



July 10, 2017

Sent via e-mail to cport@skeltonbrumwell.ca and MNRF.BRA@Ontario.ca

The Applicant

Frank and Elizabeth Lippa
c/o Skelton Brumwell & Associates Inc.
93 Bell Farm Road, Suite 107
Barrie, ON L4M 5G1
Attention: Caitlin Port, RPP

Ministry of Natural Resources and Forestry

Parry Sound District, Bracebridge Field office
Ministry of Natural Resources and Forestry
1350 High Falls Road,
Bracebridge, ON, P1L 1W9
Attention: Jeff Schosser, Aggregates Inspector/Specialist

Dear Ms Port and Mr. Schosser,

**Re: Letter of Objection, Application for Category 1& 2 Class “A” Licence
1089 Butler Mill Road, Rosseau, ON
North Half of Lot 4 and Part of Lots 4 and 3, Concession 4, Geographic
Township of Cardwell,
Township of Muskoka Lakes, District Municipality of Muskoka**

We write on behalf of our client, The Skeleton Lake Cottagers Organization (“SLCO”), to register SLCO’s objections to the above-reference pit and quarry licence application of Mr. Frank Lippa (the “Application”). The evidence gathered by SLCO to date supports its objections and concerns described herein.

We note both Councils for the Township of Muskoka Lakes (“Muskoka Lakes”) (June 16, 2017) and the Town of Huntsville (June 26, 2017) expressed their opposition to the Application. SLCO gave presentations to Muskoka Lakes Council on June 16, 2017, at a meeting attended by hundreds of residents. Every resident that spoke that day spoke against the Application. Residents expressed concern regarding water quality, tranquility, road safety (in particular packed school buses on winding, slippery roads), lack of justification for a new quarry in this location, lack of consultation with nearby residents,

and an overall fatigue with having to deal with an evolving application that dates back many years.

A petition containing 1,500 names was filed with Muskoka Lakes Council expressing overwhelming public opposition to the Application. This level of engagement and support for the environment is unprecedented in Muskoka Lakes, in the opinion of SLCO and many long-time residents.

Furthermore, Muskoka Lakes Council unanimously voted to refuse to support the Official Plan Amendment and Zoning By-law Amendment applications required for the Application. We anticipate each will file correspondence with you, per subsection 12(1)(c) of the *Aggregate Resources Act*¹ (“ARA”).

Background

Following amendments to the Application, the proposed Licenced Area is now over double in size at 54.8 ha (135.4 a), with an extraction limit of 26.4 ha, from the original proposal at this location. The annual extraction limit is 200,000 t/year, for up to 80 years of extraction. This is not a small-scale, family operation and is a quarry lifespan far out of keeping with current aggregate practice of more limited duration. An extraction operation of 16,000,000 tonnes is a large quarry, approximately half as large as some of the approved mega-quarries on the Niagara Escarpment.

The proposal is for extraction and processing of sand and gravel, and blasting and processing of granite, with a Haul Route at the entrance off Butler Mill Road.

The location of the proposed site has three open-water features and 12 intermittent and permanent watercourses, which flow into Skeleton Lake. With respect to surface water features, there are also two small unevaluated wetlands. Almost the entire area of extraction (25.9 ha) has overland flows to Lamberts Lake Creek sub-watershed, Skeleton Lake, and the 0.5 ha West Creek Sub-watershed.

Adjacent land uses include vacant woodland to the north and east, a Township gravel pit to the west, and three rural residences to the south and southwest of the property. There are additional residences within 500 metres of the extraction limit (south side, Butler Mill Road).

There are no publicly available peer reviews of the Application’s technical studies (e.g. MNRF biologists, MNRF hydrogeologist, MOECC hydrologist, MTCS archaeologist, etc.).

Expert Advice Sought on Behalf of SLCO

Like most pit and quarry applications, this Application engages a significant number of technical disciplines, e.g. planning, geology, traffic engineering, acoustical engineering, hydrogeology, hydrology, limnology, ecology, biology, archaeology, etc.

¹ RSO 1990, c A.8.

