

Date: 20071204

Docket: T-452-06

Citation: 2007 FC 1267

Ottawa (Ontario), December 4, 2007

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**LES AMIS DE LA RIVIÈRE KIPAWA,
incorporated as 1162209036 QUEBEC INC.**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA and
THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA,
THE MINISTER OF FISHERIES AND OCEANS, THE MINISTER OF TRANSPORT and
DAVID S. LAFLAMME CONSTRUCTION INC.**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of the Canadian Environmental Assessment (the Decision), of the Laniel Dam Rehabilitation (the Project), rendered jointly on February 9, 2006, by the Ministers of Fisheries and Oceans Canada (FOC), Public Works and Government Services Canada (PWGSC) and Transport Canada (TC), pursuant to subsection 20(1) of the *Canadian Environmental Assessment Act* (the 'CEAA') S.C. 1992, c. 37 and the related decisions respectively rendered by TC pursuant to subsections 5(1) and 6(4) of the *Navigable Waters Protection Act* R.S.C. 1985, c. N-22 and by DOF under subsection 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

The Parties

[2] Standing is not an issue in this case.

[3] The parties agree that it is the alleged actions of PWGSC and TC that form the basis of this application for judicial review. As such, the authority or action of FOC is not engaged. For similar reasons and with agreement of all parties and the Court, Counsel for the respondent David S. Laflamme Construction Inc., the successful bidder to carryout the Project did not make written or oral representations when the matter was heard in Ottawa on October 23 and 24, 2007.

[4] The involvement of the other Respondents merits explanation. First, PWGSC is involved because it is the proponent of the project. A proponent is defined in section 2 of the *CEAA* to mean among other things, “the federal authority or government that proposes the project.” As the proponent, PWGSC would act as the federal environmental assessment (EA) coordinator for the project. PWGSC was also responsible for ensuring that there is safe navigation near the dam and that the proposed improvements to the portage trail, which is to serve as an alternative access option during the period of construction would meet the requirements of the *NWPA*. Finally, PWGSC was responsible for posting signage and security barriers restricting access to the dam.

[5] TC, the second Respondent implicated in this application became involved because of the possible impact of the project on the navigation in the river. Following the EA decision of February 9, 2006, TC granted approval the very next day, for the rehabilitation of the Laniel Dam, pursuant to paragraph 5(1)(a) of the *NWPA*.

[6] For its part, the Applicant, Les Amis de la Rivière Kipawa (“Les Amis”) is a registered not-for-profit organization founded on June 22, 1998, in response to the now dormant Hydro-Quebec Tabaret diversion project. Over the years, this volunteer-run organization has grown to be a stakeholder in the protection and promotion of the Kipawa River. According to Mr. Doug Skeggs, founding Vice-President and current member of the Executive, serving as Director of River Preservation, Les Amis has a double mission:

Its mission is to protect and promote the ecological and recreational values of the Kipawa River running from Laniel to Lake Temiscamingue. For Les Amis, protecting ecological values means the following: ensuring the aquatic ecosystem is protected, maintained or enhanced; and protecting fish habitat in the river and in Lake Temiscamingue around the mouth of the river. For Les Amis, protecting recreational values means the following: promoting the area’s rich history and natural heritage; recognizing the river’s recreational use; and protecting and promoting the future tourism and recreation potential of the river and the region.

[7] The Applicant hereby challenges the EA decision of February 9, 2006 because it alleges that the respondents did not take into consideration the public right of navigation through the dam. It is argued that the extinguishment of this common law navigation right should have been found to be a significant adverse environmental effect under subsection 20(1) of the *CEAA*.

II. Facts

A Brief History of the Kipawa River and the Laniel Dam

[8] The Kipawa River is recognized as one of North America's top white-water rivers. The Kipawa River, which concerns this judicial review application, runs from the village of Laniel, Quebec, on Lake Kipawa to the mouth of the river on Lake Temiscamingue. The Kipawa River is 16 km long. It has approximately 16 rapids and the running of the river is done in about 5 hours beginning through the dam's spillway (which is done in 2 minutes) to the Lake Temiscamingue.

[9] In 1910, through Public Works, the Government of Canada began construction on a flood control dam at the mouth of the Kipawa River in the village of Laniel, Quebec, in the Municipalité régionale du Canton (MRC) of Temiscamingue. Completed in 1911, the Laniel Dam is located on federal lands, between an abandoned Canadian Pacific (CP) rail line and the Highway 101 Bridge on Lake Kipawa.

[10] The purpose of the Laniel Dam was two fold: to regulate the level of water of the Outaouais river system in order to ease navigation and energy protection, and to prevent flooding of the forested region along the Kipawa River and the village of Laniel, which over the years has been transformed into a vacation village whose economy relies essentially on recreational-tourism. In 2001, there were 730 cottages, 712 hunting campsites and 30 purveyances. Based on the 2001 Census, there were 85 year-round inhabitants living along the river and in the municipality of Laniel. This number increased to 150 inhabitants based on the 2006 Canada Census.

[11] The Dam has a concrete evacuator or sluice (see Glossary attached hereto as Appendix “A”) that is about 14 metres long, as well as a fill dyke embankment approximately 42,7 meters long and which is made of wood caissons filled with encroachments. The evacuator has two dewatering outlets, each approximately 6.1 meters long, separated by a pillar. These two dewatering outlets are mechanically activated through beams from top to bottom following a directive from the dam operator. This evacuator was originally conceived in 1910 to hold three dewatering outlets. However, due to technological limitations at the time of construction and problems with the rock, the third outlet could not be built.

[12] In 1918, the Government of Canada granted operation of the Laniel Dam to the Government of Quebec in an emphyteusis lease (see Glossary). In turn the Quebec Government lent its rights to the pulp and paper industry until 1965, then to Hydro Quebec from 1965 to 1986. Following a retrocession of the lease, PWSGC assumed control of the Laniel Dam in 1986.

[13] Between 1855 and the mid 1960s, the Kipawa River was used by the logging industry for log drives. In 1968, the first kayakers ventured down the Kipawa River. This handful of kayakers returned each year, learning the River, identifying and naming each of the rapids and classifying each according to the International classification standard used to establish the level of difficulty of rapids on a river.

