SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND LOW JJ.

B E T W E E N:	
LAFARGE CANADA INC.	*David Crocker, Jonathan Davis-Sydor and Liliane Gingras*, for the Applicant
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 TULLOCK, SANDRA WILLARD	*Isabelle O'Connor and Sylvia Davis*, for the Ministry of the Environment *Marlene Cashin and Judah Harrison*, for Loyalist Environmental Coalition *Joseph F. Castrilli*, for Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay *Richard D. Lindgren*, for Lake Ontario Waterkeeper and Gordon Downie *Rodney Northey and David McRobert*, for the Intervenor Environmental Commissioner of Ontario
Respondents	
	HEARD at Toronto: April 9, 10 and 15, 2008

LEDERMAN and SWINTON JJ.:

[1] Lafarge Canada Inc. has brought an application for judicial review of the decision of the Ontario Environmental Review Tribunal (the "Tribunal") dated April 4, 2007, which granted leave to appeal the decisions of two Directors of the Ministry of the

Environment (the "Ministry") granting Certificates of Approval ("CofAs") under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA").

[2] The applicant and the Ministry take the position that the Tribunal erred in the test it applied in granting leave, in the application of the test, and in the scope of the appeal rights granted.

Background

[3] Lafarge owns and operates a cement manufacturing facility in Bath, Ontario. Through 2002 and 2003, Larfarge developed a plan to use alternative fuels for up to 30% of its operation in an effort to reduce its reliance on coal and other traditional fuels. The proposed alternative fuels include used tires, shredded solid waste, pelletized municipal waste, and meat and bone meal waste.

[4] In December 2003, Lafarge applied to the Ministry pursuant to s. 39 of the EPA for a CofA (Waste) relating to the receipt, temporary storage and utilization of waste materials that would be the alternative fuel stream. In February 2004, it applied to the Ministry pursuant to s. 9 of the EPA for a Comprehensive CofA (Air) to replace its existing certificates for all sources of air emissions at the plant.

[5] The *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 ("EBR") was enacted with the purpose of protecting, conserving and, where reasonable, restoring the integrity of the environment, providing sustainability of the environment and protecting the right to a healthful environment (s. 2). Part II of the EBR provides a framework for public participation in decisions by designated ministries, including the Ministry of the Environment, where decisions may have a significant environmental impact.

[6] Part II also provides a process for a ministry to develop a Statement of Environmental Values ("SEV") (ss. 7-10). The SEV is to explain how the purposes of the EBR are to be applied when decisions that might significantly affect the environment are made in the ministry, and explain how considerations of the purposes of the EBR should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry. Section 11 requires the minister to take every reasonable step to ensure that the ministry SEV is considered whenever decisions that might significantly affect the environment are made in the ministry.

[7] In the SEV of the Ministry of the Environment, there are three guiding principles: the ecosystem approach, environmental protection (which includes the precautionary approach) and resource conservation.

[8] The EBR also sets out a process of public participation applicable to decisions to issue Class I or Class II instruments, such as the CofAs that are the subject matter of this litigation. The CofA (Air) is a Class I instrument, while the CofA (Waste) is classified as a Class II instrument. Pursuant to s. 22 of the EBR, the Ministry must give notice of its

intention to approve instruments like the CofA by giving notice on the Environmental Registry (the "Registry"). This is an Internet-based system that posts notices to the public and calls for public comments on proposals and applications. Pursuant to s. 35(1), the Ministry must consider any comments in its decision making.

[9] In accordance with the EBR, the Ministry posted Lafarge's applications on the Registry. As a result of the consultation process, Lafarge made modifications to its proposal, which were also placed on the Registry.

[10] On December 21, 2006, two Directors of the Ministry issued the requested certificates, which included a number of conditions, as well as testing and monitoring requirements.

[11] A number of groups and individuals sought leave to appeal the decisions pursuant to s. 41 of the EBR. That section states,

> Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
>
> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

The Tribunal's Decision

[12] The Tribunal received written submissions and issued a 34 page written decision (reported as *Dawber v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 25). It dismissed the applications of a number of individual applicants, concluding that their applications were not founded on a substantial and relevant information base. However, the Tribunal granted the leave applications of Clean Air Bath, a citizen's group representing approximately 200 residents in the Bath vicinity, the Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie ("LOW"), as well as Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay, a group of landowners (the "Leave Applicants").

