**BY E-MAIL**

March 24, 2013



Rick O'Connor
City of Ottawa
Legal Services Branch
110 Laurier Avenue West
Ottawa, ON K1P 1J1

Our Reference: 040144.0102

**Re: Legal Opinion regarding a request for hearing before the Environmental Review Tribunal in respect of the February 22, 2013, Ministry of the Environment Review of an Environmental Assessment for a New Landfill Footprint at the West Carleton Environmental Centre**

Dear Mr. O'Connor:

Your office has requested that we provide you with a legal opinion following the February 22, 2013, Ministry of the Environment Review of the Environmental Assessment for a New Landfill Footprint at the West Carleton Environmental Centre [the "Review"] which had been prepared pursuant to section 7(1) of the *Environmental Assessment Act*, R.S.O. 1990, ch. E.18.

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More particularly, you have requested that we provide our opinion on the following specific topics in light of the Review:

1. What steps are required to be taken by the City to have its concerns with respect to the Review brought to a hearing before the Environmental Review Tribunal [the "ERT"] should it choose to do so?;

2. In which time frames must the City take the steps required for a hearing before the ERT?;

3. What are the City's probabilities of success on a hearing before the ERT?;

4. What are the reasonably foreseeable financial risks for the City should it proceed before the ERT?; and,

5. Assuming the City does not file a request for hearing with the Ministry but another group does, what ability does the City have to join in the proceedings as either a participant or a party?

Our brief answers to these questions may be found in the Conclusion section of this opinion, on pages 10 and following.

For the purposes of this legal opinion, we have reviewed the February 22, 2013, Ministry of the Environment Review of the Environmental Assessment for a New Landfill Footprint at the West Carleton Environmental Centre, City Council Minutes 43 dated October 24, 2012; City of Ottawa Information Technology Sub-Committee recommendations regarding a New Landfill Footprint at the West Carleton Environmental Centre; City of Ottawa Report to the Planning and Environment Committee and Council dated August 16, 2010; the Conestoga-Rovers & Associates Report delivered to Meagan Wheeler Cuddihy dated October 1, 2012; the Staff Comments on Final Environmental Assessment of a New Landfill Footprint at the West Carleton Environmental Centre – Waste Management Corporation – October 2012; the *Environmental Assessment Act*, R.S.O. 1990, ch. E.18; the ERT Guide to Hearings under the *Environmental Assessment Act*; the Rules of Practice and Practice Directions of the Environmental Review Tribunal (July 9, 2010); selected excerpts from the ERT Annual Report 2011-2012, and the relevant published decisions relating to the broad issues of consultation in environmental assessments.

**FACTS**

On April 13, 2010, Waste Management Canada Corporation ["WM"] initiated an Environmental Assessment process ["EA"] for the expansion of their existing Ottawa Waste Management Facility commonly known as the Carp Landfill. WM proposed to include a new landfill footprint at the West Carleton Environmental Center as well as recycling and composting facilities.

WM completed the first step in the application for approval on June 18, 2010, with the submission of its Terms of Reference document ["ToR"], which provided the framework for what would be included in WM's EA. The City provided a number of comments and suggestions with respect to the ToR. The majority of the City's comments were accepted by WM and it made changes to its ToR in order to take into account the City's comments which it had accepted. Some of the City's comments as communicated to WM did not receive the same treatment and did not result in substantive changes to WM's proposed approach.

WM then received the Ministry of Environment's ["MOE"] approval to proceed with the EA on November 25, 2010. This approval followed the MOE's initial review of the ToR and amendments thereto to take into account MOE comments.

The EA was initiated in January 2011 and WM submitted the final EA to the MOE on September 14, 2012. Over the five week consultation period which followed, the City submitted numerous comments and concerns regarding the EA, namely, issues of odour control at the site, property value protection for the surrounding areas, the service area, site plan control approval, traffic, reporting, site capacity and expansion. In addition, the City proposed a process for future project amendments as well as for the establishment of a public liaison committee. WM replied to some of the City's concerns and submitted an Amended EA on January 21, 2013.

