

IRENE C. FAULKNER
BARRISTER & SOLICITOR

Our file: 50015

September 21, 2009

The Honourable Jim Prentice, P.C., M.P.
Minister of the Environment
Environment Canada
Les Terrasses de la Chaudière
North Tower, 28th Floor
10 Wellington Street
Gatineau, Quebec K1A 0H3

Dear Honourable Minister:

Re: Request that you refer the environmental assessment of the proposed Victoria International Marina project to a Review Panel pursuant to s. 28 of *Canadian Environmental Assessment Act (CEAA)*; CEAR reference number 08-01-36286.

On behalf of the South Island Sea Kayaking Association (SISKA) we write to request that you refer the current environmental assessment of the proposed Victoria International Marina project to an independent Review Panel for a full public hearing pursuant to s. 28 of the *Canadian Environmental Assessment Act*, based on:

- the potential significant adverse environmental effects of this project; and
- the deep and widespread public concerns associated with this project.

The proposed marina project is currently undergoing a screening level environmental assessment under *CEAA*. However, s. 28 of *CEAA* authorizes the Minister of Environment to refer the project to a review panel for public hearings if a project may cause significant adverse environmental effects, or when public concerns warrant such a referral. In this case a referral is necessary because not only does this project risk significant adverse environmental effects, it has also raised massive public concern.¹

¹ The proponent of the project has recently deposited an amended plan of the marina at the Land Titles Office. Our review of that plan indicates that the changes are minor and do not address or mitigate the concerns addressed in this letter.

Significant adverse environmental effects.

“Environmental effects” in respect of a project are defined in s. 2(1) of *CEAA* as follows:

(a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,

(b) any effect of any change referred to in paragraph (a) on

(I) health and socio-economic conditions,

(ii) physical and cultural heritage,

Environmental changes caused by this project.

The environment (which includes land, water and air) is being physically changed as the planned marina project will occupy and displace a significant portion of Victoria's open harbour -- 2.63 hectares or approximately 6.5 acres. This is an area approximately five times the size of all the floating wharves currently in the area in front of the Empress Hotel in Victoria's inner harbour. The marina will provide slips for approximately 50 mega yachts, up to 165 feet long and up to three stories high, or possibly 88 to 90 smaller boats.

The proposed marina project may cause the following significant adverse environmental effects, among others:

- The massive dredging of the harbour bed for this project could result in the re-suspension of large quantities of toxic and hypoxic or anoxic contaminants, including PCBs and dioxins, which could result in the harmful alteration, disruption or destruction of fish habitat and deposition of deleterious substances into waters frequented by fish, crabs and other organisms that are consumed by members of the public.² For example, crab fishing boats routinely keep their live crab, caught elsewhere, in the waters at Fishermen's wharf – directly across from the proposed dredging site. The dredging and re-suspension of toxic materials may have to be repeated every few years during the life of the marina,

² In 2007, Transport Canada conducted an Ecological and Human Health Risk Assessment for sediments on the harbour floor of Victoria Harbour's Lower Basin. The study found the presence of metals (antimony, copper, lead, mercury, silver and zinc), polycyclic aromatic hydrocarbons and polychlorinated biphenyls (PCBs) in the intertidal and subtidal sediments. Earlier sediment sample studies (1998, 2001 and 2005) were analyzed for a broader range of substances and found the presence of dioxins (polychlorinated dibenzo-p-dioxins/furans (PCDD/Fs)). The report further states that: “The Lower Basin is currently under a DFO-ordered sanitary closure for bivalve (e.g. clams, mussels, etc.) harvesting, commercial closure for crab fishing and a recreational consumption advisory for crab hepatopancreas.” A recent Fisheries and Oceans Canada report warns of dioxin contamination in Victoria Harbour and gives a consumption limit for crab hepatopancreas. (FOC, Tidal Areas Regulations: <http://www.pac.dfo-mpo.gc.ca/fm-gp/rec/tidal-maree/a-s19-eng.htm#Shellfish>, accessed 25 June 2009).

repeatedly releasing toxins into the water column and affecting marine life. See Appendices A [*Comments on the Victoria International Marina Project Environmental Assessment Reports, May 2007 and August 2008, by Brian Emmett. M.Sc., R.P. Bio*] and B [*Notes to File of Jim Schellenberg, November 15, 2006*].

