLARD |
| ← AN | DENOTES ANCHOR POINT |
| ● POU | DENOTES UTILITY POLE |
| -OH- | DENOTES OVERHEAD UTILITY WIRES |
| BRW | DENOTES BRICK RETAINING WALL |
| — | DENOTES SIGN |
|  | DENOTES CONIFEROUS TREE W/TRUNK DIA |
|  | DENOTES DECIDUOUS TREE W/TRUNK DIA |
|  | DENOTES SPOT ELEVATION |
|  | DENOTES SHRUB |
| BSP | DENOTES BOTTOM OF SLOPE |
| TSP | DENOTES TOP OF SLOPE |
|  | DENOTES PILLAR |
| ◎ WDP | DENOTES WOOD POLE |

DYNAMIC BEACH HAZARD

KEY PLAN - NOT TO SCALE

KEY TERM

IMAGERY
AERIAL IMAGERY SHOWN IS FOR ILLUSTRATIVE PURPOSES ONLY AND MAY NOT DEPICT CURRENT FEATURES.

COPYRIGHT © IVAN B. WALLACE O.L.S. LTD. 2020
TOPOGRAPHIC BASE PLAN OF
46 WEST BEACH ROAD
MUNICIPALITY OF CLARINGTON

SCALE 1 : 250 METRES

SCALE 1 : 250 METRES

COORDINATES

COORDINATES
COORDINATE VALUES AND DIGITAL FILE ARE IN GRID SYSTEM,
UTM ZONE 17 (81° WEST LONGITUDE), NAD83(CSRS)(2010).
COMBINED SCALE FACTOR = 1.000026

CONTOURS

CONTOURS
CONTOURS SHOWN HEREON ARE DRAWN AT 0.20 METRE
INTERVALS.

ELEVATIONS

LEVELLING
ELEVATIONS ARE GEODETIC AND REFERRED TO COSINE
BENCHMARK 0011967U031 AND HAVING A GEODETIC ELEVATION
OF 78.115 METRES.

CAUTION

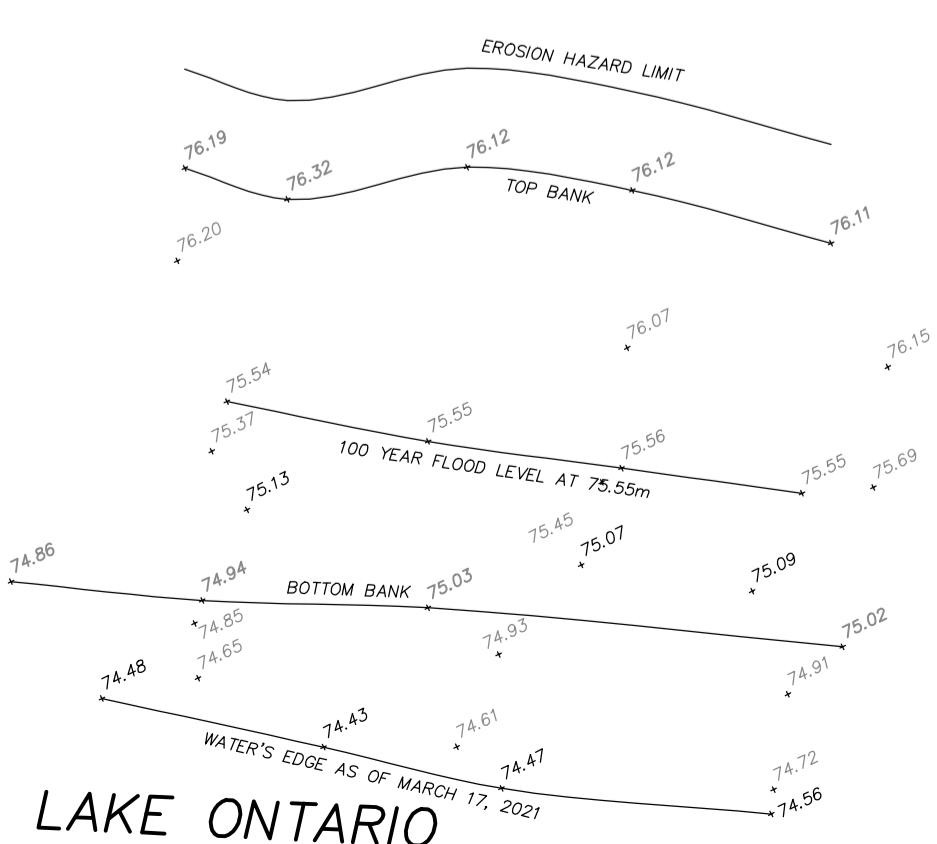
THIS IS NOT A PLAN OF SURVEY AND SHALL NOT BE USED
EXCEPT FOR THE PURPOSE INDICATED IN THE TITLE BLOCK.
THE WORK AND DRAWINGS HEREIN WERE COMPLETED FOR THE
EXCLUSIVE USE OF OUR CLIENT AND NO LIABILITY IS
ASSUMED TO ANY THIRD PARTIES OR SUBSEQUENT OWNERS.

NOTE

NOTE PROPERTY DIMENSIONS SHOWN HEREON ARE IN ACCORDANCE WITH IBW SURVEYORS RECORDS. (PROJECT NUMBER A-023601)

THE LOCATION OF THE 100 YEAR FLOOD HAZARD ELEVATION AT
77.22 METRES, CANADIAN GEODETIC VERTICAL DATUM, 2013.
THE LOCATION OF THE BOWMANVILLE & SOPER CREEKS FLOOD
LINE ELEVATION 77.80 METRES, CANADIAN GEODETIC VERTICAL
DATUM, 2013.

PROPOSED TOP OF FOUNDATION WALL IS 77.95M
PROPOSED FINISHED FLOOR ELEVATION IS 78.19M



DISTANCE NOTES METRIC

DISTANCE NOTES – METRIC

DISTANCES ARE IN METRES AND CAN BE CONVERTED TO FEET
BY DIVIDING BY 0.3048

DISTANCES ARE GROUND AND CAN BE CONVERTED TO GRID BY
MULTIPLYING BY THE COMBINED SCALE FACTOR OF 1.000026.





D. G. Biddle & Associates Limited

consulting engineers and planners

96 KING ST. E., OSHAWA, ONTARIO L1H 1B6 PHONE (905) 576-8500 FAX (905) 576-9730
e-mail: info@dgbiddle.com

April 9th, 2021

46 West Beach Rd.
Bowmanville, ON.
L1C 3K3

Attn: Sarto Provenzano

**Re: Flood Loading on Repaired Residential Foundation at
46 West Beach Rd., Bowmanville, ON.
Job Number: 119566**

Mr. Sarto,

Our office has reviewed and approved the proposed building foundations for the above noted residence with regards to the increased water pressures due to the 1:100-year storm event. Our office has designed the concrete foundation walls and strip footings for the residential building to support the regulatory 1:100-year flood hazard with Lake Ontario at an elevation of 77.22 meters (Canadian Geodetic Vertical Datum, 2013) and Bowmanville & Soper Creek at an elevation of 77.8 meters (Canadian Geodetic Vertical Datum, 2013), based on the proposed finished floor elevation of 78.19 meters.

The concrete foundations on the plan set created by our office on April 9th, 2021 conforms to the Ontario Building Code 2012 and CSA A23.3-14.

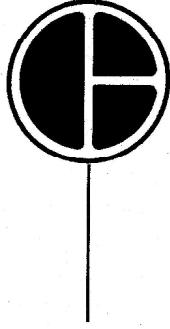
If you have any questions regarding this letter, please contact our office at your convenience.

Yours truly,

D.G. Biddle & Associates Ltd.

Tim Rupert, M.Eng., P.Eng.
Project Structural Engineer, Associate





D. G. Biddle & Associates Limited

consulting engineers and planners

96 KING ST. E., OSHAWA, ONTARIO L1H 1B6 PHONE (905) 576-8500 FAX (905) 576-9730
e-mail: info@dgbiddle.com

April 9th, 2021

Central Lake Ontario Conservation

100 Whiting Avenue
Oshawa, ON.
L1H 3T3

Attn: John Hetherington, Regulations/Provincial Offences Officer

Re: Report Addressing Comments for 46 West Beach Rd, Bowmanville, ON.
CLOCA IMS No: RPRG5870
Our File 119566

Dear Sir,

The following letter is intended to address your comments dated January 29th, 2021 regarding the application noted above.

1. A site plan prepared by a qualified professional showing to scale:

- *Elevations for the existing ground and first floor elevation using a geodetic datum, and ensure the building is flood proof (0.3m above flood elevation). Both Lake Ontario flood elevation and Bowmanville flood elevations must be illustrated on the drawings.*

Please see attached drawings and Site plan stating the existing ground and first floor elevation using geodetic datum.

- *First floor plans including location of furnace and utilities. The crawl space should not be used for utilities.*

Please refer to updated building plans. The homeowner will not be using the crawl space for utilities and will be using a mini split system to heat the building (shown on revised building drawings)

- *Location of existing/proposed septic system and type of system (holding tank or filter bed) and well.*

Please refer to revised IBW Surveyors Site plan/Topo plan/Grading plan for location of existing septic system and existing & proposed location of well. This submission package has a letter from Thomas Houston Courtice Septic addressing the type of septic and when it was last inspected.

- *Information on the performance of the proposed septic system and type of system and protection of the well from contamination during a flooding event.*

As per our previous response, Thomas Houston Courtice Septic has inspected the septic system and confirms that it is in good working order. The existing well on the property does not meet the required set back from the existing septic which is why we have proposed a new well. The proposed location of the new well is shown on IBW Surveyors Site Plan/Topo/Grading Plan.

- *The location of the Lake Ontario Flood Line on the drawings.*

The location of the Lake Ontario Flood line has been shown on IBW Surveyors Site plan/Topo/Grading plan along with the building plan package.

- *The location of the Bowmanville Creek Flood Line on the drawings.*

The location of the Bowmanville Creek Flood line has been shown on IBW Surveyors Site plan/Topo/Grading plan along with the building plan package.

- *Please provide confirmation from an engineering professional that the building support structure is designed to withstand pressures from site flooding conditions. Plans must include an engineer's stamp. Please provide a cover letter stating that this is the case from a qualified Engineer.*

Attached to this submission package is a letter from our office stating that the foundations shown on D.G. Biddle & Associates drawings have been designed to withstand pressures from the site flooding conditions.

- *The extent of the dynamic beach hazard and Lake Ontario shoreline erosion hazard.*

The extend of the dynamic beach hazard and Lake Ontario shoreline erosion hazard has been noted on IBW Surveyors Site plan/Topo/Grading Plan. Our office has also attached a CLOCA Map showing the Dynamic Beach Hazard Limit which shows that the noted residence is not within the Dynamic Beach Hazard Limit.

- Your structural and merged construction drawings must match (the merged drawings set does not reflect an elevated first floor); along with proposed elevations.

Please see merged drawings from D.G. Biddle & Associates & D.A. Drafting & Design showing the elevated first floor. IBW Surveyors Site Plan/Topo/Grading plan also shows the new proposed finished main floor elevation which corresponds to the merged building plans.

- As discussed previously a second storey will not be supported, please remove the second storey on the proposed plans and maintain only the original habitable space in your drawing set.

Our merged building drawings still show the second storey addition. The existing residence is a storey and a half. Our client is intending to extend the half storey into a full second storey.

2. The outstanding fee of \$3125.00 must be submitted at the time of resubmission.

- Sarto Provenzano will resolve this item.

3. A Grading Plan showing all existing and proposed grades and elevations and associated flooding and hazard lines.

- Please refer to IBW Surveyors Site Plan/Topo/Grading plan for all mentioned items. The client is keeping all original grades, so the existing grades are the grades.

4. Revised architectural plans, as they may be revised to address the analysis required in relation to natural hazard considerations.

- The architectural plans and structural plans have been revised to show the raising of the main floor elevation to prevent from flooding during the 1:100-year storm event.

5. A report or statement from a qualified coastal engineer confirming that the structures are sited outside of the Lake Ontario shoreline erosion and dynamic beach hazards.

- Based on the attached plan (CLOCA Map 33 of 37 Showing Dynamic Beach Hazard Limit) and based on IBW Surveyors Site Plan/Topo/Grading plan shows that the noted residence is not within the Dynamic Beach Hazard Limit or within Lake Ontario's shoreline erosion

hazard limit, therefore we have not provided a letter from a coastal engineer.

6. A report or statement from a qualified water resource engineer assessing the adequacy of flood protection, proposed design in relation to hydrostatic pressures from flooding and wave uprush and providing an analysis of the possibility of providing safe access to the site in accordance with provincial standards.

- Please confirm that this comment still stands based on our response to question #5. This property is not withing the Dynamic Beach Hazard limit or the Lake Ontario's shoreline erosion hazard limit. Our client is willing to sign a letter stating that he will indemnify and save harmless the Central Lake Ontario Conservation Authority and its officers, employees, or agents, from and against all damage, loss, costs, claims, demands, actions and proceeding, arising out of or resulting from any act or omission of the owner and/or applicant or any of his agents, employees or contractors relating to any of the particulars, terms or conditions of this permit.

The structural drawings submitted on December 22nd, 2020 have been revised to show that the main floor structure is to remain existing.

We trust that the above addresses your concerns with the application. If you have any additional comments, please provide us them at your convenience.

Yours truly,

D.G. Biddle & Associates Ltd.



Tim Rupert, M. Eng., P.Eng.
Project Structural Engineer, Associate



February 18, 2021

To Whom It May Concern:

Re: 46 West Beach Road, Bowmanville

The property located at 46 West Beach Road in Bowmanville was pumped out and a visual inspection done on August 28, 2020 and the tank was in good working order at the time of the pump out. The tank located on this property is a septic tank that has a leeching bed connected to it.

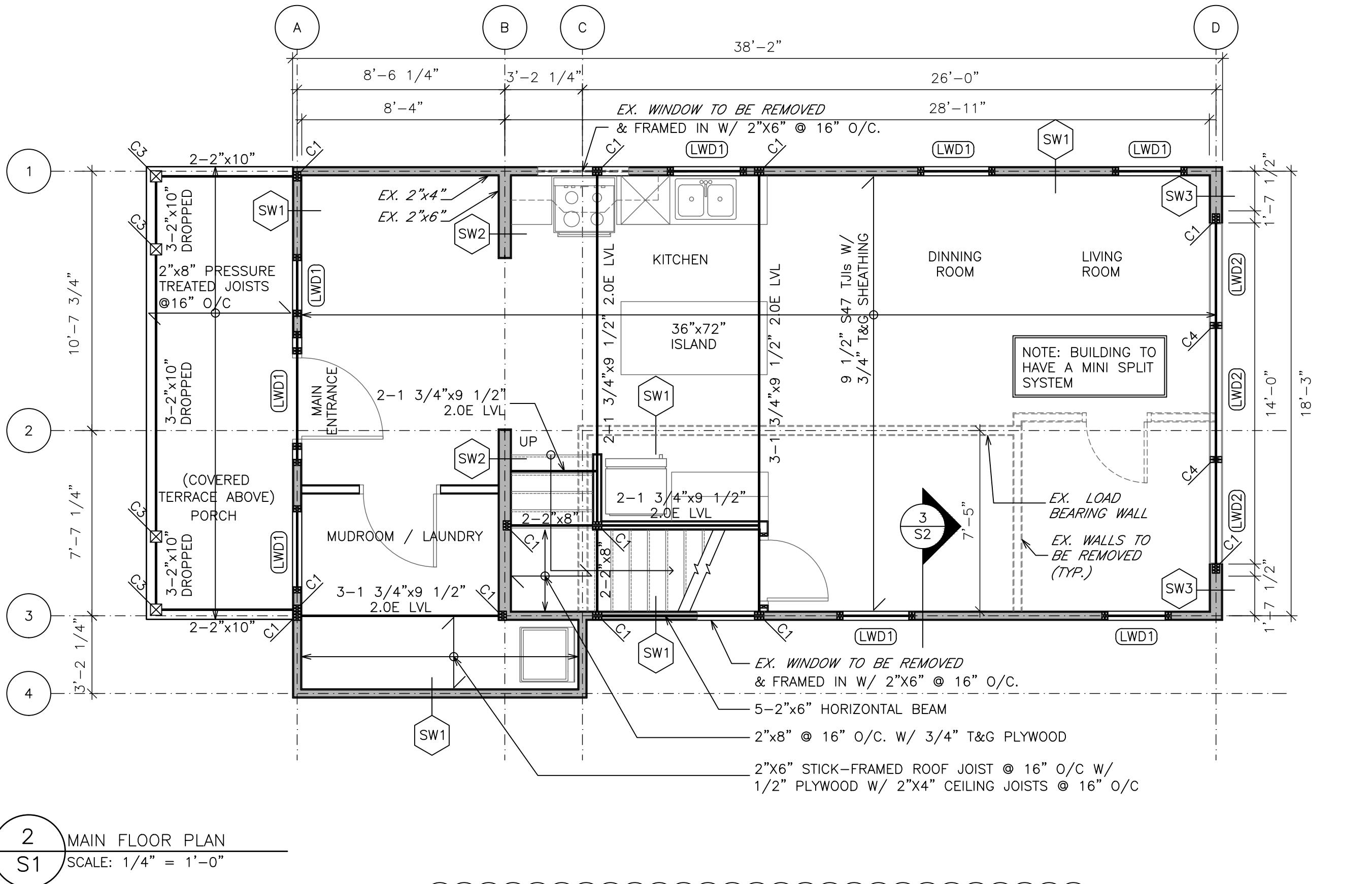
Please feel free to call me or email me if any other information is needed.

Thank you,

Tammy Bemma
Owner
Thomas Houston Courtice Septic

1-877-797-3027

courticeseptic@gmail.com



2
S1 MAIN FLOOR PLAN
SCALE: 1/4" = 1'-0"

78.35m FFE

77.95m
TOP OF FOUNDATION WALL

77.8m
BOWMANVILLE & SOPER CREEK
FLOOD LINE ELEVATION CANADIAN
GEODETIC VERTICAL DATUM, 2013
AT WEST BEACH ROAD

77.22m
1:100 YEAR FLOOD ELEVATION FLOOD
HAZARD ASSOCIATED WITH LAKE
ONTARIO CANADIAN GEODETIC VERTICAL
DATUM, 2013

GRADE

15M HOOKED DOWEL @
16" O/C TO MATCH
VERT. WALL REINF.

24"

WATER TABLE

PERIMETER DRAIN

DAMP PROOFING &
FOUNDATION DRAINAGE LAYER

NATIVE SAND

32X6 CONCRETE STRIP FOOTING
W/2-15M CONT. REINF.
PROVIDE 3" COVER

EX. 2 3/4"x6 3/4" JOIST @ 36" O/C

8" POURED CONCRETE WALL
W/ 15M @ 16" O/C E/W

4" CONCRETE SLAB ON GRADE W/
6x6 6/6 WWM (TYP.)

6" OF FREE DRAINING GRANULAR
COMPACTED TO 98% STANDARD
PROCTOR MAXIMUM DRY DENSITY

NEW BACKFILL COMPRISED OF
APPROVED ON-SITE OR IMPORTED
FILL, PREFERABLY GRANULAR SOIL
PLACED IN NOT MORE THAN
200MM THICK HORIZONTAL LOOSE
LIFTS AND COMPACTED TO AT
LEAST 98% STANDARD PROCTOR
MAXIMUM DRY DENSITY.

PROVIDE OVERLAPPED FILTER
FABRIC THROUGH EXCAVATION

LESS THAN WIDTH OF FOOTING
FOOTING DOUBLED TO 32" WIDE
AS PER 9.15.3.4.(3)

3' - 2 1/4"

1' - 10 7/8"

6"

76.25m

48" MIN.

32"

5' - 10" MAX.

4

78.35m FFE

3 STRUCTURAL FOUNDATION WALL DETAIL
S2 SCALE: 1/2" = 1'-0"

4	ISSUED AS PER CLOCA COMMENTS	21/04/09	M.S.	T.L.R.	
3	REISSUED FOR PERMIT	20/12/15	M.S.	T.L.R.	
2	REISSUED FOR PERMIT	20/12/11	M.S.	T.L.R.	
1	ISSUED FOR PERMIT	20/01/28	M.S.	T.L.R.	
NO.	REVISION		DATE	BY	APPROVED

REVISIONS

RESIDENTIAL RENOVATION
46 WEST BEACH RD. CLARINGTON, ONTARIO

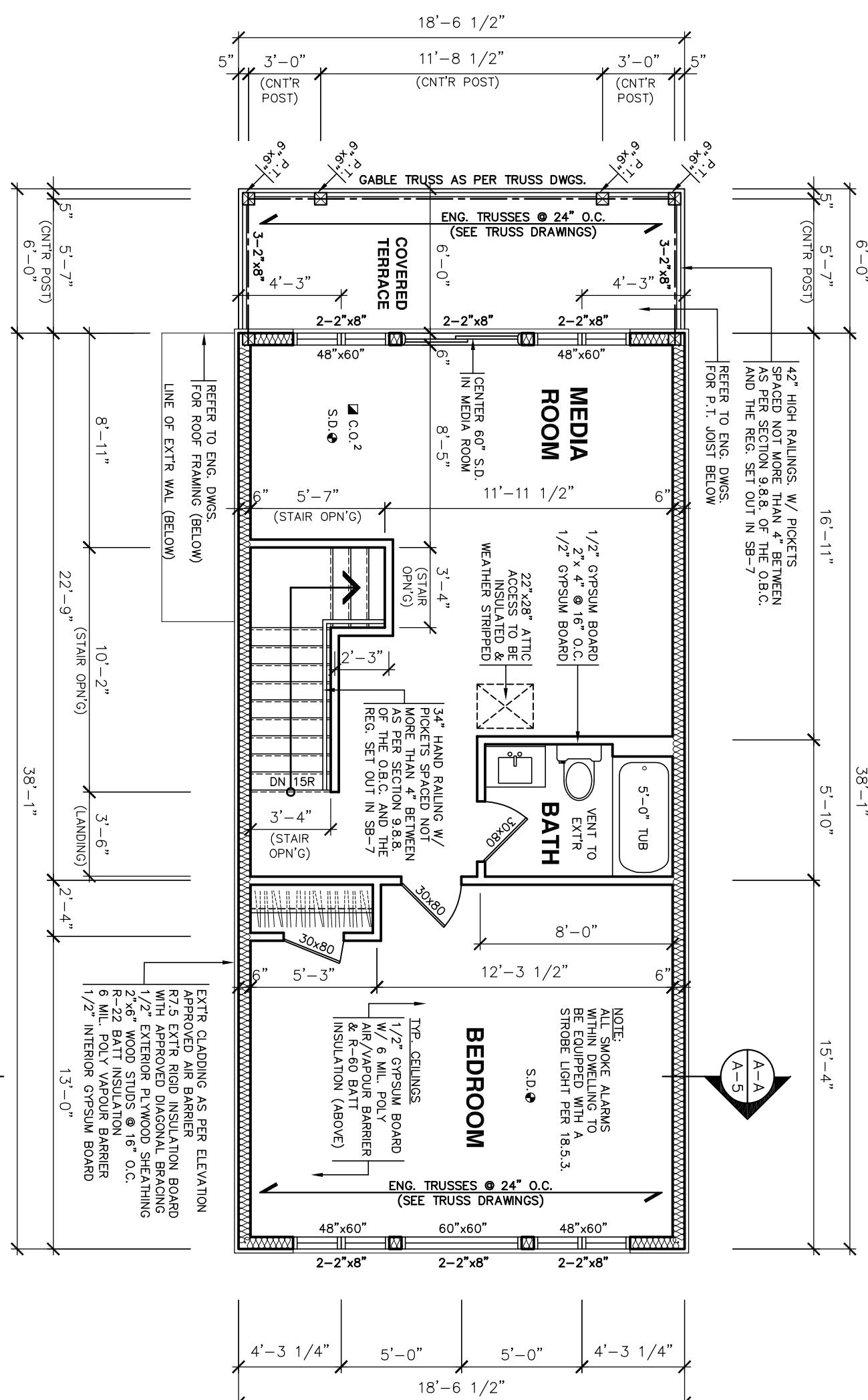
STRUCTURAL FOUNDATION

WALL DETAIL SECTION



Biddle & Associates Limited
Consulting engineers and planners
100 G STREET EAST • OSHAWA, ON L1H 1B6
(905)576-8500 • FAX (905)576-9730

SCALE: AS SHOWN		PROJECT NO. 119566
DRAWN BY: M.A.S.		DRAWING NO. S2
DESIGN BY: T.L.R.		
CHECKED BY: T.L.R.		CAD FILE: — PLOT DATE: 2021/04/09 SUBMISSION: PERMIT
DATE: SEPTEMBER 19		

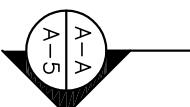


NOTE:
WOOD ROOF TRUSS MANUFACTURER TO SUPPLY
SHOP DRAWINGS & VERIFY ROOF DESIGN PRIOR
TO CONSTRUCTION.

WINDOWS SHALL CONFORM TO CSA STANDARDS
CAN/CSA-A440 "WINDOWS" AND CAN/CSA-A440-1
"USER SELECTION GUIDE TO CSA STANDARD
CAN/CSA-A440-00 WINDOWS"

PROPOSED SECOND FLOOR PLAN

TOTAL FLOOR AREA = 744 sq./ft.



NOTE:
ENTIRE EXISTING ROOF TO BE REMOVED
& FRAME NEW AS PER TRUSS AND
ARCHITECTURAL DRAWINGS

NOTE:
ALL MEASUREMENTS TO BE CONFIRMED
WITH EXISTING ON SITE

D.A. drafting & design has reviewed and takes responsibility for this design and has the qualifications and meets the requirements as designer as per the ONTARIO BUILDING CODE.

QUALIFICATION INFORMATION

Required unless design is exempt under Div. C-3.2&4.1 of the building code

DEREK ALLEN SIGNATURE

BCIN

REGISTRATION INFORMATION

Required unless design is exempt under Div. C-3.2&4.1 of the building code

D.A. DRAFTING & DESIGN

BCIN

D.A. DRAFTING & DESIGN

SECOND FLOOR PLAN

PROPOSED SECOND STOREY ADDITION FOR:

CUSTOM HOMES • COTTAGES • GARAGES • ADDITIONS • RENOVATIONS

DATE:

JAN 2020

SCALE:

3/16=1'-0"

DRAWN BY:

D.A.

CHECKED BY:

D.A.

FILE NO.:

2019-30

PROPOSED SECOND STOREY ADDITION FOR:

CUSTOM HOMES • COTTAGES • GARAGES • ADDITIONS • RENOVATIONS

DATE:

JAN 2020

SCALE:

3/16=1'-0"

DRAWN BY:

D.A.

CHECKED BY:

D.A.

FILE NO.:

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CUSTOM HOMES • COTTAGES • GARAGES • ADDITIONS • RENOVATIONS

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CUSTOM HOMES • COTTAGES • GARAGES • ADDITIONS • RENOVATIONS

DATE:

JAN 2020

SCALE:

3/16=1'-0"

DRAWN BY:

D.A.

CHECKED BY:

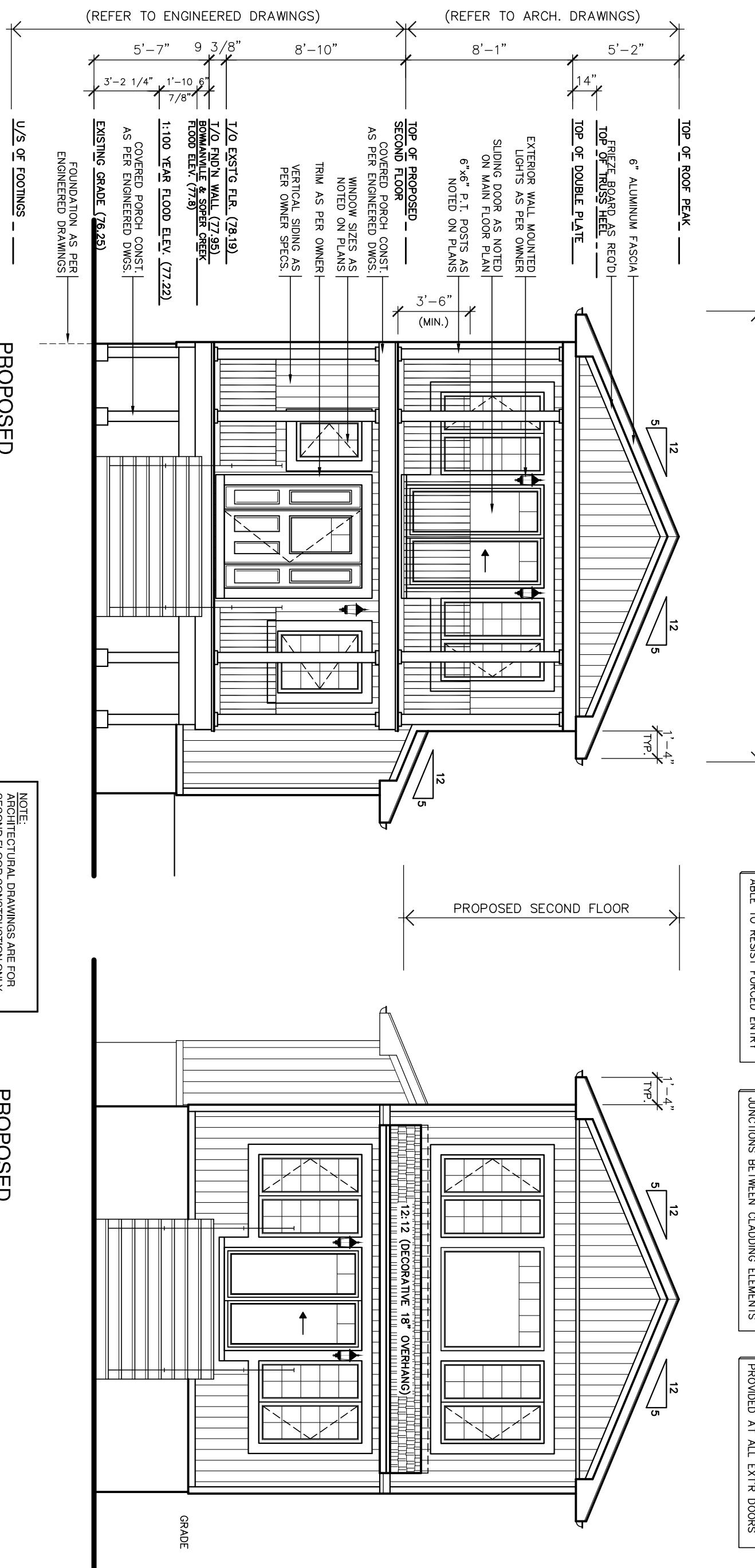
D.A.

FILE NO.:

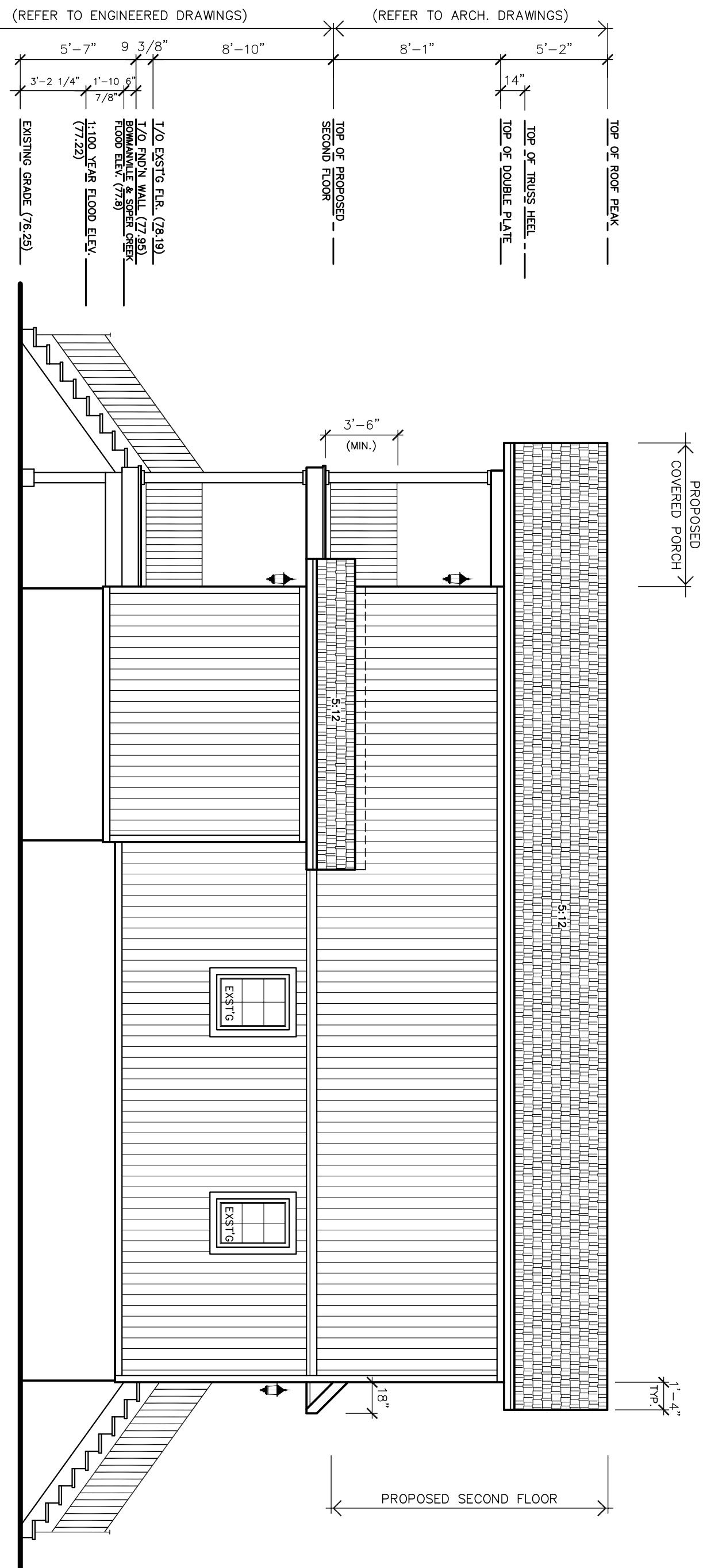
2019-30

PROPOSED SECOND STOREY ADDITION FOR:

CUSTOM HOMES • COTTAGES • GARAGES • ADDITIONS • RENOVATIONS</



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H-75

PROPOSED WEST ELEVATION

NOTES:

- U/S OF FOOTINGS** — Refer to Engineered Drawings.
- EXISTING GRADE (76.25)** — Refer to Arch. Drawings.
- RAILING HEIGHTS** — 5'-11" or less above grade, 36" high railings and 5'-11" or more above grade 42" high railings w/ pickets spaced not more than 4" between as per section 9.8.8. of the O.B.C. and the regulations set out in SB-7.
- STAIRS** — 34" hand railing w/ pickets spaced not more than 4" between as per section 9.8.8. of the O.B.C. and the regulations set out in SB-7.
- NOTES:** ARCHITECTURAL DRAWINGS ARE FOR SECOND FLOOR CONSTRUCTION ONLY.
- NOTES:** REFER TO ENGINEERED DRAWINGS FOR FOUNDATION AND FIRST FLOOR CONST.

NOTES:

- I/O EXIST'G FLR. (78.19)**
- T/O FIND'N WALL (77.95)**
- BOWMANVILLE & SOPER CREEK FLOOD ELEV. (77.8)**
- 1:100 YEAR FLOOD ELEV. (77.22)**

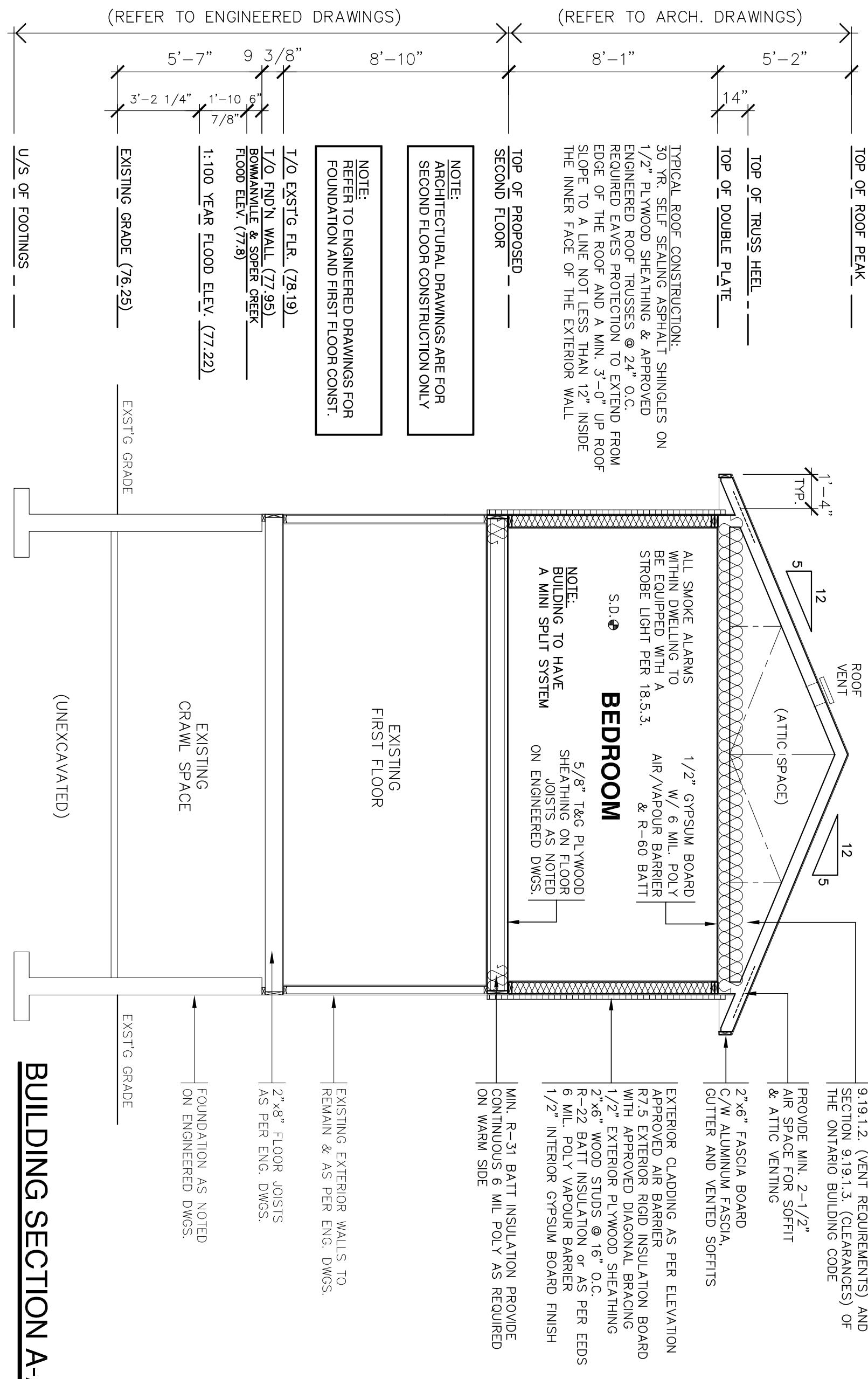
NOTES:

- TOP OF PROPOSED SECOND FLOOR**
- TOP OF TRUSS HEEL**
- TOP OF DOUBLE PLATE**
- TOP OF ROOF PEAK**
- COVERED PORCH**
- PROPOSED SECOND FLOOR**

NOTES:

- D.A. DRAFTING & DESIGN**
- WEST ELEVATION**
- 46 WEST BEACH RD.**
- DURHAM REGION**
- KAWARTHA LAKES (705) 344-1635**
- WWW.DADRAFTING.COM**
- 37950**
- BGIN**
- D.A. DRAFTING & DESIGN**
- 34457**
- BGIN**
- DEREK ALLEN**
- NAME**
- SIGNATURE**
- REGISTRATION INFORMATION**
- REQUIRED UNLESS DESIGN IS EXEMPT UNDER DIV. C - 3.2.5.1. OF THE BUILDING CODE**
- D.A. DRAFTING & DESIGN**
- FIRM NAME**
- DATE**
- REVISION**
- BY**
- NOTE: D.A. DRAFTING & DESIGN HAS REVIEWED AND TAKES RESPONSIBILITY FOR THIS DESIGN AND HAS THE QUALIFICATIONS AND MEETS THE REQUIREMENTS AS A DESIGNER AS PER THE ONTARIO BUILDING CODE.**

H-76



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TAB F

April 28, 2021

Via email francesca@spark.law

Ms. Francesca Provenzano
Spark LLP
67 Yonge Street, Second Floor
Toronto ON M5E 1J8

Dear Ms. Provenzano:

**Subject: Ontario Regulation 42/06 Permit Application for
46 West Beach, Municipality of Clarington
CLOCA File No.: RPRG5870**

I write following your submission of certain materials dated April 13, 2021 with respect to the file captioned above. Thank you for the submission of revised and additional information, as requested in my previous correspondence to your client dated January 29, 2021.

Staff at the Central Lake Ontario Conservation Authority (CLOCA) have now had an opportunity to review these materials and observe that the proposal continues to be in essence a total reconstruction and enlargement of the existing residential structure, which, as we had advised previously on several occasions, is not acceptable in terms of the risks to people and property associated with flooding and erosion natural hazards present on the subject lands; the requirements of the tests for approval under the *Conservation Authorities Act*; and, CLOCA's Board-approved *Policy and Procedural Document for Regulation and Plan Review*. We also note that the required outstanding review fee of \$3125 has not been submitted with the resubmission, as was requested in previous correspondences.

The application, as currently set out, cannot be supported by CLOCA staff and will be recommended for refusal. In such circumstances, the *Conservation Authorities Act* provides for the following at subsection 28 (12):

"Permission ... shall not be refused or granted subject to conditions unless the person requesting the permission has been given the opportunity to require a hearing before the authority ..."

Accordingly, please advise if your client wishes to present his application at a Hearing before the Authority Board, which, upon your confirmation, may be convened during the Authority's next scheduled Board meeting on Tuesday, May 18, 2020 commencing at 5 PM or at a subsequent regularly scheduled meeting date.

Enclosed, for your awareness, are the procedures governing hearings under subsection 28 (12) of the *Conservation Authorities Act*.

Finally, during our review of the submitted materials, we discovered an error with respect to the boundary of the Dynamic Beach Hazard Limit, as conceptually shown on Map 33 of 37 of the *Lake Ontario Shoreline Management Plan Hazard Maps*. A corrected copy of this map is enclosed for your use, which more accurately illustrates the conceptual spatial extent of the Dynamic Beach Hazard Limit associated with the barrier beach dynamic beach upon which the subject lands lay.

Yours truly,



John Hetherington
Regulations and Provincial Offences Officer
jhetherington@cloca.com

Encl. Conservation Ontario Hearing Guidelines, amended to 2020

Cc: Cynthia Strike, Municipality of Clarington Planning Services Department
Adam Dunn, Municipality of Clarington Building Department

g:\planning\planning\comments\2021\clarington\rprg5870 letter of refusal.docx

SECTION 28 (3)

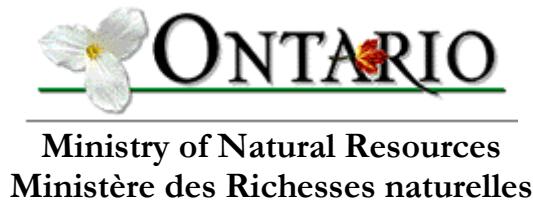
CONSERVATION AUTHORITIES ACT

HEARING GUIDELINES

**October 2005, Amended 2018 re. MLT, Amended 2020 re.
Electronic Hearings**



**Conservation
ONTARIO**
Natural Champions



SECTION 28 (3)

CONSERVATION AUTHORITIES ACT

HEARING GUIDELINES

October 2005, Amended 2018 and 2020

Summary of Revisions

Revision No.	Date	Comments	Approval Authority
0	October, 2005	Guidelines prepared as an update to the October 1992 hearing guidelines.	Ministry of Natural Resources and Forestry Conservation Ontario council
1	May, 2018	Housekeeping amendments made reflecting changes to appeal process as a result of the <i>Building Better Communities and Conserving Watersheds Act</i> , 2017 and subsequent Order in Council.	Conservation Ontario Staff
2	September, 2020	Amendments made to incorporate the use of electronic hearings.	Conservation Ontario Council

(Note: Text in red represents the amendments made in 2020)

H-83

September 14, 2020

**Re: Interim Update to the SECTION 28 (3) CONSERVATION AUTHORITIES ACT
HEARING GUIDELINES**

The corona virus disease (COVID-19) was declared a pandemic by the World Health Organization on March 11, 2020. During the Provincial state of emergency as a result of the COVID-19 virus, the Provincial government enacted Order in Council 73/20 under s. 7.1 of the *Emergency Management and Civil Protection Act*. While that order was enacted, Provincial limitation periods and procedural time periods were under suspension between March 16, 2020 and September 14th.

With the suspension on limitation periods being revoked as of September 14th and the need for continued social distancing, conservation authorities require alternate means to provide hearings under Section 28 of the *Conservation Authorities Act*. The purpose of this interim update to the Section 28 Hearing Guidelines is to incorporate the use of electronic hearings. The update to the Hearing Guidelines is complementary to an update to the “Conservation Authority Best Management Practices (BMPs) and Administrative By-Law Model” to incorporate electronic Board meetings.

As a reminder, the decision by the Provincial government to enact Order in Council 73/20 under s. 7.1 of the *Emergency Management and Civil Protection Act* will impact the scheduling of CA Hearings under Section 28 as well as the requirement for an applicant to file an appeal with the Mining and Lands Tribunal within 30 days. For any hearings that took place between March 16th and September 14th, 2020 the person who has been refused permission or who objects to conditions imposed on a permission will have 30 days after September 14th to file an appeal to the Mining and Lands Tribunal. For those CAs who have postponed hearings during the emergency period, they should be scheduled as soon as practical, keeping in mind that Administrative By-Laws and Hearing Guidelines may need to be amended to incorporate electronic meetings.

Amendments have been made throughout this document to incorporate electronic hearings. Conservation authorities are advised to review their internal Hearing Procedures to incorporate this update.

Sincerely,



Leslie Rich
Policy and Planning Liaison
Conservation Ontario

May, 2018

**Re: Interim Update to the SECTION 28 (3) CONSERVATION AUTHORITIES ACT
HEARING GUIDELINES**

Subsection 28(15) of the *Conservation Authorities Act* provides that a person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons may appeal to the Minister of Natural Resources and Forestry. Further to the passage of the *Building Better Communities and Conserving Watersheds Act, 2017* effective April 3, 2018 this appeal has been assigned to the Mining and Lands Tribunal through Order in Council 332/2018. The Mining and Lands Tribunal is now a part of the Environment and Land Tribunal Cluster (ELTO) of the Ministry of the Attorney General.

By law, the appeal made under subsection 28(15) should be filed directly with the Mining and Lands Tribunal. A copy of the appeal letter to the Minister of Natural Resources and Forestry is unnecessary and can be treated as optional. Conservation authorities should notify appellants that they must file their appeals with the Tribunal within 30 days of their receipt of notice. An appeal may be invalidated if it is not filed with the proper office within that time period. The appellants should also be instructed to copy the conservation authority in their appeal letter.

Further to this updated information, an amendment has been made to **Appendix D “Notice of Decision – Model”** to incorporate the revised contact information for the appeal. Conservation authorities are advised to review their internal Hearing Procedures to incorporate this update. It is anticipated that this “Interim Update to the Section 28(3) Conservation Authorities Act Hearing Guidelines” will provide guidance to conservation authorities related to Section 28 hearings until such time as a new Section 28 regulation is created by the province.

Sincerely,



Leslie Rich
Policy and Planning Liaison
Conservation Ontario

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TO ONTARIO REGULATION ____/06

19

Appendix D

20

1.0 PURPOSE OF HEARING GUIDELINES

The purpose of the Hearing Guidelines is to reflect the changes to the 1998 Conservation Authorities Act. The Act requires that the applicant be party to a hearing by the local Conservation Authority Board, or Executive Committee (sitting as a Hearing Board) as the case may be, for an application to be refused or approved with contentious conditions. Further, a permit may be refused if in the opinion of the Authority the proposal adversely affects the control of flooding, pollution or conservation of land, and additional erosion and dynamic beaches. The Hearing Board is empowered by law to make a decision, governed by the Statutory Powers Procedures Act. It is the purpose of the Hearing Board to evaluate the information presented at the hearing by both the Conservation Authority staff and the applicant and to decide whether the application will be approved with or without conditions or refused.

These guidelines have been prepared as an update to the October 1992 hearing guidelines and are intended to provide a step-by-step process to conducting hearings required under Section 28 (12), (13), (14) of the Conservation Authorities Act. Similar to the 1992 guidelines, it is hoped that the guidelines will promote the necessary consistency across the Province and ensure that hearings meet the legal requirements of the Statutory Powers Procedures Act without being unduly legalistic or intimidating to the participants.

2.0 PREHEARING PROCEDURES

2.1 Apprehension of Bias

In considering the application, the Hearing Board is acting as a decision-making tribunal. The tribunal is to act fairly. Under general principles of administrative law relating to the duty of fairness, the tribunal is obliged not only to avoid any bias but also to avoid the appearance or apprehension of bias. The following are three examples of steps to be taken to avoid apprehension of bias where it is likely to arise.

- (a) No member of the Authority taking part in the hearing should be involved, either through participation in committee or intervention on behalf of the applicant or other interested parties with the matter, prior to the hearing. Otherwise, there is a danger of an apprehension of bias which could jeopardize the hearing.
- (b) If material relating to the merits of an application that is the subject of a hearing is distributed to Board members before the hearing, the material shall be distributed to the applicant at the same time. The applicant may be afforded an opportunity to distribute similar pre-hearing material. **These materials can be distributed electronically.**
- (c) In instances where the Authority (or Executive Committee) requires a hearing to help it reach a determination as to whether to give permission with or without conditions or refuse a permit application, a final decision shall not be made until such time as a hearing is held.

The applicant will be given an opportunity to attend the hearing before a decision is made; however, the applicant does not have to be present for a decision to be made.

Individual Conservation Authorities shall develop a document outlining their own practices and procedures relating to the review and reporting of Section 28 applications, including the role of staff, the applicant and the Authority or Executive Committee as well as, the procedures for the hearing itself. Such policy and procedures manual shall be available to the members of the public upon request **and on the Authority's website**. These procedures shall have regard for the above information and should be approved by the Conservation Authority Board of Directors.

2.2 Application

The right to a hearing is required where staff is recommending refusal of an application or where there is some indication that the Authority or Executive Committee may not follow staff's recommendation to approve a permit or the applicant objects to the conditions of approval. The applicant is entitled to reasonable notice of the hearing pursuant to the Statutory Powers Procedures Act.

2.3 Notice of Hearing

The Notice of Hearing shall be sent to the applicant within sufficient time to allow the applicant to prepare for the hearing. To ensure that reasonable notice is given, it is recommended that prior to sending the Notice of Hearing, the applicant be consulted to determine an agreeable date and time based on the local Conservation Authority's regular meeting schedule.

The Notice of Hearing must contain the following:

- (a) Reference to the applicable legislation under which the hearing is to be held (i.e., the Conservation Authorities Act).
- (b) The time, place and the purpose of the hearing. **OR for Electronic Hearings:** **The time, purpose of the hearing, and details about the manner in which the hearing will be held.**

Note: for electronic hearings the Notice must also contain a statement that the applicant should notify the Authority if they believe holding the hearing electronically is likely to cause them significant prejudice. The Authority shall assume the applicant has no objection to the electronic hearing if no such notification is received.

- (c) Particulars to identify the applicant, property and the nature of the application which are the subject of the hearing.

Note: If the applicant is not the landowner but the prospective owner, the applicant must

have written authorization from the registered landowner.

- (d) The reasons for the proposed refusal or conditions of approval shall be specifically stated. This should contain sufficient detail to enable the applicant to understand the issues so he or she can be adequately prepared for the hearing.

It is sufficient to reference in the Notice of Hearing that the recommendation for refusal or conditions of approval is based on the reasons outlined in previous correspondence or a hearing report that will follow.

- (e) A statement notifying the applicant that the hearing may proceed in the applicant's absence and that the applicant will not be entitled to any further notice of the proceedings.

Except in extreme circumstances, it is recommended that the hearing not proceed in the absence of the applicant.

- (f) Reminder that the applicant is entitled to be represented at the hearing by counsel, if desired.

It is recommended that the Notice of Hearing be directed to the applicant and/or landowner by registered mail. Please refer to **Appendix A** for an example Notice of Hearing.

2.4 Presubmission of Reports

If it is the practice of the local Conservation Authority to submit reports to the Board members in advance of the hearing (i.e., inclusion on an Authority/Executive Committee agenda), the applicant shall be provided with the same opportunity. The applicant shall be given two weeks to prepare a report once the reasons for the staff recommendations have been received. Subsequently, this may affect the timing and scheduling of the staff hearing reports.

2.5 Hearing Information

Prior to the hearing, the applicant shall be advised of the local Conservation Authority's hearing procedures upon request.

3.0 HEARING

3.1 Public Hearing

Pursuant to the Statutory Powers Procedure Act, hearings, **including electronic hearings**, are required to be held in public. **For electronic hearings, public attendance should be synchronous**

with the hearing. The exception is in very rare cases where public interest in public hearings is outweighed by the fact that intimate financial, personal or other matters would be disclosed at hearings.

3.2 Hearing Participants

The Conservation Authorities Act does not provide for third party status at the local hearing. While others may be advised of the local hearing, any information that they provide should be incorporated within the presentation of information by, or on behalf of, the applicant or Authority staff.

3.3 Attendance of Hearing Board Members

In accordance with case law relating to the conduct of hearings, those members of the Authority who will decide whether to grant or refuse the application must be present during the full course of the hearing. If it is necessary for a member to leave, the hearing must be adjourned and resumed when either the member returns or if the hearing proceeds, even in the event of an adjournment, only those members who were present after the member left can sit to the conclusion of the hearing.

3.4 Adjournments

The Board may adjourn a hearing on its own motion or that of the applicant or Authority staff where it is satisfied that an adjournment is necessary for an adequate hearing to be held.

Any adjournments form part of the hearing record.

3.5 Orders and Directions

The Authority is entitled to make orders or directions to maintain order and prevent the abuse of its hearing processes. A hearing procedures example has been included as **Appendix B**.

3.6 Information Presented at Hearings

- (a) The Statutory Powers Procedure Act, requires that a witness be informed of his right to object pursuant to the Canada Evidence Act. The Canada Evidence Act indicates that a witness shall be excused from answering questions on the basis that the answer may be incriminating. Further, answers provided during the hearing are not admissible against

the witness in any criminal trial or proceeding. This information should be provided to the applicant as part of the Notice of Hearing.

- (b) It is the decision of the hearing members as to whether information is presented under oath or affirmation. It is not a legal requirement. The applicant must be informed of the above, prior to or at the start of the hearing.
- (c) The Board may authorize receiving a copy rather than the original document. However, the Board can request certified copies of the document if required.
- (d) Privileged information, such as solicitor/client correspondence, cannot be heard. Information that is not directly within the knowledge of the speaker (hearsay), if relevant to the issues of the hearing, can be heard.
- (e) The Board may take into account matters of common knowledge such as geographic or historic facts, times measures, weights, etc or generally recognized scientific or technical facts, information or opinions within its specialized knowledge without hearing specific information to establish their truth.

3.7 Conduct of Hearing

3.7.1 Record of Attending Hearing Board Members

A record shall be made of the members of the Hearing Board.

3.7.2 Opening Remarks

The Chairperson shall convene the hearing with opening remarks which generally; identify the applicant, the nature of the application, and the property location; outline the hearing procedures; and advise on requirements of the Canada Evidence Act. Please reference **Appendix C** for the Opening Remarks model. **In an electronic hearing, all the parties and the members of the Hearing Board must be able to clearly hear one another and any witnesses throughout the hearing.**

3.7.3 Presentation of Authority Staff Information

Staff of the Authority presents the reasons supporting the recommendation for the refusal or conditions of approval of the application. Any reports, documents or plans that form part of the presentation shall be properly indexed and received.

Staff of the Authority should not submit new information at the hearing as the applicant will not have had time to review and provide a professional opinion to the Hearing Board.

Consideration should be given to the designation of one staff member or legal counsel who

coordinates the presentation of information on behalf of Authority staff and who asks questions on behalf of Authority staff.

3.7.4 Presentation of Applicant Information

The applicant has the opportunity to present information at the conclusion of the Authority staff presentation. Any reports, documents or plans which form part of the submission should be properly indexed and received.

The applicant shall present information as it applies to the permit application in question. For instance, does the requested activity affect the control of flooding, erosion, dynamic beach or conservation of land or pollution? The hearing does not address the merits of the activity or appropriateness of such a use in terms of planning.

- The applicant may be represented by legal counsel or agent, if desired
- The applicant may present information to the Board and/or have invited advisors to present information to the Board
- The applicant(s) presentation may include technical witnesses, such as an engineer, ecologist, hydrogeologist etc.

The applicant should not submit new information at the hearing as the Staff of the Authority will not have had time to review and provide a professional opinion to the Hearing Board.

3.7.5 Questions

Members of the Hearing Board may direct questions to each speaker as the information is being heard. The applicant and /or agent can make any comments or questions on the staff report.

Pursuant to the Statutory Powers Procedure Act, the Board can limit questioning where it is satisfied that there has been full and fair disclosure of the facts presented. Please note that the courts have been particularly sensitive to the issue of limiting questions and there is a tendency to allow limiting of questions only where it has clearly gone beyond reasonable or proper bounds.

3.7.6 Deliberation

After all the information is presented, the Board may adjourn the hearing and retire in private to confer. The Board may reconvene on the same date or at some later date to advise of the Board's decision. The Board members shall not discuss the hearing with others prior to the decision of the Board being finalized.

4.0. DECISION

The applicant must receive written notice of the decision. The applicant shall be informed of the

right to appeal the decision within 30 days upon receipt of the written decision to the [Mining and Lands Tribunal](#).

It is important that the hearing participants have a clear understanding of why the application was refused or approved. The Board shall itemize and record information of particular significance which led to their decision.

4.1 Notice of Decision

The decision notice should include the following information:

- (a) The identification of the applicant, property and the nature of the application that was the subject of the hearing.
- (b) The decision to refuse or approve the application. A copy of the Hearing Board resolution should be attached.

It is recommended that the written Notice of Decision be forwarded to the applicant by registered mail. A sample Notice of Decision and cover letter has been included as [Appendix D](#).

4.2 Adoption

A resolution advising of the Board's decision and particulars of the decision should be adopted.

5.0 RECORD

The Authority shall compile a record of the hearing. In the event of an appeal, a copy of the record should be forwarded to the [Mining and Lands Tribunal](#). The record must include the following:

- (a) The application for the permit.
- (b) The Notice of Hearing.
- (c) Any orders made by the Board (e.g., for adjournments).
- (d) All information received by the Board.
- (e) The minutes of the meeting made at the hearing.
- (f) The decision and reasons for decisions of the Board.
- (g) The Notice of Decision sent to the applicant.

Appendix A

NOTICE OF HEARING

IN THE MATTER OF
The Conservation Authorities Act,
R.S.O. 1990, Chapter 27

AND IN THE MATTER OF an application by

**FOR THE PERMISSION OF THE
CONSERVATION AUTHORITY**

Pursuant to Regulations made under
Section 28, Subsection 12 of the said Act

TAKE NOTICE THAT a Hearing before the Executive Committee of the Conservation Authority will be held under Section 28, Subsection 12 of the Conservation Authorities Act at the offices of the said Authority (ADDRESS), at the hour of , **on the day of , 2020**, [for electronic hearings, include details about the manner in which the hearing will be held] with respect to the application by (**NAME**) to permit development within an area regulated by the Authority in order to ensure no adverse affect on (*the control of flooding, erosion, dynamic beaches or pollution or conservation of land./alter or interfere with a watercourse, shoreline or wetland*) on Lot , Plan/Lot , Concession , (**Street**) in the City of , Regional Municipality of , River Watershed.

TAKE NOTICE THAT you are invited to make a delegation and submit supporting written material to the Executive Committee for the meeting of (*meeting number*). If you intend to appear [For electronic hearings: or if you believe that holding the hearing electronically is likely to cause significant prejudice], please contact (*name*). Written material will be required by (*date*), to enable the Committee members to review the material prior to the meeting.

TAKE NOTICE THAT this hearing is governed by the provisions of the Statutory Powers Procedure Act. Under the Act, a witness is automatically afforded a protection that is similar to the protection of the Ontario Evidence Act. This means that the evidence that a witness gives may not be used in subsequent civil proceedings or in prosecutions against the witness under a Provincial Statute. It does not relieve the witness of the obligation of this oath since matters of perjury are not affected by the automatic affording of the protection. The significance is that the legislation is Provincial and cannot affect Federal matters. If a witness requires the protection of the Canada Evidence Act that protection must be obtained in the usual manner. The Ontario Statute requires the tribunal to draw this matter to the attention of the witness, as this tribunal has no knowledge of the affect of any evidence that a witness may give.

AND FURTHER TAKE NOTICE that if you do not attend at this Hearing, the Executive Committee of the Conservation Authority may proceed in your absence, and you will not be entitled to any further notice in the proceedings.

DATED the ____ day of , _____**202X**

The Executive Committee of the
Conservation Authority

Per:
Chief Administrative Officer/Secretary-Treasurer

Appendix B

HEARING PROCEDURES

1. Motion to sit as Hearing Board.
2. Roll Call followed by the Chairperson's opening remarks. For electronic hearings, the Chairperson shall ensure that all parties and the Hearing Board are able to clearly hear one another and any witnesses throughout the hearing.
3. Staff will introduce to the Hearing Board the applicant/owner, his/her agent and others wishing to speak.
4. Staff will indicate the nature and location of the subject application and the conclusions.
5. Staff will present the staff report included in the Authority/Executive Committee agenda.
6. The applicant and/or their agent will present their material
7. Staff and/or the conservation authority's agent may question the applicant and/or their agent if reasonably required for a full and fair disclosure of matters presented at the Hearing.¹
8. The applicant and/or their agent may question the conservation authority staff and/or their agent if reasonably required for full and fair disclosure of matters presented at the Hearing.²
9. The Hearing Board will question, if necessary, both the staff and the applicant/agent.
10. The Hearing Board will move into camera. For electronic meetings, the Hearing Board will separate from other participants for deliberation.
11. Members of the Hearing Board will move and second a motion.
12. A motion will be carried which will culminate in the decision.
13. The Hearing Board will move out of camera.
14. The Chairperson or Acting Chairperson will advise the owner/applicant of the Hearing

¹ As per the Statutory Powers Procedure Act a tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

² As per the Statutory Powers Procedure Act a tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

Board decision.

15. If decision is "to refuse", the Chairperson or Acting Chairperson shall notify the owner/applicant of his/her right to appeal the decision to the Mining and Lands Tribunal within 30 days of receipt of the reasons for the decision.
16. Motion to move out of Hearing Board and sit as Executive Committee.

Appendix C

CHAIRPERSON'S REMARKS WHEN DEALING WITH HEARINGS WITH RESPECT TO ONTARIO REGULATION ____/06

We are now going to conduct a hearing under section 28 of the Conservation Authorities Act in respect of an application by _____: , for permission to:_____

The Authority has adopted regulations under section 28 of the Conservation Authorities Act which requires the permission of the Authority for development within an area regulated by the Authority in order to ensure no adverse affect on (the control of flooding, erosion, dynamic beaches or pollution or conservation of land) or to permit alteration to a shoreline or watercourse or interference with a wetland.

The Staff has reviewed this proposed work **and prepared a staff report, a copy of which has been given to the applicant and the Board. The applicant was invited to file material in response to the staff report, a copy of which has also been provided to the Board.**

Under Section 28 (12) of the Conservation Authorities Act, the person requesting permission has the right to a hearing before the Authority/Executive Committee.

In holding this hearing, the Authority Board/Executive Committee is to determine whether or not a permit is to be issued, **with or without conditions**. In doing so, we can only consider the application in the form that is before us, the staff report, such evidence as may be given and the submissions to be made on behalf of the applicant. **Only Information disclosed prior to the hearing is to be presented at the hearing.**

The proceedings will be conducted according to the Statutory Powers Procedure Act. Under Section 5 of the Canada Evidence Act, a witness may refuse to answer any question on the ground that the answer may tend to incriminate the person, or may tend to establish his/her liability to a civil proceeding at the instance of the Crown or of any person.

The procedure in general shall be informal without the evidence before it being given under oath or affirmation unless decided by the hearing members.

If the applicant has any questions to ask of the Hearing Board or of the Authority representative, they must be directed to the **Chairperson** of the board.

Appendix D

(Date)

BY REGISTERED MAIL

(name)

(address)

Dear:

RE: NOTICE OF DECISION

Hearing Pursuant to Section 28(12) of the Conservation Authorities Act

Proposed Residential Development

Lot , Plan ; ?? Drive City of

(Application #)

In accordance with the requirements of the Conservation Authorities Act, the (**name**) Conservation Authority provides the following Notice of Decision:

On (**meeting date and number**), the Hearing Board/Authority/Executive Committee refused/approved your application/approved your application with conditions. A copy the Boards/Committee's resolution # has been attached for your records. Please note that this decision is based on the following reasons: (**the proposed development/alteration to a watercourse or shoreline adversely affects the control of flooding, erosion, dynamic beaches or pollution or interference with a wetland or conservation of land**).

In accordance with Section 28 (15) of the Conservation Authorities Act, An applicant who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister who may refuse the permission; or grant permission, with or without conditions. Through Order in Council 332/2018 the responsibility for hearing the appeal has been transferred to the Mining and Lands Tribunal. For your information, should you wish to exercise your right to appeal the decision, a letter by you or your agent/counsel setting out your appeal must be sent within 30 days of receiving this decision addressed to:

Mining and Lands Tribunal
655 Bay Street, Suite 1500
Toronto, Ontario M5G 1E5

A carbon copy of this letter should also be sent to this conservation authority. Should you require any further information, please do not hesitate to contact (**staff contact**) or the undersigned.

Yours truly,

Chief Administrative Officer/Secretary Treasurer
Enclosure

Lake Ontario Shoreline Management Plan Hazard Maps

Central Lake Ontario Conservation Authority (CLOCA)

LEGEND: Hazard Mapping:

- 100 Year Flood Level
- Erosion Hazard Limit
- Flood Hazard Limit
- Dynamic Beach Hazard Limit

Base Mapping:

- Geographical Names
- Dynamic Beach (Start Pt)
- Dynamic Beach (End Pt)
- Road Network
- Topographic Contours (2 m interval)
- CLOCA Administrative Boundary

INTERPRETATION OF THE HAZARD MAPS:

The hazard maps were prepared to support the Lake Ontario Shoreline Management Plan. The hazard limits are not the official regulatory limits of the Conservation Authority. Please contact the Conservation Authority for additional details on the regulatory limit and implications for new development.

DATA SOURCES:

2018 Orthophotography provided by © First Base Solutions

2018 Digital Terrain Model provided by © First Base Solutions

2016 LiDAR Digital Terrain Model obtained from the Ministry of Natural Resources and Forestry. Contains information licensed under the Open Government Licence – Ontario.

Geographical Names obtained from Natural Resources Canada Road Network File, 2016 Census. Statistics Canada Catalogue no. 92-500-X

Inset Map: © OpenStreetMap contributors

DEFINITIONS:

100 Year Flood Level

The 100 Year Combined Flood Level considers both static lake level and storm surge, having a combined probability of being equalled or exceeded during any year of 1% (i.e., probability, P=0.01). The 100 Year Combined Flood Level elevation for CLOCA is +76.01 m IGLD85 (+75.55 m CGVD2013).

Flood Hazard Limit

The Flood Hazard Limit is defined as the 100-Year Flood Level plus an allowance for wave runup and uprush. For the exposed shoreline, wave effects are calculated based on localized nearshore conditions and waves. For embayments, the standardized 15 m setback is applied. Refer to the Lake Ontario Shoreline Management Plan for additional details.

Toe of Bluff

The Toe of Bluff is the transition from the gently sloping beach to the steep portion of the bank or bluff slope.

Stable Slope Allowance

The Stable Slope Allowance is defined as a horizontal setback equivalent to 3.0 times the height of the bank or bluff.

Erosion Hazard Limit

The landward extent of the Erosion Hazard is the sum of the 100 year erosion rate plus the Stable Slope Allowance, measured horizontally from the toe of the bank or bluff.

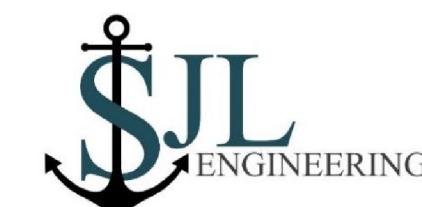
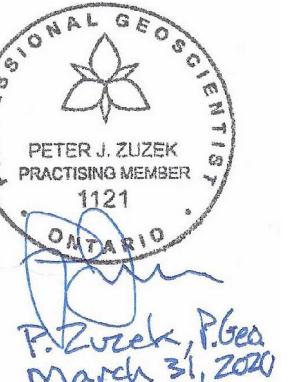
The Erosion Hazard Limit is not mapped in sheltered waters, however, localized shoreline/riverine erosion may occur and is subject to review by the Conservation Authority.

Dynamic Beach Hazard Limit

The Dynamic Beach Hazard Limit is defined as the sum of the Flood Hazard plus 30 metres measured horizontally. Local conditions may require a modified mapping approach if the beach is eroding and/or a barrier beach. Refer to the Lake Ontario Shoreline Management Plan report for additional details.

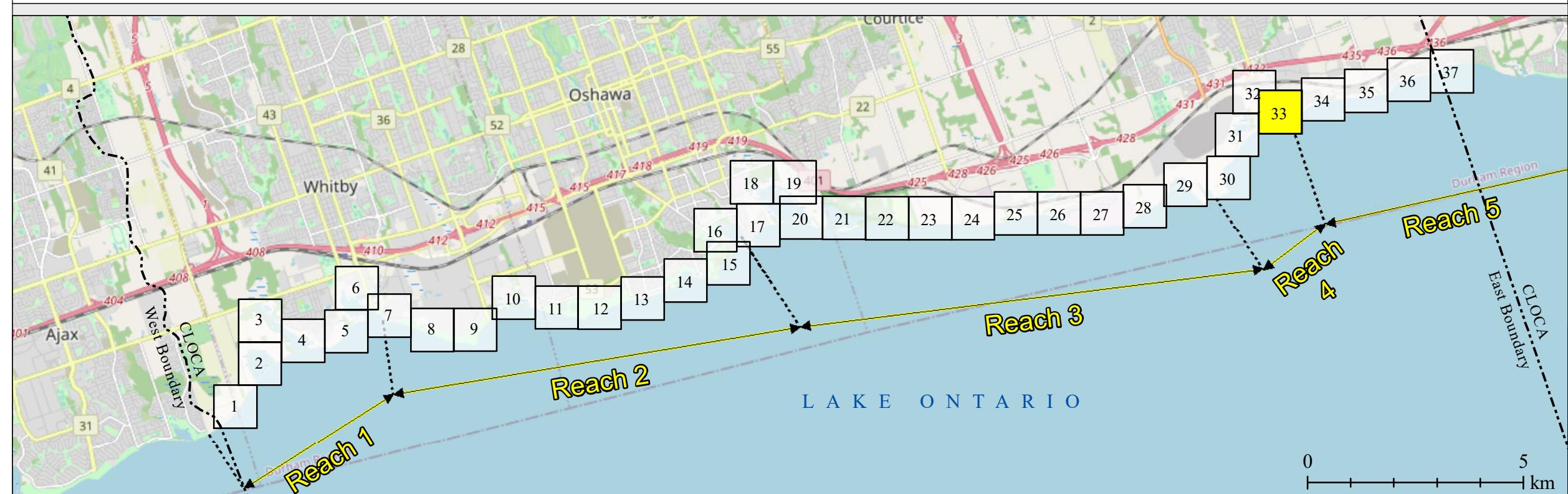


PREPARED BY:



This map was published March 2020 for the Central Lake Ontario Conservation Authority (CLOCA). The mapping of hazardous lands, including erosion, flooding, and dynamic beach areas, is subject to change. The proponent of a proposed development on or adjacent to the hazardous lands should contact CLOCA to discuss permit requirements.

Every reasonable effort has been made to ensure the accuracy of this map. However, neither CLOCA, Zuzek Inc., SJL Engineering, or any other affiliated party assume any liability arising from its use. This map is provided without warranty of any kind, either expressed or implied.



Mapping prepared by Zuzek Inc. for the Central Lake Ontario Conservation Authority, with support from Durham Region.
MAP PUBLISHED MARCH 2020
Revised April 2021



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Web: www.durham.ca

CLOCA Map
33 of 37

TAB G

H-102

Lake Ontario Shoreline Management Plan Hazard Maps

Central Lake Ontario Conservation Authority (CLOCA)

LEGEND:

Hazard Mapping:

- 100 Year Flood Level
- Erosion Hazard Limit
- Flood Hazard Limit
- Dynamic Beach Hazard Limit

Base Mapping:

- Geographical Names
- Dynamic Beach (Start Pt)
- Dynamic Beach (End Pt)
- Road Network
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100 Year Flood Level

The 100 Year Combined Flood Level considers both static lake level and storm surge, having a combined probability of being equalled or exceeded during any year of 1% (i.e., probability, P=0.01). The 100 Year Combined Flood Level elevation for CLOCA is +76.01 m IGLD85 (+75.55 m CGVD2013).