[14] It was as a result of the work of these pioneers that the white water industry began to use the Kipawa River in 1987 for modern commercial and recreational navigation, including rafting and kayaking. Since 1988, Mr. Jim Coffey of Esprit Rafting (Davidson, Quebec) has been running the Kipawa River and offering commercial rafting trips in conjunction with the Kipawa River Rally (the Festival), which draws more than 150 kayakers and rafters each year from Quebec, Ontario and the United States, to run the pristine white waters of the Kipawa River during the St. Jean Baptiste holiday, the third weekend in June. The Rally has become an annual pilgrimage not only because of the exceptional recreational features of the lower section of the Kipawa River but also because of the beauty of this forested valley, through which the Kipawa River makes its bed.

[15] The parties agree that the Laniel Dam is a very unique situation. In terms of size, width and height, it is the only water control structure or dam in the Province of Quebec that kayakers and rafters have been navigating through. In the past, the kayakers and rafters have also navigated through a dam at Kneopfli Falls, on the Magnetawan River, in Ontario. This activity of kayaking over the dam is similar to what Les Amis' members do at the Laniel Dam, in that they start in a pool of water before the dam, then navigate through the dam and continue downstream. However, the dam at Kneopfli Falls in Ontario is only 2 meters high whereas, the Laniel Dam is 10 meters or 8 meters higher. The thrill of riding the Laniel Dam is second to none the Applicant's members affirm.

[16] When it resumed control of the operation of the Laniel Dam in 1986, PWGSC undertook a series of inspections and geological studies of the dam including the following:

- Visual inspection and underwater inspection conducted in 1987, by Tecsalt, who would be retained in October 2004 as the Engineering Consultant in charge of designing the project;
- Geo-technical analysis of the condition of the concrete, rock and embankment conducted by Solroc in 1987; and
- Underwater inspection conducted by SPG Hydro International in 2000.

[17] Based on the findings of these different studies, the sluice and the beam support system were no longer in good condition. The embankment dyke had important water leaks and the dam's evacuation capacity was clearly inadequate to protect the security of the people who live near the Kipawa River in Laniel, as well as in Temiscamingue.

[18] A massive concrete structure, such as the Laniel Dam has a normal life span of 80 years. PWGSC was aware as early as 2003 that the operation of the Laniel Dam was seriously compromised by the state of advance degradation of the concrete in the sluice, due to an alkali-silice reaction (see Glossary). In spite of the repair works that have been carried out to the Laniel Dam each year since 1987, experts judged the Laniel Dam to be in an advanced state of degradation. The construction of an entirely new structure was deemed inevitable in order not only to assure the long term safety of the Laniel Dam, but also to ensure the regulation of the level of water in the Outaouais river system and most importantly, prevent flooding of the inhabited regions served by both the Kipawa and Temiscamingue Lakes.

[19] In December 2003, PWGSC established a concept design for the new dam. This project concept design was to replace the existing dyke and 2-sluice spillway, with a 4-sluice concrete dam to accommodate as much as possible a 1:10,000 –year flood event as required by the Quebec Dam Safety regulation, even though PWGSC was not legally bound to meet the provincial standards.

[20] Because of the size and possible impact of the project, PWGSC determined that the project required a federal screening level assessment. As a result, in the Spring of 2004, PWGSC asked Jacques Whitford Ltd. (Whitford), its EA consultant, to provide an EA of the proposed project. Based on Whitford's preliminary recommendations dated September 15, 2004, Tecsalt completed a detailed project plan on June 15, 2005, which was incorporated into Whitford's final EA report. Among other things, the Tecsalt report concluded that in its opinion, the existing Laniel Dam was not designed for the safe passage of vessels, and that the passage in the sluices of vessels, such as kayaks is a dangerous extreme sport.

Public Consultations

[21] As early as May 2004, PWGSC had concluded that it would be necessary to carry out targeted stakeholder meetings, in order to assess the potential impacts of the demolition and construction work. This work would not affect the level of water and navigation on the Kipawa River. However, by February 2005 FOC indicated that there would be significant impact on the fish habitat, thus requiring an EA pursuant to subsection 35(1) of the *Fisheries Act*, L.R.C. 1985, c. F-14, which provides as follows:

Harmful alteration, etc., of fish habitat

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Détérioration de l'habitat du poisson, etc.

35. (1) Il est interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.

[22] PWGSC held public consultation meetings in Kipawa and Laniel on March 16, 2005 about the project to replace the spillway and embankment of the Laniel Dam. The purpose of these stakeholder meetings was to provide an overview of the Laniel Dam rehabilitation project and collect the participants' comments, thoughts, concerns and suggestions with respect to the environmental and technical aspects of the project.

[23] Participants at the March 16th meetings included First Nations representatives from the Eagle Village First Nation, of Kipawa and the Wolf Lake First Nation of Temiscamingue. In addition to this meeting with members of the Aboriginal communities, PWGSC held a public consultation meeting that same day with targeted interested groups. Participants in this stakeholder meeting included the following:

- Laniel municipal committee (6 representatives);
- ATV (all-terrain vehicle) Club (3 representatives);
- Les Amis de la Rivière Kipawa (1 representative);
- Owners of the properties adjacent to the dam (2 representatives); and
- Fédération québécoise de canoë kayak d'eau vive (FQCKEV) (2 representatives).

[24] All participants contributed to the meeting. Several concerns were raised. These concerns were all considered and resolved by PWGSC to the participants' satisfaction, except one of the concerns raised by Mr. Peter Karwacki, founding President and representative of Les Amis regarding trespassing the Laniel Dam. This concern is captured in an e-mail message to Mr. Goulet of the Whitford office, dated March 3, 2005, in which Peter Karwacki wrote:

Mr. Goulet,
Thanks once again for seeking the input of Les Amis de la Rivière Kipawa concerning the design and implementation of refurbishments to the Laniel water control dam.

Les Amis de la Rivière Kipawa wishes that the dam remain navigable by features of its design if this is at all feasible. This means that at least one of possibly two or three water control gates, and preferably the left most gate, be designed with water release from the top of the dam to enable kayaks, rafts, and canoes to pass from the lake, over the top of the dam and on down the river as has been enjoyed by recreational enthusiasts for the last twenty-five years.

I hope that this idea is being presented to you in a timely way given the process.

We recognize that some additional planning or negotiation of scope may be necessary. [. . .]