The MOE proceeded to its review of the EA, as required by the *Environmental Assessment Act* [the "*Act*"], in order to conclude whether or not the EA has been prepared in accordance with the approved ToR, met the requirements of the *Act* and whether it contained sufficient information to allow the Minister to make a decision about the proposed undertaking. In doing so, the MOE provided an overview of the different comments received during the consultation processes and identified some key issues, which were mostly constituted of comments and concerns from the City and members of the public. These key issues included: Groundwater protection; Odour concerns Site; Capacity and Waste Diversion; the establishment of a Public Liaison Committee; the establishment of a Property Value Protection Plan, as well as Traffic and Service Area concerns. Following its review, the MOE concluded that WM had provided adequate and satisfactory responses to all key issues and concluded that the EA submitted by WM was prepared in accordance with the ToR and contained sufficient information to assess the potential environmental effects of the proposed undertaking.

Being of the view that some of the environmental issues the City submitted relating to the EA were not properly addressed by WM and therefore are still outstanding following the MOE review, the City is considering asking for a reconsideration of these issues and concerns, perhaps by way of a hearing before the ERT.

**DISCUSSION**

***Process***

The EA process is but one of the first steps to be completed in the far longer process to have the proposed undertaking approved for operation. Without being exhaustive, other steps including Certificate of Approval, zoning compliance, bylaw compliance, site plan developments etc. must all be completed before the suggested undertaking can commence operation. These other subsequent steps lead to decisions with respect to the approval of the many and varied aspects of the proposed undertaking. The decision makers with respect to those subsequent steps include the MOE but also include the City. It follows that a positive Review from the MOE in the initial EA process is not determinative of the end result with respect to the proposed undertaking, and is similarly not determinative of the manner in which the proposed undertaking will ultimately be operated from environmental and other standpoints.

Pursuant to the *Act*, a five (5) week review and comment period takes place after the delivery of the Review. In this case, the review and comment period expires on Friday, March 29, 2013, a statutory holiday. The review and comment period allows all interested persons to submit comments to the Ministry about the proposed undertaking, the amended EA or the MOE Review. Pursuant to section 7.2(3) of the *Act*, any person may during this period request that the Minister refer the proponent's application or a matter that relates to it to the ERT for a hearing and decision. It is therefore possible for any person, including but not limited to the City, to request that either all or part of the Amended EA be referred to the ERT for a hearing if they believe that their significant concerns have not been addressed through the process to that point or in the Review.

The hearing request must be made in writing to the MOE and not directly to the ERT. The hearing request should include the following:

- requester's name, address and phone number;
- the requester's involvement in the EA process;
- any attempts made by the requester to resolve issues with the proponent;
- details and supporting rationale about the significant outstanding environmental reasons for a hearing;
- detail about which part of the EA is specifically being referred; and
- a single submission clearly indicating that the submitter is making the request.

When submitting a hearing request, requesters must identify their status at the proposed hearing and whether they want to be represented at the hearing. A requester may therefore be a party or a participant (a person who has an interest in the subject matter of the hearing without raising any individual grounds may be named as a participant). The hearing request should also set out whether expert evidence or legal representation will be required at the hearing.

***Ministerial Discretion to Refer***

Filing a request for hearing before the ERT does not mean that such a hearing will be granted for the purposes of a hearing of the matters raised in the submission to the MOE or in the request for hearing. The decision to refer the matter to the ERT rests with the Minister who has absolute discretion on whether or not to refer matters to the ERT or to another entity for a decision. Indeed, section 9.3(2) of the *Act* specifies that when a hearing request is made pursuant to 7.2(3) *Act*, the Minister may – but is not required to -

refer the application or part of the application to the ERT, unless, in his absolute discretion, the Minister considers that:

- the request is frivolous of vexatious;

- the hearing is unnecessary; or

- the hearing may cause undue delay in determining the application.

Although the Minister's discretion is absolute with respect to the request for a hearing before the ERT based on expert and other evidence suggested to be presented to the ERT for its appreciation, the Minister's discretion includes the consideration of broad factors which inform the determination of whether the request is frivolous, vexatious, unnecessary or would cause undue delay in determining the application. These broad factors include but are not limited to whether:

- the request is an attempt to litigate issues that have already been decided outside of the EA process;

- the request has merit and substance in relation to outstanding issues;

- the request brings up issues that have already been dealt with in the EA – unless there is a material change in the circumstances;

- the request is being pursued to delay the implementation of the undertaking;

- the request identifies an issue that the Minister would like to be explored further before a decision is made; and,

- the hearing would be a wise use of the ERT's resources as well as those of any interested persons and the proponent's resources.

