

EASTERN GEORGIAN BAY  
PROTECTIVE SOCIETY INC.  
Applicant

and

MINISTER OF THE ENVIRONMENT,  
CONSERVATION AND PARKS and  
MACEY BAY DEVELOPMENTS CORP.  
Respondents

Court File No.: 911/19

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

**NOTICE OF APPLICATION FOR JUDICIAL  
REVIEW**

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Lawyers for the Applicant

- (f) Sections 9, 27, 20.2 and 20.3 of the *Environmental Protection Act*, RSO 1990, c E.19;
  - (g) Section 53 of the *Ontario Water Resources Act*, RSO 1990, c O.40;
  - (h) Sections 1, 2, 4, 6, and 9 *Judicial Review Procedure Act*, RSO 1990, c J.1;
  - (i) Rules 1.04, 2.03, 3.02(1), 14.05(2), 38, 57, and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg 194; and
  - (j) Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The affidavit of Thomas Bain, to be sworn, and the exhibits attached thereto;
  - (b) Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

May 2, 2019

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- (i) The Minister denied the Applicant's right to participate in the decision-making process;
- (ii) The Minister failed to allow the Applicant, and other members of the public, to be heard;
- (iii) The Minister failed to consider environmental concerns about the Sewage Works when deciding to implement the ECA;
- (iv) The Minister failed to provide reasons for its decision to implement the ECA; and,
- (v) The Minister failed to give notice of its decision to implement the ECA.

**Leave to be heard by a single judge of the Superior Court**

- (a) The Applicant seeks leave to have this application for judicial review heard by a single judge of the Superior Court.
- (b) This application concerns the Minister's failure to adhere to statutory public notice and comment processes that are meant to help protect and conserved Ontario's environment and the right to a healthful environment enjoyed by the public.
- (c) If the proposed Sewage Works are commenced before this Application can be heard, the Applicant will have been denied its right to participation in the ECA approval process under the EBR.
- (d) The delay required for this Application to be heard by a full panel of judges at the Divisional Court would likely involve a failure of Justice.

**Generally**

- (e) The Preamble and sections 5, 6, 22, 27, 28, 30, 35, 36, 118(2) and of the *Environmental Bill of Rights*, 1993, SO 1993, c 28;

- (ix) The proposed Sewage Works and the Proposed Development are separate and distinct undertakings that should be subject to separate public consultation processes; and
- (x) The OMB decision did not approve the proposed Sewage Works.
- (gg) The Sewage Works have the capacity to harm the environment and nearby wetlands, and should be subject to a separate consultation process.
- (hh) The ECA is not capable of providing the required protection for public health or the environment.
- (ii) The Minister's issuance of the ECA denied the Applicant's rights to public consultation under the EBR.
- (jj) The Minister's decision to issue the ECA without public consultation is *ultra vires* the purposes of the EBR and the EPA.

**The Minister's breach of the duty of procedural fairness**

- (kk) The Minister had a duty of procedural fairness to the public when deciding whether to implement the ECA.
- (ll) The Decision to implement the ECA is a decision that could negatively impact the Applicant's right to a healthful environment under the EBR.
- (mm) The decision to implement the ECA was an environmentally significant decision that affects the environmental rights and interests of the Applicant, as a member of the public.
- (nn) The Applicant had legitimate expectations that the Minister would post notice of the proposed ECA on the Environmental Registry for public comment.
- (oo) The Minister breached its duty of procedural fairness for reason including, but not limited to, the following:

and consultation provisions of the EBR, the reasons for which include, but are not limited to, the following:

- (i) The OMB Decision did not approve the proposed Sewage Works; rather, the Decision specifically anticipated that the proposed Sewage Works would be subject to the ECA approval process;
- (ii) Neither the Proposed Development nor the proposed Sewage Works are projects that have been approved by a tribunal pursuant to section 32(1);
- (iii) The zoning bylaw and the Official Plan, as amended by the OMB Decision, render the Proposed Development conditional on the attainment of approvals from the Minister for the Proposed Sewage Works;
- (iv) The OMB Decision anticipated that any environmental concerns about the proposed Sewage Works would be addressed by the Minister through the ECA application process;
- (v) During the OMB hearing, both Macey Bay and the Township of Georgian Bay repeatedly stated that the Applicants' environmental concerns would be considered through the ECA application process and the peer review process;
- (vi) The OMB does not have jurisdiction to determine compliance with the *Environmental Protection Act* ("EPA") or other Environmental statutes;
- (vii) The OMB Decision did not make any conclusions concerning the compliance of the Proposed Sewage Works with the EPA;
- (viii) The OMB decision did not engage in a sufficient analysis concerning the potential environmental impacts of the Proposed Development or the proposed Sewage Works;

- (y) It is the Minister's position that the issuance of the ECA is a step towards implementing a project that has been approved by a tribunal pursuant to section 32(1) of the EBR.
- (z) It is the Minister's position that the OMB's decision of March 16, 2017 constitutes a decision of a tribunal that afforded an opportunity for public participation pursuant to section 32(1) of the EBR.
- (aa) In addition to not posting the ECA for public consultation, the Minister also failed to post notice of its decision to implement the ECA on the registry, as is required by section 36 of the EBR. As a result of this failure to post its decision, the limitation period under section 118(3) of the EBR has not been triggered.
- (bb) The Minister failed to comply with both sections 22 and 36 of the EBR by failing to provide the required thirty (30) day consultation period on the ECA and by neglecting to provide the necessary notice of the Minister's final decision to approve the ECA on the Environmental Registry.

