

**PROPOSED INTERVENERS' MEMORANDUM OF ARGUMENT**

**PART I – STATEMENT OF FACTS**

**(a) Overview**

1. This is a motion for leave to intervene in this appeal by six public interest, not-for-profit environmental organizations operating across Canada and other jurisdictions: Canadian Environmental Law Association (“CELA”), West Coast Environmental Law Association (“WCELA”), Sierra Club of Canada, Québec Environmental Law Centre (“QELC”), Friends of the Earth Canada (“FOE”), and Interamerican Association for Environmental Defense (“AIDA”) (hereinafter collectively referred to as “the proposed Interveners”).

**Motion Record, Tab 1: Notice of Motion, at page 1**

2. The proposed Interveners respectfully request that they be granted leave to intervene in the appeal on the grounds that they are well-positioned to provide unique and relevant submissions which will be of assistance to this Honourable Court in considering the issues on appeal. The proposed Interveners have substantial interest in this appeal, the disposition of which will have profound and far-reaching environmental implications, and will significantly affect the Canadian public’s participatory rights established under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”).

3. Although the proposed Interveners agree with the Appellant regarding the correct interpretation of section 21 of the CEAA, they do so for different reasons than those set out in the Appellant’s factum. The proposed Interveners approach this case from a broad range of public interest perspectives which go beyond the specific mine (or mining sector) at issue in the present case, and which also transcend the interests of the immediate parties in the appeal.

**(b) Description of the Proposed Interveners**

4. As reflected in detail in the six affidavits tendered in support of this motion, the proposed Interveners are non-profit environmental organizations that take varying approaches to achieving the goals of environmental protection and citizen access to environmental justice and environmental decision-making.

**Motion Record, Tab 2: Affidavit of Theresa McLenaghan, at paras. 3-8**

**Motion Record, Tab 3: Affidavit of Patricia Chew, at paras. 2, and 4-6**

**Motion Record, Tab 4: Affidavit of Stephen Hazell, at paras. 7-8, 11-13 and 18**

**Motion Record, Tab 5: Affidavit of Jean François Girard at paras. 2-8 and 10-11**

**Motion Record, Tab 6: Affidavit of Beatrice Olivastri at paras. 2-7**

**Motion Record, Tab 7: Affidavit of Anna Cederstav at paras. 2-3, 5, and 9-11**

5. The proposed Interveners collectively have a wealth of experience working to utilize and improve environmental assessment schemes at federal, provincial, and international levels. In this regard, the groups have been variously engaged in law reform and public education activities; providing legal representation to individuals and groups in environmental assessment proceedings; writing or contributing to a range of publications; and working with international, federal, and provincial committees, and with other non-governmental organizations.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, at paras. 9, and 16-20**

**Motion Record, Tab 3: Affidavit of Patricia Chew, at paras 7-16**

**Motion Record, Tab 4: Affidavit of Stephen Hazell, at paras. 11-16**

**Motion Record, Tab 5: Affidavit of Jean François Girard at paras. 9 and 12-13**

**Motion Record, Tab 6: Affidavit of Beatrice Olivastri at paras. 8-14**

**Motion Record, Tab 7: Affidavit of Anna Cederstav at para. 4, 7-8 and 12**

6. One of the proposed Interveners, CELA, participated extensively in the original development of the CEAA, and was also involved in the 2003 amendments to the Act. CELA's submissions influenced decision of the Minister of the Environment to amend section 21 of the CEAA in 2003 so as to explicitly require public consultation on proposed scoping decisions for projects described on the Comprehensive Study List.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, at paras. 10-13, and 15**

## **PART II – STATEMENT OF QUESTIONS IN ISSUE**

7. Should the proposed Interveners be granted leave to intervene in this appeal?

## **PART III – STATEMENT OF ARGUMENT**

### **(a) General Test for Intervention**

8. Motions for intervention are addressed by Rules 55 to 59 of the Rules of the Supreme Court of Canada. Pursuant to Rule 59, a Judge of this Court may grant an order of leave to intervene upon such terms and conditions as the Judge may deem appropriate.