A number of additional factors may be considered by the Minister in order to determine whether to refer the request for a hearing to the ERT. These factors and considerations may include:

- whether the proponent consulted adequately with interested persons throughout the EA process and whether the consultation was properly documented and whether there were sufficient opportunities for participation;

- whether the requester participated in the planning process when opportunities to do so were available;

- whether all other avenues to resolve the issue, such as self-directed mediation been exhausted;

- whether the issues raised in the request for hearing are substantive in nature, clearly defined and not addressed in the EA;

- whether there are other significant outstanding issues identified in the Review;

- whether the public interest would be served if the issues were sent to the ERT for a hearing;

- whether public health and safety would be advanced by the matter being referred to the ERT for a hearing;

- whether any funding has been approved for the undertaking with time limits;

- whether there is any urgency to the timing of the approval of the undertaking;

- whether the issues raised are issue to which the *Act* applies or whether there are other legislation and/or processes for dealing with the issues raised;

- whether the issues have already been considered in the context of other legislation and processes such as the *Planning Act*;

- whether the ERT is the appropriate forum to resolve the issues at this early stage of the overall process; and,

- whether the ERT has jurisdiction to deal with the issues raised in the request for hearing.

The Minister will consider whether all other available avenues to resolve the outstanding issues have been exhausted. This principle of "exhaustion", well known in administrative law and the law of judicial review, is significant and its application by the Minister in the exercise of his discretion suggests strongly that a hearing at the ERT should be considered as and is a last resort to be employed only after all other possibilities to resolve the issues, whether through consultation, mediation or otherwise, have been exhausted and only where the outstanding issues can be considered as significant outstanding environmental issues.

***Environmental Review Tribunal's Powers***

In the event the Minister decides to refer all or part of the request for hearing to the ERT as per section 9.2 of the *Act*, a hearing will be scheduled and held pursuant to the

applicable sections of the *Rules of Practice and Practice Directions* of the ERT as well as pursuant to part III of the *Act.*

Referral to the ERT, however, does not necessarily mean that a hearing with evidence and argument will be scheduled. The Minister may in his discretion, pursuant to section 8 of the *Act*, ask the ERT to mediate the matter instead of holding a hearing. Moreover, the Minister may also, pursuant to section 9.2(2) of the *Act* impose conditions or give directions on the referral as he considers appropriate and may amend the referral to the ERT from time to time.

The ERT may make any decision the Minister is permitted to make under the *Act* pursuant to section 9.1 and 9.2 of the *Act*; it may approve the undertaking, reject it or approve it with conditions or it may make a decision on the matters referred to it by the Minister, as per section 9.2(5) of the *Act*. The ERT decision must be consistent with the approved ToR and the EA and the following factors and documents must be considered by the ERT, along with any directions given or conditions imposed by the Minister:

- the purpose of the *Act*, which is to provide protection, conservation and wise management of the environment;

- the approved terms of reference for the EA;

- the EA;

- the Ministry review of the EA;

- the comments submitted during the review period;

- if a mediator's report has been given to the Minister, any public portion of the report; and

- any decision that the Minister proposes to make on matters not referred.

Pursuant to section 42 of the *Rules of Practice and Practice Directions* of the ERT, the claimant must provide the ERT with all of the above mentioned items in the event the matter if referred to it by the Minister.

***The Minister's review of the ERT's decision***

Pursuant to sections 11.2 and 23.1 of the *Act*, ERT decisions are considered final and can only be reviewed by the Minister, who can choose to review the decision or, with the approval of Cabinet, make an order varying the decision or substituting his own decision for that of the ERT. The Minister may also, pursuant to the section 11.2(2) of the *Act*, request that a new hearing be held for reconsideration of a decision from the ERT.

***Practical Considerations and Hurdles***

The City is considering a request for hearing to the ERT of some environmental concerns it submitted with regards to the EA prepared by WM for the implementation of a new landfill footprint in the West Carleton area. It is the City's view at this time that some of its concerns are still outstanding following the Ministry review of WM's EA.

Pursuant to the *Act* and as described above, it is possible for the City to submit a hearing request to the Minister, demanding that all or part of these outstanding environmental issues be reconsidered by the ERT. There is no guarantee or, in our view, no reasonable expectation that the matter will be referred to the ERT for a hearing on the merits of the issues in light of the strong policy component involved in the EA process and the fact that the EA process is but one of the first steps in the process potentially leading to the final implementation of the proponent's plan. Moreover, if a Review addresses all significant concerns but recommends that stakeholders work together to attempt to resolve the outstanding issues, it would be the Minister's policy to not refer the matter to a hearing before the ERT unless and until the parties have exhausted all means of working together to resolve the issues within the parameters accepted by the MOE in the Review.