- The project will shade out important subtidal habitat, which may not allow the habitat to recover after dredging. The project may also negatively impact Lime Bay and its important habitat for molluscs. See Appendix C [*Letter and Comments to The Manager, Navigable Waters Protection Division, Transport Canada, from Gorge Waterway Initiative, dated December 8, 2008, "GWI Comments"*].
- The area from the western section of the proposed marina to West Bay is the only part of the harbour still utilized by marine birds for feeding, particularly during the fall and winter seasons. Over the years, bird use of the Victoria Harbour, a federally-designated Migratory Bird Sanctuary, has declined significantly due to increasing vessel and seaplane traffic and decreasing marine feeding habitat. The project is likely to exacerbate this decline. See Appendix C [*GWI Comments*].
- The subtidal area between the Songhees Walkway and Pelly Island (the location of the proposed marina) is the only area of Victoria Harbour that contains significant underwater vegetation that provides necessary habitat for marine birds and fish as they pass through the harbour to reach fish spawning areas in the Gorge and Portage inlet. This area could be significantly damaged by the proposed dredging and may not recover due to the shading caused by the proposed docks, floating breakwater and mega yachts. See Appendix C [*GWI Comments*].
- The harbour's physical environment will be changed as the project will cause changes in the type of vessels in the harbour. The project will displace, discourage and impede the operation of sustainable, environmentally friendly non-powered paddling vessels, in favour of increased use by fossil-fuel burning mega yachts. The proposed marina will also infringe on the public's right to navigate in public waters, a right that has existed for centuries. See Appendix D [*Letter from Irene C. Faulkner, Barrister & Solicitor to the Hon. Ron Cantelon, Minister of Agriculture and Lands, dated April 14, 2009*].

The changes to the environment will adversely affect health conditions, and physical and cultural heritage

The changes to the environment (water, air and land) resulting from the proposed marina's docks, buildings and vessel operations, will likely create effects on "health conditions" and "physical and cultural heritage", thus causing "environmental effects" as defined in s. 2(1) of *CEAA*. These effects will be adverse and significant, and therefore merit the establishment of a public Review Panel under s. 28.

Effects of environmental changes on health and safety.

This project has raised profound concerns about public safety and health. The middle harbour is a narrow area where southerly winds and waves from the Juan de Fuca Strait pose a challenge to aircraft operators and marine operators. The unobstructed waters north of Pelly Island that,

according to the Port of Victoria traffic scheme, are currently set aside for non-powered vessels, offer a margin of safety for aircraft and vessel operations that will be eliminated if construction of a marina is permitted.

The proposed project raises serious concerns about the safety of operators of non-powered vessels who may be forced to either travel through the marina or share the area adjacent to the marina with taxiing aircraft and harbour ferries. In addition, the safety of ferry, boat and airline passengers may also be at risk since marine and air traffic will be forced to operate in a more confined area with increased congestion.

Serious concerns about safety have been expressed by commercial and recreational users of the harbour and by government officials:

- The managing director of Victoria Harbour Ferry Company, the company which carries over 200,000 passengers a year in the harbour and accounts for over 50% of all air and marine movements on the harbour has expressed serious concerns about safety. Barry Hobbis of Victoria Harbour Ferry Company states that this proposed development will create "clear and present danger". He points out that the current proposal may cause aircraft and marine operations to shift to other areas of operation in the harbour that could lead to a condensed environment wherein there is a risk of incident which may not normally have existed. See Appendix E [*Letter from B.C. (Barry) Hobbis, Director, Victoria Harbour Ferry to the Hon. Barry Penner and the Hon. Pat Bell, dated July 3, 2009*]
- Harbour Air Seaplanes is on the record as being opposed to this marina proposal, citing the "number of users and the positive control of their paths of access" as being of considerable concern. See Appendix E.1 [*Letter from Harbour Air Seaplanes to Transport Canada, December 1, 2008*]
- Currently the waters where the marina is to be located are formally designated for the use of non-powered vessels.³ Concern about safety of both competitive and recreational paddlers has been expressed by several organizations, including Ocean River Sports, a major eco-tourism operator that provides a launching site for two paddling clubs with a membership of 150, rents non-powered vessels, trains paddlers, and operates performance canoes ranging in size up to 48-foot-long outriggers.⁴ Ocean River states that the marina "will reduce the amount of harbour space that we currently share with small and large motorized vessels, planes and ferries, creating a dangerous situation". See Appendix F [*Letter to Superintendent, Navigable Waters Protection Program, Transport Canada, from Ocean River Sports, dated December 22, 2008*].
- Go Rowing and Paddling Center -- which has trained Olympic and World Championship medalists and also offers programs for hundreds of rowers and paddlers to use dragon boats, rowing shells, outriggers and sea kayaks in the harbour -- has expressed concern that the current marina proposal will impede the only available passage for human-powered watercraft to safely transit in and out of the harbour. See Appendix G [*Letter*

³ On the Port of Victoria Traffic Scheme published by Transport Canada.

⁴ Crewed by six paddlers.

from GO Rowing and Paddling Association of Canada to the Hon. Denise Savoie, dated March 3, 2009].

