Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: June 08, 2016 **CASE NO(S).:** 15-140 and 15-142

PROCEEDING COMMENCED UNDER section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended

Applicant:	Concerned Citizens of Brant (File No. 15-140)
Applicant:	County of Brant (File No. 15-141)
Instrument Holder:	CRH Canada Group Inc.
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of leave to appeal:	Permit to Take Water from Paris Pit issued under section 34.1 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended
Reference No.:	7115-9VVLJW
Property Address/Description:	Lot 27, Concession 2
Municipality:	Township of South Dumfries
Upper Tier:	County of Brant
ERT Case No.:	15-140
ERT Case Name:	Concerned Citizens of Brant v. Ontario (Environment and Climate Change)

PROCEEDING COMMENCED UNDER section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended

Applicant:	Concerned Citizens of Brant (File No. 15-142)
Applicant:	County of Brant (File No. 15-143)
Instrument Holder:	CRH Canada Group Inc.
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of leave to appeal:	Environmental Compliance Approval issued under section 20.3 of Part II.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 for the establishment, use and operation of sewage works for the collection, transmission,

	treatment and reuse of wash water effluent from an aggregate washing operation
Reference No.:	1400-9VNPVY
Property Address/Description:	Lot 26, 27, 1, 2 & 3, Concession 3, 2, WGR
Municipality:	Township of South Dumfries
Upper Tier:	County of Brant
ERT Case No.:	15-142
ERT Case Name:	Concerned Citizens of Brant v. Ontario (Environment and Climate Change)

Heard: In writing

APPEARANCES:

Parties	**Counsel**
Concerned Citizens of Brant	Joseph F. Castrilli and Ramani Nadarajah
Corporation of the County of Brant	Paula Lombardi and Kirsten Mikadze
Director, Ministry of the Environment and Climate Change	Isabelle O'Connor and Nicholas Adamson
CRH Canada Group Inc.	Jonathan W. Kahn

ORDER DELIVERED BY JERRY V. DEMARCO

REASONS

Background

[1] This Order of the Environmental Review Tribunal (the "Tribunal") addresses a motion to review (reconsider) an earlier decision of the Tribunal. The motion is brought by two Directors of the Ministry of the Environment and Climate Change ("MOECC"), Belinda Koblik and Fariha Pannu, in respect of certain parts of a Tribunal decision dated March 31, 2016 (*Concerned Citizens of Brant v. Ontario (Environment and Climate Change)*, 2016 CanLII 17291 (the "Decision")). The Decision granted leave to appeal

seven aspects of the Directors' decisions. Director Koblik's decision was to issue Permit to Take Water No. 7115-9VVLJW (the "PTTW") under the *Ontario Water Resources Act* ("*OWRA*"). Director Pannu's decision was to issue Environmental Compliance Approval No. 1400-9VNPVY (the "ECA") under the *Environmental Protection Act* ("*EPA*"). Both of the instruments issued by the Directors relate to a proposed aggregate washing operation and sewage works at the Dufferin Aggregates Paris Pit in Dumfries, County of Brant.

[2] The Decision was rendered by a Member of the Tribunal (the "Leave Panel") following a written hearing pursuant to s. 38-41 of the *Environmental Bill of Rights, 1993* ("*EBR*"), s. 17 of Ontario Regulation 73/94, and Rules 46-60 of the Tribunal's *Rules of Practice* (the "Rules"). The Decision granted the applicants, the Concerned Citizens of Brant ("CCOB") and the Corporation of the County of Brant (the "County"), leave to appeal certain aspects of the Directors' decisions to issue the PTTW and ECA to CRH Canada Group Inc./Dufferin Aggregates ("CRH" or "Dufferin").

[3] In assessing this motion, the Tribunal has reviewed all of the materials provided on the motion to review. It has not read all of the voluminous materials that were before the Leave Panel, but has simply examined those aspects of the leave record that are relevant to this motion. The Tribunal has adopted this approach in light of the fact that its role on this motion is only to determine whether it is "advisable" that a review hearing take place.

[4] These reasons are structured according to the six considerations set out in Rule 238, which applies to motions that seek to review decisions of the Tribunal. Before analyzing those specific considerations, the Tribunal sets out the relevant legislation and rules, the issue to be decided, a summary of the parties' submissions, and a general analysis of the review Rules.

[5] For the reasons set out below, the Tribunal concludes that it is not advisable to review the Leave Panel's Decision.