**Rules of the Supreme Court of Canada, at Rules 55-59**

9. This Honourable Court, on motion, has authority to grant leave to intervene to any person who is interested in an appeal and satisfies the Court that he or she will make submissions that are relevant to the proceeding, will be useful to the Court, and differ from those of the parties to the appeal. The Court has “a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention.”

*R. v. Finta*, [1993] 1 S.C.R. 1138 at p. 1142

*Re Workers’ Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 at p. 339

*Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665

**Rules of the Supreme Court of Canada, at Rules 55 and 57**

### **(b) The Appeal has Important Public Interest Implications**

10. Intervener status is generally granted where an intervener will provide a ‘fresh’ perspective in the context of cases involving important public law issues. This is particularly so where the proposed interveners are public interest organizations.

**Brian A. Crane & Henry S. Brown, *Supreme Court of Canada Practice (2008)*. 2008 Thomson Canada Limited at p.342**

11. This appeal will impact the application of the CEAA from coast to coast to coast, and across a broad range of industrial sectors. The proposed Interveners – all of which

are public interest organizations – consider that this appeal is of profound importance to the environment and the Canadian public in two overarching ways. First, it has far-reaching environmental implications related to Responsible Authorities’ ability to take a piecemeal approach to “projects” subject to the CEAA, so as to avoid their statutory duties under section 21 of the Act. Such an approach prevents the identification and evaluation of the true nature, extent, and significance of major industrial projects’ likely environmental impacts.

12. Second, this appeal it will effectively determine the nature, extent and enforceability of the Canadian public’s participatory rights provided under CEAA, particularly in relation to project-scoping determinations under section 21 of the CEAA.

13. The ‘fresh’ perspective on the issues upon which the six public interest environmental organizations are seeking leave to intervene is outlined in the following paragraphs.

**(c) The Proposed Interveners have a Significant Interest in the Issues on Appeal**

14. CELA, FOE, WCELA, and QELC have been granted intervener status before this Honourable Court on a number of occasions, including cases that are directly relevant to the issues on appeal.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan at paras. 6-7**

**Motion Record, Tab 3: Affidavit of Patricia Chew at para. 6**

**Motion Record, Tab 5: Affidavit of Jean-François Girard at para. 10**

**Motion Record, Tab 6: Affidavit of Beatrice Olivastri at para. 7**

15. As reflected in their respective affidavits in support of this intervention motion, the proposed Interveners collectively have extensive experience and expertise regarding the CEAA, and the specific issues of ‘project splitting’ and public participation under that Act. The proposed Interveners all have a pressing and substantial interest in the disposition of the appeal, in that they each make use of the CEAA and view its correct interpretation and application as important to furthering their corporate objectives and safeguarding the interests of their client communities and environmental networks.

*Finta, supra*, at pp. 1142-1143

Motion Record, Tab 2: Affidavit of Theresa McClenaghan at paras. 4, 9-13, 15-20, and 29

Motion Record, Tab 3: Affidavit of Patricia Chew at paras. 4-5, 7-8, 10-12, and 14-15

Motion Record, Tab 4: Affidavit of Stephen Hazell at paras. 7-8, 11, 14-17, 19, and 22

Motion Record, Tab 5: Affidavit of Jean-François Girard at paras. 2, 4, 9, 11-12, and 18

Motion Record, Tab 6: Affidavit of Beatrice Olivastri at paras. 2-3, 8-14, and 18-20

Motion Record, Tab 7: Affidavit of Anna Cederstav at paras. 2, 8 and 13-15

**(d) Proposed Interveners' Submissions: Legal Context and Public Interest Implications of the Appeal**

16. If granted leave to intervene, the proposed Interveners intend to make submissions regarding the need to interpret section 21 of CEAA in a manner that:

- (a) reflects the international legal context within which the provision must be interpreted generally, and specifically applies the precautionary principle;
- (b) considers relevant jurisprudence from other jurisdictions;
- (c) protects public rights in the environment and recognizes the Crown's duties to protect those rights; and
- (d) properly reflects the importance of public participation in the environmental assessment processes.