In response to numerous concerns with the proposal, SLCO sought the advice of the following experts:

1. Mr. Gordon E. Miller, B.Sc. (Hon.), M.Sc., Ecologist and former Environmental Commissioner of Ontario (2000-2015);
2. Mr. John E. Coulter, B.A.Sc., P.Eng., Acoustical Engineer and President of J.E. Coulter Associates Ltd.;
3. Mr. Stephen Fahner, B.A. (Hon.), A.M.C.T., C.M.M.III., M.C.I.P., R.P.P., Planner and Principal of Northern Vision Planning Ltd; and,
4. A Senior Transportation Engineer.

We provide a brief summary of key issues and commentary raised by each expert below.

Objection to the Application: Ecology

Subsection 12(1) of the ARA requires the Minister or Board to have regard to the following when considering the issuance or refusal of a licence:

- (a) the effect of the operation of the pit or quarry on the environment;

[...]

- (e) any possible effects on ground and surface water resources including on drinking water sources;

SLCO's objections relate to the possible negative impacts of the Application on the environment, and ground and surface water resources. SLCO retained Mr. Gordon E. Miller, B.Sc. (Hon.), M.Sc., to comment briefly on these matters. Mr. Miller is a senior ecologist and scientist with over 30 years of experience working in environmental impact assessment and environmental planning policy.

In reviewing a number of the technical reports, his primary conclusions are that there is no need for a quarry at this location and the proposal to dump up to ten times the amount of naturally occurring phosphorus into Skeleton Lake could "significantly alter the character and ecology of the lake."

More importantly, it is the opinion of Mr. Miller that the pit and quarry operation threatens the integrity of Skeleton Lake itself.

According to Mr. Miller, the District Municipality of Muskoka possesses many of the cleanest, purest freshwater lakes on the continent, and "Skeleton Lake is in turn one of the purest in the District". This makes it a resource worth preserving. What makes the lake so unique is that it has an extremely low phosphorus concentration of 2.9 micrograms/litre ($\mu\text{g/L}$), which means that there is very little algae production and the water is ultra clear.

It also means the deepest layer of cold water retains adequately high oxygen levels all summer long, which supports a healthy lake trout population. Such lakes are termed “oligotrophic” and this unique character will only be maintained if the phosphorus concentration is kept very low.

The Ontario Provincial Water Quality Objectives (“PWQO”) specifically recognizes the sensitivity of oligotrophic lakes with the following requirement:

“A high level of protection against aesthetic deterioration will be provided by a total phosphorus concentration for the ice-free period of 10 µg/L or less. This should apply to all lakes naturally below this value”

and:

“To avoid nuisance concentrations of algae in lakes, average total phosphorus concentrations for the ice-free period should not exceed 20 µg/L”

Skeleton Lake is clearly a lake that the PWQO mandates this level of protection.

According to Mr. Miller, the Hydrological Report Level I and Level II for the Lippa pit and quarry proposal indicates that the rock from the proposed quarry has a dissolved rock total phosphorus (“TP”) of 101 µg/L. Left intact, the minerals in the surface rock dissolve by weathering very slowly so the presence of phosphorus in the undisturbed rock has not been a problem. When rock is blasted and then crushed into gravel, you create a fine rock powder from which minerals like phosphorus more readily dissolve.

The author of the hydrological assessment anticipates this and calculates an estimate of what this would mean to the phosphorus concentration of the creeks discharging into Skeleton Lake. His findings were as follows:

The operational life analysis shows dewatering impacts increase creek mean annual TP from a low of 22.6 ug/L to a high of 30.9 ug/L. These values are within the Canadian Water Quality Guidelines for Protection of Aquatic Life trigger range for TP (20-35 ug/L) attached and thus are acceptable.

Even to a casual layperson these conclusions are troubling. It is the opinion of Mr. Miller, who studied Skeleton Lake for his Master’s Thesis, that this possible contamination is unacceptable:

On their face, these estimates are disturbing. Adding water at a TP concentration of 30.9 µg/L to a lake with a natural concentration of less than one tenth that amount has the potential to create nuisance algae blooms at least locally and in doing so significantly alters the character and ecology of the lake. Further, the statement that these levels are acceptable because they meet the Canadian Water Quality Guidelines for Protection of Aquatic Life is misleading. The Canadian standards apply to a wide range of lakes across the country and are not designed to recognize the special conditions in Muskoka. The standard that is appropriate to apply in Muskoka is the Ontario Provincial Water Quality Objectives and, as indicated above, the

PWQO specifically caution against allowing TP concentrations to rise to those levels in oligotrophic lakes.

