

NOTE : This is a translation of the original affidavit of Richard Jones submitted to the federal court.

This translation is NOT a certified translation. For all legal interpretations of the information in this document, please refer to the original French text.

Number: T-452-06

Federal Court

Between:

LES AMIS DE LA RIVIÈRE KIPAWA

Plaintiff

AND

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

Defendant

Affidavit of Richard Jones

I, undersigned Richard Jones, Navigable Waters Protection Agent, Marine Safety, Transport Canada, Infrastructure and Collectivity, Cap-Diamant Regional Center, Quebec, Quebec,
SOLEMNLY DECLARE :

1. I have been working as a Navigable Waters Protection Agent at Transport Canada, Infrastructure and Collectivity (TC) since May 28th 2001; I occupy this position in the regional management office – Quebec Region under the supervision of the Manager of the Navigable Waters Protection Program;
2. My job consist essentially in evaluating the consequences on navigation of all existing or future works in, on, under, over or transversely the navigable waters;
3. Thus, I regularly have to apply laws, rules and politics in this field, of which in particular the dispositions of the *Navigable Waters Protection Law* (NWPL), L.R. 1985 , ch. N-22, the *National Board Energy Law* L.R. 1985, ch. N-7 and the Guidelines for the evaluation of repercussions on navigation aiming the protection of navigable waters and the *Canadian Environmental Evaluation Law* (CEEL);
4. In practical terms, my protection agent job generally consist of :
 - Analyzing the works proposition or existing works under the terms of the NWPL;
 - Reviewing plans, description of work, technical data of the promoter and identifying attenuation measures, markers and navigation aids requested in order to give an approval under the terms of the NWPL;
 - Conducting, if needed, site visits and inspections in order to determine the navigability of a waterway, the possibility of interference with the navigation, the possibility of a threat to a navigator’s safety and repercussions on the marine environment;
 - Planning and executing inquiries regarding the respect of the NWPL;
 - Attending meetings, project planning comities in order to attain the approval process of the NWPL;
 - Giving directives to the promoter of a project regarding the recording of publication of its work in the terms of article 9 of the NWPL;
 - Making sure that the projects are subject to environmental examination in accordance with the requirements of the CEEL, be part of the evaluation and include a copy of the report duly signed by federal authorities in the file;
 - Making sure that the approval conditions in the NWPL are related to the protection of navigation and navigating public rights;
 - Confirming that the attenuation measures in the federal sectors of competency will restrain impact on the environment at best of economical and technical feasibility;
 - Contacting the project promoter to ensure the beginning and/or completion of the work within the prescribed timelines.
5. Since I started working at TC, I have analyzed over 250 files which needed approval under the terms of paragraph 5 (1) of the NWPL and close to 40 files which needed approval

under the terms of paragraph 6 (4) of the NWPL; I, in addition, have overviewed 265 environmental evaluations;

6. It should be noted that from January 2005 to this day, the Navigable Waters Protection Program – Quebec Region, has received 73 requests for approval under the terms of paragraph 5 (1) of the NWPL and 17 requests under the terms of paragraph 6 (4) of the NWPL;
7. In addition, since the beginning of the program, over 250 dams have been approved under the terms of paragraph 5 (1) and paragraph 6 (4) of the NWPL;
8. In practical terms, it means that TC has permitted that navigation be limited at the boundaries of more than 250 dams in Quebec;
9. In spite of these restrictions to navigation, every person can nevertheless navigate on the waterway on which these dams have been build as long as they do it outside the security perimeter determined by TC in the approval documents and in plain view to the public since the owners of these dams have the obligation to install booms at the boundaries of their dams and this, at the location indicated by TC in the approval documents;
10. My colleague, Guy Lafond, retired by now, has been the Navigable Waters Protection Agent appointed with the present file from February 16th 2004 to June 28th 2006;
11. For this reason, M. Lafond has analyzed the approval request of the existing Laniel Dam under the terms of the paragraph 6 (4) of the NWPL and the construction of the new Laniel dam (“Project”) under the terms of paragraph 5 (1) of the NWPL; in this case, he also took part in the environmental evaluation process under the terms of the CEEL;
12. For this purpose, M. Lafond has done a physical exam of the location, filled a report of survey, **piece RJ-1**, and took notice of all the documents in the file, including documents produced by the promoter in order to respect the NWPL and ensure conformity with the environmental evaluation done under the terms of the CEEL and its components related to navigation;
13. Since I have been a temporary Manager of the Navigable Waters Protection Program for a part of 2005 and 2006 and that I am the Navigable Waters Protection Agent appointed to the present file since M. Lafond retired, I have followed this file closely throughout all the approval process and implementation of the NWPL and CEEL and I thus have an intimate knowledge of all the aspects of this file regarding TC;

