

FEDERAL COURT

BETWEEN:

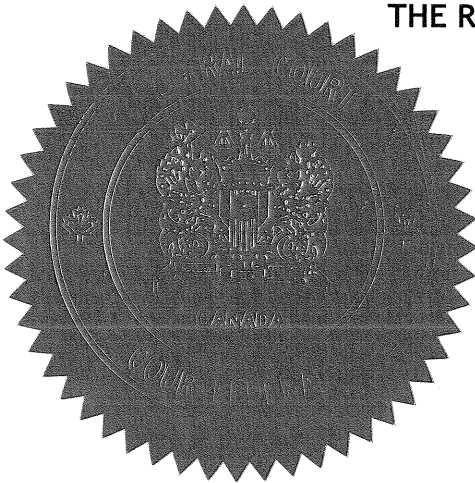
BARRY PADOLSKY, SHIRLEY BLUMBERG,
HERITAGE OTTAWA and
THE ROYAL ARCHITECTURAL INSTITUTE OF CANADA

Applicants

-and-

ATTORNEY GENERAL OF CANADA and
NATIONAL CAPITAL COMMISSION

Respondents



NOTICE OF APPLICATION

Pursuant to sections 18 and 18.1 of the *Federal Courts Act*

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the Applicants. The Applicants requests that this application be heard at Ottawa.

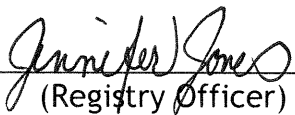
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitor, or where the Applicants are self-represented, on the Applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of

the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 26, 2015

Issued by: 
(Registry Officer)

Federal Court of Canada
90 Sparks Street, 1st Floor
Ottawa, Ontario K1A 0H9
Tel: 613-992-4238
Fax: 613-947-2141

JENNIFER JONES
REGISTRY OFFICER
AGENT DU GREFFE

TO: William F. Pentney
Deputy Attorney General of Canada
Department of Justice
50 O'Connor Street
Suite 500, Room 504
Ottawa, ON K1A 0H8

AND TO: National Capital Commission
40 Elgin Street, Suite 202
Ottawa, ON K1P 1C7

APPLICATION

In a public meeting held on June 25, 2015, the Board of Directors of the National Capital Commission (the “NCC”) considered the furtherance of a project known as the Memorial to Victims of Communism (the “Memorial”), and rendered a decision under the *National Capital Act*, RSC 1985, c. N-4, to initiate construction of that project by granting a Federal Land Use Approval to decontaminate the proposed site of that Memorial, the location being immediately southwest of the Supreme Court of Canada and on the north side of Wellington Street in Ottawa.

The Memorial is to be situated in the Judicial Precinct, which together with the neighbouring Parliamentary Precinct is some of the most hallowed and meticulously planned architectural ground in Canada because of its national significance and iconic importance to Canadian democracy. The Crown has planned and developed this ground in carefully measured steps since the decision of Queen Victoria to name Ottawa as Canada’s capital in 1857. Major, visionary decisions were made in the Holt/Bennet Plan of 1915, the Gréber Plans of 1938 and 1950, and the Parliamentary Precinct Area Plan of 1987. The latter evolved by 2007 into the authoritative expression of planning intent that guides decisions today, known as the Long Term Vision and Plan (“LTVP”) for the Parliamentary and Judicial Precincts. The identity of the National Capital Core Area is what it is today largely because of respect for these plans.

The NCC approved the current LTVP after a very extensive consultative process involving many stakeholders, including the House of Commons, the Senate, the Parliamentary Library, the Supreme Court of Canada, Parks Canada, the City of Ottawa, and others. It includes the vision of completing a harmonious architectural and landscape “triad” within the Judicial Precinct by erecting a new signature building (the Federal Court) west the Justice Building facing the central lawn in front of the Supreme Court building, which aesthetically complement the similarly

composed triad in the neighbouring Parliamentary Precinct (comprising West Block, Centre Block and East Block). These compositional forms are a main feature of the LTVP and are crucial to the integrity and heritage values of the Judicial and Parliamentary precincts.