We note parenthetically that our review of the ERT Annual Reports published for the last several years indicates that there have been no hearings on the merits referred to the ERT following Reviews and the consultative process set out in the *Act*. The absence of referrals to the ERT is not determinative in that there may be many reasons for which matters were not referred by the Minister to the ERT pursuant to the *Act*. However, the absence of ERT hearings on the merits after a Review suggests that every and all other means, including the consideration of subsequent steps in the overall approval process loom large and generally argue against a referral to the ERT. This is particularly so if the MOE Review is favourable to the proponent and finds that sufficient consultation and due regard for views and comments expressed throughout the consultation and comment stages have been properly responded to by the proponent.

The City's request will be required to set out with particularity which issues it seeks to have argued before the ERT following the Review and the post-Review consultation period. The City's request would also have to set out with particularity whether it intends to lead expert evidence which either had not been considered elsewhere in the process leading up to and including the Review.

In the event that the City sets out its intent to lead expert evidence, then the City will be required to: identify those issues for which experts will be retained; commission expert reports; have those experts review the reply expert reports very likely to be delivered by the Respondents at the hearing; deliver rebuttal reports; prepare the experts for testimony etc… in the same manner as it would during a trial before the Courts. Although we can only speculate as to the time and costs involved in such a process given the early stage of

the process, experience suggests that one or several experts would be required for the purposes of presenting opinion evidence on each issue raised and that the costs for such expert opinions and reports could very easily reach into several tens of thousands of dollars per expert, per issue. Assuming only one issue is ultimately referred to the ERT for hearing on the merits with full expert evidence, the City could reasonably forecast expert costs ranging from $ 50,000 to $ 200,000 per expert, depending on the nature of the mandate given to the expert and the scope of the mandate offered. Such costs, multiplied by the number of issues sought to be referred, could lead to out-of-pocket expert costs easily reaching into the $ 300,000 to $ 500,000 range, without reasonable expectations that the evidence would cause the ERT to reconsider the content of the Review and issue a different Review with different content.

The fact that the Review addresses and comments fairly on the City's concerns and suggestions raises another difficulty with the City's position on a potential hearing on the merits before the ERT: the City would be without the support of the MOE on the hearing and would be arguing against the MOE. Adversity of interests is usual and ought not to be considered as a stand-alone reason to not make a request for a hearing. However, the adversity of interest and the content of the Review, more particularly its fair treatment of the City's comments in response to the EA and WM's acceptance of the majority of the City's suggestions, suggest that the City would have to overcome not only its own evidentiary and policy burdens before the ERT, but would also have to demonstrate in a convincing manner that the MOE's Review contained significant errors or an absence of consideration of legitimate and significant concerns in light of the purposes of the Review completed to date. This additional burden could prove very difficult to overcome particularly given the even-handedness of the MOE's comments as set out in the Review itself.

The purpose of the Review, "*is to document the Ministry's findings about whether or not the EA has been prepared in accordance with the approved ToR and therefore meets the requirements of the EAA and whether the evaluation in the EA is sufficient to allow the Minister to make a decision about the proposed undertaking*".

The Review's objectives are therefore relatively modest and the threshold for satisfying those objectives appears relatively low, always keeping in mind that all other legislative approvals required for the undertaking remain to be obtained by WM. A hearing to argue the Review's findings and the sufficiency of the EA would therefore require that the City demonstrate conclusively that the EA either was not prepared in accordance with the ToR, does not allow the Minister to make a decision about the proposed undertaking from an environmental perspective, did not take into account significant considerations or that there was a material change in circumstances, and that the proponent and the City have exhausted all means of attempting to resolve the issues.

The Review itself, as stated above, treated the City's comments in a fair and even-handed manner following consultation by WM with the City as an interested stakeholder

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**Specific Issues for a Potential Hearing**

We understand that there are six (6) main issues which may serve as a basis for a request for hearing: site capacity and waste diversion, the service area, odour, property value protection, groundwater impacts and traffic issues. We will deal with each below.

**a) Site Capacity and Waste Diversion**

Site capacity and waste diversion were identified as top priorities in the Review. The City was consulted by WM, as was the public, and differing views as to what measures needed to be implemented were submitted as part of the EA. The Review notes that although the Ministry recommends waste diversion targets of 60% for the generators of waste, such Ministry recomendation is not a regulatory requirement. After considering the differing views, the statistical analyses submitted as part of the EA, and the concerns expressed by the City and the public, the Review found that WM's responses to the concerns and the proposed site capacity were not unreasonable.