Moreover, the numbers in the hydrological assessment are just projections based on simple modelling. They could be serious underestimates of what TP may actually discharge to the lake during the operations of such a quarry. Such an error would result in the irreparable degradation of an ecologically rare ecosystem and excellent recreational asset. [emphasis added]

While there may be some merit in peer reviewing the water quality assessment, on its face, according to Mr. Miller, the pit and quarry poses an unacceptable risk to Skeleton Lake and should not be pursued further in this highly sensitive location.

Objection to the Application: Quality and Quantity of Aggregate on Site and Need for this Particular Aggregate

Subsection 12(1) of the ARA also requires the Minister or Board to have regard to the following when considering the issuance or refusal of a licence:

- (i) the quality and quantity of the aggregate on the site;

[...]

- (k) such other matters as are considered appropriate.

With regards to location, it is the opinion of Mr. Miller that nearby Skeleton Lake is a poor choice for a pit and quarry. Specifically, in a report provided to SLCO, he challenges the need for the rock in this location:

The quarry proposed near Skeleton Lake is not extracting a unique stone or mineral located in a rare deposit. The proposal is to quarry the same metamorphic granitic stone (called gneiss) that is the bedrock at the surface of thousands of hectares of the Canadian Shield in Muskoka. They are going to crush this common stone into gravel to be sold into the Highway 11 corridor and perhaps to some degree the area around Parry Sound. But the land in question is nowhere near these markets.

It is common for proponents to include a Market Analysis justifying the need for the product and in the location proposed, i.e. close to market. According to Mr. Miller, this is the wrong location to service the Highway 11 corridor.

Mr. Miller concludes gneiss rock can be quarried at any number of other land parcels that are closer to market and not in proximity to cottage and residential development.

Objection to the Application: Noise, Haul Route and Traffic Safety

The Minister or Board is also required under subsection 12(1) of the ARA to have regard to the following when considering the issuance or refusal of a licence:

- (j) the effect of the operation of the pit or quarry on nearby communities;

[...]

(h) the main haulage routes and proposed truck traffic to and from the site;

SLCO retained Mr. John E. Coulter, B.A.Sc., P.Eng. Mr. Coulter is an acoustical engineer and President of J.E. Coulter Associates Ltd., with over 40 years of experience in acoustical engineering. He has been retained on many aggregate files.

In Mr. Coulter's opinion, there are deficiencies with the noise and haul route studies. Mr. Coulter provided a brief report in which he commented that he "can't tell if [the proponent's] Acoustic Assessment Report is a good, bad or indifferent report, because the assumptions used to justify the conclusions are not traceable. Especially for the number of vehicles and the starting time for the vehicles."

Mr. Coulter raises the following concerns with the Application's Acoustic Assessment Report:

1. The assumptions must be verified. If some of the assumptions are incorrect, it is possible the mitigation will not attenuate properly, residents will be negatively affected, and the Ministry of the Environment and Climate Change's ("MOECC") NPC-300 Noise Guideline could be exceeded.
2. For road traffic, the acoustical impact from current roads has not been evaluated. If the proposal is approved, there will be additional traffic to service the quarry, a processing location, and shipping will contribute to noise from 6:00 am until 11:00 pm. Sleep will possibly be disturbed.
3. In order to peer review this noise report, both the Blast Impact Analysis and Traffic Impact Study must be consulted. This source information should be consolidated in the Acoustic Assessment Report.
4. The report lacks basic information which makes it a little more difficult to appreciate than needs be the case. For example, there is no easily read 1:10000 map showing all of the neighbours (sensitive receptors). Instead, only four neighbours are shown as being representative. This becomes critical if the roadway is bumpy or steep but we do not have any way of checking the sufficiency of the assumptions in the noise report. It is possible that in this sort of summer home use traffic mix that there are locations along the haul route that will necessitate the use of Jacobs brakes by the haul trucks. The haul route analysis carries no analysis of whether or not the haul route selected is the route that minimizes the haul route noise impacts. The Applicant, unless he owns the trucks, does not have control of the haul route trucks beyond his property boundaries. The haul route needs more data.
5. The assumptions about the truck traffic that will be generated are not clear. It appears that the haul route traffic used in the assumptions represents the average traffic rather than the worst case day. The references to this pit/quarry being a transfer facility that will accept material for storage or transshipment means future traffic to and from the site may be unlimited. There is no suggestion as to what the noise from the transfer and processing of outside material. The processing of externally mined material and the traffic it generates needs to be looked at. The report provides an analysis of the loading and offloading activities starting at 6:00