17. A copy of the proposed Interveners' draft submissions to this Honourable Court are included as Exhibit G to the Affidavit of Theresa McClenaghan. These proposed submissions are summarized in the following paragraphs.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G**

**(i) International Legal Context: Comprehensive Environmental Assessments, the Precautionary Principle, and Public Participation**

18. The proposed Interveners submit that international law provides an important context for interpreting the CEAA, and further submit that allowing an RA to "split" a project so as to avoid the requirements of section 21 of the CEAA is contrary to Canada's obligations under international environmental law regarding the adequacy of environmental assessment processes. It is also inconsistent with the precautionary principle that has been established in international law.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 28-47**

19. The proposed Interveners also intend to discuss and apply relevant international law principles regarding public participation in environmental assessments.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 48-57**

**(ii) Relevant U.S. Jurisprudence and Law**

20. The proposed Interveners intend to make submissions on the relevance and persuasive value of caselaw which has arisen under the federal environmental assessment law in the United States.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 58-67**

21. The U.S. Supreme Court and other federal courts have strongly rejected project-splitting, recognizing that this practice results in incomplete and inadequate environmental assessments.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 61-66**

**(iii) Protecting the Public's Legally Recognized Rights**

22. Public rights exist in the environment. These public environmental rights are presumed to be part of the statutory context for understanding the purposes of the CEAA. Because public process is an important part of the protection of these rights, procedural measures aimed at protecting the public's rights, such as those embedded in section 21 of the CEAA, must be construed in favour of the rights.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 68-75**

23. Furthermore, the Crown stands in a *parens patriae* role in respect of the public's environmental rights. Subsection 4(2) of CEAA, which imposes a broad duty on the Crown to administer the Act in a manner which protects human health and the environment and applies the precautionary principle, should be interpreted as a codification of the duties associated with this role.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 76-81**

**(iv) Value and Benefits of Public Participation under CEAA**

24. Permitting interested persons and organizations to meaningfully participate in environmental assessment processes results in improved government decision-making and an increased perception of legitimacy on the part of the public.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 83-87**

25. The importance of early and meaningful public participation in environmental decision-making is embodied not only in the CEAA itself, in relevant academic commentary, and in Parliament's objectives in amending the Act in 2003, but also in a wide range of international law instruments.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 88-94**

**(e) Relevance, Utility, and Distinctiveness of the Proposed Interveners' Submissions**

**(i) Relevance of Submissions**

26. The relevance of the proposed Interveners' submissions to this appeal is amply reflected in the full text of their draft submissions as well as the summary above. The proposed Interveners intend to make submissions to this Honourable Court that pertain directly to the two issues raised by the Appellant in its Notice of Appeal, but will primarily focus on the issue of whether RAs have authority under section 21 to downgrade an environmental assessment from a comprehensive study to a screening-level assessment.

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 7-10**

**(ii) Distinctiveness and Utility of Submissions**

27. This Court has held that the 'useful and different submissions' requirement is "easily satisfied" where an applicant has a history of involvement in an issue raised in an appeal, giving the applicant "an expertise which can shed fresh light or provide new information on the matter." This is in keeping with the Court's recognition of the

desirability of having all the issues in an appeal presented in a “full adversarial context.”

*Re Workers’ Compensation Act, supra*, at pp. 340-341

28. The proposed Interveners’ intended submissions regarding the public interest implications of this appeal, the international law context within which section 21 must be interpreted, the public’s legally entrenched environmental rights, and the broader legal framework within which section 21 operates, are materially different from the submissions of the parties, and will be of significant assistance to this Honourable Court as it considers the issues before it in this appeal.