- Competitive paddler Kris Terauds has stated that competitive performance paddlers use the non-powered traffic lane along the harbour's north shore to reach the open water beyond and therefore the safety and continued operation of competitive paddlesports are threatened. Altering the harbour traffic scheme so that just a narrow outer channel is available for the transit of performance craft "in any adverse water or wind conditions, [will] leave zero margin for adjustment and drastically increases the risk of a serious accident". See Appendix H [*Letter to Honourable John Baird, Minister of Transport from Kris Terauds, dated March 19, 2009*].
- Victoria Canoe and Kayak Club ("VCKC"), a non-profit organization with over 400 members, has told Transport Canada that transiting through a private marina where yachts are operating is not a safe or viable option, especially for group kayak excursions and outrigger canoes. The Chair of VCKC Education, Standards and Safety Committee warned that collisions could occur because the construction of the marina and yacht club will substantially reduce the surface operating area available for marine traffic. "Currently without the marina structure, the approved traffic scheme provides the necessary separation while ensuring public access by all". See Appendix I [*Letter to Superintendent, Navigable Waters Protection Program from VCKC dated December 11, 2008*].
- South Island Sea Kayaking Association (SISKA), with over 130 members, warned that in addition to the potential risks to kayakers posed by increased traffic congestion and being forced to paddle in close proximity to the aerodrome taxiway, the chaotic sea conditions created by the operations of a marina's wave attenuator could expose kayakers to the risk of capsize. See Appendix J [*Letter to Superintendent, Navigable Water Protection Program from SISKA dated December 22, 2008*].
- On the revised plan, there is no detailed reference to what the specific changes are between the original plan and the amended plan, however it appears that the changes proposed by the developer are minor in nature. These changes do not address the concerns raised in earlier submissions about access to navigable waters and about marine safety, particularly as it relates to passage of outrigger canoes that are typically up to 45 feet in length and almost nine feet wide. Minor adjustments to the arched bridge still do not permit reasonable access for large outrigger canoes. There is no evidence that impacts of tidal fluctuations on the utility of this arched bridge have been considered. See Appendix K [*SISKA submissions to Transport Canada and to the Integrated Land Management Branch, August 14, 2009*].
- There is also considerable risk involved with non-powered vessels paddling through a private marina. As pointed out by SISKA, "This private traffic management plan requiring paddlers to transit through an operating marina raises safety issues that were identified in earlier submissions. Yachts have extremely restricted (and often obstructed) sightlines of vessels close aboard. Another hazard presented to paddlers is the discharge current of the yachts' thrusters while they are maneuvering within the proposed marina. The revised plan does not mitigate the safety issues with respect to transiting through the marina or navigating the narrow area between the perimeter of the marina and the taxiway. Transport Canada has yet to engage in meaningful consultation with identified

marine stakeholders groups with respect to the impact of this project on the public right to access and navigate these waters safely. The paddling community has not been given a place at the table where potential changes to the Port of Victoria harbour scheme are taking place. The concerns from the public have yet to be adequately addressed by the decision-makers." (Appendix K)

- Another concern is whether Transport Canada has conducted a proper risk analysis of terms of the potential for further negative impacts (environmental and safety) if the marina use were to change from moorage for 50 mega-yachts to moorage for 90 smaller boats. Current restrictions ensure that vessels under 65 feet do not cross the traffic lane in the center of the harbour reserved for larger vessels and seaplanes. Transport Canada officials are on record as stipulating that if the marine use was for moorage for smaller boats, additional safety issues would need to be addressed. We submit that further environmental concerns would also arise should such a change of use occur – for example, significantly higher volume of vessel movements on the water with a corresponding increase in emissions and the possibility of 'grey' water (from sinks and showers) being dispersed into the harbour. (Appendix K)

It is highly unlikely that the same level of safety that exists today can be maintained after the marina is built when existing and new aircraft and marine traffic (including non-powered vessels) are required to operate in a more restricted surface area with increased traffic congestion. Safety considerations have not been adequately resolved with stakeholders, including operators of non-powered vessels. It appears that an up-to-date proper risk analysis study with input from marine stakeholders has not been conducted. The accuracy of the proponent's Air Traffic Study dated September 15, 2006, completed for the project by McNeal & Associates, is, according to Transport Canada officials, questionable and misrepresents the Victoria Harbour operations, PVTs (Port of Victoria Traffic Scheme) and regulations. For example:

- Victoria Harbour Master David Featherby has criticized this document, stating, "[T]he historical inaccuracies referred to brings into question the accuracy of the entire document". Transport Canada Senior Inspector Rob Ogden has stated, "The risk analysis in the report is not a risk analysis by industry standards, nor does not follow the TC model [sic]." (See Appendix L [*Email from-David Featherby to Rob Ogden, Robert Prud'homme & Chris Cox dated November 28, 2007 and Email from Rob Ogden Robert Prud'homme, David Featherby & Chris Cox, dated November 28, 2007, – review of McNeal & Assoc. Report*].)
- Furthermore, Transport Canada official Robert Prud'homme has stated "The risk analysis outlined in the [McNeal] report with respect to taxiing of aircraft and powerboats on the north side of the harbour does not taken into consideration the activity of rowers and non-powered vessels in this area" (See Appendix M [*Letter from Robert Prud'homme to Community Marine Concepts Ltd.*])
- In addition, it should be noted that Transport Canada has stated that if further changes are made to the marina plan to permit moorage for smaller boats, this could give rise to substantial new risks to safety that would have to be addressed. See Appendix N [*Email*

*from Chris Cox to David Nowzek, Rob Ogden, Robert Prud'homme, and Jim Schellenberg, dated November 27, 2008]*⁵

- In an email exchange of May 15, 2008, Mr. Dave Featherby, the Victoria Harbour Master, told fellow Transport Canada officials, "it is clear from the drawings [of the proposed marina] now that the taxi way is tight up against the marina with little or no room for hand powered vessels." See Appendix O [*Email from David Featherby to Robert Prud'homme and Jim Schellenberg dated May 15, 2008*]
- In an e-mail, dated June 18, 2007, from Rob Ogden, Senior Inspector, Aerodromes and Air Navigation, Transport Canada, to Jim Schellenberg, David Featherby, et al., Mr. Ogden wrote:
 - "The location of the marina would be disruptive to both commercial marine vessels, rowers, kayaks (tourist) and commercial aircraft activities. (p. 2)
 - "The access routes would be very disruptive to both marine vessels and aircraft taxing, taking off and landing which may result in significant economic impact to existing operators (both marine and aviation)." (p. 2)
 - "The certification of the Water Aerodrome would be impacted. A large part of the water aerodrome certification is the management and separation of marine and aviation activities." (p. 2)
 - "It is highly unlikely that the same level of safety that exist today can be maintained by simply adding the new access routes to the existing Port of Victoria Traffic Scheme." (p. 2)
 - "To maintain the required level of safety and provide "equitable" access to the harbour it may require the positive control of both marine and aviation activity. This is theoretically possible but such a facility does not currently exist. This would be a costly and likely involve user fees." (p. 2)
 - "Although there would be benefits to the new marina operator and it's users, any decision (support) to go ahead with the Marina should not be made without a benefit cost analysis, understanding the impact on tourism and existing economic activities, hence it is unclear if the "Public Interest" would be served by this project." (p. 3)

⁵ Note also that a proper risk analysis study is required and revisions to the marina plan must be carefully vetted (including consultation with all marine users), if the marina design is changed to accommodate moorage of vessels less than 65 feet in length. According to Transport Canada regulations, vessels less than 65 feet are required to use traffic lanes on the south side of the harbour. These vessels would have to cross [over] area A and some of area B to enter the marina on the north shore. "Any proposal must address the interest of rowers [paddlers] and cannot include uncontrolled crossing of runways A and B for vessels less than 65 feet in length". (See Appendix M). "Should the proposal or future plans be changed to allow smaller pleasure craft (i.e. the weekend warrior crowd) to operate from this facility, then we would most certainly need to re-address all the issues this will introduce". (See Appendix N)

“Civil Aviation’s primary role is safety.” (p. 3)

In an earlier email on June 18, 2007, Jim Schellenberg told Rob Ogden that:

“My concern is that the mariners will proceed inbound to the harbour and will conflict with the traffic patterns of the north/south runway. It will push small boats from the north side of the harbour southward into both the nav channel and into the designated seaplane taxiway. It may also conflict with the east/west runways. The time of year these vessels would be coming/going is the busiest time of the year. It’s all about safety.” (p. 3)

See Appendix P [*Email exchange between Rob Ogden and David Featherby dated June 18, 2007 re: aerodrome safety & public interest*]

- Robert Prud’homme (Superintendent, Property Services, Transport Canada) stated in an e-mail to David Featherby (Harbour Master) et al, “We need to resolve the outstanding issue re hand powered boat access between the marina and the runway/taxiway.” See Appendix Q [*Email exchange from Robert Prud’homme to David Featherby et al. dated May 7, 2008, re: outstanding issue re hand powered boat access between the marina and the runway/taxiway*].

The numerous safety concerns expressed by commercial and recreational users of the harbour and by government officials have not been addressed.

Effects of environmental changes on the physical and cultural heritage.