The Laniel existing dam and the project

14. From the information given to TC by Public Works and Government Services Canada (PWGSC and/or project promoter), the Laniel dam was built in 1911 by PWGSC in order to regulate the waters of the Ottawa River for navigation and energy production purposes;
15. This dam is located at the head of the Kipawa River in the Municipality of Laniel in the Temiscamingue Region and includes a concrete spillway with 2 sluices of an approximate length of 14 meters on the left bank, and a fill dyke of 42,7 meters long made up of wooden caissons filled with rock riprap on the right bank;
16. I understand that the Kipawa River is an approximate length of 16 km and counts more or less 18 rapids;
17. The first of these “rapids” who is at the heart of this litigation is located at the head of the Kipawa River, therefore at the height of the Laniel dam;
18. During the years when PWGSC operated the Laniel dam, maintenance repairs have been done periodically; despite these repairs, I understand that PWGSC noted at the end of the 80’s that the dam should be replaced because of its bad condition and problems related to the lack of water evacuation capacity and leakages;
19. After consulting specialists in the field, I understand that PWGSC started an internal process in order to realize the project at the existing dam location;
20. It’s in this context that PWGSC approached TC with the intent to start the project in February 2004;
21. M. Lafond, as a Navigation Waters Protection Agent, was assigned to this project under the terms of the NWPL for TC at that time;
22. I understand that M. Lafond realized, at that point, that the existing dam had never been approved under the terms of the NWPL at the moment of its original construction or thereafter, and that from this fact the situation had to be regularized under the terms of paragraph 6 (4) of the NWPL before even considering the approval of the project under the terms of the NWPL;
23. PWGSC thus forwarded an approval request to TC for the existing dam under the terms of paragraph 6 (4) of the NWPL;
24. It should be noted that no environmental evaluation was necessary under the terms of CEEL before the emission of an approval by TC under the terms of paragraph 6 (4) of the NWPL considering paragraph 77 (4) of the same law and the fact that the Laniel dam was built in 1911

25 – In this context, Mr. Lafond advised Public Works and Government Services Canada (PWGSC) that the application of paragraph 6(4) of the NWPA did not imply application of the CEAA, and he explained to PWGSC the process of approval to be followed, exhibit RJ-2;

26 – Since the existing dam had to be completely destroyed and replaced with a new structure, it was also necessary to obtain the approval of the project in pursuance of paragraph 5(1) of the NWPA;

27 – The intervention of TC in the present affair is thus two-fold: on the one hand, a request for approval of the existing structure in pursuance of paragraph 6(4) of the NWPA and, on the other hand, a request for approval of the project in pursuance of paragraph 5(1) of the NWPA.

Approval in pursuance of paragraph 6(4) of the NWPA

28 – On June 10, 2004, Ms. Kim Turnbull, Valuation Officer with PWGSC which body was designated to take charge of the federal coordination of the environmental assessment of the project, forwarded an official request to Mr. Lafond for the approval of the existing dam in pursuance of paragraph 6(4) of the NWPA, which request was modified on several occasions, exhibit RJ-3 in a bundle; [TRANSLATOR: I am not sure whether “in a bundle” is correct. It is a literal translation.]

