Court File No. 451/07

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

B E T W E E N:

LAFARGE CANADA INC.

Applicant

-and-

ONTARIO ENVIRONMENTAL REVIEW TRIBUNAL, SUSAN QUINTON on behalf of CLEAN AIR BATH, MARTIN HAUSCHILD and WILLIAM KELLEY HINEMAN on behalf of LOYALIST ENVIRONMENTAL COALITION, LAKE ONTARIO WATERKEEPER and GORDON DOWNIE, GORDON DOWNIE, GORDON SINCLAIR, ROBERT BAKER, PAUL LANGLOIS, JOHN FAY, MINISTRY OF THE ENVIRONMENT (ONTARIO), DIANE DAWBER, CHRIS DAWBER, HUGH JENNEY, CLAIRE JENNEY, MARK STRATFORD, JAMIE STRATFORD, J.C. SULZENKO, JANELLE TULOCH, SANDRA WILLARD

Respondents

FACTUM OF THE RESPONDENTS LAKE ONTARIO WATERKEEPER AND GORDON DOWNIE

1. This case raises the fundamental question of whether – or to what extent – a superior court should review or overturn the statutory decision of a specialized administrative tribunal on questions of law, fact and policy within its jurisdiction.

2. The Respondents respectfully submit that the Applicant, in essence, is attempting to appeal an *intra vires* decision of the Environmental Review Tribunal ("ERT") granting the Respondents (and other parties) leave at large under the *Environmental Bill of Rights* ("EBR") to appeal two waste-burning approvals issued to the Applicant. However, section 43 of the EBR expressly provides that there is no right of appeal from the ERT's leave decision.

3. Accordingly, the Respondents' overall position is that the Application for Judicial Review should be dismissed for two main reasons: (a) the Applicant has not identified any jurisdictional errors which warrant the intervention of this Honourable Court; and (b) the Applicant should be denied its requested remedy due to the doctrine of *laches*.

PART I – THE FACTS

4. The Respondents agree with the facts set out in paragraphs 1, 6, 10 to 12, 23 to 28, and the first sentence of paragraph 2 of the Applicant's factum.

5. The Respondents disagree with the facts set out in paragraphs 7 to 9, 13 to 22, 29 to 30, and the final two sentences of paragraph 2 of the Applicant's factum.

6. The Respondents have no knowledge of the facts set out in paragraphs 3 to 5 of the Applicant's factum.

7. The Respondents rely upon the following additional facts:

(a) After the ERT's leave decision was released on April 4, 2007, the Applicant did not commence the Application for Judicial Review until almost six months later (i.e. September 28, 2007). Moreover, the Application for Judicial Review was not perfected by the Applicant until November 30, 2007, almost eight months after the ERT's leave decision. Indeed, by the time that the Application is heard by this Honourable Court in the spring of 2008, approximately a full year will have elapsed since the ERT decision was released.

(b) After the release of the ERT's leave decision, the Respondents and other parties have been actively preparing for, and participating in, proceedings before the ERT in this

matter. For example, as required by section 140 of the *Environmental Protection Act* ("EPA"), the Respondents served and filed their Notice of Appeal within 15 days of the release of the ERT's leave decision.

Respondent's Application Record, Tab 1, *Notice of Appeal* (April 18, 2007)

Schedule B, EPA, section 140

(c) In mid-May 2007, the ERT issued its *Notice of Preliminary Hearing* to advise the parties and interested members of the public that a Preliminary Hearing would be held on September 11, 2007. The purpose of the Preliminary Hearing, *inter alia*, was to: (a) identify the issues to be addressed at the main hearing; (b) establish the pre-hearing process (i.e. issue scoping, documentary disclosure, exchange of expert reports, etc.); and (c) establish dates for the main hearing. Relying upon this Notice, the Respondents prepared for, attended, and participated in this Preliminary Hearing.

Respondents' Application Record, Tab 2, *ERT Notice of Preliminary Hearing* (May 17, 2007)

Respondent's Application Record, Tab 3, *ERT Reasons for Decision* (October 4, 2007)

(d) Mere days before the September 11, 2007 Preliminary Hearing, the Applicant first notified the ERT and parties that it intended to bring an Application for Judicial Review of the leave decision. The Applicant also requested that the ERT adjourn the proceedings in light of this declared intention to seek judicial review. At the first day of Preliminary Hearing, however, the ERT refused the Applicant's request for an adjournment, and advised the Applicant to bring a proper motion for adjournment in accordance with the ERT's Rules of Practice.

Applicant's Application Record, Tab 3, Affidavit of Robert Cumming, para.6

Respondent's Application Record, Tab 3, *ERT Reasons for Decision* (October 4, 2007), pp. 4-5

(e) The Applicant subsequently brought a motion to adjourn the main hearing *sine die* in order for its Application for Judicial Review to be heard and determined by this Honourable Court. This motion was heard by the ERT on December 3, 2007, and the ERT reserved its decision on the Applicant's requested adjournment.

(f) In addition to hearing the Applicant's motion, the ERT has held additional days of Preliminary Hearings to sort out various procedural and substantive matters. On October 25, 2007, for example, the ERT received parties' submissions and subsequently issued an Order setting out various deadlines and timeframes for documentary disclosure, meetings of expert witnesses, and site visits. The ERT has also fixed dates in April to July 2008 for the main hearing.