**The MECP's violation of section 22 of the EBR**

- (cc) The Minister's Decision to invoke the section 32(1) exception was unreasonable and incorrect and was therefore unlawful and in contravention of the Applicant's rights under the EBR.
- (dd) By invoking the section 32(1) exception, the Minister fundamentally failed to comply with the notice and consultation provisions of the EBR.
- (ee) The Minister's failure to provide public notice of the ECA proposal has defeated the public notice, comment and decision-making procedures of the EBR.
- (ff) The Minister's invocation of section 32(1) was unreasonable, incorrect and unlawful, and constituted a fundamental failure to comply with the notice

- (iii) an effluent dosing tank with a capacity of 35.7 cubic metres; and
- (iv) a subsurface disposal system consisting of two dispersal beds with capacities of 79,800 L/day and 26,600 L/day respectively
- (t) Section 22 of the EBR requires the Minister to give notice to the public of a Class I, II or III proposal for an instrument under consideration in his or her ministry at least thirty days before a decision is made whether or not to implement the proposal.
- (u) Section 35 requires the Minister to ensure that comments received as part of the public participation process are considered when the Ministry makes decisions about the proposal.
- (v) Section 36 requires the Minister to give notice to the public of its decision to implement a proposal for an instrument as soon as reasonably possible after the decision to implement the proposal has been made. Section 36 requires notice to be made by posting the instrument on the Environmental Registry.
- (w) The Minister failed to post the ECA proposal to the Environmental Registry before issuing the ECA, invoking the exception under section 32(1) of the EBR to dispense with its obligation to give notice to the public of its issuance of an instrument under section 22 of the EBR.
- (x) Section 32(1) states:
  - “Section 22 does not apply where, in the minister’s opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking or other project approved by,
    - (a) a decision made by a tribunal under an Act after affording an opportunity for public participation”

- (n) The OMB's amendment to the zoning bylaw subjects the Proposed Development to nine specific "Holding Provisions", one of which effectively prohibits the Proposed Development until the issuance of an Environmental Compliance Approval ("ECA") for a sewage disposal system by the Minister.
- (o) The OMB Decision stated explicitly that the Applicant's environmental concerns concerning the sewage works would be dealt with through the MECP and the peer review processes.
- (p) The OMB's amendment to the Official Plan renders the Proposed Development conditional on any approval required for sewage and water systems by the Minister.

#### **The Environmental Compliance Approval**

- (q) Macey Bay subsequently applied to the Ministry of the Environment, Conservation and Parks ("MECP") under section 20.2 of the *Environmental Protection Act* ("EPA") for an ECA to construct Sewage Works to service the Proposed Development.
- (r) On December 19, 2018, the Minister issued an ECA to Macey Bay (ECA #6428-B6RS87) allowing for the establishment, use and operation of sewage works for the collection, transmission, treatment and subsurface disposal of domestic sewage with Rated Capacity of 106,400 litres per day to service the Proposed Development.
- (s) Specifically, the ECA allows for:
  - (i) three balancing tanks, each with a capacity of 35.7 cubic metres
  - (ii) an advanced wastewater treatment system consisting of sludge storage tanks, primary and secondary clarifiers, two bioreactors, and a phosphorous removal system;



- (f) Macey Bay seeks to redevelop the Property into a three-season trailer park, operating from May 1 to October 31, that will contain approximately 180 park model trailer units, one 2-bedroom rental cottage and one 3-bedroom rental cottage, a pool, a playground and docking facility, a community centre, and a maintenance building (“**Proposed Development**”).
- (g) Macey Bay requires a sanitary sewage collection, treatment and disposal works to service the Proposed Development (“**Sewage Works**”).
- (h) The proposed Sewage Works have the potential to contaminate nearby wetlands and watercourses, including but not limited to Severn Sound, Tobies Bay Wetlands and Georgian Bay.
- (i) The proposed Sewage Works have the potential to release phosphorous and unionized nitrogen, amongst other contaminants, into nearby watercourses.