[13] The Tribunal Member quoted from and applied his own decision in *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123, holding that the test under s. 41 "reflects a standard of proof for unreasonableness and significant harm lower than a balance of probabilities" (Decision, p. 8). However, the Member went on to state that applicants must satisfy the test under s. 41 on a balance of probabilities, but what they must prove on that standard is that "it appears there is good reason to believe" that no reasonable person would have reached the decision, and "it appears that the decision could result" in significant harm to the environment (Decision, p. 8).

[14] The Tribunal then went on to hold that the first branch of the s. 41 test could be met if a decision to issue a CofA were made without regard to the guiding principles of the Ministry's SEV. It then found that the first branch of s. 41 was met on four grounds: the failure to consider the ecosystem approach and the precautionary principle set out in the SEV, the failure to consider common law rights of landowners, and inconsistent treatment of Bath residents and other Ontario residents.

[15] The Ministry SEV endorses an ecosystem approach as a guiding principle. The Tribunal held that such an approach requires an assessment of the cumulative effects of a proposed project on ecosystems. As the Directors had considered compliance with existing regulations and guidelines, but not the potential cumulative ecological consequences of the project, the Tribunal held there was good reason to believe that no reasonable person could have reached the decision to issue the CofAs (Decision, pp. 17-18).

[16] The Tribunal also held that the issuance of the CofAs permitting the burning of tires was not consistent with the precautionary principle set out in the SEV. The Ministry's Notice of Proposal regarding a potential ban on incineration of tires was evidence that the Ministry had no experience regarding the environmental impact of burning tires. Therefore, the Tribunal concluded there was good reason to believe that the decisions to approve the CofAs for the processing and incineration of tires were decisions that no reasonable person could make (Decision, p. 21).

[17] One of the effects of issuing a CofA may be to diminish the status or viability of common law rights that might otherwise be utilized to protect the environment. As the Directors declined to weigh the impact of the CofAs on the Leave Applicants, the Tribunal held that the first branch of s. 41 was satisfied.

[18] The Tribunal also held that there was good reason to believe that no reasonable person would have issued the CofAs because of the inconsistent treatment of Bath residents and those in other parts of the province. More precisely, the Ministry had issued a Notice of Proposal to ban the burning of tires on the same day that the CofAs were issued permitting incineration of tires by Lafarge (Decision, p. 29).

[19] The Tribunal went on to hold that the second branch of the test, significant harm to the environment, was met as well. The Tribunal summarized the evidence respecting possible harm, concluding that the expert evidence was diametrically opposed. The Tribunal then found that the kinds of contaminants to be emitted by Lafarge were potentially hazardous to the environment and human health (Decision, p. 33). The Tribunal concluded:

> The Tribunal concludes that, although the environmental effects of the CofAs cannot be determined with certainty, 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. The Tribunal

finds that it appears that the Directors' decisions could result in significant harm to the environment within the meaning of the second branch of the test in section 41 of the *EBR*. (Decision, pp. 33-34)

[20] The Tribunal then went on to state that the applicants could appeal the two decisions in their entirety, and that the scope of the appeal was not limited to the grounds on which leave was granted or the issues raised in the applications for leave to appeal, unless the Tribunal orders otherwise (Decision, p. 34).

Issues in the Application for Judicial Review

[21] At the outset of the oral hearing of this application, the Court raised the issue whether the application for judicial review was premature, given that the applicant seeks to challenge the granting of leave to appeal.

[22] In addition, the applicant raised a number of issues:

1. What is the appropriate standard of review?
2. What is the proper test for leave to appeal pursuant to s. 41 of the EBR?
3. Did the Tribunal err in holding that the Directors were required to consider the SEV?
4. Did the Tribunal err in granting leave for an alleged failure of the Ministry to consider common law rights of landowners?
5. Did the Tribunal err in applying the principle of non-discrimination?
6. Did the Tribunal err by failing to examine the evidence of significant harm to the environment?
7. Did the Tribunal err in giving leave regarding the CofA (Waste) without a substantive analysis of that certificate?
8. Did the Tribunal err in granting leave at large?