Respondents' Application Record, Tab 4, *ERT Reasons for Decision* (November 20, 2007)

(g) On November 21, 2007, the ERT held another day of Preliminary Hearing to receive the parties' submissions on the scope of the ERT's jurisdiction to consider certain issues raised by the Respondents. The ERT reserved its decision on the jurisdictional limits on the issues to be addressed at the main hearing.

8. The Respondents adopt and rely upon the additional facts set out in the factum filed by the Respondents Downie, Sinclair, Baker, Langlois and Fay.

PART II – ISSUES AND LAW RAISED BY THE APPLICANT

9. The Application for Judicial Review raises eight distinct issues:

1. What is the applicable standard of review in this matter?

2. Did the ERT err in its interpretation of the leave-to-appeal ("LTA") test under section 41 of the EBR?

3. Did the ERT err by considering the MOE's *Statement of Environmental Values* ("SEV") issued under the EBR?

4. Did the ERT err by considering the common law rights of local landowners?

5. Did the ERT err by considering whether issuance of the impugned approvals constituted "discrimination" against local communities?

6. Did the ERT err by considering whether the Applicant's predicted emission of contaminants would comply with existing regulatory limits?

7. Did the ERT err by failing to undertake a substantive analysis of the Waste Certificate of Approval ("C of A")?

8. Did the ERT err by widening the scope of the Respondents' appeal?

10. For the reasons set out below, the Respondents respectfully submit that the applicable standard of review is reasonableness, or, alternatively, patent unreasonableness. The Respondents further submit that the ERT did not commit jurisdictional error as alleged by the Applicant. Instead, the ERT's leave decision is clearly reasonable, legally sound, and carefully balances public and private interests and environmental policy considerations. Accordingly, the questions posed in Issues #2 to #8, *supra*, should be answered in the negative by this Honourable Court.

Issue #1: Standard of Review

11. The Respondents adopt the detailed submissions on the standard of review set out in the factum filed by the Respondents Downie, Sinclair, Baker, Langlois and Fay. In adopting these submissions, the Respondents wish to emphasize the following propositions.

12. In summary, while the Applicant has correctly stated the four-part analysis in *Pushpanathan* and *Dr. Q* for determining the standard of review, the Respondents respectfully submit that the Applicant has misapplied this "pragmatic and functional" approach in the instant case and has erroneously claimed that the standard is "correctness".

Applicant's Factum, para. 32-42

Pushpanathan v. Canada (Minister of Citizenship &Immigration), [1998] 1 S.C.R. 982, para.29-38

Dr. Q v. College of Physicians and Surgeons (British Columbia), [2003] 1 S.C.R. 226, para.26

(a) No Private Clause or Statutory Right of Appeal

13. The Respondents respectfully submit that the absence of a privative clause within the EBR is neither determinative nor persuasive, particularly since other factors militate towards considerable curial deference to the ERT's leave decision, as discussed below. Moreover, since section 43 of the EBR expressly excludes any statutory right of appeal against leave decisions, the Ontario Legislature has clearly intended to limit judicial scrutiny of the ERT's leave decisions.

Canada (Director of Investigation & Research) v. Southam Inc., [1997] 1 S.C.R. 748, para.46

Pushpanathan, supra, para.30

Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, para.29

Schedule B, EBR, section 43

(b) ERT Expertise in Deciding LTA Applications under the EBR

14. The Respondents respectfully submit that the ERT has acquired highly specialized institutional expertise because it is "habitually called upon" to determine the broad matters arising within its "distinct legislative context" (i.e. LTA applications under the EBR and appeal hearings under the EPA).

Dr Q, supra, para.29

15. The ERT's expertise under the EBR and EPA was been recognized by this Honourable Court in the *Smith* decision, which described the ERT as possessing "specialized expertise," thereby triggering a reasonableness standard of review. This expertise has also been judicially recognized in other cases involving the ERT and its predecessors (i.e. Environmental Appeal Board and Environmental Assessment Board).

Smith v. Ontario, [2003] O.J. No. 1032 (Ont.Div.Ct.), para. 12, 15, 17

NSP Investments Ltd. v. Ontario (1990), 4 C.E.L.R. (NS) 279 (Ont.Div.Ct), para.6-8

R. v. Consolidated Maybrun Mines, [1998] S.C.J. No.32, para.43,56-57

Walpole Island First Nation v. Ontario (1997), 35 O.R. (3d) 113 (Ont.Div.Ct.), para.11-12

16. The Respondents further submit that the Applicant has fundamentally mischaracterized the nature of the issues before the ERT in the context of LTA applications under the EBR. Contrary to the Applicant's claim that the ERT is merely "seeking to resolve a dispute between two parties," the jurisdictional reality is that the ERT must determine mixed matters of law, fact, policy and the public interest when considering LTA applications under the EBR.

Applicant's Factum, para.38

17. In the instant case, for example, the ERT was required not only to construe and apply the section 41 leave test (see below), but it also had to carefully consider the voluminous technical information, scientific evidence, site-specific facts, and expert opinion adduced by the parties. In addition, the ERT had to evaluate and make findings in relation to broad matters of environmental law and policy, such as: (a) the meaning and effect of environmental planning considerations (i.e. ecosystem approach, precautionary

principle, cumulative impacts, etc.); (b) the desirability of adequate baseline data regarding air and water quality; (c) the relative merits of controlling annual loadings of contaminants rather than concentrations; (d) the substantive requirements of Ontario's air pollution regulations, standards and guidelines; (e) the advantages and disadvantages of using recyclable or non-recyclable materials to produce energy; and (f) the nature, scope and relevance of common law rights in permit-issuing processes.