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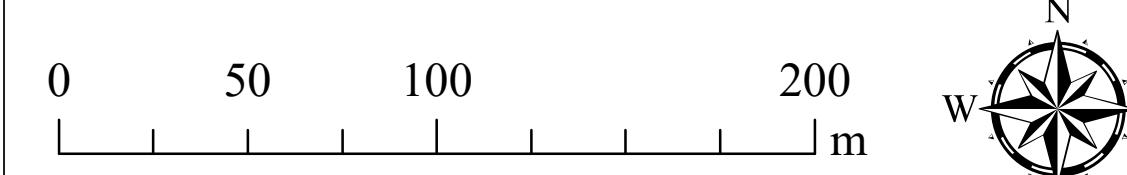
DATUMS:

Horizontal: UTM 17N NAD1983, metres.
Vertical: CGVD2013, metres

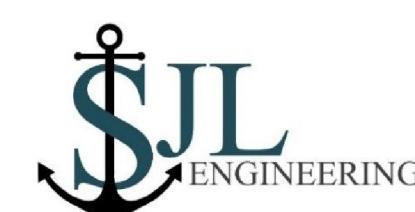
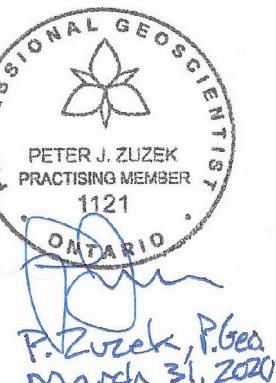
Datum Conversion:

IGLD1985 - CGVD2013 = 0.46 m (average)
To convert from IGLD85 to CGVD2013, subtract 0.46 m.

Note: There are local variations along the reaches within CLOCA. Refer to the Lake Ontario SMP for additional details.

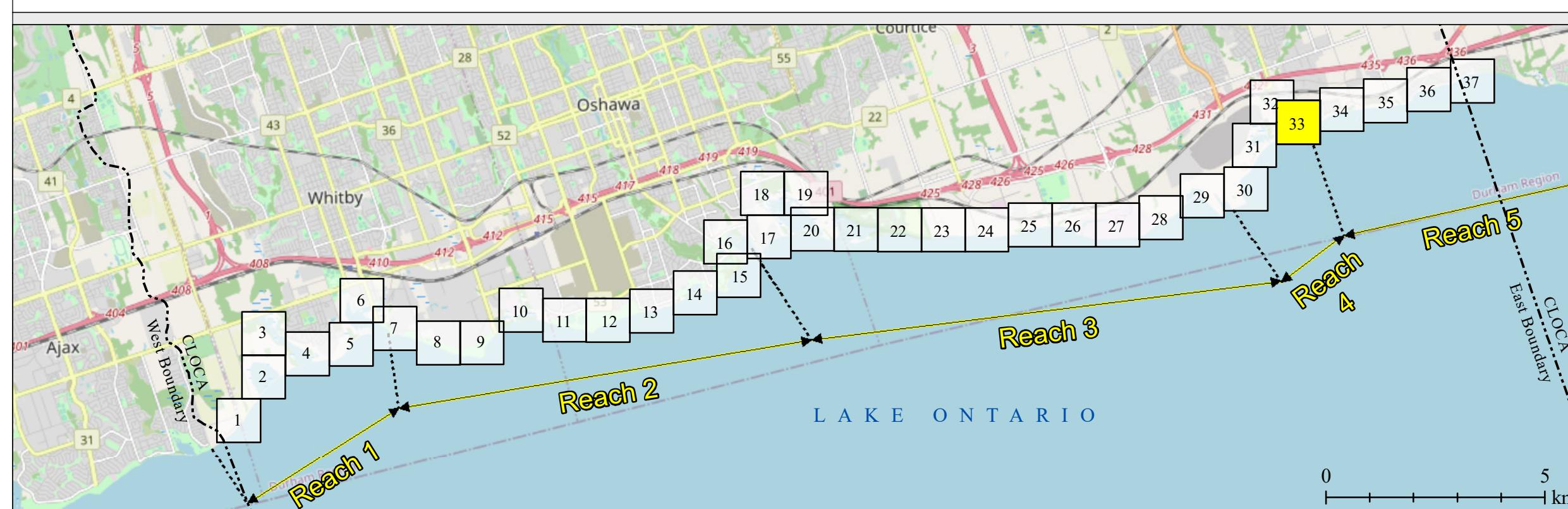


PREPARED BY:



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CLOCA Map
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TAB H

H-104

51 West Beach



H-105

New Construction 2020/2021 67 Cedar Crest



H-106

New Construction 2020/2021 121 Cove Rd



H-107

Re Upper Thames River Conservation Authority and City of
London et al.

Indexed as: Upper Thames River Conservation Authority v.
London (City)
(Dist. Ct.)

67 O.R. (2d) 784
[1989] O.J. No. 393
Action No. 6917/88
ONTARIO

District Court of Ontario
Killeen D.C.J.
February 20, 1989.

Statutes -- Interpretation -- Particular terms -- Statute and regulation prohibiting construction of building on floodplain without consent of conservation authority -- Not defining "construction" -- Internal renovations not prohibited -- Interpretation by reference to other statute defining term to include renovations not permissible -- Building Code Act, R.S.O. 1980, c. 51, ss. 1(e), 5(1), 6(1)(a) -- Conservation Authorities Act, R.S.O. 1980, c. 85, s. 28(1)(e), (2)(b) -- Interpretation Act, R.S.O. 1980, c. 219, s. 10 -- O. Reg. 171/88, ss. 1,3,4,5.

The respondent owner commenced extensive renovations on her property in the respondent city. The property was situate on floodplain land and was, therefore, subject to the jurisdiction of the applicant conservation authority. Section 3 of O. Reg. 171/88, passed pursuant to the Conservation Authorities Act, R.S.O. 1980, c. 85, provides that no person shall "construct any building" on such land without the consent of the authority and ss. 4 and 5 provide for permission in appropriate situations. The authority informed the owner of the regulation and the city issued a stop-work order. The owner then applied

to the city for a minor variance and a building permit and to the authority for permission to continue her renovations. The city's committee of adjustment granted her application for a minor variance and the respondent chief building official issued a building permit at the direction of city council. The authority refused to grant its permission and brought this application for an order under the Building Code Act, R.S.O. 1980, c. 51, rescinding the building permit.

Held, the application should be dismissed.

If the regulation prohibited the renovations, the chief building official should have refused to issue the building permit by reason of s. 6(1)(a) of the Building Code Act and s. 28(2)(b) of the Conservation Authorities Act. The regulation was passed under the authority of s. 28(1)(e) of the Conservation Authorities Act. That section permits the authority to make regulations prohibiting or regulating or requiring the permission of the authority "for the construction of any building or structure" on, *inter alia*, floodplain land. The Act does not define the terms "construct", "construction", or "building", but the regulation defines "building or structure" as a building or structure of any kind. In contrast, s. 1(1)(e) of the Building Code Act does define those terms in such a way as to catch renovations and s. 5(1) prohibits such construction without a permit. Having regard to the history of the Conservation Authorities Act, the principle of construction that words in a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, its object, and the intention of the legislature, the direction of s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, that statutes shall be liberally construed, and the ordinary meaning of the terms in question, the Act and the regulation did not extend to interior renovations but only to new structures and, perhaps, extensions. It is impermissible to interpret the terms in question by reference to their definitions in the Building Code Act, which has a different purpose.

D.L.R. 399, [1921] 3 W.W.R. 214, [1921] A.C. 384; Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa (1980), 30 O.R. (2d) 740, 118 D.L.R. (3d) 528, 14 M.P.L.R. 51; revd on another point 140 D.L.R. (3d) 577, [1982] 2 S.C.R. 616, 45 N.R. 271, 20 M.P.L.R. 121, 14 O.M.B.R. 257, folld

Dawson Creek v. Lougheed, [1959] 19 D.L.R. (2d) 249, distd

Statutes referred to

"Act for putting a legislative Interpretation upon certain terms used in Acts of Parliament, and for rendering it unnecessary to repeat certain provisions and expressions therein, and for ascertaining the date and commencement thereof, and for other purposes", S.C. 1849, c. 10

Building Code Act, R.S.O. 1980, c. 51, ss. 1(1)(e), 5(1), 6(1) (a), 15(1), (3)

Conservation Authorities Act, S.O. 1946, c. 11, ss. 13, 16

Conservation Authorities Act, R.S.O. 1960, c. 62, ss. 20(1)(d), (2)(b)

Conservation Authorities Act, R.S.O. 1980, c. 85, s. 28(1)(e), (2)(b), (3), (5)

Conservation Authorities Amendment Act, S.O. 1961-62, c. 16 (repealed 1968, c. 15, s. 40(1)), s. 9

Conservation Authorities Amendment Act, S.O. 1962-63, c. 20 (repealed 1968, c. 15, s. 40(1)), s. 4(1)

Interpretation Act, R.S.O. 1980, c. 219, s. 10 (am. 1984, c. 11, s. 184)

Municipal Act, R.S.B.C. 1979, c. 290, s. 711 (repealed 1985, c. 79, s. 4)

Ontario Heritage Act, S.O. 1974, c. 122 -- now R.S.O. 1980, c. 337

Rules and regulations referred to

O. Reg. 171/88, ss. 1, 3, 4, 5

O. Reg. 139/61

O. Reg. 322/64, ss. 3 to 7

APPLICATION for an order rescinding a building permit.

R.G. Inglis, for applicant.

J. Hoffer, for respondent, Nella Soufan.

J. Barber, for respondents, City of London and Rocky Cerminara, Chief Building Official for City of London.

KILLEEN D.C.J.:-- The applicant, Upper Thames River Conservation Authority (hereinafter called the Authority), brings this application to obtain an order under s. 15 of the Building Code Act, R.S.O. 1980, c. 51, rescinding a building permit issued by one Rocky Cerminara, the chief building officer for the City of London.

The respondent, Nella Soufan, is the owner of properties at 1 High St. and 6 Front St. in London. On January 19, 1987, she purchased these properties for a total price of \$200,000. At the time of purchase, 1 High St. was a "duplex" and 6 Front St. a "fourplex" and they were used for both residential and office purposes.

In mid-April, 1988, Mrs. Soufan decided to start major renovations on the interiors of both buildings aimed at converting 1 High St. from a duplex into a fourplex and 6 Front St. into a sixplex. This work would have meant that the living units in the two buildings would increase from six units to 10 units and, as well, there would have been upward adjustments in space to be utilized for commercial purposes: see Mrs. Soufan's record, tabs D. and R. It would seem that Mrs. Soufan planned to spend at least \$75,000 on such renovation work based on later information filed with the city official in July.

Unfortunately, Mrs. Soufan embarked on this renovation work without obtaining building permits from the city, as she clearly should have, and her problems were accentuated by reason of the unusual location of her properties.

Both of her properties are located near the Thames River and

unquestionably fall within an area over which the Authority has environmental control powers by virtue of the Conservation Authorities Act, R.S.O. 1980, c. 85 (hereinafter called C.A.A.), and, more especially, O. Reg. 171/88 under which the Authority has regulatory powers over the floodplain within the Authority's defined geographic area of jurisdiction. Section 3 of O. Reg. 171/88 reads, in part, as follows:

3. No person shall,

(a) construct any building or permit any building to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;

.

except in accordance with a permission issued under section 4.

It is conceded that the subject properties are both within an area susceptible to flooding during a regional storm; as such, construction -- whatever that term may mean -- is prohibited without the permission of the Authority.

In late April, members of the Authority's staff became aware of the fact that Mrs. Soufan was proceeding apace with her renovations and a letter was written to her advising of the requirements and strictures contained in O. Reg. 171/88. At about the same time, the London building department seems to have been galvanized into action as well. As early as April 26, 1988, a building inspector had attended at the site and issued orders for each property requiring Mrs. Soufan to obtain building permits forthwith. Mrs. Soufan seems to have been determined, at this early stage at least, to stonewall both the Authority and the city building inspectors because she continued with her work without making any hint of compliance with O. Reg. 171/88 or the local building by-law. Finally, on May 3rd, the building department issued stop-work orders against both properties and this step appears to have halted work on site.

On June 7th, Mrs. Soufan filed a formal application with the Authority seeking a "Consent to Construct" under the C.A.A. and O. Reg. 171/88. Shortly after, on July 4th, Mrs. Soufan finally got around to making formal application to the City of London for the issuance of building permits for the renovation work at both properties.

These various applications follow tortuous paths over the next several months and it is necessary to describe them. The "Consent to Construct" application of Mrs. Soufan went, first, to a body within the Authority known as the Water Management Advisory Board. This body conducted a hearing on June 23rd and quickly recommended that Mrs. Soufan's application be granted. This favourable recommendation did not, however, end Mrs. Soufan's problems with the Authority. The application then went, as it was required to do, to the executive committee of the Authority and the executive committee decided to overturn the recommendation and direct a full-dress hearing on the consent question under s. 28(3) of the C.A.A. This latter hearing went forward on August 11th with Mrs. Soufan appearing as a party to the proceeding. By letter to Mrs. Soufan, dated August 15th, the executive committee confirmed its overturning of the recommendation of the lower body in the Authority hierarchy and refused approval of the application. Paragraph 2 of this letter sets out the reasons for the refusal in the following language:

The Committee resolved to deny the Application as submitted. In the opinion of the Authority, the reconstruction and renovation of the two existing structures would substantially increase the potential for property damage due to flooding. The area proposed for development is within the Floodway (defined as the area below the 1:100 Year Flood Elevation) of the Thames River where Provincial and Conservation Authority floodplain management policies generally prohibit building or filling.

Following this adverse decision, Mrs. Soufan elected to appeal the decision of the executive committee, under s. 28(5) of the C.A.A., to the Minister of Natural Resources. This appeal which, by practice is heard by the Mining and Lands

Commissioner, is now pending.

Mrs. Soufan's roughly contemporaneous attempt to obtain relief at the city level -- through her building permit applications -- met with different results. She had learned as far back as May 3rd that the renovation work would have led to results in contravention of the applicable zoning by-law. Accordingly, she made an application to the local committee of adjustment for a minor variance permitting the planned changes in the interior of her properties. On June 13th, following a hearing on June 6th, the committee of adjustment released its decision in which it granted the minor variance, thereby permitting her to do the renovations she had already, in fact, embarked upon in April, subject to the issuance of building permits.

While the record before me is not clear on everything that Mrs. Soufan did after the favourable committee of adjustment decision, it is clear that she, or someone on her behalf, brought her difficulties with the Authority to the attention of the London municipal council. She had applied for building permits to Mr. Cerminara on July 4th. At its meeting of September 19th the council decided to pass a resolution, after an apparently spirited debate, directing Mr. Cerminara to issue the required building permits to Mrs. Soufan on condition that she save harmless the city from any claims arising from their issuance. This step was taken in the teeth of a joint memorandum signed by the city administrator and city solicitor, advising against the issuance of permits because of Mrs. Soufan's possible violation of the O. Reg. 171/88. This memorandum says, in part:

Mayor and Members

City Council

Re: Deferred Matter No. 1 --
September 19, 1988 Council Meeting
1 and 3 High Street -- Soufan and UTRCA

This letter is being submitted as a result of numerous inquiries regarding the position of the Civic Administration

on the above matter.

The Civic Administration is of the opinion that, having regard to the circumstances, there is greater justification for not issuing a building permit than there is for issuing one, for the following reasons:

1. In the absence of the Authority's permission, the construction in question allegedly contravenes the floodway regulations, a situation which technically prevents the Chief Building Official from issuing a permit. This is not a case of oversight by the owner in failing to get the Authority's permission; the owner actually sought but was refused permission ...

The upshot was that Mr. Cerminara issued building permits on October 14th. Then followed this application by the Authority under the Building Code Act seeking an order setting aside the issuance of such permits. As I have said, the Authority seeks its relief under s. 15 of the Building Code Act. The relevant provisions of s. 15 are s-ss. (1) and (3):

15(1) Any person who considers himself aggrieved by an order given or decision made by an inspector or chief official under this Act or the regulations may, within twenty days after the order or decision is made, apply to the judge of the county or district court for a hearing and appeal.

.

(3) Where an application is made to a judge for a hearing under subsection (1), the judge shall appoint a time for and hold the hearing and may rescind or affirm the order or decision of the inspector or chief official or take such action as the judge considers the inspector or chief official ought to take in accordance with this Act and the regulations, and for such purposes the judge may substitute his opinion for that of the inspector or chief official.

All counsel acknowledge that the Authority falls into the category of an "aggrieved" person within s. 15(1) of the Act.

Of course, this concession of responding counsel -- Mr. Hoffer for Mrs. Soufan and Mr. Barber for the city -- is subject to their common position that, on the facts of this case, the issuance of the building permits was perfectly proper and lawful.

Put in a nutshell, Mr. Inglis' argument for the applicant Authority is grounded on an interpretation of the language of s. 28(1)(e) of the C.A.A. which reads this way:

28(1) Subject to the approval of the Lieutenant Governor in Council, an authority may make regulations applicable in the area under its jurisdiction,

.

(e) prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure in or on a pond or swamp or in any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of such regulations;

His position may, I think, be fairly summarized as flowing from a set of propositions:

(1) First, he submits that the renovation work carried on and to be carried on by Mrs. Soufan falls within the plain meaning of the term "construction" as employed in this section.

(2) Because Mrs. Soufan's work is caught by this section, she was required to obtain the Authority's consent for it under O. Reg. 171/88.

(3) Her failure to obtain such consent means that her work to date and in the future would be unlawful activity, as being contrary to the combined effect of the C.A.A. and O. Reg. 171/88.

(4) Her work also falls within the meaning of the term "construct" as used in s. 5(1) of the Building Code Act.

(5) Finally, as a consequence of all of the above, the London council should not have ordered, and Mr. Cerminara should not have issued, building permits for Mrs. Soufan because s. 6(1)(a) of the Building Code Act requires a chief building officer not to issue a building permit if the proposed work will contravene any other applicable law.

This syllogistic-like argument of Mr. Inglis is challenged vigorously by counsel for Mrs. Soufan and the City of London. They argue, essentially, that the position of the Authority must fail because internal renovations of the kind contemplated by Mrs. Soufan do not fall within the reach of the terms "construction", "construct" and "building", as used in the C.A.A. and O. Reg. 171/88. If they do not, then, of course, the chief building officer issued his building permits lawfully and it cannot be said that the permits "... contravene any other applicable law ..." within s. 6(1)(a) of the Building Code Act.

Counsel for the respondents provide four supporting propositions for their central argument:

(1) Permission is only required from the Authority where a fresh building or, perhaps, an addition to an existing building is to be constructed.

(2) O. Reg. 171/88, read contextually, clearly cannot apply to internal renovations.

(3) The term "construction" as used in the C.A.A. must be interpreted within the context of that Act and not by reference to the definition section of the Building Code Act, an Act with different purposes.

(4) The terms "construction", "construct" and "building", as used variously in the C.A.A. and its subsidiary regulation, O. Reg. 171/88, should be strictly construed where their application could deprive an owner of proprietary rights or, alternatively, where they might have penal consequences.

In approaching the somewhat complex questions raised by counsel in this case, one must, I think, start with an analysis

of the key provisions of the relevant statutes and regulation. The C.A.A. was first enacted by S.O. 1946, c. 11. It is a relatively early example, in Ontario, of an attempt at environmental protection legislation. The full title of the original C.A.A. gives some idea of what it was attempting to achieve:

An Act to provide for the Establishment of Conservation Authorities for the purposes of the Conservation, Restoration and Development of Natural Resources, other than Gas, Oil, Coal and Minerals and for the Prevention of Floods and of Water Pollution.

Generally speaking, the C.A.A. called for procedures whereby its objects would be implemented by local entities known as "conservation authorities". These local authorities would be responsible, within a designated region embracing two or more municipalities, for the development of a "scheme" aimed, broadly, at protecting the natural resources of the watershed within the defined territorial jurisdiction of the various local authorities set up across Ontario. The present applicant Authority was, of course, one of the authorities so created under the C.A.A.

While the original C.A.A., in s. 13, defined the powers of the local authorities -- ranging from the power to study and investigate the watershed to the power to purchase, lease or even expropriate lands -- it did not address the power to oversee the construction of buildings on the watershed. Indeed, s. 16, which was the precursor of the present s. 28 of the C.A.A., restricted an authority's power to pass regulations to largely internal matters such as the conduct of meetings, the powers of officers and so on.

Inevitably, the 1946 Act underwent many changes down through the years. The Conservation Authorities Act, R.S.O. 1960, c. 62 replaced old s. 16 with an enlarged s. 20. By s. 20 the authorities were given greatly increased powers to pass regulations aimed at the broader objects of their existence. However, while s. 20(1)(d) enabled an authority to pass regulations prohibiting or regulating the placing or dumping of

fill, it did not mention any regulatory power over construction projects on floodplain lands. Section 20(2)(b) went on to provide that such regulations "... shall not interfere with any rights or powers conferred upon a municipality ...".

By the Conservation Authorities Amendment Act, S.O. 1961-62, c. 16, the regulation of "construction", in addition to fill, was first introduced into the C.A.A. The relevant provision reads as follows:

9. Clause d of subsection 1 of section 20 of The Conservation Authorities Act is repealed and the following substituted therefor:

(d) prohibiting or regulating the construction of any building or structure, or the placing or dumping of fill of any kind, in or on a pond or swamp or in any area below the high-water mark of a lake, river, creek or stream.

Then, in the following year, another amendment was introduced which had the effect of providing separate clauses for the subjects of fill and construction regulation (S.O. 1962-63, c. 20):

4(1) Clause d of subsection 1 of section 20 of The Conservation Authorities Act, as re-enacted by section 9 of The Conservation Authorities Amendment Act, 1961-62, is repealed and the following substituted therefor:

(d) prohibiting or regulating the construction of any building or structure in or on a pond or swamp or in any area below the high-water mark of a lake, river, creek or stream;

(e) prohibiting or regulating the placing or dumping of fill of any kind in any defined part of the area over which the authority has jurisdiction in which in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill.

The first regulation of significance under the Act was O.

Reg. 139/61, effective on July 1, 1961. This regulation gave the Authority the power to control the placing or dumping of fill on floodplain lands and called for a special application procedure if someone wished to obtain permission to place or dump fill. After the passage of the two amendments to the C.A.A. which gave the Authority powers of approval over construction work, O. Reg. 322/64 was passed as a replacement for O. Reg. 139/61. New O. Reg. 322/64 followed the principle of the statutory amendments and set up a regulatory scheme for construction work and the placing or dumping of fill on the floodplain: s. 3 purported to prohibit such work but the following sections -- ss. 4 to 7 -- then went on to set up an "application" procedure under which an interested person could apply to the Authority for permission to carry out construction or fill work. This application procedure is substantially the same as the procedure outlined in present O. Reg. 171/88, although later amendments to the predecessor to present s. 28 of the C.A.A. fleshed out this procedure by making it mandatory that the Authority hold hearings in certain cases and also allowing an applicant to appeal to the Minister if an application were refused by the executive committee of the Authority.

Two final points should be made about the course of the changes to the C.A.A. through the years. First, while old s. 20(2)(b) expressly stated that regulations passed under the C.A.A. could not interfere with any rights or powers conferred upon a municipality, present s. 28(2)(b) substantially narrowed the earlier provision by providing that such regulations could not "... interfere with any rights or powers conferred upon a municipality in respect of the use of water for municipal purposes, ...". Second, it is to be noted that no version of the C.A.A. including the present one, has ever attempted to define such critically important terms of present s. 28 as "construction", "building" and "structure". Equally, present O. Reg. 171/88 and its predecessors, do not define the terms, "construction", or "construct" although s. 1 of the Regulation defines "building" as meaning "... a building or structure of any kind; ...".

As I have said, the C.A.A. has undergone many changes through

the years to make it a more effective and comprehensive piece of environmental legislation. Section 28 is an example of one of the changed provisions and was obviously aimed at permitting the enactment, by Authorities, of regulations which would enable them to implement their powers in a manner consistent with the objectives of the statute itself.

For the purposes of this case, the relevant provision of s. 28 is s. 28(1)(e), already quoted above. This rather sparse provision is the only one which purports to give a local Authority any sort of control over construction projects, of whatever kind, on floodplain lands. The critical enabling language in the paragraph is that which empowers the enactment of regulations "... prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure ...". Rather remarkably, nowhere in this section, or elsewhere in the C.A.A., is there a special definition section or other provision, which attempts to define the intended scope or sweep of this paragraph. Was it intended, for example, to permit regulations only dealing with the construction of new buildings or structures or, alternatively, would it also permit regulations controlling both additions to existing buildings and internal construction work, of whatever kind, in existing buildings?

By contrast, the Building Code Act enacted to permit municipalities to exercise control over construction projects within their boundaries, contains much more specific guidance. Section 5(1) contains a broad controlling provision phrased this way:

5(1) No person shall construct or demolish or cause to be constructed or demolished a building in a municipality unless a permit has been issued therefor by the chief official.

But s. 1(1), a definition section, adds flesh and blood to s. 5 by providing the following important definitional content for the words "construct" and "construction":

(e) "construct" means to do anything in the erection, installation or extension or material alteration or repair of

a building and includes the installation of a building unit fabricated or moved from elsewhere, and "construction" has a corresponding meaning;

This definition makes it abundantly clear that building permits are called for not only in the case of construction of new buildings but, also, for internal repairs and renovations of a material character.

Leaving aside the difficulties with s. 28(1)(e) of the C.A.A. itself, one is also faced with the compounding factor of O. Reg. 171/88, enacted under the enabling powers of s. 28(1)(e). Regardless of the reach, or lack of reach, of s. 28(1)(e), one must decide, as an almost discrete problem, how far O. Reg. 171/88 has gone with the regulatory powers contemplated by s. 28(1)(e) of the parent C.A.A.

The relevant portions of O. Reg. 171/88 are these:

3. No person shall,

(a) construct any building or permit any building to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;

.

4. Subject to the Ontario Water Resources Act or to any private interest, the Authority may permit, in writing, the construction of any building or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies, if, in the opinion of the Authority, the site of the building or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

5(1) A signed application for permission to construct a building must be filed with the Authority and include,

- (a) four copies of a plan of the property showing the proposed location of the building, its elevation and the proposed final grade plan;
- (b) four copies of a complete description of the type of building to be constructed, including drainage details;
- (c) four copies of a statement of the dates between which the construction will be carried out; and
- (d) four copies of a statement of the proposed use of the building following completion of the construction.

Similarly to the C.A.A., the Regulation fails to define the critical term "construct" although s. 1 does define the terms "building or structure" as meaning "... building or structure of any kind ...".

I turn now to the meaning to be given to the terms "construction" and "building" as those terms are used in s. 28(1)(e) of the C.A.A. If, of course, this provision does not encompass internal renovations within an existing building, most clearly and, *a fortiori*, subordinate O. Reg. 171/88 cannot reach internal renovations because the regulation would be ultra vires to that extent: after all, a subordinate regulation cannot override and over-reach its parent statute.

Section 28(1)(e) of the C.A.A. purports to regulate "... the construction of any building or structure ..." on floodplain lands. The critical terms, "construction", "building" and "structure" are, as I have said, left undefined.

As it seems to me, this enabling language must be given its plain and ordinary grammatical meaning. I have examined the context of the C.A.A. as a whole and the provisions of prior versions of the statute back to 1946 and can find no hint that any other approach is justifiable. Professor Driedger, in his seminal study, *Construction of Statutes*, 2nd ed. (1983), has described the modern general principle of statutory construction this way at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

An example of this great principle in the modern cases may be found in the following passage from the judgment of Lord Atkinson in *City of Victoria v. Bishop of Vancouver Island* (1921), 59 D.L.R. 399 at p. 402, [1921] 3 W.W.R. 214, [1921] A.C. 384 at p. 387:

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

Considered in the light of this principle, can, then, the language of s. 28(1)(e) support an interpretation which allows the Authority to control internal renovations in an existing building? The Shorter Oxford English Dictionary, 3rd ed. (1973), p. 408, provides, *inter alia*, the following definitions of "construction":

1. The action of framing, devising, or forming, by the putting together of parts; erection, building; ...
2. The manner in which a thing is constructed or formed; structure
- ... 3. A thing constructed ...

The verb "construct" is similarly defined: "1. To make or form by fitting the parts together; to frame, build, erect ...". At p. 249, "building" is defined this way: "2. That which is built; a structure, edifice ...". Finally, "structure" is defined at p. 2156:

1. The action, practice or process of building or construction ...
2. Manner of building or construction; the

way in which an edifice, machine, etc. is made or put together ... 3. The mutual relation of the constituent parts or elements of a whole as determining its peculiar nature or character ... 4. That which is built or constructed; a building or edifice of any kind, esp. one of considerable size and imposing appearance ... 6. An organized body or combination of mutually connected and dependent parts or elements ...

To me these definitions, and similar ones in other dictionaries, state expressly or, by implication, that, in ordinary parlance, the terms in question embrace work aimed at the erection of some complete structure or edifice, of whatever kind, and not work aimed at the mere renovation of such an existing structure.

Section 28(1)(e) talks of regulations "... for the construction of a building ...". I do not see how this simple, unambiguous language can be tortured or stretched to include internal repair and renovation work within an existing building.

It is not, I think, uninstructive to consider here what the legislature did, in defining the term "construct", in the Building Code Act. There, the legislative draftsman obviously felt that it would be foolhardy to leave the term undefined as it was used in s. 5(1) of the Act. Hence, the definition section of that Act, s. 1, broadly defined "construct" to make it clear that building permits were required not only for the construction of new buildings but, also, the "... material alteration or repair of a building ...".

Mr. Inglis raised essentially two major points in aid of his central submission that O. Reg. 171/88 should catch Mrs. Soufan's work, namely, (1) that it would be illogical and inappropriate to give the terms "construction" and "construct", as used in the C.A.A. and O. Reg. 171/88, different and narrower meanings from those set forth in the Building Code Act and (2) that, in any event, they were broad enough to embrace renovations work. As to his first point, as I have said, the language of the Building Code Act will not support him.

Plainly, there, the legislature chose to particularize the definitional content of these terms and, in effect, enlarge upon their ordinary meanings by reference to the special definition contained in s. 1. In support of his second point Mr. Inglis relied upon the case of *Dawson Creek v. Lougheed*, [1959] 19 D.L.R. (2d) 249 (B.C.C.A.). There, the question was whether s. 711(c) of the British Columbia Municipal Act, R.S.B.C. 1979, c. 290, which purported to regulate the "... construction of buildings ..." for fire-protection purposes, was restricted to the construction of new buildings only or included the power to regulate additions and alterations to existing buildings. The court held that the language was, in fact, broad enough to include the proposed additions and alterations. However, it is plain that the court gave this broad interpretation to the subsection by examining the context within which it was included. Coady J.A., at pp. 251-2, carefully tied his holding to introductory language of the section and an immediately preceding subsection:

Section 711 of the Municipal Act, 1957 (B.C.), c. 42, reads as follows:

"711. The Council may, for the health, safety, and protection of persons and property, and subject to the 'Health Act' and the 'Fire Marshal Act' and the regulations made thereunder, by by-law [am. 1958, c. 32, s. 314(a)]:

"(a) Regulate the construction, alteration, repair or demolition of buildings and structures:

"(c) Establish areas to be known as 'fire limit' and regulate the construction of buildings in each of such areas in respect of precautions against the danger of fire, and discriminate and differentiate between the areas as to the character of the buildings permitted in each of them."

.

The opening words of s. 711 seem to me to indicate a clear intention of the Legislature to authorize municipalities to

enact by-laws for the health, safety and protection of persons and property. The authority therefore to fix fire limits and provide for Regulations with respect to the construction of buildings within a fire area or fire areas must be read and interpreted having reference to the opening words of s. 711. It would seem strange indeed that the Legislature intended to restrict municipalities, when fire areas are established, to the regulation of construction of buildings only, and not to the regulation of additions to present buildings or alterations thereto. It is clear that building by-laws adopted by municipalities pursuant to s. 711 may regulate additions to or alterations of present buildings, and I see no particular reason why the phrase "construction of buildings" as appears in s. 711(c), should be restricted only to what in effect would be the construction of new buildings. The meaning to be assigned to the word "'construction", s. 711(c), must be related to the context. When read with the context, and more particularly the opening words of s. 711, it seems clear to me that the word "construction" in s. 711(c) should be taken to include reconstruction, addition and alteration, and should not be interpreted so as to confine it to the construction of a new building only: see Craies on Statute Law, 5th ed., pp. 93-4.

Obviously, in that case, Coady J.A., concluded that the interpretation urged by the landowner appellant would have led to an absurd result and one which was inconsistent with the contextual setting of the subsection.

That case is not this case. I find nothing in s. 28 of the C.A.A. -- or for that matter anywhere else in the Act -- to indicate that the legislature intended the Authority to exercise powers over renovations within an existing building on the floodplain.

In coming to this conclusion, I am deeply conscious, as well, of the direction to judges embarking upon statutory construction contained in s. 10 of the Interpretation Act, R.S.O. 1980, c. 219:

10. Every Act shall be deemed to be remedial, whether its

immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

This statutory commandment, which seems first to have been enacted in 1849 (S.C. 1849 (12 Vict.), c. 10) has long been ignored or explained away by generations of lawyers and judges in Ontario and, indeed, elsewhere in Canada. The record of studied indifference is well diagrammed in Professor Eric Tucker's brilliant essay, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's" (1985), 35 U.T.L.J. 113.

Recently, the Ontario Court of Appeal attempted to resuscitate s. 10 in the case of *Re Trustees of St. Peter's Evangelical Lutheran Church and City of Ottawa* (1980), 30 O.R. (2d) 740, 118 D.L.R. (3d) 528, 14 M.P.L.R. 51 (Ont.C.A.). MacKinnon A.C.J.O., for the court, said this about the court's approach to the interpretation of the Ontario Heritage Act, S.O. 1974, c. 122, at p. 741:

We are of the view that the matter really comes to a narrow compass on the particular and peculiar facts of this case. It should be said at the opening that the object and purpose of the Ontario Heritage Act, 1974 (Ont.), c. 122, is clear. It is to preserve and conserve for the citizens of this country, *inter alia*, properties of historical and architectural importance. The Act is a remedial one and should be given a fair and liberal interpretation to achieve those public purposes which I have recited.

While MacKinnon A.C.J.O. does not say he is applying s. 10 in express terms, it seems clear that his words are a paraphrase of it and that he must have intended to apply it.

The actual decision of the trial and appellate courts in the St. Peter's case was reversed by the Supreme Court of Canada

but, as I read the judgment of the Supreme Court, it does not disavow the view of MacKinnon A.C.J.O. that a judge must take a liberal and purposive approach to a statute if, at least, it is obviously remedial. What the Supreme Court added, however, as a sort of cautionary footnote to s. 10, was that it cannot be used to eviscerate the plain and obvious meaning of a statutory provision which does no violence or mischief to the complete statutory edifice and objects. McIntyre J., for the majority, said this (140 D.L.R. (3d) 577 at p. 593, [1982] 2 S.C.R. 616 at pp. 623-4, 20 M.P.L.R. 121):

The Ontario courts have adopted the approach dictated by s. 10 of the Interpretation Act and they have construed the statute in the purposive manner. In this they have given effect fully to the avowed purpose of The Ontario Heritage Act, 1974. Accepting the approach so taken, I am not of the view, however, that in an effort to give effect to what is taken to be the purpose of the statute it is open to the court of construction to disregard certain provisions of the Act. The whole Act must be construed. It must be construed to give effect to the purpose above described but also to have regard for many provisions of the Act, particularly ss. 34 and 67, the purpose of which is to protect the interests of the landowner concerned. To ignore these provisions, or to read them down to where they are deprived of any real significance, is not to construe the statute but to decline to assign any meaning to certain of the words that were used by the Legislature.

I have approached my interpretation of s. 28(1)(e) in the spirit of s. 10 of the Interpretation Act but I cannot conclude that it assists the Authority. The term "construction", as used in the statutory language, cannot bear the burden of the enlarged meaning ascribed to it by counsel for the Authority whether considered alone, contextually or within the objects of the Act. There is simply no evidence in a dictionary, common parlance, or the broad framework of the Act leading to the conclusion that the environmental objects of the Act will be defeated if the Authority does not have control over internal renovations of an existing building.

In the event I might be wrong in my interpretation of s. 28(1)(e), I feel I should also move on to consider the effect of O. Reg. 171/88. Here, of course, I am assuming -- against my own holding -- that s. 28(1)(e) of the C.A.A. does empower the Authority to enact a regulation under which it could regulate not only fresh construction but, also, renovations.

The inherent fragility of the Authority's position is, I think, accentuated by an examination of O. Reg. 171/88. The combined effect of ss. 3 and 4 of the Regulation, quoted above, is to prevent the construction of any kind of building in a floodplain without the permission of the Authority and the permission is to be granted only if the Authority is satisfied the site of the building and method of construction "... will not affect the control of flooding or pollution or the conservation of land ...".

The difficulty with this language is that it is narrower than the language of s. 28(1)(e) of the C.A.A. Note that s. 4 of the Regulation speaks of "the construction of any building" (emphasis added), and later mentions "the site of the building". This phraseology surely seems directed to the fresh construction of some kind of complete discrete entity and not internal renovations, however sized.

Section 5(1) continues this theme by reference to the procedure contemplated for an application for permission to construct a building. This subsection tells the applicant about the written materials he must supply to support his request for a permit from the Authority. Section 5(1)(a) requires "... four copies of a plan of the property showing the proposed location of the building, ..."; s. 5(1)(b) calls for "... four copies of a complete description of the type of building to be constructed ..."; s. 4(d) calls for "... four copies of a statement of the proposed use of the building ...". If this Regulation were intended to cover renovations of any kind, I would have thought that the provisions of s. 1, containing a definition of "building", s. 3 describing the scope of construction work covered and, more especially, s. 5, specifying the materials to be filed in support of a permit, would have been phrased far differently than they are.

In short, assuming the Authority could have enacted a regulation under C.A.A. to control internal renovations or repairs to any existing building, I do not consider that this regulation was crafted to achieve that result. What it does do is control the actual construction of any building, that is, any type of structure from, perhaps, a pup tent to a skyscraper but it does not control renovations within an existing structure at all.

I consider that all the points taken by counsel are subsumed in my interpretative conclusions on the meaning of the relevant provision of the C.A.A. and O. Reg. 171/88. In the result, the application must be dismissed because the issuance of building permits to Mrs. Soufan did not contravene the C.A.A. or its subordinate Regulation, O. Reg. 171/88.

Unless I hear from any counsel within 10 days indicating a desire to argue the question of costs, I feel the applicant Authority should pay the party-and-party costs of the City of London and Mrs. Soufan forthwith after assessment.

Application dismissed.

**INDEX TO BOOK OF AUTHORITIES RE APPLICATION FOR DEVELOPMENT OF
46 WEST BEACH ROAD**

Primary Sources

1. *Conservation Authorities Act*, R.S.O. 1990, c. C.27 at s. 28.
2. O. Reg. 42/06: CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY: REGULATION OF DEVELOPMENT, INTERFERENCE WITH WETLANDS AND ALTERATIONS TO SHORELINES AND WATERCOURSES

Adding a Second Story qualifies as a “development” under the *Conservation Authorities Act*

3. *R. v. Geil*, 2011 ONCJ 888, affirmed on appeal, leave to the Supreme Court of Canada dismissed

Ex Ante Protection from Harm

4. *R. v. Michaud*, 2015 ONCA 585, leave to the Supreme Court of Canada dismissed
5. *Lakehead Region Conservation Authority v. DeMichele*, 2010 ONCA 480

Expert Evidence

6. *Ouellette, et al v. Law Society of Alberta*, 2021 ABCA 99
7. *Allegro Wireless Canada Inc. v. The Queen*, 2021 TCC 27

Hearsay Evidence

8. *State Farm Mutual Automobile Insurance Co. and TD General Insurance Co., Re*, 2017 CarswellOnt 3327
9. *9770 v. Tarion Warranty Corporation, Claridge Homes (Crown Pointe) Inc.*, 2019 CarswellOnt 7828

Tab 1

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(8) The parties to the hearing are the applicant municipality, the authority, any other participating municipality or specified municipality of the authority that requests to be a party and such other persons as the Mining and Lands Commissioner, or such other body as may be prescribed by regulation, may determine. 2019, c. 9, Sched. 2, s. 8 (1).

Powers on hearing

(9) Upon hearing an application under this section, the Mining and Lands Commissioner, or such other body as may be prescribed by regulation, may confirm or vary the amounts owing and may order the specified municipality to pay the amounts. 2019, c. 9, Sched. 2, s. 8 (1).

Decision final

(10) A decision under subsection (9) is final. 2019, c. 9, Sched. 2, s. 8 (1).

Debt due

(11) The amounts owed to the authority set out in a notice sent to a specified municipality or in an order under subsection (9), as the case may be, are a debt due by the specified municipality to the authority and may be enforced by the authority as such. 2019, c. 9, Sched. 2, s. 8 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 27.2 of the Act is amended by striking out “Mining and Lands Commissioner” wherever it appears and substituting in each case “Local Planning Appeal Tribunal”. (See: 2020, c. 36, Sched. 6, s. 14)

Note: On a day to be named by proclamation of the Lieutenant Governor, section 14 of Schedule 6 to the *Protect, Support and Recover from COVID-19 Act (Budget Measures)*, 2020 is repealed. (See: 2021, c. 4, Sched. 6, s. 81 (2))

Note: On a day to be named by proclamation of the Lieutenant Governor, section 27.2 of the Act is amended by striking out “Mining and Lands Commissioner” wherever it appears and substituting in each case “Ontario Land Tribunal”. (See: 2021, c. 4, Sched. 6, s. 39 (9))

Note: On a day to be named by proclamation of the Lieutenant Governor, section 27.2 of the Act, as amended by section 14 of Schedule 6 to the *Protect, Support and Recover from COVID-19 Act (Budget Measures)*, 2020, is amended by striking out “Local Planning Appeal Tribunal” wherever it appears and substituting in each case “Ontario Land Tribunal”. (See: 2021, c. 4, Sched. 6, s. 39 (10))

Section Amendments with date in force (d/m/y) [+]

Regulations by authority re area under its jurisdiction

28 (1) Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,

- (a) restricting and regulating the use of water in or from rivers, streams, inland lakes, ponds, wetlands and natural or artificially constructed depressions in rivers or streams;
- (b) prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;
- (c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development;
- (d) providing for the appointment of officers to enforce any regulation made under this section or section 29;
- (e) providing for the appointment of persons to act as officers with all of the powers and duties of officers to enforce any regulation made under this section. 1998, c. 18, Sched. I, s. 12.

Delegation of powers

(2) A regulation made under subsection (1) may delegate any of the authority's powers or duties under the regulation to the authority's executive committee or to any other person or body, subject to any limitations and requirements that may be set out in the regulation. 1998, c. 18, Sched. I, s. 12.

Conditional permission

(3) A regulation made under clause (1) (b) or (c) may provide for permission to be granted subject to conditions and for the cancellation of the permission if conditions are not met. 1998, c. 18, Sched. I, s. 12.

References to maps

(4) A regulation made under subsection (1) may refer to any area affected by the regulation by reference to one or more maps that are filed at the head office of the authority and are available for public review during normal office business hours. 1998, c. 18, Sched. I, s. 12.

Minister's approval of development regulations

(5) The Minister shall not approve a regulation made under clause (1) (c) unless the regulation applies only to areas that are,

- (a) adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards;
- (b) river or stream valleys;
- (c) hazardous lands;
- (d) wetlands; or
- (e) other areas where, in the opinion of the Minister, development should be prohibited or regulated or should require the permission of the authority. 1998, c. 18, Sched. I, s. 12.

Regulations by L.G. in C. governing content of authority's regulations

(6) The Lieutenant Governor in Council may make regulations governing the content of regulations made by authorities under subsection (1), including flood event standards and other standards that may be used, and setting out what must be included or excluded from regulations made by authorities under subsection (1). 1998, c. 18, Sched. I, s. 12.

Invalid regulation

(7) A regulation made by an authority under subsection (1) that does not conform with the requirements of a regulation made by the Lieutenant Governor in Council under subsection (6) is not valid. 1998, c. 18, Sched. I, s. 12.

Transition

(8) Subject to subsection (9), if a regulation is made by the Lieutenant Governor in Council under subsection (6), subsection (7) does not apply to a regulation that was previously made by an authority under subsection (1) until two years after the regulation made by the Lieutenant Governor in Council comes into force. 1998, c. 18, Sched. I, s. 12.

Same

(9) If a regulation made by the Lieutenant Governor in Council under subsection (6) is amended by an amending regulation, subsection (7) does not apply, in respect of the amendment, to a regulation that was made by an authority under subsection (1) before the amending regulation, until such time as may be specified in the amending regulation. 1998, c. 18, Sched. I, s. 12.

Exceptions

(10) No regulation made under subsection (1),

- (a) shall limit the use of water for domestic or livestock purposes;
- (b) shall interfere with any rights or powers conferred upon a municipality in respect of the use of water for municipal purposes;
- (c) shall interfere with any rights or powers of any board or commission that is performing its functions for or on behalf of the Government of Ontario; or
- (d) shall interfere with any rights or powers under the *Electricity Act, 1998* or the *Public Utilities Act*. 1998, c. 15, Sched. E, s. 3 (8); 1998, c. 18, Sched. I, s. 12.

Activities under the Aggregate Resources Act

(11) A requirement for permission of an authority in a regulation made under clause (1) (b) or (c) does not apply to an activity approved under the *Aggregate Resources Act* after the *Red Tape Reduction Act, 1998* received Royal Assent. 1998, c. 18, Sched. I, s. 12.

Right to hearing

(12) Permission required under a regulation made under clause (1) (b) or (c) shall not be refused or granted subject to conditions unless the person requesting the permission has been given the opportunity to require a hearing before the authority or, if the authority so directs, before the authority's executive committee. 1998, c. 18, Sched. I, s. 12.

Powers of authority

(13) After holding a hearing under subsection (12), the authority or executive committee, as the case may be, shall,

- (a) refuse the permission; or
- (b) grant the permission, with or without conditions. 1998, c. 18, Sched. I, s. 12.

Grounds for refusing permission

(13.1) If the permission that the person requests is for development related to a renewable energy project, as defined in subsection 2 (1) of the *Electricity Act, 1998*, the authority or executive committee, as the case may be,

- (a) shall not refuse the permission unless it is necessary to do so to control pollution, flooding, erosion or dynamic beaches; and
- (b) shall not impose conditions unless they relate to controlling pollution, flooding, erosion or dynamic beaches. 2009, c. 12, Sched. L, s. 2; 2018, c. 16, s. 3 (1).

Reasons for decision

(14) If the authority or its executive committee, after holding a hearing, refuses permission or grants permission subject to conditions, the authority or executive committee, as the case may be, shall give the person who requested permission written reasons for the decision. 1998, c. 18, Sched. I, s. 12.

Appeal

(15) A person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister who may,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 28 (15) of the Act is amended by striking out "the Minister who may" in the portion before clause (a) and substituting "the Ontario Land Tribunal, and the Tribunal may". (See: 2021, c. 4, Sched. 6, s. 39 (11))

- (a) refuse the permission; or
- (b) grant the permission, with or without conditions. 1998, c. 18, Sched. I, s. 12.

Offence: contravening regulation

(16) Every person who contravenes a regulation made under subsection (1) or the terms and conditions of a permission of an authority in a regulation made under clause (1) (b) or (c) is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to a term of imprisonment of not more than three months. 1998, c. 18, Sched. I, s. 12; 2010, c. 16, Sched. 10, s. 1 (2).

Limitation for proceeding

(16.1) A proceeding with respect to an offence under subsection (16) shall not be commenced more than two years from the earliest of the day on which evidence of the offence is discovered or first comes to the attention of officers appointed under clause (1) (d) or persons appointed under clause (1) (e). 2010, c. 16, Sched. 10, s. 1 (3).

Orders

(17) In addition to any other remedy or penalty provided by law, the court, upon making a conviction under subsection (16), may order the person convicted to,

- (a) remove, at that person's expense, any development within such reasonable time as the court orders; and
- (b) rehabilitate any watercourse or wetland in the manner and within the time the court orders. 1998, c. 18, Sched. I, s. 12.

Non-compliance with order

(18) If a person does not comply with an order made under subsection (17), the authority having jurisdiction may, in the case of a development, have it removed and, in the case of a watercourse or wetland, have it rehabilitated. 1998, c. 18, Sched. I, s. 12.

Liability for certain costs

(19) The person convicted is liable for the cost of a removal or rehabilitation under subsection (18) and the amount is recoverable by the authority by action in a court of competent jurisdiction. 1998, c. 18, Sched. I, s. 12.

Powers of entry

(20) An authority or an officer appointed under a regulation made under clause (1) (d) or (e) may enter private property, other than a dwelling or building, without the consent of the owner or occupier and without a warrant, if,

- (a) the entry is for the purpose of considering a request related to the property for permission that is required by a regulation made under clause (1) (b) or (c); or
- (b) the entry is for the purpose of enforcing a regulation made under clause (1) (a), (b) or (c) and the authority or officer has reasonable grounds to believe that a contravention of the regulation is causing or is likely to cause significant environmental damage and that the entry is required to prevent or reduce the damage. 1998, c. 18, Sched. I, s. 12.

Time of entry

(21) Subject to subsection (22), the power to enter property under subsection (20) may be exercised at any reasonable time. 1998, c. 18, Sched. I, s. 12.

Notice of entry

(22) The power to enter property under subsection (20) shall not be exercised unless,

- (a) the authority or officer has given reasonable notice of the entry to the owner of the property and, if the occupier of the property is not the owner, to the occupier of the property; or
- (b) the authority or officer has reasonable grounds to believe that significant environmental damage is likely to be caused during the time that would be required to give notice under clause (a). 1998, c. 18, Sched. I, s. 12.

No use of force

(23) Subsection (20) does not authorize the use of force. 1998, c. 18, Sched. I, s. 12.

Offence: obstruction

(24) Any person who prevents or obstructs an authority or officer from entering property under subsection (20) is guilty of an offence and on conviction is liable to a fine of not more than \$10,000. 1998, c. 18, Sched. I, s. 12.

Definitions

(25) In this section,

"development" means,

- (a) the construction, reconstruction, erection or placing of a building or structure of any kind,
- (b) any change to a building or structure that would have the effect of altering the use or potential use of the building or structure, increasing the size of the building or structure or increasing the number of dwelling units in the building or structure,
- (c) site grading, or
- (d) the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere; ("aménagement")

"hazardous land" means land that could be unsafe for development because of naturally occurring processes associated with flooding, erosion, dynamic beaches or unstable soil or bedrock; ("terrain dangereux")

"pollution" means any deleterious physical substance or other contaminant that has the potential to be generated by development in an area to which a regulation made under clause (1) (c) applies; ("pollution")

"watercourse" means an identifiable depression in the ground in which a flow of water regularly or continuously occurs; ("cours d'eau")

"wetland" means land that,

- (a) is seasonally or permanently covered by shallow water or has a water table close to or at its surface,
- (b) directly contributes to the hydrological function of a watershed through connection with a surface watercourse,
- (c) has hydric soils, the formation of which has been caused by the presence of abundant water, and
- (d) has vegetation dominated by hydrophytic plants or water tolerant plants, the dominance of which has been favoured by the presence of abundant water,

but does not include periodically soaked or wet land that is used for agricultural purposes and no longer exhibits a wetland characteristic referred to in clause (c) or (d). ("terre marécageuse") 1998, c. 18, Sched. I, s. 12.

Transition

(26) A regulation that was in force immediately before the day the *Red Tape Reduction Act, 1998* received Royal Assent and that was lawfully made under clause (1) (e) or (f) of this section as it read immediately before that day shall be deemed to have been lawfully made under clause (1) (c). 1998, c. 18, Sched. I, s. 12.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 28 of the Act is repealed and the following substituted: (See: 2017, c. 23, Sched. 4, s. 25)

PART VI
REGULATION OF AREAS OVER WHICH AUTHORITIES HAVE JURISDICTION

Prohibited activities re watercourses, wetlands, etc.

28 (1) Subject to subsections (2), (3) and (4) and section 28.1, no person shall carry on the following activities, or permit another person to carry on the following activities, in the area of jurisdiction of an authority:

1. Activities to straighten, change, divert or interfere in any way with the existing channel of a river, creek, stream or watercourse or to change or interfere in any way with a wetland.
2. Development activities in areas that are within the authority's area of jurisdiction and are,
 - i. hazardous lands,
 - ii. wetlands,
 - iii. river or stream valleys the limits of which shall be determined in accordance with the regulations,
 - iv. areas that are adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to an inland lake and that may be affected by flooding, erosion or dynamic beach hazards, such areas to be further determined or specified in accordance with the regulations, or
 - v. other areas in which development should be prohibited or regulated, as may be determined by the regulations. 2017, c. 23, Sched. 4, s. 25.

Exception, aggregates

(2) The prohibitions in subsection (1) do not apply to an activity approved under the *Aggregate Resources Act* after December 18, 1998, the date the *Red Tape Reduction Act, 1998* received Royal Assent. 2017, c. 23, Sched. 4, s. 25.

Same, prescribed activities

(3) The prohibitions in subsection (1) do not apply to an activity or a type of activity that is prescribed by regulation and is carried out in accordance with the regulations. 2017, c. 23, Sched. 4, s. 25.

Same, prescribed areas

(4) The prohibitions in subsection (1) do not apply to any activity described in that subsection if it is carried out,

- (a) in an area that is within an authority's area of jurisdiction and specified in the regulations; and
- (b) in accordance with any conditions specified in the regulations. 2017, c. 23, Sched. 4, s. 25.

Definitions

(5) In this section,

Tab 2

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Conservation Authorities Act
Loi sur les offices de protection de la nature

ONTARIO REGULATION 42/06

**CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY: REGULATION OF DEVELOPMENT, INTERFERENCE WITH WETLANDS AND ALTERATIONS TO SHORELINES
AND WATERCOURSES**

Consolidation Period: From February 8, 2013 to the [e-Laws currency date](#).

Last amendment: [53/13](#).

Legislative History: [+]

This Regulation is made in English only.

Definition

1. In this Regulation,

“Authority” means the Central Lake Ontario Conservation Authority. O. Reg. 42/06, s. 1.

Development prohibited

2. (1) Subject to section 3, no person shall undertake development or permit another person to undertake development in or on the areas within the jurisdiction of the Authority that are,

(a) adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beaches, including the area from the furthest offshore extent of the Authority’s boundary to the furthest landward extent of the aggregate of the following distances:

(i) the 100 year flood level, plus the appropriate allowance for wave uprush shown in the most recent document entitled “Lake Ontario Shoreline Management Plan” available at the head office of the Authority,

(ii) the predicted long term stable slope projected from the existing stable toe of the slope or from the predicted location of the toe of the slope as that location may have shifted as a result of shoreline erosion over a 100-year period,

- (iii) where a dynamic beach is associated with the waterfront lands, the appropriate allowance inland to accommodate dynamic beach movement shown in the most recent document entitled "Lake Ontario Shoreline Management Plan" available at the head office of the Authority, and
 - (iv) an allowance of 15 metres inland;
- (b) river or stream valleys that have depressional features associated with a river or stream, whether or not they contain a watercourse, the limits of which are determined in accordance with the following rules:
- (i) where the river or stream valley is apparent and has stable slopes, the valley extends from the stable top of bank, plus 15 metres, to a similar point on the opposite side,
 - (ii) where the river or stream valley is apparent and has unstable slopes, the valley extends from the predicted long term stable slope projected from the existing stable slope or, if the toe of the slope is unstable, from the predicted location of the toe of the slope as a result of stream erosion over a projected 100-year period, plus 15 metres, to a similar point on the opposite side,
 - (iii) where the river or stream valley is not apparent, the valley extends the greater of,
 - (A) the distance from a point outside the edge of the maximum extent of the flood plain under the applicable flood event standard, plus 15 metres, to a similar point on the opposite side, and
 - (B) the distance from the predicted meander belt of a watercourse, expanded as required to convey the flood flows under the applicable flood event standard, plus 15 metres, to a similar point on the opposite side;
- (c) hazardous lands;
- (d) wetlands; or
- (e) other areas where development could interfere with the hydrologic function of a wetland, including areas within 120 metres of all provincially significant wetlands and wetlands greater than 2 hectares in size, and areas within 30 metres of wetlands less than 2 hectares in size. O. Reg. 42/06, s. 2 (1); O. Reg. 53/13, s. 1 (1-3).

(2) All areas within the jurisdiction of the Authority that are described in subsection (1) are delineated as the "Regulation Limit" shown on a series of maps filed at the head office of the Authority under the map title "Ontario Regulation 97/04: Regulation for Development, Interference with Wetlands and Alterations to Shorelines and Watercourses". O. Reg. 53/13, s. 1 (4).

(3) If there is a conflict between the description of areas in subsection (1) and the areas as shown on the series of maps referred to in subsection (2), the description of areas in subsection (1) prevails. O. Reg. 53/13, s. 1 (4).

Permission to develop

3. (1) The Authority may grant permission for development in or on the areas described in subsection 2 (1) if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development. O. Reg. 42/06, s. 3 (1).

(2) The permission of the Authority shall be given in writing, with or without conditions. O. Reg. 42/06, s. 3 (2).

(3) Subject to subsection (4), the Authority's executive committee, or one or more employees of the Authority that have been designated by the Authority for the purposes of this section, may exercise the powers and duties of the Authority under subsections (1) and (2) with respect to the granting of permissions for development in or on the areas described in subsection 2 (1). O. Reg. 53/13, s. 2.

(4) A designate under subsection (3) shall not grant a permission for development with a maximum period of validity of more than 24 months. O. Reg. 53/13, s. 2.

Application for permission

4. A signed application for permission to undertake development shall be filed with the Authority and shall contain the following information:

1. Four copies of a plan of the area showing the type and location of the proposed development.
2. The proposed use of the buildings and structures following completion of the development.
3. The start and completion dates of the development.
4. The elevations of existing buildings, if any, and grades and the proposed elevations of buildings and grades after the development.
5. Drainage details before and after the development.
6. A complete description of the type of fill proposed to be placed or dumped.
7. Such other technical studies or plans as the Authority may request. O. Reg. 42/06, s. 4; O. Reg. 53/13, s. 3.

Alterations prohibited

5. Subject to section 6, no person shall straighten, change, divert or interfere in any way with the existing channel of a river, creek, stream or watercourse or change or interfere in any way with a wetland. O. Reg. 42/06, s. 5.

Permission to alter

6. (1) The Authority may grant permission to straighten, change, divert or interfere with the existing channel of a river, creek, stream or watercourse or to change or interfere with a wetland. O. Reg. 42/06, s. 6 (1); O. Reg. 53/13, s. 4 (1).

(2) The permission of the Authority shall be given in writing, with or without conditions. O. Reg. 42/06, s. 6 (2).

(3) Subject to subsection (4), the Authority's executive committee, or one or more employees of the Authority that have been designated by the Authority for the purposes of this section, may exercise the powers and duties of the Authority under subsections (1) and (2) with respect to the granting of permissions for alteration. O. Reg. 53/13, s. 4 (2).

(4) A designate under subsection (3) shall not grant a permission for alteration with a maximum period of validity of more than 24 months. O. Reg. 53/13, s. 4 (2).

Application for permission

7. A signed application for permission to straighten, change, divert or interfere with the existing channel of a river, creek, stream or watercourse or change or interfere with a wetland shall be filed with the Authority and shall contain the following information:

1. Four copies of a plan of the area showing plan view and cross-section details of the proposed alteration.
2. A description of the methods to be used in carrying out the alteration.
3. The start and completion dates of the alteration.
4. A statement of the purpose of the alteration.
5. Such other technical studies or plans as the Authority may request. O. Reg. 42/06, s. 7; O. Reg. 53/13, s. 5.

Cancellation of permission

8. (1) The Authority may cancel a permission granted under section 3 or 6 if it is of the opinion that the conditions of the permission have not been met. O. Reg. 42/06, s. 8 (1); O. Reg. 53/13, s. 6 (1).

(2) Before cancelling a permission, the Authority shall give a notice of intent to cancel to the holder of the permission indicating that the permission will be cancelled unless the holder shows cause at a hearing why the permission should not be cancelled. O. Reg. 42/06, s. 8 (2).

(3) Following the giving of the notice under subsection (2), the Authority shall give the holder at least five days notice of the date of the hearing. O. Reg. 42/06, s. 8 (3); O. Reg. 53/13, s. 6 (2).

Period of validity of permissions and extensions

9. (1) The maximum period, including an extension, for which a permission granted under section 3 or 6 may be valid is,

- (a) 24 months, in the case of a permission granted for projects other than projects described in clause (b); and
- (b) 60 months, in the case of a permission granted for,
 - (i) projects that, in the opinion of the Authority or its executive committee, cannot reasonably be completed within 24 months from the day the permission is granted, or
 - (ii) projects that require permits or approvals from other regulatory bodies that, in the opinion of the Authority or its executive committee, cannot reasonably be obtained within 24 months from the day permission is granted. O. Reg. 53/13, s. 7.

(2) The Authority or its executive committee may grant a permission for an initial period that is less than the applicable maximum period specified in subsection (1) if, in the opinion of the Authority or its executive committee, the project can be completed in a period that is less than the maximum period. O. Reg. 53/13, s. 7.

(3) If the Authority or its executive committee grants a permission under subsection (2) for an initial period that is less than the applicable maximum period of validity specified in subsection (1), the Authority or its executive committee may grant an extension of the permission if,

- (a) the holder of the permission submits a written application for an extension to the Authority at least 60 days before the expiry of the permission;
- (b) no extension of the permission has previously been granted; and
- (c) the application sets out the reasons for which an extension is required and, in the opinion of the Authority or its executive committee, demonstrates that circumstances beyond the control of the holder of the permission will prevent completion of the project before the expiry of the permission. O. Reg. 53/13, s. 7.

(4) When granting an extension of a permission under subsection (3), the Authority or its executive committee may grant the extension for the period of time requested by the holder in the application or for such period of time as the Authority or its executive committee deems appropriate, as long as the total period of validity of the permission does not exceed the applicable maximum period specified in subsection (1). O. Reg. 53/13, s. 7.

(5) For the purposes of this section, the granting of an extension for a different period of time than the period of time requested does not constitute a refusal of an extension. O. Reg. 53/13, s. 7.

(6) The Authority or its executive committee may refuse an extension of a permission if it is of the opinion that the requirements of subsection (3) have not been met. O. Reg. 53/13, s. 7.

(7) Before refusing an extension of a permission, the Authority or its executive committee shall give notice of intent to refuse to the holder of the permission, indicating that the extension will be refused unless,

(a) the holder requires a hearing, which may be before the Authority or its executive committee, as the Authority directs; and

(b) at the hearing, the holder satisfies the Authority, or the Authority's executive committee, as the case may be,

(i) that the requirements of clauses (3) (a) and (b) have been met, and

(ii) that circumstances beyond the control of the holder will prevent completion of the project before the expiry of the permission. O. Reg. 53/13, s. 7.

(8) If the holder of the permission requires a hearing under subsection (7), the Authority or its executive committee shall give the holder at least five days notice of the date of the hearing. O. Reg. 53/13, s. 7.

(9) After holding a hearing under subsection (7), the Authority or its executive committee shall,

(a) refuse the extension; or

(b) grant an extension for such period of time as it deems appropriate, as long as the total period of validity of the permission does not exceed the applicable maximum period specified in subsection (1). O. Reg. 53/13, s. 7.

(10) Subject to subsection (11), one or more employees of the Authority that have been designated by the Authority for the purposes of this section may exercise the powers and duties of the Authority under subsections (2), (3) and (4), but not those under subsections (6), (7), (8) and (9). O. Reg. 53/13, s. 7.

(11) A designate under subsection (10) shall not grant an extension of a permission for any period that would result in the permission having a period of validity greater than 24 months. O. Reg. 53/13, s. 7.

Appointment of officers

10. The Authority may appoint officers to enforce this Regulation. O. Reg. 42/06, s. 10.

Flood event standards

11. (1) The applicable flood event standards used to determine the maximum susceptibility to flooding of lands or areas within the watersheds in the area of jurisdiction of the Authority are the Hurricane Hazel Flood Event Standard, the 100 Year Flood Event Standard and the 100 Year flood level plus wave uprush, described in the Schedule. O. Reg. 42/06, s. 11 (1).

(2) The Hurricane Hazel Flood Event Standard applies to all watersheds within the area of jurisdiction of the Authority except for,

(a) Pringle Creek and Darlington Creek where the 100 Year Flood Event Standard applies; and

(b) Lake Ontario in the Great Lakes-St. Lawrence River System where the 100 Year flood level plus wave uprush applies. O. Reg. 42/06, s. 11 (2).

12. REVOKED: O. Reg. 53/13, s. 8.

SCHEDULE

1. The Hurricane Hazel Flood Event Standard means a storm that produces over a 48-hour period,

(a) in a drainage area of 25 square kilometres or less, rainfall that has the distribution set out in Table 1; or

(b) in a drainage area of more than 25 square kilometres, rainfall such that the number of millimetres of rain referred to in each case in Table 1 shall be modified by the percentage amount shown in Column 2 of Table 2 opposite the size of the drainage area set out opposite thereto in Column 1 of Table 2.

TABLE 1

73 millimetres of rain in the first 36 hours
6 millimetres of rain in the 37th hour
4 millimetres of rain in the 38th hour
6 millimetres of rain in the 39th hour
13 millimetres of rain in the 40th hour
17 millimetres of rain in the 41st hour
13 millimetres of rain in the 42nd hour
23 millimetres of rain in the 43rd hour
13 millimetres of rain in the 44th hour
13 millimetres of rain in the 45th hour
53 millimetres of rain in the 46th hour
38 millimetres of rain in the 47th hour
13 millimetres of rain in the 48th hour

TABLE 2

Column 1	Column 2
Drainage Area (square kilometres)	Percentage
26 to 45 both inclusive	99.2
46 to 65 both inclusive	98.2
66 to 90 both inclusive	97.1
91 to 115 both inclusive	96.3
116 to 140 both inclusive	95.4
141 to 165 both inclusive	94.8
166 to 195 both inclusive	94.2
196 to 220 both inclusive	93.5
221 to 245 both inclusive	92.7
246 to 270 both inclusive	92.0
271 to 450 both inclusive	89.4
451 to 575 both inclusive	86.7
576 to 700 both inclusive	84.0
701 to 850 both inclusive	82.4
851 to 1000 both inclusive	80.8
1001 to 1200 both inclusive	79.3
1201 to 1500 both inclusive	76.6
1501 to 1700 both inclusive	74.4
1701 to 2000 both inclusive	73.3
2001 to 2200 both inclusive	71.7
2201 to 2500 both inclusive	70.2
2501 to 2700 both inclusive	69.0
2701 to 4500 both inclusive	64.4
4501 to 6000 both inclusive	61.4
6001 to 7000 both inclusive	58.9
7001 to 8000 both inclusive	57.4

2. The 100 Year Flood Event Standard means rainfall or snowmelt, or a combination of rainfall and snowmelt, that has a probability of occurrence of one per cent during any given year.

3. The 100 Year flood level means the peak instantaneous still water level plus an allowance for wave uprush and other water-related hazards that has a probability of occurrence of one per cent during any given year.

O. Reg. 42/06, Sched.

Tab 3

2011 ONCJ 888
Ontario Court of Justice

R. v. Geil

2011 CarswellOnt 16035, 2011 ONCJ 888, [2011] O.J. No. 6517

**Her Majesty the Queen and Jason Geil, Janet Bratton
Ont. Corporation #1410025 o/a Geil Style Enterprises Inc.**

Zeljana Radulovic J.P.

Heard: September 29, 2010; September 30, 2010; December 22, 2010

Judgment: January 26, 2011

Docket: 10 591/592/593

Counsel: Mr. S. O'Melia — Prosecutor, for Grand River Conservation Authority
Mr. D. Thwaites, for All Defendants

Zeljana Radulovic J.P.:

Justice of the Peace Zeljana Radulovic:

1 [1] Jason John Geil, Janet Ann Bratton and Ont. Corporation #1410025 o/a Geil Style Enterprises Inc. (herein after Defendant) have been charged with three separate Information, as a joint owners of the property municipally known as 1943 Roseville Road, Township of North Dumfries, Ontario under Section 28(16) of the Conservation Authorities Act, RSO 1990 as amended. It has been alleged that on or about August 4th, 2009 at or near the Township of North Dumfries the Defendant did commit the offence of undertaking development on a property municipally known as 1943 Roseville Road, Township of North Dumfries, Ontario without obtaining an authorization of a development permit in violation of Section 2(1) Conservation Authorities Act Regulation 150/06 thereby committing an offence contrary to Section 28(16) of the Conservation Authorities Act, RSO 1990 as amended.

2 2. The Defendant Jason Geil before beginning of the trial was prepared to plead guilty with respect charge against him, with a condition that that quantum of fill put within regulated area would be rather smaller amount than the prosecutor can offer as a facts and that the Defendant Janet Bratton and Ont. Corporation #1410025 o/a Geil Style Enterprises Inc. whose president is Jason Geil would plead not guilty. Mr. O'Melia did not agree with that proposal for guilty plea and explained that that would affect the quantum of the facts that the Prosecutor has intention to enter to the Court and reflect the remedies that would be available if Defendant found guilty.

3 3. Upon considering submissions made by the Prosecutor and Defence Counsel and considering that the charges against all three Defendant are based on the same facts and that all matters were set down for trial on the same date after completion of pre-trial, court found that the administration of justice would be best served if all Defendant, who were charged separately be tried together pursuant to Section 38(1) of the Provincial Offences Act. Therefore this trial has been conducted jointly for all three Defendants.

4 4. The Prosecution is alleging that the Defendants as joint owners of the property municipally known as 1943 Roseville Road, Township of North Dumfries on or about 4th day of August 2009 had been undertaking development on a laneway through wetland by dumping of fill of gravel and building a berm on the restricted area without obtaining an authorization of a development permit in violation of Section 2(1) Conservation Authorities Act Regulation 150/06 and therefore acting contrary to Section 28(16) of the Conservation Authorities Act.

5 The Court has heard from civilian witness Mr. Gant Gole, Ms. Lisa Lair, Ms. Melissa Larion, Ms. Janet Baine and Mr. Bradley Kuntz called by the Prosecutor and from Andrew Herreman, Stewart Geil called by the Defence counsel. The Defendant Mr. Jason Geil testified on this trial. However the Defendant Janet Bratton did not testify on this trial. The Counsel for the Defendant Ont. Corporation #1410025 o/a Geil Style Enterprises Inc. and the Defendant Janet Bratton chose not to call any evidence on behalf of those two Defendants and takes position in closing submissions that the Prosecutor did not prove beyond reasonable doubt that the corporation or Janet Bratton committed the offence as alleged, and that mere fact that Defendants are joint owner of the property does not make them responsible for the violation under S28(16) of the Conservation Authorities Act.

6 Court also received demonstrative evidence Booklet of photographs marked as Exhibit A, Photo of Driveway to Geil's property marked as Exhibit B, photo of property marked as Exhibit C, Photos taken by Mr. Gole from his back deck marked as Exhibits D1 and 2, Email to Grand River Conservation Authority to Ms. Larion by Mr. Thwaites marked as Exhibits E, Certified copy of Abstract of Land marked as Exhibit F1 and 2; Corporation Profile Report marked as Exhibit G; Aerial Photo of lands marked as Exhibit H; Photographs taken by Mr. Kuntz marked as Exhibit I1 to 5; Photo from 2006 marked as Exhibit J; Photo from 2006 marked as Exhibit K; a copy of telephone Information Form marked as Exhibit L; Photo laneway taken by Jason Geil June 2010 marked as Exhibit M; Photo of laneway taken by Jason Geil on June 2010 marked as Exhibit N; photo of laneway taken by Jason Geil on June 2010 marked as Exhibit O; photo of laneway taken by Jason Geil on June 2010 marked as Exhibit P; Photographs of area in fall 2009 marked as Exhibit Q1 to 3; a copy of the Application for Development Schedule A filed September 17, 2006 marked as Exhibit R; Certified Copy of Information #07-5766 with respect charges laid under Criminal Code against Mr. Jason Geil which charges has been stayed, marked as Exhibit S and a copy of letter dated October 19, 2009 from Region of Waterloo sent to Geil Style Enterprises Inc and Jason Geil and Janet Bratton, marked as Exhibit T. Photographs and documents marked as Exhibits A, D(1 and 2), F(1 and 2), G, H,I (1-5), R and S has been filed by the Prosecutor and photographs and documents marked as Exhibit B,C, E,J,K,L,M,N,O,P,Q (1-3) and T has been filed by the Defence Counsel.

2: Issues before the Court

7 The first issue before this court is whether the Prosecutor has proved beyond a reasonable doubt that on or about 4th dated of August 2009 the Defendants did commit the offence under section 28(16) of the Conservation Authorities Act by undertaking development on a property municipally known as 1943 Roseville Road, Township of North Dumfries without obtaining an authorization of a development permit in violation of Section 2(1) Conservation Authorities Act Regulation 150/06, and if so proven did Defendant raise any available defence to escape from a liability?

8 The second issue is whether the Defendant Janet Bratton and Ont. Corporation #1410025 o/a Geil Style Enterprises Inc are guilty for undertaking development by the Defendant Jason Geil as result of mere fact that they are joint owner of the property municipally known as 1943 Roseville Road.

9 The date, location and the identity of the Defendants before the court is not in issue neither the jurisdiction of this court.