Relevant Legislation and Rules

[6] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("*SPPA*")

> **Power to review**
>
> 21.2(1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Tribunal Rules

> **REVIEW OF ORDERS AND DECISIONS (RECONSIDERATION)**
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> 235. A Party may request a review of an order or decision.
>
> 236. Notwithstanding Rule 98, a Party making a request under Rule 235 shall serve and file a Notice of Motion and all supporting material within 30 days of the date of the making of the order or decision that is the subject of the request, except in the case of orders and decisions made under the *Environmental Bill of Rights, 1993*, in which case the request must be made within ten days.
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> 237. Notwithstanding Rule 99, a Party who wishes to respond to a motion to review shall serve and file its submissions and all supporting material within ten days of the serving of the Notice of Motion and all supporting material under Rule 236.
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> 238. In deciding whether it is advisable to review all or part of its order or decision, the Tribunal may consider any relevant circumstances including:
>
> (a) whether the Tribunal acted outside its jurisdiction;
> (b) whether there is a material error of law or fact such that the Tribunal would likely have reached a different decision but for that error;
> (c) whether there is new evidence admissible under the conditions of Rule 234;
> (d) the extent to which any person or any other Party has relied on the order or decision;
> (e) whether the order or decision is under appeal or is the subject of a judicial review application; and

> (f) whether the public interest in finality of orders and decisions is outweighed by the prejudice to the requester.
>
> 239. The Tribunal may grant the motion in whole or in part, based on the material filed and/or the record from the original Hearing, and may make procedural directions for the review.
>
> 240. The panel who issued the original order or decision shall not hear the motion to review, but may hear the review itself if so designated by the Chair.
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> 241. The panel who heard the motion to review shall not conduct the review.
>
> 242. Following the review Hearing, the Tribunal may confirm, vary, suspend, or cancel the order or decision under review in whole or in part.

Issue

[7] The issue is whether it is advisable to grant the Directors' motion to review certain aspects of the Leave Panel's decision.

Discussion

Overview of the Parties' Submissions

[8] As set out below, the Directors' approach to this motion largely involved focusing on alleged material errors concerning the proper interpretation of certain conditions of the two instruments as well as related fairness arguments. Dufferin supported the Directors' argument in brief written submissions. In response, CCOB and the County brought forward the Tribunal's relevant jurisprudence and tied their submissions to the wording of Rule 238. CCOB also provided extensive responding submissions regarding each of the conditions to which the Directors referred. In reply, the Directors again focused on interpretation and fairness issues while providing some commentary on which threshold for review should apply.

Submissions of the Directors

[9] The Directors seek reconsideration of the aspects of the Decision that deal only with the following: conditions 3.3, 3.4b and 3.6 of the PTTW, the alleged lack of clear objectives for the monitoring requirements of the PTTW, and conditions 4.8 and 5 of the ECA. They seek an order granting their motion and request a teleconference to discuss the procedure for the review hearing. Through the review process, they believe that the alleged material errors of fact and law made by the Leave Panel can be corrected, such that the appeal can be narrowed and proceed expeditiously.

Directors' Submissions on Condition 3.3 of the PTTW

[10] In contesting the Decision's findings on condition 3.3 of the PTTW, the Directors first submit that they were not provided an opportunity to respond to this issue as it was not raised in the application materials. Second, they argue that the Leave Panel's interpretation of the condition amounts to a material error that is contrary to the purposes of imposing water taking limits in a PTTW.

[11] For context, the Directors point to condition 3.2, which prohibits water taking from sources other than those authorized in Table A of the PTTW. Therefore, the Directors submit that condition 3.3 only modifies the purpose for which water can be taken but not the maximum rate and amount as specified. They submit that condition 3.4a also applies to condition 3.3, in that it stipulates that any water taken must be permitted by Table A. They argue that a plain and ordinary reading of these conditions means that no water takings above the maxima specified in Table A are authorized. They submit that the Leave Panel relied on an "entirely implausible interpretation of conditions of the PTTW."

[12] The Directors also submit that the Leave Panel "pointedly declined to discuss" the legal test for granting leave to appeal under the *EBR*.

Directors' Submissions on Condition 3.4b of the PTTW

[13] With respect to condition 3.4b, the Directors submit that they were denied procedural fairness in that they were not afforded an opportunity to make submissions. Second, they argue that there was no evidence before the Leave Panel that would give any ground to believe that no reasonable person could have made the decision relating to condition 3.4b.