Applicant's Application Record, Tab 2, ERT Leave Decision

18. The Respondents respectfully submit that these and other overarching issues are not fact- or facility-specific in nature, in that they are not unique to the two waste-burning approvals issued in the instant case. Instead, such issues clearly transcend the interests of the immediate parties, and necessarily involve larger policy considerations by the ERT on what may constitute the most effective approach to ensure environmental sustainability, conserve natural resources, and protect public health.

19. Accordingly, the ERT is not simply adjudicating a narrow *lis inter pares* between private litigants when LTA applications are being considered under the EBR. Instead, the relevant EBR purposes and provisions require the ERT to: (a) select from a range of remedial choices or administrative responses (i.e. refusing or granting full or partial leave); (b) protect the environment and public health; (c) consider broad policy issues; and (d) balance multiple public and private interests in a polycentric process. Therefore, the ERT's leave decision in the instant case is entitled to a high level of deference.

Dr. Q, supra, para.31

Western Ontario Credit Corp. v. Ontario (1975), 9 O.R. (2d) 93 (Ont. Div.Ct.), para.7-8

Re Uniroyal Chemical Ltd. (1992), 9 C.E.L.R. (NS) 151 (Env.App. Bd.), para.46-47

20. Similarly, since the central focus of the leave decision is the ERT's interpretation of its constituent statute (i.e. the EBR) on issues which engage its expertise, the ERT's interpretation of the EBR is entitled to weight and should only be judicially reviewed on the basis of reasonableness (or patent unreasonableness). This is particularly since the ERT's decision rests, in part, on its analysis of conflicting expert evidence.

Sutcliffe v. Minister of the Environment (2004), 9 C.E.L.R. (3d) 1 (Ont. C.A.), para.9-10,27-28

Will-Kare Paving & Contracting v. Canada, [2000] 1 S.C.R. 915, para.66

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] 1 S.C.R. 609, para.18,27-30

Brighton v. Nova Scotia, [2002] N.S.J. No. 298 (N.S. S.C.), para.30

Pushpanathan, supra, para.34-35

(c) Purpose of the Relevant Statutory Provisions

21. The overall purpose of the EBR is to: (a) protect the environment and public health; (b) enhance public participation rights; and (c) ensure governmental accountability for environmental decision-making. Pursuant to section 64 of the *Legislation Act, 2006*, and in accordance with the modern purposive approach to statutory construction, the LTA provisions at issue in this Application for Judicial Review should be interpreted in a "fair, large and liberal" manner which best achieves these important legislative purposes.

Schedule B, EBR, section 2; *Legislation Act, 2006*, S.O. 2006, c.21, Schedule F, section 64

Sullivan and Driedger and the Construction of Statutes (Butterworths, 2002), pp. 197-201

Grey(County) Corp. v. Ontario (2005), 19 C.E.L.R. (3d) 176 (ERT), para.29-31

22. The Respondents respectfully submit that the EBR interpretation adopted by the ERT – and supported by the Respondents – in the instant case best achieves this result. Conversely, the narrow (and mistaken) interpretation suggested by the Applicant does not

attain the purposes of the EBR, and should therefore be rejected by this Honourable Court, as discussed below.

(d) Nature of the Issues Before the ERT

23. The Respondents respectfully submit that the LTA issues in the instant case required the ERT, *inter alia*, to: (a) interpret the constituent legislation (i.e. EBR) which provided the ERT's jurisdiction; (b) analyze and weigh the detailed technical and scientific evidence adduced by the parties' experts; and (c) consider matters of broad public interest, including the protection of ecosystem and human health, public participation rights, and governmental accountability for environmental decision-making. In light of this specialized mandate, there is no merit to the Applicant's suggestion that the ERT has "no greater expertise" than the courts in the matter of LTA applications under the EBR.

Applicant's Factum, para.42

24. To the contrary, the Respondents respectfully submit that the determination of the foregoing issues lies at the very core of the ERT's specialized expertise under the EBR and EPA. To paraphrase the *Smith* decision, it was "reasonably open" to the ERT in instant case to conclude that the Respondents should be granted leave at large under the EBR in respect of both waste-burning approvals. Thus, the Application for Judicial Review should be dismissed on this basis alone since it "is no more than an attempt, contrary to s.43 [of the EBR], to appeal the decision of the tribunal in respect of leave to appeal."

Smith, supra, para.9, 17-18

25. By establishing the time-limited LTA process under the EBR and by expressly excluding a statutory right of appeal, the Ontario Legislature clearly intended to create an expedited and expert process for resolving disputes over environmental approvals. Similarly, the Legislature's assignment of LTA applications to a specialized tribunal such as the ERT (rather than to the courts) reflects the complex, technical and polycentric nature of the issues in dispute. Accordingly, the EBR's objectives relating to environmental protection, public participation and governmental accountability would be significantly undermined if ERT leave decisions were held by this Honourable Court to be reviewable on a correctness standard.

R. v. Consolidated Maybrun Mines, supra, para.57

26. In summary, having regard for the above-noted factors, the Respondents respectfully submit that the applicable standard of review in the instant case is reasonableness, or, alternatively, patent unreasonableness. Because the ERT's leave decision was reasonable (or not patently unreasonable), this Honourable Court should accord considerable deference to the leave decision, and should not quash or set aside the leave decision on the grounds alleged by the Applicant. In the alternative, in the event that this Honourable Court finds that "correctness" is the applicable standard of review, the Respondents submit that, for the reasons described below, the leave decision contains no reversible legal errors and should therefore be upheld.