Although the Review does not hold that the EA is "reasonable" with respect to site capacity and waste diversion, a finding that the EA is "not unreasonable" is consistent with a finding of reasonableness. The standard for assessing the sufficiency of the EA is not that the proposal be reasonable, but rather than the purposes of the *Act* are met and that the interested stakeholders have been meaningfully consulted. The Review and the EA achieved these purposes. Given that the waste diversion is not a regulatory requirement, and that site capacity is dealt with, from the Ministry's perspective, in an acceptable manner in the EA, it is our view that the Ministry would likely find that a hearing on this issue is not necessary at this time as it may be appropriately addressed at a later stage or in a different approval process (*Planning Act* evaluations and approvals).

**b) Service Area**

The Service Area is a potentially contentious issue as the EA posits that the proposed undertaking could potentially receive 10% to 25% of its waste from any other site in Ontario. An Ontario-wide service area, in any event, was stated as being consistent with the service area permitted for the former Carp Road Landfill which the proponent used to operate until 2011. Serious concerns were raised in this regard by the City and by members of the public. The Review found that there was no reason to limit the requested service area should the undertaking be approved.

As the matter of the service area was meaningfully consulted upon and that the EA communicated the differing views of the stakeholders to the MOE, it is unlikely in our view that the Minister would refer a question related to this issue to the ERT should a request for a hearing be made: the Review sets out the precedent regarding the service

area and reflects a broad based consultation with respect to the same. It is likely in our view that the Minister would consider a hearing on this issue unnecessary at this time, particularly in light of the precedent for the service area and the other safeguards represented by the other approval processes which WM faces.

**c) Odour**

Odour concerns as raised by the City are to be dealt with as part of the Ministry's abatement process, if applicable, and not through the EA process. Moreover, the Review recommends that the City and WM work together in resolving the odour enforcement mechanisms. In this regard, a hearing on the odour concerns would likely be found to be unnecessary as the process to be followed to deal with the issue is addressed elsewhere in the overall process toward the undertaking's operations and, unless discussions between the City and WM have occurred and been exhausted before March 29, 2013, remains open for self-directed mediation.

**d) Property Value Protection**

The Property Value Protection Plan is another issue where the Review finds that the EA was acceptable. The Review recommends that the City and WM continue to work together to try to resolve the issue. The Review holds, however, that "*should this proposed undertaking be approved, a condition of approval may be recommended to address the issue*". Considering that remedial measures and/or more exacting standards applicable to later stages of the undertaking's development are already raised as possiblities going forward, it is likely in our view that the Minister would find that a hearing before the ERT on this issue is unnecessary at this time.

**e) Groundwater Impacts**

Groundwater impacts are addressed by the Environmental Compliance Approvals under the *Environmental Proctection Act*. The City and members of the public engaged in consultation with WM and had differing views, particularly in light of the proposed site being on fractured limestone which is classified as highly vulnerable to groundwater contamination and that the surrounding lands utilize well water for drinking water. WM made committments to on-site and off-site groundwater monitoring in order to address the groundwater concerns. The Review sets out that the MOE has no outstanding concerns with respect to how the EA addresses groundwater impacts and is satisfied with the proposed plan to manage the impacts if any.

The Review notes that subsequent approval processes under the *Environmental Protection Act* will likely lead to a requirement for WM to provide annual reports on groundwater impacts to the Ministry to ensure that any impacts are addressed. Considering the foregoing, and the fact that subsequent approval processes provide for assurances as to WM's compliance with its undertakings regarding groundwater impacts,

it is our view the Minister would not refer the groundwater impact issue to the ERT due to its appropriate treatment under other legislation further within the approval process for the undertaking to commence operations.

**f) Traffic Issues**

The traffic issues raised in the Review may also be appropriately addressed at later stages and in different approval processes (i.e., *Planning Act* evaluations and approvals) in connection with the proposed undertaking. It follows that it is likely that the Minister would not refer the matter of traffic issues for a hearing at the ERT because the issues are to be dealt with through other legislatively defined processes.