29 – On October 6, 2004, Mr. Lafond informed Ms. Turnbull of the steps to be followed relating to the process of approval in pursuance of paragraph 6(4) of the NWPA, exhibit RJ-4;

30 – In the context of this process of approval that also led to the collection of information that would be useful for the process of approval in pursuance of paragraph 5(1) of the NWPA, Mr. Lafond inspected the Laniel dam in the month of June 2005, as well as part of Lake Kipawa and the Kipawa River;

31 – He went to the Laniel dam on June 25, 2005, during the Kipawa River Rally, at a time of the year when the Kipawa River traditionally has water flows that allow it to be run;

32 – On this occasion, he took digital photographs and a video which reveal the following elements, among others:

- a safety boom was installed on Lake Kipawa, upstream of the dam, to restrain access to the dam ;
- bilingual posters were fixed over the gate bay of the dam to forbid swimming and navigation; [TRANSLATOR: Les Amis use the work “sluice” which suggests the opening is meant to let things go through the dam. The government might use the expression “gate bay” which rather suggests an opening with doors to control the water flow. I am not sure what is exactly the appropriate term when speaking of the old dam or the new one, which might differ.]
- the boom and posters were two visible signs allowing all boaters on Lake Kipawa to know that a safety area was defined to restrain access to the dam;

- paddlers coming from Lake Kipawa crossed the boom and then went through the gate bay of the dam to start their run down the river.

33 – A report of this inspection was prepared by Mr. Lafond during the following months, exhibit RJ-1; this report, which incidentally contains other digital photographs taken during his visit of the location, clearly shows the paddlers practices during the Rally and the safety measures put in place by PWGSC;

34 – On August 9, 2005, Mr. Michel Demers informed Ms. Turnbull that she should proceed with the registration of the plans and publication in pursuance of article 9 of the NWPA, exhibit RJ-5;

35 – In this context, PWGSC gave an advanced notice of the publication of the plans and of its request by advertisements published in the course of the following weeks in three newspapers —Le Témiscamien, the Témiscamingue and the Reflet — as well as the *Gazette du Canada*, exhibit RJ-6 in a bundle;

36 – At this stage, after considering the comments of the public, TC established that all the stages of the approval process had been gone through [TRANSLATOR: in other words, the requirements were fulfilled];

37 – Since the Laniel dam was built in 1911 in the public interest to regulate the water levels as is explained in further detail in Yvon Morin’s affidavit, and since the dam was already furnished with a boom installed at a safe distance and posters to prohibit access, TC established that the restriction to navigation that followed was justified and acceptable at this location;

38 – Furthermore, this restriction is comparable to that which is provided for around several other dams designed for water regulation [control?] or power generation in Quebec where TC judges that a restriction is necessary to ensure the safety of those that use the stretches of water concerned;

39 – The approval of the existing dam was signed by Mr. Denis Galarneau, regional director of marine safety at TC, on October 24, 2005 in pursuance of paragraph 6(4) of the NWPA, exhibit RJ-7;

40 –This decision taken by TC never gave rise to any proceedings [or judicial disputes?];

Approval in pursuance of paragraph 5(1) of the NWPA

41 – On July 11, 2005, Ms. Turnbull forwarded to Mr. Lafond an official request for approval of the project in pursuance of paragraph 5(1) of the NWPA, which request was modified several times following TC’s requests for more information with a view to clarify the nature of the project and its potential impacts on navigation, as shown in the copies of these requests, exhibit RJ-8;

42 – As we will see further on, Mr. Lafond eventually prepared the documents for approval in pursuance of paragraph 5(1) of the NWPA, that I signed afterwards for the Minister of Transport;

43 – Since we knew that this approval would trigger the environmental assessment process under the CEAA, Mr. Lafond and Lucie Pagé, Environment Officer for TC, also made sure that the environmental assessment (EA) conducted in pursuance of the CEAA complied with the law;

44 – To this end, they reviewed the documents prepared by the promoter to ensure that:

- the scope of the EA reflected a study zone encompassing all the consequences of the project;
- all the valued components of the environment had been considered in the analysis of the environmental consequences;
- the public's concerns had been taken into account;
- the negative effects on the environment had been mitigated as best possible;
- the project would not entail important negative effects on the environment, relating particularly to impacts on navigation.

45 – In the context of the EA of the project, the roles and responsibilities of the parties were established by the latter as follows:

- PWGSC was designated as the promoter of the project, federal coordinator of the EA, a responsible authority according to the terms of the CEAA and body in charge of the Canadian Environmental Assessment Registry;
- Fisheries and Oceans Canada (FOC) was designated as a responsible authority according to the terms of the CEAA in view of the necessity of obtaining an approval in pursuance of paragraph 35(2) of the Fisheries Act [?], and expert ministry for the aspects concerning fish habitat;
- TC was designated as a responsible authority according to the terms of the CEAA in view of the necessity of obtaining an approval in pursuance of paragraph 5(1) of the NWPA and expert ministry for aspects concerning navigation;
- Jacques Whitford acted as a consultant with a mandate from PWGSC to perform a fish habitat characterization and to write the screening report in pursuance of the CEAA;
- Tecsult acted as a consultant with a mandate from PWGSC to draw the plans and specifications of the new Laniel dam. In addition, Tecsult was mandated to design a project to compensate for the loss of fish habitat.