Issue #2: The EBR Leave Test

27. The ERT has been repeatedly called upon to interpret and apply the section 41 leave test since the EBR came into force in the early 1990s. Commencing with the *Barker* decision in 1996 and continuing to date, the ERT has developed an extensive

body of jurisprudence that amply supports the approach to the leave test undertaken in the instant case. A large number of these ERT decisions are contained in the record of proceeding in the instant case, and are referenced in the factum filed by the Respondents Downie, Sinclair, Baker, Langlois and Fay.

Re Barker (1996), 20 C.E.L.R. (NS) 72 (Env.App.Bd), para.40-47

28. In essence, the ERT jurisprudence has consistently articulated the general approach to section 41 as follows: in order to grant leave under the EBR, it must appear to the ERT that: (a) there is good reason to believe that no reasonable person could have made the impugned decision; and (b) the impugned decision could result in significant harm to the environment. The Respondents respectfully submit that this interpretation is both reasonable and correct, and the resulting focus upon the impugned "decision" (not LTA grounds), and the inclusion of phrases such as "it appears" and "good reason," flow directly from the actual language used in section 41. Moreover, this interpretation has been repeatedly adopted as a matter of law and policy by the ERT in every LTA application it has heard under the EBR in recent years.

Grey (County) Corp, *supra*, para.17-18

Applicant's Application Record, Tab 2, ERT Leave Decision, p.7

Schedule B, EBR, section 41

29. Accordingly, it cannot be concluded that Member Pardy went on an arbitrary frolic when he granted leave at large to the Respondents in the instant case, or when he concluded that the Respondents had satisfied both branches of section 41 on a balance of probabilities. The record is clear that Member Pardy carefully considered and properly

followed the well-established line of ERT authorities on the requirements of the section 41 leave test. .

Applicant's Application Record, Tab 2, ERT Leave Decision, p.8

30. There is no merit to the Applicant's suggestion that the ERT has "persisted in an interpretation of the requirements of section 41 that is overly lenient to leave to appeal applicants." A careful perusal of reported and unreported EBR leave decisions reveals that the majority of LTA applications are, in fact, dismissed by the ERT. For example, of the 25 EBR leave decisions contained within the record of proceeding in the instant case, 4 resulted in the granting of full leave, 5 resulted in the granting of partial leave, and 16 were dismissed. Given this track record, it cannot be seriously contended that the ERT is being "overly lenient" to leave applicants. If anything, this track record confirms that the ERT is mindful that the EBR leave test is "stringent", as noted in the *Smith* case. Indeed, Member Pardy ultimately dismissed several LTA applications in the instant case due to the applicants' failure to meet the requirements of the leave test.

Applicant's Factum, para.45

Smith, supra, para.8

Applicant's Application Record, Tab 2, ERT Leave Decision, p.9

31. There is no merit to the Applicant's contention that the Directors' decisions to issue the two approvals in the instant case should attract "deference," presumably from the ERT when considering the LTA applications under the EBR. The Respondents respectfully submit that the *SERRA* case, relied upon heavily by the Applicant, is easily distinguishable from the instant case for the reasons set out in the factum filed by the Respondents Downie, Sinclair, Baker, Langlois and Fay.

Applicant's Factum, para.39,57

32. The Respondents further submit that under the applicable legislative scheme, the ERT does not and should not "defer" to Directors whose decisions are being evaluated under the EBR leave test. There is no presumption at the leave stage – or at any time thereafter – that the Directors' decisions were correct, appropriate, or sufficiently stringent. To the contrary, there is a "strong presumption that a decision, major in both its temporal implications and scale of operations, which does not address nor give any explicit assurances concerning future environmental impacts 'could result in significant harm to the environment.'" Where this presumption is supported on the evidence (as in the instant case), then "the public interest could be best served by granting leave to appeal."

Re Ridge Landfill Corp. (1998), 31 C.E.L.R. (NS) 190 (Env.App.Bd.), para.34

33. If leave to appeal is granted under the EBR, then the ERT has broad authority to override the Directors in that the ERT: (a) holds a hearing *de novo* under the EPA (b) may make any decision that the Directors could have made under the EPA; (c) may order the Directors to take such action as the ERT deems necessary; and (d) may substitute its opinion for that of the Directors. Thus, this Honourable Court should firmly reject the Applicant's suggestion that Directors' decisions are entitled to deference from the ERT.

Schedule B, EPA, section 145.2; EBR, section 45

Re Uniroyal Chemical Ltd. (1992), 9 C.E.L.R. (NS) 151 (Env.App.Bd.), para.48

34. In addition, this Honourable Court should firmly reject the Applicant's attempt to re-write the leave test by importing new words, phrases or concepts (i.e. "patently

unreasonable", "clearly irrational", etc.) into section 41 of the EBR. This new suggested language does not exist within section 41 as enacted by the Ontario Legislature, nor does it arise on any reasonable or purposive interpretation of the plain wording and legislative intent of section 41.

Applicants' Factum, para.53,55

Issue #3: The MOE's SEV Provisions

35. Contrary to the submissions of the Applicant, there is nothing improper or jurisdictionally incorrect in the ERT's consideration of the MOE's SEV promulgated under the EBR. Significantly, neither the Applicant nor the Directors took the position at the leave stage that the SEV was an irrelevant consideration. Instead, the Applicant and Directors claimed that the issuance of the two waste-burning approvals complied with the SEV. However, the ERT properly rejected this claim in relation to the SEV provisions regarding the ecosystem approach and precautionary principle.