Les Amis de la Rivière Kipawa
Peter Karwacki
President

[25] At this public consultation meeting, Les Amis argued among other things that kayakers and rafters have passed through the sluice at the Laniel Dam for several years and that the Kipawa Rally has existed for almost 20 years. The representative questioned the basis of the project's proposed prohibition against boats, such as kayaks and rafters from going through the dam and wanted to know whether there was a law or regulation forbidding passage through the dam.

[26] PWGSC representatives clearly indicated that the passage through the spillway was not allowed due to safety concerns, explaining PWGSC's responsibilities as the owner of the dam. PWGSC also pointed out that permission had never been requested and was never issued to pass through the spillway. Furthermore, PWGSC would never grant permission for such activities, as it entails too high a risk of liability. However, as a mitigation measure, PWGSC indicated that the construction of a trail was a possibility to allow access downstream of the dam and that the flow of water into the Kipawa River would be maintained during construction, to the extent possible.

[27] PWGSC also asked the stakeholders what the impact on the economy and recreotourism would be if the kayakers could no longer pass through the spillway. In response to this, Les Amis indicated that the dam was but 1 of 16 rapids and that there are normally 320 kayakers each season. Moreover, letters from the regional governments indicated that the loss of navigation through the dam spillway would not be an important economic impact to the region's tourism industry.

[28] Whitford prepared a public consultation report in May 2005 as a summary of the public consultation meetings. This report outlined the concerns raised and the answers provided during the discussion. The draft of the public consultation report was circulated to the stakeholders in May and June 2005. An interim response was received on July 4, 2005 from Peter Karwacki requesting the specific statute and/or regulation that would prohibit white-water enthusiasts from running the dam at Laniel, and asserting that employees of PWGSC have been aware of the dam being run by white-water recreational enthusiasts.

[29] Mr. Skeggs provided a full response to PWGSC on July 14, 2005 indicating the impacts they perceived to Les Amis' activities. In October 2005, Ms. Turnbull, the PWGSC EA Project Manager for the Laniel dam rehabilitation project sent an excerpt of the analysis and mitigation measures section of the 'near-final' EA report to the stakeholders, including Les Amis, to present PWGSC's final responses to the concerns raised since the March 2005 public consultation.

[30] Final comments were requested in two weeks and no request for an extension was received from Les Amis. The comments and information received from the public and other stakeholders, including Les Amis were the subject of numerous discussions within PWGSC (operational requirements), and between PWGSC and TC (NWPA requirements), during the 11 months from the public consultation meeting in March 2005 and the final EA decision on February 9, 2006, when the three responsible authorities (PWGSC, TC and FOC) decided that they could exercise any power or perform any duty or function with respect to the project because, after having considered the screening report and the comments received from the public, they were of the opinion that the project was not likely to cause significant adverse environmental effects. The three authorities also concluded that in light of the proposed mitigation measures, the adverse impacts of the project would not be significant.

[31] Even though the authorities were unable to accommodate the request for passage through the spill because of the safety and liability concerns, PWGSC was able to act upon other concerns raised by kayakers and rafters. For instance, PWGSC shortened the originally proposed portage trail and by widening the proposed portage trail to allow vehicular access.

The exchange of communication between Les Amis and the Respondents

[32] Subsequent to the March meeting, Les Amis contacted TC requesting that the design of the new dam be such as to allow them to cross the dam. Indeed, Les Amis undertook a massive letter writing campaign to PWGSC, TC and FOC, sending over a hundred testimonials and e-mails, along with a DVD, documenting the Kipawa River Rally festival and kayakers navigating down the different rapids, through the sluice and over the Laniel Dam. So determined was Mr. Karwacki that in an e-mail dated August 23, 2005, he wrote:

“We don’t really need any more information about the project; we need the navigability of the dam at Laniel to be protected.”

[33] Moreover, on October 31, 2005, Mr. Karwacki made a written request to have access to consult the EA public Registry. On November 1, 2005, he was granted access to this EA public registry, which is a mandatory registry of all EA documents pursuant to section 55 of the *CEAA*. In addition, Mr. Karwacki also received a paper copy of the dam operations manual and Tecsalt's letter of opinion on the risk of navigating through the sluice.

[34] Indeed by early November 2005, Les Amis had received all the material upon which the EA mitigation measures, as well as PWGSC’s determination of potential liability, and the decision of significance of impacts on navigation were based. This material included the following:

- The public consultation report;
- The EA analysis and mitigation measures excerpt;

- Appendix F of the EA screening report, which included the comments from Les Amis; and Tecslut's letter of June 15, 2005, noting that the existing and proposed dams were not designed for safe passage of watercraft ; and
- Verbal information from PWGSC on a reported boating accident.

[35] After having consulted all the mandatory public registry documents, Mr. Karwacki then requested to view additional documents related to the file, including all documents related to PWGSC's determination of the risk of running the dam. However, PWGSC decided to limit communication with Mr. Karwacki and Les Amis after derogatory comments were posted on Les Amis' website and the harassing behavior by Mr. Karwacki toward the staff involved in the project. Communications were eventually limited to the respondents' solicitors when Les Amis threatened litigation.

Presence of security measures: boom and signage

[36] When the federal government took over the control of the Laniel Dam in 1986, there was a wood boom (see Glossary) that Hydro-Quebec had put in place upstream to the Dam, in order to warn boaters of the dam and to establish an upstream perimeter from the dam on the Kipawa Lake. This wood boom stayed in place until 1988, when PWGSC installed a boom with security floats. These security floats are still in place today and offer a clearly visible signal warning boaters on the Kipawa Lake that there is a Dam up ahead and that there is a security perimeter in place to prohibit access to the dam from Lake Kipawa.

[37] That is why when it became aware for the very first time at the March 16th 2005 meeting that this activity has been going on each year for almost two decades; with documented proof to bear, PWGSC sent a representative, Mr. Guy Lafond to observe and gather information regarding the activities through and around the Laniel Dam, at the time of the 2005 Kipawa River Rally.

[38] Mr. Lafond reported that indeed kayakers were ignoring the security perimeter and navigating through the dam and over the falls. His report recommended among other things that PWGSC ameliorate the security perimeter booms, repair the launching pad and post signage on and near the Laniel Dam, warning against swimming and navigating vessels beyond the perimeter and through the dam.