**CONCLUSIONS**

In summary, therefore, our conclusions with respect to the four (4) questions asked are as follows:

**1. What steps are required to be taken by the City to have its concerns with respect to the Review brought to a hearing before the Environmental Review Tribunal [the "ERT"]?**

The City must make a request for hearing before the ERT, in writing, addressed to the Minister. The request must set out:

- requester's name, address and phone number;
- the requester's involvement in the EA process;
- any attempts made by the requester to resolve issues with the proponent;
- details and supporting rationale about the significant outstanding environmental reasons for a hearing;
- detail about which part of the EA is specifically being referred; and
- a single submission clearly indicating that the submitter is making the request.

The City will also have to set out whether it intends to present expert opinion evidence and other evidence to establish that the Review is not in accordance with the *Act*.

**2. In which time frames must the City take the steps required for a hearing before the ERT?**

The City would be required to deliver its request for hearing within five (5) weeks of the date of the Review. As the review was issued on February 22, 2013, the five (5) week period ends on March 29th 2013, which is Good Friday and is considered a holiday under Ontario law. Pursuant to section 89(1) of the *Legislation Act, 2006*, the time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday, which would be Saturday, March 30th, as Saturday is not considered a holiday.

Subsection 89(2) of the *Legislation Act, 2006*, however, provides that time limits for registering or filing documents or for doing anything else that expire on a day when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business. As a result, March 30, may perhaps not be considered as a date on which the City could file a request for hearing as the Ministry's offices, to our knowledge, are not open during its regular hours of business on Saturdays and would likely not be open to the public over Easter weekend. Assuming we are correct, then the next day that is not a holiday at law would be Tuesday, April 2, 2013 and the request for hearing would have to be filed by or on that date.

For practical purposes, however, the request for a hearing before the ERT would out of an abundance of caution have to be filed by 4:00 pm on Thursday, March 28, 2013 if a request for hearing is to be made.

**3. What are the City's probabilities of success on a hearing before the ERT?**

As indicated above, our view at this time is that the City's probabilities of success in obtaining a referral by the Minister to the ERT are quite low. Considering the objectives of the Review and of the *Act*, the content of the Review as well as the availability of remedial action later in the approval process (i.e, Certificate of Approval, *Planning Act* etc...) it is our view that the ERT, if it would hear the matter, would very likely find against the City and uphold the Review as it currently reads.

**4. What are the reasonably foreseeable financial risks for the City should it proceed before the ERT?**

The City's reasonably foreseeable financial risks arise in the context of an actual hearing before the ERT and not in simply filing a request for a hearing before the ERT. The filing of the request for hearing carries no apparent or suggested financial risks for the City other than its own costs in preparing and filing the materials with the Minister.

Should the hearing be granted, however, the City would likely incur very significant expert costs, on a per issue basis, and, if unsuccessful, runs the real risk of being ordered to pay the Responding party's costs of the hearing. Assuming that the City's costs for legal counsel and experts could reasonably run into the several hundreds of thousands of dollars, it would be appropriate to consider that the City, if ordered to pay costs, could be ordered to pay the other parties' costs. The ERT's rules as to costs, however, set out that

costs are discretionary to the ERT. A fair estimate would be that costs equivalent to 40% to 60% of the City's actual costs could be ordered payable by the City in the event that a hearing is granted and the City is unsuccessful.

**5. Assuming the City does not file a request for hearing with the Ministry but another group does, what ability does the City have to join in the proceedings as either a participant or a party?**

Rules 62 to 68 of the *Rules of Practice and Practice Directions of the Environmental Review Tribunal* provide for the ability, rights and prohibitions for persons who are parties, seek to become parties, or seek to become participants in a hearing referred to the ERT pursuant to the *Act*. The operative sections of the *Act* do not require that the City be made a party to any hearing before the ERT unless some legislation designates the City as a party as a matter of law. The Minister, however may designate the City as a party in the event that another person makes a request for hearing and a hearing is held pursuant thereto.

Assuming the City is not a named party by the Minister and is not the initiating person with respect to a hearing before the ERT, then the City could request party status in the proceeding or part of it, and the ERT would then be at liberty to impose conditions as are appropriate for the representations to be made at the hearing, the whole pursuant to ERT Rule 62(c). Participant status may also be granted by the ERT, but the ERT Rules do not provide for a clear mechanism or process pursuant to which the City could apply for participant status.

For the reasons set out above, however, we do not recommend that the City engage in seeking party status in another person's proceeding should one be commenced.

We remain available should you have any questions or comments on the above or to assist you with respect to any further request you may have concerning this matter.

Yours very truly,

Heenan Blaikie LLP

Benoit M. Duchesne
Member of the Quebec and Ontario Bars

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