10 It is evident from the evidence of civilian witness Grant Gole and Lisa Lair, who are the neighbours of the Defendants, that during the first week of August 2009 a large number of dump trucks have been entering the Geil's property at 1943 Rosesvill Rd. going all the way down the laneway and instead of entering to where the out building are going along the railway tracks and back into the bush area. Mr. Gole in his evidence stated that his property is immediately beside to the property 1943 Roseville Rd. and that Defendants Jason Geil and Janet Bratton are his neighbours. On August 3rd, 2009 the trucks started going into the wetlands from about the middle of the property. He recalls being very heavy traffic for whole week from August 3 to August 8, 2009 and that frequency of track's traffic slowed down after that period of time. He explained that he observed with his own eyes when the trucks were coming they were full of fill of dirt mixed with gravel, and when they were emerging from property they were empty. He also stated that on the same time there was ongoing fill project right behind his house as the Defendant Jason Geil were constructing a berm. He further stated that there would have been approximately 150 loads for the week of August 3 to August 8, 2009 and they were dumping its loads into the wetland. As result of very high distraught on August 4, 2009 he contacted Grand River Conservation Authority and asked if there was a permit given or permission to fill in what he believed was wetland. Andrew Herreman from Grand River Conservation Authority provided him with aerial photograph form

Grand River Conservation Authority, and he was able to identify that in fact the area where the fill was going on is wetland. When presented with Exhibit A aerial photograph he confirmed that that is a aerial photograph provided by Andrew Herreman to him, and that he draw the diagram where the filling is being placed. Upon receiving confirmation that the filling is in wetland area, he took several pictures confirming dumping trucks coming into the bush area, dumping fill and returning from that area. When presented with Exhibit A photograph 66 he confirmed that he took that photograph on August 5, 2009 from golf course which is to the North from his and defendant's property and that pictures depict a truck is dumping a load directly in the wetland area. He also confirmed that he took the photographs marked as Exhibit A 67D,68E, and 69F on August 7,2009 and that those photographs depicts a truck is dumping and Defendant Jason Gail is sitting on the bulldozer directly behind it, and he is levelling the fill and that photograph 69F depict the truck had just backed in and the Defendant Jason Geil with bulldozer touching up the last load that had been dumped. He explained that he observed that with his own eyes and took the pictures with his digital camera. He did not want to take photographs of truck coming to the defendant's property before he was sure that place where the trucks were dumping a dirt mix of gravel is wetland. He further stated that work finally concluded sometimes after August 8, 2009 when traffic was much lighter and that last load on that fill area was in 2009. He stated that prior August 3, 2009 that there have been no fill place in that particular area and that spot has been prepared as much as two or three years ago, just that very spot where the trucks were entering the marsh. He explained that there was a compost pile in that area. With respect a new berm he stated that that project started two weeks before August 3, 2009 and during the period of August 3, 2009. For the following two weeks the fill was being placed in that berm. He further stated that project on the berm was completed two months ago in 2010. He explained that from his residence towards entry point for dumping they are not any impediments in the way of that view. He describe the nature of land between his property and entry points as dead flat working agriculture land, maybe 10 feet difference in elevation. Whit respect to berm he confirmed that berm is directly behind his property line and that he observed with his own eyes all the activities on the dumping the fill which consists of dirt and mix of gravel. After the August 7, 2009 he did not take any further photos of the wetland area and he did not have any contact with Grand River Conservation Authority the week after August 8th, 2009. It cross-examination he confirmed that relationship between Mr. Geil and him is extremely difficult and they have been several incidents. As result of the last incident between him and Mr. Geil the police was involved. However he stated that he does not have difficult relationship with Ms. Bratton.

11 *Ms. Lisa Lair* in her evidence explained that she is a neighbour of the Defendants. She lives at 1967 Roseville Rd., and her property is located three properties over to the west and on the south side of Roseville Rd. The Defendant's property is on the same side of the road. She could see the Defendant's property from her property. She recalls that during the early August 2009 she saw a large number of dump trucks entering the property at 1943 Roseville Rd., which is Defendant's property, and going to the bush area. She also explained that her property is a two storey shop and from her property where her office is located she could see the truck as well hear the noise coming from the trucks. She recalls seeing dump trucks from Roseville Rd. in addition to a bulldozers and packer working in the swamp area at the front of the property. She observed the trucks when they arrived at the property. She recalls that truck's traffic was significant in that period, and that she can hear the slamming of the tailgate of the truck when dumping. Her evidence corroborate with the evidence of Mr. Gole with respect area of fill and berm as depicted on the Exhibit A areal photograph as well set of photographs taken by Mr. Gole on August 5, 2009 and August 7, 2009. She further stated that she witnessed a several truck in the area where the berm has been built behind Gole's property and also the additional fill to create the roadway in bush area. She could not recall exact number of truck coming but she explained that for that first week of August there were dozens and dozens truck coming with fill and returning empty. She could not explain what sort of material has been dumped in the bush area explaining that was because it was too far from her property. However with respect the berm behind the Gole's property she explained that there is all matter of debris and all kind of things went into that berm. In cross examination she stated that she observed truck's traffic in and out of the Defendant's property all week during the beginning of August 2009 but she can't recall the particular days. Having concern about what Mr. Jason Geil is doing to her property value, she reported him to government agency. She believes that she contacted Grand River Conservation Authority about this fill the second week of August.

12 *Melissa Larion* as a resource planner for the Grand River Conservation Authority stated that her on day to day responsibilities are plan review functions, working with local Municipalities and dealing with permit requirement if area falls within regulated area. With respect property at 1943 Roseville Rd. in North Dumfries a permit application was never filed. She stated that she received a voicemail message from Grant Gole in early August 2009 with respect some sort of fill placement on

a neighbouring property. She forwarded the voice mail to their planning technician Andrew Herreman. Referring to Exhibit "A" aerial photograph she stated that was an aerial map produced by Andrew Herreman on August 5, 2009 and sent to Mr. Gole. She further explained that August 5, 2009 is not an actual date when that map was created it is date when Mr. Herreman printed out from Grand River Conservation Authority system and sent it to Mr. Gole. Mr. Grant Gole sent back the aerial map with his drawing, basically showing where he thought there might be a fill placement. Reviewing the map and using GIS mapping service, which is basically the tool that is used by Grand River Conservation Authority to figure out which areas are regulated and comparing with the areas drawing by Grant Gole it has been define that fill was within the regulated area. She in detail explained when referred to Exhibit "A" the aerial photograph and Grand River Conservation Authority map as part of Regulation 150/06 that 2009 fill and entry point for dumping as drawn by Mr. Gole on aerial photograph is within regulation limit define under regulation as wetland, and that a new berm 2009 is mostly within the regulation limit. She further stated that with respect fill in 2009 permit was never issued for the work on the site or applied for. On August 14, 2009 she sent a letter to Mr. Jason Geil addressing those concerns. She further stated that she received after couple days a call from Janet Bratton who she learned is a partner of Jason Geil. Court did not consider a part of the hear say evidence provided by this witness in cross examination with respect telephone conversation with Ms. Bratton. She stated that nor she or somebody from her office was able to go out and verify where exactly there had been fill placement as they could not get access to the property. On September 29, 2009 Brad Kuntz and she went out to the Gole's property to see if they could view anything from that stand point. They had also taken a look from the road being Roseville Road. When referred to Exhibit A Tab2 photograph marked as 72"I" she confirmed that on September 29, 2009 she had taken that photograph, explaining that is a view point from Roseville Road directly towards the property showing some sort of heavy machinery. Further, when presented with Exhibit A aerial photograph she pointed on the aerial photograph location of that heavy machinery and stated that the heavy machinery had been located within the regulated area. She stated that on September 29, 2009, when she attended at Roseville Road, she did not witness any dumping of fill or any site grading going on. She only observed heavy machinery located within the regulated area. With respect a berm behind a Gole's property she stated that berm area is mostly within the regulation limit for the wetland but it is not within the wetland. She explained that the regulation limit essentially means that in the case before the court is a 120 meters from the wetlands so within that 120 meters Grand River Conservation Authority would require a permit application for any sort of development where as if it was within the wetland Grand River Conservation Authority would not provided a permit application. She further explained that the regulation limit comes from the Conservation Authorities Act which states that any sort of work outside of the wetland that might have some sort of hydrologic impact on the wetland would require a permit from Grand River Conservation Authority in order that Grand River Conservation Authority can make sure that there is not going to be any hydrologic function impaired due to that development within that regulated area.

13 When presented with Exhibit "E" a copy of e-mail sent by D. Thwaites counsel for Defendant to M. Larson on October 6, 2009 she stated that she did not receive that e-mail and explained that her last name is misspelled that might be reasons why she did not received that e-mail.

14 *Janet Baine* communication specialist for Grand River Conservation Authority when presented with Exhibit "A" Tab 3 photograph number 73 she confirmed that on December 2, 2009 she took that picture from a plane, from the air when they were up taking pictures of several properties around the watershed. She recalls that she took a picture of the municipality address 1943 Roseville Road. She explained that on that day she was with Ms. Yerex and she had been taking pictures of the area as directed by Ms. Yerex, who is a resource planer for GRCA. She confirmed that on that day she took four pictures of the area with municipality address 1943 Roseville Road, North Dumfries.

15 *Bradley Kunts:* stated in his evidence that from August 2008 until October 2009 he was in the position of Regulations Officer for the Grand River Conservation Authority. Upon receiving information about the activities on 1943 Roseville Rd, he went to inspect what works were taking place at that time. He attended the neighbouring property at 1953 Roseville Rd. and spoke with the resident Paullette Gole. He observed that a berm had been constructed previously along the property lines between 1953 and 1943 Roseville Rd. He observed what appears to be a lane way extending from what looked to be the original laneway of 1943 Roseville Rd. extending into an area that Grand River Conservation Authority has mapped as wetlands. When presented with 5 photographs marked as Exhibits I1-5 he confirmed that he took those photographs on September 29, 2009 and that those photographs depicts the berm that appeared to have been made out of unconsolidated gravel type material that

extended along the southern property line of 1953 Roseville Rd and a laneway through wetland. He further explained that berm has been made of a loosened earth type material with various size stone and rubble in it, approximately five meters high by five meters in width extending along what is represented as the southern property line of 1953 Roseville Road. He explained in cross examination that he did not use any measurement equipments and based on his eyes observation he estimated the measurements. He further stated that 99 percent of berm was located on restricted area and may be a slight corner a few feet that extends out of that area. Referring to photograph marked as Exhibit I5 he stated that that photograph depict a relatively newly constructed laneway that did not appear on any of Grand River Conservation Authority mapping that there have been before. He explained that he was not able to walk down that laneway; however from the point where he was standing he could see clearly laneway at distance of 150 meters or so, and after that laneway turns into the forest area or the vegetated area. He further stated that it would be difficult to him to define how much fill was added to laneway but it appeared to him that some grading has been done and that more fill was added to the Easter portion. He further stated that he observed when attended the area of 1943 Roseville Rd. that laneway is more clearly define than as appear on Grand River Conservation Authority's aerial photo flown May 2006 marked as Exhibit H.

16 *Andrew Herreman*, Resource Planning Technician of the Grand River Conservation Authority evidence corroborate with the evidence of Melisa Larion. He recalls that Ms. Larion forwarded to him a voice message from Gant Gole on August 4, 2009. He spoke with Mr. Gole on August 5th 2009 and sent him a copy of Grand River Conservation Authority mapping of 1943 Roseville Rd. He also asked Mr. Gole for any photos that he could provide to him. On August 6, 2009 he received a responding e-mail from Mr. Gole and a map with Mr. Gole's indication of the place where activities where on the land as well photos. He transferred his notes and mapping to Melissa Larion. He further stated that on the afternoon August 5, 2009 at 4:15p.m.he drove by on the road allowance in the parking lot of golf course from which point he could observe property at 1943 Roseville Road. He stayed there until 4:20p.m. For that period of time he did not observed any truck activities, heavy equipments or any dumping activities. He explained that he was only 5 minutes at the area in question and that he could not speak to any of the other minutes that day or any other days of that week with respect whether any activities were occurring on 1943 Roseville Rd. Further in his evidence he confirmed that Exhibit A aerial photograph of Roseville Road marked as number 66, is one that he sent to Mr. Gole, and that that he received it back from Mr. Gole with his drowning of dumping activities.

17 *Stewart Geil* is oldest brother of the Defendant Jason Geil, who resides at 1831 Roseville Rd. He stated in his evidence that he has been residing at 1831 Roseville Rd since 1986, and his property is about as close as to that of Jason Geil's property. When presented with Exhibit A Tab 1 aerial photograph marked number 66, he stated that he believes that waterway is on his property. He further stated that his brother moved to 1943 Roseville Rd. in 2003 or 2004. He is very familiar with the surrounding area and that wetland is on the Jason's property. He stated that laneway through the wetland has been existing prior 2003 or 2004 and if one had a four wheel drive truck or tractor one could get through it. He further explained that line was mostly used by famers. It had overgrowth in the center of it, mostly with poplars tree approximately 30-40 feet tall and small brush type of growth pretty close to the driveway. There were a couple of areas where it was ruddy. From 2003 to 2009 he recalls using the laneway through wetland when the other road was blocked off. He explained that Jason was having problems and he had locked road to his property and that was a reason why he had to use the old laneway. He further stated that prior to summer 2009 there has been changes to laneway through wetland. His brother Jason put rocks and some gravel on top to firm it up, and he has put sum fine gravel on top of the driveway, removed some brushes, trimmed lower branches on the bigger trees. He further explained that within two years since his brother bought the property those ruddy areas that needed the fixing to make it better to get through has been done by Jason. He also stated that Jason has been working putting gravel on laneway since 2006, 2007 and 2008. He could not tell the amount of gravel put on but there were areas that he could see fresh gravel. With respect 2009 he stated that he had opportunity to be over at Jason's and Janet's property during the spring and the latter part of July 2009 to cut the hay. He further stated that he has been on the property since July 2009 and that he has not really observed any other changes to the laneway. He stated that that with respect to any change in the elevation of the original laneway from his observation from 2003 to 2009 putting the gravel on two to three inches which he things pack overtime that elevation would be very close to nil. With respect a project on the new berm behind Gole's house he recalls that that project started in early 2009 because he had hay stored in a trailer parked out there. In cross examination he confirmed his statement given in examination in chief stating that there was always a laneway in wetland and it hasn't really changed much other than gravel put on it. He also stated that the Defendant Jason Geil was fixing every year that laneway and he would take one or two truckloads a year up to 2009. He do not think there

was any gravel dumped in 2010. He did not witness any of that dumping but he thinks works was done because he has been on that laneway. With respect of August 2009 he stated that he witnessed fill being hauled in for the berm and trucks coming in. When he was visiting the Defendant's property he has seen three or four trucks waiting to dump and dumping in the berm area. In cross-examination he stated that he did not see any dumping on the wetland in August 2009. Further in cross examination when presented with Exhibit H and Exhibit A photographs #65 and 73 he agreed that laneway as depicted on Exhibit H as aerial photograph form May 2006 by Grand River Conservation Authority is not visible as on Exhibits A photograph #65 and 73, but he stated that there was possibility to go through brush and vegetation with a four wheel drive truck or a tractor. In cross examination he stated that location of a new berm is correct as presented on Exhibit A aerials photograph #65. When presented with Exhibit II-5 photographs dated September 29, 2009 he stated that those photographs depict the new berm and laneway and he agreed that material on a new berm looks like freshly dumped material. He further stated that when he visited the property he observed a fair stream of trucks and he recalls there were four trucks at the time he was there. It seemed to him that the trucks were coming and going and that there were always trucks waiting to dump. He stated that there was continuing truck traffic when he was visiting the property. He estimated taking the pile crated over time that would be 20 to 30 trucks a day dumping material. He believes that is around the end of July and into the beginning of August 2009. In re-examination when presented with exhibit A photograph marked #67 dated August 7, 2009 he stated that that photograph exactly depict the type of growth, trees and vegetation being mostly poplar trees on the wetland.

18 *The Defendant Jason Geil* stated that he is a contractor, and that he purchased back in October 2003 83 acres of property at 1943 Roseville Rd. That property is used for farming. He owns property jointly with Janet Bratton who is his spouse and Geil Style Enterprises. He stated that he is the president and the principal officer of that corporation. He farms three acres of it and he rents out about 56 acres. When he bought the property in 2003 it was overgrown, dead trees laying there through wetland but there was lane through the wetland. He explained that from the point of elevation the road can be describe at that time as fairly flat but because the township of Region did same digging back there in 1976 there are some hills that are higher. In his opinion there might be a difference in the land of two to three feet in some spots. He explained that when he bought the property the laneway was approximately eight feet wide and it had topsoil and gravel and it was fairly dry. He confirmed that from Fall 2003 through July 2009 he did make changes to that area and that he did work on that area. He described the type of work he has done in that period starting from 2004 as cleaning brush away, dead trees. He explained that a lot of the trees were overhanging the lane so he trimmed stuff back, made the laneway wider just by cleaning everything up that was laying around there. He also stated that over those years he probably dumped a few loads of gravel from time to time where there might have been a wet spot or a little bit of a low spots so he would just dumped a load of gravel and spread it out. He further stated that he had been using that lane in November 2006 when he was assaulted by his neighbour Mr. Gole. He recalls putting over the years a gavel on the top of laneway, explaining that he put A-gravel and eventually the laneway has been extended in width and at the present time is about 16 feet wide and 1500 feet long. When presented with Exhibit M-P he confirmed that is how lane-way looks at this time and that all of the gravel over the 1500 feet and 16 feet wide lane way, was created by roughly 18 tracks. He explained that between October 2003 and August 2009 elevation of laneway has not changed much. He stated that prior August 2009 possible in spring he might have put a couple loads of A gravel on laneway. It would be 21 tone of A gravel which was brought by a triaxle dump trucks. He explained that usually two loads would be brought at the time. Whit the respect a berm he stated that he decided to build the berm behind the Gole's and Lairs' property because his neighbours Gole and Lair were taking photographs of him at his house. He explained that at first after they put a trailer and they were shooting guns off, throwing the rocks he decided to build the berm to stop all this stuff from happening. Further he explained that he had many disputes with his neighbour Mr. Gole and that in August 2009 they had dispute over the cutting the grass which escalated to the point that Gole through the rock into his face. Gole called the police but charges has not been laid. He explained that his relationship with his neighbour Goles and Lairs is not very good. In late June 2009 before he undertook the project on berm he had a discussion with the Township. He recalls having meeting with the Township lawyer Daryl Denning about exactly what he was doing there. Prior that meeting he started to scrape the topsoil off and started dumping fill in there. He further stated that prior that time he had conversation with representative of the Grand River Conservation Authority, Drew Cherry in 2006 and 2007 because he was duping out front and since that conversation he has been aware that he would have to apply for a permit to dupm out front. In cross examination he confirmed that he never received a permit for that project from Grand River Conservation Authority. After meeting with Township the work was done on berm roughly 250 feet back from the Gole's property and about 230 to 290 feet long. He explained that the berm is actually stretched the whole length of the

Gole's property. He stated that his intention has been that a new berm to be constructed the whole length of his field which is approximately 1500 feet and 12 feet high with intention to use for cash crops up to the property line. He stated the berm was constructed with pit run on the bottom and with bigger rocks and on the top was just a sand fill. He was getting the fill for free so during July trucks were coming when it was available. He explained that one day he might get 30 loads and another day he might get 100 loads. He stated that there was no work done during last week of July 2009 as he was on holiday with his family on camping and he returned home on the afternoon August 3, 2009. He admitted that on August 4th, 2009 he was working around the farm and couple days later he called for a couple loads of A-gravel which was brought and he was just fixing up the road. Referring to Exhibit A Tab1 photoghraps #65 to 67 he admitted that those are trucks dumping the A gravel to fix the laneway. He explained that reasons for placing this A gravel from August 5 through August 7, 2009 was to tighten the laneway and make it easier to drive. He believes that he dumped three loads of A-gravel on the original laneway in that period. He agreed with the statement made by Mr. Gole that on August 8th, 2009 there was still dumping going on but in the area of the berm. He explained that it has been duping basically past Grant Gole's property which is out of the regulated area. He stated that after receiving the letter from Miss. Larion from Grand River Conservation Authority around 16 or 17 of August, 2009 he did not dump anything at the original laneway. When presented with exhibit H he confirmed that that photograph accurately depict how his property has looked like in May 2006. He stated that there was a roadway that was well grown over, the trees were overhanging it, there was a lot of bushes along it. He stated when presented with Exhibit A Tab1 photograph 65 that a new berm fill in August 2009 was just barely outside the regulated area. His evidence corroborate with evidence of Ms. Lair that after the start of August 2009 there were dozens of trucks that are coming in and dumping fill in the berm area, but he stated that the fill that was being dumped was being dumped past the regulated area going west of the Gole's property. He also stated that dumping in that area continued in 2010 but outside of the regulated wetlands. He admitted that in August 2009 he have dumped three loads of A-gravel on laneway and after receiving the letter from Grand River Conservation Authority he had full knowledge of where the wetlands were at that time and after that he never dumped any more fill in any of the marked areas. He acknowledges that he dumped three loads from August 4, 2009 to August 7, 2009 on the laneway. However in cross examination he stated that he is only doing maintenance on the laneway by cleaning, putting gravel and spreading gravel on it and that hid did not know that he is required to have a permit under Conservation Authorities Act. He further stated that he knew that a front of his property is regulated area but he did not know that all of his property is regulated area and he learned of that when he received letter from Grand River Conservation Authority August 14, 2009. In cross examination he confirmed that as result of his activities on the property the Waterloo Regional Police laid charge under a noise bylaw and that he was convicted of that charge in the Provincial Offences Court. He explained that noise was related to dump truck coming in his driveway. He stated that from 2003 to 2009 he did tree clean up, stump clean up, logging and he is not sure did he place any fill in the area from 2003 to 2006. He explained that dozens of loads of fill were brought in but he cannot recall everywhere where he was dumping because the place was a mess when he bought it.

Finding of Facts and Application of Law

19 *Section 28(1) of the Conservation Authorities Act, R.S.O. reads:*

"Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,

- (a) Restricting and regulating the use of water in or from rivers, stream, inland lakes, ponds, wetlands and natural or artificially constructed depressions in rivers or streams;**
- (b) Prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;**
- (c) Prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development;**

- (d) providing for the appointment of officer to enforce any regulation made under this section or section 29;
- (e) providing for the appointment of persons to act as officers with all of the powers and duties of officers to enforce any regulation made under this section."

Section 7(1) and (2) of the Conservation Authorities Act states that the Grand River Conservation Authority is continued under the name Grand River Conservation Authority and that the Lieutenant Governor in Council may designate the municipalities that are the participating municipalities of the Grand River Conservation Authority and the area over which it has jurisdiction.

Considering above noted sections, evidence presented to this court and submissions made by the counsel, court finds that the authority in this case is the Grand River Conservation Authority and that Grand River Conservation Authority has an area within its jurisdiction which includes the property municipally known as 1943 Roseville Road, Township of North Dumfries. The Grand River Conservation Authority made the Regulation 150/06 Regulation of Development, Interference with wetlands and alterations to shorelines and watercourses, which Regulation is approved by the Minister of Natural Resources.

Section 28(c) of the Conservation Authority Act states that regulation has authority for prohibiting, regulating or requiring the permission of the authority for development if in the opinion of the authority did control a flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by development.

Section 28(4) of the Conservation Authorities Act states:

"A regulation made under subsection (1) may refer to any area affected by the regulation by reference to one or more maps that are filed at the head office of the authority and are available for public review during normal office business hours."

Section 2 of the Regulation 150/06 states:

"Subject to section 3, no person shall undertake development or permit another person to undertake development in or on the areas within the jurisdiction of the Authority that are "..... among other listed in paragraph

- (b) (c) (d) river or stream valleys plus 15 meters, hazardous lands, wetlands, and further paragraph
- (e) states "other areas where development could interfere with the hydrologic function of a wetland including areas within 120 meters of all Provincially significant wetlands and wetlands greater than or equal to 2.0 hectares in size, and areas within 30 metres of wetlands less than 2.0 hectares in size."
- (f) Further subsection 2 refers to section 12 which is the mapping section and has been presented and submitted by the Prosecutor as a part of the Regulation 150/06 on this trial."

Section 12 of the Ontario Regulation 150/06 refers to areas included in the Regulation Limit and states:

"hazardous lands, wetlands, shorelines and areas susceptible to flooding, and associated allowances, within the watersheds in the area of jurisdiction of the Authority are delineated by the Regulation Limit show on maps 1 to 242 dated May 2006 and filed at the head office of the Authority at 400 Clyde Road, Cambridge, Ontario under the map title "Ontario Regulation 97/04: Regulation for Development, Interference with Wetlands and Alterations to Shorelines and Watercourses". O.Reg.150/06, s12.

Considering Section 12 of the Regulation 150/06 and attached mapping court finds that those maps are official documents part of the Ontario Regulation 150/06 and that area in question being 1943 Roseville Road is within regulation limit.

Pursuant to Section 2 of the Ontario Regulation 150/06 the Defendant is required to obtain a permit from Conservation Authority prior to undertaking any development.

Section 5 and 6 of the Ontario Regulation 150/06 states that no person shall without the Authority's permission, straighten, change, divert or interfere in any way with the existing channel or a river, creek, stream or watercourse or change or interfere in any way with a wetland. The permission of the Authority shall be given in writing with or without conditions.

Section 28(25) of the Conservation Authorities Act define what would be considered as development among others states:

"(c) site grading, or

(g) The temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere;"

And further with respect definition of "Wetland" states:

"**Wetland means land that**

- a) Is seasonally or permanently covered by shallow water or has a water table close to or at its surface,
- b) Directly contributes to the hydrological function of a watershed through connection with a surface watercourse,
- c) Has hydric soils, the formation of which has been caused by the presence of abundant water, and
- d) Has vegetation dominated by hydrophytic plants or water tolerant plants, the dominance of which has been favoured by the presence of abundant water,

But does not include periodically soaked or wet land that is used for agricultural purposes and no longer exhibits a wetland characteristic referred to in clause (c) or (d)."

20 Considering evidence of Ms. Larion and Mr. Kunz as well reviewing Exhibit A aerial photographs, Exhibit H court finds proven following facts: that the laneway at 1943 Roseville Rd. is fully within the regulated area. In accordance with the Regulation 150/06 that area is defined as a wetland for which part even if permit application has been filled, Grand River Conservation Authority would not give a permit for any type of development, and that the berm is mostly within regulated area which would required permit application to be submitted to the Grand River Conservation Authority prior any development. Ms. Larion's evidence corroborates with the evidence of Mr. Gole, Ms. Lair and Mr. Stewart Geil and with Exhibit "A" confirming that has been placement of material within the regulation area. Reviewing the Exhibit A aerial photograph and maps which are part of the Regulation 150/06 and considering evidence of Ms. Larion court finds that the regulation area is shaded in yellow and that laneway and berm are within regulated area. Court finds considering the Regulation 150/06 and Ms. Larion's evidence that regulation limit essentially is a 120 meters from the wetlands so within that 120 meters a permit application is required for any sort of development, where as if it was within the wetland permit application would not be provided. The Conservation Authorities Act states that any sort of work outside of the wetland that might have some sort of hydrologic impact on the wetland would require a permit from GRCA. Considering evidence of the Defendant Jason Geil whose evidence corroborate with Exhibit F1-2 Registered parcel abstracts for the property 1943 Roseville Rd. and Exhibit G Corporate profile Report for Geil Style Enterprises court finds that all three Defendants are the joint owners of the subject property and that Jason Geil is the president of the Ontario Corporation #1410025 o/a Geil Style Enterprises Inc. Ms. Larion evidence coincides with material evidence the aerial photograph of a portion of the subject property at 1943 Roseville Rd. taken May 2006 marked as Exhibit H and a photographs depicting a plotting of the regulation limit in a red line marked as Exhibit A Tab4 photograph number 74 and with the Regulation 150/06 Section 12 and two maps as a part of the Regulation. Based on those evidence court finds that the area where is laneway and a new berm does fall within the regulated area. Despite Mr. Stewart Geil has been well aware of

the area in question and that he has been living on that area since 1986 court finds that he is not a technical expert to be able to define laneway elevation, and court did not consider this part of his opinion evidence with respect laneway elevation. Further his evidence does not corroborate with material evidence Exhibit H that laneway was existing in 2006 and prior 2006. It is clear from Exhibit H aerial photograph dated May 2006 of 1943 Roseville Rd and surrounding area through wetland that that aerial photograph does not depict any laneway through the bush area. Further comparing the Exhibit H aerial photograph dated May 2006 from Grand River Conservation Authority with Exhibits A, I5 M to P there is no any indication that that laneway was existing in 2006 all way through the wetland as it appears on Exhibit A, I5 and Exhibits M to P. Court also did not give much weight to Exhibit K and J which depict some portion of roadway because based on the other evidence presented to court, court does not find proven that those photographs exactly depict area of laneway in question. Further Mr. Kuntz in his evidence was not able to identify that Exhibit K and J in fact depict the laneway through wetland as presented on Exhibit I-5 photograph taken by him on September 29, 2009. Considering evidence of Ms. Larion, Mr. Kuntz, exhibits H, I, M,N,O and P Court cannot accept evidence by Mr. Stewart Geil that there was laneway always through wetland and that it hasn't changed a much except gravel put on. Even the Defendant Jason Geil in his evidence admitted that during the period of time since he bought property at 1943 Roseville R. he was cleaning area through wetland and he made laneway wider and longer by cleaning bushes, trimming the branches and putting the gravel on the laneway. Reviewing Exhibit H which depicts aerial photograph of 1943 Roseville Rd. flown May 2006 by Grand River Conservation Authority it is evident that there is no indication of either a laneway or any sort of a passage way through wetland area, except small portion of the some sort of laneway on the beginning before bush area. However laneway is clearly visible on Exhibit A picture 73 all way through area as defined under Regulation 150/06 as wetland. Considering these findings of facts court cannot accept evidence of Stewart Geil and evidence of the Defendant Jason Geil in the part that there was laneway always present and that there was possibility to use that laneway with a four wheel drive truck or a tractor. Court cannot accept evidence of the Defendant Jason Geil that he did not have knowledge prior receiving a letter from Ms. Larion from Grand River Conservation Authority between 16 or 17, of August 2009, about wetland and requirement to apply for permit. The Defendant Jason Geil in his examination in chief stated that even in 2006 and 2007 after having conversation with Drew Cherry from Grand River Conservation Authority he was aware that he has to apply for a permit before any project he wishes to perform on the part of his property which has been under regulation defined as wetland but that he understood that is just with respect front part of the property. However further in his evidence he stated that he knew that laneway is through wetland. Exhibit R a copy of Application for Development, interference with wetlands and alterations to shorelines and watercourses permit dated Sept 17, 2006 proved that the Defendant Jason Geil in fact filed an application for development, interference with wetlands and alterations to shorelines and watercourses permit pursuant to Ontario Regulation 150/06 which application has never been approved. He also admitted that that application has never been approved by Grand River Conservation Authority. Therefore court takes position that this part of the Defendant's evidence are self serving and not trustworthy. Reviewing the Exhibit H which depicts an aerial photograph of 1943 Roseville Rd. flown May 2006 by Grand River Conservation Authority, it is clear that there is no indication of any sort of a disturbance in that area that would assist the court in finding the fact that there was some sort of a laneway as that clearly appears on Exhibit A Tab 3 four photographs marked as #73 or on Exhibit I photograph #5 dated September 29, 2009. Based on those evidence and evidence of Ms. Larion and Mr. Kuntz, whose evidence court finds to be credible and reliable and considering the Defendant Jason Geil own *admission*, court finds that at some point in time a very significant finely defined road 16 feet wide, 1500 feet long, as estimated by the Defendant's Jason Geil, was created by the Defendant through wetland. Court finds based on the presented evidence that that laneway through wetland did not exist in 2006. Court also finds upon examining the exhibit H, exhibit A and Ontario Regulation 150/06 maps that a new berm has been as Mr. Kuntz stated 99% within regulated area. It is evident from material exhibits that actual fill that was deposited on the berm is substantial. Court finds that the Defendant did not apply for permit before starting any of these activities. Considering all the evidence in totality and relying on decision in *R. v. W. (D.)* 1991 CanLII, [1991] 1 S.C.R. 742 (S.C.C.) in deciding on issue of credibility, court finds evidence of Mr. Gole and Ms. Larion as reliable and credible and corroborating with evidence of Ms. Larion, Mr. Kuntz and Mr. Herrman and even in part with the evidence of Mr. Stewart Geil and Defendant Jason Geil. Issue has been raised by the defence counsel with respect relationship between the Defendant Jason Geil and his neighbour Mr. Gole and Ms. Lair. Court observed the general integrity and intelligence of those witnesses, power to observe and capacity to remember and despite it appeared that they were agitated by the Defendant's activities court did not find in their testimony any contradiction with the testimony of other witnesses and other material evidence. Court did not find anything in the demeanour of those witnesses suggesting untruthfulness and therefore court accepts Mr. Gole's and Ms. Lair's' evidence as credible and

reliable. Upon reviewing all the evidence court finds that significant amount of fill must have been dumped to form finely define laneway 1500 feet in length and 16 feet wide through wetland and on a new berm project. Considering evidence of Ms. Lair and Mr. Gole whose evidence court accepts as credible and reliable court cannot accept defendant's evidence that during August 4 to 7, 2009 he duped only three loads of A gravel for the purpose of maintenance on the stretch of the laneway. Court finds that the Defendant Jason Geil evidence to be not credible and trustworthy with respect quantum of fill he deposited, number of trucks used to dump the fill and the period when fill has been dumped on the laneway and the berm. Court observed Jason Geil's demeanour during his testimony, his ability to recall and concludes that there were internal inconsistencies in his statement and contradiction by other witness. However court did not find proven based on the presented evidence how much of fill has been put on the lane-way and how much on the berm. What we have proven as a fact is that during the first week of August 2009 they had been extensive truck traffic, gravel had been duped on laneway through wetland as well on a new berm. It is proven that as Ms. Lair stated dozens and dozens of truck were there and Mr. Stewart Geil stated there were always trucks there 20 to 30 a day waiting to dump. Based on the evidence presented Court cannot find proven how many loads were in fact dumped on the laneway through wetland and on the berm in or around August 4, 2009. However court agrees with the submission made by the Prosecutor that according to the Regulation 150/06 and Conservation Authorities Act number of fill dumped is not important and offence can be committed even with one load of fill dumped in the area without a permit.

The Law:

21 The offence before this Court is regulatory offence. In *R. v. Sault Ste. Marie (City)* [1978 CarswellOnt 24 (S.C.C.)] Justice Dickson divided "regulatory" or "public welfare" offence into three categories: mens rea offence, strict liability offence and absolute liability offence. Considering process of categorization as define in *R. v. Sault Ste. Marie (City)* by Justice Dickson and analyzing the precision of the language in S28(1) of the Conservation Authorities Act R.S.O. 1990 and S2(1) court agrees with the submission made by the Prosecutor that this is a strict liability offence. In this type of offence prosecutor needs to prove beyond the reasonable doubt prohibited act. While the prosecutor does not need to prove that the defendant acted with a guilty mind, the defendant may escape conviction if she/he can demonstrated that she/he took all reasonable steps to avoid doing the act prohibited in fact that she/he did act with due diligence. This involves consideration of what a reasonable prudent man would have done in the circumstances of the case as one before the court. It is clear from Defendant Jason Geil's evidence that he did not act as a reasonable prudent man and did not take reasonable steps as required by the law. He was well aware in 2006 that he needs a permit for any development on his property. Even if he was under believe that this is just for front part of his property, court finds that he did not take all reasonable steps to make sure that the rest of his property is not under regulated area and that he does not need a permit before commencement of any development on his property. There are no action that can be considered as reasonable and therefore court concludes that the Defendant Jason Geil's evidence did not raise defence of due diligence.

22 It has been suggested from Jason Geil's evidence that he attempted to raise the defence of officially induced error. He stated in his evidence that as result of the conversation with Drew Cherry form Grand River Conservation Authority in 2006 he was under impression that permit is required only for the front part of his property as well after conversation with Township's lawyer Daryl Denny in 2009 he was under impression that a new berm is not within regulated area and that he is ok to continue his activities on development of the new berm. He further stated that he was not aware that he is interfering with wetland until he received letter from Grand River Conservation Authority between August 16 or 17, 2009. From that latter he got clear understanding where a wetland is and he did not dump any fill after receiving the letter from Grand River Conservation Authority.

Is the defence of officially induced error applicable in this case?

23 The Ontario Court of Appeal decision in *Maitland Valley Conservation Authority v. Cranbrook Swine Inc.* [2003 CarswellOnt 1470 (Ont. C.A.)], 2003 CanLII 41182 noted that there are a five elements of the defence of officially induced error:

1. The Accused must have considered the legal consequences of its action and sought legal advice;
2. The legal advice obtained must have been given by an appropriate official;

3. The legal advice was erroneous;
 4. The person receiving the advice relied on it, and
 5. The reliance was reasonable.
- 24 In *R. v. Cancoil Thermal Corp.* (1986), 11 C.C.E.L. 219 (Ont. C.A.) at page 231 explained the defence as follows:

The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

25 There is nothing in the Defendant Jason Geil's evidence suggesting what instructions he received from Daryl Denny Township lawyer. Daryl Denny has not been called to testify nor Mr. Drew Cherry from GRCA. Mr. Jason Geil provided no credible evidence that he received an erroneous legal opinion or advice from "official who is responsible for the administration of enforcement of particular law" as defined in *R. v. Cancoil Thermal Corp.*. Even if he was advised by Drew Cherry from Grand River Conservation Authority when he was duping a fill upfront in 2006 that he needs a permit he continued with work for all these years and during first week of August of 2009, without prior attempt to make sure that the further fill is not within regulated area. He did not attempt to contact any official from Grand River Conservation Authority in 2009 to make sure that he can perform further development on his property without interfering with wetland.

26 A great deal of time at trial and in submissions dealt with the fact how much development on laneway and a new berm has been taken on or about August 4, 2009 and how much gravel has been dumped on laneway through wetland and on the new berm. Defence counsel in closing submissions takes position that evidence of Defendant Jason Geil proofs that only three trucks of gravel were dumped during the week of August 4, 2009. However it is evident that since Defendant bought the property he was cleaning wetland area and from 2006 dumping from time to time gravel to make laneway in 2009 solid 16 feet wide and 1500 feet long through wetland. The laneway was not visible in 2006 on aerial photograph produced by GRCA marked as exhibit H on this trial. Conservation Authority acted upon complainant on August 4, 2009 and had no witnessed any of Defendant's activities on development prior that date. Full observation of a well define laneway through wetland by GRCA was during the week of August 4, 2009.

27 In *R. v. Rutherford* (1990), 75 C.R. (3d) 230 (Ont. C.A.) at page 235 stated:

A continuous or continuing offence is a concept well known in the criminal law and is often used to describe two different kinds of crime. There is the crime which is constituted by conduct which goes on from day to day and which constitutes a separate and distinct offence each day the conduct continues. There is, on the other hand, the kind of conduct, generally of a passive character, which consists in the future to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed.

28 Considering *R. v. Rutherford* Justice J. D. Wake in *R. v. Allen*, 2009 ONCJ 486 (Ont. C.J.) (CanLII) at page 4 paragraph 30 stated:

If the rocks or material observed in the water on September 5th, 2006 by Mr. Craig were found to have interfered with the watercourse on that date, it was of no relevance as to when the Appellant actually place them there since interference with the water-course would constitute a continuing offence.

Statutory meaning of the word "development"

29 In analysing statutory meaning of word "development" which means under in S25-Definitions of the Conservation Authorities Act among others under close (c) "site grading" or (d) the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere", court starts from the one principle or approach as stated by E.A. Driedger under *Construction of Statutes* (2nd ed 1983) at page 87

Today there is only one principle or approach, namely the words of the Act is to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

30 Justice Lamer in *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028 (S.C.C.) at page 1049-1050 stated:

the first task of the Court construing the statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such plain meaning can be identified this meaning can ordinary be set to reflect the Legislation's intention... The best way for the Court to complete the task of giving effective legislative intention is usually to assume that legislature means what it says when this can be clearly ascertained.

31 Considering Justice Lamer position in *R. v. Canadian Pacific Ltd.* and context of the wording of the Conservation Authorities Act and Regulation 150/06 court finds that meaning of definition as "development" among others includes site grading, the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere is clear and does not require and further interpretation.

Conclusion:

32 Court is satisfied that there were evidence before this court proving beyond reasonable doubt that Defendant Jason Geil on or about 4th day of August, 2009 did undertake development on a property municipally known as 1943 Roseville Road, Township of North Dumfries which property is define as wetland under Regulation 150/06 by dumping fill of gravel originating on the site or elsewhere without obtaining an authorization of a development permit. Court also finds that Defendants Jason Geil, Janet Bratton and Ont. Corporation #1410025 o/a Geil Style Enterprises Inc. are the joint owners of the property municipally known as 1943 Roseville Road. Jason Geil is the president and owner of the number company o/a Geil Style Enterprises Inc. Therefore he is an operating mind behind the corporation. Geil Style Enterprises Inc. as joint owner is responsible for action taken by his operating mind. Court agrees with the statement made by Justice of the Peace Woloschuk stated in *R. v. Vastis*, 2006 ONCJ 151 (Ont. C.J.) (CanLII) at page 16:

I have taken into consideration *Regina v. Fell*, which deals with the issue of whether both the corporation and the officer, president and the directing mind of the corporation could be convicted. The court in this case found that a conviction could be registered on both. It is clear from the evidence that Mr. Vastis, was an officer and president of the defendant corporation and he controlled the activities dealing with the offence of April and July 2003. I am satisfied that conviction can be registered on both defendants.

33 With respect Defendant Janet Bratton court considered that she is joint owner of the property, that she has been living on the property all the time and that she is the Defendant Jason Geil's spouse. Therefore court can infer her knowledge with respect all the activities taken by her husband Jason Geil. Court takes position that as joint owner of the property she is fully responsible for all the action taken by the Defendant Jason Geil despite there is no finding of fact that she was involved in direct development. Section 2(1) of the Ontario Regulation 150/06 is clear that no person shall undertake development, or permit another person to undertake development in or on the areas with the jurisdiction of the Authorities. Janet Bratton did not testify, and she did not raise any defence of due diligence on her side. Therefore as joint owner permitting Jason Geil to undertake the development on jointly owned property without permit she is equally responsible as Jason Geil. For this reasons court finds the Defendant Jason Geil, Janet Bratton and Ontario Corporation #140025 o/a Geil Style Enterprises Inc. guilty of the offence contrary to S28(16) of the Conservation Authorities Act.

Accused convicted.

2012 ONCJ 740
Ontario Court of Justice

R. v. Geil

2012 CarswellOnt 15014, 2012 ONCJ 740, [2012] O.J. No. 5655, 104 W.C.B. (2d) 312

**In the Matter of an appeal under clause 116(2)(a) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended**

Her Majesty the Queen, Respondent and Jason Geil, Janet Bratton,
Ontario Corporation #1410025 o/a Geil Style Enterprises Inc., Appellants

G.F. Hearn J.

Heard: September 20, 2012

Judgment: November 28, 2012

Docket: Kitchener 4460-999-10/591, 10/592, 10/593

Proceedings: affirmed *R. v. Geil* (2011), 2011 CarswellOnt 16035, [2011] O.J. No. 6517 ((Ont. C.J.))

Counsel: Steven O'Melia, for Respondent, Her Majesty the Queen

Terrance Green, for Appellants, Jason Geil, Janet Bratton, Ont. Corp. #1410025 o/a Geil Style Enterprises Inc.

G.F. Hearn J.:

Background:

1 On January 26, 2011 after a three-day trial commencing on September 29, 2010, with the evidence being completed on December 22, 2010, the appellants were found guilty of an offence under s. 28(16) of the *Conservation Authorities Act*, R.S.O. 1990 c. C. 27. The relevant provisions of that legislation relating to such findings read as follows:

Section 28 "(1): Subject to the approval of the minister an authority may make regulations applicable in the area under its jurisdiction,

...

(c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development;"

"(4) A regulation made under subsection (1) may refer to any area affected by the regulation by reference to one or more maps that are filed at the head office of the authority and are available for public review during normal office business hours."

"(16) Every person who contravenes a regulation made under subsection (1) or the terms and conditions of a permission of an authority in a regulation made under clause (1) (b) or (c) is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to a term of imprisonment of not more than three months."

"(17) In addition to any other remedy or penalty provided by law, the court, upon making a conviction under subsection (16), may order the person convicted to,

- (a) remove, at that person's expense, any development within such reasonable time as the court orders; and
- (b) rehabilitate any watercourse or wetland in the manner and within the time the court orders."

"(25) In this section,

"development" means,

...

- (c) site grading, or
- (d) the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere;".

2 Relevant as well to the matters under appeal is Ontario Regulation 150/06 made pursuant to the provisions set out in the *Conservation Authorities Act*. That regulation among other things prohibits any person from undertaking a development or preventing another person to undertake development in or on areas within the jurisdiction of the Grand River Conservation Authority including hazardous lands and wetlands. That particular regulation provides that the areas include such property within the watersheds in the area of jurisdiction of the Grand River Conservation Authority as set out on certain maps dated May of 2006 and filed at the head office of the authority in Cambridge.

3 Essentially the charges before the court relate to the alleged failure of the Appellants to obtain the necessary authorization from the Grand River Conservation Authority prior to undertaking development on property situated at 1943 Roseville Road in the Township of North Dumfries.

4 Her Worship Justice of the Peace Radulovic delivered comprehensive reasons for judgment on January 26, 2011 and on September 16, 2011 sentenced the various appellants. The Appellant Jason Geil was required to pay the maximum fine under the legislation of \$10,000, the Appellant Janet Geil \$1,500, and the corporate Appellant \$1,000. In addition, as permitted under the Act, Her Worship imposed a Rehabilitation Order with respect to a portion of the development undertaken without the necessary permit on the subject property and as outlined on the photo which is appended to that particular order.

5 Following the imposition of the sentences the appellants brought various motions before this court seeking leave to appeal and orders to stay the payment of the fines and the Rehabilitation Order pending the outcome of the appeal. For reasons delivered on February 2, 2012 such relief was granted and the appeal was argued on September 20, 2012 at which time full submissions were made by counsel and the matter was reserved to today's date.

Grounds of Appeal:

6 The Notice of Appeal and the supporting material in this matter sets out the grounds for appeal as follows:

- (1) Does a Justice of the Peace have the jurisdictional authority to hear matters regarding private property rights in respect of alleged wetlands and conservation authorities when it is not proven that the property exhibits natural wetlands?
- (2) Does a conservation authority have jurisdiction over private property prior to entering into an agreement as per s. 21 of the *Conservation Authorities Act* or in accordance with the *Conservation Lands Act*?
- (3) Did counsel at trial who represented all appellants represent the defendants competently and, further, was he in conflict having previously acted for the Grand River Conservation Authority as a prosecutor?

Reasons for Judgment at Trial:

7 Her Worship delivered a lengthy judgment on January 26, 2011 [2011 CarswellOnt 16035 (Ont. C.J.)]. In that judgment the justice of the peace reviewed the evidence of numerous witnesses who had given evidence during the course of the trial. This

review included the evidence of various Crown witnesses as well as the evidence of the appellant Jason Geil and additional defence witnesses.

8 The judgment sets out a summary of the evidence of each witness as found by the court. Her Worship then made findings of fact based on the evidence that she accepted and found credible.

9 Of note, in arriving at the facts ultimately accepted by the trial court her Worship applied the appropriate reasoning and standard of proof and gave thorough and logical reasons for such findings which are certainly sufficient for appellate review.

10 The trial court also accepted and reviewed various documentary evidence including numerous photos that had been filed, all of which had been entered without objection during the course of the trial. The justice of the peace in her reasons set out a logical path to the convictions and explained the conclusions she made, why she made them and gave reasons for rejecting the defence. She dealt with the issues in play and argued, and appears to have demonstrated within her reasons her appreciation of the issues present.

11 It is of note that the trial court made specific rulings on the issue of credibility of various witnesses including the Appellant Jason Geil. Her Worship also dealt specifically with the issue of jurisdiction of the Grand River Conservation Authority over the lands in question and found she was satisfied on all the evidence as well as the appropriate legislation that both the laneway and the berm situated on the subject property and which had been subject to development were all within the regulated area. As a result, quite properly Her Worship found that pursuant to the relevant regulation made under the *Conservation Authorities Act* a permit with respect to development in that area would be required. The court found this would be the case both with respect to the laneway and the berm, although the Restoration Order ultimately made only related to the laneway.

12 The trial court reviewed the evidence and found the evidence established that there had been created by the Appellants a "very significant defined road" through protected wetland without the necessary authorization. As well, the court when dealing with the evidence of Jason Geil found that evidence not to be credible or trustworthy in certain respects, specifically with respect to the number of loads of fill that had been applied to the property both on the laneway and the berm that had been created. With respect to the evidence of Jason Geil, the Appellant himself acknowledged the depositing of a minimal amount of fill in this particular area. However, as noted by the trial court the quantity of fill dumped is not important as an offence can be committed even with one load of fill being dumped in the area without a permit. The court also found on the facts the Appellants were aware as early as 2006 that a permit was required for the development of the property, yet proceeded otherwise.

13 Overall the judgment of the trial court reads logically following the findings of fact that are subject to deference. The pathway to conviction was reasoned and dealt with the matters that had been placed before the trial court.

Arguments and Findings on Appeal:

14 The grounds for appeal have been previously set out. It is important to note that there is no issue taken with respect to the findings of credibility nor findings of fact made by the trial court. It seems that the issues on appeal boil down to whether or not the trial court had jurisdiction to hear the matter, whether the conservation had authority itself over the subject property and, finally, whether or not counsel was effectively negligent in the conduct of the defence. Subsumed in this last issue is whether or not there was a conflict with respect to defence counsel. Apparently such counsel had acted previously as a prosecutor for the authority as noted by one of the cases relied upon by the defence in support of other arguments on appeal. Further subsumed in this particular issue is whether or not fresh evidence should be considered by the appeal court, i.e. the photograph which purports to show the existence of a private laneway or road on the subject property in the area developed as early as 1975.

15 The Appellant takes no issue with the finding of the trial court with respect to the defence put forward at trial of an officially induced error which was considered and rejected by the trial court.

16 Initially with respect to the jurisdiction of this court on appeal, I note s. 120 of the *Provincial Offences Act* which states as follows:

120. (1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,

(a) may allow the appeal where it is of the opinion that,

- (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

- (i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
- (iii) although the court is of the opinion that on any ground mentioned in subclause (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

17 Section 122 of the *Provincial Offences Act* reads:

122. (1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal; or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence. Variance of sentence

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court. R.S.O. 1990, c. P.33, s. 122.

18 Relevant to the consideration of new evidence, the authority of the court under s. 117(1) permits the court to order the production of any writing, exhibit or other thing relevant to the hearing of the appeal. This encompasses the Appellant's argument that the court should consider as fresh evidence the photograph submitted on the appeal and marked as Exhibit #2, being what purports to be an April 1975 photo of the subject property.

First and Second Grounds of Appeal:

19 Dealing initially then with the first two grounds of appeal relating to the court below's jurisdiction to deal with "private property rights". Here the Appellants argue that the finding of the Justice of the Peace was unreasonable or cannot be supported by the evidence and, further, and in any event, should be set aside on the ground of a wrong decision on a question of law.

20 Her Worship considered this jurisdictional issue within the context of the provisions of the *Conservation Authorities Act*. She found that the Grand River Conservation Authority was the necessary authority and that it had jurisdiction over the area where the subject property was located. She further found that the relevant regulation made under the Act was in place and included by reference to the maps filed at trial the property known as 1943 Roseville Road, Township of North Dumfries. All such findings were available to the Justice of the Peace on the evidence that she accepted.

21 Her Worship clearly set out the evidence to be considered, understood the legislation that she quoted and the principles she had to apply. Her reasons with respect to the jurisdictional issue show that she was quite cognizant of the relevant issue and her decision with respect to that issue is perfectly reasonable.

22 The legislation grants authority to the Grand River Conservation Authority to make regulations regarding an area under its jurisdiction. Here, the land was within the jurisdiction of the authority and the authority was authorized to restrict development on designated property including wetlands.

23 Section 21, I find, operates independently of s. 28 of the Act and applies to situations where the authority might enter into an agreement to meet their obligations under the legislation. It in no way impacts on the authority's ability to make regulations regulating development within a regulation area. The Justice of the Peace's reasons dealt with this issue appropriately, fully, and in this court's view, correctly. These particular grounds of appeal have no merit.

Third Ground of Appeal:

24 This involves consideration of the alleged incompetence of counsel, the admission of "new evidence" and the issue of "conflict". With respect to this particular ground of appeal, the Appellants submit initially a conflict on the part of trial counsel as that particular counsel had previously acted for the G.R.C.A. in a prosecution of a case dealing with a similar issue wherein, interestingly enough, the prosecution had not been successful. It also involves a consideration of the negligence or incompetence of defence counsel conducting the trial of this matter. This issue arises as a result of the alleged failure of counsel to provide the court with certain evidence including the photograph submitted on appeal which purports to show a laneway as early as 1975 in the area where the laneway now exists and where the development occurred. The Appellants also allege that trial counsel failed to lead evidence and argue the issue of impact, if any, on wetlands as found by the court.

25 In dealing with the issue of the admission of fresh evidence on appeal, the test for considering whether or not to admit such evidence is governed by the following principles. (See *R. v. Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.) and *R. v. McMartin* (1964), [1965] 1 C.C.C. 142 (S.C.C.).)

(1) It is not in the interests of justice that the appeal court receive evidence as a matter of course in the absence of specific direction in the governing statute authorizing that.

(2) Whether the accused made an attempt to adduce the evidence at trial is an important consideration.

(3) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(4) The evidence must be credible in the sense that it reasonably is capable of belief.

(5) The evidence must be such that if believed it could reasonably when taken with the other evidence adduced at trial be expected to have affected the result.

26 It has been found that the due diligence component of the fresh evidence inquiry specified in the case law noted is consistent with the principles underlying the *Provincial Offences Act* and the realities of proceedings under the Act. (See *R. v. 1275729 Ontario Inc.*, [2005] O.J. No. 5515 (Ont. C.A.).) Also, it is important to appreciate that there is a reluctance on the part of the appeal court to grant new trials for the calling of fresh evidence when the Appellants were represented at trial.

27 With respect to the issue of incompetence or claimed incompetence on the part of trial counsel, the case law establishes that this is a fairly high test that the Appellants must meet on a balance of probabilities. The actions complained of must show incompetence and the Appellants must show that the acts or admissions of the trial counsel were unreasonable and fell below appropriate standards. The Appellants must also establish that the incompetence alleged on the part of trial counsel had an effect on the reliability of the decision made by the lower court and that there is a reasonable probability that the decision would have been different if trial counsel had not been incompetent. (See *R. v. White*, [1997] O.J. No. 961 (Ont. C.A.).)

28 In dealing with this particular ground of appeal, it is important to look at the trial justice's decision with respect to the relevant areas where it is alleged counsel was negligent. This allegation effectively arises as a result of alleged failure of counsel to produce a photograph which the Appellants allege shows the existence of a roadway in 1975 and before. It also encompasses an argument that defence counsel failed to lead evidence on the impact of the development on the wetlands.

29 In dealing with this issue, which became a factual issue decided in favour of the prosecution at trial, the Justice of the Peace did not accept evidence that a laneway existed prior to 2006 and relied on the photograph filed at trial which showed no such road in existence in 2006 (see Exhibit H). Specifically she did not accept the evidence of the Appellant Jason Geil nor the defence evidence presented by his brother with respect to the pre-existence of such a laneway, nor with regard to the extent of the development undertaken.

30 The presiding Justice of the Peace thoroughly considered all of the evidence with respect to such an issue and found that the area where there was a roadway and the area where there was a new berm fell within the regulated area. The Justice of the Peace discounted the evidence of Stewart Geil with respect to the elevation of the laneway and relied on the photograph marked as Exhibit H dated May of 2006 of the subject property which did not depict any laneway through the bush area. The Justice of the Peace, as she was entitled to do, referred to further exhibits, in particular photographs marked accordingly to indicate that there was no indication that such a laneway existed in 2006 throughout the wetland. It would appear as well that there was photographic evidence led at trial to apparently show a portion of the roadway that pre-existed but the Justice of the Peace gave that evidence little weight as it had not been shown that the photographs precisely depicted the areas of concern.

31 The Justice of the Peace did not accept the evidence of Stewart Geil that a laneway always had existed through the wetland and that it had not changed much except that some gravel had been put on it. In coming to that conclusion Her Worship considered the very evidence of the Appellant Jason Geil who admitted that he had been cleaning the area through the wetland and had made the laneway wider and longer by cleaning bush, trimming branches and putting gravel on the roadway.

32 In coming to the conclusion that she did with respect to the non-existence of the laneway previously, the Justice of the Peace noted:

Reviewing Exhibit H which depicts an aerial photograph of 1943 Roseville Road flown May 2006 by Grand River Conservation Authority is evidence that there is no indication of either a laneway or any sort of a passage through the wetland area except a small portion of some sort of laneway on the beginning before the bush area. However, the laneway is clearly visible on Exhibit A Picture 73 all the way through the area as defined under Regulation 150/06 as wetland.

33 There is nothing before the court to indicate that the photo now sought to be introduced as new evidence was not available at the time of trial. Further and in any event it is clear that upon viewing the photograph it does not assist the Appellants in any productive way as an existing roadway is not readily apparent. Certainly not or near to the extent of the roadway illustrated on Exhibit #1 to the appeal which is an aerial photograph showing the current roadway as of July 13, 2012.

34 It is important to note the evidence of Jason Geil itself confirmed a "development" to a certain degree, much less than alleged by the authority, had taken place on the laneway even if in fact it did exist in some form or another prior to 2006. Further, the fact that it existed prior to 2006 would not have assisted the court in understanding that it continued to exist in 2006 as the photograph filed at the trial clearly does not show such a laneway and, in any event, even if it did exist on all the evidence including the evidence of the Appellants development did take place to some degree. The Justice of the Peace found that degree to be much greater than suggested by the defence evidence but even to the degree set out by the Appellants it would have been sufficient to warrant findings of guilt on the facts as found by the trial court.

35 The Appellants have not shown there was an attempt to adduce the evidence at trial, nor that the evidence in any event is relevant in the sense that it would have a decisive or potential decisive weight at trial. Further, it cannot in any way be said that the "new evidence" could reasonably be expected to have affected the result given even the evidence of the Appellant Jason Geil at trial.

36 The request to introduce the new evidence on the appeal is therefore denied. The court would make it clear that even if such "evidence" had been submitted it does not, in this court's view, support the position of the Appellants that the laneway existed previously or that even if the laneway did exist it existed to the degree in place at the time the charges were laid. In fact, if anything, the "new evidence" confirms the significant extent of the development undertaken by the Appellants without proper authorization over the designated property.

37 Dealing with the alleged incompetence at trial, this ground of appeal has no merit nor does the issue of alleged conflict. Any conflict that may have existed was for the authority to raise as they had been previously represented by trial counsel on an unrelated matter, granted involving similar issues raised at the trial in this matter. Further, there is absolutely nothing on the record to cause the court to have concern with respect to the competence of counsel at trial. This was not raised during the course of the trial and I find is an afterthought on the part of the Appellants. Decisions with respect to the calling of evidence and submissions upon the completion of the evidence are within the realm of trial counsel to decide. There is nothing before the court to indicate such decisions were wrong let alone negligent and there is nothing whatsoever to suggest the actions of trial counsel compromised in any way the fulfillment of his duties and ethical responsibilities, nor did his actions compromise the rights of the Appellants. The issue of conflict and negligence is, in this court's view, a "red herring".

38 The court has already addressed the issue of the "photo" and notes further that the Appellants raise the issue of counsel failing to bring forward evidence with respect to the impact on the wetlands. The impact on the wetlands is of no consequence and would not have assisted the Appellants in defending the action as clearly the property is within the designated area, development was undertaken without a permit and the Appellants, particularly Jason Geil, were aware that such authorization was required. Still, they proceeded in at least a cavalier manner in developing not only the laneway but also the berm in a significant fashion.

39 An appeal court may overturn a conviction acting under s. 120 if:

- (1) it is unreasonable or cannot be supported on the evidence.
- (2) there has been an error on a question of law; or,
- (3) there has been a miscarriage of justice.

The test is not whether the appeal court has a reasonable doubt with regard to the first ground about the correctness of the conviction or even if satisfied that it is wrong, but instead the test is whether it is possible to reach that verdict acting judicially. The onus is on the Appellants to establish that the court entering the conviction erred and that the evidence cannot support a conviction.

40 With respect to Ground 2, the Appellant must show a clear error of law. The Appellant must prove the error. Even if it does so, the court might dismiss the appeal if the error did not occasion a substantial wrong or miscarriage of justice, although the onus of showing this generally falls on the Respondent.

41 The third ground deals with the miscarriage of justice and is reserved for the most extreme situations in which it is necessary to grant an appeal for reasons of fundamental justice. (*R. v. Arnold*, [2002] O.J. No. 3835 (Ont. C.J.).)

42 Keeping in mind the test, the court finds that the trial judge considered all matters reasonably. She articulated her reasons for rejecting the testimony of certain witnesses and reached a conclusion that was certainly open to her on all of the evidence. Further, with respect to the issue of jurisdiction the justice considered that particular issue, applied appropriate case law to the facts before the court and did not err in that regard.

43 Accordingly, the appeal as to conviction will be dismissed.

44 With respect to the issue of the sentence appeal, the trial court considered the evidence before it, addressed the aggravating and mitigating factors on sentence and applied those factors to appropriate principles. It appears given all the circumstances in place and considering the aggravating features, particularly with respect to the Appellant Jason Geil, the sentences were fit and

appropriate. The fines imposed address the issues of deterrence and cannot be considered harsh or oppressive. The Appellant Jason Geil received the maximum fine and that fine was warranted on the basis of the aggravating features present and noted by the Justice of the Peace in her reasons for sentence.

45 For the reasons noted then the appeals as to conviction and sentence will be dismissed.

Appeals dismissed.

2013 ONCA 457
Ontario Court of Appeal

R. v. Geil

2013 CarswellOnt 8921, 2013 ONCA 457, [2013] O.J. No. 3087, 107 W.C.B. (2d) 801

**Her Majesty the Queen, Responding Party and Jason John
Geil, Janet Ann Bratton, Ontario Corporation #1410025
c.o.b. as Geil Style Enterprises Inc., Moving Parties**

P. Lauwers J.A., In Chambers

Heard: March 04, 2013
Judgment: March 19, 2013
Docket: CA M42088

Proceedings: refusing leave to appeal *R. v. Geil* (2012), 2012 ONCJ 740, 2012 CarswellOnt 15014 (Ont. C.J.); affirming *R. v. Geil* (2011), 2011 ONCJ 888, 2011 CarswellOnt 16035 (Ont. C.J.)

Counsel: Terrance G. Green, Mariah Soper, for Moving Parties
Steven O'Melia, for Responding Party

P. Lauwers J.A., In Chambers:

1 The applicants Jason John Geil, Janet Ann Bratton, Ontario Corporation #1410025 operating as Geil Style Enterprises Inc. built a farm roadway on land they owned to provide cultivation access to a section of their land. They did so without securing the permission of Grand River Conservation Authority. They were convicted of breaching a regulation under s. 28(16) of the were convicted of breaching a regulation under s. 28(16) of the were convicted of breaching a regulation under s. 28(16) of the

2 The applicants seek leave to appeal under s. 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended.

3 The principles for granting leave to appeal leave under s. 131 of the *Provincial Offences Act* are set out in *Enbridge Gas Distribution Inc. v. Ontario (Ministry of Labour)*, 2011 ONCA 13 (Ont. C.A. [In Chambers]), per Watt J.A. at paras. 33-35. There must be question of law alone, the resolution of which may have an impact on the jurisprudence in a way that is of interest to the public at large, and that resolution must be essential in the public interest, in the sense of "material, important," or for the due administration of justice: *R. v. Krukowski*, [1991] O.J. No. 255 (Ont. C.A.) per Lacourciere J.A. at para 13. Further, the leave court may advert to the merits: *Enbridge Gas Distribution Inc. v. Ontario (Ministry of Labour)* at para. 38.

4 The legal issue that the applicants raised in argument can be distilled: Does the Provincial Policy Statement enacted by the Province under the *Planning Act*, R.S.O. 1990, c. P.13 immunize farmers from prosecution under the *Conservation Authorities Act* by a Conservation Authority where the offence relates to farming activities, in this case constructing a road incidental thereto?

5 The applicants concede that the proper application of the Provincial Policy Statement was not argued before the trial justice. The applicants complain that trial counsel was incompetent in failing to do so. The issue was raised before the appeal court but was not referenced in the reasons for decision. The applicants complain that in failing to address the argument, the appeal court's reasons do not comply with trial counsel was incompetent in failing to do so. The issue was raised before the appeal court but was not referenced in the reasons for decision. The applicants complain that in failing to address the argument, the appeal court's reasons do not comply with trial counsel was incompetent in failing to do so. The issue was raised before the

appeal court but was not referenced in the reasons for decision. The applicants complain that in failing to address the argument, the appeal court's reasons do not comply with *R. v. Sheppard*, [2002] 1 S.C.R. 869 (S.C.C.).

6 The applicants submit that the issue is of importance to farmers generally. They also point to another decision of a justice of the peace which they submit conflicts with the trial decision in this case. In *R. v. Minas*, (Justice of the Peace Ann Rohan, unreported, dated January 21, 2009), as in this case, the land was in agricultural use and a road was built without a permit in an area designated as a wetland subject to regulation by the Conservation Authority.

7 There was some evidence in *Minas* that a laneway had existed on the land in the location of the road. In the course of his reasons for decision, the trial justice in *Minas* said:

The 2005 Ontario Provincial Policy stated that wetland protection is not to limit agricultural use. This is Mr. Thompson's evidence (an expert land use planner), that the defendant did not require a permit as agricultural activities are exempt as it relates to wetland protection under the *Planning Act*.... It is this court's opinion that a roadway existed for agricultural purposes on this property and may have been overgrown by lack of use over the years.... Quite frankly, the matter before the court is whether or not the defendants should have access to viable farmland over an improved historic roadway for agricultural purposes; it is the opinion of this court, after hearing all the evidence, examining all the exhibits...that the defendants are not guilty of these offences.

8 The applicants claim that there was such a laneway here too, which would bring the case even closer to *Minas*. But the appeal judge noted at para 31 and 33 of his decision:

[31] The Justice of the Peace did not accept the evidence of Stewart Geil that a laneway always had existed through the wetland and that it had not changed much except that some gravel had been put on it. In coming to that conclusion Her Worship considered the very evidence of the Applicant Jason Geil who admitted that he had been cleaning the area through the wetland and had made the laneway wider and longer by cleaning bush, trimming branches and putting gravel on the roadway.

[33] There is nothing before the court to indicate that the photo now sought to be introduced as new evidence was not available at the time of trial. Further and in any event it is clear that upon viewing the photograph it does not assist the Applicants in any productive way as an existing roadway is not readily apparent. Certainly not or near to the extent of the roadway illustrated on Exhibit #1 to the appeal which is an aerial photograph showing the current roadway as of July 13, 2012.

In my view, *Minas* is accordingly not a conflicting decision.

9 In relation to leave to appeal leave under s. 131 of the *Provincial Offences Act*, the respondent agrees that the interpretation of the Provincial Policy Statement and its application to farming raises a question of law. The respondent takes the simple position, however, that the argument that the applicants as farmers are immunized from prosecution by virtue of the Provincial Policy Statement simply has no merit.

10 The respondent submits that the Provincial Policy Statement gets its status from s. 3 (5) of the *Planning Act*:

(5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter,

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

11 The respondent submits that the subsection plainly provides that the duty of the Conservation Authority to comply with the Provincial Policy Statement is limited, as the *Planning Act* states, to "the exercise of any authority that affects a planning matter". The Provincial Policy Statement has no effect on the ordinary exercise of Conservation Authority's jurisdiction under the *Conservation Act* in regulating wetlands. This would also explain why trial counsel, who was well-versed in the law having previously acted for the Conservation Authority, did not raise the issue; failing to do so was, the respondent submits, not an instance of incompetence.

12 The applicants raised three complaints in the factum, being whether the appeal judge provided sufficient reasons for judgment, whether he properly weighed the evidence that was brought before him and whether he properly applied the law to the evidence. In the circumstances of this case, none of these is capable of meeting the test for leave under s. 131 of the *Provincial Offences Act*. I reach the same conclusion on the proposed legal question; the position to be argued by the applicants has no merit.

13 The motion for leave to appeal is dismissed.

Tab 4

2015 ONCA 585
Ontario Court of Appeal

R. v. Michaud

2015 CarswellOnt 13209, 2015 ONCA 585, [2015] O.J. No. 4540, 126 W.C.B. (2d) 70, 127 O.R. (3d) 81, 22 C.R. (7th) 246, 328 C.C.C. (3d) 228, 339 O.A.C. 41, 341 C.R.R. (2d) 89, 82 M.V.R. (6th) 171

Her Majesty the Queen, Respondent and Gene Michaud, Appellant

David Watt, P. Lauwers, C.W. Hourigan J.J.A.

Heard: March 10, 2015

Judgment: August 31, 2015

Docket: CA C59271

Proceedings: affirming *R. v. Michaud* (2014), 311 C.R.R. (2d) 170, 2014 CarswellOnt 6753, 2014 ONCJ 243, 66 M.V.R. (6th) 149, [2014] O.J. No. 2443, D.A. Harris J. (Ont. C.J.)

Counsel: David Crocker, Laura K. Bisset, for Appellant
Joshua Hunter, Padraic Ryan, for Respondent

Comment

This decision raises important questions about the relationship between the right to security of the person as guaranteed by section of the *Charter* and what Justice Lauwers, at paragraph 148, refers to as "[m]undane but critically important safety regulation." The decision of the Supreme Court of Canada in *Bedford v. Canada (Attorney General)*, 2013 SCC 72, 7 C.R. (7th) 1 (S.C.C.) brings the tension between constitutional rights and safety regulation into sharp relief, as the decision indicates.

Because the *Charter* predominantly protects individual legal rights, there has been a strong tendency towards avoiding the balancing of individual and societal rights at the stage of determining whether a particular right has been violated. This is especially so in the criminal law sphere, where the Supreme Court has described the state as being the "singular antagonist" against the accused: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (S.C.C.) at 994. Sometimes, however, our highest court has recognized that some balancing within the right must occur where the rights of competing parties conflict; for instance, this has occurred in relation to the issue of the production of third party counselling records in sexual assault cases: *R. v. Mills* (1999), 28 C.R. (5th) 207 (S.C.C.). Nevertheless, in *Bedford*, at paragraphs 123-127, the Court stressed the analytical distinction between sections 7 and 1 and therefore the requirement that the focus at the section 7 stage must be on whether the right has been violated for the individual before the court. Although this has the advantage of consistency and is true to the individual nature of most *Charter* rights, it seemingly presents difficulties in the case of safety regulation. This was highlighted by Justice Lauwers in *Michaud* and he obviously found a section 7 violation with great reluctance. Thus, the most important part of the judgment may be in the section entitled "Reflections on Bedford", at paragraphs 146-154, in which he strongly expresses the concern that the *Bedford* approach risks trivializing constitutional rights. He has mused, at paragraph 151, that a way to avoid this dilemma would be to treat safety regulations differently for the assessment of overbreadth and gross disproportionality. Whether *Michaud* is appealed to the Supreme Court or whether the issue must await another case for its resolution, this question ultimately will have to be decided at the highest level.

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P. Lauwers J.A.:

1 Gene Michaud, the late appellant, was a commercial truck driver. He was required by law to equip his truck with a functional speed limiter set to a maximum speed of 105 km/h. The speed limiter on Mr. Michaud's truck was functional, but was set to 109.4 km/h. He was charged with contravening s. 68.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (*HTA*) and s. 14(1) of the equipment regulation, R.R.O. 1990, Reg. 587 (the "legislation"), which together impose the speed limiter requirement. Mr. Michaud admitted the facts.

2 The justice of the peace at first instance acquitted Mr. Michaud on the basis that the legislation infringed his right to security of the person and thereby violated s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*. When Mr. Michaud passed away before the first appeal, his wife, Barbara Michaud, was substituted as the party and the appeal proceeded. On appeal, the Ontario Court of Justice admitted fresh evidence, found no *Charter* violation, and set aside the trial decision.

3 This is a test case for the trucking industry. Justice Blair granted leave to appeal to this court under s. 139 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (*POA*) on two questions of law:

1. What is the scope of an appeal to the Ontario Court of Justice on a Part I *POA* offence, pursuant to s. 135 of the *POA*?
2. Is s. 68.1(1) of the *HTA* unconstitutional because it violates the right to security of the person, which is protected by s. 7 of the *Charter*?

4 For the reasons set out below, I would dismiss the appeal. Following a brief overview of the proceedings below, I address each question of law in turn.

A. The Decision of the Justice of the Peace

5 On consent, the evidence at trial consisted of affidavits and out-of-court cross-examinations. The trial justice had evidence from three witnesses called by the defence: the appellant Mr. Michaud, a licensed professional driver; Julie Cirillo, an expert on highway safety; and Michael Lepage, an expert on greenhouse gases. The Crown called Dr. Frank Saccomanno, an expert on truck speed limiters.

6 The trial justice followed the analytical approach taken by the trial court in *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 102 O.R. (3d) 321 (Ont. S.C.J.). He considered first, whether the legislation constituted a deprivation of Mr. Michaud's security of the person, and second, whether the deprivation was in accordance with the principles of fundamental justice.

(1) Security of the Person

7 The trial justice identified three purposes for truck speed limiters: to reduce greenhouse gas emissions, to reduce the severity of collisions, and to prevent accidents.

8 The trial justice acknowledged, at pp.15-16, that the speed limiters may achieve, albeit in only a minor way, the goal of reducing greenhouse gas emissions by trucks, based on the evidence of Mike Lepage, an expert in meteorology, air quality analysis and atmospheric chemistry modelling.

9 On the goal of reducing of the severity of collisions, the trial justice noted, at p.9, that: "All agreed that speed is a factor in severity and affects response times and may contribute to frequency of accidents." He qualified his acceptance of this evidence, at p. 15: "However, I was provided no evidence as to what the threshold speed might be because once you are past a certain speed it does not matter." He added, by way of explanation: "so after a certain rate of speed, it is not going to matter. It is going to be severe and there are going to be fatalities but I have nothing to refer to on this."