Applicant's Factum, para.67, 70-71

Applicant's Application Record, Tab 2, ERT Leave Decision, pp.11-21

36. Under the "reasonableness" branch of the section 41 leave test, the ERT is required to have regard to the relevant law and policies developed to guide decisions on environmental approvals. Given the broad definition of "policy" under the EBR, the MOE's SEV is clearly an important policy that applies to Directors' decisions to issue instruments, such as the two waste-burning approvals in the instant case. Indeed, on its face, the MOE's SEV states that the guiding principles within the SEV "will be among the tools used by the [MOE] to apply the environmental values set out in the purposes of the EBR when making decisions that might significantly affect the environment." It is beyond dispute that the two waste-burning approvals in the instant case are

environmentally significant, and are, in fact, prescribed by regulation as environmentally significant instruments for the purposes of Part II of the EBR. Thus, the Directors' decisions on whether to issue the two approvals should have triggered the proper application of the SEV principles as a matter of policy.

Schedule B, EBR, sections 1, 41; O.Reg.681/94, sections 1.1, 2 and 5

Record of Proceeding, Vol. III, Tab 5b43, MOE SEV, page 3

37. In addition, the Applicant's factum fails to mention that the MOE was legally compelled to issue its SEV pursuant to sections 7 to 9 of the EBR, and that section 11 of the EBR specifically requires the Minister to "take every reasonable step to ensure that the [SEV] is considered whenever decisions that might significantly affect the environment are made in the Ministry." In light of this legal duty imposed upon the MOE by the EBR, the Respondents respectfully submit that it was reasonably open to, and jurisdictionally proper for, the ERT to have regard to the SEV as "relevant law" for the purposes of the section 41 leave test.

Schedule B, EBR, sections 7-9, 11

38. Regardless of whether the SEV is characterized as law or policy, other ERT decisions have affirmed the importance of applying SEV principles to decisions respecting environmental approvals. Accordingly, Member Pardy's consideration of the SEV in the instant case is completely consistent with ERT precedent.

Robins v. Ontario (2007), 28 C.E.L.R. (3d) 57 (ERT), para.14

Grey(County) Corp., supra, para.73-74

Dillon v. Ontario (2002), 45 C.E.L.R. (NS) 9 (ERT), para.63

39. The Applicant argues that the ERT erred in finding that there was apparent non-compliance with SEV provisions regarding the ecosystem approach and precautionary principle. The Respondents respectfully submit that such arguments lack merit and represent an improper attempt by the Applicant to appeal the ERT's findings, contrary to section 43 of the EBR. Moreover, on a judicial review application, it is not open to this Honourable Court to effectively re-try the case, or to find facts, regarding SEV compliance. As discussed below, the task of determining LTA applications has been assigned by the Ontario Legislature to the ERT, not the courts.

Applicant's Factum, para.72-90

Schedule B, EBR, section 43

Issue #4: Common Law Rights of Local Landowners

40. The Applicant has presented no authorities to support its claim that the ERT erred by considering the potential effect of the Directors' decisions on the common law rights and interests of adjoining landowners. The Respondents respectfully submit that it was reasonably open to, and jurisdictionally permissible for, the ERT to have regard for such effects when assessing the reasonableness of the Directors' decisions.

Applicant's Factum, para.91-96

41. As noted above, the "reasonableness" branch of the section 41 leave test clearly requires the ERT to "have regard to the relevant law." There is nothing in section 41(a) that explicitly or implicitly excludes the common law as "relevant law", or that restricts this phrase to statutory enactments or regulations. While legislation may be used to alter the common law, it is presumed that legislatures generally do not intend to change common law rights, unless statutes contain clear and unambiguous provisions to achieve this result. No such legislative intent or language appears within section 41 of the EBR.

Sullivan and Driedger on the Construction of Statutes (Butterworths, 2002), p.341

42. Moreover, Member Pardy was factually correct when he found that the Directors "declined to consider and weigh the common law rights of the Applicant Landowners or the potential consequences of the C of As upon them." Similarly, Member Pardy was legally correct when he concluded that "approvals may authorize activities that have potential to infringe upon common law rights," and that "regulatory approval of particular substances or processes can protect facilities from common law liability." For example, it has been judicially held that the common law defence of "statutory authority" can negate civil liability where a defendant's statutorily approved operations have caused off-site harm to plaintiffs who rely upon common law causes of action (i.e. nuisance, trespass, negligence, strict liability, etc.). It should be further noted that the EBR itself provides that compliance with an approval is a defence to the statutory cause of action available to plaintiffs under section 84 of the EBR.

Applicant's Application Record, Tab 2, ERT Leave Decision, pp.25-26

Solloway v. Okanagan Builders Land Development Ltd. (1976), 71 D.L.R. (3d) 102 (B.C. S.C.), para.42

Schedule B, EBR, sections 84-85

43. For these reasons, the Respondents respectfully submit that the ERT did not commit jurisdictional error by considering common law rights when assessing the reasonableness of the Directors' decisions to issue the impugned approvals. This is particularly true in light of Member Pardy's overall finding that "the kinds of contaminants to be emitted from the Lafarge kiln… are potentially hazardous to the environment and human health", and that "the Applicants have produced a substantial information base that establishes the potential for significant harm to the environment

from the use of alternative fuels at the Lafarge facility." In light of these findings regarding the serious risk of off-site harm, the Respondents respectfully submit that it was prudent and legally sound for the ERT to consider common law rights and interests.