[23] The LOW respondents also raised the issue of laches, arguing that the application should be barred because of delay.

Prematurity

[24] The Court raised the issue of the prematurity of this application, particularly in light of s. 43 of the EBR, which provides that there is no appeal from a decision to grant or refuse leave to appeal.

[25] Judicial review is a discretionary remedy. This Court has observed on many occasions that judicial review should not be granted with respect to an interlocutory decision unless there are exceptional circumstances. When a preliminary decision will likely result in a fundamental failure of justice, the Court may exercise its discretion to hear the application (*United Food and Commercial Workers International Union v. Rol-Land Farms Ltd.*, [2008] O.J. No. 682 (Div. Ct.) at para. 43).

[26] The Federal Court has had occasion to apply a similar line of jurisprudence when a party challenged a decision of the Pension Appeals Board granting leave to appeal a decision of the Review Tribunal. The Court held that special circumstances must be established when a party seeks to challenge the granting of leave to appeal, because the granting of leave is an interlocutory proceeding that does not decide the merits of the appeal (*Mrak v. Canada (Minister of Human Resources and Social Development)*, [2007] F.C. 909 (T.D.) at paras. 27-28).

[27] The applicants and the Ministry submitted that the application for judicial review is not premature and should be heard on the merits because of the nature of the challenge to the decision. Both these parties have taken the position that the Tribunal applied an incorrect test in granting leave, thus making a jurisdictional error. As well, they submitted that the Tribunal made an error in law in applying the Ministry SEV.

[28] They argued that they should be allowed to challenge the decision at this stage of proceedings because any error in applying the leave test cannot otherwise be cured. On appeal, the Tribunal has no jurisdiction to consider the merits of the leave decision (see s. 43 of the EBR). The Ministry submitted that the decision could not be challenged after a decision on the merits, as the grant of leave to appeal will have become academic and will likely be found moot at that stage.

[29] Given the nature of the challenge to the Tribunal's decision, we are of the view that this application for judicial review should be decided on the merits. The allegation that the Tribunal erred in applying the test for leave is a matter of significant importance in this and other cases.

The Standard of Review

[30] The applicant and the Ministry submit that the appropriate standard of review is correctness, while the Leave Applicants take the position that the standard is reasonableness. According to the applicant, the Tribunal made an error of law going to its jurisdiction in the test applied for leave to appeal, and it erred in law when applying the test because it treated the SEV as policy that the Directors should have considered.

[31] In the recent case of *Dunsmuir v. New Brunswick*, [2008] SCC 9, the Supreme Court of Canada held that there are only two standards for judicial review: correctness and reasonableness (at para. 45). The Court also held that the pragmatic and functional approach used to determine the standard of review should be replaced by a standard of review analysis (at paras. 51-61).

[32] One indication of the reasonableness standard is the existence of a privative clause. While the applicant and the Ministry submit that there is no privative clause in the EBR, s. 43 does prohibit an appeal from a decision to grant leave to appeal. This appears to be a weak form of privative clause. However, it is indicative of the Legislature's intention that leave decisions should be final.

[33] More importantly, deference is generally to be accorded where a tribunal determines a question of fact, discretion or policy, or where it is interpreting its own statute or statutes closely connected with its function, with which it has particular familiarity (at paras. 53-54). Moreover, deference is more likely to be accorded where the decision-maker has special expertise (at para. 55).

[34] The Tribunal is a specialized body, with expertise in environmental law and policy. In the present case, the Tribunal was interpreting s. 41 of the EBR and applying it to the facts of this case. The EBR is an environmental statute with which the Tribunal has familiarity, and the application of s. 41 to the Directors' decisions raises questions of mixed fact and law. Therefore, the Tribunal's leave decision is entitled to some deference.

[35] The Supreme Court in *Dunsmuir* held that the standard of correctness would apply to true questions of jurisdiction or *vires* – that is, questions where the tribunal must determine whether it has the statutory authority to decide a particular matter (at para. 59). While the applicant submits that the determination of the correct test for leave is a jurisdictional question, the interpretation of s. 41 is a matter clearly within the statutory authority conferred on the Tribunal, and not a true question of jurisdiction as identified in *Dunsmuir*.