CEAA’s Reference Guide on Physical and Cultural Heritage provides examples of Cultural Heritage Resources which must be considered if a project’s environmental changes will adversely affect them. The Guide cites the cultural landscapes of Stanley Park in British Columbia and the Percé Rock in Gaspé as examples of such Cultural Heritage Resources.⁶ In this case this project’s changes to the environment will severely impact Victoria Harbour, which is a similarly important cultural landscape and national treasure. In fact, when Canadians think of Victoria, they automatically think of Victoria Harbour.

The CEAA Guide goes on to describe “Effects on Cultural Heritage Resources Related to Change in the Environment”. One example provided in the Guide states:

“building on the federally-owned waterfront at an historic town could affect not only the cultural resources in the area but also alter the density and viewsapes of the area. The impacts of the project on the heritage character of the town must be assessed.”⁷

⁶ Canadian Environmental Assessment Agency “The Canadian Environmental Assessment Act, Reference Guide on Physical and Cultural Heritage Resources” (1996) at 4, online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/017/images/cea25_2e.pdf> accessed 19 June 2009.

⁷ *Ibid*, at 5.

Similarly, the proposed marina will destroy some of Canada's most iconic and beautiful urban views – heritage views that define what Victoria is, and what Victoria means to its residents and to all Canadians. Views across the harbour to James Bay and the Olympic Mountains beyond will be blocked by mega yachts, which range from 65 to 180 feet long and are up to three stories high. Many thousands of residents and visitors to Victoria enjoy these views throughout the year, and these views have come to define the City.

While not clearly taking a position on the proposed marina in its April 19, 2009 letter providing "referral comments" to the Province the City of Victoria identified numerous impacts that this proposed marina would have on the physical and cultural heritage of Victoria. See Appendix R [*Letter from City of Victoria to Province of B.C. Integrated Land Management Branch, dated April 19, 2009*]

Subsequently, Mayor Fortin, on behalf of the Council of the City of Victoria, has raised two "very serious issues" with The Honourable Patrick Bell. Mayor Fortin wrote:

The Scale of the Proposed Marina

The footprint of the proposed marina is much greater than originally conceptualized in relevant City Planning policies. The Council believes this project is fundamentally out of balance with the current plans for the neighbourhood and runs counter to the original vision for this location. Although this zoning does permit docks for pleasure boats, the underlying intent of the Community Plan has been to support a range of marine uses that are oriented to public use and that are compatible with adjacent residential and park uses. Further, the proposed scale of the marina will have a significant negative impact on view corridors over the harbour envisioned in City Planning documents.

...

The scale and scope of the proposed marina is far beyond the community interests and expectations brought to this Council's attention.

Integrity of Adjacent City Park

The City is the owner of Lime Bay Park, which is immediately west of the Royal Quays and lot SCR-1. The proposed marina shows docks and piles erected on the water surface fronting Lime Bay Park. The Council wishes to express their concern and the concern of many residents in our community with the erection of docks and piles in front of Lime Bay Park. The Council believes that the public has a reasonable expectation that the water surface fronting one of the last remaining park areas in Victoria's Inner Harbour not be encumbered with docks and piles as this will detract from the public's enjoyment of the park and impede access across the water surface to the park. Council is supportive of the public's expectation to be able to land or launch a vessel along the foreshore of a park.

See Appendix S [*Letter from Dean Fortin, Mayor, City of Victoria to The Honourable Patrick Bell, Minister of Forests and Range, June 25, 2009*]

Clearly, the impacts of this project's changes to the water and air of the project site will impact Victoria Harbour and its physical and cultural heritage values. These impacts are important to the people of Canada and visiting tourists and must be carefully assessed.

Public concerns merit a Review Panel

Section 28 provides that the Minister may refer an assessment to a Review Panel if public concerns warrant such a referral. The issues described above have led to widespread and urgent public concern about this project across a broad spectrum of the community including politicians, business operators, marine stakeholder groups, environmental groups and a diverse array of citizens.

Much concern has been expressed that the public consultation process has been grossly inadequate for a project of this scope that could permanently change the use and enjoyment of such an important public asset and turn it over to private use. Inadequate public consultation has engendered distrust towards government officials responsible for overseeing the environmental assessments and the various approvals which are required for this project to proceed. In our respectful submission, a public hearing before an independent Review Panel is the only administrative procedure that may serve to address the numerous concerns which have been raised by SISKA and other stakeholders, and restore the public trust.