[14] The Directors point to the uncontested evidence of Director Koblik, who estimated the sediments would have to be removed every three to five years. Furthermore, the expense of removing sediment acts as a disincentive for CRH to remove sediment more frequently than is necessary.

[15] The Directors suggest that the Tribunal may be more comfortable receiving additional expert evidence on this issue as part of a review hearing.

Directors' Submissions on Condition 3.6 of the PTTW

[16] First, the Directors state that they were not afforded an opportunity to make submissions or submit evidence on this issue. Second, they state that the Leave Panel's findings on condition 3.6 of the PTTW are based on material errors of fact and law.

[17] The Directors submit that condition 3.6 is an added layer of protection to encourage the consideration of further limiting water taking and is a good example of adaptive management. The Directors state that the only way for a limit to be increased is through the normal statutory amendment process in the *OWRA.*

[18] They state that the Leave Panel committed an error of law at para. 76 of the Decision by stating that affected stakeholders may not have an opportunity to submit

concerns about new water taking levels. The Directors state that, should an amendment of the water taking limit be made, the *EBR* rights to notice and to seek leave to appeal would be triggered.

[19] They state that condition 3.6 does not create any new legal avenue for changing the permitted amounts of water taking without an amendment to the PTTW and *EBR* posting. They state that the only changes permitted in the PTTW are those in condition 6, which allows the Director to suspend or reduce the amount of water, but not to increase it.

Directors' Submissions on Objectives for Monitoring Requirements in the PTTW

[20] The Decision, at para. 119 (see also, para. 112), refers to the "lack of clear and specific objectives for the monitoring requirements in the PTTW". Nevertheless, the Directors provide submissions on the monitoring requirements for both the PTTW and the ECA. The Directors state that they are puzzled by the Leave Panel's finding that there is a lack of clear and specific objectives for monitoring requirements. The Directors state that both the PTTW and ECA contain extensive and precisely articulated monitoring parameters.

[21] The Directors state that the overarching purpose of the PTTW monitoring program is to ensure that if, contrary to all expectation, the water taking does have an adverse impact on groundwater levels, the monitoring program will reveal this impact at an early stage. With regards to the ECA, should aggregate washing operations cause contaminants to accumulate, this will be revealed by the monitoring program. Furthermore, they argue that the purpose of the ECA monitoring program is clearly stated on p. 11 of the ECA.

Directors' Submissions on Condition 5 of the ECA

[22] The Directors submit the Leave Panel made a material error based on a misunderstanding of the Contingency and Pollution Prevention Plan, specifically that it did not include a trigger mechanism. The Directors state that the very nature of a plan dictates that it has a trigger. For instance, any spill is a trigger for implementing the contingency plan. Furthermore, the type of plan which should be implemented based on the types of fluids to be contained on this site is well understood and not controversial. The Directors also submit that there is no evidence that significant environmental harm could result from the current drafting of condition 5.

Directors' Submissions on Condition 4.8 of the ECA

[23] The Directors submit that the Leave Panel based its conclusions on condition 4.8 of the ECA on a material error of law. The Leave Panel found that condition 4.8 of the ECA did not specify the future uses of sediment for on-site rehabilitation. The Directors submit that the ECA Director does not have jurisdiction to regulate the ultimate disposition of accumulated sediment within an ECA but can only impose conditions related to the operation of sewage works.

[24] The Directors point to note 3 in the Operational Plan (approved under the *Aggregate Resources Act*, R.S.O. 1990, c. A.8), which requires that the sediments from the ponds be used as fill as part of the rehabilitation plan for the pit. The rehabilitation of the quarry site, they submit, is evidently outside the jurisdiction of the sewage works ECA. Therefore, the Directors state that condition 4.8 provides the most sensible way of addressing pesticide loading within the jurisdictional confines of the ECA.

Submissions of Dufferin

[25] Dufferin supports the relief sought by the Directors and their request for a review of the Decision with respect to conditions 3.3, 3.4b, 3.6, and the monitoring requirements of the PTTW and conditions 5 and 4.8 of the ECA. Dufferin agrees with the Directors and states that Dufferin was not provided the opportunity to make submissions or submit evidence on the grounds upon which leave was granted.

[26] Dufferin submits that condition 3.3 is clearly only an exception to the purpose set out in condition 3.2, not the volume. It states that the interpretation of the condition in the Decision is not supported by the instrument or the evidence.