[36] The Ministry submitted that the interpretation of s. 41 was a question of law of central importance to the EBR and third party rights. However, that does not attract a correctness review. According to *Dunsmuir*, the tribunal must be determining a question of general law, important to the legal system as a whole and outside the adjudicator's area of specialized expertise in order to attract review on a correctness standard (at para. 60). Here, the Tribunal was applying a leave provision in an environmental statute with which it had familiarity and drawing on its expertise in coming to its conclusion. Therefore, the standard of review in this application is reasonableness.

Interpretation of s. 41

[37] Part II of the EBR allows the general public to participate in and influence decision-making of the Ministry which has environmental significance.

[38] In respect of appeals of decisions on Class I and Class II instrument proposals, under s. 38(1) of the EBR, any person resident in Ontario has standing to seek leave to appeal if such person has an interest in the decision. It need not be a direct interest. The fact that a person has exercised a right given by the EBR to comment on a proposal on the Registry is evidence that a person has an interest in the decision on the proposal (s. 38(3)).

[39] The test for leave to appeal is found in s. 41 of the EBR, which was quoted earlier and is reproduced for ease of reference:

> Leave to appeal a decision shall not be granted unless it appears to the appellate body that,

(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and

(b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

[40] The wording of this provision is unusual in a number of respects. Most notably, it begins with a negative, i.e. the express prohibition "leave to appeal a decision shall not be granted ..." Thus, there is a presumption against granting leave. Moreover, the decision must be so egregiously in error that there is good reason to believe that "no reasonable person ... could have made the decision." Appeals by third parties are, therefore, intended to be an exceptional remedy.

[41] On its face, the EBR leave test is "stringent", as noted in *Smith v. Ontario (Environmental Review Tribunal)*, [2003] O.J. No. 1032 (Div. Ct.). Various reasons have been ascribed for this strict test by commentators:

1. The instrument holder has much more at stake than do members of the public who may have no physical or economic connection to the subject matter;

2. Appeals are very costly, in terms of legal and transaction costs, administrative resources, predictability and delay. There is an important social value in minimizing these costs by reserving appeals for cases of real unfairness and bungling; and

3. It is the mandate and primary role of government decision makers to serve the collective public interest and third party appeals should be limited to those cases where regulators have betrayed or failed their public trust.

(See Mark S. Winfield, "A Political and Legal Analysis of Ontario's Environmental Bill of Rights" (1998), 47 U.N.B.L.J. 325 at page 11; Dianne Saxe, *Ontario Environmental Protection Act Annotated, Ontario Environmental Bill of Rights, Annotated,* pages 40.1-41 and 42.8c).

[42] Balanced against that is the stated intent of the EBR to enable the people of Ontario to participate in the making of environmentally significant decisions by the Government of Ontario. This, in turn, would support an interpretation of s. 41 that facilitates fostering access to justice in environmental matters and permitting appeals

where the balance of the test in s. 41 has been met. Thus, although there is a presumption against it, the granting of leave is not insurmountable.

[43] The Tribunal held that the standard of proof was lower than a balance of probabilities, requiring the application be founded on a substantial and relevant information base. However, the Member added:

> The same conclusion can be expressed in an alternative way: applicants must satisfy the section 41 test on a balance of probabilities, but what they must prove to that standard is that *it appears there is good reason to believe* (that no reasonable person could have made the decision) in the first branch, and that *it appears that the decision could result* (in significant harm) in the second branch.

In one breath, the standard of balance of probabilities is rejected, but then seems to be accorded new life in this sentence.

[44] Lafarge and the Ministry submit that the Tribunal erred in law in its interpretation of s. 41. Lafarge argued that the applicants must show, after all the evidence is weighed on a balance of probabilities, that they have a strong *prima facie* case that the decision of the Director was patently unreasonable. The Ministry stated the test requires that the evidence show, on a balance of probabilities, that the Director's decision is clearly at odds with relevant law and policy, and that the decision could result in significant harm to the environment.