10 On the goal of preventing accidents, the trial justice accepted the evidence of Mr. Michaud and Ms. Cirillo, and rejected the evidence of Dr. Saccomanno.

11 Mr. Michaud's evidence was anecdotal. The trial justice accepted it as the "observational" evidence of an "experienced professional", but not an expert (p. 6). Mr. Michaud asserted that a speed limiter set at 105 km/h would have put him in personal danger by preventing him from keeping pace with traffic in certain circumstances. He recounted several instances from personal experience in which he felt unsafe due to the speed limiter's restriction on his ability to manoeuvre his vehicle. In particular, he pointed to: his inability to accelerate at exits and on ramps where there is considerable friction between vehicles traveling at different speeds; his inability to pass slower vehicles in a timely manner; and his inability to manoeuvre out of a "jack-knife" situation by way of acceleration.

12 Ms. Cirillo is the retired Assistant Administrator and Chief Safety Officer of the United States Federal Motor Carrier Safety Administration. She testified that a speed limiter set at 105 km/h would place trucks at variance with the higher mean speed of highway traffic. She asserted that "turbulence" resulting from speed variance among vehicles, rather than absolute rates of speed, causes collisions; the use of speed limiters produces variations in speeds among vehicles, and therefore causes more accidents. As the trial justice put it, (p. 5): "increased variance from the mean rate of speed will result in a higher number of collisions." Ms. Cirillo admitted she was not an expert on speed limiters.

13 Dr. Saccomanno is a tenured Professor of Civil Engineering at the University of Waterloo and an expert in speed limiters. He authored a study for Transport Canada that led to the creation of the legislation. At trial, Dr. Saccomanno asserted, based on mathematical models, that equipping trucks with speed limiters would result in increased safety by reducing truck speed and by decreasing the severity of collisions and possibly reducing fatalities.

14 In his affidavit Dr. Saccomanno gave the opinion: "truck speed limiters do not pose any significant safety hazard that would argue against their adoption for freeway operations." He added that they decrease high — risk interactions between cars and trucks, improve lane discipline, and reduce crash frequency and severity.

15 The trial justice did not accept Dr. Saccomanno's evidence. Instead he cited it as partially supportive of Ms. Cirillo's evidence. He quoted Dr. Saccomanno's study: "at certain volumes and specific areas of the highway, namely on and off ramps, greater turbulence occurs, resulting in decreased safety." He cited Dr. Saccomanno for the proposition that in certain instances "speed limiters can actually reduce the level of safety" (at p.10).

16 The trial justice noted that many factors contribute to highway traffic accidents, including excess speed and variance from the mean speed. However, he found that the evidence did not establish that the use of speed limiters actually results in increased safety and decreased accident rates. He stated, at p. 11:

There is no research that says the use of speed limiters has resulted in increased safety and a decrease in the accident rates in those jurisdictions that have implemented them. There are no studies providing any empirical scientifically supported evidence demonstrating before and after effects of speed limiters.

17 The trial justice reasoned that the *HTA* is meant to promote drivers "having due care and attention or having reasonable consideration for other persons while driving"; there is an expectation that a driver will be able to manoeuvre as necessary to avoid collisions, but the speed limiter interferes with this ability in some instances, putting the driver and those nearby in danger.

(2) The Principles of Fundamental Justice

18 As noted, for the purposes of the s. 7 analysis using the approach taken in the trial decision in *Bedford*, the trial justice considered three purposes for speed limiters: reducing greenhouse gas emissions, reducing the severity of collisions, and preventing accidents.

19 The trial justice acknowledged that the speed limiters may achieve the goal of reducing greenhouse gas emissions by trucks, albeit in only a minor way. But that acknowledgment was of no moment in his consideration of the principles of fundamental justice. Nor did the trial justice advert to the goal of reducing the severity of collisions in this section of his analysis.

20 Instead the trial justice focused on the goal of accident prevention. He determined that the danger imposed on Mr. Michaud by the operation of the legislation was not in accordance with the principles of fundamental justice. In particular, he held that the 105 km/h setting for the speed limiter was arbitrary. Since the government could not explain how it arrived at precisely that number, he surmised that it was chosen "without the benefit of science as to the safety or effectiveness of the limit" (p. 17). He found that the requirement of speed limiters set to 105 km/h failed to achieve its goal of increasing highway safety by preventing accidents. Instead, "it has created a potentially new set of dangers that may result in collisions caused by the inability to have full care and control of one's vehicle" (p. 15).

21 The trial justice concluded that the legislation therefore negatively affected Mr. Michaud's s. 7 right to security of the person, based on the trial court's logic in *Bedford*. Accordingly, the trial justice did not convict Mr. Michaud of the offence, but provided the following remedy: "section s. 68.1 of the *Highway Traffic Act* is struck for this instance, as it is contrary to section 7 of the *Charter of Rights and Freedoms* as it pertains to the security of person" (at p. 19).

B. The Decision of the Appeal Judge

22 In conducting his review, the appeal judge noted that he had two advantages over the justice of the peace. First, he had the benefit of the recent decisions of the Ontario Court of Appeal and the Supreme Court of Canada in *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, 109 O.R. (3d) 1 (Ont. C.A.), and *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.) (paras. 33-34). Second, he had the benefit of fresh expert evidence that was not available at the time of trial (para. 95).

23 The appeal judge reviewed the evidence presented at trial, noting that Dr. Saccomanno and Ms. Cirillo agreed that both excess speed and speed variance were factors in the occurrence of motor vehicle accidents, but disagreed as to the relative importance of each factor (para. 55).

24 He observed that the "[s]tudies reviewed by Dr. Saccomanno were either positive or neutral regarding the safety implications of speed limiters on trucks" (para. 64), and that Ms. Cirillo "was not aware of any studies on speed limiters at all let alone a study that showed that speed limiters make speed variance more likely or that accident rates increase" (para. 70).

25 The appeal judge then reviewed the Crown's fresh evidence. Dr. Saccomanno testified by way of a new affidavit and out-of-court cross-examination about a study released in March 2012, after the trial, by the United States Federal Motor Carrier Safety Administration. This new study, entitled *Research on the Safety Impacts of Speed Limiter Device Installations on Commercial Motor Vehicles: Phase II*, identified the impacts of commercial vehicle speed limiters on the frequency and severity of collisions.

26 The appeal judge quoted Dr. Saccomanno's opinion that: "the study has established a major empirical link between observed carrier crash rates and speed limiter use"; it provided "sound statistical evidence that truck speed limiters yield positive safety benefits in reducing crashes where speeding is a problem"; and it provided "a strong empirical counter-argument to the view that limiters increase speed variance...lead[ing] to higher car-truck frequency" (para. 87).

27 The defence relied on the responding evidence of Dr. Steven Johnson, a tenured professor of industrial engineering at the University of Arkansas, Fayetteville. Dr. Johnson had some involvement in the new study. He had been hired to assemble a panel of peer reviewers for the new study but had not reviewed it himself.

28 The appeal judge noted Dr. Johnson's opinion that the new study's conclusions were "misleading and misrepresent the data from the study". The appeal judge clearly doubted Dr. Johnson's evidence, observing that he had not shared his concerns with the study's authors prior to its publication, and cited his repeated statements in cross-examination that he was not "criticizing the study" (paras. 90-92). Dr. Saccomanno acknowledged that the study had some methodological and data infirmities but explained why they were not serious enough to undermine the reliability of its conclusions (paras. 93-94). The appeal judge accepted Dr. Saccomanno's evidence.

29 The appeal judge concluded that the defence evidence had not established that the speed limiter deprived Mr. Michaud of his security of the person. In particular, he found that Mr. Michaud did not support his opinion that speed limiters endanger his life with any established facts beyond his anecdotes (para. 112). The appeal judge noted that Mr. Michaud described one occasion in which he accelerated to avoid a dangerous situation. This kind of situation was addressed by Dr. Saccomanno: according to a 2008 study by the U.S Transportation Research Board entitled "Safety Impacts of Speed Limiter Device Installations on Commercial Truck and Buses", at p. 11, acceleration was used in fewer than two per cent of traffic conflicts to avoid potential crashes (para. 123). I infer that the appeal judge found this incidence of risk to be *de minimis*.

30 Further, the appeal judge found that Ms. Cirillo did not offer any evidence that speed limiters led to the speed differentials she identified as a greater cause of accidents than speeding (para. 102). And even if she had established a link between speed limiters and increased danger, the appeal judge found, in light of Dr. Saccomanno's evidence, that Ms. Cirillo had not established that speed differentials caused more accidents than speeding (para. 104).

31 The appeal judge accepted Dr. Saccomanno's evidence that speed limiters contribute to increased highway safety (paras. 135, 140). He found Dr. Saccomanno's evidence to be clear, unbiased, directly relevant to the issues before the court, and in line with common sense, noting that the same could not be said about the evidence presented on behalf of Mr. Michaud (paras. 141-43).

32 The appeal judge concluded, therefore, that Mr. Michaud's evidence failed to establish that the speed limiter requirement deprived him of his s. 7 right to security of the person.

33 Although the appeal judge's conclusion on this issue determined the appeal, he went on to consider whether Mr. Michaud had established that the speed limiter requirement was arbitrary and, as a result, was not in accordance with the principles of fundamental justice.

34 The appeal judge concluded that the legislation was not arbitrary because it was directly connected to its objectives of reducing truck emissions and improving highway safety (paras. 164-175). With respect to the latter objective, the appeal judge noted that the legislature's view that reducing truck speed would improve highway safety was supported by a number of safety organizations, similar legislation in other countries, and common sense (paras. 170-173). Further, the appeal judge concluded that the regulated maximum speed limiter setting of 105 km/h was not arbitrary because it represents the maximum legal speed plus a five per cent margin of error (paras. 156-57).

35 The appeal was allowed, but instead of entering a conviction against the deceased Mr. Michaud, the proceedings against him were stayed.

36 I now turn to the appeal questions.

C. The First Question: What is the Scope of an Appeal to the Ontario Court of Justice on a Part I POA Offence?

37 The prosecution was commenced by a certificate of offence, commonly known as a "ticket", under Part I of the *POA*. The appellant submits that it was an error in principle for the appeal judge to use his review powers under Part I of the *POA* effectively "to conduct a re-trial". Instead, he should have applied the more limited scope of appeal and the more deferential approach to the trial justice's findings that would be required if this were an appeal under Part III of the *POA*.

38 The appellant makes two arguments in support of this submission. First, this was not a simple parking or by-law infraction defended against by a self-represented litigant or paralegal. Instead the trial involved experienced counsel, expert evidence and a two-day trial consisting primarily of legal argument under the *Charter*. The fact that the prosecution was started, in the discretion of a Ministry of Transportation officer, by a ticket and not by the laying of an information, is no more than irrelevant "happenstance". The exhaustive trial process in this case was not typical of a Part I prosecution, the appellant argues, and should in principle have given rise to the more limited scope of review applicable to appeals under Part III.

39 Second, the appellant submits that the *POA* does not contemplate a re-trial of the sort conducted by the appeal judge, who did not defer to the trial justice's credibility findings, but extensively re-weighed the evidence.

40 As I will explain after describing the context, there is no merit to these arguments. The appeal judge's decision to admit fresh evidence required him to take a more expansive approach to all of the evidence.

(1) The Context

41 Mr. Michaud's truck was inspected at a Ministry of Transportation inspection station on the Queen Elizabeth Highway. The officer discovered that his speed limiter was set at 109.4 km/h, not to 105 km/h as required by the legislation. He issued a ticket to Mr. Michaud. This led to the prosecution under Part I of the *POA*, and eventually to this appeal.

42 The *POA* provides for provincial offences to be prosecuted in one of two ways. If the charging officer issues a ticket, then the prosecution follows the process in Part I of the *POA*, (or for parking infractions, under Part II). If the charging officer chooses to lay an information, then the prosecution follows the process in Part III of the *POA*.

43 It is no surprise that the charging officer issued a ticket under Part I of the *POA*. Administratively, it is expedient for officers in a busy highway inspection station to hand out tickets at the point of the infraction for traffic or other minor offences like the one at issue in this case. The laying of an information is a more protracted procedure requiring the involvement of a justice of the peace and is generally used for more serious charges. The choice is left to the charging officer. There was nothing atypical about the ticket in this instance and there is no suggestion that the officer abused his authority in issuing it.

44 I reject the appellant's submission that the manner of proceeding was mere "happenstance".

(2) The Appeal Court's Procedural Powers in a Part I Appeal

45 Section 135(1) of the *POA* provides that "an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I" may be appealed to the Ontario Court of Justice. Section 136(2) of the *POA* stipulates that such appeals are to be "conducted by means of a review". The appeal court's broad powers in conducting the review are set out in ss. 136(3):

(3) In determining a review, the court may,

- (a) hear or rehear the recorded evidence or any part thereof and may require any party to provide a transcript of the evidence, or any part thereof, or to produce any further exhibit;
- (b) receive the evidence of any witness whether or not the witness gave evidence at the trial;
- (c) require the justice presiding at the trial to report in writing on any matter specified in the request; or
- (d) receive and act upon statements of agreed facts or admissions.

The appeal court has power to affirm, reverse or vary the decision under appeal, or to direct a new trial, under s. 138(1).

46 The appellant submits that the scope of appeal under Part I is broader than an appeal of a conviction under an information laid under Part III, which is instead governed by ss. 116 to 134 of the *POA*. I agree that this is generally true. See, for example, *R. v. Duma*, 2012 ONCJ 94 (Ont. C.J.), at para. 24.

47 The centrality of legislative intent to the determination of the appropriate standard of review was recognized by Binnie J. in *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 30, and by Rothstein J. in his concurring reasons, at para. 85.

48 As explained by Duncan J. in *R. v. Gill* (2003), 46 M.V.R. (4th) 230, [2003] O.J. No. 4761 (Ont. C.J.), at para. 11, the legislature clearly intended Part I appeals to be conducted as robust reviews, so that deference to the trial justice is limited to credibility findings:

I am of the view that I must review the record before me and reach my own conclusion on the issue. It is not a matter of deferring to the trial justice's conclusion and intervening only if I conclude that her decision was unreasonable. To approach it in that way would be to effectively transpose the Part III provisions to Part I and II appeals when the legislature took pains to distinguish between the two. However, where findings of credibility are in issue, I should accept the trial justice's findings unless they are unreasonable.

49 There is no basis in the legislation, case law or principle to depart from this robust review simply because the present case is not a "typical" Part I matter, as submitted by the appellant.

(3) The Effect of the Fresh Evidence

50 The appellant submits that the appeal court's Part I review powers do not permit an appeal judge to engage in extensive re-weighing of the evidence or to interfere with credibility findings. The appellant argues that, in doing so, the appeal judge impermissibly conducted a re-trial.

51 The appellant's argument ignores the important role played by the fresh evidence. In particular, Dr. Saccomanno, for the Crown, and Dr. Johnson, for Mr. Michaud, provided expert opinions on a new American study identifying the impact of speed limiters on the frequency and severity of crashes.

52 Once the fresh evidence was admitted, the appeal judge was obliged to consider it along with all of the other evidence, and to consider whether the trial justice's views of the trial evidence were reasonable.

53 The appeal judge accepted the evidence of Dr. Saccomanno that speed limiters yield positive safety benefits, over what he found to be the somewhat contradictory evidence of Dr. Johnson. That evidence filled a hole in the Crown's case, which was identified by the trial justice's finding that there was no empirical evidence establishing that the use of speed limiters had actually resulted in increased safety and a decrease in accident rates. The new study remedied that deficiency.

54 In my view, in light of the fresh evidence, the appeal judge was entitled if not obliged to re-assess all of the evidence under s. 136 of the *POA*. The issue of the sufficiency of the fresh evidence is well within the purview of an appeal judge reviewing a decision under Part I of the *POA*: *Gill*, at para. 11. So too is the power of the appeal judge to come to his own conclusion on all of the evidence, and to find, as he did, that the appellant's evidence was not sufficient to establish on a balance of probabilities that the speed limiter requirement deprived Mr. Michaud of his right to security of the person.

55 Contrary to the appellant's assertions, the appeal judge did not so much overturn the credibility findings of the trial justice, as qualify them in light of the fresh evidence. He did not find that Mr. Michaud and his expert witness, Ms. Cirillo, were not credible, but he found that the trial justice gave too much weight to their evidence in light of the opposing evidence of the Crown's expert witness, Dr. Saccomanno (para. 53).

56 The appeal judge relied on the fresh evidence in coming to this conclusion. He noted that Dr. Saccomanno's testimony was clear, unbiased, directly relevant to the issues before the court, and in line with common sense; he did not find this to be true of Mr. Michaud and Ms. Cirillo (paras. 141-43). The assessment of the evidence is at the core of the appeal judge's function under Part I of the *POA*¹.

(4) Conclusion on the Scope of Appellate Review by the Ontario Court of Justice on a Part I POA offence

57 The appellant has not established that the appeal judge committed a palpable and overriding error, or an error in principle, in the way he approached his role or the evidence.

58 I would reject the appellant's first ground of appeal, and answer the first question on this appeal as follows: The scope of an appellate review by the Ontario Court of Justice on a Part I *POA* offence pursuant to s. 135 of the *POA*, is broad. There is no need, in the circumstances of this case, to add judicial gloss to a well-understood review standard and appeal methodology.

D. The Second Question: is S. 68.1(1) of the HTA Unconstitutional Because it Violates the Right to Security of the Person Under S. 7 of the Charter?

59 The appellant asserts that the legislation violates his right to security of the person under s. 7 of the *Charter*, which provides:

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.

60 The onus is on the rights claimant under s. 7 of the *Charter* to establish that the impugned legislation deprives him or her of security of the person, and that the deprivation is not in accordance with the principles of fundamental justice. If the claimant succeeds in doing so, then the burden shifts to the respondent Crown, under s. 1 of the *Charter*, to justify the deprivation as a "reasonable" limit that is "demonstrably justified in a free and democratic society".

61 The appellant relies on the analytical framework established by the Supreme Court of Canada decision in *Bedford* (more recently summarized by the Court in *R. v. Smith*, 2015 SCC 34 (S.C.C.)). He argues that the legislation fails the s. 7 test because it is "arbitrary" in the *Bedford* sense. The appellant also argued in this court, but not below, that the impact of the legislation on him offends s. 7 because it is "grossly disproportionate".

(1) The Governing Principles: The Bedford Framework

62 In *Bedford*, the Supreme Court clarified the respective roles of s. 7 and s. 1 of the *Charter* in rights adjudication. Section 7 of the *Charter* is meant to assess "the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law." (para. 121). Section 7 of the *Charter* therefore "does *not* consider the beneficial effects of the law for society" (para. 121). (Emphasis in the quoted excerpts by the Supreme Court.) Section 7 focuses on the relationship between the individual claimant and the law, while s. 1 of the *Charter* focuses on the relationship between the private impact and the public benefit of the law (paras. 124-129). The balancing function — "whether the negative impact of the law on the rights of individuals is proportional to the pressing and substantial goal of the law in furthering the public interest" — is addressed only in the s. 1 *Charter* analysis (para. 125), after the claimant has established the s. 7 breach.

63 The corollary of s. 7's singular focus on the individual rights claimant is that an unacceptable "impact on one person suffices to establish a breach of s. 7" (para. 127), or "to violate the norm" (para. 122). This singular focus has significant implications for the application of s. 7 of the *Charter* to safety regulation, as discussed below.

64 The first question in the s. 7 analysis is whether the law "limits", or "negatively impacts" life, liberty or security of the person (*Smith*, para. 16, *Bedford*, para. 58). Security of the person has been defined over time to include the physical and psychological integrity of the person, including personal autonomy. Possible negative effects on the preservation of a person's physical safety and wellbeing are clearly contemplated by security of the person. There must be, and there is in this case, a "sufficient causal connection between the state-caused effect and the prejudice suffered by the claimant" (*Bedford*, para. 75).

65 The second question in the s. 7 analysis is whether the "limitation" or "deprivation" imposed by the law on security of the person is contrary to the principles of fundamental justice (*Smith*, para. 21, *Bedford*, para. 93).

66 In *Bedford* the court referred to three negative "principles of fundamental justice": arbitrariness, overbreadth, and gross disproportionality. The court noted that "the jurisprudence has given shape to the content of these basic values" (para. 96), and went on to outline them in a way that aims to maintain their distinctiveness while recognizing their overlap (para. 107)².

67 The three principles of arbitrariness, overbreadth, and gross disproportionality recognize what Hamish Stewart calls the impugned legislation's "failures of instrumental rationality" (*Fundamental Justice: Section 7 of the Canadian Charter of*

Rights and Freedoms (Toronto: Irwin Law Inc., 2012), at p. 151). The Supreme Court approved, at para. 107 of *Bedford*, Peter Hogg's gloss: "the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective." Professor Hogg added: "If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective." ("The Brilliant Career of Section 7 of the Charter" (2012), 58 S.C.L.R. (2d) 195, at p. 209.)

68 As the Supreme Court put it in *Bedford*, the "first evil" at which s. 7 is directed is an "absence of connection between the law's purpose and the s. 7 deprivation" (para. 108).

69 The principle of "arbitrariness" exists where there is no "direct" or "rational" connection between the purpose of the law and the impugned effect on the individual, or if it can be shown that the impugned effect undermines the objective of the law (para. 111).

70 The principle of "overbreadth" is engaged by a "law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose". Overbreadth exists "where there is no rational connection between the purposes of the law and *some*, but not all of its impacts" (para. 112) (emphasis by the Supreme Court). This principle recognizes that the law may be "rational in some cases, but that it overreaches in its effect in others" (para. 113). In the area of overreach the law is to be understood as arbitrary. That is why the principles of arbitrariness and overbreadth are related (para.117).

71 The principle of "gross disproportionality" under s. 7 "[t]argets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported." This rule "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure" (para. 120).

(2) The Application of the Governing Principles from *Bedford*

72 The appellant argues the legislation is arbitrary and grossly disproportionate in its impact on him, because it prevents him and similarly situated truck drivers from risk-avoidant speeding that in some instances would actually be consistent with the legislation's objective of improving highway safety. This is better understood as overbreadth in the *Bedford* analysis. The Supreme Court found in *Bedford* that a negative impact affecting a single person was a sufficient basis for finding a breach of s. 7 of the *Charter* (para.127).

73 On a strict and literal reading of *Bedford*, I am compelled to find that the appellant has established the legislation deprived him of his right to security of the person in a manner that violated one of the negative principles of fundamental justice, thereby breached his s. 7 *Charter* rights. Dr. Saccomanno's expert evidence confirmed Mr. Michaud's anecdotal evidence of needing on occasion to accelerate out of a dangerous situation. As the appeal judge noted, at para. 123, statistical studies have shown that acceleration to avoid collisions is needed in about 2% of traffic conflicts, as opposed to other evasive manoeuvres such as braking or steering. That evidence is sufficient to establish the first branch of the *Bedford* test; by preventing the appellant from accelerating beyond 105 km/h in all situations where it is needed to avoid collisions, the legislation imposes a danger that negatively affects his security of the person.

74 The second branch of *Bedford* addresses consistency with the principles of fundamental justice. Here, in the 2% of traffic conflicts where the truck driver needs to accelerate in order to avoid a collision, the legislation appears to be overbroad by the Court's definition in *Bedford*. (As I explain below, the actual proportion of traffic conflicts that would engage a truck's need to accelerate is smaller than 2%.) For trucks already moving at the maximum speed when a traffic conflict requiring acceleration occurs, the driver and others in the immediate vicinity on the road are put into an unsafe situation because the driver cannot accelerate; this is contrary to one of the purposes of the legislation, which is highway safety. For those in such a situation, the law contradicts its own purpose of improving highway safety; for them the legislation is overly broad and operates in an arbitrary manner, as the appellant claims. The singular focus of s. 7 under *Bedford* means that it is not possible to dismiss this prospect as a *de minimis* consequence of a beneficial safety regulation. And for an individual truck driver in the traffic conflict, the moment of danger is real.

75 Taking the *Bedford* analysis to its logical conclusion, even though the legislation would accomplish one of its goals by reducing the severity of collisions and another of its goals by modestly reducing greenhouse gases, it breaches s. 7 in its overbreadth. To paraphrase *Bedford*, truck speed limiters may be "rational in some cases", but the legislation "overreaches in its effect in others" (para. 113). In the area of overreach the law operates arbitrarily.

(3) Conclusion on the Application of Section 7 of the Charter to the Legislation

76 In my view, the logic of *Bedford* means that the appeal judge erred in his approach to the burden of proof on the appellant. It is implicit in his decision that he considered the burden to be on the appellant to prove that the regulatory trade-off in the design of the legislation results in a net negative safety outcome for Mr. Michaud.

77 However, the operative trade-off, as acknowledged by the experts in their evidence, was between the general benefit of a reduction in the speed of trucks brought about by the use of speed limiters, and the general detriment brought about by the increase in traffic turbulence created by speed variance that is a logical outcome of the use of speed limiters. These are statistical concepts.

78 The problem is that any statistical analysis of safety measures moves invariably into the balancing of risks and benefits across a population. That, as the Supreme Court clearly stated in *Bedford*, is the province of s. 1 of the *Charter*, not s. 7.

79 According to *Bedford*, the focus of s.7 is relentlessly on the individual claimant. If, as the result of legislation, a single individual is left in danger in even a single situation, then the legislation breaches the claimant's s. 7 *Charter* rights. Mr. Michaud meets that test in this case with respect to the speed limiter requirement for his truck. I reach this conclusion most reluctantly for the reasons set out below in the section entitled "Reflections on *Bedford*".

80 On the strict application of *Bedford*, the legislation is constitutional only if it complies with s. 1 of the *Charter*. This gives rise to the third question for this appeal.

E. The Third Question: does Section 1 of the Charter Save the Legislation?

81 Section 1 of the *Charter* requires the court to determine whether the legislation's s. 7 infringement is "reasonably and demonstrably justified in a free and democratic society." The onus is on the Crown seeking to uphold the legislation.

82 The court must determine first, whether the purpose of the law is pressing and substantial, and second, whether the means by which that purpose is advanced are proportionate. The proportionality analysis asks three questions: (1) Is the limit rationally connected to the purpose? (2) Does the limit minimally impair the right? (3) Is there proportionality between the deleterious and salutary effects of the law? (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.); *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.)).

83 The Supreme Court noted in *Carter*, at paras. 82, and 94-95, that it would be difficult to justify an infringement of s. 7 under s. 1, but added, at para. 95: "in some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*". This, in my view, is one such situation. More are predictable in light of *Bedford*'s instruction that the public good sought to be achieved by the challenged law can be considered only in the s. 1 analysis.

84 In this section of the reasons, I begin with a discussion of the relevant contextual factors relating to safety regulation, including risk assessment and regulation design, then consider why safety regulations attract a lower level of constitutional scrutiny than criminal law, and conclude by applying the s. 1 *Charter* analysis to the s. 7 breach in this appeal.

(1) Contextual Considerations relating to Safety Regulation

85 It is perhaps trite to say that s. 1 *Charter* analysis is contextual, fact-specific and detailed. There are two salient contextual factors relevant to this appeal. First, the area of legislative activity engaged is road safety, which shares features with safety

regulation on a more general basis. Second, risk assessment is critical to safety regulation, but it is difficult and uncertain, and implicates the physical health and safety of individuals, even mortality.

(a) Safety Regulation

86 Safety concerns permeate the complex system of laws relating to the operation of motor vehicles, which must surely be one of the most common yet potentially dangerous activities carried out routinely by large numbers of individuals in modern society. Safety concerns underlie simple ordering rules like driving on the right hand side of the road, rules requiring obedience to traffic signals and signs, and the wide array of criminal offences relating to driving.

87 Further, safety regulation covers virtually all areas of human activity in our society, from the operation of motor vehicles, as in this case, to building codes, electrical codes, fire codes, protocols and standards for drug testing and dosages, pollution, food inspection, transportation by rail or air, liquor licensing, occupational health and safety, and so on.

88 Safety regulation often sets bright line rules, rather than standards. For example, the law prescribes speed limits on highways, in addition to the standard of requiring individuals to drive safely having regard to all of the relevant circumstances.

89 Rules have the advantage of being certain and knowable, but rules can be both over and under-inclusive given their purpose. While the purpose of speed limits is public safety, a bright line rule will not achieve that result perfectly. It might be, for example, that one driver can drive safely at the speed limit, and would be able to do so at a higher, but illegal speed. The speed limit is over-inclusive for this driver. Conversely, another driver might not be able to drive safely at the speed limit, and would only be able to do so at a lower speed. The speed limit is under-inclusive for this driver.

90 The legislation in this case implements a safety regulation by means of a bright line rule: the speed of trucks is mechanically limited, and the enforced speed is higher than the speed limit on Ontario roads.

(b) Risk Assessment

91 In setting safety standards, trade-offs are often required. Two or more competing policy tensions must be reconciled in some way. In this case, the competing tensions are the need for mobility at a high speed for individuals and goods, on the one hand, and the prevention of collisions, on the other hand, which supports controlled and lower speeds.

92 As Todd L. Archibald, Kent W. Roach and Kenneth E. Jull observe in *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (looseleaf) (Toronto: Canada Law Book, 2015) (*Risk Management*), at s. 1:60:

The democratic will supports the concept of speeding laws. The experts must determine what the appropriate maximum speed limits should be. A limit of 20 km/h on all highways would ensure that almost no one would die in a motor vehicle accident. The problem would be, of course, that the economy would grind to a halt at this speed.... The ultimate calculation must assess risk to human life and health from one activity in contrast with the risk from another activity or side effect.

93 At the root of a typical safety trade-off is risk assessment, which incorporates the technique of cost-benefit analysis. One consideration is the possible harm to individuals, including mortality, of the activity in question. In *Simpler: The Future of Government* (Simon and Schuster, New York, 2013) Cass R. Sunstein notes, at p. 156: "The best defense of cost-benefit analysis is that government should try to promote social welfare, broadly understood, and that cost-benefit analysis is a nudge toward achieving that goal — imperfect to be sure, but valuable nonetheless." There is no way to soft-soap the mortality element, although Professor Sunstein tries to do that at p. 158:

The key point is that in engaging in cost-benefit analysis, regulators do not really try to identify the monetary value of a human life. Instead they ask about *the value of eliminating a statistical risk of death*. That question, while hardly easy, is far more tractable.

(Emphasis in original.)

94 Not surprisingly, Ontario has a Regulatory Policy, one of the principles of which is that "regulations are based on assessed risks, costs and benefits." See Service Ontario, *Ontario's Regulatory Policy* (Toronto: Queens Printer for Ontario, 2015), online: Service Ontario <<http://www.ontariocanada.com/registry/downloads/Ontario%20Regulatory%—20Policy.pdf>>. This is also true for federal regulations: Treasury Board of Canada Secretariat, *Canada Cost-Benefit Analysis Guide: Regulatory Proposals* (Ottawa: Her Majesty the Queen in Right of Canada, 2007), online: <http://www.tbs-sct.gc.ca/rtrap-parfa/analys/analys-eng.pdf>.

95 The balancing of costs and benefits is in the very nature of regulatory design and its main challenge, as explained by Professor Sunstein in "The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)" (2014) 114 Colum. L. Rev. 167, at pp. 168-69:

[T]here is an elaborate literature on the problems of risk and uncertainty, and also on how regulators should deal with them. Situations of risk exist when we can identify outcomes and assign probabilities to each of them. Situations of uncertainty exist when it is possible to identify outcomes but not to assign probabilities. Both situations create serious challenges for regulators. We can imagine, for example, a regulation for which estimates of both benefits and costs span a wide range. Perhaps regulators cannot identify the probabilities that ought to be assigned to various points along the continuum. Even if they can do so, it may not be self-evident what ought to be done when benefits exceed costs at some points within the respective ranges, but fail to do so at others. [Footnotes omitted.]

96 The evidence in this appeal shows that there is a real debate between those who assert, like Dr. Saccomanno, that speed limiters enhance highway safety on balance, and those, like Ms. Cirillo, who assert that speed differences brought about by speed limiters cause traffic turbulence which increases the danger of collisions. That debate is found in the studies, including Dr. Saccomanno's studies, and was a live issue at the trial and the first appeal.

97 The presence of real danger triggers the advisability of a safety regulation. But the absence of experience, the science, means that probabilities cannot be accurately assigned to identified outcomes. This uncertainty can be overcome with experience, as probabilities become known, and regulations can then be better tailored. Still, there is no way to eliminate the risk that is inherent in the activity, which is tolerated because of the beneficial aspects of the regulated activity.

98 Further, risk analysis often implicates human mortality. At the limit of any rule or standard that is implemented by a safety regulation, the regulator countenances the possibility that someone participating in the regulated activity will be put at risk of injury or even death.

99 In my view, the consequence of these realities is that much safety regulation, if it falls to be assessed under the singular approach required by *Bedford*, would be seen to be inconsistent with security of the person under s. 7 of the *Charter*.

(c) *The Design of Safety Regulations*

100 Regulations having an *ex ante* or prospective orientation can take two forms: they can impose general behavioural standards to be met, such as requiring prospective licence-holders to demonstrate the capacity for the prudent operation of a motor vehicle, or they can provide specific rules, such as the requirement to have a speed limiter set at a particular speed³.

101 The legislation at issue here is a form of hybrid safety regulation. It has an "*ex ante*" or "precautionary" aspect, because it imposes the speed limiter requirement that would prevent a certain kind of operation of a truck. It also has an "*ex post*" or deterrent aspect, because compliance with the speed limiter requirement is enforced by penalties. Purely *ex post* regulations address safety issues by deterring unsafe behaviour with the threat of consequences.

102 There is good reason to favour *ex ante* rules where human life or safety is at stake and where there is scientific uncertainty as to the precise nature or magnitude of the possible harms. In such cases, regulators utilize a "precautionary principle," which the authors of *Risk Management* note, "tackles the problem of an absence of scientific certainty in certain areas of risk, and directs that this absence of certainty should not bar the taking of precautionary measures in the face of possible irreversible harm" (1:40).

The Supreme Court has recognized the precautionary principle in the context of environmental protection regulations: 114957
Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville), [2001] 2 S.C.R. 241 (S.C.C.).

103 Although the problem of over-inclusiveness would not arise if the legislature had chosen to penalize speeding truck drivers instead of preventing them from speeding in the first place, the regulator has determined that the objective of highway safety is best met by a hybrid regulation that couples an *ex ante* precaution with an *ex post* consequence.

(2) *The Constitutional Scrutiny of Safety Regulations*

104 The Supreme Court has always emphasized that *Charter* analysis is contextual, fact-specific and detailed, and the court's proper role "will vary according to the right at issue and the context of each case" and "cannot be reduced to a simple test or formula": *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 36.

105 Courts are guided by a number of cautionary principles, several of which come into play in this appeal. The first considers whether deference is due to the legislator or regulator. Justice McLachlin (as she then was) observed that deference varies "with the social context" and with the "difficulty of devising legislative solutions to social problems which may be only incompletely understood" by the court: *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 135. She also observed, echoing Aristotle at para 89, of *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.):

The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of.

106 This court has noted that judicial deference to legislative choice is particularly appropriate where the legislation is concerned with public welfare or safety: *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (Ont. C.A.) and *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (Ont. C.A.).

107 Courts are to "be sensitive to the separation of function among the legislative, judicial and executive branches": *Doucet-Boudreau* at para. 33. The Supreme Court added, at para. 35 of *Doucet-Boudreau*, quoting from *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.), at para. 136: "In carrying out their duties, courts are not to second-guess legislatures... they are not to make value judgments on what they regard as the proper policy choice." See also *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.), at 389, *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), at para. 51.

108 The principle of separation of powers reflects the Supreme Court's understanding of the institutional competence of courts, as it noted in *Doucet-Boudreau*, at para. 34: "In the context of constitutional remedies, courts must be sensitive to their role as judicial arbiter and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited." The Court explained, at para. 57, that the principle requires the judiciary to be deferential not only to policy objectives, but to the specific means chosen to achieve those objectives: "It would not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited."

109 The Supreme Court has recognized the need for technical expertise, something that ministries, government agencies and specialized tribunals possess, but courts do not. The wisdom of this approach is illustrated by analogy to the administrative law context. The Court has long required that courts defer to specialized expert decision makers in judicial review: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 54; *Khosa*, at para. 25; *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 16.

110 The principle of due deference has given rise to the concept of "margin of appreciation". As stated by Stratas J.A. in *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89 (F.C.A.), at para. 135, in the administrative law context this "margin of appreciation" can be narrow or wide "depending on the nature of the question and the circumstances." He added, at para. 136, that "where the decision is suffused with subjective judgment calls, policy considerations and regulatory

experience or a matter uniquely within the ken of the executive, the margin of appreciation will be broader" and "the court is less likely to reach the remedial stage."

111 The Supreme Court has recognized the "conceptual harmony" between judicial review in the administrative law framework and reasonableness review in the *Oakes* framework, since "both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives": *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.), at para. 57.

112 Another cautionary principle is based on the important distinction between regulatory and criminal offences. Regulatory offences do not attract the same level of moral blameworthiness: *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.). The regulatory nature of an offence colours the judicial interpretation of its constitutionality, "with the result that regulatory offences are subject to a lower standard of *Charter* scrutiny": Gonthier J., for the majority in *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), at para. 57. He added, at para. 59, that: "Legislators must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection." This observation has general application: the expressions "margin of manoeuvre" and "room to manoeuvre" reflect the same concerns as "margin of appreciation".

113 With the contextual considerations about safety regulation and the cautionary principles about judicial intervention in mind, I now turn to the application of s. 1 *Charter* analysis to the s. 7 breach.

(3) The Application of the Section 1 Charter Analysis to the Section 7 Breach in this Appeal

114 In considering the application of s. 1 of the *Charter* to a breach of s. 7, the court must first determine whether the purposes, goals or objectives of the limit established by the impugned legislation are pressing and substantial.

(a) Pressing and Substantial Objectives

115 It is not disputed that the government's goals in enacting the speed limiter legislation were to improve highway safety by preventing accidents and reducing the severity of collisions, and to reduce greenhouse gas emissions. The daily carnage on our roads shows that the operation of motor vehicles is one of the most common yet potentially dangerous activities carried out routinely by large numbers of individuals in modern society. I accept that these objectives are pressing and substantial.

116 The s. 1 *Charter* analysis next considers whether the means by which those purpose are advanced are proportionate: (1) Is the limit rationally connected to the purpose? (2) Does the limit minimally impair the right? (3) Is there proportionality between the deleterious and salutary effects of the law? I address these requirements in turn.

(b) Rational Connection

117 The government must establish a rational "connection between the infringement and the benefit sought on the basis of reason or logic" (*RJR-Macdonald Inc.* at para. 153; *Carter*, at para. 99). It must show that the limit is not arbitrary in the sense of being totally unconnected to the purpose for which it was enacted. In doing so, the government need only demonstrate a reasonable prospect that the limit will further the objective to some extent, not that it will certainly do so: *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), at para. 48.

118 The government argues that requiring trucks to be equipped with speed limiters set at 105 km/h is rationally connected to the objectives of the legislation. By controlling the maximum speed at which truck drivers can drive, speed limiters reduce both the frequency and severity of highway accidents. Highway accidents involving trucks can be very dangerous, and reducing the severity of accidents therefore would improve highway safety.

119 The appeal judge relied on Dr. Saccomanno's evidence to conclude, at para. 63, that trucks are 20 to 30 times heavier than cars and require 20 to 40 percent longer stopping distances. Dr. Saccomanno noted, at para. 19 of his affidavit, that: "The severity of a crash is also expected to be lower when speed limiters are involved due to lower speed and reduced dissipation of

kinetic energy." The trial justice's observation that "once you are past a certain speed it does not matter" (p. 15), is not supported by the evidence and is counterintuitive. The appellant does not contest the link between speed and the severity of collisions.

120 The expert evidence in this case, as accepted by the appeal judge, supports the Crown's argument. Beyond the argument about the permissible scope of the appeal addressed above in relation to the first issue, the appellant has not pointed to any palpable or overriding error in the appeal judge's finding of fact, at para. 135, that "the use of speed limiters does contribute to increased safety on the roads." Nor does the appellant point to any error in the appeal judge's finding of fact that speed limiters contribute to reducing greenhouse gas emissions.

121 I therefore find that the speed limiter law is rationally connected to the goals of improving highway safety and reducing greenhouse gas emissions.

(c) Minimal Impairment

122 In the minimal impairment analysis, the court asks "whether there are less harmful means of achieving the legislative goal" while at the same time deferring to the legislature in instances where it is better situated to choose among a range of alternatives: *Hutterian Brethren*, at para. 53; *Carter*, at para. 102. In order to satisfy this branch of the *Oakes* test, an alternative must achieve the purpose of the legislation to the same extent: *Hutterian Brethren*, at para. 54.

123 The Crown argues that the legislation is minimally impairing in improving highway safety by reducing the speed of trucks; it regulates individual truck drivers only to the degree required to ensure they approach compliance with valid and unchallenged speed limits. It even allows them a 5% margin over the highest speed limit in Ontario.

124 Although the appellant did not make a fully developed s. 1 argument, the implication of his s. 7 argument is that the legislation is not minimally impairing, because in some traffic conflicts involving trucks it would be safer for a truck driver to be able to accelerate beyond the speed enforced by the speed limiter. The implicit submission is that the legislature should have found a way to achieve highway safety without totally removing truck drivers' ability to accelerate above 105 km/h when it is in the interests of safety for them to be able to do so. For instance, the appellant argues, the use of traffic police officers and radar guns would accomplish the speed reduction objective.

125 There are two implied assertions to the appellant's position: first, the government's regulatory approach is unsound; and second, the 105 km/h speed limit set for the limiter is itself arbitrary. I reject both assertions.

(i) The government's regulatory approach is not unsound

126 The government could choose from the three types of regulation: "*ex ante*" or "precautionary"; "*ex post*" or deterrent to be enforced solely by penalties; or hybrid, being a combination of both. The hybrid model adopted by the government combines the effectiveness of both approaches in controlling the speed of trucks. This is entirely appropriate where human life or safety is at stake, and where there is scientific uncertainty as to the precise nature or magnitude of the possible risks.

127 The *Highway Traffic Act* and its regulations constitute a complex regulatory response to the social problem of motor vehicle and highway safety. The regulatory structure is suffused with technical expertise related to safety, as the evidence in this case shows. There was a real debate between those who assert, like Dr. Saccomanno, that speed limiters enhance highway safety on balance, and those, like Ms. Cirillo, who assert that speed differences brought about by speed limiters cause traffic turbulence which increases the danger of collisions. Where there is debate about countervailing risks in a situation of uncertainty, the regulator must make the call and did so. This is precisely where the judicial "margin of appreciation" comes to the fore and courts ought to defer.

128 As the Supreme Court noted in *Hutterian Brethren*, at para. 37:

Where a complex regulatory response to a social problem is challenged, **courts will generally take a more deferential posture throughout the s. 1 analysis** than they will when the impugned measure is a penal statute directly threatening the

liberty of the accused. ... The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate.

129 In *Carter*, the Supreme Court repeated, at para. 97, that "a "complex regulatory response" to a social ill will garner a high degree of deference" citing *Hutterian Brethren*. However, the Court added, at para. 98, that an "absolute prohibition could not be described as a "complex regulatory response"."

130 However, this is not a case in which the concept of prohibition can play a useful analytical role. Picking out one feature from a very complex regulatory structure is too granular an approach. Assuming that the limit could be seen as an absolute prohibition on excessive speeding by trucks, it does not automatically fail, as this court noted in *Cochrane v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 321 (Ont. C.A.) at para. 34 (pit bull ban).

131 The legislature has determined that the objective of ensuring highway safety cannot be not achieved satisfactorily without a blanket prohibition on speeding by trucks, enforced by speed limiters. As stated in *Hutterian Brethren*, a minimal impairment analysis does not require the government to institute less impairing measures that do not achieve its objective⁴.

132 The choice of the hybrid form of safety regulation, and the specific decision to require trucks to be equipped with speed limiters are uniquely within the purview of the regulator.

(ii) The 105 km/h speed limit set for the limiter is not arbitrary

133 In the absence of specific evidence, the trial justice noted, at p. 17, that "it can only be surmised that the 105 km/h figure was arrived at by the government without the benefit of science". His inference might actually be true given the state of the science. If so, is it fatal to the government's position? In my view it is not.

134 Once the policy decision was made to require truck speed limiters, the obvious question was: to what speed should trucks be limited? Although, as the appeal judge noted, truck speed limiters are becoming more prevalent in North America, the absence of experience on which the science would be based meant that Ontario had to select some number. Presumably, with experience, the number could change if it turned out not to be well tailored. The setting of any number in a safety standard has a degree of arbitrariness about it, in that the number could easily be slightly higher or slightly lower, but this is not arbitrariness in a constitutional sense. There is nothing obviously outlandish or "totally out of sync" in the limit of 105 km/h.

135 In oral argument, in response to a question from the bench, counsel for Mr. Michaud said that he would be content with a speed limiter set to 110 km/h, since Mr. Michaud had set his limiter at 109.4 km/h. The fact that the live dispute in this appeal could boil down to a 5 km/h difference of opinion as to the maximum speed shows how necessary the margin of appreciation for regulators really is, and illustrates the inadvisability of the courts undertaking too searching an analysis of the legislative response to public safety concerns. Those qualified to assess the evidence and determine the appropriate response are the regulators and policy-makers who have developed expertise in precisely this type of regulation and the cost-benefit analysis it demands.

136 I would find that the legislative choice to set truck speed limiters at 105 km/h falls within the reasonable range of policy choices open to the government. The number reflects a 5% margin over the legal speeding limit and is well within the margin of appreciation or room to maneuver due to the regulator. I would find the speed limiter legislation to be minimally impairing.

(d) The Proportionality of the Legislation's Effects

137 The proportionality analysis under s. 1 of the *Charter* differs from the analysis undertaken at the second stage of s. 7 relating to the application of the principles of fundamental justice. The s. 1 analysis is prescribed by the Supreme Court in *Hutterian Brethren*: Is the limit on the right proportionate in effect to the public benefit conferred by the limit (para. 73)? This analysis "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'" (para. 76). It entails a broad assessment of whether the "benefits of the impugned law are worth the costs of the rights limitation" (para. 77), or whether "the deleterious effects are out of proportion with the public good achieved by the infringing measure" (para. 78).

138 The task involves balancing the harm done to Mr. Michaud's s. 7 right to security of the person, along with other truck drivers affected by the legislation, against the benefit to the public resulting from truck speed limiters set to 105 km/h.

139 At its highest, the evidence shows that in 2% of the traffic conflicts involving trucks, it would be less dangerous if a truck driver could accelerate to avoid a collision. It follows that in 98% of such traffic conflicts, the inability to accelerate does not expose the truck driver to harm. Braking, steering and other evasive manoeuvres are sufficient.

140 Moreover, the fact that acceleration is used as an evasive technique in only 2% of traffic conflicts does not support the appellant's assertion that, in those situations, he must be able to accelerate up to speeds faster than 105 km/h in any event. I note that it is not clear from the evidence what proportion of the 2% is made up of trucks moving at maximum speed. Traffic conflicts also happen in situations where the truck is not at maximum speed, such as entering the highway (appeal decision para. 113), or exiting (appeal decision para. 114). The actual proportion of traffic conflicts that would engage a truck's need to accelerate would therefore be smaller than 2%. The 2% statistic might overstate the deleterious effects on Mr. Michaud and his colleagues having their speed limiters set to 105 km/h.

141 With respect to Ms. Cirillo's contention that the speed limiters cause traffic turbulence, which is itself dangerous, the appeal judge found, at para. 70, that Ms. Cirillo "was not aware of any studies on speed limiters at all let alone a study that showed that speed limiters make speed variance more likely or that accident rates increase." The appeal judge found, in the context of making out Mr. Michaud's s. 7 claim where the onus was on the appellant, at para. 102, that Ms. Cirillo did not offer any evidence that speed limiters lead to the speed differential she identified as a greater cause of accidents than speeding. Finally, the appeal judge found, at para. 104, that, in light of Dr. Saccomanno's evidence, Ms. Cirillo did not establish that speed differential caused more accidents than speeding.

142 The evidence shows that forced speed reduction for trucks saves lives. As noted, the appeal judge accepted Dr. Saccomanno's evidence that speed limiters contribute to increased highway safety (paras. 135, 140). There was undisputed evidence that speed limiters decrease the severity of accidents. There was also evidence that speed limiter reduce the frequency of accidents. The appeal judge accepted this evidence (para. 60).

143 In light of these findings, the established salutary effects of the speed limiter legislation outweigh its less well-established deleterious effects. There is no evidence that the effects of the speed limiter legislation are "out of all proportion" to its objectives: *Bedford*, at para. 22.

(e) Conclusion on the Section 1 Charter Analysis

144 To summarize, I would find, on the evidence, that the purposes of the speed limiter legislation for trucks, being the improvement of highway safety and the reduction of greenhouse gases, are pressing and substantial. The means by which these purposes are advanced are proportionate in that: the limiter legislation is rationally connected to the purposes; in terms of the margin of appreciation due to the regulator, the speed limiter legislation minimally impairs the s. 7 right to security of the person of truck drivers; and there is proportionality between the deleterious and salutary effects of the legislation, since the public benefits associated with improved highway safety exceed the detrimental effects on the s. 7 right of truck drivers.

145 I would uphold the legislation under s. 1 of the *Charter*. The Crown has justified the breach of Mr. Michaud's s. 7 *Charter* right as a "reasonable" limit that is "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

(4) Reflections on *Bedford*

146 Earlier I expressed my reluctance to find that the legislation breached s. 7 of the *Charter*, but said that I felt compelled to do so based on the Supreme Court's decision in *Bedford*. In *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.), at para. 21, intermediate courts of appeal were instructed to apply the law the Supreme Court laid down, but then explain why the court finds doing so to be "problematic". I offer these observations in that spirit.

147 Section 7 of the *Charter* uses strong language in saying: "Everyone has the right to... security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." It seems strangely incongruous to consider highway safety regulation, or any safety regulation, as "depriving" anyone of "security of the person" or of engaging the "principles of fundamental justice" in the sense demanded by s. 7, especially since it is regulatory and not criminal law.

148 Mundane but critically important safety regulation seems to back into problems with s. 7 for two reasons, as explained above: first, as an artifact of the nature of risk assessment and risk management, which often implicates human mortality, because at the limit of any rule or standard that is implemented by a safety regulation, the regulator countenances the possibility that someone will die or be killed in the regulated activity; and second, as a result of regulatory design. When a regulator uses a precautionary or hybrid regulation, such as the one in issue in this appeal, the regulator chooses a pro-active bright-line rule in preference to a general behavioural standard, even though such a rule is usually over-inclusive and errs on the side of safety. These are legitimate and reasonable uses of governmental authority.

149 In my view, these typical features of safety regulation do not truly engage either deprivation of security of the person or the constitutional principles of fundamental justice; the idea that they do risks trivializing these concepts⁵.

150 The incidental effect of the *Bedford* analysis is that many safety standards that are based on risk assessments will be subject to challenge and to judicial scrutiny under s. 7 of the *Charter*. The problem comes from two different aspects of the analysis. The first is its singular or individual focus coupled with the Court's description of arbitrariness, overbreadth and gross disproportionality as principles of fundamental justice. The second relates to an apparent softening of the strong *Charter* language of deprivation by the looser language of "limits" or "negatively impacts" (*Bedford*, para. 58). A negative impact seems much easier to establish than a deprivation.

151 Perhaps the way forward for the *Charter* evaluation of safety regulations is to recognize them as a distinct category of legislation, and to require the claimant to establish overbreadth or gross disproportionality under s. 7 not on an individual basis, but on a more general basis, balancing the effects on the individual claimant and similarly affected persons together against the effects of the regulation on the intended beneficiaries. (I recognize this would retrench on the Supreme Court's restatement of the respective roles of s. 7 and s. 1 of the *Charter* in *Bedford*.)

152 Outlier situations, in which a legislature or regulator uses a safety regulation for an improper collateral purpose, or where the regulator makes a gross error, are imaginable. But these would be amenable to judicial sanction under the ordinary principles of administrative law. Cases have held that governments ought to be free to make public policy choices in regulating plainly hazardous activities. A *Charter* response seems exaggerated and unnecessary.

153 In *R. v. 1260448 Ontario Inc.*, [2003] O.J. No. 4306, 180 C.C.C. (3d) 254 (Ont. C.A.) this court cautioned against overly enthusiastic judicial review in the context of road safety. In that case, legislation creating absolute liability if a truck driver's wheel fell off during travel was challenged under s. 7 of the *Charter*. The claimants argued that the penalty created psychological stress and thereby infringed their security of the person. In response, Laskin J.A. wrote, at para. 29:

The right to the security of the person does not protect the individual operating in the highly regulated context of commercial trucking for profit from the ordinary stress and anxieties that a reasonable person would suffer as a result of government regulation of that industry. As Lamer C.J.C. said in *G. (J.) [New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46] at para. 59, "if the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, **massively expanding the scope of judicial review** and, in the process, trivializing what it means for a right to be constitutionally protected."

154 I agree.

F. Disposition

155 To recapitulate, I would reject the appellant's first ground of appeal. The appellant has not established that the appeal judge committed a palpable and overriding error, or an error in principle, in the way that he approached the evidence or his role. The appeal judge did not exceed the scope of appellate review by the Ontario Court of Justice on a Part I *POA* offence under s. 135 of the *POA*.

156 I would give effect to the appellant's second ground of appeal respecting the application of s. 7 of the *Charter*. As the result of legislation, Mr. Michaud meets the *Bedford* test, since the speed limiter requirement for his truck leaves him in physical danger in some situations.

157 I would uphold the legislation under s.1 of the *Charter*. The Crown has justified the breach of Mr. Michaud's s. 7 *Charter* right as a "reasonable" limit that is "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*. Accordingly, I would dismiss the appeal.

David Watt J.A.:

I agree

C.W. Hourigan J.A.:

I agree

Appeal dismissed.

Footnotes

1 I observe that even if the appeal had proceeded under Part III of the *POA*, the appeal judge would have been obliged to establish a process for the reception and testing of the fresh evidence. The method he used in this appeal would have been consistent with his authority under Part III of the *POA* and with the powers of an appeal court under s. 683 of the *Criminal Code*, R.S.C., 1985, c. C-46, on which Part III is modeled.

2 In *Bedford* the court referred to arbitrariness, overbreadth, and gross disproportionality variously as "values" (paras. 96, 105), "principles", (paras. 106, 107) and "concepts" (para. 97), which implies that they are analytical synonyms.

3 The authors of *Risk Management* use speed limiters as an example of a "rules-based *ex ante* solution" (2:15:30).

4 I note in passing that the trial justice impugned the government's assertion that it relied on 18 months of research to back the need for introducing speed limiters, "yet Dr. Saccomanno's research was not published until after the introduction of the legislation in 2009 and refers to the introduced legislation."(p.16) Regulators have knowledge, information, experience and expertise on which they can act without waiting for published peer — reviewed articles in professional journals.

5 See *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at para. 43, where McIntyre J. adopted a description of s. 15, which I would paraphrase and apply here: The broader the reach given to section 7, the more likely it is that it will be deprived of any real content.

2016 CarswellOnt 7197
Supreme Court of Canada

R. v. Michaud

2016 CarswellOnt 7197, 2016 CarswellOnt 7198

Gene Michaud v. Her Majesty the Queen

Abella J., Karakatsanis J., Brown J.

Judgment: May 5, 2016

Docket: 36706

Proceedings: Leave to appeal refused, 2015 CarswellOnt 13209, 328 C.C.C. (3d) 228, 339 O.A.C. 41, [2015] O.J. No. 4540, 127 O.R. (3d) 81, 126 W.C.B. (2d) 70, 2015 ONCA 585, 82 M.V.R. (6th) 171, 22 C.R. (7th) 246 (Ont. C.A.); Affirmed, 2014 CarswellOnt 6753, 311 C.R.R. (2d) 170, [2014] O.J. No. 2443, 113 W.C.B. (2d) 308, 2014 ONCJ 243, 66 M.V.R. (6th) 149 (Ont. C.J.)

Counsel: Counsel — not provided

Per curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C59271, 2015 ONCA 585, dated August 31, 2015, is dismissed.

Tab 5

H-196

2010 ONCA 480
Ontario Court of Appeal

Lakehead Region Conservation Authority v. DeMichele

2010 CarswellOnt 4716, 2010 ONCA 480, 189 A.C.W.S. (3d) 1138

**Lakehead Region Conservation Authority (Applicant / Respondent
in Appeal) and Frank DeMichele (Respondent / Appellant)**

M. Rosenberg J.A., Paul Rouleau J.A., and S.T. Goudge J.A.

Heard: June 18, 2010

Judgment: June 18, 2010

Docket: CA C51551

Proceedings: affirming *Lakehead Region Conservation Authority v. DeMichele* (2009), 2009 CarswellOnt 8728 (Ont. S.C.J.)

Counsel: Michael Harris for Appellant

Allan McKittricks for Respondent

Per curiam:

1 In the ordinary course it would be appropriate for the Conservation Authority to rely on the penal provisions of the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, to ensure compliance. However, this is not an ordinary situation. The appellant has a history of developing land without a permit. To some extent the application judge found this conduct was condoned by the Authority and that they were aware of at least some of the appellant's conduct.

2 However, the appellant's clearly stated intention to continue with this activity after being asked to stop by the Authority and his statement that he had no intention of seeking a permit from the Authority, justified the granting of the injunction.

3 While the Authority regulates the use of private property, it does so for a public purpose, protection of wetland environment. In this case there is a public interest in ensuring compliance with the *Act*. The application judge fully considered all the applicable principles set out in *Pharmascience inc. c. Binet*, [2006] 2 S.C.R. 513 (S.C.C.). We agree with her decision

4 Accordingly, the appeal is dismissed with costs in the amount of \$10,000 inclusive of G.S.T. and disbursements.

Appeal dismissed.

Tab 6

H-198

2021 ABCA 99
Alberta Court of Appeal

Ouellette, et al v. Law Society of Alberta

2021 CarswellAlta 606, 2021 ABCA 99

**Christian Sylva Ouellette and Christian Joffre Ouellette
(Applicants) and Law Society of Alberta (Respondent)**

Thomas W. Wakeling J.A.

Heard: January 28, 2021; February 26, 2021

Judgment: March 16, 2021

Docket: Calgary Appeal 1901-0341AC

Counsel: Christian Sylva Ouellette, for himself
C.O. Llewellyn, for Applicant, Christian Joffre Ouellette
P.A.L. Smith, Q.C., for Respondent, The Law Society of Alberta

Thomas W. Wakeling J.A.:

I. Introduction

1 Christian Sylva Ouellette and Christian Joffre Ouellette filed their civil notice of appeal almost two months after the one-month appeal deadline expired. They applied for an order extending the deadline.¹

2 The Registry subsequently struck their appeal because they failed to file the appeal record on time. More than five months later the Ouellettes applied for an order restoring their struck appeal.

3 I dismiss their application to restore their appeal.

II. Questions Presented

4 Given that the Ouellettes filed their notice of appeal after the expiration of the one-month appeal deadline, they had no appeal to restore. Their notice of appeal has no legal effect.

5 The first question that has to be resolved is whether it is appropriate to grant the Ouellettes an extension of the one-month deadline and, in doing so, give their notice of appeal legal effect. If I conclude that it is inappropriate to extend the deadline, there is no need to consider the merits of the restoration application because there is no appeal to restore.

A. Application To Extend the Time To Appeal

6 An application for an order extending the deadline for filing an appeal is assessed by applying the six criteria set out in Cairns v. Cairns²

7 First, did the applicant intend to appeal while the applicant had the right of appeal?

8 Second, has the applicant offered an explanation for the applicant's failure to file a notice of appeal before the deadline?

9 Third, if the applicant has provided an explanation, does it constitute "some very special circumstance which serves to excuse or justify such failure"?³

10 Fourth, has the applicant established that the applicant's delay has not caused the respondent any prejudice or the prejudice the respondent has suffered is not of such a magnitude as to make it unjust to grant the extension?

11 Fifth, has the applicant derived any benefit from the judgment the applicant wishes to appeal?

12 Sixth, does the appeal have sufficient merit that the appeal has "a reasonable chance of success"?⁴

13 If an applicant complies with all six markers, is there a compelling reason to deny him the requested relief? A compelling reason may exist if the applicant took too long to apply for relief.

14 If the applicant fails one or more of the six markers, are there nonetheless compelling reasons to extend the time to appeal?⁵

15 How do the applicants fare under this protocol?

16 If I decline to extend the time to appeal, the Ouellettes' notice of appeal has no legal effect — there is no appeal. If there is no appeal, there is no appeal to restore and no need to consider the restoration application.

17 If I extend the time to appeal and give legal effect to the Ouellettes' notice of appeal, I must then consider whether to restore the Ouellettes' appeal.

B. Application To Restore the Appeal

18 The general rule is that an appeal may be restored if it is in the interests of justice to do so.⁶ In making this assessment, the Court must ask five questions.⁷

19 First, is there any reason to conclude that the applicant's intention to appeal ceased at any time after the applicant filed a notice of appeal? If so, the Court has reason to doubt the applicant's commitment to the appeal and there is no reason to restore it.

20 Second, has the applicant provided an explanation for the delay that caused the Registry to strike the appeal? If so, is the explanation consistent with an intention on the part of the applicant to advance the appeal?

21 Third, has the applicant moved with sufficient expedition to cure the defect?

22 Fourth, what are the prospects of success? Is the appeal hopeless or the likelihood that the appeal will succeed very low? It makes no sense to restore an appeal that is certain or almost certain to fail.

23 Fifth, will the restoration of the appeal cause the respondent any prejudice? If so, is it just to require the respondent to shoulder this prejudice?

24 "In the absence of extraordinary circumstances, a court should restore an appeal if the applicant meets the five criteria and decline to do so if the applicant misses any of the five criteria".⁸

III. Brief Answers

A. Application To Extend the Time To Appeal

25 The applicants should have filed their notice of appeal before September 3, 2019. They did not file it until October 31, 2019. They were almost two months late. The delay was twice as long as the one-month appeal period that they seek to extend.

26 On October 31, 2019 the case management officer told the applicants that they filed their notice of appeal late and that they must move with expedition. They did not. They waited until February 14, 2020 — roughly 3.5 months — to file an application for an order extending the deadline.

- 27 The applicants passed the first part of the *Cairns v. Cairns*⁹ test.
- 28 The Law Society of Alberta¹⁰ conceded that the applicants entertained the necessary intention to appeal.
- 29 The Ouellettes also cleared the second hurdle. Mr. Ouellette provided an explanation for their delay. He understood that the one-month window did not open until the order pronounced on August 2, 2019 was filed on October 1, 2019.
- 30 This explanation does not pass the third test. Rule 14.8(2) is clear. An explanation based on a failure to understand a clear rule does not qualify as a "very special circumstance".
- 31 The applicants also failed to establish that their late filing has not caused the Law Society significant prejudice. A favourable judicial outcome is a valuable commodity. A respondent is entitled to expect that it will be able to rely on that benefit if an adverse party does not act in a timely manner to challenge it. The applicants' delay by itself causes recognizable prejudice to the Law Society.
- 32 The applicants' appeal is hopeless. The Ouellettes' statement of claim discloses no action against the Law Society.
- 33 In summary, the applicants failed to pass the third, fourth, and sixth parts of the test.
- 34 There are no compelling reasons to overlook the significant deficiencies in the Ouellettes' application. The fact that they waited 3.5 months to file an application for an extended deadline is also a telling factor that speaks against exercising any residual discretion I may have in their favor.

B. Application To Restore the Appeal

- 35 My decision not to extend the time to appeal means that the Ouellettes' notice of appeal has no legal effect and there is no valid appeal.
- 36 It follows that I need not address the Ouellettes' restoration application. There is no appeal to restore.
- 37 If I had extended the time to file an appeal, I would not have restored the appeal.
- 38 The Ouellettes' appeal is hopeless. It makes no sense to restore an appeal that is hopeless. "An appeal that is almost certain to fail should be laid to rest without any more private and public resources devoted to it".¹¹

IV. Statement of Facts

- 39 On July 25, 2016 a Hearing Committee of the Law Society ordered that Christian Sylva Ouellette be disbarred.¹²
- 40 Mr. Ouellette did not exercise his rights under the *Legal Profession Act*¹³ and appeal the order of the Hearing Committee to the Benchers of the Law Society.
- 41 Instead, on August 29, 2016¹⁴ he and his son commenced an action in the Court of Queen's Bench against The Law Society of Alberta seeking a declaration that the disbarment decision was void ab initio, an order reinstating him as a member in good standing of the Law Society and damages for breaches of section 7 and 11(b) of the Canadian Charter of Rights and Freedoms¹⁵ and other common law rights.¹⁶
- 42 The Law Society successfully applied before Master Robertson for an order under rule 3.68 of the Alberta Rules of Court¹⁷ striking out the Ouellettes' claim on the ground that it disclosed no cause of action.¹⁸

43 Master Robertson concluded that the statement of claim was a collateral attack on the Hearing Committee's July 25, 2016 decision to disbar him.¹⁹ Mr. Ouellette's claim could not succeed if he failed to successfully challenge the disbarment ruling, which could only be done by the process commencing with an appeal under the *Legal Profession Act*²⁰ against the Hearing Committee's decision — something that Mr. Ouellette explicitly chose not to do.²¹ The Master also rejected Mr. Ouellette's argument that the Law Society owed him a duty of care.²²

44 The Ouellettes appealed the order striking out their claim. Justice Phillips dismissed their appeal on August 2, 2019.²³

45 Justice Phillips proceeded on the basis that the facts the Ouellettes alleged in their statement of claim were true.²⁴ But this did not assist the Ouellettes. Justice Phillips rejected the Ouellettes' argument that the Law Society's alleged misconduct breached either or both section 7 and 11(b) of the Canadian Charter of Rights and Freedoms.²⁵ In addition, she held that damages would not have been an appropriate remedy for any Charter breaches.²⁶

46 Justice Phillips also rejected Mr. Ouellette's argument that the Law Society owed a common law duty of care to either or both of the Ouellettes.²⁷ She characterized the Ouellettes' action as an abuse of process:²⁸

What Mr. Ouellette is trying to accomplish is for this Court to find that the ... [Law Society] process and decision were void. He seeks not only an award of damages, but also reinstatement. Clearly, he should have appealed and exhausted that process when he had the opportunity to do so. In that regard, ss. 75 and 76 of the [Legal Profession] Act set out the appeal process from a decision of the Hearing Committee. The appeal is to the Benchers. An appeal from the Benchers is to the Court of Appeal [under s. 80] [T]he usual rule is for a litigant to follow the proper designated route under the *Act* and exhaust the appeal process. To ... go outside that appeal process in this case, is a collateral attack and therefore, an abuse of process.

47 The Ouellettes filed a civil notice of appeal from Justice Phillips' decision in this Court on October 30, 2019.

48 The one-month deadline set out in rule 14.8(2) of the Alberta Rules of Court²⁹ expired on September 2, 2019.

49 In an October 31, 2019 letter the case management officer informed the Ouellettes that

[t]he decision under appeal was pronounced on August 2, 2019 and, pursuant to Rule 14.8, the deadline to appeal the decision was within 1 month of the date of pronouncement, so by September 2, 2019. Note that the date the resulting formal order may be filed is not relevant to the deadline to appeal — see: *Phoenix Land Ventures Ltd. v. FIC Real Estate Fund Ltd.*, 2015 ABCA 245, at paras. 18-28. Therefore, this appeal has been filed out of time and a filing extension is required in order to proceed. An application to extend time to file the appeal must be made to a single appeal judge as soon as possible and prior to the deadline for the Appeal Record.

50 On November 19, 2019, Ms. Smith, Q.C., counsel for the Law Society, asked the Registrar to strike the appeals because the Ouellettes had not served her with a filed copy of the document ordering the transcript and appeal record, as an appellant must do to comply with rule 14.15(c) of the Alberta Rules of Court.³⁰

51 In a November 19, 2019 letter, the case management officer reminded the Ouellettes that an appellant must file the appeal record before the deadline — within four months from the date on which the notice to appeal was filed — or the Registrar will strike the appeal.

52 In a February 6, 2020 letter to the case management officer, without making any reference to *Phoenix Land Ventures*, Mr. Ouellette argued that he filed his civil notice of appeal in compliance with rule 14.8 of the Alberta Rules of Court and that he need not seek an extension for filing his civil notice of appeal.

53 The case management officer, in a February 7, 2020 letter, rejected Mr. Ouellette's argument set out in his February 6, 2020 letter, stating that the start date for the one-month appeal window, was August 2, 2019, the date Justice Phillips filed her written reasons dismissing Mr. Ouellette's appeal. She informed Mr. Ouellette that if he wished to pursue an appeal he must apply for an order extending the time to file an appeal against Justice Phillips' order.

54 On February 14, 2020 the Ouellettes filed an application returnable February 25, 2020 seeking an extension of time to file a notice of appeal. Each Ouellette filed his own supporting affidavit.

55 The elder Ouellette claims in his affidavit sworn February 13, 2020 that his intention to appeal Justice Phillips' order started as soon as he read her decision and has remained steadfast ever since.

56 He provides the following explanation for his failure to file a civil notice of appeal on time: "The reason I did not file the Notice of Appeal within 30/31 days of August 2, 2019 was because I misinterpreted Rule 14.8, reasoning that the date that the Order of Madam Justice Phillips was 'made' as referenced in Rule 14.8 was the date the order was physically signed by her Ladyship, which date was either September 30 or October 1, 2019".³¹

57 The affiant also attaches as exhibit B a letter he wrote to a person who holds a Master of Social Work degree outlining the services the letter's recipient has provided to Mr. Ouellette and the reasons why Mr. Ouellette thinks he has been clinically depressed. This attached a January 29, 2016 doctor's note explaining Mr. Ouellette's admission to hospital that month at which time he was diagnosed with "an adjustment disorder in relation to difficulties with his professional body". It explained that "[a]djustment disorders are essentially difficulty adjusting to difficult circumstances" that "do not require medications and typically are transient in nature". The recipient responded in a February 14, 2020 letter, attached as exhibit C to Mr. Ouellette's affidavit, in part as follows: "I would describe your emotional state as being one of a reactive depression (rather than a clinical depression) which is meant to mean that should your stated issues be resolved in a positive manner from your point of view, I would expect the depressed state you experience to be resolved and disappear".

58 Mr. Ouellette's son's supporting affidavit, in essence, gave no explanation for his failure to file a timely notice of appeal. Paragraph 5 of the son's affidavit reads, in part, this way: "I make this Affidavit explaining that the reason I have not filed the appeal in time, because my appeal would be part of the Appeal that my father filed, and I was relying on his appeal filings". He added that he was in remand since June 8, 2019 and "[has] no income to otherwise independently advance the appeal, nor practically could ... [he] without ... [his] father's appeal".³²

59 The Ouellettes failed to file the appeal record on time.

60 On March 3, 2020 the case management officer informed Mr. Ouellette that the Registry struck his appeal — on account of his failure to file the appeal record on time — and removed his February 14, 2020 application from the May 20, 2020 hearing list.

61 On August 14, 2020 the Ouellettes filed an application returnable August 25, 2020 seeking an order restoring their struck appeal.

62 The elder Ouellette filed an affidavit he swore on August 13, 2020 in support of his August 14, 2020 application. Part of this affidavit states that "[s]ome of the delay is the result of COVID-19 and some of the delay is result of serious depression on my part due to LSA dishonesty and improper conduct".³³

63 He attached as exhibit P to his August 13, 2020 affidavit an August 9, 2020 letter from the same social worker whose earlier letter is attached as exhibit C to Mr. Ouellette's February 13, 2020 affidavit. Exhibit P recounts statements Mr. Ouellette made to the social worker in several telephone conversations in July and August, 2020. The final paragraph provides the social worker's assessment:

[Mr. Ouellette] asked me if such experience as he was having could be damaging to one's psychological integrity to which I replied yes. The continued state of tense excitement, fear and anxiety would result in the brain producing stress hormones

which would eventually become toxic to his psychological state if the situation producing them continued for a prolonged timeframe. In such a situation the person involved would experience damage to one's psychological integrity producing the negative consequences that he mentioned.

64 The elder Mr. Ouellette swore another affidavit on November 6, 2020 in support of an adjournment application relating to "the application to restore, as well as the application to extend time". Nothing in this affidavit specifically relates to the mental health of the affiant in the period commencing August 2, 2019 and ending February 14, 2020 inclusive — other than a general assertion that he has been under "a long term (four years) ongoing and increasing level of stress that has greatly reduced ... [his] ability to function in a serious litigation matter in an active (Court) setting".³⁴

V. Applicable Alberta Rules of Court Provisions

65 Parts of rules 1.2, 13.5, 14.8, 14.16, 14.37 and 14.47 of the Alberta Rules of Court³⁵ are set out below:

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

.....

(b) to facilitate the quickest means of resolving a claim at the least expense ...

.....

13.5(2) The Court may, unless a rule otherwise provides, stay, extend or shorten a time period that is

(a) specified in these rules

(3) The order to extend or shorten a time period may be made whether or not the period has expired.

.....

14.8(1) In this rule, "date of decision" means the later of

(a) the date that the judgment, order, or other decision being appealed is made, or

(b) if reasons are given after a judgment, order or other decision being appealed is made, the date the reasons are issued.

(2) An appellant must file with the Registrar 3 copies of a notice of appeal that meets the requirements of rule 14.12 and Form AP-1,

(i) within the time for commencing an appeal stated in an enactment,

(ii) if the appellant is granted permission to appeal, within 10 days after the date permission is granted, or

(iii) if subclauses (i) and (ii) do not apply, within one month after the date of decision

.....

14.16(3) The Appeal Record and Transcripts must be

(a) prepared promptly and filed and served forthwith after they are prepared, and

(b) filed not later than 4 months from the date on which the notice of appeal was filed,

or the appeal will be struck by the Registrar.

.....

14.37(1) Unless an enactment or these rules otherwise require, a single appeal judge may hear and decide any application incidental to an appeal, including those that could have been decided by a case management officer.