[39] Following Mr. Lafond's report of his visit, PWGSC improved the security measures at Laniel Dam. The Dam is now equipped with signs indicating to boaters and members of the public that swimming and navigation are forbidden near the dam. The parties agree that these signs were put in place only after Mr. Lafond's visit to the Rally in 2005, after PWGSC first became aware from the Applicant that its members have been navigating through the evacuators or spillways and over the dam, since 1987.

The awarding of the contract

[40] At the time of the public consultation meetings in March 2005, PWGSC planned to incorporate the public consultation results and to finalize the EA as soon as possible in 2005, as the construction contract was to be issued in the fall of 2005 and PWGSC wished to avoid potential re-tendering of the construction contract.

[41] However, these plans were frustrated by repeated delays. In June 2005, TC informed PWGSC that it too had to conduct its own EA. However, it would rely on the information obtained from PWGSC's public consultation meetings on March 16, 2005. In September 2005, Whitford, the EA Consultant provided a draft EA report for review and consideration by PWGSC, TC and FOC. TC did not confirm that it would be a responsible authority for the project until October 7, 2005. An excerpt of the EA referring in part to the analysis and the mitigation measures was sent to Les Amis in October 2005.

[42] In light of the delays and given the potential consequences of failure of the dam, PWGSC went ahead and made a public announcement by Press Release dated November 7, 2005, awarding the construction contract of the project as designed prior to the finalization of the EA process. This was done also to avoid having to delay the start of work on the project until after the fish spawning season in the Spring of 2006. The press release made it clear that the work will be carried out with a view to the environment and that consultation had occurred to meet the concerns of the interested parties.

[43] The contract was awarded to David S. Laflamme Construction Inc., in the amount of \$13,406,560. Since the EA process was not finalized, the contract contained a provision for obtaining approvals and permits before work started. Further delays in the EA and NWPA processes resulted in the deferral of the EA decision and of the construction of the cofferdams (see Glossary) as any work in the reservoir and river could not proceed until both the FOC and NWPA approvals were received.

[44] The contracting process continued because a re-tendering would likely delay the rehabilitation, which was not acceptable to PWGSC as the completion of the dam rehabilitation was required to ensure the safety and economic well-being of the inhabitants of the area and especially of those who rely on the dam and the reservoir. Eventually, TC's EA report granting the green light to the project was announced on February 10, 2006, or one day after the impugned decision.

III. The Legal Framework

[45] The steps to be followed to build or rehabilitate a Dam are set out in subsection 20(1) of the *CEAA* and related decisions of paragraph 5(1) (a) and subsection 6(4) of the *NWPA*. I shall deal first with the latter statutory provision, referring to it as the 6(4) licensing process. This will be followed by the 5(1) licensing process and then the 20(1) licensing process.

The 6(4) licensing process

[46] By letter dated March 17, 2004, FOC informed PWGSC that the construction of the 1911 Dam was not approved pursuant to the *NWPA*, and said approval would be required before the start of the rehabilitation work on the Dam. In other words, PWGSC was required to first legalize the existing dam by virtue of subsection 6(4) of the *NWPA* for the proposed renovation of the dam, the concrete evacuator with its two dewatering outlets, as well as the fill dyke. For ease of reference subsection 6(4) of the *NWPA*, provides as follows:

**Ministerial orders respecting
unauthorized works**

*Approval after construction
commenced*

6. (4) The Minister may, subject to deposit and advertisement as in the case of a proposed work, approve a work and the plans and site of the work after the commencement of its construction and the approval has the same effect as if given prior to commencement of the construction of the work.

**Ordres ministériels à l'égard
d'ouvrages non autorisés**

*Approbation après le début des
travaux*

6. (4) Le ministre peut, sous réserve de dépôt et d'annonce comme dans le cas d'un ouvrage projeté, approuver un ouvrage, ainsi que ses plans et son emplacement, après le début de sa construction; l'approbation a alors le même effet que si elle avait été donnée avant le début des travaux.

[47] On June 11, 2004, PWGSC applied to TC for approval of the existing 1911 Laniel Dam. As part of the 6(4) licensing process, PWGSC was required to submit plans for the proposed refurbishment of the dam and publish notices of the proposed renovation project in the *Canada Gazette*, as well as in the legal section of two local newspapers at least once.

[48] In compliance with these requirements, a Notice was published in the *Canada Gazette*, dated September 10, 2005 informing the public that PWGSC had deposited plans to TC under the *NWPA* for approval of the plans and site of work on the existing dam, dyke and boom on Kipawa Lake near the Kipawa River at Laniel Quebec. The notice in the *Canada Gazette* solicited comments regarding marine navigation on the deposited plans and proposed work on the dam. However, such comments would be considered only if they were in writing and were received not later than 30 days after the date of publication.

[49] A similar notice appeared in both official languages, in the local newspaper *Le Témiscamien* dated September 7, 2005. In addition a second newspaper, *Le Reflet* published the identical notice in its September 9th, 2005 edition. On October 18, 2005, PWGSC provided proof of these three public notices and the 6(4) licence approving the 1911 dam was granted on October 24, 2005. It thereby permitted the Minister of TC to authorize existing works on navigable waters in Canada. As such this decision was for the purpose of approving the dam built in 1911 and its upstream boom on Kipawa Lake. For Les Amis also, it meant that their navigation rights were now formally prohibited.

[50] The 6(4) licensing process did not require public consultation under the *CEAA* because the existing dam was built prior to June 22, 1984, as stipulated by subsection 74(4) of the *CEAA*. Similarly, no environmental screening, including an analysis of potential mitigation measures, and an EA decision pursuant to the *CEAA* were necessary prior to the issuance of the subsection 6(4) permit. The Applicant does not contest the Minister's decision to obtain this subsection 6(4) permit. However, the Applicant challenges the fact that they were not notified and merely happened to be informed by someone in Temiscamingue of the notices in the local papers.

The 5(1) (a) licensing process

[51] TC rendered its decision approving the licensing process pursuant to paragraph 5(1) (a) of the *NWPA*, on February 10, 2006 or a day after the finalization of the decision that forms the object of this judicial review application. The purpose of the paragraph 5(1) (a) *NWPA* licence was to authorize PWGSC to go ahead with the construction of works on the River according to the conditions set forth in the permit issued by TC. The pertinent passages of section 5 of the *NWPA* provide as follows:

Construction of works in navigable waters

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;
[. . .]