Applicant's Application Record, Tab 2, ERT Leave Decision, pp.25-26

Issue #5: Discrimination Against Local Communities

44. Contrary to the Applicant's submissions, there is nothing improper or jurisdictionally incorrect in the ERT's consideration of the potential discriminatory or inconsistent effects of the Directors' decisions upon local communities in the instant case. In the circumstances, and on the evidence, the ERT correctly concluded that the undesirable and unreasonable consequence of the Directors' decisions was to expose local Bath residents to potential environmental impacts to which no other Ontario community may be subject.

Applicant's Factum, para.97-105

Applicant's Application Record, Tab 2, ERT Leave Decision, pp.28-29

45. The Respondents further submit that the *Safety-Kleen* decision, cited by the ERT, does not assist the Applicant in the instant case for the reasons set out in the factum filed by the Respondents Downie, Sinclair, Baker, Langlois and Fay. Moreover, it appears that the Applicant accepts the soundness of the "principle of consistency" articulated in the *Safety-Kleen* decision, but continues to deny it should have been applied in the instant case. Whether – or to what extent – administrative or environmental inconsistency arises in the circumstances of the instant case was a finding of fact and policy made within jurisdiction by the ERT, and cannot be appealed by the Applicant to this Honourable Court due to section 43 of the EBR.

Applicant's Factum, para.99

Schedule B, EBR, section 43

Issue #6: Predicted Compliance with Regulatory Limits

46. There is no merit to the Applicant's suggestion that the LTA applications should have been dismissed solely because the Applicant predicted that it would be in compliance with numerical standards set out in the applicable regulations. Leaving aside the unproven and self-serving nature of the Applicant's assertion, the Respondents respectfully submit that the ERT did not commit jurisdictional error in rejecting this narrow interpretation of the leave test under the EBR.

Applicant's Factum, para.67, 106-117

47. As noted by Member Pardy, the ERT has routinely held that regulatory emission standards are not the only "relevant laws" that must be considered in the context of section 41 of the EBR. Other applicable laws – such as the EPA – should also be considered at the leave stage to assess the reasonableness of the impugned decision and its potential to cause significant environmental harm. For example, even if a facility's contaminant discharges comply with numerical limits set out in regulations or approvals, the general anti-pollution prohibition in section 14 of the EPA still applies to the facility. More importantly, notwithstanding the facility's compliance with regulatory limits, section 14 is contravened if the authorized discharges cause, or are likely to cause, "adverse effects" (i.e. impairment of environmental quality; harm or material discomfort to any person; adverse effects on the health of any person; etc.). A similarly broad prohibition is set out in Ontario's general air pollution regulation.

Applicant's Application Record, Tab 2, ERT Leave Decision, pp.12-13

Schedule B, EPA, sections 1, 14; O.Reg.419/05, section 33

48. Accordingly, the Respondents respectfully submit that there is nothing improper or jurisdictionally incorrect in the ERT's rejection of the Applicant's argument that its predicted compliance with certain regulatory limits was wholly determinative of whether leave to appeal should have been granted in the instant case. In the circumstances, it was reasonably open to the ERT to consider other applicable statutory provisions even if the Applicant intended to comply with numerical standards.

Issue #7: ERT Analysis of the Waste C of A

49. Contrary to the Applicant's submissions, there is nothing improper or jurisdictionally incorrect in the ERT's concurrent consideration of the Air and Waste C of A's. First, although the two C of A's are, of necessity, issued under different sections of the EPA, they are inextricably linked together and should be viewed as an integrated approval of a single project, *viz.* the collection, storage, handling and burning of solid waste as "alternative fuels" at the Applicant's cement manufacturing facility. Second, the C of As were applied for at the same time by the Applicant, and were issued by the Directors on the very same day. Third, both C of A's extensively cross-reference each other. Fourth, although the ERT's leave decision contains fewer references to the Waste C of A than the Air C of A, a careful perusal of the leave decision reveals that Member Pardy did, in fact, make a number of general and specific findings that apply to both impugned approvals. Accordingly, there is no merit in the Applicant's claim that the ERT somehow erred in granting leave to appeal in relation to both instruments.

Applicant's Factum, para.116

Respondents' Application Record, Tab 1, Air C of A (December 21, 2006); and Waste C of A (December 21, 2006)

Applicant's Application Record, Tab 2, ERT Leave Decision, pp.33-34

Issue #8: Scope of the Appeal

50. Contrary to the Applicant's submissions, there was nothing improper or jurisdictionally incorrect in the ERT's decision to grant the Respondents full leave to appeal both approvals, even though Member Pardy found that certain specific grounds had not satisfied the leave test under the ERT. As noted above, the wording of section 41 focuses upon the Directors' decisions, not the individual grounds that an LTA applicant may choose to advance at the leave stage. Having concluded in the instant case that "it appears that no reasonable person, having regard for the relevant laws and government policies, would have made the decisions" to issue the two impugned approvals, and having further concluded that these decisions "could result in significant harm to the environment," it was reasonably open to, and jurisdictionally permissible for, the ERT to grant the Respondents unrestricted leave to appeal both decisions "in their entirety."