Some examples of the "public concern" generated by this proposal include:

- Approximately 7000 people have signed a petition opposing this project.⁸ The Honourable Denise Savoie tabled the Petition on Parliament on June 17, 2009.⁹
- A public meeting held in February 2009 at Victoria City Hall that was organized by Denise Savoie, MP and the Victoria West Community Association was packed to overflowing with citizens and elected officials voicing opposition.
- A subsequent meeting organized by a group of former Victoria mayors at Victoria High School in April 2009 attracted hundreds of people opposed to the project, including business owners and an Olympic medalist in competitive paddlesports.
- Member of Parliament, Dr. Keith Martin, speaking for constituents and user groups, in a letter to Minister John Baird, dated April 9, 2009, stated:

The public consultation has been inadequate and residents and user groups are deeply concerned but they have been excluded from having any input into this project.

⁸ The website www.savevictoriaharbour.com contains the petition and further examples of the public's interest and concern over the proposed marina.

⁹ <http://denisesavoie.ndp.ca/node/1045>

The benefits to the community appear to be modest but the impact on what is truly one of the loveliest and most functional harbours in Canada will be negative and profound. See Appendix T [*Letter from Dr. Keith Martin to Minister John Baird, dated April 9, 2009*]

- Member of Parliament, Denise Savoie, in a letter to you and the Honourable John Baird, expressed her concern and that of her constituents with respect to Transport Canada's decision that public participation is "not warranted" for this project. See Appendix U [*Letter from Denise Savoie, MP to the Honourable Jim Prentice and the Honourable John Baird, January 22, 2009*].
- Three former Victoria mayors, the current mayor and two local Members of Parliament have spoken out publicly to express their concerns about the harm that may be caused by this project.
- Marine users, including local businesses who operate on these waters and several rowing and paddling organizations representing close to 1,000 members have made submissions outlining serious concerns about environmental risks and impacts on other users of these waters if this project proceeds. Individual citizens have also written numerous letters of concern to government and the media. Print media have published innumerable articles about concerns with this project and the electronic media has also aired the concerns of citizens.

See:

Appendices C to K referenced above
Appendix V (*Various letters to the Editor*)
Appendix W (*Media clips*)

- Marine and other users reiterated in August, 2009, when responding to a revised plan posted by the proponent, that the changes to the plan were insignificant and did not address concerns that they had raised earlier in the review process. (Appendix K)
- In addition, residents, marine stakeholders and tourists have expressed their concerns on a website¹⁰ where they clearly demonstrate that in addition to offering some of the best urban paddling waters in the world, the harbour is a natural 'gem' that offers unique and irreplaceable values to the public that must be protected – including beautiful views, recreational enjoyment along the WestSong Walkway, wildlife viewing and maintenance of biodiversity¹¹.
- In conversation with a federal official, a city official has acknowledged that "local residents are generally opposed to the project". See Appendix X [*Notes from telephone call between Mickey Lam (City of Victoria) and James Wilkinson (Transport Canada)*].

¹⁰ This website www.savevictoriaharbour.com contains the petition and further examples of the public's interest and concern over this proposed marina.

¹¹ www.savevictoriaharbour.com

- Federal officials have acknowledged that there are issues about equitable access to the harbour that have not been resolved and it is unclear if the public interest would be served by this project. (See Appendices L to Q)

The citizens of this region view this project as a real threat to the fundamental integrity of a regional and national asset – Victoria’s small but beautiful harbour. Public concern about a project could not be higher, and the public demands a full vetting of this project.

Further Need for a Review Panel

By law, a Review Panel will be unbiased, which is particularly necessary in this case.

By law, a Review Panel must be comprised of persons who “are unbiased and free from any conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project.”¹²

We submit that there is a need for an independent, unbiased Review Panel for this project due to the demonstrated reasonable apprehension of bias on the part of federal and provincial officials in favour of approving this project. This apparent bias of federal and provincial officials undermines the public’s confidence that this matter will be dealt with objectively, and in the public interest. The remedy for this undermining of public trust is a full and transparent public hearing process to determine what decision would best serve the public interest.

Documented examples of a reasonable apprehension of bias include:

- A Transport Canada employee stating that she will “champion this [marina] project”. See Appendix Y [*Email from Irene Lin to Jim Schellenberg, dated October 30, 2007*].
- A provincial cabinet minister issuing a letter of support for the marina. See Appendix Z [*Letter from Minister Hagen to WAM Partner*].
- In November 2005 a Provincial official from the Integrated Land Management Bureau instructed the City of Victoria that the City was obliged to obtain “written support” from Marina developer Mr. Evans before the City could rezone a section of the relevant water lot as park – because, according to the Provincial official, the developer, Mr. Evans, had an “interest” in the provincial waterlot. This was not true, and was an improper instruction to constrain the City’s rezoning of the water lot.