#### **Decision of the Ontario Municipal Board**

- (j) From January 25, 2017 to February 8, 2017, the Ontario Municipal Board (“**OMB**”) held a hearing to determine, amongst other things, whether the local zoning bylaw and the local Official Plan should be amended to allow for the Proposed Development (“**Hearing**”).
- (k) Several interested individuals and groups participated in the Hearing to express concern about the environmental impacts of the Proposed Development and the Sewage Works on the nearby wetlands. The Applicant was a participant in these proceedings.
- (l) On March 16, 2017, the OMB rendered its decision approving amendments to the local zoning bylaw and the local Official Plan to allow for the Proposed Development (“**OMB Decision**”).
- (m) Specifically, the OMB Decision modified the zoning bylaw and the Official Plan to apply site specific zoning to the Property to allow for the Proposed Development.

- (h) An order directing that any proposal to grant the ECA must be posted on the Environmental Registry for the statutorily required period of public comment and review under the *Environmental Bill of Rights, 1993*;
- (i) Costs of this Application on a substantial indemnity basis;
- (j) Such further and other relief as counsel may advise and this Honourable Court may permit

2. The grounds for the application are:


- (a) The Applicant, the Eastern Georgian Bay Protective Society (“Applicant”), is a not-for-profit environmental interest organization that advocates for the environmental conservation of the shores and islands of Eastern Georgian Bay.
- (b) The Respondent, the Minister of the Environment, Conservation and Parks (“Minister”), is responsible for administering the *Environmental Protection Act*, RSO 1990, c E.19 and is subject to the obligations set out in the *Environmental Bill of Rights, 1993*, SO 1993, c 28.
- (c) The Respondent, Macey Bay Developments Corp. (“Macey Bay”), is a corporation incorporated pursuant to the laws of Ontario, having its head office in Toronto, Ontario. At all material times, Macey Bay has been in the business of land and property development.
- (d) Macey Bay is the owner of the property known municipally as 380 Macey Bay Road, in the Township of Georgian Bay, District of Muskoka (“Property”).
- (e) The Property currently consists of a three model homes, a large “clubhouse structure, two park model trailer units, a storage building, a pool building, a construction trailer, three derelict structures, a boat launch, and a dock.

## APPLICATION

1. The applicant makes application for:
  - (a) Leave for this application to be heard on an urgent basis before a single judge of the Divisional Court sitting as a judge of the Superior Court of Justice;
  - (b) If necessary, an order abridging the time for service of this application;
  - (c) A declaration that the Minister of the Environment, Conservation and Parks' ("Minister") failure to comply with section 22 of the *Environmental Bill of Rights* ("EBR") in respect of the issuance of an Environmental Compliance Approval ("ECA") was unreasonable, incorrect, procedurally unfair, and therefore unlawful;
  - (d) A declaration that the Minister's decision to invoke section 32(1)(a) of the EBR to avoid public consultation for the issuance of an ECA was unreasonable, incorrect, procedurally unfair, and therefore unlawful;
  - (e) A declaration that the Minister's decision not to post notice of its decision to implement an ECA to the Environmental Registry as required by section 36 of the EBR was unreasonable, incorrect, procedurally unfair, and therefore unlawful;
  - (f) A declaration that the Minister has fundamentally failed to comply with the notice and consultation requirements under Part II of the *Environmental Bill of Rights, 1993* by failing to post a proposal to grant the ECA on the Environmental Registry for public notice and consultation;
  - (g) An order in the nature of *certiorari* quashing the Minister's decision to issue the ECA for being unreasonable, incorrect, procedurally unfair, unlawful and *ultra vires* the purposes of the *Environmental Bill of Rights, 1993*,

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: May 27, 2019

Issued by   
Local registrar

Address of 80 Dundas Street West, London,  
court office Ontario N6A 6A3.

- TO: MINISTER OF THE ENVIRONMENT, CONSERVATION AND PARKS  
Ministry of Environment, Conservation and Parks  
Minister's Office  
Ferguson Block, 11<sup>th</sup> Floor  
77 Wellesley Street West  
Toronto, Ontario  
M7A 2T5
- AND TO: MACEY BAY DEVELOPMENTS CORP.  
145 Adelaide Street West, No. 500  
Toronto, Ontario  
M5H 4E5
- AND TO: ATTORNEY GENERAL OF ONTARIO  
Crown Law Office- Civil  
8<sup>th</sup> Floor, 720 Bay Street  
Toronto, Ontario  
M7A 2S9

Court File No.:

911/19



**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BE T W E E N :**

**EASTERN GEORGIAN BAY PROTECTIVE SOCIETY INC.**

**Applicant**

**- and -**

**MINISTER OF THE ENVIRONMENT, CONSERVATION, AND PARKS and  
MACEY BAY DEVELOPMENTS CORP.**

**Respondents**

**APPLICATION UNDER s. 6(2) of the *Judicial Review Procedure Act***

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.**

**THIS APPLICATION for Judicial Review will come on for a hearing before a single judge of the Divisional Court, sitting as a judge of the Superior Court of Justice on May 21, 2019 at 9:15 am at 80 Dundas Street, London, Ontario N6A 6A3.**

**IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.**

**IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.**