Construction d'ouvrages dans les eaux navigables

5. (1) Il est interdit de construire ou de placer un ouvrage dans des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux à moins que :

a) préalablement au début des travaux, l'ouvrage, ainsi que son emplacement et ses plans, n'aient été approuvés par le ministre selon les modalités qu'il juge à propos;
[. . .]

For the purposes of paragraph 5 (1) (a) above, under section 2 of the *NWPA*, 'Minister' means the Minister of Transport.

[52] However by virtue of paragraph 5(1) (d) of the *CEAA*, an Environmental Assessment is required prior to carrying out certain projects, such as the building or rehabilitation of a dam. The authority to conduct an EA is granted by paragraph 5(1)(d) of the *CEAA*, which is set out below:

**Projects requiring
environmental assessment**

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
[. . .] or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Projets visés

5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes:

[. . .]

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.

[53] Paragraph 59(f) of the *CEAA* grants the Governor in Council the authority to enact regulations pursuant to paragraph 5(1) (d) of the *CEAA*, which it did by enacting the *Law List Regulations*, SOR/94-636. The EA screening process is to be carried out pursuant to subsection 16(1) of the *CEAA*, which states:

**ENVIRONMENTAL
ASSESSMENT PROCESS
General**

Factors to be considered

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

**PROCESSUS
D'ÉVALUATION
ENVIRONNEMENTALE
Dispositions générales**

Éléments à examiner

16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :

- | | |
|--|--|
| <p>(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;</p> | <p>a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;</p> |
| <p>(b) the significance of the effects referred to in paragraph (a);</p> | <p>b) l'importance des effets visés à l'alinéa a);</p> |
| <p>(c) comments from the public that are received in accordance with this Act and the regulations;</p> | <p>c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;</p> |
| <p>(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and</p> | <p>d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;</p> |
| <p>(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.</p> | <p>e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.</p> |

The 20(1) licensing process

[54] The third and final step in the statutory framework requires the responsible authorities to decide on a course of action once the EA screening process is complete. That is what subsection 20(1) of the *CEAA* is for. It provides, among other things the following options:

**Screening
Decision of responsible
authority following a
screening**

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

**Examen préalable
Décision de l'autorité
responsable**

20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :

a) sous réserve du sous-alinéa c) (iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

- | | |
|--|--|
| <p>(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or</p> | <p>b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;</p> |
| <p>(c) where</p> | <p>c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :</p> |
| <p>(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,</p> | <p>(i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,</p> |
| <p>(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or</p> | <p>(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,</p> |
| <p>(iii) public concerns warrant a reference to a mediator or a review panel,</p> | <p>(iii) si les préoccupations du public le justifient.</p> |

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

IV. The Impugned Decision

[55] Having completed the screening of the Laniel Dam Rehabilitation and considered the comments from the public, the authorities were of the opinion that “the project is not likely to cause significant adverse environmental effects.” It is this little phrase that forms the gravamen of this application.

[56] For purposes of completeness, the decision also states as follows:

As detailed in the environmental assessment report, mitigation measures have been required for the project to address:

- air quality
- water quality
- water quantity
- sedimentation
- soil quality
- vegetation
- noise levels
- birds and/or their habitat
- fish and/or their habitat
- structure, site or thing of historic, archaeological, paleontological or architectural significance
- socio-economic impacts

A follow-up program has been implemented to verify the accuracy of the environmental assessment of a project and/or determine the effectiveness of any measures taken to mitigate the adverse environmental effects of the project and because of the following reasons:

- Environmentally Sensitive Area/Valued Ecosystem Components
- Public Concerns
- New or Unproven Technologies

It is estimated this program will start on May 1, 2007 and continue until November 1, 2012.

For more information or how to obtain a full description of the follow-up program and its results, please contact:

Tamara Taub
Senior Environmental Assessment Officer

V. Issues

1. Has the Applicant demonstrated that, through an unrecognized use by kayakers and rafters of the spillway of the Laniel Dam as a launching point into the River, for over 40 years, a navigable common law right existed? If that right existed, was it considered by the authorities during the licensing process that was followed in accordance with the law?
2. Assuming that the project was the cause prohibiting navigation through the dam is the decision rendered under subsection 20(1) of the *CEAA* nevertheless reasonable since the prohibition does not constitute a “significant adverse environmental effect?
3. Was the Applicant’s right to procedural fairness breached during the course of the EA process? If so, should the remedy sought of quashing the February 9, 2006 decision, rendered pursuant to subsection 20(1) of the *CEAA* be granted?

VI. The Standards of Review

[57] The 6(4) licensing permit upon which the first issue of the common law navigation right is based, raises the question of whether the law was followed. This is a question of law. Consequently, the correctness standard should apply.

[58] The 5(1) licensing process and the EA procedure followed are mainly questions of mixed fact and law. Therefore, the applicable standard of review is reasonableness *simpliciter*. In this regard, I adopt the compelling reasoning of Mr. Justice Sexton of the Federal Court of Appeal in *Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1008, 2001 FCA 203. This was an appeal from an order of the Trial Division, dismissing an application for judicial review of the Minister of the Environment's decision that a project to develop a dry storage facility for used nuclear fuel at the Bruce Nuclear Power Facility was not likely to cause significant adverse environmental effects. In determining the applicable standard of review, Sexton J held as follows at paragraphs 32, 36, 40:

32 In the recent decision in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*,¹⁰ this Court considered the standard of review to be applied to a decision of a responsible authority upon receipt of a screening level environmental assessment. Applying the pragmatic and functional approach most recently propounded by the Supreme Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,¹¹ Linden J.A., writing for a unanimous panel, held that the appropriate standard was reasonableness *simpliciter*.