Applicant's Factum, para.117-120

Applicant's Application Record, Tab 2, ERT Leave Decision, p.34

Grey(County) Corp., supra, para.39,43-52

51. For the same reasons, it was reasonably open to, and jurisdictionally permissible for, the ERT to specify that the scope of the Respondents' appeal was not limited to the grounds advanced at the leave stage, "unless the Tribunal orders otherwise." This latter qualification is entirely consistent with the ERT's ability to "control its own procedures" as recognized in the *Smith* case, and ensures that the ERT will continue to retain overall authority over the scope of the appeal as the matter proceeds to the main hearing. However, it must be noted that the Respondents' Notice of Appeal has been deliberately confined to the general grounds that Member Pardy did accept as satisfying both

branches of the leave test under the EBR. Thus, there can be no jurisdictional complaint that the Respondents have somehow strayed beyond the broad parameters of the leave at large granted by the ERT.

Applicant's Application Record, Tab 2, ERT Leave Decision, p.34

Smith, supra, para.6-7,10-12

Respondents' Application Record, Tab 1, *Notice of Appeal* (April 18, 2007), pp.2-3

PART III – ADDITIONAL ISSUES AND LAW RAISED BY THE RESPONDENTS

52. The Respondents respectfully submit that the Application for Judicial Review raises two additional issues:

(a) Does the doctrine of *laches* bar the granting of a remedy to the Applicant? and

(b) If this Honourable Court accepts one or more of the application grounds advanced by the Applicant, what is the appropriate remedy?

(a) Doctrine of Laches

53. It is trite law that judicial review applications should be promptly prosecuted, and that the equitable doctrine of *laches* applies in the context of judicial review. Thus, unreasonable delay by a judicial review applicant may result in the curial refusal to grant a remedy without deciding the merits of the application.

Immeubles Port Louis Ltee v. Lafontaine (Village), [1991] 1 S.C.R. 326, para.89

Chippewas of Sarnia Band v. Canada (2001), 51 O.R. (3d) 641 (Ont. C.A.), para. 255-58

54. Under the doctrine of *laches*, the remedy requested by the Applicant in the instant case can and should be refused if this Honourable Court finds that the Applicant, in delaying the commencement of the Application for Judicial Review, has either: (a)

acquiesced in the ERT's leave decision; or (b) created circumstances which make the prosecution of the Application unjust or unreasonable.

M.(K.) v. M.(H), [1992] 3 S.C.R. 6, para.98

55. The Respondents respectfully submit that both branches of the doctrine of *laches* are applicable in the instant case, and should bar the granting of a remedy to the Applicant. In considering this issue, this Honourable Court should have regard for the period of delay, its effect on third parties, and the balance of justice or injustice to the parties if the requested remedy is granted or refused.

Innisfil 400 Group Ltd. v. Ontario, 2007 CarswellOnt 4671 (Ont. S.C.J.), para.25

56. As noted above, after the leave decision was released by the ERT on April 4, 2007, the Applicant waited approximately six months before commencing the Application for Judicial Review, then inexplicably took another two months to perfect the Application. Both of these events – commencement and perfection – occurred <u>after</u> the ERT had already held Preliminary Hearings in this matter. By way of comparison, in *R. v. Board of Broadcast Governors*, a delay of approximately four months by the applicant (and corresponding injustice to other parties) resulted in judicial refusal to grant discretionary remedies.

R.. v. Board of Broadcast Governors (1962), 33 D.L.R. (2d) 449 (Ont. C.A.), para.29-30

57. In the circumstances of the instant case, it can only be concluded that the Applicant has not acted with due dispatch in initiating and prosecuting the Application for Judicial Review. To the contrary, the Applicant's conduct can be best characterized as dilatory and unreasonable. The Respondents respectfully submit that if the Applicant

had a legitimate complaint about the jurisdictional soundness of the ERT's leave decision, then it was clearly incumbent upon the Applicant to commence the Application for Judicial Review at the earliest opportunity in order to: (a) safeguard its legal right to seek judicial review; (b) prevent triggering the doctrine of *laches*; (c) avoid inconvenience to, or disruption of, the appeal hearing now underway before the ERT; and (d) prevent prejudice and injustice to the Respondents and other parties currently participating in the Preliminary Hearings and preparing for the main hearing.

58. In an attempt to explain its delay in seeking judicial review, the Applicant has suggested that it preferred to conduct "without prejudice" negotiations with the Respondents and other parties on their outstanding concerns about the two waste-burning approvals. While this initiative may appear laudable, the Respondents respectfully submit that there is no logical, legal or factual connection between the substantive matters dealt with during such negotiations, and the various legal issues now raised by the Application for Judicial Review.

Applicant's Application Record, Tab 3, Affidavit of Robert Cumming, para.3-6

59. In addition, the Applicant has not produced a scintilla of evidence to demonstrate that the timely commencement of the Application for Judicial Review would somehow have dissuaded or prevented the Respondents from participating in "without prejudice" negotiations. Accordingly, the Applicant's reference to these negotiations should be viewed by this Honourable Court as an unpersuasive rationale or excuse for the Applicant's deliberate refusal to seek judicial review in a timely manner.

60. Moreover, it is well-established in law that settlement negotiations between parties do not suspend or stop the running of a statutory limitation period. By analogy, the Respondents respectfully submit that the negotiations in the instant case did not suspend or stop the operation of the doctrine of *laches.*

McBride v. Vacher, [1951] O.W.N. 268 (Ont. C.A.), para.12

61. In the circumstances, the Applicant has failed to meet its onus of satisfactorily explaining its delay in commencing the Application for Judicial Review, or its failure to move expeditiously in perfecting the Application for Judicial Review. The Respondents respectfully submit that the prudent and most appropriate course of action by the Applicant would have been to promptly commence the Application for Judicial Review, continue the negotiations with the Respondents, and consider withdrawing the Application if the negotiations resulted in a mutually acceptable settlement. Having failed or refused to do so, the Applicant must now be held accountable for its inordinate delay in seeking judicial review.