a.m. This usually means that there is a queuing period starting at 5:45 a.m. or so while the trucks sit outside the gates idling. There are other references to loading and deliveries happening up to 11:00 p.m., well beyond the 7:00 a.m. to 7:00 p.m. referred to in the detailed analysis.

6. The recommendations for mitigation are extensive yet nothing explains how the transshipment noise may need to be mitigated. To work properly, the location and barriers intended to deal with the processing of transhipped material could be critical. This aspects of the operation needs to be addressed.

According to Mr. Coulter, "The omission of current road traffic impacts is a significant omission by not telling us what is going to happen along the haul route." The Muskoka Lakes Staff Report is unclear as to whether these issues will be addressed by the District Municipality of Muskoka and Public Works reviews.

On behalf of SLCO, Donnelly Law also requested a preliminary opinion from a very experienced, senior transportation engineer that is a member of both the Association of Professional Engineers of Ontario and Institute of Transportation Engineers. While he declined the retainer for reasons of unfamiliarity with Muskoka Lakes (the local area), he did review the Traffic Impact Study (January 2017) and provided the following comments:

1. Strong recommendation in favour of peer review of the Traffic Impact Study (January 2017) ("TIS") by a formally trained transportation engineer with appropriate experience. The attached CV of Mr. Scott W. Brumwell, P. Eng. (Skelton & Brumwell Assoc. Inc.) does not list relevant experience in traffic impact or road safety analysis.
2. The application should include an assessment of the nearby intersection using intersection capacity software, based on actual turning volume counts from background traffic (to be measured by Applicant and not deduced from daily traffic counts).
3. The TIS is unconventional, in that it does not address peak hour traffic volumes (a.m. and p.m.) or include schematics with peak hour turning movements (a.m. and p.m.). Given Saturday operations are proposed, analysis using Saturday peak traffic counts are also recommended.
4. Given the character of the area (recreational), the TIS analysis should be based on peak hour traffic volumes for the summer months.
5. Operational issues may exist, e.g. limited sightlines on the haul route. These issues can be addressed by a transportation engineer with specific experience in road user safety and road design, referring to the Highway Safety Manual. The fact that this has not been done does not permit a conclusion that the road safety issues have been addressed.

SLCO is not satisfied that Township Staff's recommendations adequately address these concerns.

Objection to the Application: Planning and Land Use Considerations

Subsection 12(1) of the ARA requires the Minister or Board to have regard to the following when considering the issuance or refusal of a licence:

(g) any planning and land use considerations;

SLCO retained Mr. Stephen Fahner, B.A. (Hon.), A.M.C.T., C.M.M.III., M.C.I.P., R.P.P., for preliminary advice on the related *Planning Act*² applications for the pit and quarry, to provide to Council in advance of the June 16, 2017 meeting on those applications. Mr. Fahner is a planner and the Principal of Northern Vision Planning Ltd. Mr. Fahner provided Donnelly Law with a memo with most of the relevant Official Plan policies related to the *Planning Act*.

Mr. Fahner comments that while the policy provides discretion to wait until the Site Plan stage to request peer review, it is his opinion this would be too late in this case.

Mr. Fahner notes that Muskoka Lakes' Official Plan section E 14.2 states crushing operations must be at least 2 km from the Waterfront designation. Mr. Fahner believes 2 km includes approximately the southern half of the Lots in question. As a result, there may be an Official Plan conformity issue that needs to be carefully evaluated.