36 This Court has recognized that policy concerns militate in favour of a more deferential standard of review. The environmental assessment process is already a long and arduous one, both for proponents and opponents of a project. To turn the reviewing Court into an "academy of science" -- to use a phrase coined by my colleague Strayer J. (as he then was) in *Vancouver Island Peace Society v. Canada*¹² -- would be both inefficient and contrary to the scheme of the Act. Thus, in *Bow Valley Naturalists, Linden J.A.* had the following to say regarding the scope of judicial review of a decision taken upon receipt of an environmental assessment:

The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the Judges to decide what projects are to be authorized, but, as long as they follow the statutory process, it is for the responsible authorities.¹³

40 In my opinion, Rothstein J.A.'s approach is equally applicable to the decision made in the case at bar. A standard of review of reasonableness simpliciter requires that the Minister have a reasonable basis for arriving at her decision. In conducting its review, the Court should consider all of the material available to the Minister and draw a conclusion. Such a conclusion can be drawn without the Court becoming an "academy of science". The Court is not required to agree with the Minister's decision. It must merely be able to perceive a rational basis for it.

[59] Finally, where questions of procedural fairness and the principles of natural justice are raised as in the third issue in this application, the standard of review is always correctness. See *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at paragraph 65.

VII. Analysis

Issue 1

Has the Applicant demonstrated that through an unrecognized use by kayakers and rafters of the spillway of the Laniel Dam as a launching point into the River, for over 40 years, a navigable common law right existed? If that right existed, was it considered by the authorities during the licensing process that was followed in accordance with the law?

[60] The Applicant has not demonstrated that, through the unrecognized use by kayakers and rafters who have used the dam as the launching gate into the Kipawa River for a little more than 25 days per year, for the past 40 years, a navigable common law right exists. It is undeniable that the Kipawa River has been for enthusiastic kayakers and rafters an attractive site for their specialized sport. It was initially discovered in the late 1960s. For a good number of years, a festival is held on site on the third weekend in June, where initially 200 persons came. The most recent festival events in 2005 attracted more than 300 enthusiastic users.

[61] The evidence also shows that the owner of the dam has collaborated through the years with the festival organizers in ensuring that a minimum level of water goes through the dam to supply the proper level of water to permit the proper exercise of the sports on the Kipawa River. It should be noted that the evidence also shows that the necessary refurbishment of the dam will not prevent the Kipawa River Rally from taking place or that the longstanding cooperation between Les Amis and staff at PWGSC with respect to the annual release of water to the required levels will not continue, on the contrary.

[62] What is at issue here is not the practice of the sport on the river but the navigability of the Laniel Dam. The fact that the Applicant's members because of their experience have safely used the dam does not mean that it is not dangerous to the general public. The use of the dam by kayakers and rafters through the years does not create a common law right. The owner has never officially granted permission to use the dam as a rapid. It is the opinion of the owner that it is dangerous for the general public to use the gateway as an entrance. The fact that Les Amis, as experienced river runners have been using it without incident, as a launching rapid into the river does not take away the concern for the danger that an owner may have; keeping in mind the public safety of the general public. A navigable right through the dam has not been created for the general public or for Les Amis because of their use over close to 40 years.

[63] While I have concluded that the Applicant has not demonstrated that such a common law right exists by virtue of the unrecognized use of navigating through the dam, for a number of years, it would otherwise not be necessary to reply to the corollary question in this first issue, which is "[i]f that right existed, was it considered by the authorities during the licensing process that was followed in accordance with the law?" However, in order to provide a clarity and completeness, I find it necessary to respond.

[64] This common law right does not exist. Based on the evidence, it is also evident that even if the Court were to find that this right does exist, the Applicant's position that this right was not taken into consideration by the authorities during the licensing process would fail because it is not supported by the evidence.

[65] The parties agree that the 6(4) licensing process had to be done and there was no complaint that the process was carried out in a manner that is contrary to the *CEAA*. The Respondent authorities complied with each of the requirements of TC for the retroactive official approval of the existing structure. The authorities gave the necessary public notices in the *Canada Gazette* and two local newspapers. Comments and input were invited. When these were received, satisfactory responses were provided, such that the approval of the 6(4) permit was granted forthwith.

[66] Moreover, the question of navigation is not an unfettered right. Navigation is not absolute. It must be exercised reasonably. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, Mr. Justice La Forest held at paragraph 69:

69 The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way; see *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 (H.L.), at p. 846. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others.

43 The inconsistency contended for is that the Navigable Waters Protection Act implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act, whereas the Guidelines Order requires, at a minimum, an initial environmental impact assessment. The appellant Ministers concede that there is no explicit prohibition against his taking into account environmental factors, but argue that the focus and scheme of the Act limit him to considering nothing other than the potential effects on marine navigation. If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

[67] These same principles apply to the circumstances in this case. It is for these reasons that the response to the first issue is negative. Even if there was a common law right to navigate through the dam, the evidence does not support the proposition that the authorities did not take this factor into consideration. This is sufficient to settle the litigation at stake. However, I do think that the parties deserve answers to the two remaining issues in dispute. Hopefully, this will bring finality to the litigation.

Issue 2

Assuming that the project was the cause that prohibited navigation through the dam, is the decision rendered under subsection 20(1) of the CEAA nevertheless reasonable since the prohibition does not constitute a "significant adverse environmental effect?"

[68] The Applicant argues that the decision reached establishing that the Project was unlikely to cause significant adverse environmental effect was an unreasonable conclusion to draw from the evidence for there was ample documentation and proof to substantiate the fact that Les Amis navigated the Laniel Dam. In fact, they have done so without mishap or injury on a regular basis, water levels permitting, each year and for over 40 years. Les Amis do not consider the dam to be dangerous because of the past experience going back close to 40 years.

[69] However, the evidence also shows that representatives of the owner of the dam have never officially granted permission to use the dam. While Les Amis have navigated through the spillway of the dam, the evidence shows that this has always been an unauthorized use of the Laniel Dam. Indeed, when the authorities learnt during the March public consultations that this has been the practice all along, they took immediate action to first monitor this activity, and then take decisive action to protect the general public from the danger posed by the dam.

[70] Signs were posted in 2005 forbidding the use of the dam and Les Amis still used the dam as an entrance into the River. The dam entrance is a Class III category depending on the level of water going into the dam. A Class III chute is defined as a rapid that can be run safely by intermediate paddlers, which can be run at water levels between 100 and above 120 cms.