According to documents we have recently obtained, Mr. Evans submitted an application for marina purposes over water Lot 1 in October 2005, but it was sent back 13 days later because it was lacking information. Clearly in November 2005 Mr. Evans did not have *any* legal interest in the water lot and did not even have a pending application for the water lot. Yet the provincial officials still incorrectly told the City that the developer had an “interest” – and incorrectly advised the City that his support must be obtained before the City could rezone the lot. Thus, the Province appears to have improperly given the developer a “veto” over City rezoning of the water lot. This e-mail exchange between

¹² CEAA, s. 33(1)(a)(I)

the province and city gives the perception that the province may unduly and improperly favour the developer's proposed marina. This is of concern because the developer is now applying to the Integrated Land Management Bureau for a water lot licence of occupation -- and the ILMB's previous inaccurate instructions to the City raise serious questions about the neutrality of the agency in making decisions about the application. See Appendix AA [*Emails from ILMB to the City and questions posed to the ILMB with respect to Evans' "interest" and the ILMB's response.*]

- Transport Canada mailing notices of the developer's March 2009 open house to members of the public. The notice that was sent out by Transport Canada (TC) on behalf of the developer consisted of the developer's promotional brochure that 'pitches' the exciting and positive aspects of this development, rather than an official notice of a public event with neutral wording. Therefore the perception is that the review officer who distributed the brochure was promoting the project and urging people to become excited about it. The email suggested this open house was an opportunity for public consultation. "Transport Canada has requested the proponent meet to hear and discuss these issues with you in an open forum." TC has provided no documentation to demonstrate that the comments heard were collected, reviewed and taken into consideration to inform their decision-making process. This contributed to the perception among attendees that this event was not a meaningful opportunity to give input to the decision-makers. The alleged differential treatment arises because the review officer did not offer similar free mail-out services to organizers (Victoria West Community Association and MP Denise Savoie) of a public forum held on February 17, 2009. Transport Canada declined invitations to attend the public forum, even though the review officer had attended an earlier event organized by the proponent in September 2008. See Appendix BB. [*example of email from Transport Canada mailing open house invitation.*]
- There is a perception that Transport Canada officials may have been biased in favour of moving this project forward. This perception is based on documentation in which Transport Canada officials make statements that could indicate a willingness to move the project forward based on preliminary information without having fully vetted the project or mitigated public concerns. For example, according to a note on file summarizing a telephone conversation between Transport Canada and the proponent (in which the proponent apparently expressed concerns about negative comments made in public by a third party), the proponent was given assurances that appear to be premature. "I told him [Evans] the department had reviewed this issue and **we were confident that the marina could be accommodated without compromising the safe operation of the harbour**". [emphasis added] Given that the plan had not yet been deposited for public viewing or advertised in the Canada Gazette, and the consultations with non-powered vessel operators had not taken place, on what basis did the review officer give these assurances to the proponent? See Appendix CC [*24 June 2008 – telephone record – call from Robert Evans*]
- Another example: Transport Canada official Robert Prud'homme informed developer Robert Evans in November 2007: "... this is to inform you that Transport Canada will be reviewing the information provided by your company for the development of the proposed marina adjacent to the Songhees development We can then arrange to meet early in the new year to further discuss the next steps to **move this project forward.**" [emphasis added] See Appendix DD [*26 Nov 2007 email from Robert Prud'homme to Robert Evans*]

Another source of concern surrounding the proposed project has been the lack of proper public consultation for a project that will potentially forever change Victoria Harbour. For example, concerns raised in the submissions of key stakeholders have not been addressed.

This lack of consultation has engendered distrust towards the developer and towards the government officials responsible for overseeing the environmental assessment and for providing necessary project approvals. Public hearings by an independent review panel are necessary to restore public trust in the process.

- The Victoria West Community Association (“VWCA”) requested to be added to Transport Canada’s list of invitees to the public consultation process for the proposed mega-yacht marina. Mr. Schellenberg of Transport Canada responded to VWCA stating that Transport Canada would be holding a meeting that week for non-motorized recreational marine user groups only. Mr. Schellenberg did not invite VWCA to this meeting, which was held September 18, 2008, telling them that there would be other forums at which residents of Vic West could discuss issues they had with the proposed marina. To the best of our knowledge, Transport Canada has convened no such further forums. See Appendix EE. [*Email exchange between Nan Judd and Jim Schellenberg, September 16 to October 1, 2008*]
- Likewise, the West Bay Residents Association (“WBRA”) asked, on two occasions, to be advised of public consultation opportunities. Mr. Schellenberg did not respond to their requests, nor did he advise them of the September 18, 2008 meeting, despite having notice of their desire to have an opportunity to speak to the proposal. See Appendix FF [*Email from WBRA to David Osbaldeston, Manager, NWPP*]
- It is our understanding that the September 18, 2008 meeting (held midday on a work day) for recreational users of non-powered vessels was chaired by Lachlan MacLean, a representative of the developer. As regards my client, SISKKA, they did not receive formal notice of the meeting and only heard about it from another organization a few hours before it was scheduled to start. This can hardly be considered “public consultation”. See Appendix J, pp. 5-6.