(2) For greater certainty, a single appeal judge may

.....
(c) when a notice of appeal ... is not filed within the time limit, strike the appeal ... or extend the time to appeal
.....

14.47 An application to restore an appeal that has been struck, dismissed or deemed abandoned

(a) must be filed and served as soon as reasonably possible, and

(b) must be returnable no later than

(i) for a standard appeal, 6 months after having been struck, dismissed or deemed abandoned, or

(ii) for a fast track appeal, 3 months after having been struck, dismissed or deemed abandoned.

VI. Analysis

A. Introduction

66 I will first consider whether it is appropriate to grant the Ouellettes an extension of the one-month appeal deadline. Unless the deadline is extended, the Ouellettes' notice of appeal has no legal effect and there is no need to consider their restoration application.³⁶

B. The Ouellettes' Application To Extend the Time To Appeal Is Without Merit

1. Time Limits Are of Fundamental Importance and Must Be Enforced Except in Extraordinary Circumstance

67 A review of the court rules of common law jurisdictions discloses that there are always deadlines for filing appeals. This is the primary appeal window. No appeal court with which I am familiar does not stipulate a time period within which an appeal must be filed.

68 Why is this?

69 Deadlines are needed to move proceedings along at an acceptable rate³⁷ and to bring litigation to an end.³⁸ Rule compliance is essential in a civil process system committed to the timely resolution of disputes.³⁹

70 In Alberta, the primary appeal window is recorded in rule 14.8(2) of the Alberta Rules of Court⁴⁰ — generally, "within one month after the date of a decision".

71 This is usually the duration of the primary appeal window in the common law world.⁴¹

72 This period is long enough to allow a party to assess the impact of the decision on its interests, the prospects of a successful appeal, and potential appeal costs, and to prepare and serve the necessary appeal papers.⁴²

73 It is also short enough not to detract from the fact that a judgment not the subject of an appeal filed before the deadline "is a valuable asset to the victorious party".⁴³ As Justice McHugh of the High Court of Australia stated in *Gallo v. Dawson*, "the successful party has a vested right to retain the judgment".⁴⁴

74 This reasonable expectation on the part of the prevailing party in the finality of a judgment not appealed within the stipulated appeal period should be preserved in the absence of *very compelling* reasons.⁴⁵

75 Most common law rules of court also feature secondary appeal windows to cover extraordinary cases.⁴⁶ California, in essence, does not.⁴⁷

76 Rule 14.37(2)(c) of the Alberta Rules of Court⁴⁸ introduces a secondary appeal window. It authorizes a single appeal judge to extend the duration of the primary appeal window for an unspecified period, as is the case with most secondary appeal windows.

77 The duration of the secondary appeal window should take into account the legitimate competing interests of applicants, respondents and the state.

78 Applicant's interests are advanced by generous secondary appeal window periods. Long appeal periods reduce the risk that parties who wish to appeal are not thwarted by appeal windows that have closed before they have filed necessary appeal notices. They might argue that "[t]hey participated in a dispute resolution process that had several levels of adjudicators and they ought not to be deprived of their reasonable expectation to have access to the appeal court".⁴⁹

79 Respondents oppose generous secondary appeal window periods. They are ardent supporters of the notion that it "is in the public interest for disputes to come to an end".⁵⁰ Having prevailed in the original disposition they hold judgments that are of value and assert that their worth should be acknowledged sooner rather than later by the adoption of secondary appeal windows of the shortest duration that is fair and reasonable.

80 The state — represented by the judicial branch of government — also has an interest that must not be overlooked.

81 First, it is important to recognize that a disappointed litigant has "no constitutional right to appeal a decision of a superior court or any other court".⁵¹ Secondary appeal windows, regardless of their duration, are not in conflict with fundamental access-to-court values. A jurisdiction would be entitled, if it chose to do so, to eliminate secondary appeal windows.

82 Second, courts are stewards of public resources. They must use them wisely. "Allocating resources to disputes that are directly attributable to noncompliance with straightforward time rules is not the highest and best use of judicial assets".⁵² The state's interests are promoted by rules that introduce short secondary appeal windows and apply stringent standards that strongly encourage litigants to comply with the rules so that the number of applicants relying on secondary appeal windows is greatly reduced. Secondary appeal window applications should be *very rare* occurrences.

83 In *Travis v. D & J Overhead Door Ltd.*,⁵³ I reviewed *Cairns v. Cairns*⁵⁴ and its progeny⁵⁵ and concluded that primary appeal window time lines should be strictly enforced "to ensure that disputes are resolved in a timely way and to give credence to the principles of finality".⁵⁶ Exceptions should only be made "in exceptional circumstances".⁵⁷

84 I explained that a court was more likely to conclude that exceptional circumstances existed if the applicant sought an extension measured in days, passed the six-part *Cairns v. Cairns* test, and filed an application for an extension order as quickly as possible.⁵⁸

85 But I acknowledged that it was open to a court to grant an extension of a greater duration under very narrowly defined conditions if the applicant passed the merits-based component of the *Cairns v. Cairns* test and moved quickly to correct the deficiency once able to do so:⁵⁹

Suppose that a lawyer's office is flooded or destroyed by a forest fire and it takes some time for the practitioner to reestablish normal routines and discharge commitments to clients and other lawyers. Or suppose that a lawyer or client or both are incapacitated by illness or injury and are unable to manage their affairs. This may happen if a sole practitioner is involved in an automobile accident and is in a coma. Or a lawyer may experience mental health problems that prevent him or her from making the decisions needed to protect the clients' interests. Because the applicant bears the burden to prove the facts

that serve as the basis for the exercise of the court's discretion in the applicant's favour the applicant must provide expert evidence to substantiate any claim of incapacitation.

2. The Ouellettes Are Not Granted an Extension of the Deadline To Appeal

a. The Six-Part Cairns v. Cairns Test

86 Justice McGillivray, writing for the Supreme Court of Alberta Appellate Division in *Cairns v. Cairns*,⁶⁰ recorded six distinct criteria that a court must canvas when assessing the merits of an application for an extended deadline for filing an appeal — the secondary appeal window.

87 First, did the applicant harbor an intention to appeal when the primary appeal window was open — the period commencing with the day of the decision the applicant wishes to appeal and terminating on the day the appeal period expires?⁶¹

88 Second, has the applicant provided an explanation for the applicant's failure to file a notice of appeal in the primary appeal period?⁶²

89 Third, if the applicant has offered an explanation, does the proffered explanation constitute "some very special circumstance which serves to excuse or justify such failure"?⁶³ Justice McGillivray expressly declared that "in the ordinary case a misapprehension as to the law and practice relating to such applications affords no reason for following such a course".⁶⁴ This position is sound. It encourages lawyers to ascertain the accepted meaning of the *Alberta Rules of Court* and promotes rule compliance. These are both worthy goals. It has appealed to many common-law judges over an extended period of time.⁶⁵

90 Fourth, will the delay in the final resolution of the matter prejudice the respondent, and, if so, what is the magnitude of the prejudice?⁶⁶

91 Prejudice exists even if the delay may not diminish the ability of the respondent to defend its interest in the litigation.⁶⁷ Prejudice measures the adverse impact delayed resolution may have on other legitimate interests of the respondent. "Defendants ... are unwilling participants in an adversarial process. They should not have to endure for unreasonable periods of time the stress and inconvenience that outstanding litigation causes".⁶⁸

92 A prolonged secondary appeal period may constitute prejudice.⁶⁹

93 Fifth, has the applicant taken the benefit of the judgment the validity of which he seeks to challenge?⁷⁰ This will rarely occur.⁷¹ It is difficult to imagine a set of facts that would create this situation.

94 Sixth, has the applicant "a reasonable chance of success" if the appeal is heard?⁷² It makes no sense to extend the deadline at all for an appeal that is hopeless or nearly hopeless.

95 To summarize, in the absence of compelling reasons, a court should extend the deadline for filing an appeal if the applicant passes the six-part *Cairns v. Cairns* test and applies promptly for relief and decline to grant an extension if the applicant fails to pass the *Cairns v. Cairns* hurdle.

b. The Ouellettes Fail Important Elements of the Six-Part Cairns v. Cairns Test

96 The Ouellettes fail three important elements of the six-part *Cairns v. Cairns*⁷³ test.

97 Mr. Ouellette swore in his February 13, 2020 affidavit that he and his son filed their civil notice of appeal on October 30, 2020 because he thought the one-month appeal period commenced the date the order pronounced on August 2, 2020 was filed — around October 1, 2020, he thought.⁷⁴

98 This explanation does not constitute a "very special circumstance" that excuses or justifies his failure to file his notice of appeal in a timely manner. Justice McGillivray rejected a comparable explanation in *Cairns v. Cairns*⁷⁵ And the English Court of Appeal in *Selwyn Ltd. v. Baker* refused to accept what appears to be the very same explanation as Mr. Ouellette advanced.⁷⁶ More recently, Justice Brown, in *Adderley v. 1400467 Alberta Ltd.*,⁷⁷ noted that "a misunderstanding of the effect of a rule does not constitute a 'special circumstance' that qualifies as furnishing a reasonable explanation".

99 The fact that Mr. Ouellette is a self-represented litigant does not assist him. Rule 1.1(2) of the Alberta Rules of Court⁷⁸ states that "[t]hese rules ... govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer".

100 I am satisfied that granting the Ouellettes an extension would significantly prejudice the interests of the Law Society.⁷⁹ The Ouellettes commenced their action against the Law Society in 2016. Both the Master and the Court of Queen's Bench of Alberta have concluded that their action discloses no cause of action. Justice Phillips filed her decision on August 2, 2019.⁸⁰ The Ouellettes should have filed their appeal on or before September 2, 2020. They were almost two months late — twice the duration of the primary appeal window. And then, in spite of the clear determination by the case management officer that they filed out of time and must move with expedition to seek an extended deadline, they waited from October 31, 2019 to February 14, 2020 to file the necessary extension application.

101 Mr. Ouellette provides no explanation for this roughly 3.5-month delay.⁸¹

102 Mr. Ouellette states in his supporting affidavit that he has "experienced a serious depression as a direct result of the actions and (mis)conduct of the Respondent and its agents, most recently since 2016, on an ongoing basis".⁸²

103 Needless to say, a bald assertion by an affiant that he suffers from "serious depression" is not reliable evidence that the affiant suffers from this condition.

104 A party seeking to attribute dilatory action in the prosecution of an appeal to a medical condition must, in most cases, present expert evidence that supports this assertion.⁸³ The affidavit of a psychiatrist or a psychologist offering a diagnosis and explaining the impact of the condition on the person suffering from this condition would be necessary. The expert's affidavit must set out the expert's qualifications and the facts on which the expert's opinion is based. The adverse party would be entitled to question the expert.

105 Mr. Ouellette did not do this.

106 Instead, he attached as an exhibit to his February 13, 2020 affidavit a letter from a social worker who declined to express the opinion that Mr. Ouellette was clinically depressed. The social worker opined that Mr. Ouellette's "emotional state as being one of reactive depression". In any event, an opinion from a social worker is of minimal value. The social worker does not indicate that he has any training that would allow him to offer an opinion on Mr. Ouellette's mental health.

107 Nor does the January 29, 2016 doctor's note that he attached to his letter to the social worker assist him. That note only attests that Mr. Ouellette had an "adjustment disorder" that is "typically transient in nature" at the time of his admission to hospital in 2016. It says nothing about Mr. Ouellette's mental state years later around the time of this application. In addition, Mr. Ouellette relies on this letter as supporting the merits of his appeal: "a psychiatrist wrote and stated that I was 'too high functioning' with nothing wrong with me and yet I was suspended on medical (psychological) grounds".⁸⁴

108 Mr. Ouellette has not claimed in his February 13, 2020 affidavit that his medical condition adversely affected his ability to ascertain the deadline for filing a notice of appeal and to prepare a notice of appeal or to file an application for an extension of time for filing an appeal. None of these tasks requires a great deal of energy or the ability to concentrate for long periods. Mr. Ouellette could have contacted the case management officer and she would have told him that the appeal filing deadline

was September 2, 2020. He could have contacted the Law Society practice advisor or he could have retained counsel. He does not state in his affidavit that he was impecunious and could not afford to retain counsel.

109 The Ouellettes' appeal has no chance of succeeding. Their appeal is hopeless.⁸⁵

110 A court cannot order damages for breach of right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*⁸⁶ unless the defendant has breached a *Charter* right or freedom of the plaintiff and damages are "appropriate and just in the circumstances", an element of section 24(1) of the Charter.

111 Because I am convinced it is plain and obvious that damages would not be an "appropriate and just [remedy] in the circumstances", I need not decide whether it is plain and obvious that the facts alleged by the Ouellettes in their current statement of claim establish a *Charter* breach.

112 No court acting in a manner consistent with the majority judgment in *Ernst v. Alberta Energy Regulator*⁸⁷ would award *Charter* damages against the Law Society on account of the manner in which it executed its duty to monitor the conduct of its members. Ms. Ernst commenced an action against the Alberta Energy Regulator seeking *Charter* damages. The Regulator refused to communicate with Ms. Ernst for sixteen months. The majority — Justices Abella, Cromwell, Karakatsanis, Wagner, and Gascon — was satisfied that an immunity clause in the *Energy Resources Conservation Act*⁸⁸ precluded an action against the statutory delegate for *Charter* damages.⁸⁹ Four justices concluded that, even if the immunity clause did not cover *Charter* damages, an award of *Charter* damages would never be an appropriate and just remedy⁹⁰ against the Alberta Energy Regulator. They were of the view that Ms. Ernst should have applied for judicial review. This would have been an effective alternate remedy.⁹¹ Judicial review would have been a much quicker and cheaper. For them, that a judicial review court could not award damages was not decisive.⁹² It was still an effective alternative remedy. In addition, they were convinced that *Charter* damage actions would unduly distract the Regulator from focusing on its obligation as a statutory delegate⁹³ and endanger its status as an impartial regulator.⁹⁴ Litigation between a statutory delegate and a member of the public whose interests were subject to assessment by the statutory delegate would compromise the statutory delegate's obligation to be neutral.⁹⁵ Justice Abella opined that *Charter* damages were not "likely" to be an appropriate and just remedy.⁹⁶

113 The Supreme Court has repeatedly cautioned courts against granting *Charter* damages.⁹⁷ This makes sense. *Charter* damages will seldom be needed to advance a legitimate purpose that underlies the *Charter*. State actors, most of the time, will not be prompted to comply with the *Charter* by an award of *Charter* damages. Other remedies will be adequate to promote future *Charter* compliance.

114 A lawyer who is disbarred as a result of an order made by a Hearing Committee under the *Legal Profession Act*⁹⁸ may appeal that determination to the Benchers.⁹⁹ Mr. Ouellette should have done this if he wished to contest the Hearing Committee's decision. Only the Benchers and the Court of Appeal hearing an appeal against a decision of the Benchers¹⁰⁰ exercising their statutory functions under the *Legal Profession Act* may set aside a disbarment order.¹⁰¹ The Court of Queen's Bench has no authority to do so under the *Legal Profession Act*. The procedure for reviewing disbarment decisions made by a Hearing Committee is more expeditious and probably less expensive than an action challenging the validity of a Hearing Committee's decision in the context of a civil action.¹⁰² I am satisfied that an action seeking *Charter* damages requiring the Law Society to defend its discipline decisions made under the *Legal Profession Act* would impair the Law Society's ability to discharge its statutory functions for the benefit of society and jeopardize its status as a neutral adjudicator.

115 I agree with Master Robertson¹⁰³ and Justice Phillips¹⁰⁴ that the Law Society did not owe a duty of care to the Ouellettes.

116 The Ouellettes passed only three elements of the six-part *Cairns v. Cairns* test.

117 Counsel for the Law Society conceded that the Ouellettes formed the intent to appeal Justice Phillips' order in the one-month period following August 2, 2019.

118 I am satisfied that the Ouellettes also met the second and fifth elements of the test. Mr. Ouellette provided an explanation for his late filing and it is obvious that he has not derived any advantage from the August 2, 2019 order.

119 An applicant that clears the six hurdles *Cairns v. Cairns* constructs is very likely to be granted a modest extension. The Ouellettes did not do this and they seek an extension that is almost twice as long as the primary appeal window.

c. There Is No Reason To Exercise Any Residual Discretion in Favor of the Ouellettes

120 There is no valid reason to exercise any residual discretion¹⁰⁵ I may have to extend the appeal period until October 31, 2019. Mr. Ouellette made a bad situation even worse when he waited roughly 3.5 months to file an extension application.¹⁰⁶ I would have settled on this disposition even if I had decided that the Ouellettes' appeal was not hopeless.

C. The Ouellettes Have No Appeal To Restore

121 Given my determination that the Ouellettes' notice of appeal has no legal effect, they have no appeal to restore. It follows that their restoration application must be dismissed.

122 Had I granted the Ouellettes' extension application, I would not have restored the appeal. Their appeal is hopeless. No more private and public resources should be devoted to this prospective appeal.¹⁰⁷

VII. Conclusion

123 I dismiss the Ouellettes' application to restore their appeal.

Footnotes

1 Alberta Rules of Court, Alta. Reg. 124/2010,r. 14.37(2)(c).

2 *Cairns v. Cairns*, [1931] 4 D.L.R. 819,824-27 (Alta. Sup. Ct. App. Div.). See *Travis v. D & J Overhead DoorLtd.*, 2016 ABCA 319, ¶¶ 48; 92 C.P.C. 7th 259, 273 (chambers) ("Almost every reported Alberta judgment in the last seventy years dealing with an application to extend the time within which an applicant may file a notice of appeal cites *Cairns v. Cairns*") & *Adderley v. 1400467Alberta Ltd.*, 2014 ABCA 291, ¶ 8; 580 A.R. 319, 321-22 (chambers) ("The considerations relevant to granting an extension of time to file a notice of appeal are well-established: *Cairns v. Cairns*").

3 *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 826(Alta. Sup. Ct. App. Div.).

4 Id. 827. See *Travis v. D & J Overhead DoorLtd.*, 2016 ABCA 319, ¶ 25; 92 C.P.C. 7th 259, 275 (chambers) ("An appeal does not have reasonable prospects of success if the likelihood of success is exceedingly low so as to make the appeal frivolous").

5 *Stoddard v. Montague*, 2006 ABCA 109, ¶8; 412 A.R. 88, 91 & *The Queen v. Canto*, 2015 ABCA 306, ¶ 13; 329 C.C.C. 3d 169, 177.

6 *Wass v. Wass*, 2020 ABCA 180, ¶ 25(chambers); *Warren v. Warren*, 2019 ABCA 20, ¶ 36; 82 Alta. L.R.6th 213, 222 (chambers) & *Barry v. Institute of Chartered Accountants of Alberta*, 2016 ABCA 89, ¶ 26; 98 C.P.C. 7th 247, 253 (chambers).

7 *Wass v. Wass*, 2020 ABCA 180, ¶ 26(chambers); *Warren v. Warren*, 2019 ABCA 20, ¶¶ 6-10; 82 Alta. L.R. 6th 213, 217 (chambers) & *Barry v. Institute of Chartered Accountants of Alberta*, 2016 ABCA 89, ¶ 27; 98 C.P.C. 7th 247, 253-54 (chambers).

8 *Wass v. Wass*, 2020 ABCA 180, ¶ 27(chambers). See also *Warren v. Warren*, 2019 ABCA 20, ¶ 15; 82 Alta. L.R. 6th 213, 218 (chambers) ("Even if the applicant had cleared the five hurdles a restoration application places in front of him and was presumptively

entitled to a restoration order, I would not have restored his appeal. He has not discharged his obligations under the order appealed from. An applicant who disregards court orders ... should not be surprised if a court declines to grant him an indulgence").

9 [1931] 4 D.L.R. 819 (Alta. Sup. Ct. App. Div.).

10 The legal name is "The Law Society of Alberta". Legal Profession Act, R.S.A. 2000, c. L-8, s. 1(m).

11 Barry v. Institute of Chartered Accountants of Alberta, 2016 ABCA 89, ¶ 27; 98 C.P.C. 7th 247, 254 (chambers).

12 *Law Society of Alberta v. Ouellette*, 2016 ABLS 53.

13 Legal Profession Act, R.S.A. 2000, c. L-8, ss. 72(1)(a) & 75.

14 Affidavit of Christian Sylva Ouellette sworn February 13, 2020 and filed February 14, 2020, exhibits E (Statement of Claim filed August 29, 2016 filing stamp) and F (Amended Amended Amended Statement of Claim filed April 23, 2019).

15 Canada Act 1982, c. 11, Sch. B.

16 *Ouellette v. Law Society of Alberta*, 2019 ABQB 492, ¶ 7.

17 Alta. Reg. 124/2010.

18 *Ouellette v. Law Society of Alberta*, 2018 ABQB 52.

19 Id. ¶ 81.

20 R.S.A. 2000, c. L-8, ss. 75(1) ("If the Hearing Committee makes an order under section 72(1) [finding a member is guilty of conduct deserving sanction], the member in respect of whom the order is made may appeal to the Benchers in accordance with this section") & 80(1) ("A person found guilty of conduct deserving of sanction may appeal to the Court of Appeal any or all of the following: (a) a finding, determination or order made by a Hearing Committee that may not be appealed to the Benchers under section 75; (b) an order of the Benchers under section 76(1); (c) all or part of an order made against the member by the Benchers under section 77(1). (2) The appeal shall be commenced not more than 30 days after the date on which the finding, determination or order appealed from was made").

21 *Ouellette v. Law Society of Alberta*, 2018 ABQB 52, ¶¶ 25 ("Legal Profession Act ... sets out the appeal process from a decision of the Hearing Committee: the appeal is to the Benchers. An appeal from the Benchers is to the Court of Appeal"), 26 ("Mr. Ouellette argues that he did not need to pursue that appeal process [set out in the Legal Profession Act]. ... He says that an appeal to the Law Society Benchers would be a waste of time"), 30 ("Mr. Ouellette argues that although the legislation provides for appeal rights, it does not preclude an action such as this") & 75 ("A claim that is premised on an allegation of bias must go through the proper appeal channel. Mr. Ouellette took considerable pains to explain to me that he consciously chose not to do that").

22 Id. ¶¶ 72 & 85.

23 2019 ABQB 492.

24 Id. ¶ 33.

25 Id. ¶¶ 53, 58 & 64.

26 Id. ¶¶ 63 & 64.

27 Id. ¶ 67.

28 Id. ¶¶ 71 & 79.

29 Alta. Reg. 124/2010.

- 30 Id.
- 31 Affidavit of Christian Sylva Ouellette sworn February 13, 2020 and filed February 14, 2020, ¶ 6.
- 32 Affidavit of Christian Joffre Ouellette sworn February 12, 2020 and filed February 14, 2020, ¶ 4.
- 33 Affidavit of Christian Sylva Ouellette sworn August 13, 2020 and filed August 14, 2020, ¶ 31.
- 34 Affidavit of Christian Sylva Ouellette sworn November 6, 2020 and filed November 9, 2020, ¶ 16.
- 35 Alta. Reg. 124/2010.
- 36 See *Rose v. Bulkowski*, 2000 ABCA 316 (chambers) (the Court refused to extend the time to file an appeal against an order under the *Divorce Act* to give effect to a notice of appeal filed after the deadline).
- 37 Warren v. Warren, 2019 ABCA 20, ¶ 67; 82 Alta. L.R. 6th 213, 230 (chambers) ("Rule compliance is a fundamental obligation of those who participate in a public dispute resolution process that promotes timely and cost-effective determination of controversies and recognizes that unresolved disputes are inimical to the welfare of the community") & *Ratnam v. Cumarasamy*, [1965] 1 W.L.R. 8, 12 (P.C. 1964) (Malaya) ("the purpose of the rules ... is to provide a time table for the conduct of litigation").
- 38 The principle of finality is of paramount importance. *Owners Condominium Plan No. 8022845 v. Haymour*, 2015 ABCA 234, ¶ 54; 602 A.R. 201, 208 (chambers) ("Finality is a value in the litigation process"); *Yd (Turkey) v. Secretary of State*, [2006] EWCA Civ 52, ¶ 25 ("it is a fundamental principle of our common law that the outcome of litigation should be final") & *The Queen v. Meyboom*, [2012] ACTCA 2, ¶ 1 (chambers) ("Time limits for the taking of various steps are common in litigation ... to protect the important value of finality in litigation").
- 39 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 107; 92 C.P.C. 7th 259, 305 (chambers) ("If this Court insists on strict rule compliance and forgives noncompliance only in extraordinary circumstances there will be a reduction in the number of missed appeal deadlines and less of this court's time will be devoted to hearing time extension applications, a nonproductive use of judicial resources. I am convinced that there is a direct correlation between the approach courts take to rule compliance and the prevalence of rule compliance in litigation. Litigants who know that the courts will insist on adherence to timelines are much more likely to abide by the rules"); *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 163; 406 D.L.R. 4th 22, 84-85 per Wakeling, J.A. ("If the courts do not insist that plaintiffs abide by these lenient timelines and dismiss dormant actions they will be part of the litigation landscape"); *The Queen v. Garrioch*, 2015 ABCA 180, ¶ 13 (chambers) ("Failure to insist that parties observe the rules is tantamount to an invitation to ignore them. Consistent enforcement of the rules sends an unmistakable message that compliance with the rules is the best way to promote the orderly and just resolution of appeals"); *Ratnam v. Cumarasamy*, [1965] 1 W.L.R. 8, 12 (P.C. 1964) (Malaya) ("The rules of court must *prima facie* be obeyed"); *Sayers v. Clarke Walker*, [2002] EWCA Civ 645, ¶ 25; [2002] 3 All E.R. 490, 497 ("there is an interest in rules being obeyed and the resources of the court not being taken up with ancillary disputes of this kind"); *Mitchell v. News Group Newspapers Ltd.*, [2013] EWCA Civ 1537, ¶ 41; [2014] 2 All E.R. 430, 442 ("the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner"); Sir Jeffrey Bowman, Report to the Lord Chancellor, The Review of the Court of Appeal (Civil Division), ¶ 54 (September 1997) ("For the system to work effectively, it is important that all rules and procedures are complied with strictly. ... Once this is clear, parties seem to find it easier to meet deadlines and other requirements"); *Denton v. TH White Ltd.*, [2014] EWCA Civ 906, ¶ 34; [2015] 1 All E.R. 880, 892 ("Factor (b) [of Civil Procedure Rule 3.9 that in an application for relief from sanctions for non-compliance the court will consider the need to enforce compliance with rules, practice directions and orders] emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated"); Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report 386-87 & 399 (December 2009) ("Professor Zuckerman argued that the courts must deliver judgments within a reasonable time and at reasonable cost. ... Court users are only entitled to their fair share of court resources. At the moment judges, ... are far too indulgent to litigants in default. This causes not only delay but also unproductive waste of court resources in dealing with the effects of litigant failure to meet deadlines. Professor Zuckerman stated: '... [The Court of Appeal] would have to adopt a policy that gives practical expression to the need to ensure that court resources are properly utilised. This means, amongst others, that a litigant who has failed to take advantage of the opportunity of prosecuting his case will not get another opportunity, unless he has been prevented from doing so by circumstances beyond his control. I make

the following recommendations: ... (vi) The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions"); *ConcernedCitizens of Canberra, Inc. v. Chief Executive (Planning and Land Authority)*, [2015] ACTCA 56, ¶ 21 (chambers) ("time limits are important and must, *prima facie*, be obeyed") & *Quagliano v. United States*, 293 F. Supp. 670, 672 (S.D.N.Y. 1968) ("Strict compliance with the rules is necessary if we are to achieve our goal of current calendars").

- 40 Alta. Reg. 124/2010.
- 41 See *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 14(1)(a) (thirty days); *The Court of Appeal Act*, 2000, S.S., c. C-42.1, s. 9(2) (thirty days); *Court of Appeal Rules*, Man. Reg. 555/88 R, r. 11(1) (thirty days); *Rules of Civil Procedure*, R.R.O., Reg. 194, r. 61.04(1) (thirty days); *Code of Civil Procedure*, C.Q.L.R. c. C-25.01, art. 360 (thirty days); *Rules of Court*, N.B. Reg. 82-73, R. 62.05(2)(a) (thirty days); *Rules of Civil Procedure*, R. 61.03(1) (P.E.I.) (thirty days); *Nova Scotia Civil Procedure Rules*, R. 90.13(3) (twenty-five days); *Court of Appeal Rules*, Nfld. & Lab. Reg. 38/16, r. 8(2)(a) (thirty days); *Rules of the Court of Appeal for the Northwest Territories Respecting Civil Appeals*, R-091-2018, r. 7(3)(a)(iii) (thirty days); *Court of Appeal Act*, R.S.Y. 2002, c. 47, s. 10 (thirty days) & *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27(2)(b) (thirty days). Some appeal periods are longer. E.g., *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 58(1)(a) (sixty days); *The Supreme Court Rules 2009*, S.I. 2009/1603 (L. 17), r. 19(2) (U.K.) (forty-two days) & *Rules of the Supreme Court of the United States* (ninety days). Some are shorter. E.g., *Civil Procedure Rules*, S.I. 1998/3132 (L. 17), r. 52.12(2)(b) (U.K.) (twenty-one days); *Uniform Civil Procedure Rules 2005*, Reg. 418/2005, r. 50.3(1) (N.S.W.) (twenty-eight days); *Uniform Civil Procedure Rules 1999*, r. 748(a) (Queesl.) (twenty-eight days); *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, r. 64.05(1)(ab) (twenty-eight days) (Vict.); *Supreme Court Rules 2000*, S.R. 2000, No. 8, r. 659 (Tasmania) (twenty-one days); *Rules of the Supreme Court 1971*, Ord. 65, r. 9 (W. Austl.) (twenty-one days); *Uniform Civil Rules 2020*, r. 214.1(1) (S. Austl.) (twenty-one days); *Court Procedure Rules 2006*, S.L. 2006-29, r. 5103(d) (Austl. Cap. Terr.) (twenty-eight days); *Federal Court Rules 2011*, S.L.I. 2011, No. 134, r. 36.03 (Austl.) (twenty-eight days); *Supreme Court Rules 2004*, S.R. 2004/199, r. 11(1)(b) (N.Z.) (twenty working days); *Court of Appeal (Civil) Rules 2005*, S.R. 2005/69, r. 29(1)(a) (twenty working days) (N.Z.) & *High Court Rules 2016*, L.I. 2016/225, r. 20.4 (twenty working days) (N.Z.).
- 42 Travis v. D & J Overhead Doors Ltd., 2016 ABCA 319, ¶ 114; 92 C.P.C. 7th 259, 308 (chambers) ("The duration of Alberta's primary appeal window is substantially the same as in other provinces and territories. ... A prospective appellant has ample time to assess the wisdom of appealing and preparing and serving the necessary documents").
- 43 Id. at ¶ 51; 92 C.P.C. 7th at 281 (chambers). See *Alberta Health Services v. Wang*, 2017 ABCA 198, ¶ 11 (chambers) ("Appeal periods are deliberately short, and reflect the importance and value of a final judgment to the winning party"); *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 824 (Alta. Sup. Ct. App. Div.) ("I cannot too strongly emphasize that a person who has a judgment as to which the time for giving notice of appeal has expired has a vested interest in that judgment and in the benefits that may flow from it"); *International Financial Society v. Moscow Gas Co.*, 7 Ch. D. 241, 247 (C.A. 1877) per James, L.J. ("the respondents have a right (and I think it is as valuable a right as any which a subject has in this country) to know when they can rely upon the decree or order in their favour"); *Nicholson v. Piper*, 24 Times L.R. 16, 17 (C.A. 1907) per Buckley, L.J. ("where a litigation had been adjudicated upon, the successful litigant had, upon the termination of the time allowed for appealing, a vested interest in his order") & *Jackamarra v. Krakouer*, [1998] HCA 27, ¶ 4; 195 C.L.R. 516, 519-20 per Brennan C.J. & McHugh J. ("the respondent to the application has a vested right to retain the judgment, the subject of the appeal. To grant the application for an extension of time is to put at risk a vested right of the respondent").
- 44 [1990] HCA 30, ¶ 3; 93 A.L.R. 479, 481.
- 45 *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 825 (Alta. Sup. Ct. App. Div.) ("the holder of a judgment after the time for giving notice of appeal has expired, has a special right or interest which will not be set aside by the Court, unless *weighty* reasons be given for asking the Court to interfere with that right") (emphasis added); *The Ampthill Peerage*, [1977] A.C. 547, 569 (H.L. 1976) per Lord Wilberforce ("the law, *exceptionally*, allows appeals out of time") (emphasis added); *Re Wigfull & Sons' Trade Mark*, [1919] 1 Ch. 52, 58 (C.A. 1918) per Swinfen Eady, M.R. ("where an application is made to enlarge the time for appeal there must be some *proper* grounds for supporting it") (emphasis added); *Nicholson v. Piper*, 24 Times L.R. 16, 17 (C.A. 1907) per Buckley, L.J. ("where a litigation has been adjudicated upon, the successful litigant has, upon the termination of the time allowed for appealing, a vested interest in his order of which he ought not in the absence of *special* circumstances to be deprived") (emphasis added) & *Youngman v. Melbourne Storage Co.*, 7 Austl. L.T. 53, 54 (Vict. Sup. Ct. chambers 1885) ("When the time has been allowed to elapse that

gives the defendant a vested interest in the judgment, and this vested interest ought not to be disturbed unless there is some good reason for disturbing it").

- 46 E.g. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 59(1) ("the court proposed to be appealed from ... or the Supreme Court ... may under special circumstances, either before or after the expiration of a time period prescribed by section 58 [time periods for appeals], extend that time period"); *Supreme Court Rules 2009*, S.I. 2009/1603 (L. 17), r. 5(1) (U.K.) ("The Court may extend or shorten any time limit set by these Rules or any relevant practice direction (unless to do so would be contrary to any enactment") & Practice Direction 2, ¶ 2.1.13 (U.K.) ("The Registrar may reject an application for permission to appeal solely on the ground that it is out of time"); *Civil Procedure Rules, 1998*, S.I. 1998/3132 (L.17), r. 3.9(1) (UK) ("the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need — (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders"); *High Court Rules 2004*, S.R. No. 304, 2004, r. 4.02 (Austl.) ("Any period of time fixed by or under these Rules may be enlarged or abridged by order of the Court or a Justice whether made before or after the expiration of the time fixed") & *Rules of the Supreme Court of the United States*, R. 13.5 ("For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. ... An application to extend the time to file a petition for a writ of certiorari is not favored").
- 47 Appellate Rules, r. 8.104(b) (Cal.) ("Except as provided in r. 8.66 [time extension for earthquakes or other public emergencies], no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal").
- 48 Alta. Reg. 124/2010.
- 49 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 110; 92 C.P.C. 7th 259, 307 (chambers).
- 50 Id. at ¶ 111; 92 C.P.C. 7th at 307.
- 51 *Trisura Guarantee Insurance Co. v. Duchnij*, 2021 ABCA 78, ¶ 72. See also *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, 69-70 per La Forest, J. ("Appeals are solely creatures of statute There is no inherent jurisdiction in any appeal court. [T]here is no right of appeal on any matter unless provided for by the relevant legislature").
- 52 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 112; 92 C.P.C. 7th 259, 307 (chambers).
- 53 2016 ABCA 319; 92 C.P.C. 7th 259 (chambers).
- 54 [1931] 4 D.L.R. 819.
- 55 E.g., *The Queen v. Canto*, 2015 ABCA 306, ¶ 13; 329 C.C.C. 3d 169, 177; *Stoddard v. Montague*, 2006 ABCA 109, ¶ 7; 412 A.R. 88, 90-91; *Sohal v. Brar*, [1998] ABCA 375, ¶ 1; [1999] 7 W.W.R. 345, 346 & *Royal Bank of Canada v. Morin*, 6 A.R. 341, 342 (Sup. Ct. App. Div. 1977).
- 56 2016 ABCA 319, ¶ 118; 92 C.P.C. 7th 259, 309(chambers). See A. Fradham, Alberta Rules of Court Annotated 2020, at 1548 ("If his Lordship's view is shared by other members of the Court of Appeal, this case would seem to herald the beginning of an era in which it will be more difficult to obtain an order permitting the late filing of an appeal").
- 57 Id. at ¶ 120; 92 C.P.C. 7th at 309.
- 58 Id. at ¶ 124; 92 C.P.C. 7th at 310-11.
- 59 Id. at ¶ 127; 92 C.P.C. 7th at 312-13.
- 60 [1931] 4 D.L.R. 819, 824-829.
- 61 Id. 826.
- 62 Id. 827.

- 63 Id. 826.
- 64 Id. 828.
- 65 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, n. 122; 92 C.P.C. 7th 259, n. 122 (chambers) per Wakeling, J.A. ("The fact that a lawyer did not comprehend what the rules of court require is not a sufficient basis to extend the time"); *Adderley v. AlbertaLtd.*, 2014 ABCA 291, ¶ 12, 580 A.R. 319, 322 (chambers) per Brown J.A. ("a misunderstanding of the effect of a rule does not constitute a 'special circumstance' that qualifies as furnishing a reasonable explanation How to properly count time under r 506 was not an obscure, novel or debatable question"); *Armstrong v. Armstrong*, 2006 ABCA 228, ¶ 21; 391 A.R. 48, 53 (chambers) per Coté, J.A. ("even if the point [the commencement date of the appeal period] might possibly have been obscure long ago, that point has ceased to be novel, complex, or doubtful in Alberta, given the case law That error cannot now be called a special circumstance within the meaning of the *Cairns* case"); *Selwyn Ltd. v. Baker*, [1924] W.N. 195, 196 (C.A.) (the failure to appreciate that the primary appeal window opened when the judgment was pronounced and not when it was entered did not qualify as a reason for extending the appeal period); *Nicholson v. Piper*, 24 Times L.R. 16, 17 (C.A. 1907) per Buckley, L.J. ("the mere fact that the litigant's legal advisers thought that he could not appeal was not a special circumstance justifying a departure from the rule"); *Colesv. Ravenshear*, [1907] 1 K.B. 1, 5, 7 & 8 (C.A. 1906) (the Court applied *International Financial Society* and *Re Helsby*); *ReHelsby*, [1894] 1 Q.B. 742, 745 (C.A.) per Lord Halsbury ("The rule gives the Court power, 'under special circumstances', to extend the time for appealing. Here there are, in my opinion, no special circumstances. A mistake was made by the clerk of the appellants' solicitors. If that is a 'special circumstance,' then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the rule. The notice of appeal was served too late, and I can see no ground for extending the time"); *InternationalFinancial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241, 248 (C.A. 1878) per Baggallay, L.J. ("This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the rules is not such a special circumstance as to induce the Court to give special leave which is required to extend the time") & *FirstAuburn Trust Co. v. Estate of Abraham B. Baker*, 134 Me. 231, 237; 184 A.767, 770 (Sup. Jud. Ct. 1936) ("In analogous remedial statutes, such as petitions for review, it is held that the burden rests upon the petitioner of showing due diligence, not only on his own part but also on the part of his attorney").
- 66 *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 827(Alta. Sup. Ct. App. Div.).
- 67 *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 133; [2017] 7 W.W.R. 343, 385 ("Sometimes the very existence of litigation may threaten an important and legitimate interest of the moving party. If so, the nonmoving party's failure to advance the claim against the moving party with reasonable diligence may significantly prejudice the moving party").
- 68 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 177; 92 C.P.C. 7th 259, 325 (chambers).
- 69 *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 825(Alta. Sup. Ct. App. Div.) per McGillivray, J.A. ("the holder of a judgment after the time for giving notice of appeal has expired, has a special right or interest") & *Yd (Turkey) v. Secretary of State*, [2006] EWCA Civ. 52, ¶ ("it is a fundamental principle of our common law that the outcome of litigation should be final").
- 70 *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 827(Alta. Sup. Ct. App. Div.).
- 71 E.g., *Coleman v. Interior Tree, Fruit and Vegetable Committee*, [1930] 4 D.L.R. 800, 801 (B.C.C.A.) per MacDonald, C.J. ("Mr. Norris [counsel for the Committee] asked, when he found how the Judge was intending to decide the question, that this undertaking should be given, and it was given, the money was paid into Court, and he took advantage of that by taking the money out") & *Atlas Record Co. v. Cape & Son Ltd.*, 31 B.C.R. 432, 433 (C.A. 1922) per Martin, J.A. ("We are all of the opinion that ... you cannot approbate and reprobate a judgment ... [I]f you propose to bring an appeal from a judgment, you must be careful not to take benefits under that judgment").
- 72 *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 827(Alta. Sup. Ct. App. Div.).
- 73 [1931] 4 D.L.R. 819.
- 74 Affidavit of Christian Sylva Ouellette sworn February 13, 2020 and filed February 14, 2020, ¶ 6. I am proceeding on the basis that Mr. Ouellette's application will determine the outcome of his son's application.

- 75 [1931] 4 D.L.R. 819, 828 (Alta. Sup. Ct. App. Div.).
- 76 [1924] W.N. 195, 196.
- 77 2014 ABCA 291, ¶ 8; 580 A.R. 319, 321-22(chambers).
- 78 Alta. Reg. 124/2010. See Canadian Judicial Council, Statement of Principles on Self-Represented Litigants and Accused Persons 9 (2006) ("Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case"). See also Gharib v. Mohos, 2020 ONSC 1872, ¶ 16 (Div. Ct.chambers) ("In his oral submissions he stated that as a self-represented party he did not know or understand what he needed to do to perfect the appeal. While I appreciate that it is difficult, self-represented parties are required to determine their obligations, and then comply with the Rules of CivilProcedure").
- 79 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 30; 92 C.P.C. 7th 259, 276 (chambers) ("Mr. Travis' six-month delay in seeking an extension of time within which to file a notice of appeal has caused the respondents serious prejudice. They are entitled to assume when the appeal period expired and Mr. Travis failed to file a notice of appeal that his actions have been dismissed and the litigation is over").
- 80 2019 ABQB 492.
- 81 An applicant must move with "sufficient expedition" to remedy a deficiency in the prosecution of an appeal. See *Wass v. Wass*, 2020 ABCA 180, ¶ 33 ("The applicant did not move with sufficient expedition to cure her late filing of the appeal record").
- 82 Affidavit of Christian Sylva Ouellette sworn February 13, 2020 and filed February 14, 2020, ¶ 15.
- 83 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶¶ 127, & 162-63; 92 C.P.C. 7th 259, 313 & 321 (chambers) ("Because the applicant bears the burden to prove the facts that serve as the basis for the exercise of the court's discretion in the applicant's favour the applicant must provide expert evidence to substantiate any claim of incapacitation. ... I am unwilling on this record to accept counsel's self-diagnosis that his health 'made it impossible for ... [him] to address the appeal within the usual time frame'"). See also *Gharib v. Mohos*, 2020 ONSC 1872, ¶ 14 (Div. Ct. chambers) ("The entirety of Mr. Gharib's affidavit evidence ... is that 'due to health issues that has arisen in the past weeks, I have not been able to gather the necessary documents required for my appeal.' He appends a letter from a psychologist, not properly introduced as evidence, which states merely that Mr. Gharib 'is under psychological treatment for his injuries sustained by his Motor Vehicle Accident.' No additional information is provided as to restrictions or hindrances with respect to Mr. Gharib's ability to gather documents for his appeal, or what documents he requires that he could not obtain. This falls far short of establishing that Mr. Gharib had a medical explanation for his failure to perfect"); *Baig v. Mississauga*, 2020 ONCA 697, ¶¶ 14-15 ("The motion judge accepted that, while Mr. Baig had proffered evidence of a mental illness, there was no evidence that it rose to the level of incapacity for the purposes of s. 7 of the Limitations Act. ... [T]he motion judge held ...: '... *Medical documentation from 2017 and 2018 indicating that Mr. Baig has some cognitive deficits falls well short of establishing that he is now or was incapable during the limitation period. I note as well that Mr. Baig was articulate and organized in his preparation of and presentation of material to the Court and as well in his submissions.* There was nothing in his presentation which caused me to doubt that he had the capacity to commence the action within the limitation period.' [Emphasis added.] In our view, the motion judge correctly applied s. 7 of the Limitations Act. ... [U]nder s. 7(2), a plaintiff is presumed to have been capable of commencing a proceeding, unless the contrary is proved on a balance of probabilities") & *Paulsson v. Board of Trustees of andfor the University of Illinois*, 2018 ONSC 901, ¶¶ 7-8 (Div. Ct.chambers) ("In spite of this intention [to appeal] the Plaintiff did not take any steps to file his Notice of Appeal until almost two years after the jury had rendered its verdict and an award of costs had been made against him. His explanation for this delay is that neither his health nor his finances permitted him to proceed with the appeal. His loss at trial was traumatic for him and exacerbated his major depressive disorder and his attention deficit disorder. In support of his motion the Plaintiff filed a letter from his psychiatrist confirming that he has been receiving treatment for his disorders since March of 2014 and that these disorders were exacerbated after he lost at trial. ... I do not find that the Plaintiff's explanation for his almost two-year delay in filing a Notice of Appeal to be satisfactory or persuasive").
- 84 Applicant's Memorandum of Argument, ¶ 8; Affidavit of Christian Sylva Ouellette sworn February 13, 2020 and filed February 14, 2020, ¶ 19 & exhibit B, page 3 ("I was suspended on an interim basis by the LSA, reportedly on medical grounds, in my absence, without any evidence whatsoever before the committee as to my actual health at that time, other than that I was in the hospital... ; ...the

interim (reportedly medical) suspension was continued, with no evidence whatsoever of any health limitation on my part, and in fact, in the face of medical evidence to the contrary (please see medical letter attached)".

85 *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319, ¶ 125; 92 C.P.C. 7th 259, 311 (chambers) ("It makes no sense to extend the filing by even a day if it is patent that the applicant has a frivolous appeal").

86 Canada Act 1982, c. 11, Sch. B. (U.K.).

87 2017 SCC 1; [2017] 1 S.C.R. 3.

88 R.S.A. 2000, c. E-10.

89 *Ernst v. Alberta Energy Regulator*, 2017 SCC1, ¶ 15; [2017] 1 S.C.R. 3, 20.

90 Id. at ¶ 24; [2017] 1 S.C.R. at 22.

91 Id. at ¶ 41; [2017] 1 S.C.R. at 29. See also *Konesavarathan v. Middlesex-London Health Unit*, 2019 ONSC 3879 (Div.Ct.) , ¶¶ 34, 36 & 39 ("[The applicant] claims that the manner in which the [Human Rights] Tribunal conducted the hearing and applied the [Human Rights] Code violates his rights under section 15(1) of the Charter. He alleges that the Vice-Chair relied on racial myths and stereotypes and that this is indicative of systemic racism at the Tribunal. The applicant seeks a number of declarations in relation to the Tribunal's Final Decision and he seeks *Charter* damages. [T]he Court advised ... that the panel would not consider the issues raised in the Notice of Constitutional Question because they were not raised before the Tribunal. In any event, as held by the Supreme Court of Canada in *Ernst*, ... Charter damages are not available against a quasi-judicial body, in part, because judicial review is an adequate alternative remedy") & *Gill v. WorkSafeBC*, 2017 BCCA 239, ¶¶ 15-16 & 19; 418 D.L.R. 4th 70, 77-77 & 78 ("Mr. Gill's claim to damages under the *Canadian Charter of Rights and Freedoms* is also flawed. It is doubtful that Charter damages could ever be awarded in the face of the clear statutory immunity that the respondent enjoys: Even if, for the sake of argument, it could be said that such damages might be awarded in some exceptional case, it is evident that a condition precedent an award would be a finding that Mr. Gill was entitled to compensation under the *Workers Compensation Act*. Such a finding is beyond the jurisdiction of a civil court, as compensation determinations are within the exclusive jurisdiction of the respondent. This court has, on previous occasions, rejected the proposition that framing a claim as a one involving a *Charter* breach is sufficient to give a civil court the ability to usurp the exclusive jurisdiction of the Workers Compensation Board and the WCAT to make factual and legal determinations under the *Workers Compensation Act*. Mr. Gill's only recourse, in the event that the respondent or the WCAT acted improperly in assessing his compensation claim, was by way of judicial review").

92 Id. at ¶ 37; [2017] 1 S.C.R. at 27.

93 Id. at ¶ 53; [2017] 1 S.C.R. at 34.

94 Id. at ¶ 54; [2017] 1 S.C.R. at 34-35.

95 This explains, in part, why courts whose decisions are under appeal are not entitled to retain counsel and advocate in support of the decision under appeal before the appeal court and why statutory delegates play a limited role in judicial review proceedings. *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, 709 ("It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction"); *Ontario Energy Board v. Ontario Power Generation Inc.*, 2015 SCC 44, ¶¶ 52 & 57; [2015] 3 S.C.R. 147, 176 & 177 ("The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, ... provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis....[T]ribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion ... [balancing] the need for fully informed adjudication against the importance of maintaining tribunal impartiality"); *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, ¶ 54 ; [2017] 1 S.C.R. 3, 34 ("in order not to compromise the decision-maker's impartiality or the finality of his or her decision, the decision-maker has a limited role in an appeal or judicial review proceeding") & *Koloff v. United Nurses of Alberta*,

2 P.S.E.R.B.R. 1368, 1427 (1991) ("A tribunal does not advance its acceptance in the community it serves as a neutral dispenser of justice by climbing into the ring to trade punches with those who in other circumstances expect the tribunal to wear a striped shirt").

96 Ernst v. Alberta Energy Regulator, 2017 SCC1, ¶ 123; [2017] 1 S.C.R.3, 58-59.

97 Schachter v. Canada, [1992] 2 S.C.R. 679,720 per Lamer, C.J. ("An individual remedy under s. 24(1) of the Charter will *rarely* be available in conjunction with an action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will end the matter. No retroactive s. 24 remedy will be available") (emphasis added) & Mackin v. New Brunswick, 2002 SCC 13, ¶ 81; [2002] 1 S.C.R. 405, 443 per Gonthier, J. ("although it cannot be asserted that damages should never be obtained following a declaration of unconstitutionality, it is true that, *as a rule*, an action for damages brought under s.24(1) of the Charter, cannot be combined with an action for a declaration of invalidity based on s. 52 of the Constitution Act, 1982") (emphasis added). See also Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42, 76 & 91 (the Court dismissed the plaintiff's damage claim — the tort of intimidation based on the enforcement of an enactment that was *ultra vires*) & Welbridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg, [1971] S.C.R. 957, 969 (the Court upheld decisions dismissing a negligence action against a municipality based on a declaration that an amending zoning bylaw was invalid: "It would be incredible to say in such circumstances that [a legislature exercising statutory authority] owed a duty of care giving rise to liability in damages for [exercising its statutory authority unlawfully]").

98 R.S.A. 2000, c. L-8, s. 72(1)(a).

99 Id. s. 75(1).

100 Id. s. 80(1).

101 Arndt v. Banerji, 2018 ABCA 176, ¶¶58-60; 424 D.L.R. 4th 656, 688-689, leave to appeal ref'd, [2018] S.C.C.A. No.277 ("The Board, as a public institution, clearly owes a duty under the statute to employers, injured workers, and the public generally to administer the workers' compensation regime in a reasonable manner. It is, however, a statutory, public duty, not a duty in tort. Further, if the Board fails to discharge that duty, the remedy is to be found within the appeal and review procedures contemplated by the Act. It is not a 'duty in tort remedied by a damage award' that can be enforced through an ordinary civil action The law does not recognize any tort such as 'negligent administration of a regulatory scheme' or 'negligent processing of a claim for statutory benefits'. ... As the Supreme Court points out in *Ernst* ... tort actions of this type amount to impermissible collateral attacks of the tribunal's decisions") & Quinn v. British Columbia, 2018 BCCA 320, ¶ 62 & 73 ("the existence of alternative remedies both in private law and through the operation of the CFCSA [*Child, Family and Community Service Act*] are both compelling countervailing factors that demonstrate the Respondents' claim for *Charter* damages has no reasonable prospect of success and should not consume scarce judicial resources by going to trial. They are unable to establish that damages would be a 'just and appropriate' remedy for their alleged s. 7*Charter* violations. Absent a *Charter* challenge to the child protection scheme, any breach of the Respondent parents' psychological integrity could have been vindicated by engaging with the process under the CFCSA and, if supported by the pleading of material facts, by seeking private law remedies such as in the tort of misfeasance of public office").

102 See Harelkin v. University of Regina, [1979] 2 S.C.R. 561, 592 per Beetz, J. (the Court upheld a decision dismissing a judicial review application when the governing statute allowed an internal appeal against a decision requiring the applicant to withdraw from the University: "I have reached the conclusion that the appellant's right of appeal to the senate committee provided him with an adequate alternative remedy. In addition, this remedy was in my opinion a more convenient remedy for appellant as well as for the university in terms of costs and expeditiousness").

103 *Ouellette v. Law Society of Alberta*, 2018 ABQB 52, ¶¶ 72 & 85.

104 *Ouellette v. Law Society of Alberta*, 2019 ABQB 492, ¶¶ 67 & 69.

105 See Balisky v. Balisky, 2019 ABCA 404, ¶ 15 (chambers) ("Because the court retains overriding discretion to extend the time to appeal, it is not fatal for an applicant to fail to meet all branches of the *Cairns* test, but it is more likely that an extension will be granted where each element is satisfied"); Oommen v. CapitalRegion Housing Corp., 2017 ABCA 265, ¶ 8 (chambers) ("Where an applicant satisfies all of the requirements, it is highly likely an extension of time will be granted, but the court has an overriding discretion to extend the time to appeal so it is not necessary that an applicant satisfy all of the requirements to be successful"); Onishenko v. Cholowski, 2017 ABCA 238, ¶ 5 (chambers) ("The Court has the discretion to extend time even if not all parts of *Cairns* are met");

Lofstrum v.Radke, 2017 ABCA 211, ¶ 3; 56 Alta. L.R. 6th 52, 55 (chambers) ("[The *Cairns*] factors guide the Court in exercising its discretion to extend the time to appeal, but they do not set rigid requirements, and they do not override the Court's general discretion to extend time in appropriate cases") & R.T. v. T.L., 2017 ABCA 69, ¶ 14 (chambers) ("[The *Cairns*] factors guide the Court in exercising its discretion to extend the time to appeal, but they do not set rigid requirements, and they do not override the Court's general discretion to extend time in appropriate cases").

- 106 Alberta Rules of Court, Alta. Reg. 124/2010,r. 1.5(2) ("An application under this rule must be filed within a reasonable time after the applicant becomes aware of the contravention, non-compliance or irregularity"). See Mitchell v. News Group Newspapers Ltd., [2013] EWCA Civ 1537, ¶ 40; [2014] 2 All E.R. 430,442 (an applicant who applies for relief promptly has a better chance of securing it than one who does not).
- 107 Barry v. Institute of Chartered Accountants of Alberta, 2016 ABCA 89, ¶ 27; 98 C.P.C. 7th 247, 254 (chambers) ("An appeal that is almost certain to fail should be laid to rest without any more private and public resources devoted to it").

Tab 7

H-220

2021 TCC 27
Tax Court of Canada [General Procedure]

Allegro Wireless Canada Inc. v. The Queen

2021 CarswellNat 884, 2021 TCC 27

**ALLEGRO WIRELESS CANADA INC. (Appellant)
and HER MAJESTY THE QUEEN (Respondent)**

Steven K. D'Arcy J.

Heard: May 6, 2019; May 7, 2019; May 8, 2019; September 21, 2020; September 22, 2020; September 23, 2020

Judgment: March 31, 2021

Docket: 2014-1690(IT)G, 2014-1691(IT)G

Counsel: Jonathan N. Garbutt, Justin Pon (Articling Student), for Appellant
Alisa Apostle, Natasha Mukhtar, Aaron Tallon, for Respondent

Steven K. D'Arcy J.:

1 The Appellant has filed an appeal in respect of its taxation year ending on September 30, 2010 (the "2010 Taxation Year") and an appeal in respect of its taxation year ending on September 30, 2011 (the "2011 Taxation Year"). I heard the two appeals together on common evidence.

2 The Appellant carried out a number of projects in an attempt to develop software that would address the various needs of its clients. In computing its tax liability for the 2010 Taxation Year and the 2011 Taxation Year, the Appellant took the position that a number of these projects constituted scientific research and experimental development ("SR&ED") under the provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5thSupp.).

3 Specifically, when computing its income tax liability for the 2010 Taxation Year, the Appellant claimed SR&ED expenditures of \$798,342 and corresponding investment tax credits ("ITCs") of \$279,420 in respect of three projects. The Minister of National Revenue (the "Minister") disallowed \$697,723 of the amount claimed as SR&ED and \$244,208 of the corresponding ITCs in respect of two projects.

4 In computing its income for the 2011 Taxation Year, the Appellant claimed SR&ED expenditures of \$615,906 and corresponding ITCs of \$215,567. The Minister disallowed \$463,401 of the amount claimed as SR&ED and \$162,190 of the corresponding ITCs.

5 During the six days of hearings, the Appellant called three fact witnesses, Mr. Wesley Rupel, Mr. Khalid Eidoo, and Mr. Russell Roberts, and one expert witness, Doctor Gerald Penn. The Respondent called one fact witness, Ms. Cathy Sporich, and two expert witnesses, Doctor Shrinavensen Keshav and Doctor Shirook Ali.

6 I found all four fact witnesses to be credible. For reasons I will discuss, I have only relied on the expert evidence of Doctor Penn.

7 The parties filed a short partial Agreed Statement of Facts (the "PASF").

I. Summary of Facts

8 Mr. Rupel described the Appellant's business and the various research projects. During the relevant period, Mr. Rupel and his business partner controlled the Appellant.

9 Mr. Rupel holds an undergraduate degree in physics and mathematics. In 1981, he started a combined Masters and Ph.D. program in physics at the University of California, Santa Barbara. He completed the Masters portion of the program, however in 1985, while his professor was on sabbatical, he took a break from the program and joined Dynamical Systems Research ("Dynamical"), a software start-up company located in Berkeley, California.

10 A year later Microsoft acquired Dynamical. The acquisition allowed Microsoft access to Dynamical's software, which it used when creating the Windows operating system. Mr. Rupel was one of 10 people involved in the initial stages of creating the Windows computer operating system.

11 Mr. Rupel's work at Microsoft focused on increasing the speed of the Windows operating system, which was a significant issue since the first version of the operating system was extremely slow.

12 Mr. Rupel left Microsoft in 1992 and, in his own words, basically retired. He returned to Microsoft in 1998. He joined the Appellant in 2002 and became President and Chief Technology officer in 2004.

13 Mr. Rupel and his business partner formed the Appellant to create software for industries that they believed were underserved from a software perspective. It focused on providing a software platform that allowed its clients to communicate remotely with their workers. This communication was done through wireless hand-held devices with LCD screens that the Appellant's clients' workers used to remotely access their employer's computer system.

14 The Appellant's clients include transportation logistics companies such as Manitoulin Transport, retailers such as Loblaws and the Liquor Control Board of Ontario and companies that provide field services to their customers, such as Canon Canada ("Canon") and Shred-it.

15 Mr. Rupel provided a number of examples of how the Appellant's clients used the wireless hand-held devices. For example, he described how Canon's approximately 400 technicians used the devices to communicate with Canon's headquarters when conducting repairs at the premises of Canon's customers. This allowed Canon to track the repair work performed by the technicians. It also allowed Canon to communicate directly with each worker.

16 Loblaws used the devices in the receiving area of its various stores to scan bar codes, which helped Loblaws control its inventory. Loblaws also used the devices to record deliveries and inventory at various third-party retailers that purchased their goods from Loblaws.

17 The hand-held devices allowed for the transfer of information between the field workers of the Appellant's various clients and databases maintained by the clients. During the relevant period, this was a new product that had not previously existed.

18 Third parties provided the wireless hand-held devices and the Appellant provided the software. The information was transferred through cellular networks, primarily the network operated by Rogers Wireless.

19 Mr. Rupel described in detail the various technical issues the Appellant faced when developing the software that allowed the hand-held devices to communicate with the servers. These servers held, or were connected to the servers that held, the databases of its various clients.

20 He noted that all software development was based upon specific client needs. The Appellant spent significant time determining the needs of each of its clients. This involved understanding the client's business and the issues the client was trying to resolve. Once this was determined, the Appellant developed specifications setting out what the software should do in order to resolve the client's problems. The specifications were reviewed by the client and the Appellant's software development team.

21 The specifications would then go to the Appellant's software development team to build the software according to the specifications. The software development team frequently encountered problems that resulted in a review of the specifications or changes to the software to resolve the problem.

22 Once the first version of the software was written, it was then reviewed by the Appellant's quality analysis team and its business development team. The quality analysis team ensured the software was doing what it was supposed to do and the business development team ensured it did what it was supposed to do from a business standpoint.

23 Mr. Rupel noted that, when developing software-based products, technical problems are always encountered. For example, the Appellant may build exactly what is specified but once it puts the software into the device, it is "just too slow". In order to satisfy the needs of its clients, the Appellant had to find solutions to all problems encountered. During the relevant period, this was a complicated exercise because of the state of the wireless technology and the underlying software at that specific point in time. He noted that it would be much easier to meet the specifications today since the underlying technology is much more advanced.

24 He noted that one of the major problems faced by the Appellant was the fact that third-party software controlled the low-level features of the hand-held devices.

25 For example, various third parties provided the software that operated the radio that was used to communicate with the various cell towers. Different third parties provided the software for different models of the hand-held devices. This resulted in inconsistency in the operation of one model compared with another model.

26 Mr. Rupel noted that if the Appellant identified a problem that should not have occurred based upon the specifications of the underlying software, then it had to get creative. Routine engineering would not resolve the problem. It had to "come up with hypotheses of things [it] could try or do and see what work[ed] by experimentation."

27 The Appellant also had to account for the different servers used by each of its clients. In many instances, the Appellant would install its own server at its client's premises and this server would then communicate with the client's server.

28 The Appellant's core product was its platform (software), which it built to accommodate the different idiosyncrasies of the various hand-held devices used by its clients. The platform had to take into account the different operating systems and the frequent updates to the software controlling the low-level features of the devices. The Appellant's goal was to have one system that all the different applications used in the operation of the devices could be written to.

29 This required the Appellant to develop and maintain a significant amount of software. It was also constantly developing software to improve the operation of the various hand-held devices on its platform.

30 Mr. Rupel described the process the Appellant used to ensure the devices worked properly for its clients. He provided background on why the Appellant was required to perform research when conducting its business.

31 He noted that the Appellant did not have access to the source codes for the various underlying software that operated the hand-held devices. He referred to this software as a *black box*, something the Appellant could not see the "insides of". He noted that as the Appellant developed its various products, various *bugs* and *quirks* occurred.

32 *Bugs* arose when the underlying tools and software performed as expected and the Appellant made a mistake when writing its software, which it needed to fix.

33 *Quirks* arose when, after looking at the problem, the Appellant could not determine why the event was occurring. It did not make sense to the Appellant. In Mr. Rupel's words, there was something mysterious going on and it required a deeper investigation.

34 Mr. Rupel noted that a *quirk* may or may not end up on the Appellant's SR&ED claim. The Appellant made the decision later, after it finished its investigation and hopefully found a solution to the *quirk*. It would review the work it had done and determine whether it had conducted a significant amount of experimentation or whether the issue had been relatively straightforward and resolved in a direct manner. In the latter instance, the work was not included in the Appellant's SR&ED claim.

35 He then discussed the nature of the software development the Appellant carried out in order to provide its service in a reliable manner.

36 He noted that in the late 1980s, when he was working at Microsoft, if Microsoft's source code was not working properly it was because of something Microsoft had done incorrectly when developing the software. The Microsoft employees would then look through all of the source codes that went into Microsoft Windows to determine where the error occurred. Microsoft built everything from scratch.

37 Mr. Rupel noted that by 2010 and 2011 things had evolved. Instead of writing all of the software from scratch, companies, when building a product, utilized software from various sources. He described the various software as software components.

38 Most of the actual functionality that was being executed when someone built a product was not being done by the people who appeared to be writing the software, but rather by their use of various components that performed a number of different functions. What was occurring was that a company built its products by taking these components and writing software that "glue[d] them together".

39 This required the builder of the product to rely on the various software components to do what they were intended to do. A *quirk* would arise when there was some kind of interaction between the different software components that was not expected, that is, when a software component was not doing what the builder expected it to do.

40 When this occurred, the Appellant would call the product support department at the company that had developed the specific software component to see if it had a solution. If it did not have a solution, then the Appellant would have to start experimenting to determine under what circumstances the software component behaved in a certain way and when it did not behave in that manner. Sometimes the Appellant could avoid the problem by doing something in a different way. Experimenting was required in the first instance because the Appellant was working with black boxes (the third-party software components) that were not behaving in the way the Appellant expected them to behave.

41 The Appellant had to experiment and test to find out what it could do to get all of the software components to execute in the manner the Appellant required in order for the hand-held (or another one of its devices) to provide the service the Appellant's client required.

42 Mr. Rupel provided a general example of the nature of the problems that the Appellant encountered. He noted that component A, component B and component C may all be working as designed, but when you put them together, an unexpected complicated interaction occurs. He noted that the resolution of this problem requires making a hypothesis, testing, getting a result, learning from it and finding a solution.

43 Mr. Rupel also explained how the Appellant kept track of the work it performed. He referred to how it tracked and managed changes to source codes. He noted that software is what operates a computer, and source code is basically how someone produces software.

44 The Appellant maintained a source code control system that kept track of every change someone made to the source code. It allowed anyone making changes to the source code to be aware of any previous changes that he or she or another employee had made to the source code. It also maintained a version control system that kept track of the current and previous versions of a particular software.

45 Mr. Rupel explained that there is a place in the source code control system to place comments. When a person makes a change to the source code, he or she explains in the comments why the change was done.

46 The Appellant also used bug/quirk tracking software: one called FogBugz and a second called Jira X. This allowed the Appellant to keep track of all bugs/quirks that were reported, when the bug/quirk was fixed and when a quality assurance team reviewed the fix.

47 With respect to determining when the work preformed with respect to quirks constituted SR&ED, the Appellant, with the help of its Canada Revenue Agency ("CRA") SR&ED technical advisor, Mr. Paul Wong, had set up a system in the bugs/ quirks tracking software (particularly Jira X). This system allowed the Appellant to keep track of the problems it identified as quirks, the things that were not working the way the Appellant expected them to work. When the Appellant's developers were attempting to find a solution to a quirk, they would place information in the bug tracking software with respect to the work they were performing in an attempt to fix the identified quirk.

48 The Appellant also stored information with respect to specific projects in the source code control system. The Jira X bug tracking software provided a reference for information in the source code control system. The source code control system would contain a similar reference to the Jira X bugs/quirks software. They were cross-referenced.

49 The Appellant would ultimately review the bug tracking software and the source code control system to determine what quirks had been identified, the testing the Appellant's developers carried out in an attempt to fix the quirk and the ultimate resolution of the issue. After conducting this review, it would determine whether the work constituted SR&ED.

50 During the relevant years, the Appellant filed claims in respect of SR&ED performed on five separate projects. It identified technological objectives for each of the five projects. The Appellant worked on three of the projects in its 2010 Taxation Year and two of the projects in its 2011 Taxation Year.

51 The Minister accepted the Appellant's claim for SR&ED in respect of the second project carried out in 2011. As a result, the Appellant only filed appeals in respect of the three projects carried out in 2010 and the remaining project carried out in 2011.

52 The PASF notes that the Appellant's SR&ED claim for its 2010 Taxation Year included three projects, consisting of a number of activities defined as follows:

2010 Taxation Year Project 1 (**"2010 Project 1"**), "Protocol Compliant Methods to Extend Bluetooth Functionality"

- TA1/TO1
- TA2/TO2

2010 Taxation Year Project 2 (**"2010 Project 2"**), "Methods to Optimize TCP Services over Cellular Networks"

- TA1/TO1
- TA2/TO2
- TA3/TO3

2010 Taxation Year Project 3 (**"2010 Project 3"**), "Methods and Techniques to Improve Messaging Performance"

- TA1/TO1
- TA2/TO2

53 TA/TO stands for technological advancement/technological obstacle. Mr. Eidoo testified that the actual claims made by the Appellant did not delineate between different TAs or TOs. The Appellant filed claims in respect of the three SR&ED projects. The delineation between TA1/TO1, TA2/TO2, and TA3/TO3 was done by the CRA. Basically, the CRA converted the three projects into seven projects.

54 2010 Project 3 is no longer before the Court. The CRA accepted that the portion of the project it identified as TA1/TO1 was a valid SR&ED claim. The Appellant conceded, during the hearing, that the remaining portion of its SR&ED claim with respect to 2010 Project 3 did not constitute SR&ED.

55 Only a portion of 2010 Project 1 and 2010 Project 2 are before the Court. The CRA accepted that the portion of 2010 Project 1 that it identified as TA2/TO2 and the portion of 2010 Project 2 that it identified as TA2/TO2 constituted SR&ED. Therefore, the following are the only portions of the Appellant's SR&ED claim for the 2010 Taxation Year that are before the Court:

TA1/TO1 of 2010 Project 1, and

TA1/TO1 and TA3/TO3 of 2010 Project 2.

56 The PASF notes that when computing income for its 2011 Taxation Year the Appellant claimed expenditures in respect of the two SR&ED claims described as follows:

2011 Taxation Year Project 1 ("**2011 Project 1**"), "Multi-point Integration Platform for Mobile Applications"

- TA1/TO1
- TA2/TO2
- TA3/TO3

2011 Taxation Year Project 2 ("**2011 Project 2**"), "Methods and Techniques to Improve Messaging Performance"

- TA1/TO1
- TA2/TO2

57 As noted previously, 2011 Project 2 is not before the Court. The CRA accepted that the entire 2011 Project 2 constituted SR&ED.

58 Only the portion of 2011 Project 1 identified by the CRA as TA1/TO1 is before the Court. The CRA accepted that the portion it identified as TA2/TO2 qualified as SR&ED. The Appellant conceded during the hearing that the portion of 2011 Project 1 identified as TA3/TO3 did not constitute SR&ED.

59 Mr. Rupel described in detail each of the four projects before the Court.

II. Expert Witnesses

60 I heard from three expert witnesses. The Appellant called Doctor Gerald Penn and the Respondent called Doctor Shrinavensen Keshav and Doctor Shirook Ali.

61 Doctor Penn provided his opinion on whether the work performed by the Appellant on its five projects was research and/or experimental development according to the standards of a researcher in information technology.

62 Doctor Keshav provided his opinion with respect to whether the Appellant's work relating to TA1/TO1 and TA3/TO3 of 2010 Project 2 and TA1/TO1 and TA3/TO3 of 2011 Project 1, as the work was described in certain documents provided to him by the CRA, complied with the guidelines established for SR&ED credits by the CRA.

63 Doctor Ali provided her opinion on the degree to which the work carried out by the Appellant qualifies for SR&ED credits on the following two technical objectives:

Implementation of a throttling mechanism to prevent overruns when sending more than 64KB across a Bluetooth printer connection.

The determination of a concurrency limitation with MSMQ when approximately 200 concurrent devices attempt to perform messaging operation.

64 These are the two projects identified by the CRA as TA1/TO1 of 2010 Project 1 and TA2/TO2 of 2010 Project 3.

A. Expert Report of Doctor Penn

65 At the time Doctor Penn was presented to the Court, the Respondent stated that she had numerous concerns with respect to the admissibility of Doctor Penn's expert report. The Court held a *voir dire* to determine the admissibility of Doctor Penn's expert opinion evidence. Doctor Penn testified during the *voir dire*.

66 At the end of the *voir dire*, I accepted Doctor Penn's report and qualified Doctor Penn as an expert witness to provide the Court with his opinion on whether the Appellant's work during the 2010 and 2011 on the relevant projects constituted research and/or experimental development according to the standards of a researcher in information technology. I informed the parties that I would provide my reasons for accepting Doctor Penn's report in my written reasons for judgment.

67 The test for admissibility of expert opinion evidence is a two-step test as set out by the Supreme Court of Canada in *White BurgessLangille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("Inman confirms and clarifies the common law principles previously described by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 SCR9 (".

68 The first step of the test requires the party putting the proposed expert forward to establish that the evidence satisfies the following four threshold requirements (the so-called *Mohan* factors):

- Relevance;
- Necessity in assisting the trier of fact;
- The absence of any exclusionary rule; and
- A properly qualified expert.

69 The second step requires the trial judge to conduct a cost-benefit analysis to determine if otherwise admissible expert evidence should be excluded because its probative value is overborne by its prejudicial effect. This requires the trial judge to consider such things as consumption of time, prejudice and the risk of causing confusion.

70 At the commencement of the *voir dire*, the Respondent's counsel stated that she had concerns with Doctor Penn's qualifications and concerns with respect to Doctor Penn's expert report. She noted that her concerns with the report were related to relevance and necessity.

71 I have no difficulty qualifying Doctor Penn as a properly qualified expert. He had the requisite special knowledge and experience relating to the specific subject matter on which he was being offered. He acquired this peculiar knowledge through study and experience.

72 Doctor Penn holds a Ph.D. from the School of Computer Science at Carnegie Mellon University in Pittsburgh, Pennsylvania.

73 Since 2013, he has been a full professor with the Department of Computer Science at the University of Toronto. He was formerly the associate chair of research and industrial relations in the Department of Computer Science at the University of Toronto. He has taught at the University of Toronto since 2005.

74 As part of his job, he has often worked with private sector partners to determine whether they are entitled to claim SR&ED credits for certain research and development projects.

75 He has extensive experience in computer science, including working with NASA when he was a visiting researcher at the Ames Research Centre in California. His work with NASA focused on human/computer interaction. The work involved research on a dialogue system for extra-vehicular missions on the Mars mission.

76 Doctor Penn has 20 years of experience in information technology research. He noted that he has worked on projects similar to the projects the Appellant undertook during the relevant period. He provided numerous examples of specific research projects that related to Bluetooth and wireless networks in areas similar to Allegro's projects.

77 The Respondent did not question Doctor Penn's independence. In fact, Doctor Penn's independence is evidenced by the fact that he agreed with the Minister that the work carried out by the Appellant on one of the subprojects (TA3/TO3 of 2011 Project 1) was not research and/or experimental development.