[71] In the English original text of the document entitled “A Brief History of Modern Commercial and Recreational Navigation on the Laniel-to-Lake Temiscamingue Section of the Kipawar River in Northwest Quebec,” authored by Doug Skeggs, in March 2005, which was submitted to PWGSC for its consideration during the EA process, the document sets out the levels of water required to run the dam safely. However, the wording in the French version of this document is significantly different and more serious in terms of the danger represented by the dam at different water levels. I note that the translator of the English text, José Mediavilla, is an avid kayaker who has run the Kipawa River since the early 1970. Both versions are reproduced below:

The Dam (Class III all levels):

The flood control dam under the highway bridge in Laniel is very runnable at any level above 120 cms. It has been run at levels below 100 cms but, depending on whether the water is going through one or both gates, the drop may be [too] steep and not recommended, your choice. Above 250 cms a hole starts to form reacting off the pillar between the two flood gates, but [it's] fairly easy to work around on either side.

Le Déversoir (classe R II, indépendamment du débit)

Le Déversoir qui se trouve sous le pont de la route 101 à Laniel est praticable à tous les débits supérieurs à 120 m³/s. La descente a été pratiquée à des niveaux aussi bas que 100 m³/s, mais la dénivellation est alors si forte qu'elle forme une chute peu recommandée. À moins de 100 m³/s, la descente doit être évitée à tout prix. À plus de 250 m³/s, un rouleau se forme autour du pilier central entre les deux portes d'évacuation, mais il est très facile de l'éviter en passant d'un côté ou de l'autre. (My emphasis)

[72] This difference in the French text is instructive coming from an experienced kayaker who has personal experience of navigation through the dam.

[73] There are several other facts on the record indicating that it was not unreasonable for PWSC, TC and FOC to be of the joint opinion that the project is not likely to cause significant adverse environmental effects. First, the water levels reach the Class III category only approximately 25 days per year. The remainder of the year, it is a more hazardous classification. To obtain the proper level of water to reach the appropriate floatability through the dam, there has to be an intervention by man. It is not alone a consequence of nature through rain or the melting of snow.

[74] Second, the representatives of the owner of the dam consider that it is a danger to give access to the public. To come to this conclusion, they relied on the hydraulic knowledge of Mr. Yvon Morin, Administrator for PWGSC in the field of Coastal and port engineering, as well as on Richard Jones, Navigable Waters Protection Agent, Marine Safety, and Transport Canada. In addition, it relied on the opinion of Tecsalt, which states as follows [original in French; translation by the Court]:

“The dock that we recommend will allow rescuers to intervene in case of incidents [such as the boat that drifted over the dam] and permit kayakers to launch their kayaks safely and descend the rapids of the Kipawa River to the Temiscamingue Lake without having to go through and over the dam itself. Going over the dam is extremely dangerous and we cannot approve the request made by Les Amis to recognize the Laniel dam as being navigable. The Laniel Municipal Committee completely disassociates itself from the position and actions of Les Amis.”

[75] The owner of the dam has a responsibility to the public to ensure that it is not dangerous. It must take means to ensure that the dam will not attract boats into its gate. Signs have been put up to that effect, in addition to the booms. An owner has a right and a duty to ensure safety of its property. Safety booms on the Kipawa Lake have existed at least as early as when Hydro Quebec managed

the dam from 1965 to 1986. The safety booms are in existence in order to indicate danger and to forbid coming close to the dam. Under cross examination on affidavit dated September 15, 2006,

Mr. James Coffey, Director of Esprit Rafting Adventures confirmed as follows:

Q: And you recall your experience in '87 now.

A: Yes.

Q: Do you recall there being a boom upstream of the dam at that point in time?

A: A boom as in . . .

[. . .]

Q: Something to delineate upstream of the actual dam itself, either made out of wood or made out of plastic, something that delineates and potentially restricts access to the dam itself.

A: There has been, to the best of my recollection, since I first went to Kipawa, a cable with a plastic sheath around it that could be described as a boom upstream of the water control structure of Laniel.

Q: Which would have been present, to the best of your recollection, in 1987?

A: I believe so, yes.

[76] The evidence shows that a kayaker suffered an ankle injury in 2005. More seriously, there was a boating accident in the 1980s as noted in a letter dated June 15, 2005 to PWGSC from Mr. Yvon Gagnon, President, Comité municipal de Laniel Inc. In this incident, a client of the company “Jack Newman Place,” had problems with the motor of his boat while on Lake Kipawa in Laniel Bay. The force of the current drifted the boat towards the Laniel Dam before emergency help could

arrive. The boat went through the dam and was destroyed by the rocks. The occupants of the boat were rescued. Similarly, a boat belonging to Mr. Georges Trudel, owner of “Camp de la Baie Smith” also was destroyed when it got loose from the dock and drifted over the dam.

[77] Third, the evidence of Mr. Coffey, also establishes that the non-use of the dam would not cancel the use of the river for rafting purposes. On the contrary, Les Amis admit that the dam is but one rapid among sixteen rapids. The Kipawa River is a gem for kayakers and rafters. In addition, the Municipality, the MRC, and the Société de développement are all of the opinion that the dam is dangerous and its non-use could not stop its festivities for rafters. Therefore, keeping in mind all of these points, the evident conclusion to arrive at is that the none-use of the dam is not a significant adverse environmental effect.

[78] Fourth, to have tried to meet the needs of Les Amis and insert a passage for them to go through the spillway in the new design concept would have cost an additional \$750,000 dollars for a use of a little more than 20 days per year. Admittedly, \$750,000 is but a mere fraction amounting to less than 5% of the estimated total cost of the project. But to refuse to spend taxpayers money to the tune of ¾ million dollars for less than 20 days a year for the thrill of a ride over the falls, can hardly be characterized as an unreasonable proposition.

[79] In a letter dated October 13, 2005, Mr. Yvon Gagnon, President, Comité Municipal de Laniel Inc. wrote as follows [original in French; translation of the Court]:

“As a commentary, I add that we are surprised to see the great interest of the kayaking clubs in the construction when everyone very well knows that these kayakers come to Laniel during the annual Rally, which lasts for two days maximum. These are the only two days out of the year when one can see kayakers on the River.

Moreover, there are about a dozen rapids along the 17 km stretch of the Kipawa River and this it is in these rapids that true kayakers test their abilities. However, not a single kayaker can go over the “Grand Chute” because at this rapid, all kayakers must take a long and difficult portage, about twenty minutes long before going down the last rapid that enters into the Temiscamingue Lake. Perhaps we will receive demands to make the “Grande Chute” navigable??