[27] Dufferin states that the County's hydrologist explained that the sediment would be removed "on occasion as the sediment accumulates in the settling pond." Dufferin states that no concern was raised about the frequency of this removal by the applicants. However, to clarify, Dufferin points to condition 4.9(c)(i) of the ECA, which provides that sediment must be removed from the settling pond prior to the commencement of the washing season. Dufferin also makes submissions in support of the Directors' interpretation of condition 3.6 of the PTTW. Dufferin states that no increase can be contemplated without a further amendment to the PTTW and its concomitant public process.

Submissions of the County

[28] The County requests that the Directors' motion requesting a review of the Leave Panel's Decision to grant leave to appeal be dismissed in its entirety. In making this request, it reviews the test to be met for granting a motion to review, responds to the Directors' assertion that the Leave Panel breached procedural fairness, and highlights the impact of revoking the leave decision on the County and the public interest.

County's Submissions on the Test for a Review Motion

[29] The County analyzes what the Tribunal is to consider in order to grant a review. It submits that the threshold for a review has not been met. First, the County notes that, per Rule 238, the Tribunal must determine if it is "advisable" to grant a review. When making this determination, the issue for the Tribunal to determine is not whether the impugned decision is "correct". The County submits that the Tribunal's task is to determine whether the impugned decision is "reasonable" in light of the criteria set out in Rule 238.

[30] Second, the County notes that the review process is not an opportunity to re-argue the merits of a decision (*Miller v. Ontario (Director, Ministry of the Environment)* (2008), 37 C.E.L.R. (3d) 214 at para. 18 (Ont. Env. Rev. Trib.) ("*Miller*")). Simply because a different outcome by a different decision-maker was possible, this does not necessitate the granting of a review.

[31] Last, the County notes that the threshold test must be applied stringently and exercised only when exceptional circumstances warrant a review (*Trent Talbot River Property Owners Assn. v. Ontario (Director, Ministry of Environment)* (2006), 22 C.E.L.R. (3d) 159 at para. 44 (Ont. Env. Rev. Trib.) ("*Trent Talbot*")).

County's Submissions on Alleged Errors of Law and Fact

[32] The County submits that there is no evidence to support the Directors' assertion that the Leave Panel's interpretations of the conditions are materially in error.

[33] First, for an error of fact or law to exist, it must be "material" to the extent that the Leave Panel that initially heard the matter "would likely have reached a different decision but for the error." The Leave Panel's weighing and consideration of the evidence is not a sufficient basis to necessitate a review (*Baker v. Ontario (Director,*

Ministry of the Environment) (2009), 47. C.E.L.R. (3d) 118 at para. 18 (Ont. Env. Rev. Trib.) ("*Baker*")). The County submits that the Directors appear to disagree with the approach taken by the Leave Panel in coming to the Decision. This does not constitute a material error.

[34] The County submits that the Leave Panel took a principled approach to its Decision, reviewing the evidence and argument in light of the MOECC's Statement of Environmental Values ("SEV") issued under the *EBR*. It was neither unreasonable nor a material error of any kind, submits the County, for the Leave Panel to find that the SEV factors were intrinsically important to its analysis of the leave applications and the PTTW and ECA conditions. The County states that the bulk of the Directors' motion submissions focus on detailed technical merits. It states that it is premature for that type of analysis and that the Directors will have ample opportunity at the main hearing of the merits.

County's Submissions on New Evidence

[35] The County submits that the Directors cannot now seek to introduce new evidence in support of a review request, as suggested in their motion, as the Directors did not address how the test under Rule 234 for the introduction of new evidence had been met.

County's Submissions on Fairness

[36] The County does not agree with the Directors that the Leave Panel was procedurally unfair. The County submits that the Decision was based on the arguments and information before the Leave Panel. While the precise arguments from either side may not have been adopted, they were not ignored. Nor, the County submits, did the Leave Panel rely on evidence which was not before it. The Leave Panel analyzed the instruments and their conditions in light of the SEV, "which was precisely the task that

the County and CCOB in their leave applications had placed before it". The review process is not an opportunity for the Directors to cure defects in their leave submissions. Furthermore, the County submits that the Directors will have the opportunity to make their arguments at the more appropriate forum of the hearing on the merits of the appeal.

County's Submissions on Reliance on the Decision

[37] The County points to Rule 238(d), which involves considering whether any other party or person has relied upon the Decision. The County submits that it has incurred costs by proceeding with an appeal of the PTTW and ECA conditions specified in the Decision.