[45] We are of the view that the Tribunal was not only reasonable, but correct, in stating that the standard of proof was less than a balance of probabilities. At the leave to appeal stage, the appropriate standard of proof is an evidentiary one - i.e. leading sufficient evidence to establish a *prima facie* case, or showing that the appeal has "preliminary merit", or that a good arguable case has been made out, or that there is a serious question to be tried. Although worded differently, all of these phrases point to a uniform standard which is less than the balance of probabilities, but amount to satisfying the Tribunal that there is a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process. This lesser standard is embodied in the words of s. 41, namely "appears" and "there is good reason to believe". It is not the function of the Tribunal member who is giving leave to determine the actual merits of the appeal; rather, the member must determine whether the stringent threshold in s. 41 has been passed.

[46] The question under the first branch of s. 41(a) then becomes whether those seeking leave have put forth a *prima facie* case that "no reasonable person having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision." Put another way, this part of the test mandates reasonable persons to have regard to relevant law and policies and the factual record. If there has been a failure by the Directors to consider relevant law and policies, then, given the effect of the failure to do so, the Tribunal may conclude that there is good reason to believe that no reasonable person could have made the decision in issue.

[47] The second branch of the test under s. 41(b) requires that a *prima facie* case be made to show that "the decision in respect of which an appeal is sought *could* result in significant harm to the environment" (emphasis added). The question for the Tribunal then becomes whether the decision in question has the potential to cause significant environmental harm.

[48] In our view, the Tribunal was not only reasonable, but correct in the interpretation given to s. 41 of the EBR.

Was the decision of the Tribunal granting leave unreasonable?

Did the Tribunal commit a reviewable error in holding that the Directors were required to consider the SEV?

[49] The Tribunal correctly understood that its jurisdiction was not to question the adequacy of the content of the relevant laws and policies, but rather the issue was whether the Directors' decisions took into account those laws and policies. At page 12 of the Decision, the Tribunal correctly stated:

> The Tribunal agrees that the laws and policies that apply to the Directors' decisions are not themselves the subject of the test under the first branch of section 41, and the Tribunal is not seized with the task of assessing the reasonableness or adequacy of their content, at least not directly. The Tribunal does not have the mandate to require changes to those laws and policies or to impose upon the Directors a duty to achieve a higher standard of environmental protection than those laws and policies require. Instead, the reasonableness of the Directors' decisions must be assessed in the context of the legal regime within which they occur. ... However, it is appropriate to inquire whether and to what extent the Directors' decisions considered, incorporated and reflected relevant laws and policies.

[50] In this regard, the Tribunal concluded that there was a failure by the Directors to consider or apply the guiding principles in the Ministry SEV, which were relevant policies.

[51] The Ministry SEV endorses an ecosystem approach to environmental protection and resource management. The ecosystem approach necessarily includes an assessment of cumulative effects of emissions upon ecosystems.

[52] The SEV also directs the Ministry to exercise a precautionary approach in its decision making when there is uncertainty about the risk presented by particular pollutants or classes of pollutants. In such a case, the Ministry is to exercise caution in favour of the environment.

[53] The Tribunal found that there was good reason to believe that no reasonable person could have made the decisions to issue the CofAs without assessing the potential

cumulative ecological consequences of approving the Lafarge application, as required by the ecosystem approach. It also found that the decisions were not consistent with the precautionary principle. It appeared to the Tribunal that there was good reason to believe that the decisions to approve the CofAs for the storing and incineration of tires were decisions that no reasonable person could make, given the direction in the SEV to apply a precautionary approach. It held that the first part of the s. 41 test was met on these grounds.

[54] The Ministry argued that the SEV was not intended to guide decisions by Directors, but rather was to be applied by the Ministry as it developed legislation. It argued that SEV reads like a mission statement with wide-sweeping language. Under s. 7 of the EBR, significant latitude was given to a Minister as to how he or she was going to apply and integrate these values with other considerations. Under Part VI of the Ministry's SEV, it was stated that the Ministry will apply the purposes and guiding principles as it develops acts, regulations and policies. It went on to say that approval of instruments such as CofAs is issued under acts and regulations, and decisions on such instruments will, in turn, reflect those principles. The Ministry submitted that there is nothing in the SEV that provides guidance to Directors as to how to exercise discretion, and it provides no assistance to them as to what kind of conditions should be imposed.

[55] Moreover, both Lafarge and the Ministry argued that the EBR treats policies separately from SEVs and, therefore, if the Legislature intended a SEV to be part of the s. 41 consideration, it would have said so expressly.