29. Because of their respective expertise and distinct backgrounds and perspectives, as outlined in their respective affidavits in support of this motion, the proposed Interveners’ position is very different from those of the parties in this appeal. The Appellant’s expertise is limited to the impacts of mining activities, and its concern in the instant case specifically relates to the application of the CEAA to the Red Chris Mine Project. In contrast, the proposed Interveners’ experience and interest extends well beyond the mining sector, enabling them to offer useful and relevant submissions regarding the important legal issues at issue in this appeal. The proposed Interveners do not take a position on the specific outcome of this appeal in relation to the Red Chris Mine Project; instead, they have an interest in the proper application of the CEAA generally and section 21 specifically.

*Finta, supra*, at pp. 1143-1144

**Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, para. 5**

30. A careful perusal of the Appellant’s factum reveals that the Appellant does not intend to fully canvass the relevant international law regime, public environmental rights, environmental assessment caselaw in other jurisdictions, or other key matters of environmental law and policy that the proposed Interveners intend to address in their submissions. The interests and perspectives of the proposed Interveners will thus be prejudiced if leave to intervene is refused, particularly since the other parties in the appeal do not represent these interests or perspectives.



Motion Record, Tab 2: Affidavit of Theresa McClenaghan, Exhibit G, paras. 24, 30-31, 35

**(f) Conclusion: The Proposed Interveners Satisfy the Test for Intervention**

31. For the foregoing reasons, the proposed Interveners respectfully request that they collectively be granted leave to intervene in this appeal, subject to the terms and conditions outlined below. In the alternative, in the event that this Honourable Court finds that certain individual organizations are ineligible for intervener status, it is respectfully requested that this Honourable Court should grant leave to the other organizations which satisfy the criteria for obtaining leave to intervene.

32. If leave to intervene is granted, the proposed Interveners respectfully request an opportunity to file a factum longer than the 20 page limit usually imposed upon interveners. This request is made in light of the number of groups involved, the number of complex legal and policy issues arising in this appeal, and the extensive nature of the international law regime that is relevant to the present appeal.

Motion Record, Tab 2: Affidavit of Theresa McClenaghan, paras. 36 to 37

33. However, if this Honourable Court does not grant the proposed Interveners leave to file a 30 page factum, the proposed Interveners undertake to revise their draft factum (Exhibit G to the Affidavit of Theresa McClenaghan) to meet the 20 page limit, or such other page limit as may be specified by this Honourable Court.

**PART IV – COSTS**

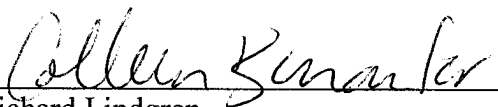
34. The proposed Interveners seek an Order from this Honourable Court that there be no costs to or against them in relation to this motion and, if leave is granted, in relation to the appeal.


**PART V – ORDER SOUGHT**

35. The proposed Interveners respectfully request an Order:
- (a) granting leave to the Canadian Environmental Law Association, West Coast Environmental Law Association, the Sierra Club of Canada, Québec Environmental Law Centre, Friends of the Earth, and Interamerican Association for Environmental Defense to intervene in the appeal;
  - (b) permitting the Interveners to file a factum not exceeding 30 pages, or such other length as the Court may order, within eight weeks after the order granting leave;
  - (c) permitting the Interveners to make oral submissions at the hearing of this Appeal, not exceeding 20 minutes;
  - (d) directing that the Interveners shall not supplement the appeal record, file additional affidavits, or raise new issues on appeal;
  - (e) directing that there be no costs to or against any of the Intervener organizations; and
  - (f) such further terms and conditions as this Honourable Court may deem appropriate.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at the City of Toronto, Ontario, this 7th day of May, 2009.

  
Richard Lindgren  
Counsel for the Interveners

  
Andrew Gage  
Counsel for the Interveners