78 Doctor Penn's expert opinion evidence is necessary. I require his opinion evidence because of the highly technical nature of the projects at issue. His evidence is also relevant. It relates to the main issues before the Court.

79 The Respondent did not raise any exclusionary rule.

80 I also find that the benefits of his testimony outweigh any potential costs. In fact, I do not see any significant costs.

81 Doctor Penn's report identifies the issues he was retained to address, notes what documents and discussions he relied on, provides a summary of his opinion and then for each of the projects provides an analysis of how he reached his conclusions. That is exactly what the Court expects to find in an expert report.

82 The Respondent's main concern with Doctor Penn's report is his numerous references to a technical review of the Appellant's projects authored by the Appellant's CRA scientific research and technology advisor, Mr. Paul Wong. As discussed previously, Mr. Wong had helped the Appellant develop the system in its bugs/quirks tracking software to document the quirks found by the Appellant.

83 Mr. Wong's report is the report in which the CRA splits the Appellant's five projects into twelve separate projects. Mr. Wong's report is one of the 284 electronically encoded document files reviewed by Doctor Penn.

84 When providing his expert opinion on the Appellant's projects, Doctor Penn references Mr. Wong's conclusions with respect to whether each of the 12 projects identified by Mr. Wong qualifies as SR&ED and states whether he agrees or disagrees with Mr. Wong. Doctor Penn refers to Mr. Wong's conclusions in the course of providing his expert opinion on each project.

85 Doctor Penn provides his expert opinion on pages 2 to 16 of his report. On pages 17 to 24 of his report, under the title Exhibit C, Doctor Penn provides his views on certain documents that Mr. Wong provided to the Appellant in response to an undertaking given during Mr. Wong's discovery. I have ignored this portion of Doctor Penn's report. It does not form part of his expert opinion with respect to whether the work performed by the Appellant constitutes research and/or experimental development. My understanding is that the Appellant requested the comments on these pages in the hope that they could be used to settle the appeal. However, no settlement discussions occurred.

86 The Respondent's counsel argued that Doctor Penn's written opinion is "so dependent" on its rebuttal of Mr. Wong's report that it is impossible to extricate the stand-alone opinions with respect to whether the projects qualify as SR&ED. In the Respondent's view, to do so would be prejudicial to the Respondent.

87 I do not accept the Respondent's argument. Doctor Penn's report is very clear and concise. I have no difficulty differentiating his comments with respect to Mr. Wong's report from his own conclusions with respect to whether the Appellant's work on individual projects constituted research and/or experimental development. In fact, it is not clear to me how Doctor Penn could have provided his opinion without referring to Mr. Wong's report. He was required to inform the Court of the information he referred to when forming his opinion. It was the CRA, not the Appellant, that divided the Appellant's five projects into twelve projects. Doctor Penn would need to understand why the CRA subdivided the Appellant's five projects into twelve projects before providing his opinion.

88 Certainly the Respondent's expert witness, Doctor Ali, felt that it was important to review Mr. Wong's report since it is listed in her report as one of the primary references she used when preparing her expert report (Mr. Wong's report is filed as Exhibit A-8).

89 The Respondent's second concern related to Doctor Penn's telephone interviews with Mr. Rupel and Mr. Wayne Hammerschlag, an employee of the Appellant. In his report, Doctor Penn referred to the interviews when informing the Court of the basis on which he formed his opinion.

90 During cross-examination, counsel for the Respondent asked Doctor Penn if there was a transcript of these interviews. As one would expect, there is no transcript. However, Doctor Penn stated that he had notes summarizing the interviews. At the request of counsel for the Respondent and before the end of counsel for the Respondent's cross-examination of Doctor Penn during the *voir dire*, Doctor Penn produced the notes. The notes (Exhibit A-38) are two pages in length, are in point form and provide a brief summary of Mr. Rupel's answers to eight questions asked by Doctor Penn and Mr. Hammerschlag's answers to eight questions asked by Doctor Penn.

91 The notes are inadmissible as hearsay in proof of any facts asserted in the notes. However, they are admissible as evidence of the basis upon which Doctor Penn formed his opinion.

92 Doctor Penn testified that he asked the questions in order to clarify certain issues he identified when reviewing the 284 electronic documents. The issues related to the Appellant's business and procedures.

93 Counsel for the Respondent argued that I should not accept Doctor Penn's expert report since a transcript of the interviews was not provided to the Respondent or the Court. As a result, the basis for Doctor Penn's opinions that were reliant on the interviews could not be tested.

94 The fact that an expert's opinion is based in whole or in part on information that is not proven before the Court does not render the opinion inadmissible. It is an issue of weight. The extent to which the factual foundation for the opinion is proven by admissible evidence will affect the weight it will be given.

95 Doctor Penn's interviews of Mr. Rupel and Mr. Hammerschlag allowed Doctor Penn to clarify certain questions he had with respect to the Appellant's business and procedures. Mr. Rupel provided the Court with extensive evidence on both the Appellant's business and its procedures. I find that all of Doctor Penn's references to the Appellant's business in his expert report and during his in-chief testimony and cross-examination are consistent with Mr. Rupel's testimony. In other words, the factual foundation for Doctor Penn's testimony was proven by the admissible evidence before the Court.

B. Expert Reports of Doctor Ali and Doctor Keshav

96 I qualified Doctor Ali and Doctor Keshav as expert witnesses in the fields in which they provided their opinions.

97 Counsel for the Appellant raised the concern that Doctor Ali's and Doctor Keshav's expert reports were based upon very limited factual information. He argued that Doctor Ali and Doctor Keshav were not provided with the key documents they required in order to make an informed opinion.

98 I informed counsel that I could not address issues relating to the factual foundation of Doctor Ali's and Doctor Keshav's reports until I had reviewed the reports in detail and until I had an informed understanding of the factual basis for their opinions. Further, I informed counsel that his concerns went to the weight I would give the reports, something I could not decide until I had read the reports in detail and heard from Doctor Ali and Doctor Keshav.

99 After reading each of the export reports and hearing from the two experts, I agree with counsel for the Appellant that the factual foundation for each of the reports is based upon insufficient information. Specifically, neither of the two experts called by the Respondent had a sufficient understanding of the Appellant's business, products or procedures that would allow them to give opinions that would help the Court.

100 Both Mr. Rupel and Doctor Penn testified that the difficult technological environment that the Appellant was attempting to operate in caused the various technological issues encountered by the Appellant.

101 As I noted previously, the Appellant's core product was its platform (software), which it built and constantly improved to accommodate the different idiosyncrasies of various hand-held devices, servers and printers. Mr. Rupel testified that the Appellant was trying to develop products that would address issues that arose when dealing with the interactions of numerous complex systems. At the time, its clients were using numerous hand-held devices and printers that were in the early stages of development. It also had to design systems that operated with the various servers of its clients and recognize the different environments that each of its clients operated in. In my view, an understanding of the Appellant's business and the technical issues that arose in its working environment was essential to providing an informed opinion with respect to whether its work constituted experimental development.

102 It was clear from the evidence before me that Doctor Penn spent a significant amount of time understanding the Appellant's business environment and, more importantly, the technical uncertainty that arose as the Appellant attempted to develop its products in order to carry on and grow its business.

103 It is clear that Doctor Penn felt that this was essential for him to provide an informed opinion. For example, as I will discuss, when reviewing TA1/TO1 of 2010 Project 1, one of the key facts that Doctor Penn relied on was the fact that the Appellant was dealing with a range of mobile devices that were not manufactured by the Appellant.

104 After reading Doctor Ali's and Doctor Keshav's reports and hearing their oral testimony, I have concluded that neither had the required understanding of the Appellant's business. In my view, this represents a fatal flaw in their reports. They did not have the necessary factual foundation that would allow them to provide to the Court informed opinions on the projects in question.

105 Doctor Keshav states in his report that he based his opinion with respect to the four projects he considered on the following documents:

- The Appellant's summary of its SR&ED claim filed with the CRA (CRA Form T661)
- Documents referred to as the "Allegro Wireless Activity Timeline" for 2010 and for 2011 (the document for 2010 is two pages in length and the document for 2011 is two and a half pages in length).
- A document entitled "2010 Allegro CRA Post Review Supplement" and a document entitled "2011 Allegro CRA Post Review Supplement".
- A CRA letter to the Appellant.

106 It is clear from his testimony that Doctor Keshav relied primarily on the Appellant's Form T661. It is also clear from his testimony, particularly his answers during cross-examination, that Doctor Keshav had very limited knowledge of the Appellant's business. He was not aware of the nature of the Appellant's business, its clients, the nature of the various devices used in the Appellant's business and the source code control system and software that the Appellant used to document its research.

107 For example, Doctor Keshav was not aware that the Appellant was developing software that would be compatible with multiple hand-helds. He also was not aware of the issues faced by the Appellant because of the limited documentation provided by the manufacturers.

108 It is not clear to me how Doctor Keshav could provide his opinion without understanding the Appellant's business, the technological issues that arose as the Appellant tried to develop products to meet its clients' needs, the systems the Appellant used to track these technological issues and the steps it took to address these issues.

109 Doctor Keshav concluded at certain points in his report that the Appellant did not attempt to formally present and validate a hypothesis. The problem I have with him making this conclusion is that he admitted that he was not aware of the FogBugz and Jira X software (the bugs/quirks tracking software) that the Appellant used to document the work it performed (including the making of hypotheses) on the so-called quirks it encountered.

110 The software was a key part of the system the Appellant had developed to make and document its hypotheses as it tried to deal with the technical issues it encountered. For example, the Appellant's identification of a project as qualifying SR&ED was based primarily on the documentation of its work contained in the Jira X software (which contained the documentation of hypotheses made by the Appellant). Yet, Doctor Keshav was not even aware of the existence of the software, the very software that the Appellant used to identify the projects it carried out in a particular year in order to determine if the work performed on the projects constituted SR&ED.

111 This lack of information with respect to the Appellant's business is evident in Doctor Keshav's report, in which he makes a number of factual assumptions. Throughout his report, when discussing facts he relied on and assumptions he made, he uses phrases such as "it is not clear", "this seems to indicate" and "perhaps what was meant". Doctor Keshav's use of these phrases, together with his need to make numerous factual assumptions, evidences that Doctor Keshav did not have the factual foundation required to provide the requested information. This was reinforced during his cross-examination.

112 I have similar concerns with Doctor Ali's report with respect to the one project she considered that is before the Court, the TA1/TO1 of 2010 Project 1. Similar to Doctor Keshav, her primary reference material was a limited number of documents provided by the CRA. She used three documents that Doctor Keshav also used: the T661s, the activity timelines and the CRA letter referred to in Doctor Keshav's report. Her primary reference material also included Mr. Wong's technical report, a CRA policy statement and five short documents of the Appellant.

113 Similar to Doctor Keshav, Doctor Ali also testified that she was not aware of the Appellant's business.

114 Mr. Rupel testified that a number of the technical obstacles the Appellant faced with respect to TA1/TO1 of 2010 Project 1 were caused by the fact that the Appellant, when developing its products, had to deal with Bluetooth stacks from different manufacturers, printers from different companies and multiple handsets. Doctor Ali testified that she was not aware that the Appellant was dealing with the different stacks, printers and handsets.

115 Doctor Ali stated that different environments (different types of printers and different types of hand-helds) would have different limitations. She noted that for the Appellant to find a solution that works with all of the limitations would require investigation and development. However, she was not aware that the Appellant faced these different environments.

116 Doctor Ali noted that experimenting involves not only testing and analyzing but also exploring the relationship between tests, explaining the results as they relate to the hypothesis, drawing conclusions, proposing a new hypothesis or conducting additional tests. One of the concerns Doctor Ali raised in her report is that it was unclear to her whether the Appellant conducted this analysis.

117 Mr. Rupel testified that the Appellant documented this analysis in its source code control system and bugs/quirks tracking software. Doctor Ali noted on cross-examination that she was not informed of the system the Appellant used to document the

technical issues it encountered and how it dealt with such issues. This included the Appellant's use of the bugs/quirks tracking software.

118 I find the fact that she was not aware of the Jira X and FogBugz software surprising since she notes in her expert report that one of the documents she relied on was entitled "Samples of Contemporaneous Information", which the Respondent filed as Exhibit R-66. This two-page document notes that one of the sources used by the Appellant to identify the tasks performed within each SR&ED project was information collected through analysis of the Jira X and FogBugz records.

119 Doctor Ali stated that she was concerned about the information she was provided but did not ask for additional information. She did not communicate with anyone. She took the information provided by her client, the CRA, and provided her opinion based on this information.

120 The Appellant was attempting to develop a new product (its platform) that would work seamlessly with a multitude of devices using different operating systems and operating on various client operating systems. Neither Doctor Ali nor Doctor Keshav was aware of this difficult environment. As a result of this weak factual foundation, especially when compared to Doctor Penn's factual foundation for his opinion, I have given no weight to the expert reports of Doctor Ali and Doctor Keshav. The only expert report that I have placed any reliance on is the expert report of Doctor Penn.

III. Summary of the Law

121 Section 248(1) provides the following definition of SR&ED:

"scientific research and experimental development" means systematic investigation or search that is carried out in a field of science or technology by means of experiment or analysis and that is

- (a) basic research, namely, work undertaken for the advancement of scientific knowledge without a specific practical application in view,
- (b) applied research, namely, work undertaken for the advancement of scientific knowledge with a specific practical application in view, or
- (c) experimental development, namely, work undertaken for the purpose of achieving technological advancement for the purpose of creating new, or improving existing, materials, devices, products or processes, including incremental improvements thereto,

and, in applying this definition in respect of a taxpayer, includes

- (d) work undertaken by or on behalf of the taxpayer with respect to engineering, design, operations research, mathematical analysis, computer programming, data collection, testing or psychological research, where the work is commensurate with the needs, and directly in support, of work described in paragraph (a), (b), or (c) that is undertaken in Canada by or on behalf of the taxpayer,

but does not include work with respect to

- (e) market research or sales promotion,
- (f) quality control or routine testing of materials, devices, products or processes,
- (g) research in the social sciences or the humanities,
- (h) prospecting, exploring or drilling for, or producing, minerals, petroleum or natural gas,
- (i) the commercial production of a new or improved material, device or product or the commercial use of a new or improved process,

- (j) style changes, or
- (k) routine data collection;

122 Five criteria have been used by the courts to assist in determining whether a particular activity constitutes SR&ED. These criteria were summarized by the Federal Court of Appeal in C.W. Agencies Inc. v. The Queen, 2001 FCA 393, 2002 DTC 6740, at paragraph 17, as follows:

1. Was there a technological risk or uncertainty which could not be removed by routine engineering or standard procedures?
2. Did the person claiming to be doing SR&ED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty?
3. Did the procedure adopted accord with the total discipline of the scientific method including the formulation testing and modification of hypotheses?
4. Did the process result in a technological advancement?
5. Was a detailed record of the hypotheses tested, and results kept as the work progressed?

123 The criteria were first outlined in the decision of this Court by Judge Bowman (as he then was) in Northwest Hydraulic Consultants Limited v. The Queen, 98 DTC 1839 TCC ("Northwest Hydraulic decision").

124 In discussing whether a technological risk or uncertainty existed, Judge Bowman noted the following in *Northwest Hydraulic* at paragraph 16:

- (a) Implicit in the term "technological risk or uncertainty" in this context is the requirement that it be a type of uncertainty that cannot be removed by routine engineering or standard procedures. I am not talking about the fact that whenever a problem is identified there may be some doubt concerning the way in which it will be solved. If the resolution of the problem is reasonably predictable using standard procedure or routine engineering there is no technological uncertainty as used in this context.
- (b) What is "routine engineering"? It is this question, (as well as that relating to technological advancement) that appears to have divided the experts more than any other. Briefly it describes techniques, procedures and data that are generally accessible to competent professionals in the field.

IV. Which Projects Constituted SR&ED

125 I will begin by addressing, for each project, whether there was a technological risk or uncertainty which could not be removed by routine engineering or standard procedures.

A. TA1/TO1 of 2010 Project 1

126 The Appellant's filing with the CRA described the technological advancement that the Appellant was trying to achieve with respect to the TA1/TO1 portion of 2010 Project 1 as follows: "the implementation of a throttling mechanism to prevent overruns when sending more than 64KB across a Bluetooth printer connection (overcoming specific Bluetooth printing implementation limitations)." ¹

127 Mr. Rupel described in some detail the technological obstacles the Appellant had to overcome, the work it performed and the results it obtained with respect to the TA1/TO1 portion of 2010 Project 1.

128 He noted that the printers in question were small printers that were used by approximately 20% of its clients and that hung on the belt of the client's employees. The printers printed documents, such as receipts, based upon information that was transferred via Bluetooth from the hand-held device to the small printer. Microsoft wrote the software used to communicate with the small printer (referred to as the "Bluetooth stack"). The Appellant was not able to "look inside" the software to see how it worked or to adjust how it worked.

129 The problem the Appellant faced was that the small printers had a 64 KB buffer which stored the information sent from the hand-held device to the printer until the printer was able to use the information to print the document. The problem was that if too much information was sent, then the buffer was exceeded and some or all of the information was lost. This meant that its client could not get a proper printout of the document.

130 The fact that the Appellant's different clients had Bluetooth stacks from different companies and printers and hand-held devices from different manufacturers compounded the problem. The Appellant needed to write software that would work on all of these systems.

131 Mr. Rupel noted that the problems placed the Appellant in a situation that was outside the bounds of normal engineering. He noted that with normal engineering one is working with systems that do not have buffer overruns, systems that work. The Appellant was required to work with someone else's system that had bugs and did not work properly, a system that was basically a black box.

132 Mr. Rupel stated that the Appellant experimented with three different solutions to the problem, doing a "lossy-type scenario", using a transparent compression method and using a throttling mechanism. He noted that the Appellant was looking for creative solutions that would allow it to work around the problem while using the standard interfaces.

133 The "lossy-type scenario" involved sending less data in order to avoid exceeding the 64 KB buffer. Mr. Rupel explained that this meant that one does not have complete fidelity in the document being printed, in the sense that the information being passed to the printer is incomplete in some manner, which may be acceptable depending on the application. The document that is printed may not look as good as the original, but it may be acceptable to the user.

134 Compressing the data meant using one of numerous available methods. It appears that one of the methods the Appellant tried was to create a JPEG image. The JPEG image would have all the text that needed to be transferred but in a compressed format.

135 He noted that the Appellant tried to develop a transparent compression method. This meant that the Appellant was trying to compress and then decompress the data without the intervening software being aware that this was happening. It had to develop software to "dig" into different places in the Bluetooth stack to try to inject compression in a way that would avoid the 64 KB buffer overrun.

136 Neither of these methods proved to be successful. However, the Appellant was able to overcome the problem by developing a throttling mechanism. A throttling mechanism is a way to control the speed at which the data is being pushed through the system. Mr. Rupel noted that, through experimenting, the Appellant was able to find an optimum speed that allowed the Bluetooth printer to clear out its buffer fast enough that it would never overrun the buffer.

137 Experimenting was required because the Appellant faced a number of obstacles. If the speed was too slow, the printer would fall asleep, if it was too fast, the problem would be made worse. In addition, the Appellant had to contend with the fact that the printers do not have a constant printing speed. It also had to develop software that would work for different types of documents for a variety of different types of printers and different types of hand-helds. As mentioned previously, it had to do all of this without access to the software that actually operated the printers and the hand-helds, the so-called black boxes. The Appellant tracked the work it performed in its source code control system and its Jira X quirk software.

Doctor Penn's Opinion

138 Doctor Penn concluded that the work performed by the Appellant with respect to TA1/TO1 of 2010 Project 1 was experimental development and applied research.

139 He noted that the issue the Appellant faced was largely a result of the lack of standards and the incompatibility problems that were prevalent in 2010 and 2011. He noted that the Appellant had to conduct a systematic investigation of the range of available options from different Bluetooth stack providers as well as different mobile device platforms in order to determine what was possible.

140 His actual conclusions were as follows:

The application of throttling and compression can only be achieved by setting certain quantitative parameters that are inherent in these techniques, such as lengths of time and targetted transfer rates or percentages of compression. **While setting or optimizing the settings of these parameters for a fixed pair of devices could be considered routine in different circumstances, this project dealt with interoperability across a range of mobile devices that were not manufactured by Allegro.** I know of no readily assessable knowledge base, now or in 2010, with which Allegro's engineers could have set these parameters merely through due diligence. This was a painstaking, experimental diversion from ordinary software development activities that no reasonable software engineer would call routine.

... firstly, Allegro were assembling a proprietary knowledge base of experimentally ascertained mobile device behaviours that did not exist in any readily assessable form, and, secondly, that, had they chosen to make this knowledge base public, its value to the broader community of mobile software developers would have extended even to those who never intended to purchase Allegro products. This component's work was applied research.²

[Emphasis added.]

141 Doctor Penn's opinion is an example of the importance of knowing the technological environment that the Appellant faced when conducting experiments in an attempt to improve its products.

B. TA1/TO1 of 2010 Project 2

142 As discussed previously, the CRA split the 2010 Project 2 into three components. Mr. Rupel explained to the Court a number of general terms/concepts that applied to the entire 2010 Project 2.

143 The technological objective of 2010 Project 2 was to:

... develop methods and techniques to improve the scalability and throughput of TCP (Transmission Control Protocol) services transmitted over IP (Internet Protocol) on cellular networks. In particular, the objective was to develop methods to enable more efficient streaming of digital audio, connection-handling mechanisms to translate UDP to TCP and reduce the overhead related to TCP timeouts.³

144 Mr. Rupel explained to the Court the meaning of UDP and TCP. He also explained what is meant by a load balancer, session control and caching.

145 He noted that TCP is a protocol for internet communication. TCP is built on top of the internet protocol and provides a reliable way for the vast majority of things on the internet to communicate.

146 UDP is another protocol that is also built on top of the internet protocol, similar to TCP. UDP is a very lightweight protocol when compared to TCP, but TCP does a number of things that are not done by UDP.

147 Mr. Rupel explained that when a large amount of data is being sent over the internet, it gets broken down into pieces (packets) and each packet is sent separately through the internet protocol.

148 He noted that the advantages of TCP include the fact that it guarantees that the packet of information sent over the internet actually arrives at its destination. If the packet does not show up at the destination, TCP sends a notice to the sender of the information identifying which packet did not arrive. It also has a feature that ensures that packets of data, once received, are placed in the correct order.

149 UDP does not have these features but since it does not have as much "overhead" it can be faster than TCP. The Appellant created a UDP protocol that allowed its clients to reduce their data usage on the wireless cellular networks, which significantly reduced the clients' costs. Mr. Rupel emphasized that at the time the cost of bandwidth on cellular networks was very expensive.

150 When the Appellant created the UDP protocol, it worked very well, however at some point problems developed. It determined that the problems were being caused by the interaction between its UDP protocol and new firewalls that were being installed by its clients.

151 Another problem related to load balancers. Clients that had a large amount of traffic on their networks and multiple servers used these load balancers. The purpose of the load balancers was to balance the usage of each of the servers.

152 The Appellant encountered problems with the interaction of load balancers and session control. Session control refers to managing sessions between a server and a specific user (referred to as a client). Instead of the client having to send all of the same information repeatedly to the server, the server stores some of the information until the session is completed. This is referred to as caching. A problem arose when load balancers caused portions of the information transferred to be stored on different servers.

153 Because of these issues, the Appellant was required to abandon its UDP protocol. It then worked to develop a TCP protocol that would work better than its UDP protocol and still reduce the client's data usage.

154 Mr. Rupel discussed the portion of 2010 Project 2 identified by the CRA as TA1/TO1.

155 The Appellant's CRA filing described the technological advancement that the Appellant was trying to achieve with respect to the TA1/TO1 portion of the 2010 Project 2 as follows, "the implementation of a non-disposable byte array pool into which digital audio was compressed for transmission completely eliminating audio breakup caused by buffer under runs (the under runs were in turn caused by insufficient packet throughput)." ⁴

156 When switching from a UDP protocol to a TCP protocol the Appellant encountered a problem with audio files. They were not being sent fast enough and only a portion of the audio file could be played when first accessed by the recipient of the audio files.

157 The Appellant began experimenting with different ways to compress the audio files. At first, the methods it tried were not successful.

158 It then began experimenting with what is known as unsafe attributes. Mr. Rupel explained that the software language that the Appellant was using had a managed environment. Basically, it ensured that the various source code being used operated properly. However, the code used to do this slowed things down.

159 The Appellant tried writing so-called unsafe attributes by adding code that was not going to be managed. Mr. Rupel described the effect of unsafe attributes as follows:

... You don't have a safety net underneath you anymore, you're walking across the tightrope hoping that you don't have any bugs at that point because if you do it's not going to catch them, it's not going to prevent you from hurting yourself.⁵

160 He noted, however, that it resulted in less overhead, which meant that the Appellant could hopefully push data through quickly enough to solve the problem.

161 The use of unsafe attributes did not work. The ultimate solution involved going back into the so-called managed world and using a hybrid solution where the Appellant was "doing things that [were] a little bit unsafe but not particularly unsafe."⁶

162 Mr. Rupel provided a detailed technical description of the solution. It involved reusing certain of the objects that had been transferred. He described the process in layperson's terms as follows:

... So it's sort of like you had a bucket that you would — you'd get a bucket and you would fill it up with water and you send it over where you need it and you would throw the whole bucket over and get another bucket and fill it up with water and — now instead we're sort of taking — we're just throwing the water over and bringing the bucket back and filling it up again. So we're reusing the same bucket.⁷

This saved enough overhead that the Appellant was able to solve the problem with the audio files. The solution worked for whatever audio was sent and on the approximately 500 different devices it encountered.

163 Mr. Rupel stated the following with respect to the work performed regarding the unsafe attributes and the solution of reusing certain objects:

I still have to find out if it works. It's just an idea, a hypothesis. No guarantee it is going to work. You have to experiment and find out and lots of details in the code. When we sit here and talk about it it's sounds straightforward but when you're actually digging in the code there's all kinds of complexities that you run into that you have to fight with in order to be able to accomplish the goal in the first place. So can we actually even do this hybrid thing, is it possible, and once we do is it going to be adequate.⁸

Doctor Penn's Opinion

164 Doctor Penn noted that in 2010 and 2011 the UDP came with restrictions on the number of concurrent devices that could be connected at any one time to a mobile network. He understood that the Appellant was experimenting with the TCP because it allowed more devices to be connected. However, the Appellant was faced with the issue of slower transmission speeds. He concluded that the Appellant's work on this project constituted experimental development given the experimental nature of the approach the Appellant needed to take with the different devices to determine what the then available ecology could support.

165 In his expert report, he stated the following:

... Programming with audio is a very niche expertise that most software engineers lack. This observation, combined with the increasing demand for smartphones over the last seven years, has led to a commodification of audio processing hardware and audio processing APIs within the mobile device industry that has greatly consolidated during the interval. In 2010, however, there was still a considerable variance among handheld mobile devices in the range of supported audio formats, audio codecs, available audio transfer rates and supported functionality for audio in vendor-supplied APIs. Although Allegro's eventual solution to this TO differs markedly from their solution to TO1 of FY2010 Project 1, the components TO1 of these two projects share the property that the investigation that they undertook was necessarily systematic ... and wide-ranging (although, with reasonable probability, incomplete as of the end of FY2010), having considered the idiosyncrasies of numerous mobile devices in circulation at that time. In the present component, these audio-specific parameters were underlying technological uncertainties in an ecology of foreign devices that Allegro's platform developers would have had to adapt their product to... Allegro were building a knowledge base in FY2010 Project 2 TA1/TO1, characterizing the distribution of parameters relevant to digital audio transmission in 2010, that would have been of value to members of the broader community of mobile software developers who had never intended to purchase Allegro's products.

This, too, was applied research and not a routine application of standard techniques. ...⁹

C. TA3/TO3 of 2010 Project 2

166 The Appellant's CRA filing described the technological advancement that it was trying to achieve with respect to the TA3/TO3 portion of 2010 Project 2 as follows: "The development of an [sic] synchronous event wrapper capable of timing out a process quickly, eliminating an average wait of 5-8 minutes for a TCP timeout from a mobile device".¹⁰

167 Mr. Rupel explained what a synchronous event was by distinguishing between a synchronous event and an asynchronous event. A synchronous event occurs when, in the course of communication, the system sends a request for information and then waits until it receives the answer. An asynchronous occurs when the systems sends a request for information and then does other things while another part of the system waits for the answer.

168 Mr. Rupel noted that with a synchronous event the whole system is waiting for the response and with an asynchronous event it is not waiting for the response. The synchronous method is used when the system cannot move forward in the logic of the program until the system receives an answer.

169 The problem the Appellant faced was that Microsoft had built a five-to-eight-minute timeout into its software that controlled the low-level features of the hand-held devices. The Appellant had no control over this timeout. Problems occurred in the TCP communication when a request was going out for information and no information was coming back. The Microsoft software would then take at least five to eight minutes to reset. This was a problem for the Appellant, which was trying to make devices that worked in real time, i.e., were always connected to the network.

170 Mr. Rupel described the problem as a software problem that occurred because Microsoft developed the software using protocols from a wired network and the devices were now being used on a wireless network. He noted that the designers of the software never envisaged a situation where the device would be connected but could not send data, but this is a common occurrence for a device on a wireless network. An example of this type of situation is when a device is taken into a parking garage with poor reception.

171 While it was a design feature of the Microsoft software, the Appellant had to fix the problem without access to the code used by Microsoft, while operating in a very complex system.

172 Mr. Rupel described three methods that the Appellant tested in an attempt to solve the problem.

173 The first method involved using a firewall and deep packet inspection to terminate long-running connections that were waiting for a response. The Appellant was trying to deal with the situation where the software would tell it that it was connected, but there was actually a problem and the device was not communicating.

174 He explained that deep packet inspection meant that the Appellant was "peeking" into places that it would not normally be expected to go, namely the network buffers where the information was coming in through the TCP network.

175 Since the firewalls monitored the system traffic and knew exactly what was passing through the network, the firewall could be used to find information on what was going through the network.

176 Testing using the deep packet inspection and firewalls did not lead to a solution to its problem.

177 The second method it tried involved experimenting with a loopback process which involved sending a packet out through the networking layers with instructions that the place it should go is back to the point where it originated.

178 It hoped to avoid the five-to-eight-minute timeout problem by killing the network session, which, theoretically, would cause everything to immediately reset. The problem it encountered was that it was only able to kill one side of the session (such as the device side) but was not able to kill the session on the other side (the server side). This left the system in what Mr. Rupel referred to as an inconsistent state, which caused a problem.

179 The problem was resolved by developing a two-pronged mechanism to eliminate the issue. Mr. Rupel described the process as follows:

... by creating another process we created a parallel situation where we could start a new session for — the original session, which is where everything is still happening, all the important stuff is still going on there, but we create this other process that then creates a new session with the server, and then we have to basically keep track of what's happening over there but we can use that channel then to do our communication until that five-to-eight-minute timeout finally times out.

And so we have sort of a temporary communication channel that we set up during the period of time that the five-to-eight-minute window is blocking us.¹¹

180 Mr. Rupel noted that the Appellant recorded all of its work in the source code control system. The Appellant wrote software for each of the methods it tried in order to test each of the proposed methods.

Doctor Penn's Opinion

181 Doctor Penn does not believe that TA3/TO3 of 2010 Project 2 by itself constituted experimental development or research. However, he believes that TA3/TO3 supported the other parts of 2010 Project 2, which he believes constituted experimental development or research. In effect the part of 2010 Project 2 that the CRA identified as TO3/TA3 supported the other portions of 2010 Project 2 in such a way that it contributed to the overall aims of an experimental development project. He questioned whether it made sense for the CRA (or anyone) to split the Appellant's 2010 Project 2 into three components.

182 He stated the following in his expert report:

... This project's [2010 Project 2] description proposes one overarching technological advancement: a TCP-based application protocol that surpasses UDP in throughput and scalability. Whether or not this could be achieved was a technological uncertainty. To achieve that advancement, there are certain design features of TCP that are inconsistent with its use in this application protocol. One of those, TO3, is the long timeout delays that are typically built into TCP stacks. It is a defect of the subproject terminology, "TA3/TO3", that it implies such a limited scope of work as to preclude the identification of a TA or TU for just this one component. This component shares in the technological advancements and uncertainties of the project to which it contributes...

... I am unable to reasonably ascertain that a systematic investigation was conducted as part of this component's work on the basis of the documents and interviews available to me. I am, on the other hand, reasonably certain that Project 2 as a whole did consist of research and experimental development alongside some inevitable routine development that took place in support of the project's overall research programme. I also find it reasonably probable that the work described in TA3/TO3 and the associated technical content by itself was sufficiently novel to serve as the basis for a standardized extension to the TCP protocol for low-latency communication on unreliable networks. What is unclear to me is whether the realization of TA3/TO3's research potential in fact took place.¹²

D. TA1/TO1 of 2011 Project 1

183 The Appellant described the technological advancements it was trying to achieve for all of Project 3 as follows:

The technological objective of this project was to develop an integration platform for mobile devices that enables dynamic multiple endpoints. Specifically, the objective was to develop methods to enable mobile data packets to be intelligently routed to different applications without the need for setting up specific end points or messaging agents for each integration point.¹³

184 With respect to TA1/TO1 of Project 3, the Appellant hoped to achieve a technological advancement by developing a connection timeout mechanism for distributed transactions initiated by a mobile device.

185 The technological obstacle the Appellant faced was related to mobile transaction timeouts. The Appellant noted that the main purpose of its system was to provide data to client devices such as mobile devices. This required data to be sent across

high-latency cellular networks. Because of the latency of cellular networks, it is not easy to determine whether a connection has timed out.

186 Mr. Rupel noted that people confuse bandwidth with latency. Latency is another aspect of speed or timing. He noted that information may pass through a system at a high speed (high bandwidth) and still be delayed in arriving at its destination (high latency).

187 He explained that cellular networks are high latency when compared with wire networks. In a cellular network, "[t]here's a lot more handshaking that has to go on with decoding what's in the radio waves and the layers of technology that has to filter through in order to just get where you're going with it. ... that initial delay is worse on a wireless network, especially on a cellular network."¹⁴

188 The timeout was the same as in 2010 Project 2, but the timeout in 2011 Project 1 caused a different problem. Mr. Rupel explained that the Appellant's system bundled up business logic messages and sent it through the system. As discussed previously, the messages are broken up into pieces and sent through in little packets, which are reconstructed on the other side. The process has what is referred to as a queuing mechanism. The Appellant's software handles what is in the queue to feed the information through the underlying black box and then reconstruct it on the other side. The timeouts were causing problems in the fidelity of the Appellant's queuing process.

189 For example, the timeout may cause the system to reset. Once it resets it feeds all the information sitting in the queue into the system at such a fast rate that it overwhelms the device.

190 As a result, the Appellant had to conduct tests on application timeouts to determine the optimal timing. Mr. Rupel noted that there are a lot of trade-offs in the timing in that if you make it too short, you have one set of problems, if you make it too long, you have another set of problems. It was trying to find the "sweet spot", complicated by the fact that it was working with black boxes and had no way to know if the individual problems that occurred on one extreme or the other were going to become unacceptable from a business standpoint.

Doctor Penn's Opinion

191 Doctor Penn explained that in order for the Appellant to keep the connections from timing out, it needed to consider the limited CPU capacities and networking capacities of each of the devices involved. It is his opinion that this was an experimental issue that could not have been resolved by a standard as at 2011. He considered the research done by the Appellant to be experimental development since the Appellant had to experiment with multiple devices under multiple network conditions in order to determine whether the connections could support various solutions in order to maintain the reconnect. He provided the following opinion in his written report:

... the development of a mechanism that waits a specified period of time before resetting a network connection is standard practice, and the experimentation required to set the wait time often involves only a trivial amount of experimentation. ... however, knowing how long to wait when developing a product within an ecology of foreign devices and on multiple cellular networks is not routine. ... Allegro were building just such a knowledge base [knowledge of necessary wait times] that would have been of value to members of the broader community of mobile software developers, including those who had never intended to purchase Allegro's products. This was the result of applied research.¹⁵

192 Doctor Penn also reviewed TA3/TO3 of 2011 Project 1. He concluded that the work carried out by the Appellant was not experimental development. Counsel informed the Court that this was the reason the Appellant conceded this issue at the commencement of the trial.

E. Finding of the Court

193 With respect to projects TA1/TO1 of 2010 Project 1, TA1/TO1 of 2010 Project 2 and TA1/TO1 of 2011 Project 1, I agree with the Appellant and Doctor Penn that the work done by the Appellant was experimental development.

194 The Appellant's core product was its platform (software), which it built to account for the difficult environment in which it operated. The Appellant was attempting to develop a new product (its platform) that would work seamlessly with a multitude of devices that used different operating software and ran on the various operating systems of the Appellant's clients. It was a product that had not previously existed.

195 The Appellant's success depended on its ability to satisfy its clients' needs in an environment characterized by numerous wireless devices with numerous underlying software systems that the Appellant could not access, the so-called black boxes. The Appellant also had to design a platform that would interact with the numerous servers of its clients. Its product had to work regardless of the manufacturer of the hand-held device used by the client and/or the operating software used by the hand-held device.

196 This environment was further complicated by the state of the wireless technology and underlying software at the point in time the Appellant carried out the experimentation. Mr. Rupel and Doctor Penn both noted that many of the issues the Appellant faced would not exist today because of the technological advancements that have been made over the last ten years. However, they existed at the time the Appellant carried out the projects.

197 Working in that environment, the Appellant needed a product that worked better than products offered by its competitors. This required the Appellant to be constantly working to improve its product. It did this by constantly developing software to improve the operation of the various hand-held devices that its clients used on the Appellant's platform.

198 As Mr. Rupel and Doctor Penn explained, when developing this software the Appellant faced numerous technological challenges that required the Appellant to experiment to find solutions.

199 Mr. Rupel noted that if the Appellant identified a problem that should not have occurred based upon the specifications of the underlying software, then it had to get creative. Routine engineering would not resolve the problem. It had to experiment, to "come up with hypotheses of things [it] could try or do and see what worked".¹⁶

200 Doctor Penn concluded that these experiments as they related to the three projects constituted scientific research and resulted in a technological advancement. Doctor Penn was eminently qualified to make these conclusions based upon his education, experience and knowledge of the Appellant's business. His conclusions are consistent with the evidence before me.

201 On the basis of the evidence before me, particularly Mr. Rupel's description of the research the Appellant performed and Doctor Penn's expert opinion, I have concluded that the work undertaken by the Appellant with respect to projects TA1/TO1 of 2010 Project 1, TA1/TO1 of 2010 Project 2 and TA1/TO1 of 2011 Project 1 related to the development or improvement of its product and involved attempting to resolve a technological risk or uncertainty that could not be resolved by routine engineering or standard procedure.

202 The three projects required the Appellant to conduct tests and experiments, in a difficult environment, to find new solutions that would allow all of the software components to execute in the manner the Appellant required in order for it to develop and improve a product that would meet the needs of its clients. Those solutions could not be found by routine engineering. It was work that the Appellant undertook for the purpose of achieving technological advancements that would allow the Appellant to create a new and/or better product. This product was a platform that would work with multiple devices in the environment described by Mr. Rupel.

203 With respect to project TA3/TO3 of 2010 Project 2, as discussed previously, Doctor Penn concluded that if one considered the work related to what the CRA described as TA3/TO3 by itself, the work did not constitute experimental development or research. However, he questioned whether it made sense to split 2010 Project 2 into three parts. Doctor Penn believed that TA3/TO3 supported the other parts of 2010 Project 2, which he believed constituted experimental development or research. I have found that TA1/TO1 of 2010 Project 2 was experimental development and the Minister accepted that TA2/TO2 of 2010 Project 2 was SR&ED.

204 I accept Doctor Penn's conclusion that the part of 2010 Project 2 identified by the CRA as TA3/TO3 supported the other portions of 2010 Project 2 in such a way that it contributed to the overall aims of an experimental development project. In other words, I accept that the Appellant's work on this part of 2010 Project 2 was experimental development.

205 My conclusion with respect to the four projects is consistent with the fact that the CRA found that the four projects were the same or similar to projects in respect of which the Appellant received grants from the National Research Council of Canada (the "NRC") pursuant to its Industrial Research Assistance Program (the "IRAP"). The grants the Appellant received were to conduct research that would lead to better products.

206 The Appellant had numerous systems in place to record the various hypotheses it made when conducting its research. In particular, it recorded its research in its source code control system and its Jira X quirk tracking system. For a specific experimental project, including the projects at issue, these systems recorded the hypothesis made by the Appellant at the beginning of the project, the testing of the hypothesis and any changes made to the hypothesis as the work progressed. This was a system the Appellant developed with the assistance of Mr. Wong, its CRA technical advisor.

207 It was only after reviewing the source code control system and the Jira X software tracking system to determine the work it preformed that the Appellant made the decision on whether it should claim the project on its tax return as SR&ED.

208 On the basis of the evidence just discussed, I have concluded that when the Appellant conducted the projects at issue, it formulated hypotheses specifically aimed at reducing the identified technological uncertainty, followed appropriate procedures on testing, including the formulation, testing, and modification of hypotheses, and maintained a detailed record of the hypotheses tested and results achieved as the work progressed.

209 For these reasons, the work performed by the Appellant on the projects identified by the CRA as TA1/TO1 of 2010 Project 1, TA1/TO1 of 2010 Project 2, TA3/TO3 of 2010 Project 1 and TA1/TO1 of 2011 Project 1 constitutes SR&ED for purposes of the *Income Tax Act*.

V. Amount of SR&ED Expenditures Incurred and Corresponding ITCs

210 Having found that the Appellant's work on the four projects discussed above constitutes SR&ED, I must now determine the total amount of SR&ED expenditures the Appellant incurred during the relevant period and the amount of corresponding ITCs it is entitled to claim.

211 For each of the years at issue, the Appellant elected under clause 37(8)(a)(ii) (B) and subsection 37(10) to use the proxy method when calculating its SR&ED expenditures and corresponding ITCs. Pursuant to regulation 2900(4), the Appellant and the Respondent calculated the proxy amount as 65%¹⁷ of the eligible salaries and wages of the Appellant's employees who were directly engaged in SR&ED carried out in Canada. Obviously, the Appellant and the Respondent did not agree on what activities of the Appellant constituted SR&ED.

212 At the commencement of the hearing in May 2019, I asked each party to provide the Court with the amount of SR&ED expenditures the Appellant incurred for each of the four projects at issue and the amount of corresponding input tax credits for each project.

213 Despite the assurance of counsel that the calculations would be provided to the Court, the parties did not provide the amounts to the Court in 2019. When the hearing resumed in September 2020, I reiterated that the Court required this information. The parties never provided this information to the Court.

214 I did hear from Ms. Sporich of the CRA on the second day of the September hearing dates. She provided the Court with a detailed breakdown of how the CRA calculated the amount of SR&ED expenditures allowed and the calculation of the corresponding ITCs. She did not provide the Court with similar information for the four projects at issue.

215 However, after I once again emphasized that the Court required such information, she did undertake to provide the Court with a calculation of how the CRA would have calculated the SR&ED expenditures if the Minister had accepted the Appellant's claim as filed. This information (Exhibits R-8 to R-13) was provided on the last day of the hearing.

216 The Appellant did not object to any of the CRA's calculations except for, as I will discuss shortly, the CRA's calculation of the IRAP government assistance.

217 Exhibit R-13 contains, for the 2010 Taxation Year and the 2011 Taxation Year, the amount the Appellant claimed as SR&ED expenditures and corresponding ITCs and the amounts the Minister allowed. The calculation for the 2010 Taxation Year is as follows:

	Filed by Taxpayer	Assessed by the CRA
Total SR&ED Expenditures	\$587,005	\$171,979
Add:		
Prescribed Proxy Amount	65%	\$365,003
Deduct		
Government Assistance - OITC	\$88,705	\$11,179
Government Assistance - IRAP	<u>\$65,261</u>	<u>\$171,979</u>
—		
Qualified Expenditures for ITC	\$798,342	\$100,607
—		
ITC	35%{*}	\$279,420
—		
		\$35,212

Notes: * See paragraphs (a.1) and (e) of the definition of "investment tax credit" in subsection 127(9).

218 The calculation for the 2011 Taxation Year is as follows:

	Filed by Taxpayer	Assessed by the CRA
Total SR&ED Expenditures	\$418,890	\$120,635
Add:		
Prescribed Proxy Amount	65%	\$272,279
Deduct		
Government Assistance - OITC	\$68,834	\$16,945
Government Assistance - IRAP	<u>\$6,829</u>	<u>\$29,598</u>
—		
Qualified Expenditures for ITC	\$615,506	\$152,505
—		
ITC	35%	\$215,567
—		\$53,377

219 The Appellant did not provide the details of its calculation of the amounts claimed on its tax returns. The CRA's calculation of the amounts the Minister assessed in respect of the total SR&ED expenditures, the prescribed proxy amount, and the government assistance is contained in Exhibits R-3 to R-7 and R-13. Ms. Sporich explained the calculations to the Court.

220 As a result of allowing the Appeal with respect to the four projects at issue, the Court must determine new amounts for total SR&ED expenditures, the prescribed proxy amount and the government assistance. Since neither party provided calculations of such amounts for the four projects at issue, the Court calculated such amounts using the evidence before the Court. Each party should have performed these calculations and then provided the calculations to the Court.

SR&ED Expenditures

221 I will first address the total SR&ED expenditures for the 2010 Taxation Year.

222 In its tax filing the Appellant claimed \$587,005 of allowable SR&ED expenditures comprised of salary and wages of \$562,005 and a payment to a contractor of \$25,000.¹⁸ When assessing the Appellant, the Minister assumed that the work performed by the subcontractor did not constitute SR&ED. The Appellant has not argued that the Minister's assumption was wrong or provided the Court with any evidence to support a \$25,000 payment to a contractor.

223 The Minister allowed the Appellant SR&ED expenditures of \$171,979 comprised entirely of salary and wages. Using the numbers provided by the Respondent in Exhibit R-9, I have increased the \$171,979 by the salary and wages the Appellant incurred in respect of the TA1/TO1 of 2010 Project 1, TA1/TO1 of 2010 Project 2 and TA3/TO3 of 2010 Project 2. This results in total allowable SR&ED expenditures of \$425,911 for the 2010 Taxation Year.

224 I have performed a similar calculation for the 2011 Taxation Year. Using the numbers provided by the Respondent in Exhibit R-12, I have increased the \$120,635 of salary and wages allowed by the Minister by the salary and wages incurred by the Appellant in respect of TA1/TO1 of 2011 Project 1. This results in total allowable SR&ED expenditures of \$355,891 for the 2011 Taxation Year.

Prescribed Proxy Amount

225 The prescribed proxy amount is 65% of the SR&ED expenditures. For the 2010 Taxation Year this is 65% of \$425,911, or \$276,842. For the 2011 Taxation Year the prescribed proxy amount is 65% of \$355,891, or \$231,329.

Government Assistance

226 When calculating SR&ED expenditures, both the Appellant and the Minister took into account two forms of government assistance received by the Appellant.

227 The NRC, pursuant to its IRAP, provided the first government assistance (the "IRAP Grant"). Pursuant to a contribution agreement between the NRC and the Appellant (Exhibit A-1), the NRC agreed to contribute up to a maximum of \$500,000 for salary and wage costs incurred in the performance of certain work described in the agreement.¹⁹ Pursuant to the PASF, the Appellant received \$470,378 of the IRAP Grant. The Minister, when calculating the Appellant's SR&ED expenditures and related ITCs, assumed that all of the projects in respect of which the Appellant claimed SR&ED were the same or similar to some of the projects covered by the IRAP Grant.

228 The Appellant, when calculating its eligible SR&ED and ITCs, deducted \$65,261 in the 2010 Taxation Year and \$6,829 in the 2011 Taxation Year in respect of the IRAP Grant. Therefore, the Appellant assumed that it received at least a part of the IRAP Grant in respect of the SR&ED projects before the Court. I heard no evidence from the Appellant with respect to how it calculated the \$65,261 and \$6,829. In fact, the Appellant provided no evidence with respect to which of its employees' remuneration was covered by the IRAP Grant and what work such employees performed in respect of the SR&ED projects.

229 The Respondent, using information the Appellant provided to the CRA, provided the Court with a schedule (Exhibit R-7) showing the specific employees of the Appellant who worked on the five research projects, the number of hours each employee worked on the projects and the hours of each employee that were reimbursed under the IRAP Grant.

230 For the 2010 Taxation Year, the schedule shows that 23 employees worked a total of 15,899 hours on the five research products²⁰ and 11,337 of the hours each employee worked for the Appellant were reimbursed under the IRAP Grant.

231 The CRA then reduced the 11,337 reimbursed hours by those hours that related either to the Appellant's projects that the CRA did not accept as SR&ED or related to other projects (see Exhibits R-7 and R-8). It determined that only 4,010 of the employee hours reimbursed under the IRAP Grant related to the projects it accepted as being SR&ED. It then applied each

employee's hourly rate to the 4,010 hours to arrive at a total IRAP Grant reimbursement of \$131,054 in respect of the projects it accepted as SR&ED.

232 For the 2010 Taxation Year, the CRA deducted the calculated IRAP Grant of \$131,054 under paragraph 37(1)(d) when determining the Appellant's deduction under section 37 for scientific research and experimental development expenditures (see Exhibit R-3, page 1). However, when determining the corresponding ITCs, the CRA deducted, under paragraph 127(18), \$171,979, which represents all of the salary and wages the Appellant incurred when conducting the projects the Minister accepted as SR&ED (see Exhibit R-3, page 2).

233 Ms. Sporich provided the following reason for deducting, under subsection 127(18), all of the salary and wages incurred by the Appellant as opposed to only that portion of the salary and wages that had been reimbursed under the IRAP Grant: since the IRAP Grant was in respect of projects that were claimed for SR&ED, the work done on the projects had to, under subsection 127(18), be removed from the calculation of the expenditures that qualify for the ITC.²¹

234 Exhibit R-7 contains a similar calculation for the 2011 Taxation Year. For the 2011 Taxation Year, the CRA determined that the Appellant received an \$18,491 IRAP Grant in respect of the projects that it accepted as SR&ED projects.

235 The Appellant disagrees with the Minister's position. It argues that whatever amount is deducted under paragraph 37(1)(d) when determining the Appellant's deduction for research and experimental development expenditures, the same amount should be deducted under subsection 127(18) when determining the amount of the Appellant's corresponding ITCs.

236 I agree with the Appellant.

237 Paragraph 37(1)(d) requires a taxpayer to deduct the following amount when determining its deduction under subsection 37(1) for scientific research and development expenditures:

the total of all amounts each of which is **the amount of any government assistance or non-government assistance (as defined in subsection 127(9))** in respect of an expenditure described in paragraph (a) or (b), as paragraph (a) or (b), as the case may be, read in its application in respect of the expenditure, that at the taxpayer's filing-due date for the year the taxpayer has received, is entitled to receive or can reasonably be expected to receive,

[Emphasis added.]

238 The paragraph requires the taxpayer to deduct the amount of *any government assistance* as defined in subsection 127(9). The taxpayer is required to deduct the government assistance if it is received in respect of certain expenditures made on scientific research and experimental development that are contained in paragraphs 37(1) (a) and (b).

239 Subsection 127(18) requires a taxpayer, when calculating an ITC under subsection 127(5) in respect of its SR&ED qualifying expenditure pool, to deduct the following amount:

Where on or before the filing-due date for a taxation year of a person or partnership (referred to in this subsection as the "taxpayer") the taxpayer has received, is entitled to receive or can reasonably be expected to receive **a particular amount that is government assistance, non-government assistance or a contract payment** that can reasonably be considered to be in respect of scientific research and experimental development, the amount by which the particular amount exceeds all amounts applied for preceding taxation years under this subsection or subsection 127(19) or 127(20) in respect of the particular amount shall be applied to reduce the taxpayer's qualified expenditures otherwise incurred in the year that can reasonably be considered to be in respect of the scientific research and experimental development.

[Emphasis added.]

240 When a taxpayer is calculating its ITC, this paragraph requires the taxpayer to deduct the amount of government assistance received. It is required to deduct the government assistance if it can reasonably be considered to be in respect of SR&ED.

241 Under both paragraph 37(1)(d) and subsection 127(18), the Appellant was required to deduct the amount of government assistance as defined in subsection 127(9) that it received in respect of its SR&ED projects. The IRAP Grant is government assistance for purposes of subsection 127(9).

242 The CRA determined that the amount of the IRAP Grant that was in respect of the projects it accepted as SR&ED was \$131,054. The CRA should have deducted this amount under both paragraph 37(1)(d) and subsection 127(18). Subsection 127(18) does not allow for the deduction of an amount in excess of the government assistance received by the Appellant.

243 Ms. Sporich provided the Court with Exhibit R-10, which is prepared on the same basis as Exhibits R-7 and R-8 but assumes that the Minister accepted the Appellant's SR&ED claim as filed. It is the CRA's calculation of the amount of the IRAP Grant that the Appellant received in respect of all of its projects.

244 Consistent with Exhibit R-7, Exhibit R-10 shows that for the 2010 Taxation Year 23 employees worked 15,899 hours on all of the projects that the Appellant claimed were SR&ED and 11,337 of those hours were reimbursed under the IRAP Grant. Exhibit R-10 shows that of the 11,337 hours reimbursed under the IRAP Grant, 8,029 were in respect of work performed on the projects that the Appellant claimed were SR&ED. Ms. Sporich then applied the hourly rate of each employee to the 8,029 hours to arrive at a total IRAP Grant of \$262,239 in respect of all of the Appellant's projects that it claimed constituted SR&ED. On page 2 of Exhibit R-10, she breaks down the \$262,239 by individual project. Pages 3 and 4 of Exhibit R-10 contain similar calculations for the 2011 Taxation Year.

245 Using page 2 of Exhibit R-10 I have adjusted the IRAP Grant number for the 2010 Taxation Year to only include projects that the Court has accepted as SR&ED. Specifically, TA2/TO2 of 2010 Project 3 was excluded since the Appellant conceded at the start of the hearing that it did not constitute SR&ED. Adding the number provided for the projects that the Court has found to be SR&ED results in an IRAP Grant of \$202,889. A similar calculation for the 2011 Taxation Year results in an IRAP Grant of \$22,386. These are the amounts that must be deducted under paragraph 37(1)(d) and subsection 127(18).

246 The second government assistance taken into account by both parties was referred to as the OITC. I received no evidence on the nature of the grant other than the fact that both parties deducted an amount in respect of the OITC when determining the Appellant's SR&ED expenditures and ITCs. Both the Appellant and the Minister calculated the OITC government assistance as 10% of the following:

Allowable SR&ED expenditures

Plus: prescribed proxy amount

Less: IRAP assistance received in respect of SR&ED.²²

247 Applying this calculation to the amounts determined by the Court results in OITC government assistance of \$49,986 in the 2010 Taxation Year and \$56,483 in the 2011 Taxation Year.

248 On the basis of the above, the Appellant incurred qualifying SR&ED expenditures of \$449,878 and \$508,351 in the 2010 and 2011 taxation years, respectively, and is entitled to corresponding ITCs of \$157,457 and \$177,923 for the 2010 and 2011 taxation years, respectively, calculated as follows:

	2010 Taxation Year	2011 Taxation Year
Total SR&ED Expenditures	\$425,911	\$355,891
Add:		
Prescribed Proxy Amount	65%	\$276,842
Deduct		
Government Assistance - OITC	\$49,986	\$56,483
Government Assistance - IRAP	<u>\$202,889</u>	<u>\$22,386</u>

Qualified Expenditures for ITC		\$449,878	\$508,351
ITC	35%	\$157,457	\$177,923

249 For the foregoing reasons, the appeals are allowed with costs and the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that the Appellant incurred qualifying SR&ED expenditures of \$449,878 and \$508,351 in the 2010 and 2011 taxation years, respectively, and is entitled to corresponding ITCs of \$157,457 and \$177,923 for the 2010 and 2011 taxation years, respectively.

Appeal allowed.

Footnotes

- 1 Exhibit A-3, page 35, Box 240.
- 2 Exhibit A-37, pages 6 — 7.
- 3 Exhibit A-4, page 39, Box 240.
- 4 Exhibit A-4, page 40, Box 240.
- 5 Transcript of oral hearing, Monday, May 6, 2019, page 143.
- 6 Transcript of oral hearing, Monday, May 6, 2019, page 145.
- 7 Transcript of oral hearing, Monday, May 6, 2019, page 146.
- 8 Transcript of oral hearing, Monday, May 6, 2019, pages 147 — 148.
- 9 Exhibit A-37, page 9.
- 10 Exhibit A-4, page 40, Box 240.
- 11 Transcript of oral hearing, Tuesday, May 7, 2019, page 166.
- 12 Exhibit A-37, page 10.
- 13 Exhibit A-6, page 51, Box 240.
- 14 Transcript of oral hearing, Tuesday, May 7, 2019, pages 175 — 176.
- 15 Exhibit A-37, page 15.
- 16 Transcript of oral hearing, Tuesday, May 7, 2019, page 186.
- 17 The 65% percent applies to taxation years before 2015.
- 18 See Exhibit R-3.
- 19 Paragraph 1.1 of the agreement specifies that the Appellant was only to be reimbursed for \$500,000 of its salary costs.
- 20 The 15,899 hours is the same number of hours as the total SR&ED hours claimed by the Appellant on Exhibit R-4.
- 21 Transcript of oral hearing, Tuesday, September 22, 2020, page 172.

22 See Exhibit R-13, R-8.

Tab 8

H-249

2017 CarswellOnt 3327
Ontario Arbitration (Insurance Act)

State Farm Mutual Automobile Insurance Co. and TD General Insurance Co., Re

2017 CarswellOnt 3327, 65 C.C.L.I. (5th) 271

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, as amended, Section 268 AND REGULATION 283/95 THEREUNDER

IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991, c.17

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (Applicant)
and TD GENERAL INSURANCE COMPANY operating as TD HOME AND
AUTO and the MOTOR VEHICLE ACCIDENT CLAIMS FUND (Respondents)

ALI DORRE by his Litigation Guardian ASHA DORRE (Applicant) and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and TD HOME & AUTO INSURANCE COMPANY (Respondents)

Kenneth J. Bialkowski Member

Heard: January 30, 2017

Judgment: February 27, 2017

Docket: None given.

Counsel: Laura Emmett, for Applicant, State Farm Mutual Automobile Insurance Company
Jeffrey Naganobu, for Respondent, TD General Insurance Company
Jennifer Chapman, for Respondent, Motor Vehicle Accident Claims Fund
Judith Anne Hull, for Plaintiff, Ali Dorre
Sonia Fabiani, for Defendant, State Farm Mutual Automobile Insurance Company
Robert van Praet, for Defendant, TD Home & Auto Insurance Company

Kenneth J. Bialkowski Member:

ISSUE

1 In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant Ali Dorre with respect to personal injuries sustained in a motor vehicle accident which occurred on October 15, 2009. In order to make such determination, it is necessary to deal with the issues of whether the vehicle insured by TD was the vehicle that ran over the claimant and whether the claimant was, at the time of the incident, principally financially dependent on his sister Asha Dorre, insured with State Farm. Those same issues, as well as the issue of whether the claimant was "residing" with his sister Asha, are to be determined in the context of the above-styled tort action so as to determine the insurance coverage available to satisfy any Judgment that may be obtained by the Plaintiff in tort.

PROCEEDINGS

2 The Arbitration proceeded in London, Ontario, over a period of nine hearing days commencing January 30, 2017. It involved some 20 witnesses and 49 exhibits.

FACTS AND EVIDENCE

3 In the following paragraphs to follow, I will provide a general overview of the evidence adduced and then deal with specific details of evidence and documents in the analysis which follows.

4 This arbitration originates from an incident that occurred on October 15th, 2009. Early that morning, the claimant Ali Dorre was struck by a motor vehicle and suffered catastrophic injury. He was born on November 12th, 1988 and was 20 years of age at the time of the accident. His family consists of his mother ("Faduma"), eldest sister ("Asha") and remaining siblings, ("Leyla"), ("Hawa") and ("Abdullahi"). They originated from Somalia and after spending several years in Germany, they came to Canada. The claimant was a child when they arrived in Canada.

5 The claimant's sister Asha was insured by State Farm. Initially Ali made claim for Accident Benefits as against the State Farm policy on the basis that the claimant was "principally financially dependent" on his sister. State Farm has been paying statutory accident benefits for more than seven years, but claims in this proceeding that it is not the priority insurer as the claimant Ali Dorre was *not* principally financially dependent on their insured Asha Dorre, at the time of the accident.

6 TD is the insurer for a green 4 door Honda automobile bearing license marker BCWC042 ("Green Honda") and owned by Ahmad Warsame. It is asserted that the Green Honda was involved in this incident which fact is denied by TD. It is asserted that the claimant was with the sons of Ahmed Warsame (Ali and Mohammed Warsame) in the early morning hours of October 15, 2009 and was being driven home by them from a club when last seen. It is asserted that it was the Warsame vehicle insured with TD that ran over the claimant.

7 Initially, the claimant and his family lived in a four bedroom townhouse at 46 Ivy Court ("Ivy") in London, Ontario. This was government subsidized housing controlled by London Housing. In December of 2007, the three sisters moved out to 80 King Edward Street, Apartment 406 ("King Edward"), in London, Ontario. This was a two bedroom apartment and not government subsidized. All three sisters signed the lease. There is evidence from the family that Ali was living at King Edward at the time of the incident but there is also other evidence to suggest that he was not.

8 The evidence of where the claimant resided is controversial, as is the financial support he received from his sister Asha, insured with State Farm. The residency of the claimant Ali Dorre is a factor to be considered in the financial dependency analysis and possible coverage under State Farm's OPCF 44R (underinsured coverage) issued to Asha Dorre.

9 The evidence must be viewed from the perspective of the three crucial issues in these disputes:

1. involvement of the vehicle insured by TD;
2. residency of the claimant;
3. the claimants financial dependency on his sister Asha.

POLICE EVIDENCE

10 The police evidence consisted of a two volume police file, the videotape interviews of three individuals who had been with the claimant in the hours leading up to the subject incident and the oral evidence of Sergeant Poustie, Sergeant Van Der Klugt and Sergeant Orchard.

Oral evidence of Sergeant Poustie and police file

11 Sergeant Poustie of the Major Crimes Investigation Unit of the London police force was the supervisor of the investigation of the incident herein as it was thought initially to be a potential homicide. He was called at 4:40am on October 15, 2009 and immediately proceeded to the station where he co-ordinated the investigation.

12 The police had received a 911 call at 4:03am from a witness by the name of Crystal Ramdharry, indicating that she had witnessed the subject incident. She stated that a man was on the ground and a vehicle ran over the man. It was a dark car.

13 The police file shows that when police arrived at the scene the victim, now known to be Ali Dorre, was found on the road bleeding from the head with a tire mark impression across his chest. He had no shirt on. His pants were down around his knees. What was described as a crime scene was secured.

14 A police officer attended the residence of the 911 caller Crystal Ramdharry and took a statement at 4:09am. She told the officer that she had stepped out for a cigarette and heard some yelling. She indicated she saw a man on the ground and saw the car run him over. The vehicle involved was a dark coloured car. The vehicle then proceeded north and then south making a turn at Cleveland.

15 A further statement was taken from this witness at 9:35am that morning by Detective Constable Orchard. She confirmed that she had heard male voices and saw the car hit the man. She later indicated in the statement that she didn't actually see the car hit the person but pretty sure it did. She could not remember if she saw the car go up and over the body. She felt sick to her stomach because she believed the car hit him. She described the vehicle as being a medium sized car, with two brake lights and with plates that she thought were as low as the bumper, but modified her answer as to the location of the plates with the words "probably" and "think so".

16 Later that morning Sergeant Poustie interviewed a friend of the claimant's, Chris Mason. Details of the videotaped interview are set out below. He had been with Ali and the Warsame brothers on the night of this incident. They went downtown in the Warsame vehicle. After leaving a club called Billy Bob's, Chris was dropped off about 3:00am, leaving Ali in the car with the Warsame brothers with Ali (aka "Juvi") Warsame driving. They were driving a green Honda. The officer thought Chris Mason was co-operative and spoke freely. He had no reason to disbelieve him.

17 The police file also contained video interviews of two other friends of Ali Dorre taken on October 15, 2009, details of which are found below and also confirming the involvement of the Warsame brothers in the day's activities.

18 Once information was obtained that Ali had last been seen with the Warsame brothers, attempts were made to locate them and the green Honda being used that night. It was determined that the Warsame brothers had left the country and the vehicle owned by their father was never located.

19 The police file contained information from the Canada Border Services Agency that Mohamed Warsame tried to enter the United States on October 15, 2009 and was denied entry. Ali "Juvi" Warsame was allowed entry claiming he was on his way to Columbus, Ohio for a flight to Atlanta and then on to Dubai. They and their vehicle have never been found.

20 The police file contained information from a neighbour, Darryl Moyles, who saw a dark car at about 3:30 - 4:00am, driving fast. It was a new car over 2000 or late 90's.

21 The police file also contains information from a neighbour, Timothy Harvey, who claims that he woke up at about 3:00am to the sound of screaming. Males were in a heated argument yelling in Arabic. He later heard a vehicle spinning out. It was a small car.

22 The police file contained information from the police reconstructionist, P.C. Riley, indicating that there was a tire mark across the chest of the claimant, indicating he was laying on the road when he was run over.

23 Sergeant Poustie in his investigation placed significant weight on the fact that the Warsame brothers immediately left the country. It was suggestive to him of a guilty mind. Similarly, he placed significant weight on the fact that the Warsame vehicle had disappeared, leading him to believe that they got rid of it or it would have turned up by now. Although no charges were laid, it was concluded that all information pointed to the Warsame brothers having been involved in this incident. If one of the Warsame brothers were to return to Canada and refuse to speak to the police, then Sergeant Poustie's concluding report indicates that the appropriate charge may be aggravated assault with the vehicle being intentionally driven over Dorre. The concluding report indicated that the investigation would be coded as an aggravated assault.

24 With respect to the "residency" issue in this proceeding, Sergeant Poustie testified that all of the information they had indicated that Ali Dorre resided at 46 Ivy Court. No one ever suggested he lived anywhere else. If told that he may have been residing elsewhere or sleeping elsewhere, that location would also have been searched. The police only searched 48 Ivy Court for belongings that would have assisted them in their investigation.

Oral evidence of Sergeant Van Der Klugt and police file

25 This witness was a detective in the Major Crimes Unit called in at 4:34am on the morning of October 15, 2009.

26 He later attended the hospital where he took a taped statement from Ali Dorre's mother, Faduma Aden ("Faduma"). He thought her English was fine. She was fully co-operative. She said she lived at 46 Ivy Court with her two sons. It was never suggested that Ali lived anywhere else. She indicated that she supported her son Ali financially. She gave him money. When asked who might do something like this to him she advised of three men in the neighbourhood that he was afraid of and that she was considering moving to Denmark for the boys' safety.

27 None of the men described matched the description of the Warsame brothers. Faduma last saw her son at about 8:30am on October 14, 2009 before she left for work. He was sleeping in his bed.

28 Faduma consented to a search of the property to see if any clues could be found as to what might have happened the previous night. They attended 46 Ivy Court. Faduma could not find his passport or keys. She indicated that he kept his passport under the cable box on the TV unit. It was not there. No other address was searched. It was never suggested to the sergeant that his belongings might be elsewhere.

29 Sergeant Van Der Klugt spoke to Faduma once again on October 20, 2009 informing him that she had heard that the Warsame brothers had returned to Somalia.

30 The Sergeant also testified about an e-mail from the OPP in Cambridge indicating that they had stopped and seized a vehicle operated by Warsame on September 30, 2009, a couple of weeks prior to the subject incident. It was noted that Ali Dorre had been a passenger.

Oral evidence of Detective Orchard and police file

31 This witness was a field investigator with the Major Crimes Unit and involved in the subject investigation.

32 Detective Orchard attended 46 Ivy Court at 7:01am on October 15, 2009 and spoke with the claimant's mother Faduma. He would have been the first person to have spoken to her about the incident. She provided the information outlined above. She was co-operative. He then drove her to the hospital. He later went with Faduma, who had consented to a property search, to see if there were any clues as to what happened the night before. They attended 46 Ivy Court. They were unable to find his passport or keys. The passport was normally kept under the TV cable box in the living room. The townhouse looked lived in with furniture in both living room and kitchen. It was never suggested to him that he look elsewhere for his belongings, keys and passport. Only 46 Ivy Court was searched.

33 Detective Orchard took the statement from the 911 caller, Crystal Ramdharry, at her residence at 9:35am on October 15, 2009. The information provided has been outlined above. He believed she was truthful and reliable.

Videotape police interview of Chris Mason - October 15, 2009

34 Chris indicated in his interview that he was an acquaintance of Ali, knowing him from "the hood". He was with Ali the night of the subject incident. They dropped off another friend, Dustin Craig, about 11:00pm. Dustin was drunk and it was his birthday. Chris and Ali were driven downtown by Juvi and his brother ("the Warsame brothers"). They stopped at a 7-Eleven. They went to a club called Jim Bob's where Ali got into a fight with Juvi and his brother in the parking lot. Only Juvi's brother went into the club. All three were drunk. Juvi was driving a green Honda owned by his parents. Ali continued arguing once

they got back into the car. Chris did not know what they were arguing about. They were arguing in both English and Somalian. Chris was dropped off about 3:00am. Juvi was driving when they pulled away with Ali in the car. The 911 call came in at 4:09am from Crystal Randharry.

Videotape police interview of Mike Nguyen - October 15, 2009

35 Mike had been a friend of Ali for about five years and would see him six days a week. He had been with the claimant the day before the subject incident. He went to Ali's house that morning. Another friend, Dustin Craig, was there. It was Dustin's birthday and they were drinking beer. When Mike left, only Dustin was there. Mike went home, smoked some weed, watched a movie and fell asleep.

36 He knew Ali hung with Juvi and his brother. They would often drink together. They too were Somalians.

37 Ali did not work. He believed his mom gave him money. He was lazy.

Videotape police interview of Dustin Craig - October 15, 2009

38 Dustin was a good friend of Ali and would see him about four times each week.

39 On the morning preceding this incident, Ali phoned him about 11:00am and asked him to come over. Dustin took the 1 $\frac{1}{2}$ hour bus trip to Ali's. They sat in the backyard of 46 Ivy Court. Mike Nguyen was there but leaving. The cops walked by with a police dog around 2:00pm. They had a brief conversation with the two them. The police were looking for two suspects who had abandoned a stolen car nearby. While the police were there, they called in on their radio indicating that they were at 46 Ivy Court. Dustin and Ali then went to Mike's and played one X-box game. After leaving, they went to the park to play some basketball before returning to Ali's backyard where they sat from about 6:00pm to 11:00pm. It was at that time that Juvi called and drove over a short time later. They drove Dustin home, stopping at a 7-Eleven on the way. No one entered the 7-Eleven. The Warsames were driving a green Honda. He understood that after dropping him off they were going out for a good time.

EVIDENCE OF CLAIMANT AND FAMILY

Ali Dorre May 4th, 2011 EUO/Discovery Evidence

40 The EUO/Discovery evidence of Ali Dorre indicates that Ali lived with his mom until he got kicked out. He thinks he was about 18 at the time. He went to live with his sisters on King Edward. Although he was in receipt of Ontario Works, his sisters paid for everything at King Edward. He would receive money from Mike Nguyen ("Asian Mike"), his mom and Asha. Asha would give him \$20-40 per month. His mother would leave him \$5 each day. Mike would give him \$200 per month. He received \$217 per month from Ontario Works.

41 The claimant did not work since moving to King Edward. He had worked previously but quit because it was boring and he just needed enough money for the summer.

42 On the night of this incident, his last recollection was being driven from Billy Bob's and waking up in hospital. Ali Warsame was driving. He was told by a local kid by the name of Kelly Tyler that he saw him being beaten up by two black guys and run over. It should be noted that Kelly Tyler has never been located. The claimant believes the Warsame brothers did it. He believes they took his house key, went to his house and took his passport. He believes the Warsames are back in Somalia. Ali Warsame tried to contact him by Facebook about a year after the incident but Ali would not communicate with him.

Oral evidence of Ali Dorre

43 Ali is currently 28 years of age and presented his evidence in a fashion clearly indicating serious cognitive deficits.

44 He described the difficulties he had with the law but stated he was acquitted of all charges. The police records indicate that the charges were actually withdrawn. He denied that he ever sold drugs.

45 When asked by his lawyer in direct examination as to where he resided in the two years leading up to this, he answered 46 Ivy Court. He said he remembered that and it was not something that other people had told him. He explained where he slept and that he kept his clothes in a closet. It was not until several minutes later that he stated that he was actually living at 80 King Edward in the two years before the incident. His body language and facial expression was such that it suggested he suddenly realized what he was supposed to say. Thereafter he maintained that he had been living at King Edward during that period.

46 Ali was questioned as to his attendance in school in 2009. He registered for two courses once he applied for Ontario Works. The Lifelong Learning records confirm that he registered for two courses but only attended one and even then only attended 17.4% of the classes and never completed the course. He said he got the flu and then the accident happened. The reality is that the course was to finish in mid-June 2009 and his last class attended was May 6th. While attending the classes he said he spent the monthly Ontario Works benefit of some \$216 on school supplies and some clothes. He reported his address to Lifelong Learning as 46 Ivy Court. He admitted in cross-examination that he was told by Ontario Works that he would have to either go to work or go back to school in order to get benefits. When approved for Ontario Works he set up a bank account with Scotia Bank showing 46 Ivy Court as his address.

47 In cross-examination, he admitted that he was in amazing health before this accident being skinny and having a "six-pack". He says he was mentally healthy as well. In his testimony he claimed that he played basketball.

48 He indicated that if his mother said he was a student in 2006 and 2007, which was not the case, she would have just forgotten dates and would not have lied.