[56] Upon a consideration of ss. 7 and 11 of the EBR, it is arguable and, therefore, reasonable for the Tribunal to have regarded the SEV as relevant policy which should guide the decisions of Directors. Under s. 7, the Minister is required to prepare a SEV that explains how the purposes of the EBR are to be applied when decisions that might significantly affect the environment are made in the Ministry. Moreover, under s. 11 the Minister is to take every reasonable step to ensure that the Ministry SEV is considered whenever decisions that might significantly affect the environment are made in the Ministry. There is no exclusion for Directors when they are making a decision whether or not to implement a proposal for a Class I or a Class II instrument.

[57] We conclude that the Tribunal was reasonable in finding that leave should be granted because of the failure to apply the SEV. The Tribunal concluded that the SEV falls within "government policies developed to guide decisions of that kind", which was consistent with past jurisprudence of the Tribunal on SEVs – see, for example, *Dillon v. Ontario (Director, Ministry of Environment)* (2002), 45 C.E.L.R. (N.S.) 9 at 27.

[58] Lafarge argued that at the heart of the case is the question whether the Directors unreasonably failed to consider the SEV. It pointed out that the Directors conducted a lengthy review and consultation process before the issuance of the CofAs, and that they themselves included a comprehensive list of conditions and testing requirements to ensure that the use of alternative fuels at the Bath plant is carried out in a safe and environmentally sound manner. The conditions in the CofAs require a comprehensive, frequent, monitored and accelerated emissions testing program. The end result is that

some of the standards imposed on Lafarge are even greater than as set out in the applicable regulations and Guideline A-7.

[59] Lafarge argued, therefore, that although the SEV may not have been formally taken into account, the Directors have imposed on Lafarge higher limits than required by even Guideline A-7 or O. Reg. 419/05. Given the Ministry's history with Lafarge, counsel for Lafarge argued that there exists an historical baseline, and that all of the emissions from the Lafarge plant attract stricter conditions. Thus, it was submitted that there is an indirect taking into account of the cumulative effect, and that emissions will be less than those emitted from the Lafarge stack in the past. Counsel also pointed out that with the number of conditions attached to the CofAs, a precautionary approach is being followed, in that there is an established monitoring and test period with respect to emissions.

[60] Under an ecosystem approach, decisions are made by measuring the effects on the system as a whole, rather than on their constituent parts in isolation from each other. Therefore, it was reasonable for the Tribunal to have concluded that without assessing the specific potential cumulative ecological consequences of approving the Lafarge applications, and given the concern that the CofAs were made in the face of uncertainty about environmental risk from the adverse affects of tire burning, the Directors' decision was unreasonable because of the failure to take into account SEV principles. Thus, it was reasonable for the Tribunal to conclude that it appeared that there is good reason to believe that no reasonable person could have made the decisions to issue the CofAs without applying an ecosystem approach and a precautionary approach to its decisions.

[61] On this ground alone, we conclude that it was reasonable for the Tribunal to conclude that the test in the first part of s. 41 was met. However, the Tribunal also held that the test in the first part of s. 41 was met on the grounds that the Directors failed to take into account common law rights of landowners and failed to take into account "environmental consistency".

[62] We need not determine, for purposes of this application for judicial review, whether or not each of these grounds, standing alone, would be sufficient to support the granting of leave. When these grounds are considered cumulatively with the holding respecting the application of the SEV, we conclude that the Tribunal reasonably held that the threshold for granting leave under the first part of the test had been met.

Common law rights of landowners

[63] In the overall context of this case, it is arguable that common law constitutes "relevant law" within the meaning of s. 41(a). Accordingly, it was reasonable for the Tribunal to conclude that the Directors' decisions were unreasonable because of the failure to consider the common-law rights of landowners, given the Tribunal's findings regarding the serious risk of off-site harm and its conclusion with respect to the SEV. Under s. 39(2) of the EPA, the Directors are to consider whether the waste disposal site may create a nuisance. In this way, the Directors have to go beyond regulatory standards. In assessing the reasonableness of the Directors' decisions, the Tribunal has to have

regard for relevant law. Nothing excludes the common law from "relevant law" or limits it to statutes and regulations. There is nothing in the legislation to say common law rights are to be taken away. The Tribunal's interpretation of "relevant law" should be given deference.