Finally, it is respectfully submitted by SLCO that the proponent has failed to demonstrate that the quarry proposal conforms to Muskoka Lakes' Official Plan. Specifically, section 3 of Muskoka Lakes' Official Plan requires Council to ensure the Vision for Muskoka Lakes is defended when making decisions regarding *Planning Act* applications and new development.

This Vision includes the following commitments:

Through its Official Plan, the Township of Muskoka Lakes endeavours to maintain a strong sense of community while embracing economic enhancement and growth opportunities that:

- Respect the environment;
- Maintain a high level of protection for our lakes;
- Nurture the protection and conservation of significant natural and cultural heritage features;
- Contribute to a year-round sustainable economy; and
- Enhance the quality of life of all citizens.

As one Muskoka Lakes Councillor so aptly put it at the Public Meeting of June 16, 2017, this quarry Application fails to establish how destroying an important part of the landscape and Skeleton Lake watershed, while running hundreds of dump trucks through quiet communities, could possibly enhance the life of all citizens.

² RSO 1990, c P. 13.

Based on the above-referenced opinions of Mr. Miller, Mr. Coulter and the senior traffic engineer, SLCO respectfully submits additional matters of good planning will be engaged and must be reviewed for this application.

Objection to the Application: Uncertainty and Incomplete Mitigation Proposals

In *James Dick Construction Ltd. v. Caledon (Town)*³ (“Caledon”), the Ontario Municipal Board (“OMB”) denied an application for an Official Plan Amendment, Zoning By-law Amendment, and ARA licence to remove 39 million tonnes of aggregate over a 30-year period on an 89-hectare property. Even though it considered the applications in the context of the 1997 Provincial Policy Statement (“PPS”), this finding of the OMB on the interpretation of “no negative impacts” is directly on point:

The Board finds that this means that a proponent of development has the onus of demonstrating no negative impact. Objectors to a development need not demonstrate that there will be negative impact.⁴

The OMB also held:

The Appendix deals with monitoring selected features in the wetlands and based on this monitoring “additional mitigation/contingency measures will be implemented. This approach utilizing off-site access to private property is the optimal means of ensuring that target levels are maintained”. JDCL’s consultants confirmed that JDCL has no agreements in place with private landowners which would facilitate required access.

Appendix I goes on to “provide mitigation and/or contingency options will vary by location and will be subject to MNR approval”.

Having considered the provisions of the AMP, in particular the Milestones and Appendix I, the Board finds that JDCL has not met the requirements of the PPS. Policy 2.3.2 provides that development may be permitted on lands adjacent to certain significant natural heritage features if it has been *demonstrated* that there would be no negative impacts on those features. The subject property is “adjacent lands” for the purposes of the PPS.

It may be that if all the Milestones set out in the AMP can be met to the satisfaction of MNR after Board approval of these applications, it could be concluded that the JDCL will have demonstrated no negative impacts on natural heritage features. However the Board cannot find that this possibility affords the certainty, pre-Board approval, required by the PPS.⁵ [emphasis added]

Mr. Miller, who has previously studied Skeleton Lake, has raised sufficient concerns with impacts to water quality to warrant the Ministry of Natural Resources and Forestry’s (“MNR”) refusal to proceed to clearance of the application.

³ [2010] OMBD No 905.

⁴ *Caledon*, *supra* note 3 at para 13.

⁵ *Caledon*, *supra* note 3 at paras 260-3.

It is respectfully submitted that Mr. Lipa's proposal relies on too many uncertainties or outcomes that have not been resolved by its own consultants, and are left to a future time with unknown clearances in the Site Plan process, a process which precludes SLCO and the public. Mr. Lipa has proposed no concrete plan for monitoring and mitigating any observed impacts on Skeleton Lake, etc.

It is respectfully submitted that as in *Caledon*, the Application should not be approved as it clearly fails the PPS policies for natural heritage and any reasonable interpretation of good planning. The proponent has not demonstrated "no negative impacts" to Skeleton Lake.

Objection to the Application: Consultation with Aboriginal Communities

Ignoring the rights of Aboriginal communities is a fundamental planning and constitutional error. To date, we see no evidence of consultation with Aboriginal communities.

We are aware the Ministry circulated notice of the Application to the following: Métis Nation of Ontario, Williams Treaties First Nations, Wahta Mohawks, Wasauksing First Nation. We stress that the Ministry's duty to consult extends beyond the provision of notice.