However, the June 25 decision on site decontamination departs from the LTVP, because it authorizes breaking ground and clearing permanent landscape features such as trees for the Memorial upon the same site that the LTVP prescribes for the building that would complete the Judicial Triad. This does violence to decades of careful architectural and landscape planning, and would make it impossible to realize the LTVP, particularly for the Judicial Precinct.

Despite these far-reaching ramifications, the NCC has not provided for adequate public notice and consultation, whether measured by common law requirements or its own policies and procedures on public engagement. For example, the public had virtually no notice of the decision document on site decontamination (2015-P76.1), because the NCC staff shared it with the public just minutes before that agenda item began on June 25 (and appears to have shared it only with people physically attending the meeting, not streaming it on the Internet). Nor did the NCC give advance notice of pertinent information, such as the nature of the site contamination, so that members of the public could have an informed opinion and make submissions on the necessity of the proposed decontamination. Under the heading “Consultations & Communications” in the decision document, none of the consultations that NCC notes took place with members of the public. The only public meeting that the NCC planned with respect to the Memorial decision was scheduled to take place later on June 25, several hours after the decision was made. As recently as April 2015, the NCC Chief Executive Officer, Mark Kristmanson, publicly stated that plans for the Memorial were continuing, and that construction of the monument site would not begin until federal design approval had been granted by the NCC.

Most seriously, the NCC's decision allowing ground to be broken for the Memorial project is premature, and therefore *ultra vires* of the *National Capital Act*, because no complete "proposal" for that project has been considered or approved. Section 12(3) of the *Act* prohibits the commencement of any project, as by breaking ground, prior to the proposal being submitted and approved. As the NCC acknowledged during the public meeting on June 25, 2015, the final architectural and landscape design for the Memorial has not yet been proposed, and thus no weighing for approval by the NCC could take place in accordance with sections 10(1) and 12(2) of the *Act*.

The Applicants are professional architects and non-governmental organizations having a professional and community interest in the built environment and Ottawa's heritage as the national capital. None opposes the commemorative intent of the Memorial, but all are concerned that the precipitous decision of the NCC to approve breaking ground within the Judicial Precinct contrary to the LTVP threatens the architectural integrity of Canada's capital, and believe that any such decision requires meaningful public consultation given the singular, iconic significance of the site to Canada's heritage and democracy.

The Applicant makes application for:

- (a) An order setting aside the National Capital Commission's decision of June 25, 2015, to commence the decontamination of the proposed site of the Victims of Communism Memorial;
- (b) An interlocutory and/or interim injunction to prevent the breaking of ground pursuant to the June 25, 2015 decision, until the hearing of this application and lawful approval is gained for the project in accordance with the National Capital Act;
- (c) An order directing the National Capital Commission to reconsider the matter

following adequate notice and public consultation and in accordance with the principles of procedural fairness;

- (d) Costs of this application; and
- (e) Such further and other relief as the Applicant may request and this Honourable Court may permit.

The grounds for the application are:

- (a) The NCC breached procedural fairness and legitimate expectations in its lack of public consultation on the project ahead of the impugned decision;
- (b) The *National Capital Act*, R.S.C., 1985, c. N-4, ss. 10-12;
- (c) Bylaws of the NCC, as amended from time to time; and
- (d) NCC Corporate Administrative Policies and Procedures: Public Engagement, July 7, 2010.

The application will be supported by the following material:

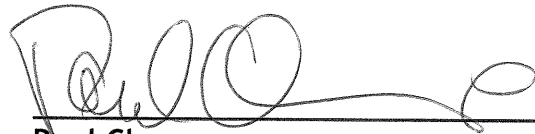
- (a) The Affidavits of Barry Padolsky, Shirley Blumberg, or some such other material or affidavits; and
- (b) Such further and other materials as the Applicant may advise and this Honourable Court may permit.

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicants request a copy

and that the Registrar receive a certified copy of all materials and documentation that are not in the Applicants' possession but that are in the possession of the Respondent:

- (a) Such material as was in the possession of the NCC (both the secretariat and Board) concerning the June 25 decision giving Federal Land Use Approval for the decontamination of the Memorial site, including public submissions related to that subject.

June 26, 2015



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Solicitors for the Applicants