[64] In some instances, regulatory approval could negate common law rights. Therefore, when a Director is considering approving activity which might constitute a nuisance or another tort, it may be necessary to require more protective and stringent conditions, given the potential for migration of substances off-site.

[65] The two CofAs in question might not prevent impact of off-site contaminants and, therefore, the Tribunal was reasonable to find that there is good reason to believe that a failure by the Directors to consider the breach of the common law rights of local landowners that are threatened by Lafarge's use of alternate fuels would result in a decision that no reasonable person could have made.

Possibility of Inconsistent Environmental Effects Between Communities

[66] The Tribunal found there was a failure on the part of the Directors to take into account "environmental consistency". In the context of the EPA, the Tribunal was of the view that consistency means that facilities should be regulated as necessary to limit environmental effect to a consistent level across Ontario. It concluded that a reasonable, prudent person with knowledge of the law, policies and surrounding facts would not expose the residents of Bath to the effects of tire burning activity, especially when the Ministry was considering banning such activity in the rest of the province. It was within the realm of reasonableness for the Tribunal to conclude that it would be discriminatory to the community of Bath to potentially expose its residents to the effects of a tire burning process while at the same time considering not permitting it anywhere else in the province.

[67] Accordingly, it was reasonable for the Tribunal to conclude that it appeared that there was good reason to believe that the decisions to approve the Lafarge CofAs are decisions that no reasonable person could make so as to expose local Bath residents to potential environmental impacts, when no other Ontario community is subject to such impacts.

Whether the Decisions Could Result in Significant Harm to the Environment

[68] In its decision, the Tribunal indicated that under this branch of the test there need be an assessment of the potential for significant harm. Thus, compliance with numerical point of infringement standards in a regulation was not necessarily determinative of whether it appears that the decisions could result in significant harm to the environment. There was expert evidence expressing concern about potential health implications of the Lafarge proposal to burn waste and stating that there was potential for significant emissions of airborne contaminants from cement kilns burning tires.

[69] The Tribunal acknowledged that the expert evidence provided by the parties on the question of significant harm to the environment is diametrically opposed.

Nevertheless, the Tribunal was reasonable in concluding that although the environmental effects of the CofAs cannot be determined with certainty, the applicants had produced a substantial information base that established the potential for significant harm to the environment from the use of alternative fuels at the Lafarge facility.

[70] Despite the stringent approval process and the conditions in the CofAs, it was not unreasonable in the circumstances for the Tribunal to find that such tire burning activity, with which there has been little or no experience, could result in significant environmental harm.

[71] The Tribunal gave adequate reasons for concluding that the second branch of s.41 had been satisfied. That decision was reasonable, and the Court should not second guess the Tribunal in this regard.

Whether the Tribunal erred in granting leave with regard to the CofA (Waste)

[72] Lafarge submitted that there was insufficient analysis by the Tribunal with respect to the CofA (Waste) to ground a finding that the test in s. 41 was met. The Ministry framed this argument as a denial of procedural fairness, as the Tribunal failed to give adequate reasons for granting leave with respect to the CofA (Waste).

[73] The two CofAs are inextricably linked, were applied for and issued together. They cross-reference each other.

[74] A careful reading of the Tribunal's decision indicates that the two CofAs were under consideration throughout, and that the holdings of the Tribunal applied to both. Given the interrelatedness of the two CofAs, it was reasonable for the Tribunal to grant relief with respect to both certificates, and its reasons were adequate to reveal the basis for its decision.

Scope of the Appeal

[75] There was nothing improper or jurisdictionally incorrect in the Tribunal's decision to grant the respondents full leave to appeal both CofAs, even though the Tribunal found that only certain specific grounds had satisfied the leave test under s. 41.

[76] The wording of s. 41 focuses upon the Directors' decisions and not on the individual grounds that an applicant may choose to advance at the leave stage. The Tribunal reasonably ordered that the scope of the appeal was not limited to the grounds on which the applications had been granted leave or to the issues raised by the Leave Applicants in their leave applications, "unless the Tribunal orders otherwise". This latter qualification is entirely consistent with the Tribunal's ability to "control its own procedures" as recognized in the *Smith* case, *supra*, and ensures that the Tribunal will continue to retain overall authority over the scope of the appeal as the matter proceeds to a hearing on the merits.