Meeting of September 22, 2009

A public meeting has been announced for September 22, 2009 from 6pm to 9pm which we understand will have representation from all three levels of government – federal, provincial, and municipal. This meeting has come about as the result of Victoria MP, Denise Savoie, taking the concerns of her constituents to her colleagues in Ottawa, to Provincial officials and to City officials. My clients appreciate the opportunity Ms. Savoie has facilitated to bring all three levels of government together on this issue in a public forum. The agenda of the meeting will allow the developer one hour to “display and answer questions about his revised proposal”. The second hour of the meeting will be consumed by representatives of the federal, provincial and municipal levels of government presenting their roles and jurisdictional responsibilities with respect to the approval process, and the final hour is to be “an opportunity for the public to ask questions.” While my clients appreciate all three levels of government coming together to provide information about their roles and responsibilities with respect to this proposed marina,

such an “informational” public meeting cannot address the potential significant adverse environmental effects of the proposed marina project or the deep and widespread public concerns associated with the project. In our respectful submission, only a full hearing before an independent Review Panel can address these concerns. See Appendix GG [*Media Release, Denise Savoie, MP, September 10, 2009 and letter from Denise Savoie, MP to Michael Henderson, Transport Canada, Larry Pederson, ILMB, and Mayor and Council City of Victoria, September 2, 2009*]

A Review Panel can test the inconsistent evidence regarding this project.

A Review Panel provides the opportunity to summon and cross-examine witnesses and order documents to be produced. Where the credibility of the information put forward about a project is in question, the Review Panel provides an important means of determining the truth. The courts and other agencies have pointed out that the ability to orally cross examine witnesses may be required when a decision maker is faced with inconsistent evidence.¹³ Inconsistent information about the marina proposal has been provided to authorities and the public. For instance:

- In the October 6, 2008 notes of a telephone call between the City of Victoria and Transport Canada, the City employee indicated that the proponent “kept assuring them [the City of Victoria] that everything was ok on the federal front, but I [Transport Canada] clarified that the proposal was still under federal review and no approvals were granted to date”. See Appendix HH [*Notes of phone conversation between Mickey Lam (City of Victoria) and James Wilkinson (Transport Canada) dated October 16, 2008*].
- In the same phone call of October 6, 2008, the City employee “advised that the proponent does not own the upland as they claim. While the proponent once owned the land, they sold it to the new condo owners when they sold the developments”. See Appendix HH.
- A professional has described inconsistencies in the developer’s Environmental Assessment Report in a critique with respect to the potential adverse environmental impacts of the proposed marina (See Appendix A)
- Discrepancies with the developer’s wave attenuator study, which has health and safety implications, have also been discovered. Dr. Gordon Greeniaus, Professor Emeritus of Physics, University of Alberta, has found that the developer significantly underestimated the effects of wave reflection, and his critique of the developers’ study has been confirmed by another leading expert. See Appendix II [*Letter from Dr. Gordon Greeniaus to Hon. John Baird dated March 11, 2009 critiquing the developer’s wave attenuator report*]

¹³ BC Forest Practices Board “Administrative Review Procedures: Oral Hearings and Panel Size” (2000) at 3, online: Forest Practices Board Special Report <http://www.fpb.gov.bc.ca/assets/0/114/178/184/360/70943c1b-ab08-44fc-b69e-98b7a16de8d2.pdf> (accessed 16 June 2009). For an example of how courts have treated the issue, see *Cadillac Investments Ltd. v. Northwest Territories Labour Standards Board* (1993) 24 Admin. L.R. (2d) 81.

Conclusion


In summary, we strongly urge you to refer the proposed Victoria International Marina project to an Independent Review Panel for a full public hearing. The magnitude of this project in Victoria's small and congested harbour and its potential to change the character of Victoria forever demands that a full and open public process is engaged. Not only does the proposed marina pose potentially significant adverse environmental effects, the concerns expressed to date by a wide cross-section of Victoria residents demands that this project be given full scrutiny in open public hearings. This is necessary not only to fully assess the environmental impact of the proposed marina, but also to restore the public trust.

we trust you will give this request favourable consideration. I look forward to your timely response.

Sincerely,



Irene Faulkner
Barrister & Solicitor



Scott Bernstein
Articled Student
Environmental Law Centre

cc: Honourable John Baird, Minister of Transport, Infrastructure and Communities
The Honourable Patrick Bell, Minister of Forests and Range
Mayor Fortin and Council, City of Victoria