46 – It is my understanding that meetings were held at the beginning of 2005 during which representatives of PWGSC presented the Laniel dam refurbishment project as a whole to the concerned parties at FOC and TC;

47 – Following these meetings, Tecsult finalized its draft of the project and presented it, with PWGSC, at a public consultation “reserved for invited parties” in the month of March 2005;

48 – This consultation aimed at collecting the comments, the concerns, the proposals of the participants relating to the achievement of the project on the technical as well as environmental levels;

49 – Even though TC did not take part directly in this consultation, we received the report of the consultation as well as the report of another consultation specifically relating to the jurisdiction of FOC, exhibit RJ-9;

50 – My understanding is that the local native communities, the Laniel municipal committee*, the ATV Club [all-terrain vehicle?], Les Amis de la Rivière Kipawa (“Les Amis”), the owners of the properties next to the dam, the Fédération québécoise de canoë-kayak d’eau vive and the local snowmobile clubs were invited at this consultation, and representatives of several of these groups actually did come.

51 – On this occasion, some people, notably Les Amis, argued among other things that paddlers have passed through the gate bay [sluice] for several years; that the Rally has existed for close to 20 years; and they questioned the basis of the prohibition to pass through the gate bay for boats such as kayaks; Les Amis also asked whether a law or regulation forbids the passage of a boat through a dam;

52. Furthermore, the Friends subsequently represented to TC that they wanted the new dam’s conception to allow them passage across the gate bays;
53. Indeed, TC has namely received a video and over a hundred e-mails and letters with opposing views on the project informing us of their wish to continue navigating across the gate bays;
54. When Mr. Lafond showed up on the premises in June 2005, he noted that paddlers navigated across the dam’s gate bays and this in spite of a boom and visible signs;
55. Mr. Lafond noted that the security measures were aimed at navigator awareness of the danger and to prevent passage across the gate bays, and that evidently, paddlers chose to ignore such measures;
56. As noted above, Mr. Lafond further prepared a report of his inspection, Exhibit RJ-1, which report relates, with supporting photos, the practices of paddlers and security measures put in place by PWGS;
57. Finally, Mr. Lafond noted that paddlers, after passing across the gate bays, could navigate the remainder of the Kipawa river;
58. In may of 2005, Mrs. Turnbull forwarded to Mr. Lafond the document entitled “Coordination fédérale d’évaluation environnementale / Description modifiée du projet de remplacement du barrage Laniel” (Federal coordination of environmental assessment / Modified description of replacement of Laniel dam project), Exhibit RJ-10;
59. Mr. Lafond examined said document in the following weeks and paid particular attention to the aspects of the project relating to navigation;
60. From May to October 2005, I understand that Mr. Lafond was in regular contact with the developer Tecsalt and Jacques Whitford inc.;

61. From what I can gather, the main goal of Mr. Lafond throughout this process was to see to it that the developer take the necessary steps to maintain a navigational link between the upstream and downstream sections of the project and to promote navigator security;
62. In September 2005, Lucie Pagé, environmental officer at TC, gave her comments on the document entitled “Environmental evaluation Laniel Dam – replacement of dike evacuator”, Exhibit RJ-11;
63. In October 2005, Mr. Lafond received the previous preliminary examination report, which contained a detailed description of the developer, his projects, the project’s environment, environmental impact assessment and environment management plan;
64. In December 2005, PWGS gave a preliminary notice of registration of plans and request by ads in the following weeks and the papers Le Temiscamien and le Reflet, as well as in the Canada Gazette, Exhibit RJ-12;
65. Mr. Whitford’s final preliminary examination report was then given to TC, who evidently participated in drafting the parts pertaining to navigation;
66. TC representative, namely Mr. Lafond and Lucie Pagé, took notice of said report and noted that its conclusions, pertaining to the current litigation, reflected their position to the fact that the carrying out of the project was not likely to produce major adverse environmental effects and that the impact on navigation, once mitigation measures were put into effect, were of little significance;
67. Mr. Lafond and Lucie Pagé therefore recommended the carrying out of the project according to paragraph 20(1) of the CEAA by signing the document on February 1st, 2006, which recommendations were approved on February 2nd, 2006, by Claude Bérubé, regional manager, environmental affairs, TC; copy of final preliminary examination report duly signed and deposited as an exhibit to Mrs. Turnbull’s affidavit;
68. On February 10, 2006, as acting manager of Navigable Waters Protection Program, I signed the approval document of the project in virtue of par. 5(1) of the NWPA, Exhibit RJ-13;
69. In light of the above, it is evident that TC followed all steps of the approval process in virtue of the NWPA, prior to issuing approval documents for the project, such as registration of plans, deposit of same at the public registry, publication in two local papers and in the Canada Gazette, public consultation of effects on navigation, taking into account public comments and approval of carrying out of the project in virtue of CEAA;