Whether the application is barred by laches

[77] LOW submitted that the doctrine of laches should apply to bar the grant of a remedy to Lafarge.

[78] As stated earlier in these reasons, judicial review is a discretionary remedy. Where there has been unreasonable delay by a judicial review applicant, the court may refuse to grant judicial review without deciding the merits of the application (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at para. 89; *Chippewas of Sarnia Band v. Canada (Attorney General)* (2001), 51 O.R. (3d) 641 (C.A.) at paras. 255-58). What is an unreasonable delay will depend on the facts of the particular case (*R. v. Board of Broadcast Governors* (1962), 33 D.L.R. (2d) 449 (Ont. C.A.) at paras. 29-30).

[79] Here, the application for judicial review was launched on September 28, 2007, almost six months after the decision of the Tribunal, and it was not perfected for a further two months, until November 30, 2007. Lafarge explains the delay by its participation in negotiations with the respondents. However, it has not explained why the application for judicial review could not have been pursued in a more timely manner.

[80] An application for judicial review of a decision granting leave should be pursued expeditiously, given the potential prejudice to the opposing parties and given the likely delay caused to the proceedings before the Tribunal. Here, had this application for judicial review been successful on the merits, the respondents would have suffered prejudice by the applicant's delay, as they have been in the process of preparation for what will be a lengthy and complex appeal. They have already participated in a number of preliminary hearings of the Tribunal, as well as a motion brought by the applicant for the adjournment of the appeal hearing.

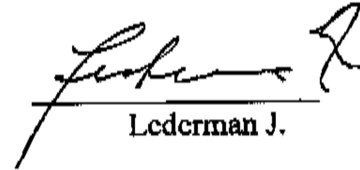
[81] Although this application will be dismissed on its merits, in any future application of this nature, the applicant should move in a timely fashion or risk having the application dismissed for delay. This is consistent with the clear intention of the Legislature to have the leave to appeal process take place within strict time constraints. Section 40 of the EBR requires that an application for leave be made not later than 15 days after the decision is rendered. Pursuant to O. Reg. 73/94, s. 17, the Tribunal is required to make a written decision on the leave application within 30 days, unless the Tribunal decides it needs more time. Section 43 of the EBR prohibits the appeal of a leave decision. Thus, the leave process is meant to occur in an expeditious fashion. So, too, should any application for judicial review of a leave decision.

Conclusion

[82] The application for judicial review of the decision granting leave to appeal is dismissed. The decision of this Court on this application is not to be taken as deciding the merits of the appeal – for example, the application of the SEV. The merits are appropriately for the Tribunal to determine, on the basis of a full evidentiary record,

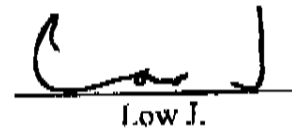
although they are subject to a further appeal to this Court on a question of law (EPA, s. 145.6(1)).

[83] The Environmental Commissioner does not seek costs. If the other parties cannot agree on costs, the respondents, other than the Ministry, may make brief written submissions within 21 days of the release of this decision. The Ministry and Lafarge shall have 14 days to respond. All submissions should be made to the Registrar of the Divisional Court.



Lederman J.

Swinton J.



Low J.

Released: June 18, 2008

COURT FILE NO.: 451/07
DATE: 20080618

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND LOW JJ.

B E T W E E N:

LAFARGE CANADA INC.

Applicant

- and -

ONTARIO ENVIRONMENTAL REVIEW TRIBUNAL et al

Respondents

REASONS FOR JUDGMENT

LEDERMAN and SWINTON JJ.

Released: June 18, 2008

LEFARGE CANADA INC.
Applicant

v.

ONTARIO ENVIRONMENTAL REVIEW TRIBUNAL, *et al.*
Respondents

Court File: 451/07

DIVISIONAL COURT

BEFORE LEDERMAN, J, SWINTON, J & LOW, J.

DATE APRIL 9, 2008

DISPOSITION - THIS ~~APPEAL~~ APPLICATION IS June 18/08 dismissed for written Reasons delivered by Lederman, Swinton JJ. Costs to be addressed in writing

Lederman J

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding Commenced at Toronto

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