The nature of the asserted Aboriginal right dictates the degree of consultation required. The degree of consultation and accommodation required lies on a spectrum:

The Crown's duty to consult and accommodate the asserted Aboriginal interest "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."⁶

A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties.⁷

That is, the degree of consultation may vary from notice to more meaningful involvement.

Policy 2.6.1 of the PPS requires the conservation of "significant cultural heritage landscapes". The definition for "cultural heritage landscapes" in the PPS is:

Cultural heritage landscape: means a defined geographical area that may have been modified by human activity and is identified as having cultural heritage value or interest by a community, including an Aboriginal community. The area may involve features such as structures, spaces, archaeological sites or natural elements that are valued together for their interrelationship, meaning or association. Examples may include, but are not limited to, heritage conservation districts designated under the Ontario Heritage Act; villages, parks, gardens, battlefields, mainstreets and neighbourhoods, cemeteries, trailways, viewsheds, natural areas and industrial complexes of heritage significance; and areas recognized by federal

⁶ *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257 at para17, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 39.

⁷ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 37.

or international designation authorities (e.g. a National Historic Site or District designation, or a UNESCO World Heritage Site). [Emphasis added]

The Archaeological Assessment Stage 1 and Stage 2 do not consider the possibility of a cultural heritage landscape. This is a significant omission, particularly because the naming of the Skeleton Lake itself (being Aboriginal) strongly suggests the lake has spiritual and cultural significance that extends further than suggested in the Archaeological Assessment, submitted without Aboriginal community input.

The extraordinary water quality of Skeleton Lake and presence of numerous fish species may also be attractive to Aboriginal communities concerned about the rapid loss of relatively undisturbed landscape and aquatic natural heritage features.

The PPS requires MNR and the Ministry of Tourism, Culture and Sport to address Aboriginal concerns through a meaningful process of consultation. Policy 2.6.5 requires MNR and Muskoka Lakes to consider the interests of conserving cultural heritage resources and archaeological resources. Policy 4.6 requires the PPS to be implemented in a manner that is consistent with section 35 of the *Constitution Act, 1982*⁸. There is no evidence on the record of consultation with Aboriginal communities regarding the Application.

Aboriginal communities do not appear to have been consulted, as the archaeological reports give the “all clear” for blasting at the site, but do not include a Consultation Record. Furthermore, given the sensitivity of Skeleton Lake and near pristine environment, the omission of a cultural heritage landscape assessment may be significant.

Conclusion

SLCO provides the following concluding objections to the Application:

1. There are numerous technical deficiencies that must, at the very least, be addressed by the Applicant before the Application proceeds further.
2. Not accounting for traffic safety in a region with significant tourism and recreation is a disqualifying omission, given the characteristics of the proposed haul route (winding roads, limited sight lines, busy summer traffic, school bus routes, etc.).
3. There are enough significant omissions in the Acoustic Assessment Report that residents, some of whom were not accounted for, cannot be guaranteed that their tranquil environment will be maintained and early morning calm enhanced. Does everyone not agree these are crucial Muskoka Lakes values?
4. There has been no demonstration of no negative impacts to Skeleton Lake. In fact, the evidence of the proponent concedes it will be introducing phosphorus levels above recommended levels.
5. Aboriginal communities have not been consulted and very likely have an interest in preserving Skeleton Lake in its present, near pristine state.

⁸ Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Please do not hesitate to contact me at 416-572-0464, or by email to david@donnellylaw.ca, cc'ing jessica@donnellylaw.ca, should you have any questions or comments concerning this correspondence.

Yours truly,

A handwritten signature in blue ink, appearing to read "D. R. Donnelly", with a long horizontal flourish underneath.

David R. Donnelly

cc. D. Pink
D. Corry
S. Aubichon, Wahta Mohawks
K.S. McKenzie, Williams Treaties First Nations
Chief W. Tabobondung, Wasauksing First Nation
C. Brown, Wasauksing First Nation
Métis Nation of Ontario
Chief R. Noganosh, Chippewas of Rama First Nation
D. Shilling, Chippewas of Rama First Nation