The Comité Municipale de Laniel Inc. refuses to get involved and completely disassociates itself from all responsibility regarding the navigation through the dam by amateur or professional kayakers.”

[80] It is PWGSC’s studied opinion that it has no information in its database pertaining to the navigation of the Laniel Dam and certainly no permission was ever granted to anyone, including the Applicant’s experienced kayaking members, to navigate through the sluice and over the Laniel Dam. For PWGSC, it is a public safety issue that engages Crown liability.

[81] For all these reasons, the Court finds that the decision pursuant to subsection 20(1) concluding that the Project does not constitute a “significant adverse environmental effect is reasonable”.

Issue 3

Was the Applicant's right to procedural fairness breached during the course of the EA process? If so, should the remedy sought of quashing the February 9, 2006 decision, rendered pursuant to subsection 20(1) of the CEAA be granted?

[82] The Applicant submits that the authorities breached the principles of procedural fairness during the EA process in that they operated under tight timeframes making it unlikely that proper consideration was accorded to the numerous submissions made by Les Amis. Other examples of the denial of procedural fairness include the fact that PWGSC's conclusion that navigation was unsafe was based on Tecsalt's letter dated June 15, 2005, the same person responsible for the design of the Project. Also, the Applicant alleges that they were denied the opportunity to present opposing expert evidence to the findings that navigating the dam was unsafe.

[83] The Court takes seriously the allegations of breach of procedural fairness where participatory rights have been denied. In this regard, the Court relies on the standard set by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, (1999), 174 D.L.R. (4th) 193 (S.C.C.). While unlike the circumstances of the humanitarian and compassionate application in *Baker* (above), the Applicant in the present matter is not alleging the denial of the right to an oral hearing, the principles at the heart are the same. Madam Justice l'Heureux-Dubé wrote in part at paragraph 30:

“[T]aking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these

circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to [page215] present their case fully and fairly. [the Court's emphasis]"

[84] Based on the overwhelming evidence in this case it is not necessary to undertake the balancing analysis pruned in *Baker*. It is enough for the purposes of the present matter to determine whether “considering all the circumstances;” Les Amis whose interests were affected by the new Project had a meaningful opportunity to present their case fully and fairly.

[85] The parties agree that the targeted public consultations that took place in March 2005 included representatives from all the groups who would be affected by the proposed rehabilitation of the dam. The evidence clearly shows that Les Amis were consulted along with other stakeholder groups directly affected by the proposed work to the Laniel Dam. Their point of view, like that of the other participants was considered. It so happens that it was not possible to satisfy their demands. Just because their position was not retained does not mean it was not considered fully or fairly.

[86] The Court is mindful of the following additional facts. First, EA Registry access was given to Les Amis on November 1, 2005, the very day after their request for such access. The behaviour and derogatory comments of the President, Peter Karwacki did not help the situation. His behaviour was deemed to be harassment.

[87] Also, the Court is mindful of the fact that the mitigation measures did take into consideration the opinion of Les Amis, including the following:

- maintaining the current management of waters of the Kipawa reservoir after construction;
- ensuring that the procedures for the dam operation will also remain unchanged;
- maintaining the levels of water during the navigation period, between the maximum elevation of 269.75 meters and the minimal level necessary for navigation (269.50 meters);
- creating a safe pathway from the Lake to the River;
- constructing a boat ramp; and
- providing a navette from the lake to the river during construction.

[88] Ms. Turnbull, the E.A. Manager, stated in her affidavit sworn on August 11, 2006, and which was confirmed under cross examination on affidavit on September 15, 2006 that the concerns of kayakers were taken into consideration. She noted in particular that in addition to the concerns expressed by Les Amis, the representative of the Quebec Federation of Whitewater canoers and kayakers (FQCKEV) another intervener presented a similar point of view concerning the navigation into the River.

[89] As Ms. Turnbull affirms, the contrasting views on navigation were clearly indicated in the EA report, acknowledging that “for Les Amis this is an important impact” and that “[m]any comments have been received from area kayakers: therefore, arrangements must be made for the safe descent into the river.” In addition, the documents received from Les Amis outlining its members concerns were included in Appendix F of the EA report.

[90] Finally, because the evidence clearly shows that opportunities for timely and meaningful public participation throughout the processes were given to the public, which included Aboriginal groups, municipalities, MRC, individuals and Les Amis, the Applicant has failed to demonstrate that there was a breach of the principle of procedural fairness such that the remedy sought to quash the decision may be granted.

VIII. Conclusion

[91] For the reasons outlined above the application for judicial review shall be dismissed.

[92] The question of costs was left to the Judge. Accordingly, no costs are awarded because of the particular circumstances of this case. To come to this conclusion, I have taken into consideration the parties involved, their respective objectives and the hope that this litigation has come to an end. The Kipawa River is still navigable for the fervent kayakers and rafters.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

- The application for judicial review of the decision dated February 9, 2006 is dismissed;
- Without costs.

**“Simon Noël”
Judge**

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-452-06

STYLE OF CAUSE: Les Amis de la Rivière Kipawa,
incorporated as 1162209036 Quebec Inc. and

The Attorney General of Canada and the Minister of Public
Works and Government Services Canada, the Minister of
Fisheries and Ocean, The Minister of Transport and David S.
La Flamme Construction Inc.

PLACE OF HEARING: Ottawa, ON

DATE OF HEARING: October 23, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL J.

DATED: December 4, 2007

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Appendix 'A'

Glossary

The definitions are those provided by and commonly used by the parties.

'*Alkali-silice reaction*' = a chemical reaction of the contents of the concrete that provokes a swelling or expansion of the concrete. This leads to an ongoing and progressive degradation of the structure.

'*Boom*' = Barrier across river to warn of danger beyond the point of the barrier. Booms may be wooden or buoys attached together along a line that lies on top of the water across the width of the river.

'*Cofferdams*' = watertight enclosure pumped dry to permit work below the waterline.

'*Emphyteusis*' = "A hereditary leasehold; a non-owner's right to use land in perpetuity, subject to forfeiture for non-payment of a fixed rent or for certain other contingencies." (*Black's Law Dictionary*, 7th ed. p. 542).

'*Estacade*' = landing stage

'*Spillway*'/'*Sluice*' = canal or in Maritime parlance, a dewatering outlet.