49 In cross-examination, he described Mike Nguyen as a neighbour who lived next door. When advised that Dustin Craig and Mike Nguyen told police he lived at 46 Ivy Court, he indicated "they could have lied."

50 Ali did recall being questioned by police while sitting in his back yard at 46 Ivy Court on October 14, 2009, the day before the subject incident, while they were looking for suspects with respect to a stolen car. A note in the police file authored by P.C. Yovicic indicates that he spoke to Ali Dorre and was told that he lived there and had nothing to hide. Ali admitted telling them that.

51 In cross-examination, he testified about a hospital record that showed he attended hospital on August 19, 2009, having suffered a laceration to the head as a result of a fall. The hospital record showed his address as 46 Ivy Court. He believed that someone had stolen his OHIP card and passport and was using them. He had no explanation as to how the individual stealing such documents that would know that the person to notify was his sister Asha and would have her phone number.

52 When discussing the contents of the Ontario Works file, he admitted that he never worked in Toronto or lived with his girlfriend there as he reported to them in 2009.

53 Ali admitted that he had never been to Ohio, Minnesota or Atlanta as he reported to police while in jail in Sudbury in 2006. He said he gave them that information when asked where he would go if he tried to run away.

54 While in Parkwood following this incident, he signed a consent to immunization on November 3, 2009 showing 46 Ivy Court as his address. He said he did not recall telling them that. This was prior to his retaining counsel. Similarly, the hospital records include records on November 18 and 20, 2009 with respect to eye examinations where his address is indicated as 46 Ivy Court.

EUO of Asha Dorre July 6th, 2012

55 The EUO/Discovery evidence of Asha Dorre indicates that within three weeks of the move to King Edward in late 2007, Abdullahi, brother of the claimant, moved in with the sisters. The same month the sisters moved, Ali ended up coming as well and staying about five days a week. From December of 2007 until December of 2008, Ali spent roughly five nights a week at King Edward and two nights a week on Ivy Court on average. She claimed he left a lot of clothes at her apartment. She

admitted giving a statement to police after the accident which suggested she had not lived with him for two years, but claimed they misinterpreted what she said and what she meant was she had not lived at Ivy for two years. She further indicated that as a result of Ali's previous dealings with the law, a bail condition was that he was to reside at Ivy Court, but he did not follow this.

56 Asha indicated that Ali did not work nor contribute to the household expenses. Asha would give Ali money. She estimated that it would be small individual sums, but it would add up to \$100 or \$150 from each bi-weekly paycheque. She was later questioned about her \$100 to \$150 week contribution and never corrected the examiner. She stated that once Ali was approved for Ontario Works, this reduced to about \$80 every two weeks. The rent was normally split equally among the sisters. The rent was between \$675 and \$702 per month. Asha would pay for the internet/tv/phone at about \$150 per month and received \$35 per month by each sister for contribution. She would also still pay some utilities for Ivy Court. Asha would buy the household goods and share in the groceries for King Edward. Asha would buy clothes for Ali and Abdullahi at \$50-\$60 every six months. She stated that she has been pretty much a parent for Ali all his life.

57 Asha owned a vehicle insured with State Farm. She worked for Sterling and made a little less than \$11 per hour at the time.

Oral evidence of Asha Dorre

58 Asha is presently 36 years old and the oldest of the five Dorre siblings and is now working at London Health Sciences. She agreed with the answers she gave on her EUO and confirmed that by the end of 2007, the whole family had moved from 46 Ivy Court to 80 King Edward. She claims they left Ivy Court because it was noisy and busy and all wanted to feel like grownups. When asked why her mother would keep Ivy Court, she said that her mother always thought they would move back or that we would get sick of paying rent.

59 Asha entered the work force in 2001 and has remained in the workforce through to the present time. Until the preparation for the arbitration hearing, she was unaware that her mother was telling London Housing that she was no longer living at 46 Ivy Court in 2001, 2002, 2003, 2004 and 2006. Asha first entered the workforce in 2001. She admitted that such statements would have been inaccurate, later conceding when pressed that they would have been lies, but claims not to have known that by reporting her income, rent for the townhouse may have increased.

60 Asha recalled that Ali had enrolled in Lifelong Learning in 2009 to upgrade his high school credits but does not know if he completed any courses.

61 She now recalls Ali facing charges in Sudbury in 2006 and spending some time in jail pending bail, but added that all charges were eventually dropped. She was also aware that he was charged with robbery in October 2008. She acted as his surety and was in the courtroom when the conditions of release were read out, with one of the conditions being he reside at 46 Ivy Court. She did not recall hearing that specific condition but agreed that it was stated in court if the transcript said so. She admitted signing the Recognizance of Bail with respect to the incident of October 2008 which showed Ali's address as 46 Ivy Court and hers at 80 King Edward, yet never telling anyone that his address was inaccurate. In fact, the entire bail hearing file showed Ali's address as 46 Ivy Court. Asha did not know if he gave them that address or why he would have given them that address. She testified both the charges from 2006 in Sudbury and the 2008 charges in London were eventually dropped. As far as she knows Ali does not have a criminal record.

62 She had no recollection of him ever travelling to Ohio, Minnesota or Atlanta.

63 On the morning of October 15, 2009, Asha drove to Ivy Court to pick up her mother and drive her to work. When she arrived, the police were there and she was advised that her brother was in hospital. She and her mother were driven to the hospital by police. In a statement given at 10:47am that morning, she advised that she last talked to him by phone on Tuesday (the accident having happened in the early morning hours of Thursday October 15, 2009). She called him by phone. When asked how long ago she last lived with him, she answered by saying "I think I have lived at my current address it will be two years in December". She claims that her answer only applied to her, but it is clear that she did not say ""I think we have lived at our current address it will be two years in December". She also indicated in the statement to police that he had told her that he planned to look for a job and start working.

64 In cross-examination, she was referred to a hospital note indicating that she met his lawyer on November 9, 2009. Although stating in an Affidavit that his tax information showed him at 80 King Edward, she admitted that his Notice of Assessment for 2007 filed on April 15, 2009 showed him residing at 46 Ivy Court. She admitted that the tenancy agreement signed by the three sisters required no one else was to reside there without management approval.

EUO of Abdullahi Dorre February 8th, 2016

65 The EUO/Discovery evidence of Abdullahi Dorre indicates that he moved in with his sisters by January 1st, 2008, along with his brother Ali. So did his mom. He spent about 90% of his time at King Edward. Once or twice per week his mom would stay at Ivy Court. Abdullahi did not pay for anything for Ali but he would get money from Asha. His mom would also give him \$5 here and there. Asha would buy Ali clothes and also help out Abdullahi including toiletries. Ali contributed nothing to the household expenses. His mother would go to Ivy Court once or twice a week to check on it and sleep over. The longer they were at King Edward, the less frequent his mother returned to Ivy. Asha was given respect because she was the family's second mom.

66 Abdullahi was aware that Ali was arrested for robbery in 2008 but had no knowledge of his incarceration in Sudbury in 2006. He had no knowledge of Ali living in Toronto or travelling to Atlanta, Minnesota or Ohio. He was unaware of Ali ever having worked construction in Toronto. He was unaware of Mike Nguyen ever giving him money.

Oral evidence of Abdullahi Dorre

67 Abdullahi is presently 29 years of age and just finishing a four year program in sociology at the University of Guelph. He agreed with the answers given on his EUO.

68 On the morning of October 15, 2009, Abdullahi received a telephone call from his mother at Ivy Court and immediately ran over. By the time he got there she was no longer there. He ran back to King Edward and drove Asha's car to the hospital. At hospital he was interviewed by the police. He texted Dustin, a friend of Ali's, to learn that Ali had been with him, Chris Mason and the Warsame brothers the previous night. Abdullahi had met the Warsame brothers before and recalled them driving a dark coloured Honda Civic. Dustin advised that they had dropped him off at his home and the four of them carried on.

69 Abdullahi does not recall being at 46 Ivy Court while the police were completing a search on the day of the incident. He did remember seeing a police officer while taking out some garbage that day.

70 Tax records revealed the following yearly incomes:

2006	\$5,049
2007	\$3,768
2008	\$33,210
2009	\$3,612

71 Abdullahi did not know why his mother kept the townhouse at Ivy Court.

72 Abdullahi testified that he was close with Ali when they were younger but not that close at the time of the incident. They had different friends. He did not know what Ali did during the day. He stated that his brother was not a drug dealer. He was aware that his brother had been arrested at one point, but denied knowing that he was incarcerated in 2006 in Sudbury between December 21, 2006 and January 16, 2007 pending bail.

73 The witness admitted that if Ali told Ontario Works that he lived in Toronto in 2008 and had worked construction he would have been lying. He was unaware of his brother being attacked with a baseball bat shortly before the subject incident or anyone else threatening his life.

74 Like the other siblings, it was confirmed that Asha was like a second mother to the family.

75 Abdullahi confirm that Ali did not go to school in 2009.

EUO of Faduma Aden February 8th, 2016

76 The EUO/Discovery evidence of Faduma Aden indicates that the family had lived at Ivy Court. The three daughters moved out in 2007 and Abdullahi also went over to King Edward in 2007. Ali moved to King Edward at the end of 2007 or beginning of 2008. She also lived at King Edward coming back to Ivy once or twice per week. Faduma never told the housing co-op that her sons had moved from Ivy. Asha paid hydro, cable and internet for Ivy at \$200 per month total. She also bought Ali most of his clothes and bought most of the food. Ali may have slept at Ivy once or twice per week. Faduma would give Ali \$5.00 on various occasions. The only other person she knew that gave him money was Asha.

Oral evidence of Faduma Eden

77 Faduma is the mother of Ali and presently 61 years of age. She came to Canada from Somalia via Germany.

78 She maintained that in the months before the incident, she was living with her family at 80 King Edward. She testified that Asha was like a second mother to the other siblings and as much as a caregiver to them as she was.

79 In dealing with her involvement with London Housing, she admitted that they would have to know her income and who she lives with. When she removed Leyla's name as who she lived with in 2001, 2002 and 2003, she said she did it because Leyla was no longer on welfare. The form merely asked for the names of others living in the home. She denied that it was an attempt to ensure that her rent would not increase since Leyla began working in 2001. She advised London Housing that she had moved to her father's, but admitted in the arbitration that she never moved out of her home. She admitted that she meant to say that Leyla was planning to move to her father's. Faduma maintained throughout that she thought her rent was based on only what she was making, despite being referred to provisions that aggregate residence income was considered. She admitted never telling London Housing that Ali and Abdullahi left in December 2007, as she now claims, because she was the only one paying the rent. In cross-examination regarding the London Housing file numerous discrepancies were highlighted, but she maintained that she never did any of this so that her rent would not be increased. She ultimately admitted it was a lie to tell them that Leyla had moved to her father's. In April of 2008 she finally told London Housing that Leyla and Hawa had moved out, but that Abdullahi was still living at 46 Ivy Court and so was Ali, but planning to move to live with his father. The records from her employer Paramed including the pay stubs as contained in the London Housing file, all show her address as 46 Ivy Court.

80 Tax information revealed the following incomes:

2006	\$14,939
2007	\$14,202
2008	\$15,638
2009	\$15,685

81 Her employer Paramed records showed her to live at 46 Ivy Court and the telephone number that they had was the one at Ivy Court. It was not until December 14, 2009 (after the incident) that she changed her phone number to the one at Asha's. She was an "elective employee" where they would phone her to offer her hours and she could "elect" to accept or reject the hours offered.

82 Faduma recalled police officers attending Ivy Court on the morning of this incident and being advised as to Ali's condition. She testified that due to her mental state after being advised of Ali's condition she has no memory as to what she may have told police, but that if the police notes contain such information then she has no doubt she said it. She would not disagree with what they wrote. She recalls signing a consent to a search of property at 46 Ivy Court and went there with police to search for various items such as passport, keys and clothing items. She never told them that he was living at some other address.

83 On the crucial issue of residency, the statement to Sergeant Van Der Klugt on the morning of October 15, 2009 indicated that she lived at 46 Ivy Court with her two sons and that her other children lived nearby. She admitted that such statement was given when she did not know that residency would be a factor in a legal dispute.

84 Faduma admitted telling Abdullahi and Asha on the morning of October 15, 2009 to go clean the house. When asked why, she said in case relatives visit. She denied it was to remove drugs. Throughout she denied he was a drug dealer "as far as she knew". During the property search by police the next day, she told them that he kept his passport under the cable box above the TV but it could not be found. Again, she never suggested they should search elsewhere.

85 Faduma testified that she did not contribute to the grocery bills at 89 King Edward where she claimed she was residing pre-incident and only bought minimal groceries for 46 Ivy Court. She was taken in cross-examination through her bank records which showed far more than minimal grocery purchases. Her explanation was that relatives had visited and food had been donated to the Salvation Army food bank. She said her aunt had visited for 15 days in 2009 yet the grocery purchases spanned several months.

86 Faduma recalled Dustin telling her that Ali was with Chris Mason and the Warsame brothers when he last saw them on the night of the incident.

87 She gave evidence that about three months after the incident a guy from Somalia told her that the father of the Warsame brothers wanted to talk to her. She met him at a Tim Horton's where he admitted that it was his children that hit Ali with the car. He said the car was at the Scarborough house. She claims that she provided this information to the police and officer named Jerry or Gary.

88 Faduma described Ali pre-accident as being happy, outgoing and enjoyed playing sports. She admitted that he was not working and had never moved to Toronto. When asked why he was not working she said because he was going to school. She admitted he did not go to school in 2008. She claims he tried to find work but that it was difficult to find work in London. She understood that he had to go to school in 2009 as part of Ontario Works requirements.

EUO of Hawa Dorre February 10th, 2016

89 The EUO/Discovery evidence of Hawa Dorre indicates that she initially moved to King Edward with her sisters. She could not remember why. Shortly thereafter the balance of the family moved in as well. Everyone would sleep wherever they could. Ali would sleep at King Edward five or six nights per week. Once in a while he and her mother would sleep at Ivy Court in order to check the house and for her mother to clean. Hawa would attend occasionally at Ivy Court with her mother. Her mother would clean while she relaxed. Hawa could not remember if there was a phone or computer at Ivy Court at that time.

90 Hawa indicated that Asha would help Faduma financially but Hawa was not aware of the details. Asha would also help Ali out financially and with household items and clothes. Hawa observed this about ten times. Ali would not ask his mom for money. Hawa is not sure about Ali seeking money from anyone other than Asha. While rent was split evenly, Hawa and Leyla paid \$35 each per month for internet, phone and TV and contributed on rare occasion for groceries.

Oral evidence of Hawa Dorre

91 Hawa is presently 33 years of age and has been working at London Health Sciences as nurse since 2012. She confirmed the evidence adduced on her EUO and the financial contributions made by family members to the household. She maintained that the whole family had moved into 80 King Edward in December 2007. She had no idea why her mother kept the townhouse at 46 Ivy Court or why they moved.

92 In the years leading up to this incident, Hawa was working part-time at Paramed as a PSW while going to school at Fanshawe. Her T4's disclosed the following incomes:

2006	\$5,658.10
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2007	\$3,190.66
2008	\$7,534.12
2009	\$25,234.64

93 Hawa confirmed that Ali never moved to Toronto in 2008 or worked construction as he advised Ontario Works and stated that if he told them that it would be inaccurate.

94 Hawa was aware of an incident in 2008 involving Ali and a break and enter charge. She had no memory of him being arrested in Sudbury in 2006 and charged with possession of cocaine for the purposes of trafficking, possession of money from the proceeds of crime, possession of cannabis and breach of probation among others. She had no memory of him being absent from the family for about a month between December 2006 and January 2007 when he was incarcerated in Sudbury pending bail. She claims she was busy.

95 Like the other siblings she described Asha as a second mother and detailed all the things that she did for the family while they were growing up.

EUO of Leyla Dorre, February 10th, 2016

96 The EUO/discovery evidence of Leyla Dorre indicates that within two weeks of moving out with her sisters, the balance of the family moved to King Edward. King Edward was a two bedroom apartment. People would sleep wherever whoever got there first. Asha would write the rent cheques and the sisters would pay her. The three sisters shared the rent equally. In 2009 rent was \$684 per month. The sisters also paid \$35 per month for cable/phone/internet. Asha would pay the balance as she was the only one working full-time. Leyla would eat out or eat the food her mother made or the food that Asha would buy. Overall, Asha bought the most food but Leyla would spend about \$10 to \$30 per week. Asha would buy toiletries for the family, clothes for Ali, as well as give Ali money. Ali never worked while they lived at King Edward. Ali paid no household expenses.

97 Her mother would spend one or two nights per week at Ivy Court. Ali would go with her.

98 in a statement given to police immediately following the incident, she indicated that Ali lived with his mother at 46 Ivy Court. On the EUO she said she was in shock and that was a mistake. In the statement she also indicated that she last spoke to Ali by phone the previous Tuesday.

Oral evidence of Leyla Dorre

99 Leyla Dorre is presently 31 years of age and employed as an educational assistant in London.

100 She agreed with the answers given on her EUO as outlined above.

101 She testified that she earned \$8,539 in 2006 and \$8,311 in 2007 while working for Sterling and going to school. In 2008 she was finished school and made \$10,024. She made \$9,722 in 2009. She would not concede that money was tight but claimed they had enough despite occasionally having to borrow from Asha and the fact that bank records show she was in overdraft on four occasions in 2009 and had an NSF cheque.

102 There were many things she could not remember. She could not remember if there was a phone at Ivy Court or ever calling there. She could not recall any discussion with any family member about the move from Ivy Court to King Edward. She did not remember or know that Ali had been arrested in London and Sudbury. She did not know that Ali had been charged in 2006 with possession and trafficking in cocaine, possession of proceeds from an indictable offence, possession of cannabis, wilful obstruction of a police officer and failure to comply with court orders. She was unaware that he was in custody between December 20, 2006 and January 16, 2007 until granted bail. She testified that she could not remember Ali being missing for a month. She had no memory of Ali ever having travelled to Atlanta, Minnesota or Ohio. She had no memory of Ali moving

to Toronto between October 2008 and March 2009 as reported to Ontario Works. She stated that it would be inaccurate if he had said that he spent such time in Toronto.

103 She confirmed that Asha helped Ali out financially but could not say how much. She did not know if Mike Nguyen ever gave him money but she would not have thought so. She denied that Ali may have been dealing drugs.

104 Leyla testified that between 1997 and 2007, the five family members lived together at 46 Ivy Court. She had not moved out in 2003 when working at Sterling as reported to London Housing by her mother. Asha did not move out in 2003 and 2006 as reported by her mother to London Housing. She candidly admitted that if her mother was reporting that, they would be lies.

105 Leyla gave a statement to police on October 15, 2009. She indicated she was living with her sister and that her brother Ali was living at 46 Ivy Court. In the statement she indicated that she had last spoke with him on Tuesday by phone. She now says she cannot remember if she last spoke to Ali when she said she did and the information given as to his address was inaccurate. She claims to have been in shock. She said that her memory now was better than it would have been then in the circumstances.

106 Leyla described her sister Asha as a "second mom" who assumed greater duties than one would expect from a sister five years older. Since her mother was working she often watched the younger siblings, cooked, helped with homework and would also discipline. She would refer to her brothers as her babies. Leyla said she would go to Asha for advice even before her mother.

INVESTIGATION EVIDENCE WITH RESPECT TO RESIDENCY

107 Counsel for State Farm retained a private investigator to determine where the claimant was residing at the date of this incident. John Rivard testified that he asked each witness an open ended question as to where they believed Ali Dorre lived at the time of the incident in October 2009. These interviews took place in 2013.

108 John Craig, father of Ali's friend Dustin Craig, signed a statement indicating that he dropped him off at Ali's residence at 46 Ivy Court where he lived with his mother a couple of times in 2009.

109 Jamal Farah provided Mr. Rivard with information that that he had known Ali since 2004 or 2005. Farah advised Rivard that prior to the motor vehicle accident, Ali was residing with his mother at 46 Ivy Court.

110 Natasha Keats had known the claimant for 15 years and claims to have been a friend and neighbour. She advised Mr. Rivard that the claimant at the time of the accident was residing with his mother and older brother at 46 Ivy Court.

111 Mike Nguyen advised Mr. Rivard that he knew the claimant for six or seven years and considered him to be his best friend. Mike indicated that Ali always lived with his brother and mother at 46 Ivy Court. Ali's sister lived nearby and he would visit her from time to time.

HOSPITAL EVIDENCE AND RECORDS

112 Maureen McKenzie testified on behalf London Health Sciences with respect to the hospital file of Ali Dorre. On arrival to hospital he was identified as an unknown patient until such time he could be identified. The records indicate that at 10:05am on October 15, 2009, Ali was identified by his mother who was sent to admitting to register. Ms. McKenzie testified that hospital protocol would require the admissions clerk to ask for the patient's address rather than asking to confirm a previous address which may have been given to the hospital. The addressograph stamp prepared showed 46 Ivy Court presumably on information provided by Faduma. Throughout his hospital stay, there is nothing to indicate any other residential address was provided to the London Health Sciences.

113 Ms. McKenzie also gave evidence as to a hospital attendance by Ali Dorre on August 19, 2009, just a few months before the subject incident. He had walked in with a head laceration at 11:02pm. The address given by Ali, assuming hospital protocols were followed, was 46 Ivy Court.

114 Ali was transferred from London Health Sciences to Parkwood. He was discharged from Parkwood on November 26, 2009. Susan Davis-Bailey, a social worker at Parkwood, testified that she met with Faduma on October 30, 2009 to complete certain forms and Faduma gave her address and phone number, as well as Ali's, as being 46 Ivy Court. Notes of an interaction with the family on November 17, 2009 indicated that they had yet to retain a lawyer. A sister of Ali's attended the hospital on November 26, 2009 to get accident benefits forms executed. Ali was discharged the same day. Ms. Bailey understood even at the time of discharge that prior to the accident, Ali and his mother were living at 46 Ivy Court. Ms. Bailey recalled at some point the family telling them that they were afraid to return to their residence for fear of further assaults.

ONTARIO WORKS FILE AND EVIDENCE

115 Jennifer Downie testified that she was the caseworker with respect to Ali Dorre. He first contacted Ontario Works by phone in March 2009. He indicated he lived at 80 King Edward but had been living in Toronto since October 2008 with his girlfriend. He was now staying with his sister. He indicated that he had difficulty finding work and would like to go back to school.

116 Ms. Downie met the claimant on March 30, 2009. He reported that he had been living with and supported by his sister for the past month.

117 The Application for Benefits indicated that he was not living with a parent and living at 80 King Edward since March 1, 2009. It also indicated that he was last employed February 1, 2009.

118 Some of the documents provided showed an address at 46 Ivy Court but was not a concern to the caseworker as many applicants are transient and she had a note from Asha Dorre indicating he was living with her.

119 Ali's claim was approved and he began receiving benefits retroactive to March 24, 2009.

120 An Ontario Works Directive was entered into evidence with respect to the impact of a claimant living with a parent.

STATE FARM ADJUSTER

121 Kelly Wonch testified on behalf of State Farm, insurer of Asha Dorre. She was the adjuster handling Ali's claim accident benefits claim. She first was notified of the claim November 19, 2009 in speaking with Asha. She received the application for benefits and a CAT application by letter dated November 24, 2009. The two documents gave different addresses for the claimant. Ms. Wonch testified that she really did not notice that, being more concerned with the serious nature of the claimant's injuries. She admitted that the Explanation of Benefits gave the address of the claimant at 80 King Edward. A housekeeping claim that was presented and denied was eventually settled on what Ms. Wonch claims was a "without prejudice basis" leaving the issue of "residency" to the priority dispute rather than a FSCO arbitrator which would have been the case if not resolved. The log notes confirm discussion of the without prejudice basis but the closing documents make no reference to this.

122 In cross-examination, Ms. Wonch indicated that Ali's address was provided by Asha and she had no reason to doubt it, until she heard about the evidence adduced on the discoveries in May 2011. It was at that time it became clear that residency was an issue and there was evidence that he may well have been living at 46 Ivy Court at the time of the incident. She maintained that there had never been an admission as to residency as housekeeping would have to be paid regardless of where he lived if he so qualified.

ACCOUNTING EVIDENCE

123 Three accountants testified in this proceeding with respect to the issue of financial dependency. It was clear that the determination of financial dependency will depend on the factual findings made in this proceeding, so at risk of oversimplification, I will only set out the general conclusions of the accountants.

124 The accountant retained by TD is Daniel Edwards from Crowe Soberman. On the assumption, among others, that Ali resided primarily or fully at 80 King Edward, he concluded that Ali could not provide more than 50% of his own needs and that Asha was the largest contributor. With application of the "plurality approach" established by Arbitrator Densem in *Economical Mutual Insurance Co. and Aviva Canada Inc., Re* [(January 29, 2013), Scott W. Densem Member (Ont. Arb. (Ins. Act))], he concluded that Ali was dependent on Asha. He found that Ali did not provide more than 50% of his needs and that Asha was the largest contributor although not exceeding 50%.

125 The accountant retained by State Farm (AB) was Jessy Hawley of Davis Martindale. Again, at risk of oversimplification and on the assumption that Ali was residing at 46 Ivy Court, she concluded that Ali was not dependent on any one person for more than 50% of his needs and therefore he was not financially dependent on Asha.

126 The accountant retained by State Farm (tort) was Karen Dalton of Hoare, Dalton. She too concluded that Ali was not dependent on his sister Asha whether living at King Edward or Ivy Court. Whether at either residence, she was not contributing more than 50% of his needs.

127 In addition, Ms. Dalton testified that it would have been very difficult for her to have been giving Ali the money she claims she did, given her own expenses.

128 Ms. Dalton further testified that even working minimum wage 75% of the year, Ali would have been able to provide more than 50% of his needs.

ANALYSIS AND FINDINGS

PRIORITY DISPUTE

129 With respect to the accident benefits priority dispute, there are many situations which arise where an individual injured in a motor vehicle accident has access to more than one policy of insurance with respect to payment of statutory accident benefits. Section 268 of the *Insurance Act*, R.S.O. 1990, c.I.8, is a legislative scheme to determine which insurer must pay statutory accident benefits when more than one policy is potentially accessible. If a dispute arises with respect to the application of s.268, commonly known as a priority dispute, then the Dispute Between Insurers regulation (Ontario Regulation 283/95), sets out the specific details that govern how a dispute is to be processed and provides for an Arbitration with regards to this dispute, to be in accordance with guidelines set out in the *Arbitrations Act*, 1991, S.O. 1991, c.17, as amended.

130 As the parties have agreed that the claimant was a non-occupant and was allegedly struck by an automobile the following rules with respect to priority of payment apply, under Section 268(2)(2):

- i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
- ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
- iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
- iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

[underlining emphasis mine]

131 Section 2 of the *Statutory Accident Benefits Schedule — Accidents On or After November 1, 1996*, ("SABS") defines an "insured person" as:

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

i. is involved in an accident in or outside Ontario that involves the insured automobile or another automobile

...

(b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile

...

132 Section 2(6) of the SABS states that a person is a dependent on another person if the person is *principally dependent for financial support* or care on the other person or the other person's spouse.

133 On the basis of the aforesaid, the Fund would stand in priority if it could not be proven on the balance of probabilities that the vehicle insured by TD was the striking vehicle and the claimant was not principally financially dependent on his sister Asha at the time of the accident. If it were proven on the balance of probabilities that the claimant was struck by the vehicle insured with TD and the claimant was principally financially dependent on his sister Asha, then State Farm would stand in priority by reason of s.268(2)(2)(i). If it were proven on the balance of probabilities that the claimant was struck by the vehicle insured by TD and the claimant was not principally dependent on his sister Asha, then TD would stand in priority for the payment of statutory accident benefits pursuant to s.268(2)(2)(iii).

TORT INSURANCE COVERAGES

134 Now with respect to insurance coverage in tort, State Farm's policy contains uninsured automobile coverage, as required by the *Insurance Act* and contained in the Ontario Automobile Policy (OAP 1), as well as underinsured and unidentified automobile coverage, as per the Family Protection Endorsement ("OPCF 44R").

135 The Plaintiff, Ali Dorre, is not entitled to coverage under State Farm's policy unless he qualifies as a "dependent relative" of his sister, Asha Dorre, as defined in the statutory and policy provisions discussed below.

Statutory Provisions — Uninsured Automobile Coverage

136 Section 265 of the *Insurance Act* provides for uninsured automobile coverage:

265. (1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,

(a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

(b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; and

(c) a person insured under the contract is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile,

subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations

137 The definition of "person insured under the contract" includes, in respect of a claim for bodily injuries or death, the insured and his or her spouse and any "dependent relative" of either who is struck by an uninsured or unidentified automobile.

138 Uninsured Automobile Coverage under the Ontario Automobile Policy (OAP 1)

139 With respect to the OAP 1, coverage for uninsured automobile coverage is available for the following individuals:

5.3 Claims for Bodily Injury or Death

5.3.1 Who is Covered?

The following are insured persons for bodily injury or death:

...

You, your spouse, your same-sex partner, and any dependent relative of you, your spouse or your same-sex partner,

...

when not in an automobile, streetcar or railway vehicle if hit by an unidentified or uninsured automobile.

OCPF 44R — Family Protection Coverage Endorsement

140 The OPCF 44R provides that the insurer shall indemnify an "eligible claimant" for the amount that he is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury of an insured person arising directly or indirectly from the use or operation of an automobile.

141 Section 1.3 of the OPCF 44R defines "eligible claimant" as:

(a) the insured person who sustains bodily injury; and

(b) any other person who, in the jurisdiction in which an accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.

142 "Insured person" is defined in s. 1.6 of the OPCF 44R as:

(a) the named insured and his or her spouse and any dependent relative of the named insured and his or her spouse, while

...

(iii) not an occupant of an automobile who is struck by an automobile.

143 The definition of "dependent relative", as per Section 1.2 of the OPCF 44R, includes "a relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured" or "a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support".

144 The term "resides" is not defined in the *Insurance Act*, the OAP 1, or the OPCF 44R.

145 On the basis of the aforesaid, the determination of tort insurance coverage will also be dependent on the findings as to the involvement of the vehicle insured by TD, the residency of Ali Dorre at the time of the accident and whether he was principally financially dependent on his sister Asha at the time.

THE THREE ISSUES TO BE DEALT WITH

1. Involvement of the Warsame vehicle insured with TD

146 TD takes the position that the Applicant State Farm, the Plaintiff Ali Dorre, State Farm and the Fund cannot prove on the balance of probabilities that the Warsame vehicle, which they insured, was the vehicle that struck the claimant on October 15, 2009.

147 TD takes the position that the bulk of evidence suggesting it was the Warsame vehicle involved is hearsay to which no weight ought be given. TD claims that when one discards the hearsay evidence there is simply insufficient credible evidence to conclude that on the balance of probabilities it was the Warsame green Honda that struck the claimant.

148 However, I am satisfied that the legislation and jurisprudence allows me in an arbitration proceeding such as this to consider evidence which may not be considered if applying the strict rules of evidence.

149 Section 268 of the Insurance Act sets out the hierarchy as to which insurer stands in priority to pay statutory accident benefits to a claimant. If the insurers cannot agree as to which insurer stands in priority, as is the case here, O. Reg 283/95 sets out the mechanism for resolving such disputes:

7. (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed. [underlining evidence mine]

150 With respect to the evidence to be admitted, the *Arbitration Act, 1991* states:

Evidence

21. Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications.

151 Section 15 of the *Statutory Powers Procedure Act* ("SPPA") speaks to the admissibility of evidence at a hearing:

Evidence

What is admissible in evidence at a hearing

15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.[underlining emphasis mine]

What is inadmissible in evidence at a hearing

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(4) Where a tribunal is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document.

[emphasis added]

152 Section 15(1) of the SPPA permits the admission of hearsay evidence, subject to reliability, with the weight to be accorded to such evidence being a matter that is left to the discretion of the Arbitrator.

153 In *Duan v. Boutros*, 2013 ONSC 2451 (Ont. Div. Ct.), the Ontario Divisional Court was hearing an appeal from the Landlord and Tenant Board. One of the issues which arose was the introduction of repair estimates without calling the individuals who prepared them. Lederer J. on behalf of the three Judge panel and dismissing the appeal, stated at paragraph 4:

This proceeding was governed by the Statutory Powers and Procedure Act, R.S.O. 1990, c. S 22. Hearsay evidence is permitted (see s. 15(1)).

154 The Supreme Court of Canada has confirmed the admissibility of hearsay evidence before administrative tribunals. In *Starson v. Swayze*, 2003 SCC 32 (S.C.C.) at paragraph 115, the Court indicates that there is no doubt that such evidence is admissible before the Board by reason of s.15(1) of the *Statutory Powers and Procedure Act*. The weight to be given left to the discretion of the Board with a caution to avoid undue emphasis on uncorroborated evidence that lacks sufficient indicia of reliability.

155 Section 15 allows documents to be accepted as evidence of the statements recorded therein even if the author of those statements is not available for cross-examination. This was confirmed by the Ontario Labour Relations Board by way of an appeal from a decision of the *Toronto Police Assn. v. Toronto Police Services Board* [(April 11, 2008), Doc. 3382-06-HS (Ont. L.R.B.)], 2008 CanLii 17121.

156 The jurisprudence supports the proposition that so long as hearsay evidence is relevant and can be regarded as fairly reliable, it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law. The British Columbia Court of Appeal so found in *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2006 BCCA 119 (B.C. C.A.) and included a quote from Lord Denning in its decision:

A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is not reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law.

157 Further support for the admissibility of hearsay evidence is found in the decision in *Tétu v. Ontario (Criminal Injuries Compensation Board)*, 2011 ONSC 782 (Ont. Div. Ct.), where the Ontario Divisional Court considered an appeal of a decision of the Criminal Injuries Compensation Board. The Court noted that the Board was not bound by the strict rules of evidence and could choose to accept and rely upon hearsay evidence, as per Section 15(1) of the SPPA. The appellant argued that the hearsay evidence was so inherently unreliable that it amounted to a breach of procedural fairness and natural justice to admit it since there was no way that the appellant could refute it.

158 The Court disagreed. The Court found that there was "ample circumstantial evidence" before the Board that supported the reliability of the hearsay evidence, and indeed would have supported the inference that the appellant attended the premises for the purpose of selling drugs even without admitting the hearsay evidence. The testimony of a police officer, which included hearsay evidence, had been "central" to the Board's decision.

159 In terms of priority dispute jurisprudence, Arbitrator Densem's decision in *MVACF v. Jevco* (August 4, 2011), is particularly on point. In that case, the issue was whether the claimant had been struck by the Jevco-insured vehicle. One of the key pieces of evidence was a business card on which a missing witness had written the license plate number of the Jevco-insured vehicle. Jevco objected to the admission of the business card on the basis that it was hearsay. Arbitrator Densem admitted the business card. He found that the business card satisfied both the common law test for admissibility of hearsay evidence and "certainly" the evidence admissibility requirements of the *Arbitration Act*. Beginning at page 12, he stated:

With respect to the common law test, hearsay evidence is admissible if it is reliable and necessary. Reliability is determined by the circumstances. Relevant factors vary from case to case, but the key question is whether the evidence sought to be adduced derives from circumstances that substantially negate the possibility it comes from an untruthful or mistaken source. With respect to the "necessary" requirement, the evidence sought to be introduced does not have to be the only evidence available to prove the case. The test is flexible and may be met where evidence of the same value cannot be expected from another source.

I am satisfied on the totality of the evidence that the license plate number recorded on the business card which is Exhibit 2 was accurately recorded as the license plate number of the vehicle belonging to Mr. Palmer, and that this evidence meets the common law reliability and necessity test discussed above. If I am wrong with regard to this evidence meeting the common law admissibility test, I find nevertheless that the evidence is admissible by operation of section 21 of the *Arbitration Act*, and section 15 of the *Statutory Powers Procedure Act*.

160 Despite the arguments advanced by TD, I am satisfied that on the balance of probabilities it was the Warsame vehicle insured with TD that ran over the claimant. This finding can be reached without reference to what might be considered hearsay or unchallenged evidence as contained in the police file and involvement of the TD vehicle is clearly established if any weight is given to the evidence of Dustin Craig, Chris Mason, Mike Nguyen and the eyewitness Crystal Ramdharry.

161 Although Ali Dorre's memory post-incident may have been affected by the injuries sustained he seems to have maintained his past memories and in particular specific details of the events on the evening preceding this incident. He recalls the Warsames coming over after he phoned them to help celebrate Dustin Craig's birthday. He recalled they drove a green Honda Civic. He recalled attending Billy Bob's. His last memory was being driven from Billy Bob's in the Warsame vehicle. Ali was driving. The physical evidence confirms that the claimant was run over by a vehicle. There was a tire mark found running across his chest. The Warsames left the country immediately and their vehicle was never found leaving the inference of a guilty mind and that the vehicle disappeared as it may have displayed physical evidence confirming contact with Ali's body whether it be blood, clothing remnants or scuff marks. On this evidence alone I am satisfied on the balance of probabilities that it was the Warsame vehicle that ran over Ali Dorre.

162 The proceeding included evidence that was unchallenged yet reliable and corroborated that I have considered. It also contained evidence that I have found to be unreliable and uncorroborated that I have ignored.

163 I find the evidence of Dustin Craig, Chris Mason, Mike Nguyen and the eyewitness Crystal Ramdharry, although they were not cross-examined, reliable and relevant so as to reinforce the findings I would have made in the absence of such unchallenged evidence. Furthermore, there was consistency in their evidence giving it the ring of truth and reliability. In fact, the police investigation obtained information from several witnesses that were also consistent with the ultimate findings of police investigation implicating the Warsame vehicle.

164 I accept the evidence of Dustin Craig and Chris Mason that the claimant was with and last seen with the Warsames in the hours leading up to this incident. A review of the video of their interview by police depicted individuals who actually trying to provide information to assist their friend Ali who they knew was in hospital with serious injuries.

165 No one disputes that the Plaintiff was struck by a motor vehicle. In my view, the evidence of the various witnesses is consistent and pointing to the fact that the Plaintiff was struck by the TD insured vehicle.

166 In the paragraphs to follow I will highlight the evidence I attached some weight and the evidence upon which I attached no weight.

167 The Plaintiff gave very detailed evidence on his Examination for Discovery on May 4, 2011 regarding his actions on the day preceding the accident and that evening. There did not appear to be an issue with his memory of the events the evening before.

168 On his Examination for Discovery, the Plaintiff told Counsel for State Farm Tort that he was hanging out in his backyard with Ali [Warsame], Ali's brother Mohammed [Warsame], and Chris Mason. The Plaintiff was 100% sure that Ali was the driver that night.

169 The Plaintiff said that he was familiar with the TD vehicle, having ridden in it on a number of occasions, including the night of the accident. About two weeks prior to the accident, the Plaintiff had gone to Toronto with Mohammed in the Honda Civic.

170 On the night of the accident, the Plaintiff said that he went to downtown London with the Warsame brothers and Chris Mason. After leaving downtown, Ali Warsame was driving and the Plaintiff was sitting in the front passenger seat. Mohammed Warsame was in the back seat. Chris Mason gave the same evidence as to where they were sitting in the vehicle, as per his statement to police.

171 The Plaintiff said on his Discovery that he knew that it was the Warsames that hit him with their vehicle. However it is clear he had no direct memory of that occurring so I take this as merely his opinion.

172 The Plaintiff said on his Discovery that Ali Warsame tried to talk with him through Facebook following the accident, apologizing for what they had done. The Warsames' uncle apologized to the Plaintiff for what the Warsames had done. The owner of the vehicle, Ahmed Warsame apologized to the Plaintiff's mother and tried to work out a deal with her. I do not attach weight to this evidence and particularly the evidence that Faduma met with the father of the Warsame boys. There is no record of the latter in police file and I found the evidence of Faduma on this point, like so much of her evidence overall, impossible to accept and just another example of saying whatever to assist the family in their legal disputes.

173 A review of the London Police makes it clear that they were certainly convinced that the TD vehicle struck the Plaintiff. Sergeants Poustie, Van der Klugt, and Orchard testified that their investigation was thorough.

174 Sergeant Poustie was the primary investigator. Sergeant Poustie interviewed Chris Mason. Sergeant Van der Klugt interviewed the Plaintiff's mother, Faduma Aden and the Plaintiff's friend, Mike Nguyen. Sergeant Orchard interviewed an independent eyewitness, Crystal Ramdharry. Sergeants Orchard and Van der Klugt executed a search at the Plaintiff's residence at 46 Ivy Court.

175 Constable Pinkney interviewed Asha Dorre and Leyla Dorre. He has since retired however and could not be located. As well, I was advised by counsel that Crystal Ramdharry, Mike Nguyen, Natasha Keats and Jamal Farhan Farah could not be located for the purposes of the arbitration hearing.

176 The police and medical professionals involved in this matter were recording information in the course of their duties. In my view, they were attempting to help the Plaintiff and had no reason to be anything but truthful. I find their evidence is reliable.

177 Sergeant Poustie was responsible for completing a thorough investigation into what he initially thought was potential homicide. Fortunately the Plaintiff survived. In his concluding report, Sergeant Poustie indicated that there was no doubt that the Plaintiff was hit by a motor vehicle. He believed the vehicle that struck the Plaintiff was the green Honda vehicle owned by Ahmed Warsame. There was no other vehicle of interest, according to London Police.

178 The Plaintiff's account of the events that night is corroborated by Chris Mason. Chris Mason reported to police that, when he was dropped off, Ali Warsame was driving the vehicle. One of the brothers convinced the Plaintiff to get into the front seat of the vehicle. Chris Mason understood that the Warsame brothers were going to drop the Plaintiff off at "home" after Chris Mason was dropped off. The Plaintiff's "home" was 46 Ivy Court. The accident occurred close to 46 Ivy Court.

179 Sergeant Poustie described Chris Mason as cooperative. He found Chris Mason to be truthful. He believed that there was no reason to disbelieve what Chris Mason said. Having reviewed his video statement and as I have stated I must agree with this assessment.

180 Sergeant Poustie specifically noted that there were no objective facts to disprove Chris Mason's version of events. Sergeant Poustie stated as follows:

It is a constellation of facts that point to the veracity of the facts and considering all the other evidence in totality he [Chris Mason] is being truthful about what happened.

181 According to Chris Mason's statement, the Plaintiff and the Warsame brothers were still arguing when they dropped Chris Mason off. Crystal Ramdharry told police that she witnessed an altercation, consistent with the version of events that Chris Mason reported to police.

182 Sergeant Orchard spoke to Crystal Ramdharry, an eyewitness to the incident. Sergeant Poustie stated that, of the witnesses, he found Crystal Ramdharry to be more truthful than Darryl Moyels. Sergeant Poustie explained that Crystal was more engaged. She used specific language. She spoke about her feelings and the fact that she was sick to her stomach. In contrast, Darryl Moyels used language like, "I want to say". Darryl Moyels was also likely picked up in a door-to-door canvass, unlike Crystal Ramdharry, who had called 911 after being a witness to the incident.

183 Ultimately, Sergeant Poustie gave evidence that he gave significant weight to the fact that the Warsame brothers fled the country within 24 hours of this accident. The Warsame brothers fleeing, according to Sergeant Poustie, "spoke to a guilty mind, not wanting to co-operate with the investigation and not wanting to be held accountable."

184 Sergeant Poustie put even more weight on the fact that the vehicle has never been recovered.

185 As I have stated I too give significant weight to the fact that both Warsames left the country and the vehicle has never been found. The inescapable inference from this is they and the vehicle being operated by one of them was involved which, in my view, is corroborative of the evidence that is claimed to be unchallenged. I find that the inference to be drawn from their immediate departure and their vehicle not being found makes this challenged evidence reliable and relevant as with great consistency it totally corroborates the ultimate findings.

186 In reaching my conclusion of the involvement of the green Honda, I have considered the arguments advanced by TD. I considered that no charges were laid but concluded that would have been difficult if they were not in the country and as far as driving offences, there was no evidence beyond a reasonable doubt, to determine who was driving at the very moment of

the incident. I realize that police only required reasonable grounds to lay charges but can clearly see why they did not give the circumstances outlined above.

187 I have also considered that Crystal Ramdharry was equivocal in her statements as to whether she actually saw contact between the vehicle and the body on the ground and the vehicle. Her 911 call said "male was on the ground and a vehicle ran over the male". In her initial statement she said "I seen the car run him over". In the second statement she initially said she saw a man on the ground and the car hit the man. But later in the statement she said:

didn't actually see the car hit the person but pretty sure it hit but don't recall body moving or car jumping up, felt sick to my stomach because believed car hit

188 I take from this that it was certainly her impression that there was contact. This impression together with the evidence that there were tire marks across the chest of the claimant satisfies me that there was contact even though Randharry's evidence was somewhat equivocal with respect to contact.

189 I have also considered her description of the vehicle involved contained some elements inconsistent with a Honda Civic. TD claims that Ramdharry said that the license plate was lower than the brake lights. She said it was a medium car dark in colour and could have been blue. The balance of her description was consistent with the Honda Civic. I note that when describing the location of the plate she used modifying words "probably" and "think so" which demonstrates to me some doubt as to that part of her statement. As for her description of size and colour, photographs were introduced as evidence as to green Hondas of that vintage and it is easy to see how an individual might describe it as medium size and maybe blue. The information given to police by Tim Harvey confirmed that the people were yelling in Arabic and the car may have been a small Honda. Witness Darryl Moyles confirmed it was a dark car and he wanted to say it was a Grand Prix or something. I would not expect an individual making such observations from a distance at night to be totally accurate and am satisfied the descriptions overall that they were either consistent or not significantly inconsistent with the dark Honda Civic owned by Warsame.

190 TD highlighted the fact that Ali attempted a return to North America after this incident through Atlanta but he was refused entry. TD says the attempted return is not indicative of a guilty mind but there is no specific evidence of a planned return to Canada or the specific identification he would use.

191 I have also considered that the evidence discloses three individuals in the neighbourhood of Ivy Court that Ali was concerned about, none of them meeting the same description as the Warsames. There is simply no evidence that any of these gentlemen operated a dark green Honda or observed in the area where this incident took place.

192 In my view the theories advanced by TD do not change the "big picture" and evidence overall which clearly implicates the Warsames. All sources confirm that the vehicle was a dark coloured small to medium sized car. Men were heard arguing. One witness had them arguing in Arabic. The Warsames left the country the same day and the Warsame vehicle was never found. The natural inference is they got rid of it for, if found, there may have evidence of contact with the body of Ali Dorre - blood, clothing remnants, tire marks consistent with the size of tire marks on Ali's chest, undercarriage scuffing or whatever. No evidence was introduced to provide an explanation for their disappearance and that of their vehicle.

2. Residency of Ali Dorre at the time of the incident

193 The term "resides" is not defined in the *Insurance Act*, the OAP 1, or the OPCF 44R.

194 The jurisprudence with respect to "residency" establishes that residency is highly flexible and will depend on the context. The jurisprudence establishes various principles that I am prepared to accept. Residence with the named insured does not need to be longstanding. Coverage is provided for those who "recently" move in with the named insured. It is possible to reside at more than one location for the purposes of the OPCF 44R. Visitation is not enough to find that the relative was residing with the named insured. In determining whether an individual qualifies as a dependent relative, it is necessary to consider the factual intentions of the individual involved regarding the attachment of the relative to the household. In order for residency to be established, there must be a present intention to remain permanently. The issue of residency is factual and so does not

rely on any legal entitlement to reside at a particular location: "Legal residency and de facto residency are not necessarily the same." When examining the evidence related to residency, the trier of fact will also look at any legal documents which list the applicant's residence. These documents could include employment files, student files, OSAP loan documents, bank accounts, credit cards and driver's license.

195 The decision of *Gardiner v. MacDonald Estate*, 2015 ONSC 227 (Ont. S.C.J.), establishes that in determining whether an individual qualifies as a dependent relative, it is necessary to consider the factual intentions of the individual involved regarding the attachment of the relative to the household. The Court found the evidence established that the claimant considered his mother's home to be his *permanent* residence. Therefore, the claimant was found to reside with his mother for the purpose of the OPCF 44R.

196 As indicated in *Tanas Estate v. Wawanesa Mutual Insurance Co.*, 1990 CarswellOnt 628 (Ont. H.C.), generally, "residence" means a person's permanent place of abode and not his temporary place of abode. The mere physical presence of a person in a place does not constitute his residence. He must have the present intention of remaining there for some time but not necessarily for all time. Although the relative seeking coverage may have lengthy visits with the named insured, this is insufficient to find coverage under the OPCF 44R if the relative had no intention of remaining with the named insured. Visitation is not enough to find that the relative was residing with the named insured.

197 It was held in *Boilard v. Morozuk*, 1995 CarswellOnt 4439 (Ont. Gen. Div.), that in order for residency to be established, there must be a present intention to remain permanently. The claimant was the named insured's brother. He had come to stay with his brother for the summer months for employment purposes and was involved in a motor vehicle accident. The Court found that the claimant did not have the required intention to stay with his brother permanently or for a considerable time. His intention was to stay there only for the summer and to reside permanently in Quebec where he intended to return following the summer to resume his studies. Therefore, the claimant was not a dependent relative as defined in the Family Protection Endorsement.

198 In *Harris (Litigation Guardian of) v. Pilot Insurance Co.* [1997 CarswellOnt 3022 (Ont. C.A.)], 1997 CanLII 4436, the Plaintiff's parents were divorced and the Plaintiff spent time at each of his mother's and his father's residences. Approximately eight months prior to the accident, this pattern ended and the Plaintiff did not return to his mother's place. He had quit school three months prior to the accident and became an adult two months prior to the accident. He had obtained a full-time job. The Court of Appeal found that the Plaintiff's actions no longer afforded a basis for concluding that he lived with both his father and his mother. There was no positive evidence that the Plaintiff intended to return to his mother's residence, taking into account the change in his pattern of life and the significant difference between it and that which had existed before. Therefore, the Court of Appeal held that it would have been unreasonable to hold that the Plaintiff had a dual residence at the time of the accident. The Plaintiff was not entitled to coverage under the Family Protection Endorsement issued to his mother as he did not reside in the same dwelling premises as his mother.

199 There exists a great discrepancy in the evidence as to where the claimant resided at the time of the accident. The evidence adduced by the family on their respective EUOs and their oral evidence at the arbitration hearing would suggest that Ali spent most of his time at 80 King Edward and was therefore residing in the same dwelling as his sister Asha. The pre-incident documentary evidence, save and except for the Ontario Works file, indicates the claimant resided at 46 Ivy Court. The documentary evidence prepared in the immediate aftermath of the accident and the information provided by family members in the immediate aftermath of the accident indicates he resided at 46 Ivy Court and therefore not residing in the same dwelling as his sister Asha.

200 I am of the view that the evidence provided in the pre-accident records, the evidence contained in the immediately post-accident records and the information provided by the family to police and hospital immediately post-accident is by far the most reliable. I find that Ali Dorre was resident of 46 Ivy Court at the time of the accident. At no time in the immediate aftermath of the accident was it ever suggested that Ali lived anywhere other than Ivy Court. This is what the family told both the police and hospital staff.

201 It was not until long after that the family took the position that Ali was resident at 80 King Edward. There may have been motivational issues involved. In the situation where residency with or principal financial dependency upon Asha could *not* be established, then tort recovery may have been limited to \$200,000 as that would be the amount recoverable from the Fund or from TD if it were able to be successful on its off-coverage position. By establishing residency with and/or financial dependency upon Asha, then State Farm's \$1,000,000 limits could potentially be exposed. In reaching my finding on "residency", I have considered the fact that both the mother Faduma and the claimant Ali were prepared to provide false information to London Housing and Ontario Works to enhance and make available benefits from those sources.

202 I will attempt to review in detail the available evidence supporting my finding as best I can in chronological order:

203 The Plaintiff was arrested in connection with a robbery on October 7, 2008. According to the London Police Services Information, the Plaintiff resided at 46 Ivy Court. According to the Recognizance/Conditions of Release relating to these charges, the Plaintiff agreed to reside at 46 Ivy Court.

204 For the school year in 2009, the Plaintiff was enrolled in an English class at Lifelong Learning Centre from April 16 to May 6, 2009. His address was listed as 46 Ivy Court.

205 Ali Dorre attended the Emergency Room on August 19, 2009, less than two months prior to the accident. We heard from Maureen McKenzie of LHSC that the Plaintiff would have been a walk-in. He would have had to confirm his address upon admission. He confirmed that he lived at 46 Ivy Court.

206 As to the question as to where was Ali Dorre in the days leading up to this accident, based on Faduma Aden's statement to police which was taken by Sergeant Van der Klugt, she testified the Plaintiff was at Mike Nugyen's on Tuesday. He "*came home*" to 46 Ivy Court from Mike Nguyen's at approximately 9:30pm.

207 This information is corroborated by Mike Nguyen's statement to police that the Plaintiff was at his house on Tuesday with Dustin Craig. We know that the Plaintiff was last seen by his mother on Wednesday morning, October 14, 2009 at 8:30am when she left for work that day. We know from Mike Nguyen's statement to police that he arrived at 46 Ivy Court at approximately 11:00am or noon on October 14, 2009.

208 At this Hearing, Ms. Aden said that she saw the Plaintiff at 80 King Edward on the morning of October 14, 2009. I find that this is simply not credible.

209 When Ms. Aden spoke to police while standing in her living room at 46 Ivy Court, she explained that she had last seen the Plaintiff in bed in the living room wearing black pants before she left for work that day. The police notes accurately reflect what Ms. Aden told them. Sergeant Orchard testified that Ms. Aden had last seen the Plaintiff prior to the accident at 46 Ivy Court. She left 46 Ivy Court that morning and told the Plaintiff to lock the door behind her.

210 The police statements from every family member until long after the incident confirm that the Plaintiff lived at 46 Ivy Court.

211 Leyla Dorre confirmed her brother Ali lived at 46 Ivy Court. Asha Dorre confirmed that she had last lived with the Plaintiff two years prior to the accident. Her evidence to suggest she did not understand the questions posed to her is not credible in my view. The inference to be drawn from the question and answer is that she had not lived with her brother in two years.

212 I did not find Leyla Dorre's evidence with the issue of residency on this arbitration to be credible. In my view she was evasive in her testimony. Of her entire police statement, Leyla Dorre asserted that the only fact that she says the police got wrong was her statement that the Plaintiff lived at 46 Ivy Court. I cannot accept this as being believable.

213 Asha Dorre has attempted to explain away her statement by indicating that she did not understand the only question that is really the crux of this legal dispute. However, in looking at her police statement, Asha Dorre was asked, "How long did you

last live with Ali at 46 Ivy Court?" She was then asked, "Do you know what Ali did to put in the time at home since you *moved out*?" The Plaintiff's home was not her home. I find that she understood this question and answered without difficulty.

214 Asha Dorre specifically told Sergeant Orchard that it was "unusual for Ali to stay overnight somewhere else" .. Sergeant Orchard testified that he thought Asha Dorre was referring to 46 Ivy Court. Sergeant Orchard described Asha Dorre's demeanour that morning as "matter of fact". He testified that Asha seemed sincere and honest.

215 Sergeant Orchard gave evidence that, when he arrived at 46 Ivy Court that morning at 7:00am, Ms. Aden was inquisitive of the police but she was not distraught. Sergeant Orchard testified that Ms. Aden was able to coherently listen to police and answer their questions. He described Ms. Aden as co-operative.

216 Sergeant Van der Klugt testified that he believed what Ms. Aden had told him during her police statement. He found her to be forthcoming and she attempted to assist with providing information. She had made phone calls to assist in their investigation.

217 In cross-examination, Sergeant Van der Klugt confirmed that Ms. Aden was upset but composed. It is clear from the medical records that Ms. Aden would not have seen her son prior to giving her statement to Sergeant Van der Klugt.

218 During her interview, Ms. Aden identified herself to Sergeant Van der Klugt and immediately told him that she lived on Ivy Court with her two sons, Ali and Abduhalli. Ms. Aden explained that Abduhalli went to UWO and the Plaintiff stayed home and was financially supported by her.

219 Ms. Aden also explained that her daughters, Asha, Hawa, and Leyla lived on King Edward. Ms. Aden indicated that her daughters had moved away from 46 Ivy Court because their townhouse had been broken into previously.

220 In addition to explaining who the Plaintiff may have feared in the neighbourhood, Ms. Aden specifically stated, "Ali asked me if we could move somewhere else". If the Plaintiff had already moved from 46 Ivy Court to 80 King Edward, there would be no reason for him to move from 46 Ivy Court.

221 Ms. Aden told police and confirmed at this hearing that her friend called her at 46 Ivy Court between 11:30pm and 12:30am on the night of this incident. Why would Ms. Aden's friend call her late at night at 46 Ivy Court if she was supposedly living at 80 King Edward? As well, how could Ms. Aden have known that the man from Unit #56 who she claims came to 46 Ivy Court almost every night at midnight, unless she was present at 46 Ivy Court?

222 At 10:49am on October 15, 2009, Ms. Aden signed a Consent to Search her home at 46 Ivy Court. Ms. Aden gave evidence that, immediately after signing the consent, she advised her son, Abduhalli and her daughter, Leyla to go and take out the garbage at 46 Ivy Court. She denied that her request was made because she knew she had drugs or illegal items in her home. She tried to tell us that she was worried her house was not clean and that relatives might visit. At the hospital, Ms. Aden thought that her son could be dead in a matter of hours. A person who was in grief would not, in my view, have been worrying about the state of her home. Abduhalli Dorre gave evidence that he took the garbage out because he is a neat freak. In re-examination, he attempted to suggest that he doesn't remember what he was thinking with respect to taking out the garbage. It certainly raises suspicion and fits with the overall evidence as to the type of individuals that Ali was associating with.

223 At no point did Ms. Aden indicate to police that she lived anywhere but 46 Ivy Court. Sergeant Van der Klugt was asked "Was there any suggestion that Ali lived anywhere else?" He responded, "Not in my mind."

224 When Sergeant Orchard attended at 46 Ivy Court the following day, he made observations that the townhouse "certainly looked lived in". Sergeant Orchard testified that there was no suggestion that the London Police should look elsewhere for Ali's wallet, passport or other belongings.

225 Sergeant Van der Klugt and Sergeant Orchard attended at 46 Ivy Court with Ms. Aden to search for the Plaintiff's belongings, which included his house key, passport, grey jacket, black hoodie, and a Toronto Maple Leafs ball cap. Ms. Aden searched the living room and could not find his passport or his wallet. Ms. Aden searched 46 Ivy Court in an effort to locate

the Plaintiff's belongings. Ms. Aden did not suggest to either Sergeant that the Plaintiff's belongings could be anywhere other than 46 Ivy Court.

226 London Police confirmed that they did not search anywhere but 46 Ivy Court. Sergeant Van der Klugt confirmed that, had they been provided with information to suggest the Plaintiff was residing somewhere else, they would have followed up and conducted a search of that area.

227 Sergeant Poustie confirmed that according to his recollection, there was never a suggestion that the Plaintiff lived anywhere but 46 Ivy Court. He stated "46 Ivy Court is where Ali lived". Sergeant Poustie confirmed that he was not aware of any other location other than 46 Ivy Court where the Plaintiff kept any of his belongings. Sergeant Poustie indicated that had he lived somewhere else, a search would have been conducted of that residence too and there was never one conducted of 80 King Edward..

228 The police statements given by the Plaintiff's immediate family members are the most reliable to determine where, in their minds, the Plaintiff resided at the time of the accident. There was never any suggestion or indication that any of the family members considered 80 King Edward to be the Plaintiff's residence, either primary or secondary.

229 The London Police also interviewed the Plaintiff's friends.

230 Mike Nguyen considered the Plaintiff to be his best friend. Mike Nguyen had no reason to lie to police or to John Rivard about the Plaintiff's residence at the time of the accident. Mike Nguyen was clear: the Plaintiff lived at 46 Ivy Court.

231 Mike Nguyen made reference to Ms. Aden putting a roof over the Plaintiff's head and she supported the Plaintiff. This information supported what Sergeant Van der Klugt had been told by Ms. Aden. Sergeant Van der Klugt found Mike Nguyen's statement to be "absolutely truthful".

232 Mike Nguyen saw Ali Dorre every day for at least 1 -1 1/2 hours each day. Mike Nguyen would see the Plaintiff "early in the morning when they both woke up". Mike Nguyen and the Plaintiff would call each other on the phone. Mike Nguyen would call the house line at 46 Ivy Court or he would just walk over. Interestingly, the Plaintiff indicated that he smoked a joint at the "start of every morning". Mike Nguyen said he gave the Plaintiff money because the Plaintiff was a loyal friend.

233 When Mike Nguyen went to the Plaintiff's home at 46 Ivy Court the day of the accident at 1:00pm and knocked on his door and no one answered, he stated, "That was weird". Without calling first, Mike Nguyen had an expectation that the Plaintiff would be present at 46 Ivy Court. Mike Nguyen and the Plaintiff were "tight". They were so close that they would tell others they were "brothers or cousins". They were so close that Mike Nguyen told police he would know if the Plaintiff robbed someone.

234 The Plaintiff also stated on his Examination for Discovery that his next door neighbour, his friend, could vouch for him because he used to walk over to "my house" and get me in the morning. He was referring to Mike Nguyen.

235 Dustin Craig also confirmed that he was the Plaintiff's best friend. Dustin Craig gave a statement to police. He confirmed that he had known the Plaintiff for 7-8 years. He called the Plaintiff every day. Dustin Craig saw the Plaintiff four days per week. On October 14, 2009, Dustin Craig recalled receiving a telephone call from the Plaintiff at 10:30am. Dustin Craig told police that the Plaintiff resided at 46 Ivy Court.

236 Dustin Craig described in detail how well he knew Ms. Aden and he even knew her likes and dislikes. Dustin called Ms. Aden Faduma "Hoya", which means mom in Somalian. Dustin Craig reported that he hung out inside 46 Ivy Court for a period of time on October 14, 2009, but once Ms. Aden returned home from work, they could no longer go inside. Dustin Craig recalled the Plaintiff telling him that they could not go inside because Ms. Aden "was making food and when she's making food she doesn't like people around".

237 The police records and Dustin's police statement confirm that at 4:43pm on October 14, 2009, Constable Yovicic was investigating another incident that day involving a stolen vehicle and he arrived in the backyard of 46 Ivy Court where he

found Ali Dorre and Dustin Craig. In his evidence at this arbitration, the Plaintiff also recalled this incident. He agreed that he identified himself and that he told the police officer that he resided at 46 Ivy Court.

238 John Craig gave a statement to police on October 15, 2009. John Craig indicated that he took his son to Boston Pizza for lunch and then he dropped his son off at the Plaintiff's residence. From what his son said, the Plaintiff lived there — the low rent townhouses at 146 or 46, behind Kimberly (*Ivy Court*).

239 John Craig signed a statement on April 19, 2012. John Craig indicated that the Plaintiff was a friend of John Craig's son, Dustin Craig. He met the Plaintiff a couple of times in 2009 when he dropped his son off at the Plaintiff's residence where he lived with his mother at 46 Ivy Court.

240 Jamal Farhan Farah gave a statement to police on October 15, 2009. Mr. Farah reported that he became good friends with Ali Dorre when he moved into the neighborhood. When he was asked what he thought had happened to the Plaintiff, he responded: "I don't know, but he doesn't even walk through where the crime scene was even to go home. He always walks up towards Cleveland through the basketball courts because that's [sic] the fastest way to his house."

241 Mr. Farah also spoke with Investigator, John Rivard on March 22, 2012. Mr. Farah advised that he had known the Plaintiff since late 2004 or early 2005. Mr. Farah reported that, prior to the subject accident, the Plaintiff lived with his mother at 46 Ivy Court.

242 John Rivard also spoke to Natasha Keats, who had known the Plaintiff for 15 years. She was a friend and neighbour. She said that the Plaintiff lived with his mother and brother at 46 Ivy Court at the time of the accident.

243 The Plaintiff's friends and neighbours were unanimous: the Plaintiff lived at 46 Ivy Court at the time of the accident.

244 Following the subject accident, the Plaintiff was admitted to hospital. The hospital records consistently indicate that he resided at 46 Ivy Court at the time of the subject accident.

245 We heard from Maureen McKenzie that the general practice for admitting patients is to have the family identify the patient and then proceed to admitting to register the patient.

246 We heard from Beverly Lewis from London Health Sciences. Ms. Lewis gave evidence that she was told that the Plaintiff resided with his mother and brother at 46 Ivy Court.

247 It is clear from the evidence of Susan Davis-Bailey that she verified with Ms. Aden that the Plaintiff's address was Ivy Court, as found on the addressograph that had been used at London Health Sciences.

248 This coincides with Social Work Case Aide, Ms. Pilon's written note dated November 26, 2009, wherein one of the Plaintiff's sisters advised that the health records department would need to be notified of a new address and phone number for the Plaintiff.

249 Ms. Davis-Bailey explained in the Integrated Discharge Summary dated November 26, 2009, and confirmed by her evidence at this Arbitration, that she knew the family had expressed great concern about returning to live at 46 Ivy Court. The family was fearful and had difficult memories associated with the incident and the townhome the Plaintiff had previously lived in.

250 According to Ms. Davis-Bailey, upon discharge, the Plaintiff and his family were all going to stay with his older sister in her apartment.

251 The fact that Ms. Davis-Bailey misstated the "townhouse" as an "apartment" does not persuade me that that Ali was being released from where he lived pre-incident to his sister's apartment, which was why his address and telephone number needed to be updated.

252 Physiatrist, Dr. Delaney, completed an OCF-19 for the purpose of the Plaintiff's accident benefits claim. When completing the form, Dr. Delaney noted the Plaintiff's address as 46 Ivy Court.

253 According to the report of Nicole Ferreira dated January 25, 2010, the Plaintiff's mother reported that, subsequent to the incident, the Plaintiff, his siblings, and his mother moved into his sister's apartment, as the family's prior home is associated with negative memories of the incident, and the family no longer feels safe there. The Plaintiff had three sisters and one brother.

254 On his Examination for Discovery, Ali described 46 Ivy Court as "home" on numerous occasions.

255 When discussing his activities on the day of the accident, the Plaintiff stated that he was hanging out in "my backyard" at 46 Ivy Court. There would be no backyard at his sister's apartment.

256 In describing the events of that evening, the Plaintiff said that he was on his way "home" from downtown London. 46 Ivy Court was where he "lived". His exact evidence was "I dropped, I asked them to drop me off *at home, like that's where I live, Kimberly, Ivy Court, home*". That was the last thing that the Plaintiff remembered before waking up in the hospital.

257 The Plaintiff was asked about his ID that he had left at home that evening. His answer was "That's why *I went home...* and they took probably my house key and went in *my house*."

258 Ms. Aden said to the police that the Plaintiff's passport was kept under the cable box in the living room at 46 Ivy Court.

259 When confronted with the numerous references that the Plaintiff reported living at 46 Ivy Court pre-accident, the Plaintiff would say that whoever said or wrote that was lying.

260 The Plaintiff went as far to say that his family members lied to the police about where he was living when the police spoke with his family in the immediate aftermath of the accident, despite his family having no motivation to subvert a police investigation. Rather, his family would have been extremely motivated to help the Plaintiff, as he was fighting for his life in hospital.

261 It is clear to me that Ms. Aden will provide false information when it is financially beneficial for her or her family members. As I have indicated earlier, there may have been motivational issues as to where Ali lived.

262 Ms. Aden's theory that she kept the townhouse because she expected or wanted all of her family members to return is difficult to accept. On March 28, 2008, she attempted to submit an Internal Joint Tenancy Request Form for the purposes of adding her two sons, the Plaintiff and Abduhalli, to her lease at 46 Ivy Court.

263 In a letter from London Housing to Ms. Aden dated April 17, 2008, Ms. Aden was advised that she had completed the wrong form. She was asked to complete a transfer form indicating that she wanted to stay in the same area but she was reassured that she would likely not be transferred to a two bedroom apartment because these units did "not come up often". Ms. Aden was told that she would be placed on a waiting list for a unit to come available.

264 Ms. Aden then wrote a letter indicating that her daughters, Leyla and Hawa did not live there any longer but that her two sons continued to live with her and therefore, she needed a two bedroom apartment. That is in my view entirely inconsistent with her alleged motive to maintain the four-bedroom townhouse in case her children returned home.

265 As of April 9, 2009, Ms. Aden confirmed with London Housing that the Plaintiff and Abduhalli continued to live with her at 46 Ivy Court. She listed them both as students so that it would not affect her rent.

266 Ms. Aden lied to London and Middlesex Housing Corporation throughout the history of her tenancy. Her explanation about her understanding of her reporting requirements is simply unbelievable. I cannot help but find she lied to keep her rent as low as possible.

267 Ms. Aden indicated that the food was at 80 King Edward as she did not cook at 46 Ivy Court. When asked if there was any food at 46 Ivy Court, she said, "No. Sometimes I put burgers in the, in the, in fridge." Why did Ms. Aden say that? Likely because the Plaintiff had given evidence that sometimes he took burgers from his mom's house and cooked them at his neighbour's. There was no milk or eggs, but there were burgers. According to Ms. Aden, the family members who slept at 46 Ivy Court ate "burger and bread" for breakfast. This would be difficult to accept and is contradicted by her banking records which would indicate that she spent far more on groceries than she was prepared to admit.

268 At this arbitration, despite earning below the poverty line, Ms. Aden denied that keeping 46 Ivy Court empty for one year and 10 months was a waste of money. She indicated that money was not important to her. When asked if she was making a donation to the government, she answered, "Yes it could be". She denied that paying $\frac{1}{4}$ of her earnings towards an empty townhouse in a subsidized housing complex was a waste of money.

269 Ms. Aden also testified that she donated food to the Salvation Army. She denied purchasing any more than \$10 to \$20 per month for food, which is not consistent with her bank records hence her explanation that she gave food to the Salvation Army. I do not accept this explanation. It is clear from the evidence overall that this was a family barely making ends meet. Furthermore, no other family mentioned that her mother was giving food to a food bank of the Salvation Army.

270 I find that the available evidence overwhelmingly supports a finding that the claimant resided at 46 Ivy Court at the time of the accident. Based on what I believe to be the credible evidence of the neutral parties (the police, the investigators, medical professionals) the Plaintiff clearly cannot establish that he resided with his sister at the time of the accident.

3. Financial dependency

271 In terms of traditional legal principles, criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco Insurance Co. of America* (1984), 48 O.R. (2d) 451 (Ont. H.C.) aff'd (1985), 50 O.R. (2d) 797 (Ont. C.A.). Consideration should be given to criteria as follows in determining dependency for the purposes of the *Schedule*:

- i. The amount of dependency;
- ii. The duration of the dependency;
- iii. The financial needs of the claimant;
- iv. The ability of the claimant to be self-supporting.

272 In *Federation Insurance Co. of Canada v. Liberty Mutual Insurance Co.* ((May 7, 1999), Lee Samis Member (Ont. Arb.)), it was determined that a person's capacity to earn must be taken into account in measuring dependency. A person can only be principally dependent for financial support if the cost of meeting their needs is more than twice their resources. This has come to be known as the 51% rule.

273 Early jurisprudence applied this 51% rule using a detailed analysis of the claimant's income sources in comparison to the value of that provided by the person or persons upon whom the claimant was said to be dependent. This has been referred to as the "mathematical approach". The exercise of determining the value of that provided in many cases proved to be a difficult and expensive task. In the last few years a new approach to the analysis of dependency has emerged known as the "LICO approach". In *Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada* [(May 1, 2014), Vance H. Cooper J. (Ont. Arb.)], (Award of Arbitrator Vance H. Cooper, dated May 1, 2014), the arbitrator preferred to resort to an alternative approach to determine dependency, namely, to use Low Income Cut-Off measure as a qualifying number in relation to which 51% rule is to be applied (as opposed to using actual expenses of the claimant).

274 After hearing all evidence including evidence at cross-examinations and re-examinations of the three accountants involved in that case, Arbitrator Cooper noted that all of the accountants who gave evidence and offered expert opinions, acknowledged the inherent difficulty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and individual expenditures in relation to needs.

275 Arbitrator Cooper referred to decisions of Arbitrator Samis in *Coseco v. ING Insurance Co. of Canada* [(July 21, 2010), Samis J. (Ont. Arb. (Ins. Act))] (Award July 21, 2010) and *St. Paul Travelers and York Fire & Casualty Insurance Co., Re* [2011 CarswellOnt 19008 (Ont. Arb. (Ins. Act))] (Award, dated August 11, 2011). In these decisions Arbitrator Samis explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in household — the exercise we were directed not to follow by *Miller v. Safeco Insurance Co. of America* appeal. Instead, Arbitrator Samis suggested we should follow a "*more objective valuation of the costs of meeting someone's needs*". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

276 To that end, Arbitrator Samis used Canada LICO threshold statistic numbers as determined by Statistics Canada which he characterized as the "*best and most reliable approach to the evidence respecting one's needs*".

277 Arbitrator Cooper's decision in *Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada* was appealed to Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal as reported at 2015 ONSC 4020 (Ont. S.C.J.), Justice Mayers found that mathematical calculation or application of 51% rule in relation to needs/means is an important factor, but it is not the only factor. A change in mathematics variable, while can alter a mathematical conclusion on dependency, does not necessarily alter the "big picture". At page 4 Justice Mayers wrote:

A Change in math from 50.0001% dependency to 49.999% dependency may or may not overcome other factors of the actual dependency between the relevant parties.

278 Justice Mayers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistic to determine the cost of housing in a locale*".

279 As jurisprudence currently stands, both the "mathematical" and "LICO" approaches are being applied by judges and arbitrators. TD in this proceeding has advanced a third approach called the "plurality approach" which it claims is the appropriate approach to use when there are several contributors to the claimant's financial needs.

280 TD maintains that in a situation where there is more than one individual contributing to the finances of the claimant, the decision of *Economical Mutual Insurance Co. and Aviva Canada Inc., Re* (Arbitrator Densem — January 2013), should apply. In *Economical*, the claimant was receiving financial support from both her father and mother. The financial support received from her father and mother, individually, was greater than her own financial contribution to her own needs. Despite this, none of the parties contributed to at least 51% of the claimant's financial needs.