Brown v. Waterloo (Region) Commissioners of Police (1985), 10 Admin L.R. 1 (Ont. Div. Ct.), para.45-46

62. The Respondents further submit that when the Applicant opted to negotiate rather than to seek judicial review, the Applicant was effectively acquiescing in the ERT's leave decision. This is particularly true since the Applicant chose to negotiate for an extended period of time, and otherwise appeared to have tacitly accepted or assented to the ERT's leave decision. Indeed, the Applicant did not raise any formal legal objection to the validity of the ERT's leave decision until mere days before the first Preliminary Hearing

was to be held. Thus, the first branch of the doctrine of *laches* – acquiescience – is applicable on the facts of this case.

63. Similarly, the second branch of the doctrine of *laches* – injustice – is equally applicable on the facts of this case. From April 4, 2007 onward, the Applicant knew, or reasonably ought to have known, that the Respondents (and other parties) were relying and acting upon the leave decision (i.e. by filing their Notice of Appeal, retaining experts, and otherwise preparing for the Preliminary Hearing and main hearing). The ERT, too, also relied upon the unchallenged validity of the leave decision by issuing the Notice of Hearing, holding Preliminary Hearings, and scheduling dates for the main hearing. In these circumstances, and at this late stage, the Respondents respectfully submit that it would be unjust and unconscionable to grant a remedy to the Applicant when it failed to act diligently in seeking judicial review of the leave decision that the Respondents and ERT have relied upon to their detriment.

64. While the Applicant had the right to legally challenge the leave decision, that right should have been exercised in a timely manner, and it must be reconciled with the interests of the Respondents, other parties, and the ERT Members who are now seized with the appeal hearing. In short, the remedy sought by the Applicant should be refused by this Honourable Court because it would result in hardship or prejudice to the public interest, to the ERT's administration of environmental justice, and to the Respondents who have relied and acted upon the leave decision in good faith.

Chippewas of Sarnia Band, *supra*, para. 257-58

(b) Appropriate Remedy

65. The Applicant is seeking an order wholly quashing the ERT's leave decision, or, alternatively, an order limiting the Respondents' appeal to such "proper" grounds as may be specified by this Honourable Court. The Respondents respectfully submit that in the event that this Honourable Court finds jurisdictional error within the ERT's leave decision, the orders requested by the Applicant are too limited and inappropriate.

> Applicant's Application Record, Tab 1, Notice of Application for Judicial Review, para. 1(a) and (b)

66. With respect to the Applicant's request that the leave decision simply be quashed, the Respondents submit that any order in the nature of *certiorari* should be accompanied by a further order remitting the matter back to the ERT for reconsideration in accordance with the law as interpreted by this Honourable Court. Where an impugned administrative decision has been quashed, the traditional remedy is to remit the substantive matter back to the administrative body for reconsideration, unless there are unusual circumstances.

> *Canadian Civil Liberties Association v. Ontario Civilian Commission on Police Services* (2002), 165 O.A.C. 79 (Ont. C.A.), para.92

67. This general rule has been stated by this Honourable Court as follows:

> The traditional common law rule with respect to the power of a superior court to review the legality of administrative action is that while a court may quash a decision of a tribunal, based on an error of law or breach of procedural fairness, it cannot encroach on the tribunal's jurisdiction and prohibit it from re-hearing the same matter again, unless there are exceptional circumstances [citations omitted].
>
> In the last mentioned decision, Lord Denning is quoted as saying that the Court of King's Bench had to exercise a supervisory role towards inferior tribunals and not substitute its views for those of the tribunal. The Court usually lets the tribunal hear the case again.

Rathe v. Ontario (Health Professions Appeal & Review Board) (2002), 166 O.A.C. 161 (Ont. Div. Ct.), para.29-30

68. In the instant case, there are no exceptional circumstances or factors which prevent this Honourable Court from remitting the matter back to the ERT in the event that the April 4, 2007 leave decision is quashed. To the contrary, there are compelling legal and public policy reasons why the matter should be sent back to the ERT if the application for judicial review is granted.

69. For example, the Respondents are entitled in law to have their original EBR leave application heard and determined by the ERT. Simply quashing the leave decision (as requested by the Applicant) would place the Respondents' duly filed LTA application in legal limbo. Moreover, the public interest would not be served if the considerable environmental and public health concerns about the two impugned approvals were not considered in a timely and efficient manner via the third-party appeal provisions available under the EBR. These concerns remain serious, unresolved, and ripe for adjudication by the ERT despite the passage of time since the Respondents filed their leave application under the EBR in January 2007.

70. In addition, the Ontario Legislature has clearly (and exclusively) assigned the task of determining EBR leave applications to the ERT, not this Honourable Court. The Respondents therefore respectfully submit that this Honourable Court should reject the Applicants' ill-conceived invitation to decide the merits of the Respondents' leave application, or to "limit" the Respondents' ongoing appeal to "proper" grounds. In the circumstances, the most appropriate remedy is remittance back to the ERT if this

Honourable Court concludes that Member Pardy's leave decision contains jurisdictional error as alleged by the Applicant.

PART IV – ORDER REQUESTED

71. For the foregoing reasons, the Respondents respectfully request an order dismissing the Application for Judicial Review with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 31, 2007

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Richard D. Lindgren
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Lake Ontario Waterkeeper and Gordon Downie