Putting in issue of the process by the Friends

70. In the context of the litigation herein, the Friends put in issue this process, alleging namely that the governmental authorities had not taken into account their comments and the past practices of certain paddlers navigating through the gate bays of the dam;

71. This position by the Friends is inaccurate since TC ensures it has taken into consideration comments received from the public pertaining to navigation, the dam's current situation and Kipawa river user security, prior to approving the carrying out of the project according to par. 20(1) of the CEAA and to issue the approval document;
72. TC noted that navigation at works' location was restricted and this, notwithstanding the fact that paddlers were choosing to ignore security measures;
73. Although TC had noted the occasional passage across the gate bays, they came to the conclusion that the project, as proposed with its security and mitigation measures as well as approval conditions, would impact only lightly on navigation; indeed, navigation, which was only practiced on this section a few days a year, would only be restricted at the immediate location of the project, allowing paddlers to navigate the rest of the 16km river;
74. Since the proposed project only restricted navigation at the level of the projects, TC ensured that the navigable link between upstream and downstream would be maintained once the project was completed;
75. As appears on the Addendum of the approval document prepared by TC, Exhibit RJ-13, the project developer should (among other things) provide and maintain access to the free passage of the public in vehicles or on foot between the upstream and downstream parts of the dam; the developer should also install a security boom according to specifications of the Private Buoy Regulations and provide paddlers with a shuttle for the duration of the Laniel dam construction;
76. I know that the environmental assessment report supporting Mrs. Turnbull's affidavit readdresses the main approval conditions of TC and that all mitigation measures outlined in the document shall be respected by the developer;
77. It is therefore with such mitigation measures and NWPA approval conditions in mind that TC estimated that the project would hold no significant residual negative impact on navigation, as was concluded in the environmental assessment report, item 5.8.6;
78. In fact, paddlers will suffer no significant impact on the practice of their activities, as only a small portion of the Kipawa river, at the level of the project, will not be accessible on a small distance as a result of the new project;
79. Paddlers will, however, be able to launch their boat directly downstream from the dam, a few meter away from it, using a launching ramp as provided for in the assessment report;
80. As mentioned above, TC's position in the present project is in accordance with its regular position, as restriction to navigation at the level of the project is similar to that existing at the limits of many NWPA-approved water regulating or power dams in Quebec;
81. Such a restriction is customary for dams in navigable waters used by navigators since TC is of the opinion that passage across gate bays of a water regulation dam is unsafe;

82. As such, the project addresses TC preoccupations in terms of security for users of waterways in that area;
83. Further, to the best of my knowledge, the Laniel dam is the only place in Quebec where paddlers have gone across dam gate bays in the last few years;
84. TC's position shared by Mr. Pierre R. Tremblay of Tecsalt, as shown in his letter dated June 15, 2005, to Robert Laporte of PWGC, Exhibit RJ-14;
85. In view of the above, I am of the opinion that the Friends are wrong to complain since navigation was already forbidden in this area and, had it not been forbidden, all mitigation measures have been implemented to minimise impact on navigation, and to ensure navigator security at that location;
86. All facts mentioned above are true to the best of my knowledge.

ET J'AI SIGNÉ

Richard Jones

Affirmé solennellement devant moi à Québec

Province de l'Ontario, le août 2006.

Commissaire à l'assermentation