281 In deciding what to include as part of a claimant's self-supporting resource, one should consider the claimant's own efforts, capacity or status. According to Arbitrator Densem support emanating independently of the claimant should not be classified as his or her self-supporting resource. Arbitrator Densem also took from other arbitrations that personal resources are generated by the person or entitled to receive them in the person's own right as an individual.

282 They do not derive from another person. Including support received from another person as part of the claimant's personal resources for determining financial dependency is not consistent with the definition of self-supporting.

283 Arbitrator Densem found that principal dependency exists where the claimant, is chiefly, mainly or for the most part (i.e. more), dependant on one, independent source of support, than he or she is on their self-supporting resources, and on any other single independent source of support.

284 The claimant can have any number of independent support sources. If one of these support sources is the largest contributor to the claimant's support, then by definition that source is the principal supporter. The value does not need to be greater than 50%, it only has to exceed the value of any other independent support contribution and that of the claimant's self-support.

285 Using this scenario, Arbitrator Densem concluded that the claimant was only able to contribute 20% to her own financial needs, while her father was contributing 45%, and her mother was contributing 35%. With these values, Arbitrator Densem determined that the claimant was principally financially dependent on her father, as he was making the largest contribution when compared separately to his wife and the claimant herself. He found the father's automobile insurer in priority even though the father did not contribute more than 50% of the claimant's needs.

286 I have been advised that the this decision of Arbitrator Densem was not appealed, nor has it been referred to or distinguished in any subsequent case despite the passage of four years.

287 Before applying one or more of these approaches to the financial dependency analysis, it is necessary to decide on the appropriate time frame for analysis. The parties have proposed either the 12 month period pre-incident or the 7 month period pre-incident. The latter time frame would represent the period the claimant was receiving Ontario Works.

288 As established in *Dominion of Canada General Insurance Co. v. Ontario*, [2013] O.J. No. 3345 (Ont. S.C.J.), the relevant time period to review in determining dependency is not legislated. However, the period should not be a snapshot. The Court has found that the "snapshot" approach on the day of the accident is inappropriate. Instead, the time frame considered must be one that provides a fair picture of the relationship at the time of the accident. The relationship must be looked at as a whole over a reasonable period of time to allow the Arbitrator to determine the nature of the relationship at the time of the accident.

289 I find that the appropriate time frame for analysis on the facts before me is the roughly seven month period pre-incident being the period of time the claimant was receiving Ontario Works. This situation had existed for a considerable period of time with no evidence that it was going to change. In fact, there was evidence adduced that the claimant planned to enroll in another adult learning class at Weable the day following the incident. I accept that evidence but am of the view that such planned enrollment was only to support a continuation of Ontario Works benefits and not a genuine attempt to upgrade his education. It is clear from the evidence that he earlier only attended Lifelong Learning minimally with no real attempt at completing the program. I do not accept Ali's evidence that his attendance was poor because he had the flu. There was simply no medical or other corroborative evidence in this regard.

290 Given the use of this time frame and the finding that he was resident at 46 Ivy Court, it is clear that Ali did not receive more than 50% of his needs from Asha, nor was she the largest contributor to his needs. No matter which approach is used (mathematical, LICO or plurality), financial dependency on Asha has not been established.

291 During the applicable time frame Ali was receiving \$216 each month from Ontario Works. Asha's contributions came nowhere near that. I accept that she was providing him with about \$80 each month as she testified and was also buying him clothes from time to time. I also accept the fact that Ali would spend time at King Edward where he would visit his sisters, have the occasional meal, use the internet and watch the occasional pay per view movie. At Appendix X2 of the accounting report of Daniel Edwards (retained by TD) dated January 9, 2017, an analysis is made of financial contributions on the assumption that Ali was residing at Ivy Court for the 7 month period pre-accident. He concluded that the average monthly contribution by Asha was \$90. On this basis, Ali was contributing 38.8% to his own needs through Ontario Works whereas Asha was contributing 29.7% and Faduma 29.2% on the basis of the contributions outlined.

292 The "plurality approach" advanced by Arbitrator Densem in *Economical* (supra), even in the event it was good law, is not satisfied on the facts of this case. The largest independent support source was Ontario Works; it was not Asha. I find that

the second largest contributor was Faduma. Not only did she provide accommodation, but food and cash to Ali. I find that Mr. Edwards has undervalued both the cash and food contributions made by Faduma. As for cash contributions, the evidence varied. On her EUO, Faduma indicated at page 65 that her average cash contribution was \$35 per week which was consistent with Ali's EUO evidence. It was only later in her EUO testimony that she indicated it was "every now and then whenever he asked for it". I find that Faduma's cash contributions to Ali may not have been \$35 per week but were a lot higher than the \$50 per month used by Mr. Edwards. Similarly, Mr. Edwards has only allowed 25% of \$50 per month as her food contribution to Ali's needs. Faduma's bank records confirm far more grocery purchases than she was prepared to admit and certainly not consistent with a \$12.50 monthly contribution to Ali. I do not accept her explanation that she gave food she purchased to food banks and the Salvation Army. This was a family that was barely making ends meet and was not in a position to be so generous. By increasing Faduma's cash contribution to even \$20 per week and her food contribution to 25% of \$100 per month raised her contributions to a percentage higher than Asha's. Clearly Faduma was the second largest contributor to Ali's needs aside from Ontario Works.

293 Over the 7 months pre-accident Ontario Works provided \$216 for 7 months for a total of \$1512. Asha contributed \$90 per month by way of cash and clothing totalling \$630. There was also evidence she contributed to hydro and phone at Ivy for a total of \$150 per month with Ali presumably getting 1/3 of the benefit (3 person household at Ivy) for a 7 month total of \$350. This brings Asha's total contributions to Ali's needs for the 7 month period to \$980. At \$20 per week Faduma's cash contributions for the 7 month period would be about \$600. Her contribution to housing even assuming a 3 person household would be \$700 for the 7 month period. Her contribution to food for the 7 month period would be \$175 for a grand total contribution of \$1477 and much greater than the \$980 contribution of Asha. Given the finding that Ali was living at Ivy Court clearly makes Asha's contributions to Ali's needs less than those of her mother.

294 In my view all of this mathematical analysis is moot in any event as one of the criteria in determining financial dependency is the ability to be self-supporting as confirmed by the Ontario Court of Appeal in *Miller* (supra) and as outlined in *Federation Insurance Co. of Canada v. Liberty Mutual Insurance Co.* (Arbitrator Samis — May 7, 1999). I find on the facts before me that Ali Dorre had the capacity to provide for more than 50% of his basic needs. I accept the principle outlined by Arbitrator Samis where he confirms that the ability to be self-supporting must be taken into account in determining dependency and writes:

An intelligent, able-bodied individual fully capable of employment who chooses to live at home with his parents ought not be considered dependent upon them.

295 Although there may have been some negative prognosticators for employment such as minimal education, poor work history and a lack of a driver's licence, I find on the evidence that he was capable of employment and could have earned at least minimum wage. Pre-accident he was healthy physically and mentally on his own admission. He described himself as being slim and having a "6-pack" and was playing basketball. He lived in a large city with an available public transportation system where presumably minimum wage job opportunity existed for those with minimal education such as in the service industry (McDonalds, Tim Hortons) or any manual labour job such as landscaping, loading, moving or many others. The evidence indicates he simply did not want to work and preferred his Ivy Court lifestyle while supported by Ontario Works, his mother and his sister Asha. When he last worked years earlier he worked 1 week at PRC Books in a telemarketing position and quit because it was boring. He then worked for 3 or 4 months at Angelo's Bakery stating "I just needed enough money for the summer then I just quit". As his friend and next door neighbour Mike Nguyen stated when asked why Ali was not working - "he was just lazy". This is not a case where there was evidence of physical disability, mental disability, alcohol/drug addiction or a rural geographical location with no available transportation system or job opportunity. Furthermore, I do not accept any suggestion that he was a full time student. I find that he only enrolled in Lifelong Learning to remain qualified for Ontario Works. He only attended one of the two classes in which he registered and his attendance was pathetic. In my view, he was capable of minimum wage jobs if he chose to do so. He preferred simply to be supported by Ontario Works, his mother and his sister Asha while doing whatever he was doing around the Ivy Court neighbourhood.

296 The accountant Karen Dalton testified that working 30 hours per week at a minimum wage job would have provided Ali with 76.8% of his basic needs. The accountant Daniel Edwards includes the LICO statistics at Appendix B2 of his report of December 9, 2016. It indicates that the low income measure for one person was \$18,876. 50% of this would be \$9,438. I find Ali Dorre had the capacity to earn at least \$9,438 and provide for more than 50% of his needs.

297 What we appear to have here is a family member different than the rest of his siblings. He was a family member who dropped out or was kicked out of school early and became involved with the wrong crowd. He became involved in the wrong activities. The neighbourhood he lived in at 46 Ivy Court was conducive to those activities and probably why he spent most of his time there as I have so found. He was unlike his other four siblings who appeared to be motivated to complete their post-secondary school education and find competitive employment.

IMPACT OF FACTUAL FINDINGS

298 On the basis of the factual findings herein, I find that TD is the priority insurer and that State Farm's OPCF 44R underinsured coverage endorsement is not exposed as Ali Dorre was not principally financially dependent upon nor resided with his sister Asha Dorre at the time of this incident.

ORDER

299 I hereby order:

1. that TD(AB) is the priority insurer;
2. that TD(AB) assume carriage of the accident benefit claim of Ali Dorre;
3. that TD(AB) indemnify State Farm(AB) for benefits paid to and on behalf of Ali Dorre, together with interest calculated in accordance with the *Courts of Justice Act*;
4. that TD(AB) pay the costs of State Farm(AB) of this arbitration on a partial indemnity basis;
5. that TD(AB) pay the costs of the MVACF of this arbitration on a partial indemnity basis;
6. that the State Farm policy is not exposed to the tort claims of Ali Dorre;
7. that TD(tort) pay the costs of State Farm(tort) of this arbitration on a partial indemnity basis;
8. that TD(tort) pay $\frac{1}{2}$ of the costs of the Plaintiff of this arbitration on a partial indemnity basis given the mixed success of the plaintiff on the issues;
9. that TD(AB) and TD(tort) share the arbitrator's costs and if agreement cannot be reached on respective shares, I will receive submissions in that regard.

Order accordingly.

Tab 9

2019 CarswellOnt 7828
Ontario Licence Appeal Tribunal

9770 v. Tarion Warranty Corporation, Claridge Homes (Crown Pointe) Inc.

2019 CarswellOnt 7828

An appeal of a Decision of Tarion Warranty Corporation under the Ontario New Home Warranties Plan Act R.S.O. 1990, c. O.31 to Disallow a Claim

Ottawa Carleton Standard Condo Corp. 669 (Appellant) and Tarion Warranty Corporation (Respondent) and Claridge Homes (Crown Pointe) Inc. (Added Party)

Marisa Victor Adjud.

Heard: September 25, 2017; September 26, 2017; September 29, 2017; October 2, 2017; October 3, 2017; October 6, 2017; October 10, 2017; October 11, 2017; October 12, 2017; October 13, 2017; October 9, 2018; October 10, 2018; October 11, 2018; October 12, 2018; October 15, 2018; October 16, 2018; October 17, 2018; October 24, 2018; October 25, 2018; October 29, 2018; October 31, 2018

Judgment: May 17, 2019

Docket: 9770/ONHWP

Counsel: Christy Allen, David Lu, for Appellant

Andrew McKenna, for Respondent

Helmut Brodmann, for Added Party

Marisa Victor Adjud.:

OVERVIEW

1 This case had a long and winding road leading to this appeal before the Licence Appeal Tribunal (the Tribunal or the LAT). The appellant, the Ottawa Carleton Standard Condo Corp. 669 (the Strand), is a condominium corporation. The condominium is a 179 unit, 14-storey building located in Ottawa (the Building). The Building was built by the added party, Claridge Homes (Crown Pointe) Inc. (the Builder, or Claridge) and completed, or declared, on November 3, 2003.

2 Within the first year of the declaration of the Building, the Strand retained an engineering company to conduct an audit as required by law. The engineering company issued the first-year performance audit report (the PA) which listed numerous defects with the Building. The PA, received by the respondent Tarion Warranty Corporation (Tarion) on October 26, 2004, initiated the claim. Overtime many of the issues raised in the PA were resolved. By 2009, Tarion had issued three warranty assessment reports (WARs) denying coverage for a number of items claimed including most of those in the current appeal.

3 In 2009, after Tarion had issued its last WAR, the Strand ceased communication with Tarion. The Strand did not request a decision letter and Tarion did not produce one.

4 In 2015, five and a half years later, the Strand contacted Tarion and advised that there were previously claimed defects that remained unresolved. It requested that Tarion either conciliate the outstanding defects or issue a decision letter under s. 14 (3) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 (the Act).

5 These claims were denied by Tarion in its warranty decision letter on August 17, 2015 (the Decision). The appellant then appealed the Decision to the LAT on September 4, 2015. Of the twenty items denied in the Decision, only eight items are appealed.

6 The remaining eight claims all fall into two main areas of concern - the building envelope or the dual-temperature piping system that is part of the heating and cooling system.

7 The hearing of this matter began on September 25, 2017 and lasted for ten days until October 13, 2017. Twelve further days of the hearing were scheduled to take place in March and April 2018, to allow for repairs to the building and to obtain expert evidence on the cost of repairs. Those dates were vacated on consent due to construction delays and to allow the parties adequate time to prepare and respond to numerous expert reports. The hearing of this matter then resumed in October 2018 for a final eleven days. It was completed on October 31, 2018 with an additional few days allowed for written reply submissions on one issue.

RESULT

8 I find the following:

- a. On the issue of the building envelope:¹
 - i. Item 6 (EC8) — cold walls in suites: This item is not warranted.
 - ii. Item 7 & 8 (W1 and W2) — lack of detail in window drawings: This item is not warranted.
 - iii. Item 11 & 12 (W8 and W9) — condensation on windows and patio doors: The excess condensation caused by substandard and/or missing insulation and failure to incorporate the thermal break is warranted under the Act. Compensation is due in the amount of \$166,000 plus HST.
 - iv. Item 13 & 14 (W10 and W11) — air leakage around sliding doors and windows: This item is not warranted.
- b. On the claim of item 19 (M13), deficient insulation of the dual-temperature pipe system:
 - i. The insulation of the pipes was not done in a workmanlike manner and fell below the standard of construction at the time, therefore it is warranted under the Act. Compensation is due in the amount of \$906,285 plus HST.
- c. The delay in bringing this claim before the LAT does not result in coverage being denied.

PRELIMINARY AND INTERLOCUTORY ISSUES

9 Throughout the course of the hearing, the following preliminary and interlocutory decisions were made:

- a. Motion to admit the reports of the engineering company, Morrison Hershfield;
- b. Motion for additional disclosure — mid-hearing motion; and
- c. Objection regarding proper reply — at the end of the hearing.

a. Motion to admit the reports of the engineering company, Morrison Hershfield

10 On the first day of the hearing, the appellant made it clear it planned to introduce reports prepared by Morrison Hershfield (MH), an engineering company, for the truth of their contents. In addition, the appellant planned to call just one witness, Mr. David Kayll, an engineer with MH who authored some of the reports, to speak to all of the MH reports.

Submissions

11 The appellant stated that a principled exception to the hearsay rule applies to the documents not authored by Mr. Kayll.

12 Tarion opposed the admissibility of the documents. Tarion stated they could be admitted for authenticity, but witnesses were needed to speak to the contents. As they are expert reports they cannot be submitted as business records. Tarion was concerned that allowing Mr. Kayll to speak to all the MH reports, even those not authored by him, would deny Tarion the opportunity to cross-examine the expert who drafted the report. Tarion stated it was unfair to have these documents accepted for the truth of their contents and unfair not to call the authors to testify given the complexity of the case.

13 Claridge supported Tarion's position.

Analysis

14 I allowed the MH documents and reports to be admitted as evidence. The decision was made pursuant to s. 15 of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 (the SPPA), which authorizes hearsay evidence in administrative proceedings. There was no denial of natural justice by having one MH representative, Mr. Kayll, testify in regard to all the MH reports, even those he did not author.

15 The qualifiers to s. 15 are that the documents must be relevant, not unduly repetitious, not covered by privilege and that there be no denial of natural justice. In this case, the documents appeared highly relevant and were disclosed well in advance of the hearing. There were no concerns regarding notice. I therefore found that there was no denial of natural justice such that the documents should be rendered inadmissible. The issues raised by the respondents in moving to exclude the reports could go to weight.

b. Motion for Additional Disclosure — Mid-hearing motion

16 On October 10, 2017, seven days into the hearing, the appellant made a motion under r. 6.8(d) of the Tribunal's *Rules of Practice* for further disclosure of documentation by Tarion. The requested documents included copies of notes, memos and internal communications with Claridge relating to the claims under appeal.

Submissions

17 The motion was made after the appellant discovered that not all documents in Tarion's possession had been disclosed. The appellant argued that it is entitled to know if there was a basis for a denial other than what was in Tarion's WARs. The appellant further argued that due to the high potential value of this claim, proportionality favours the disclosure of further documentation and that outweighs any prejudice.

18 Tarion opposed the motion. It did so on the basis that it complied with the requirement to disclose all documents it intended to rely on (r. 6.3). It also opposed the motion on the basis that the timing was late in the proceeding as it was seven days into the hearing and was only related to questions arising on cross-examination. In addition, it stated the request was vague and over-broad.

Analysis

19 While the LAT has the power under the SPPA and its Rules of Practice to order further disclosure, I declined to do so on the basis of relevance and proportionality.

20 I was not satisfied the documents as defined were relevant for the hearing. The issues are whether the deficiencies are warranted under the Act. The Tribunal owes no deference to Tarion's decision or to Tarion's decision-making process.

21 There was no specific request for a relevant missing document. The request was overbroad.

c. Objection regarding proper reply — at end of hearing

22 On the last day of the hearing, October 31, 2018, during submissions, the appellant used its reply to respond to Tarion's submission that the delay in bringing the claim should be a complete bar to compensation.

Submissions

23 Tarion objected to the appellant's use of reply on the basis that those submissions should have been made in chief as the appellant had advance notice of the argument Tarion would be making.

Analysis

24 I allowed the appellant to address the argument in reply given the over-riding consideration of fairness at the Tribunal.

25 I also allowed Tarion a further week to provide no more than five pages of written submission to respond to the appellant's reply submissions on that one issue.

ISSUES

26 The issues are whether the appellant's claims are warranted under the Act, and if so, what compensation is owed.

27 The following claims are in dispute:

a. Building envelope:

- i. Item 6 (EC8) — cold walls in suites
- ii. Item 7 & 8 (W1 and W2) — lack of detail in window drawings
- iii. Item 11 & 12 (W8 and W9) — condensation on windows and doors
- iv. Item 13 & 14 (W10 and W11) — air leakage around sliding doors and windows

b. Dual-Temperature Pipes:

- i. Item 19 (M13) — pipe insulation — condensation on pipes

28 In order to decide each claim, I must answer the following questions:

- Is the item warrantable?
- Did Claridge fall below the standard of construction applicable at the time?
- What is the amount of compensation due?

29 In relation to all claims I must also answer the following novel question:

- Even if the appellant proves its claims, due to the length in delay in bringing this claim, should compensation be denied?

LAW

a. The Applicable Statutory Warranty

30 Section 13(1)(a) of the Act provides that the vendor of a home warrants to the owner that the home is constructed in a workmanlike manner and is free from defects in material, is fit for habitation and is constructed in accordance with the Ontario Building Code (the Code). Under s. 13(4) of the Act, the warranties apply for a one-year period unless otherwise prescribed.

b. Compensation for Breach of Warranty

31 Section 14(3) of the Act provides for payment of compensation for damages resulting from a breach of the warranty in s. 13(1) of the Act.

c. The Common Element Warranty Claim

32 Under s. 15(a) of the Act, the condominium corporation is deemed to be the owner of the common elements of a condominium. Under s. 15(b) the warranties on the common elements start on the date of registration of the condominium declaration and description (Registration).

33 Common element warranty claims are subject to both the Act and the *Condominium Act*, 1998, S.O. 1998, c. 19.

34 Section 44 of the *Condominium Act* requires the board of directors of a residential condominium to retain a professional engineer or architect to conduct an audit of the common elements to determine whether there are any deficiencies in the common elements after construction has been completed that may give rise to a claim under the Act. The engineer or architect conducting the audit shall inspect the major components of the building and conduct a survey of owners. The PA shall be prepared that includes details of the inspection and findings made, and a determination of whether there are any deficiencies in the common elements that may give rise to a claim under the Act. The PA must be submitted to the board and filed with Tarion before the end of the 11th month following Registration of the building.

35 Under ss. 44(10) of the Act, the filing of the PA with Tarion shall be deemed to constitute a notice of claim for the deficiencies disclosed within.

d. Tribunal Powers on Appeal

36 Where Tarion makes a decision under s. 14 of the Act, the owner may appeal the decision to the Tribunal under ss. 16(2).

37 The Act is consumer protection legislation and should be given a broad and liberal interpretation. The onus is on the appellant to prove, on a balance of probabilities that the defects in the common elements constitute a breach of the warranty that damages have resulted from the breach and the amount of those damages. The Tribunal owes no deference to Tarion's decision.

38 Following a hearing, the Tribunal may, pursuant to s. 16(3) of the Act, order Tarion to take such action as the Tribunal considers Tarion ought to take in accordance with the Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of Tarion.

BACKGROUND FACTS

a. Engineers retained by the Strand

39 In 2004, the Strand retained MH to complete the required audit. On October 25, 2004, MH produced the PA upon which the Strand's current claims are based.

40 MH engineers, including David Kayll and Dan McDonald, were retained to investigate the initial 150 defects listed in the PA. Included in those claims were the eight items under appeal. Between 2004 and 2011, MH produced a number of experts' reports on both the issue of the building envelope and the issue of the dual-temperature pipe system. David Kayll testified at the hearing.

41 The Strand then retained Keller Engineering (Keller) to continue investigating the outstanding claims, including those under appeal. James Dahmer and Justin Tudor testified regarding their reports dating from 2011 to 2017.

42 In 2017, the Strand retained Ryan Leonard of Goodkey, Weedmark & Associates Ltd. (Goodkey) to investigate and report on the items under appeal and provide cost estimates for their repair. He also testified.

b. Tarion involvement

43 The Strand was in regular contact with Tarion regarding outstanding items from the PA from 2004 until 2009. During that time, Tarion conducted a common elements meeting and several conciliations. Many of the items in the PA were resolved. However, from 2008 to 2009 Tarion issued three WARs covering most of the items under appeal. The WARs denied warranty coverage.

c. Claridge Involvement

44 In 2004, Claridge was contacted by the Strand regarding the items in the PA. Claridge did resolve some of the items over time. There were, however, times when the appellant contacted Claridge and no response was received for months at a time even though repeated attempts were made.

45 In February 2008, the Strand wrote to Tarion to request a common elements meeting, stating that its relationship with Claridge had broken down.

46 On March 23, 2009, the Strand filed a Statement of Claim against Claridge. This action was ultimately not productive as the case was dismissed on consent of all parties on January 13, 2016.

EVIDENCE AND ANALYSIS

a. Building Envelope

47 The following claims fall into the building envelope category:

- Item 6 (EC8) — cold walls in suites
- Item 7 & 8 (W1 and W2) — no details regarding connection of air to windows
- Item 11 & 12 (W8 and W9) — condensation on windows and doors
- Item 13 & 14 (W10 and W11) — air leakage around sliding doors and windows

48 I will deal with each item in turn.

i. Item 6 (EC8): Cold walls in suites

49 As part of the audit conducted by MH, an owner's survey was completed. The survey contained complaints that cold exterior walls and drafts could be felt in units 607 and 703. The complaint regarding unit 703 was withdrawn. Only the complaint in relation to suite 607 remained unresolved.

Is the item warrantable?

50 There was no dispute that a deficiency causing cold walls could be covered by the warranty.

Did Claridge fall below the standard of construction at the time?

Evidence

51 Dorothy Church testified for the Strand. She was the senior condominium manager through her employment with the Condo Management Group that provided services to the Strand. She stated that as of February 6, 2007, there had been no investigation by MH or any other expert as to why the walls in unit 607 were cold. She was unable to advise of any further investigation of the cold walls. She stated that access had been given to any unit on request if notice was provided.

52 MH completed several investigations into the building envelope. On July 9, 2007, MH wrote to the Strand to advise of existing wall conditions as found in unit 411. As a result of openings made in the walls, they found incomplete insulation and

recommended replacing the vapour barrier and insulation in the unit. The letter from MH does not provide any commentary regarding cold walls in unit 607 or in the rest of the building.

53 In 2008, MH conducted exploratory wall openings in seven units to investigate window and door condensation issues. These investigations found a lack of Tyvek, a polyethylene product used as a house wrap, within the exterior wall assembly. MH suggested the lack of Tyvek, which acts as an air barrier, was allowing cold air to reach within the stud cavity and cool the windows contributing to the condensation problem. The report itself did not comment on whether the deficiency was leading to cold walls.

54 In 2009, MH produced a report based on a suite-by-suite survey conducted for the purpose of identifying the prevalence of condensation and/or ice buildup and cold walls. They entered every unit and took temperature and relative humidity measurements. For suite 607 the survey notes wall temperatures around windows to be between 15°C and 20°C when the outside temperature was -26°C and indoor temperature was 22°C. The report concluded that interior surface temperatures of the exterior walls ranged from 9°C to 20°C. The report commented on wall construction, again referring to the lack of Tyvek found in the previous investigation. The report recommended five tasks to be completed in order, going from most cost effective to most expensive. The report noted that task five, the only task that involved improving air tightness of exterior walls, might not be necessary. It also stated that tasks four and five exceeded the original design approach but may be necessary to achieve original design intent.

55 Mr. Kayll testified that he did not know whether MH was ever asked to go back and examine cold walls in either suites 607 or 703. He stated the issue of cold walls links with the condensation issues. He agreed on cross-examination that MH's focus was on excess condensation and not cold walls.

56 Keller measured wall temperatures in April 2012, however it did not include unit 607 in its study. That report was focused on causes of condensation and made no particular comment on wall assembly deficiencies that could be causing cold walls.

57 Mr. Tudor of Keller Engineering testified that the repairs suggested to reinsulate the windows and patio doors would have little impact on cold walls. Keller had conducted some test repairs on the windows and patio doors. The wall temperature measurements remained relatively stable after the repairs were completed.

58 Robert Fisher, a warranty services representative, testified for Tarion. He stated that a claim for cold walls would require the appellant to open up the wall to provide evidence of a missing or inadequate interior climate control measures. In rejecting the claim, Mr. Fisher testified that Tarion had not been given access to unit 607 and had not been provided evidence of a defect.

59 Don Buchan, engineer and head of Buchan, Lawton, Parent Ltd., was retained by Tarion as an expert. In his opinion, the cold wall temperatures in unit 607, recorded by MH in the 2009 suite-by-suite survey, would not be considered unusually cold considering the outside temperature at the time.

Analysis

60 The evidence submitted related to this item does not support evidence of cold walls or a defect in the construction of the walls in unit 607 or in the rest of the Building. In order to be successful, the appellant must show evidence that a building deficiency exists such that the construction of the walls was not completed in a workmanlike manner, or the existence of a defect in violation of the Code.

61 In particular, the expert evidence of MH and Keller and the investigations they conducted were not focused on establishing evidence for cold walls or determining the cause of any cold wall deficiencies. Even though MH recorded a wall temperature measure for unit 607, no expert opinion was given that those measurements represented a cold wall that falls below expected norms. The 2009 MH report recommending five tasks also indicated that repairs to the building envelope, task five, might not be necessary if the other four tasks were completed, and also exceeded the original design approach.

62 Mr. Buchan provided an expert opinion that the temperature recorded in the suite-by-suite survey in 2009 provided a wall temperature recording for unit 607 that was within expected ranges. There was no evidence to dispute his opinion.

63 I find that the appellant has failed to prove that there is a common element deficiency in the wall assembly in unit 607 or anywhere else in the Building causing cold walls. As such this item is not warranted.

ii. Item 7 & 8 (W1 and W2): Lack of details in window drawings

64 These two items are interlinked and therefore grouped together. Item 7 provides that no details were provided that clearly indicate the method of connecting the air and weather barriers to the window. Item 8 provides that no details were provided detailing window anchorage.

65 The PA states that the architectural drawings and window shop drawings do not clearly illustrate the method of connecting the air and weather barriers to the window assembly. In particular, they found that anchorage details were lacking.

Is the item warrantable?

Evidence

66 The parties disagree as to whether this item is warrantable.

67 The appellant has the onus to show that this item is warrantable under the Act. The Strand submits that the Act is consumer legislation and should therefore be given a broad and liberal interpretation. The Strand has grouped this claim within the building envelope complaints. The rationale is that the lack of these drawings contributed to the defective installment of windows (Items 11 & 12) leading to condensation problems.

68 Tarion takes that position that the failure to provide drawings is beyond the scope of warranty coverage. Mr. Buchan, the expert for Tarion, further states that in his opinion, while these drawings are useful, they are not often provided as part of the document turnover. Tarion further states that even if the contract between the appellant and the added party required the turnover of the drawings, issues of design or contract are remedied by way of civil court. Tarion states the warranty only covers issues of workmanship that cause damages.

69 Tarion relies on several past decisions of the Tribunal that hold that there is a distinction between design and workmanship and that the provision of the shop drawings is an issue of design.

70 The construction performance guidelines, December 1, 2003 (the Guidelines) were admitted as evidence in the hearing. The Guidelines are used by Tarion to determine if a condition is covered by the warranty. The version submitted as evidence was the version in place at the time of the construction of the Building. It makes no reference to the provision of shop or architectural drawings, nor does it state that a lack of detailing in the drawings is a defect.

Analysis

71 I find that this item does not constitute a breach of warranty under the Act because it is not covered by the warranty.

72 This item does not form part of the home or its materials and as a matter of common sense does not fall under s. 13 of the Act. Though these drawings are no doubt useful, they are not covered by the warranty program.

73 The appellant has failed to satisfy the onus of proving that this item is covered by the warranty.

iii. Item 11 & 12 (W8 and W9): Condensation on windows and doors

74 These two items are interlinked and therefore grouped together. Item 11 states that there is a problem with window condensation and ice accumulation. Item 12 is the same complaint but with regard to sliding patio door condensation and ice accumulation.

Is the Item Warrantable?

Evidence

75 The Strand takes the position that excessive condensation is a defect that is warrantable. The Strand points to the decisions in *Haider*² for the proposition that the Tribunal may find an issue not normally considered a defect to be warranted, and further, that an appellant need only prove the existence of a defect and not the cause. In the *Haider* case, the issue was excessive efflorescence on the exterior of bricks, a naturally-occurring white substance which usually dissipates within two years. In that case it was still present four and half years later. Here, the appellant states that the issue of excess condensation was reported within the warranty period and ought to be warranted under the Act where it is unusual or unacceptable even if the cause is undetermined.

76 Tarion states that condensation on windows is not itself a warrantable item. It states that the Guidelines support this at section 8.5 where it states that there is no warranty for condensation.

77 In the alternative, the Strand argues that the claim for condensation is a reporting of a symptom of an underlying deficiency, that being defective perimeter insulation of the windows. There is no dispute that defective insulation could be covered by the warranty.

Analysis

78 I find that the claim of excess condensation can be a deficiency covered by the warranty program in certain situations. I base this decision on principles of statutory interpretation, the legislation, and the decisions in *Haider*.

79 Section 13 of the Act provides the legislative basis for the warranty coverage and includes that a home shall be constructed in a workmanlike manner and be free of defects in material. Further, the home construction shall also comply with the Code. Subsection 13(2) specifies several exclusions. In this list of exclusions is item (e) - "damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation." If an item meets the criteria under ss. 13(1) and is not excluded by ss. 13(2), it can be covered by the warranty. In this case, the provisions of s. 13, read together, suggest that the legislature intended that damage caused by condensation is covered if it is not due to the owner's failure to maintain adequate ventilation.

80 The applicable version of the Code³ states at section 5.3.1.2 that windows are required to minimize surface condensation and installation of windows shall incorporate a thermal break. This implies that installation of a window that does not minimize condensation is a Code violation. Therefore, windows and window installations that do not minimize surface condensation fail to comply with the Code, and are warrantable under s. 13 of the Act.

81 I find that it is possible to have a warrantable claim for condensation as long as the condensation is not due to the owner maintaining inadequate ventilation, and the condensation exceeds what is normally expected in the circumstances.

82 In the alternative argument put forward by the appellant, it was not disputed that deficient insulation could be covered by the warranty.

Did Claridge fall below the standard of construction at the time?

Appellant's Evidence

83 A significant portion of the hearing was focused on the description and mechanics of condensation, including a homeowner's lifestyle and the relative humidity (RH) in any given unit as contributing factors to condensation.

84 The experts generally agreed that several factors can affect condensation: fresh air and circulation of air, the undercut of the doorways, running exhaust fans, use of dryers or showers, window coverings, the number of people living in a unit, and stack effect on taller buildings.

85 There was disagreement among the experts as to the appropriate level of indoor RH in order to determine if the level of condensation on the windows was abnormal. Suggested appropriate indoor RH ranged from 20% to 35%. The RH value affects the capacity of air to hold moisture: the lower the RH, the less likely it is that condensation on windows will occur.

86 MH stated in its 2006 reports that 35% RH was the level they used for their analysis. Mr. Kayll testified that 35% RH was used because it was a comfortable level during winter months.

87 Mr. Kayll's November 2008 reports for MH, however, used a standard of 30% RH. In the report he suggested that 30% RH should be a target for unit owners as the MH investigations had shown less condensation at that RH level during winter months. He testified that in his opinion 30% RH was a bit high when cold outside, but at the time it was considered a low RH level in an occupied suite. He agreed that there was no standard RH level set in the Code.

88 In Mr. Kayll's November 2008 report, he also suggested other strategies to reduce condensation including: review indoor air pressure to ensure corridors had a positive pressure compared to individual suites to improve fresh air delivery (fresh air in the winter would reduce indoor RH levels); review door seals to ensure consistent air flow into suites; review exhaust fans which could remove humid air following cooking or showers; and then review the tightness of the building envelope. He recommended a budget of \$750 to \$1000 per door or window opening and suggested an overall budget of \$125,000 would address the most problematic windows and patio doors. In testimony, Mr. Kayll stated those amounts were ball park suggestions.

89 In cross examination, Mr. Kayll agreed that reducing RH to 20% would further reduce the risk of condensation.

90 Expert reports from MH and Keller recorded the following:

- PA — 33% of respondents indicated condensation and/or frosting on windows, 35% of respondents indicated condensation and/or frosting on patio doors;⁴
- March 14, 2006 MH report: windows in suite 411 not performing as expected;
- March 11, 2008 MH report: reported ice and condensation from 45 unit-owners, investigations ongoing;
- March 14, 2006 MH report: states winter design indoor RH for residential occupancy is 35% at an indoor temperature of 20°C.
- April 7, 2008 MH report: seven exploratory openings made, some thermal breaks in windows not properly insulated;
- November 20, 2008 MH Report: advised that target indoor humidity of 30% RH in cold weather should be the goal;
- February 2009 MH suite-by-suite survey: condensation or ice buildup found in 85% of units with comments noting if condensation or ice was on outer panes;
- February 18, 2010 MH report: confirmed condensation and recommended reviewing the adequacy of the air barrier around windows and patio doors where RH was at 20% or less, ventilation is adequate, and condensation is still occurring;
- April 11, 2016 Keller report: test repairs were done on three units to observe wall assemblies and found missing and incomplete insulation and issues concerning the location of the window's thermal break, all aspects that could contribute to window condensation; and
- July 31, 2017 Keller report: investigation involving four exploratory openings describing problematic insulation, different composition of insulation (batt and spray foam) and inconsistent location of thermal break.

Tarion's Evidence

91 Mr. Buchan testified that with an RH level of 20%, together with adequate ventilation, if condensation is an issue then the next steps can be taken with regard to the building envelope. He critiqued the MH expert reports, stating there was no continuum in the way the investigations progressed. He stated that sample sizes for investigations were too small to extrapolate from. In his opinion, the suite-by-suite survey lacked qualitative information, and monitoring was done on three days instead of continually for a month or more to obtain long-term monitoring measures.

92 Mr. Buchan also critiqued the Keller test repairs. He stated that they were marginally successful and therefore did not provide evidence that re-insulation of all the windows and doors would improve condensation levels in the Building.

93 Mr. Buchan did agree, however, that where a thermal break is exposed, due to lack of or improper insulation, it was a deficiency.

Claridge's Evidence

94 Mr. Fortin was called as an expert by Claridge. He is a mechanical engineer who has spent his entire career in the window industry. He was qualified as an expert in curtain wall, windows and glazing and had conducted around 100 investigations, including five to ten in high-rise condominium buildings such as the one at issue in this appeal. His expertise was not challenged by any of the other parties.

95 Mr. Fortin testified that in his opinion the Code required minimization of condensation and that windows and patio doors need to have a thermal break. Mr. Fortin testified that the windows used in this building met the minimum standards in the Code, however, they were of low-end quality, which he stated was typical for residential high-rise construction. Mr. Fortin explained that while condensation was a natural and even expected occurrence, the condensation to be concerned about was condensation inside the window system that can damage drywall and/or develop mold. In Mr. Fortin's opinion, an RH of approximately 20% or less is needed in colder weather in order to minimize condensation.

96 Mr. Fortin focused on the suite-by-suite survey measurements taken by MH in 2009 and referred to in the Keller report of April 11, 2016. Mr. Fortin discounted any suite where there was an additional comment stating frost or condensation was on the outside of the window or door. This type of condensation, in his view, was not problematic or damaging. In his opinion, after disregarding those suites, as well as any suite where RH was above 20%, there were only four units with problematic condensation. These had RH values of around 20% and still had interior condensation. In cross-examination he agreed with the appellant's experts that this was a discrepancy in how those windows were insulated. He agreed there could be missing insulation, deficiencies with spray foam insulation and/or failure to incorporate a thermal break.

97 Mr. Fortin also agreed, under cross-examination, that thermal breaks should be insulated. When shown photos of some of the test openings, he agreed that had he been reviewing the Building during construction, he would have required the insulation and placement of the thermal break to be corrected.

98 Mr. Fortin also stated that the purpose of minimizing condensation in workmanship, and indeed as required by the Code, is to reduce water damage on drywall and prevent mold.

Analysis

99 I find that the expert evidence establishes on a balance of probabilities that the excess condensation on the windows and patio doors in the Building is a breach of the warranty under the Act. In addition, I find that windows with missing insulation and windows where the thermal break is exposed, due to lack of or improper insulation, is a breach of the warranty under the Act.

100 Despite the disagreement among the experts as to the correct level of RH for testing of windows and patio doors, the most compelling evidence came from Mr. Fortin, the window expert retained by Claridge. Mr. Fortin's testimony, agreeing that at least four units had problems with their windows based on the suite-by-suite survey, agreeing that thermal breaks need to be

insulated and that the purpose of minimizing condensation is to reduce drywall damage and prevent mold, is powerful evidence. Mr. Fortin was called as an expert for Claridge, who was adverse in position to the appellant.

101 Mr. Fortin stated, though, that four units with problematic insulation did not mean there was a problem throughout the Building. I disagree. Excess condensation on the windows and patio doors was a complaint flagged in the PA done within the first year. Other strategies were explored, including balancing the HVAC system, conducting test repairs, examining the exhaust fans etc. The test openings revealed deficient insulation around some windows and doors. These included incomplete insulation, spray foam that was not fully cured and thermal breaks not insulated. Those discoveries, together with the history of complaints and Mr. Fortin's agreement that at least four units had problematic insulation, are significant.

102 The appellants are not required to show that the problem exists in every unit or even in most units, they are required to show that it is a common element issue that is warranted. The condensation levels on windows and patio doors in at least those four units in the Building are excessive and are not excluded by ss. 13(2) of the Act because they cannot be attributed to lack of ventilation. In addition, the test openings show some windows lack continuous insulation and a failure to insulate the thermal break, both of which can cause excess condensation. Based upon this evidence, I find the Builder fell below the standard of construction by failing to minimize condensation as required by the Code, and by failing to meet the standard of workmanship and construction that applied at the time.

What is the amount of compensation due?

Submissions

103 The appellant states that it is entitled to damages for a breach of warranty under s. 14(3) of the Act. It is entitled to be paid out of Tarion's guarantee fund to rectify common elements with the intent to make the condominium corporation whole. The appellant states that the damages required are the cost of repair.

104 The appellant's expert, Mr. Leonard, has estimated that remedial work consisting of repairing spray foam around all windows and patio doors and providing appropriate undercuts to unit entrance doors would cost approximately \$830,000 plus HST. In the alternative, Mr. Leonard states that the windows are reaching the end of their lifespan and should be replaced on a rolling basis within the next ten years. He testified that an alternative remedy to a full re-insulation of the existing windows would be a fund of \$60,000 plus HST to compensate for additional work to repair and replace damaged insulation and drywall around the window openings when replacing the windows as required in the next ten years.

105 The February 11, 2009 MH report, that recommended five tasks, included as part of task five the reinsulation of windows and doors. At that time, MH estimated that only 20-25% of openings needed to be reinsulated at a cost of \$4000 per suite and totaling \$150,000 to \$190,000.

106 The respondent states that the appellant has failed to show that the breaches caused any damage and therefore no compensation is due.

107 In the alternative, Tarion argues that any award of damages needs to consider the length of time it has taken the appellant to pursue a remedy, which in turn has prevented Tarion from mitigating its damages. It states this is especially true because Claridge has no assets and recourse is only to Tarion's guarantee fund.

108 Finally, it argues that the \$60,000 plus HST alternative offered by Mr. Leonard is a speculative amount.

Analysis

109 The appellant is entitled to be placed in the position it would have been had the insulation been done correctly in the first place. That requires the reinsulation of some of the window and patio door openings.

110 Replacement of all insulation surrounding windows and patio doors is not appropriate in this case because not all are deficient. The quoted cost is \$830,000 plus HST for all openings deficient or not. In addition, if all the openings were re-

insulated, all of that work would need to be re-done in ten years when all the windows are replaced anyway due to end of life cycle.

111 The appellant's alternate position of \$60,000 to repair damage when the windows are replaced anyway is also unsatisfactory. The replacement of the windows would fix the insulation problems because new windows would be properly insulated during the replacement. However, it leaves the unit owners living with the common element deficiency for another ten years.

112 The evidence has not established which specific openings need to be remedied. Although there was a suite-by-suite survey done in 2009, there was no building-wide testing of windows and patio doors with indoor RH maintained at 20% and outside temperature cold but not below -25 degrees. The delay in pursuing this appeal means that even if the above-testing were done today, it would not identify which windows had defective insulation from the start. This is because over time the windows themselves, the insulation, and other aspects, such as weather stripping, will have degraded from their original condition affecting the test results.

113 MH stated in 2009 that 20-25% of the openings might require repair. I accept this figure as it represents an estimate of deficiencies closer in time to the completion of the Building. Applying that same 20-25% deficiency rate to the \$830,000 estimate for repairs provided by Mr. Leonard in 2018, provides a range of \$166,000 to \$207,000.

114 I find that the Strand is entitled to \$166,000 plus HST in warranty coverage for this item. This amount provides funds to reinsulate 20% of the openings, based on the 2009 estimate of percent deficiencies, and the current estimate for the cost of repairs.

iv. Item 13 & 14 (W10 and W11) — air leakage around sliding doors and windows

115 These two items are interlinked and so are grouped together. Item 13 states that there are cold drafts near the sliding doors in suites 308, 605, 610, 612 and 1011. Item 14 states that there is air leakage around the bathroom window of suite 509.

Is the Item Warrantable?

116 There was no dispute that air leakage around windows and doors could be covered by the warranty.

Did Claridge fall below the standard of construction at the time?

Evidence

117 These items were noted in the PA. However, by February 2007, MH documents tracking the outstanding claims from the PA, noted that these items had been corrected.

118 Ms. Church testified that she was not able to determine what work the Strand had done on these items. She suggested that these items were corrected due to ongoing complaints by owners. She agreed that this item was not as high a priority as other items the appellant was addressing in the early years following the PA. Nevertheless, she stated that it was always a concern for the Strand. Complaints were addressed on an as-needed and unit-specific basis, and not on a systemic basis. She stated that she suspects these issues continue to exist in the Building today.

119 Mr. Kayll testified that he did not know what repairs were made as that information was lacking from the Strand's files. He agreed that those items appeared to have been resolved as of February 2007. He stated that after Ms. Church advised MH that the item had been corrected, MH would not have done any further examination.

120 The appellant did not submit any expert reports specifically addressing these items.

121 The respondent states that the procedural history of this item renders it impossible to determine if it breached the standard of construction at the time. In the normal course of a warranty claim under the Tarion regime, an item is conciliated by Tarion

prior to issuing a WAR or decision. The Strand did not request Tarion conciliate this item in November 2007, March 2009, or March 2015, the dates of the conciliation requests. In August 2015, Tarion denied this defect in response to a request for a decision, without ever having conciliated the item.

122 Mr. Fisher testified that although these items were reported as part of the PA, those complaints were a lay person's view and there needed to be further proof of the deficiency. He stated there were no expert reports covering these items. Furthermore, the sliders on the windows and doors contain weather stripping which needs to be replaced over time due to wear and tear. Mr. Fisher stated there was no evidence of a maintenance program regarding that weather stripping. Finally, Mr. Fisher stated it was difficult to assess an item when it has been repaired as that prevents Tarion from being able to determine the state of the item prior to repair. It is the original condition that determines whether an item is warrantable.

123 Mr. Buchan testified that his review of the expert reports showed no evidence of air leakage at all.

Analysis

124 The appellant has failed to show that these items are warranted. The fact that this item was deemed resolved many years ago means that the engineering investigations and expert reports done to examine the claimed defects failed to address these items. The repairs done on a unit-by-unit basis lack records, making it difficult to determine which units were repaired and which units reflect an original state. Even if the original state of the units could be examined, the passage of time means that the weather stripping on those windows and doors is not an accurate reflection of the quality of the workmanship over a decade ago.

125 Finally, there was no evidence of the damage caused by air leakage and further, what remedy was sought to address these items in particular.

126 The appellant has been unable to establish that the air leakage around the windows and doors is as a result of poor workmanship or a violation of the Code such that these items should be warranted.

b. Item 19 (M13) Dual-Temperature Pipes

127 Item 19 states that the insulation and/or vapour barrier on dual and chilled water piping is substandard, causing condensation. The system is called a dual-temperature system because the same pipes used for heating the Building are used for cooling it, with a changeover during the spring and fall to place heating pumps or chilled water pumps into service.

128 The appellant states that the above item is further expanded upon in the PA by the following information:

Where reviewed all dual temperature (combined heating and cooling) piping insulation and/or vapour barrier has failed or was incorrectly installed and has caused condensation on the piping and in the insulation, which will likely result in external corrosion of the piping and potentially mold growth on the piping. This condition may also be similar within wall assemblies and at other concealed locations. This insulation was also not installed in accordance with Specification Section 15081-2.2.4, 2.2.5, 3.2.4, and 3.4.3.

Is the Item Warrantable?

129 There was no dispute among the parties that deficient insulation around the pipes and a deficient vapour barrier could be warranted.

Did Claridge fall below the standard of construction at the time?

Appellant's Evidence

130 The appellant submitted that the purpose of the insulation and vapour barrier is to minimize thermal loss and prevent condensation on the surface of the pipes. The Strand states that standard was not met. In the alternative, the appellant states that

even the standard supported by Tarion, that of minimization of condensation, was also not met. The appellant states that the defect is such that the overall purpose of the system is not met and therefore there is a breach of the warranty.

131 The appellant retained five mechanical engineers to study the dual-temperature piping system. It states that all of them found that there was a clear defect of workmanship such that excessive condensation was resulting in damage.

132 The following is a timeline of some of the key events after the PA:

- Ms. Church stated drywall repairs had been done on a case-by-case basis.
- MH early reports focused on the possibility that the condensation observed could lead to corrosion of the pipes, shortening the expected life of the pipes.
- In 2008, MH noted that a contractor, Caesar's Plumbing, had been hired by the Builder and had completed minor repairs in some locations in May 2007. Those repairs consisted of adding a thin layer of insulation over existing insulation and jackets and applying foil type pressure sensitive tape over the insulation. The repairs are noted as "workmanship not in accordance with industry standards."
- In March 2008, MH conducted a further review which examined nine areas of insulation and piping. Condensation and/or mold staining was noted on canvas jackets as well as surface corrosion of pipes. These findings were generally repeated in the MH report of October 2008.
- In April 2009, Glencor Engineering (Glencor), metallurgical experts hired by the Builder, inspected the pipes. The findings of Glencor were somewhat similar to that of MH except that in some locations Glencor found that the moisture was caused by pipe leakages and not defective insulation.
- In June 2009, MH commented that Caesar's Plumbing had completed further repairs in May as recommended by both MH and Glencor. However, inspection of chilled water risers in concealed pipe chases inside occupant suites had yet to be done.
- In 2011, Mr. Dahmer of Keller wrote a report that included a list of all the deficiencies in the insulation and vapour barrier. These included discolouration of canvas jackets due to water saturation, improperly finished canvas jackets, non-continuous insulation, less than 1" thickness in insulation in some areas, evidence of water pooling and mold, missing pipe insulation, incomplete insulation and wet insulation. He concluded that the insulation and vapour barrier installed did not meet the Code at the time of construction. He recommended that all the piping be assessed, and all insulation removed. Pipes with more than superficial corrosion were to be replaced. All corrosion on remaining pipes was to be sanded off. Pipes were to be painted and all new insulation installed.
- In 2016, after further inspection by additional companies, GTT ONSET and G&L Insulation, Mr. Dahmer produced a further review of the dual-temperature pipe system that summarized the findings to date, which included information from a pipe corrosion and insulation investigation undertaken by the two companies above, a review of the Code and a cost estimate to replace the insulation. He stated that the deficiencies in the insulation violated the Code. He recommended removing all insulation, repairing and replacing corroded pipes and reinsulating.
- In 2017, Mr. Dahmer wrote that although condensation levels would likely never be at zero, condensation should never be so excessive that it saturates the fibers of the insulation, causing the insulation to lose its thermal capacity, or be allowed to pool within the insulation, or leak through the vapour barrier damaging adjacent materials. He stated that drywall replacement should not be required after only 14 years of building life due to condensation leaks and that this is evidence that the minimums set out by the Code had not been met. He stated that there are excessive condensation problems.
- Also, in 2017, Mr. Leonard of Goodkey produced a report after cutting open two risers to do investigative work on concealed areas of the system. He found insulation that was not continuous through floor penetrations and non-continuous vapour barriers where riser clamps were installed; pipe insulation on Victaulic joints that was compressed; and pipe insulation on expansion joints that was also compressed. He also found all insulation exposed had some staining, due to

excess condensation within risers, beyond what could be reasonably expected. He wrote that mold growth was found in 50% of the riser cavities and some on the back of drywall.⁵ He stated he found mold in eight or nine of the 28 locations he investigated. He wrote that the mold growth was caused by the condensation that results from poor pipe insulation.

133 Mr. Dahmer, mechanical engineer for Keller Engineering, testified regarding his investigations and the report he produced in 2011 that included a list of all the deficiencies in the insulation and vapour barrier. He testified that he noted water pooling and mold. He noted corrosion and water staining on a boiler but could not be certain if these damages were from condensation or leakages. In particular, he found wet insulation, including complete saturation. The amount of wetness, he stated, was incredible. While he agreed that there would be some condensation, he stated saw more condensation than he had seen in 99% of buildings he has viewed. In his opinion, the Building needed a full-scale replacement in order to prevent moisture running from the mechanical room down through the whole building. He stated that all the insulation had to be opened up to determine the full extent of wetness and corrosion.

134 Mr. Leonard testified that his investigation revealed that the insulation was often attached with duct tape around the insulation jacket, compressing the insulation so that it lost its insulating value. He stated the manufacturers would not stand by the way the insulation was installed. He relied on the North American Insulation Manufacturers Association (NAIMA) Guide to Insulating Chilled Water Piping Systems with Mineral Fiber Pipe Insulation, written in 2015, as a guide to how insulation should have been installed. He said the same insulation practices should have been followed when the Building was built. He also relied on the Code as a minimum building standard which he stated requires the prevention of condensation. In his opinion, wet insulation does not prevent condensation, and that the condensation on the pipes is not normal and should not be expected.

135 Mr. Leonard also stated that the purpose of opening up new sections of risers, as he did as part of his investigation, was to see what the original condition of the insulation and piping was.

136 Mr. Leonard addressed some of the conflicting evidence as to whether some of the water staining and leaking was due to the failure of Victaulic couplings, possibly due to an overpressure event. In his opinion, he did not see any leaks and did not believe that leaks were the cause of any of the concerns he was flagging. He also stated that on-site investigations in 2017 showed staining in the mechanical room and at the base of risers in the parking garage despite previous attempts to repair the insulation only to have the moisture staining return. This, he says, shows that condensation remains an issue post the 2007-2009 leak repairs and that localized repairs will not solve the problem.

137 Finally, in his opinion placing drip pans inside the risers to catch condensation before it drips on drywall is an unreasonable solution.

Tarion's Evidence

138 Mr. Fisher testified for Tarion. His opinion was that there was no evidence that the insulation on the piping was substandard.

139 He stated he attended an inspection in 2009 that was also attended by MH and Claridge. Claridge agreed to repair and replace leaking and corroding sections of the dual-temperature pipe system. These repairs are referred to in the 2009 Glencor reports. Mr. Fisher's conclusion was that MH was content to work with Glencor and that the areas of concern were being addressed.

140 Mr. Fisher also stated that Dan McDonald of MH was unable to confirm whether or not the pipes had the proper amount of insulation. Mr. Fisher was familiar with Mr. McDonald and asked him at a meeting whether the insulation was substandard. Mr. Fisher stated that Mr. McDonald did not confirm that the insulation was substandard. When asked in cross examination, Mr. Fisher agreed that he based the Tarion decision in part on Mr. McDonald's response, which consisted solely of Mr. McDonald shaking his head.

141 Mr. Fisher said that had Mr. McDonald stated that the insulation was half as thick as required, or not Code-compliant, then he would have been warranted it. His denial was based on MH failing to give a quantitative measure as to what was substandard with the insulation and vapour barrier.

142 In his Warranty Assessment Report dated May 13, 2009, Mr. Fisher stated that given that two engineering firms were actively investigating the issue of condensation on the pipes, the complaint would be held as under investigation pending the outcome of the engineers' activities.

143 Mr. Fisher testified that he believed the Strand and the Builder had resolved the matter. He also agreed with the opinion of Glencor, that damage viewed in the dual-temperature piping system was due to leaks and not condensation. In his view, condensation had caused only superficial damage.

144 In terms of the Tarion warranty, Mr. Fisher held that there was no evidence of what the standard of workmanship required was and that there was therefore no evidence that the insulation and vapour barrier fell below a standard.

145 Mr. Buchan, the expert for Tarion, testified that the dual-temperature system was an average system but one that is not used much anymore. He stated that the insulation he viewed was above-average and that condensation on the pipes was to be expected. He stated that although the system is substandard for today, it was standard at the time the Building was built. He stated that the undisturbed insulation he viewed in the mechanical room was well within the normal range. He also saw no evidence of mold. He stated that the focus had been on corrosion as a result of condensation, and that testing had since shown that above average corrosion was not occurring. He further stated that there is no standard for insulating pipes in the Code.

146 Mr. Buchan viewed some of the drywall that was removed during the investigations in 2017 and found only minor drywall damage on the 14th floor and no systemic problems. In terms of any remaining concerns, in his opinion the installation of drip pans below bends in the piping would be an acceptable long-term solution.

147 Tarion also submitted that some repairs have already been done and that staining on insulation is a normal condition of the system, especially a decade and a half into the life of the building.

148 Tarion submits that drywall damage has not been proven. It argues that Ms. Church stated drywall repairs had been done but produced no documentation to support those repairs or costs. Mr. Leonard produced photos of the 14th floor damage, including drywall damage, but did not note any associated costs.

149 Tarion submits that extensive mold damage has not been proven. Mr. Leonard conceded in cross-examination that possibly as low as 40% of the openings he viewed had mold on the inside of the risers. Mr. Buchan, on the other hand, stated he viewed no mold when he examined some of the drywall pieces at a later date. He states he only saw staining on drywall from the risers which was not proven to be mold. Although a small amount of mold was identified by a mold company, Tarion stated that there was no indication of how widespread the mold issues was. Further, there was no evidence of any risk to the inhabitants of the Building.

150 Tarion also states that the appellant has failed to prove that wet insulation has prevented the system from working as it should. There was no evidence of damages related to thermal loss from inefficient heating or cooling.

Claridge's Evidence

151 Ronald and David Twigg, of Glencor, testified as experts for Claridge. They are both metallurgical engineers recognized as experts in the field. They conducted testing on the pipes in 2009 and 2017.

152 In 2016 they produced a report summarizing the findings to date and commenting on the findings of the other experts. They summarized their findings from 2009 as follows:

- Unit 103: significant corrosive attacks due to leaks and soaked insulation;

- Garbage chute area: heavy corrosion with wet insulation and probably water rundown from leakage;
- Unit 203: superficial to minor corrosion on the risers. Probable leakage from above or at the joints resulted in heavy corrosion at these locations;
- Unit 308: only minor corrosion on the risers;
- Unit 707: wet insulation and heavy corrosion with probable condensation rundown;
- Unit 1007: superficial rusting consistent with condensation; and
- Unit 1402: Some significant rusting due to condensation.

153 Their 2016 conclusion was that where condensation had occurred, the corrosion on the piping appeared to be "superficial to mild attack."

154 In 2017 they conducted further testing on the dual-temperature pipes and found that there was only superficial corrosion on the pipes of an amount that was to be expected after a decade and a half of operation. Their evidence on these matters was accepted by the parties.

155 They also found some bulges in the pipe expanders and damaged Victaulic couplings leading them to conclude that there had been an overpressure event during change over from heating to cooling or vice-versa. This overpressure event likely caused some of the leaks and staining observed. This damage would be unconnected to deficient insulation and resulting condensation.

156 With regard to condensation, the Twiggs state that when the pipes are wet it can lead to corrosion. However, when they are hot, corrosive pitting, the most unpredictable and dangerous concern, does not occur. General corrosion starts out as a localized pit. Once formed, it can turn into a general attack on the pipe. This is because the pit itself can generate further corrosion even if the initial cause of the corrosion has stopped. In addition, the development from an initial pit to a true pit attack is non-linear and unpredictable. A pitting attack is a significant issue for the lifespan and integrity of the piping system. However, if the pipes are dry, corrosion does not occur, and therefore pitting does not begin, especially with hot pipes.

157 The Twiggs are not experts on insulation, however, David Twigg did provide his opinion on what effect replacing the insulation now would have on future pipe corrosion. He stated that removing the insulation and replacing it could increase corrosion by introducing new chemicals to the system. This could lead to rapid corrosion.

Analysis

158 There was significant disagreement amongst the witnesses as to the standard of workmanship that applies. Mr. Dahmer found a litany of issues when he investigated in 2011 and said the Building's pipe condensation was worse than 99% of the buildings he had viewed. In 2016, his report stated that the deficiencies are contrary to the Code. Mr. Leonard argued that the overall failure of the insulation to meet its intended purpose, which was to minimize thermal loss and prevent condensation, was below the standard. On the other hand, Mr. Fisher testified that he wanted a quantitative measurement showing a deficiency. Mr. Buchan stated that the only standard we have is the Code, but denied that the deficiencies were violations of the Code. His expert opinion was that the piping insulation was above average. All parties agree the standard is not one of perfection. The key issue is where to draw the line between adequate workmanship, and workmanship that falls below the standard and is therefore a warranty breach.

159 I find that the appellant has established, on a balance of probabilities that the insulation of the pipes was not constructed in a workmanlike manner and it fails to meet one of the purposes for which it was installed — to minimize condensation. The appellant has shown that the insulation was not installed in line with industry practices by showing: missing insulation, compressed insulation, saturated insulation, and insulation that does not minimize condensation. Inadequate and/or missing insulation is a deficiency that can lead to excess condensation and related drywall damage and mold growth.

160 In determining damages, I prefer the evidence of the appellant's experts who conducted thorough investigations of the system. I make an exception for the issue of pipe corrosion.

161 In 2004, within one year of the Building's completion, MH noted the inadequate insulation and vapour barrier on the dual-temperature pipe system in the PA. Their concern was excess condensation, corrosion, mold growth, drywall damage and thermal loss. This is significant evidence as the conditions noted in later years were the same as those observed when the building was newly-constructed.

162 In March 2008, MH found condensation and/or mold staining on canvas jackets as well as surface corrosion of pipes. They noted that concealed spaces had not yet been examined.

163 The 2011 and 2016 Keller reports came to the same general conclusion as MH in that the insulation was sub-standard and as a result the system was subject to excess condensation.

164 In 2017, Mr. Leonard examined the interior of the risers by making 28 new riser openings for the purpose of determining as-built conditions. This is important because there were some pipe repairs done over the years, but none where the enclosed spaces were opened up. He found mold growth on jackets and drywall as well as condensation staining that he did not attribute to leaks inside the concealed risers. Even staining and mold in 40% of the concealed riser spaces is a significant amount. Mold growth was confirmed by laboratory analysis. These findings add further confirmation to the early expert reports.

165 I find that the appellants have shown condensation, drywall and mold damage in the common element areas of the dual-temperature piping system.

166 Pipe corrosion was a potential concern that has not been borne out by testing. The Glencor observations first confirmed corrosion then discounted it. In 2009, they concluded from observations that there had been some condensation that caused superficial to mild attack corrosion. In particular Unit 1402 had "some significant rusting due to condensation." This is one spot where there appears to be no argument that the condensation caused corrosion. In 2009, Glencor suggested the pipes had a reduced life expectancy of 20%. However, in testimony they negated some of their earlier findings. They maintained that it is difficult to predict corrosion, and in particular pit attacks. But they testified that despite superficial corrosion caused by condensation, the pipes were now exhibiting a normal life expectancy. I accept that there has been superficial and mild attack corrosion caused by condensation but that damage beyond what can be expected as normal has not occurred.

167 With regard to Tarion's evidence, I have significant concerns with Mr. Fisher's testimony. Mr. Fisher was not qualified as an expert, though he is an engineer. He testified that he denied this claim based partially on Dan McDonald of MH shaking his head at a meeting nearly a decade ago. This was not in the 2009 WAR. Had he advised as much in his report, it would have given the appellant or Mr. McDonald an opportunity to clarify what that head shake might have meant. Mr. Fisher valued that head shake over the significant number of expert reports provided. Mr. Fisher also stated that he needed a quantitative measure to allow the claim and one was not given to him. Given the Strand was expending significant cost and effort in retaining engineering experts to evaluate the problem, surely it would have been prudent of Mr. Fisher, as the key Tarion representative and decision-maker, to tell the Strand what he was looking for. He did not. I found his testimony to be dismissive of the evidence of deficiencies put in front of him.

168 Mr. Buchan's reports consisted mostly of document review and a few on site visits in 2017. He did not conduct his own investigation. In his opinion, he stated that the insulation was above-average. He also stated that it fully complied with industry standard practices at the time of construction with minor imperfections. However, Mr. Buchan's testimony was at times contradictory. He emphasized that this building was a typical building that was not high-end, that the quality was as required by the Code, but no more. In testimony, he stated that the insulation was "standard" for the day, not above-average. His above-average conclusion, he said, was based on the quality of workmanship he observed in the mechanical room alone. I therefore do not accept his opinion of the quality of the insulation. I do agree with Mr. Buchan, however, that no weight should be placed on the G&L Insulation report due to the out of focus photographs contained in the report and the overall lack of quality. No one from G&L Insulation testified.

169 I am convinced by the sum of the appellant's expert witnesses that they have shown on a balance of probabilities that the insulation and vapour barrier in the building was not completed in a workmanlike manner and is therefore a deficiency covered by the warranty. The damages proven are excess condensation causing drywall damage and mold growth. The damages proven were shown to have occurred throughout the dual-temperature piping system and not just in localized areas.

170 While condensation has caused some pipe corrosion, damages beyond what would have been expected have not occurred. In addition, the experts agreed that substandard insulation causes greater thermal loss, however no evidence supporting that potential damage was adduced.

What is the amount of compensation due?

Appellant's Submissions

171 The appellant argues that it is entitled to payment for damages due to breach of the warranty. The damages are the costs associated with the repair of the defect. There is no need to prove secondary damage.

172 The appellant also pointed to the separate statutory obligations of condominiums to maintain and repair common elements. The appellant states it is required to repair the defect even if the Tribunal denies the appeal. The appellant states that the warranty program should work together with the obligations of the Condominium Act so that condominium owners are not burdened with defects caused by builders at the time of construction.

173 The appellant is seeking the following damages to repair the dual-temperature pipe insulation:

- Proposal — \$25,000 plus HST;
- Phase 1 work — \$115,245 plus HST;⁶ and
- Phase 2 work - \$766,040 plus HST;⁷
- Total: \$906,245 plus HST

174 The work quoted above, as described by Mr. Leonard in his testimony, is to replace the insulation on the accessible risers. It also involves a work-around, designed by him, to insulate the pipes as they travel through the floors, while also fire-proofing those openings as required for fire safety in the Building. One riser, deemed inaccessible due to its location primarily running through units, would be left untouched.

175 Mr. Leonard also opined that the best solution might be to alter the current system to make it a heat pump system which would have hot pipes only and no potential for condensation. He stated it does not address all the insulation concerns, only the condensation. He conceded that this solution is not a repair, that it would be expensive, and that it was not what had been sent out for tender.

Tarion's Submissions

176 Tarion argues that the passage of time and the lack of mitigation on behalf of the appellant has prevented it from mitigating its own damages.

177 Tarion pointed to case law that supported the proposition that the economic cost to bring a deficiency into compliance is not recoverable if there is no evidence of harm if the building is left as is.

178 Tarion states that the remediation plan suggested by Mr. Leonard is not in accordance with industry standards. Also, Mr. Leonard's plan would leave one riser untouched due to access issues. Tarion states it if is acceptable to the appellant to leave one riser untouched, then the same should hold for the other risers too.

179 Tarion states that the proposed repair is unreasonable given the evidence of David Twigg, who provided the expert opinion that changing the insulation now would introduce new chemicals and could result in increased corrosion risk. Tarion states that the proposed remedy would make the situation worse.

180 Tarion suggests the installation of drip pans would remedy the situation without needing to replace the insulation.

181 Finally, Tarion argues that any compensation awarded must be proportional to the damages.

Claridge's Submissions

182 Claridge submits that David Twigg's evidence makes it clear that replacing the insulation could have a corrosive effect on the pipes by providing fresh chemicals. Therefore, the repair may do more harm than good.

183 Claridge also states that replacement of insulation is out of proportion with the benefit that doing so might provide.

Analysis

184 The pipes should have been insulated properly in the first place. Section 14(3) of the Act states that an owner is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if the person has a cause of action against the builder for damages resulting from that breach. The Divisional Court stated in Liddiard⁸ that what is conferred by the warranty is the right to have done that which should have been done correctly in the first place or a sum of money to purchase the labour and materials to do so.

185 Therefore, I find that the appellant is entitled to the cost of repairs. To that end, the Strand has provided evidence of the cost of repairs through the tendering process it undertook. The total cost is \$906,285 plus HST.

186 Nevertheless, this case diverges from the normal case due to the extended passage of time since the Building was built. David Twigg's unchallenged evidence is that replacing the insulation at this late date when the system has already reached an equilibrium, could potentially cause severe corrosion, a very expensive problem to fix. Had this case been heard within a couple years after the claim had been made, those concerns that new chemicals would be introduced into an already stable system, would not have been applicable given the young age of the pipe system at the time.

187 The respondent makes an attractive argument — to do the repairs would fix the problem but potentially cause more harm than good, therefore compensation should be denied. However, I have considered this argument and rejected it because it leaves the appellant shouldering the deficiency and damages caused by the Builder without compensation.

188 I also reject the argument because awarding compensation does not necessarily require the appellant to complete the repairs proposed at the hearing. In *Ontario (3512-ONHSPA-Claim), Re*,⁹ after finding sufficient evidence to award an amount to repair an HVAC system, the Tribunal went on to state that it would "leave it to the homeowner to rectify the damages through their own consultants, to their own satisfaction and in their own time. They are free to repair the high velocity combo system, to seek other advice and canvas other solutions if they wish, or to use the funds from the warranty to contribute to the cost of a total replacement." While the decision is not binding on me, I find it useful as a reminder that the Tribunal has recognized in past decisions that the appellant is not required to carry out the proposed repairs. Here, the appellants are free to use the funds for whatever purpose they choose, in this case that may well be to contribute to the significantly greater cost of a converting the Building to a new heat only system as suggested by Mr. Leonard.

189 Tarion also argues that since the damages to date are minor, the cost of repairs is out of proportion and I should therefore give an award proportional to the perceived seriousness of the damage. I have turned my mind to this option as well. Having reviewed the previous Tribunal case provided to me that purported to grant a proportional judgment,¹⁰ I do not find that the reasoning in that decision should be followed here, as the facts are distinguishable. In that case, the Tribunal refused to mandate repairs of brickwork as the cost was significant and there was no evidence adduced at all of the quantum of damages suffered. I

also have no evidentiary basis that suggests an appropriate percentage on which a proportional award could be justified. Also, the warranty program provides compensation for the damages caused and it is recognized in past decisions and here, that one manner of determining the quantum of damages is the cost of repairs. If that cost of repairs is reduced due to the perceived significance of the damages, it would leave consumers subsidizing the cost of repairs even though the defect was covered by warranty. A proportional judgment in this case is not satisfactory for all these reasons.

190 Tarion submits that the passage of time has caused greater costs and prevented Tarion from mitigating its damages. In 2009, however, MH provided a rough estimate that replacing the insulation would cost \$4000 per unit. Multiplied by the 179 units in the Building and the cost estimate at the time was approximately \$700,000. That amount has not unduly increased given the appellant's accepted quote received in 2018, nearly ten years later, if one factors in the cost of inflation. I see no grounds to deny coverage now when the passage of time has not benefitted the appellant and has not changed the fact that the deficiency was caused by the Builder and there is warranty coverage that applies.

191 Finally, it is within the discretion of the Tribunal to direct Tarion to take any action the Tribunal considers Tarion ought to take in accordance with the Act. Considering the lengthy history of the litigation between these parties, and the complexity of the repairs required to correct the deficiency, I direct Tarion to pay the compensation out of the guarantee fund rather than have Tarion complete the repair.

192 The appellant has provided evidence that the cost of repairs is approximately \$906,285 plus HST. They are awarded that amount.

c. Delay in Making Claim

Submissions

193 Tarion argues that the delay by the appellant in seeking coverage from Tarion should result in a denial of coverage even if a warranted deficiency is found. Tarion in particular points to the five and a half year silence from 2009 until 2015. Tarion states a complete bar to compensation is warranted based on the facts of this case. Tarion, however, agrees that no statute of limitations applies to this case and that this argument is novel.

194 The appellant argued that a delay on its own should not bar recovery unless there is prejudice. It states that there is no prejudice to Tarion due to delay. The Strand points to Mr. Leonard's testimony that the repairs done today would have been the same as those required in 2009, therefore there is no failure to mitigate damages.

Analysis

195 The facts do no support a complete bar to recovery due.

196 It is agreed by all parties that no statute of limitations applies to this case. The Strand dutifully made its claim within the first year as required by the Act. Therefore, Tarion was put on notice of the claim within the warranty period. Between 2004 and 2009, the appellant was in regular contact with Tarion. When that communication ceased in 2009, Tarion could have taken steps to close the claim. Although I understand it was Tarion's usual practice to issue a decision letter only once it was requested by the homeowner, it still had the option to issue one on its own initiative then. Had it done so, the appellant would have had fifteen days to appeal the decision letter to this Tribunal. Tarion did not take that step. To take punitive action against the appellant now for not communicating for five and a half years, ignores the fact that Tarion could have communicated with the appellant during that time and it could have taken steps to ensure that it properly closed the file by issuing a decision letter.

197 In addition, I have already taken the passage of time into consideration in my analysis of each item above.

198 As such, I decline to bar recovery due to the delay in bringing the appeal.

ORDER

199 For the reasons set out above, I order as follows:

a. Item 11 & 12 (W8 and W9) - condensation on windows and patio doors: I order Tarion to pay the appellant \$166,000 plus HST from the guarantee fund as damages for the warranted claims.

b. Item 19 (M13), deficient insulation of the dual-temperature pipe system: I order Tarion to pay the appellant \$906,285 plus HST from the guarantee fund as damages for the warranted claim.

Footnotes

1 The item number refers to the claim as listed in the Decision, with the bracketed number (EC8, for example) referring to the same claim as listed in the PA.

2 See *Haider, Re*, [1996] O.C.R.A.T.D. No. 31 (Ont. Comm. Reg. App. Trib.) at para 43, aff'd in *Haider v. Ontario New Home Warranty Program*, [1997] O.J. No. 2726 (Ont. Div. Ct.) (collectively, *Haider*).

3 *Ontario Building Code Act, 1992*, SO 1990, c. 23 and O. Reg. 403/97

4 37 unit-holders of 179 units responded to the audit survey.

5 In testimony he stated that the amount could have been between 40% and 60%.

6 This work has been completed.

7 This amount was the lowest bid received out of three bids following tendering of the repair project.

8 *Liddiard v. Tarion Warranty Corp.* [2009 CarswellOnt 7303 (Ont. Div. Ct.)], 2009 CanLII 65801.

9 (2008), [2009] O.L.A.T.D. No. 184 (Ont. L.A.T.) at para 185.

10 *Ontario (3106-ONHWP4-Claim), Re (November 10, 2006)* [2006] O.L.A.T.D. No. 504 (Ont. L.A.T.) at paras 91-92.