County's Submissions on Finality and Public Interest

[38] The County argues that the finality of decisions ought to be presumptively preserved, and that it is in the public interest to do so barring prejudice to the requester. The County submits that that the Directors face no prejudice should the Tribunal refuse to grant the motion for reconsideration. The Directors will still have an ability to defend their decisions to issue the PTTW and ECA and their respective conditions. Refusing the Directors' request, the County submits, would serve the public interest by facilitating public participation in environmental decisions whose outcomes affect a wide range of communities.

Submissions of CCOB

[39] CCOB submits that the motion seeking reconsideration by the Directors is neither cogent nor compelling. CCOB submits there is no basis upon which to grant the motion with respect to any of the conditions of the PTTW or ECA. With respect to the PTTW in particular, CCOB submits that there is a high degree of ambiguity and lack of clarity in

the conditions of the PTTW. This has a direct bearing on how much water taking is being authorized by the Director under the PTTW pursuant to the *OWRA*. CCOB submits that "when the Director issues an instrument that demonstrates a pattern of manifest errors or ambiguity in the wording of material conditions in that instrument, it constitutes strong indicia of unreasonableness under the first branch of the leave test and the potential for causing significant environmental harm under the second branch".

CCOB's Submissions on the Test for a Review Motion

[40] CCOB submits that the power of reconsideration should only be exercised in exceptional and compelling circumstances. CCOB relies on *Trent Talbot* in asserting that the test for reconsideration is a "stringent" one which should only be exercised in "exceptional" circumstances. CCOB also points to *Chandler v. Alberta Association of Architects*, [1989] S.C.J. No. 102 at para. 20 for the proposition that there is "a sound policy reason for recognizing the finality of proceedings before administrative tribunals".

CCOB's Submissions on Fairness

[41] In response to the Directors' submissions that it was procedurally unfair for them not to have the opportunity to make submissions on Conditions 3.3, 3.4b and 3.6, CCOB notes that "the Directors were provided additional time to make submissions well beyond that which normally is provided to a party on an application for leave to appeal". Rather than the normal 15 day timeframe to file response materials, CCOB notes that the Directors had approximately 50 days.

[42] Second, CCOB states that the Directors were provided full notice and fair opportunity to make representations on each of the issues on which they are now seeking reconsideration. CCOB points to specific passages in the Directors' evidence and submissions at the leave stage to demonstrate that the Directors were engaged on the matters addressed in the Decision. Therefore, CCOB submits that there is no basis

for the Directors' assertion that the Leave Panel breached its duty to afford procedural fairness in relation to Conditions 3.3, 3.4b and 3.6.

[43] CCOB asserts that the Directors have failed to apply the test for submitting new evidence, which is necessary in light of para. 22 of the Directors' motion material. That paragraph states: "the Tribunal may be more comfortable receiving additional expert evidence on this issue as part of its reconsideration." CCOB points to Rule 234 and *Trent Talbot,* which enunciates the key considerations which are to be applied in considering whether or not to allow new evidence.

CCOB's Submissions on Condition 3.3 of the PTTW

[44] CCOB argues that the Directors' submissions regarding condition 3.3 in their motion requesting reconsideration are at odds with the Directors' submissions and evidence at the leave stage. In those earlier submissions, the Directors stated that the "proponent is required to monitor daily water takings and to separately monitor takings for the purpose of dust suppression. The net cumulative water consumption of the proponent's operation will not negatively impact current and future municipal and local domestic water users." CCOB submits that this statement confirms that the Director is authorizing two separate water takings: water taking for dust suppression in addition to water taking for aggregate washing. The amounts, however, are not clarified and thus remain at issue.

[45] Second, CCOB notes that the wording of condition 3.3 is highly ambiguous and therefore open to two possible interpretations: (1) the maximum amount of water permitted in Table A of the PTTW includes both washing and dust suppression, or (2) water taking for dust suppression is in addition to permitted takings for washing aggregate. CCOB submits that as a general rule, every condition of a PTTW must be unambiguous in its meaning if it is to be capable of being complied with and enforced. CCOB submits that condition 3.3 does not demonstrate these properties.

[46] CCOB submits that a review of the leave decision contradicts the Directors' claim that the Leave Panel did not discuss the leave test. The first branch of the leave test was discussed in some detail at pp. 16-19 of the Decision and the second branch at pp. 48-50. CCOB submits the test was adequately discussed in the Decision, including the statement that the Leave Panel would rely on the wording of the *EBR* and case law such as *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.) ("*Lafarge*").

CCOB's Submissions on Condition 3.4b of the PTTW

[47] CCOB disagrees with the Directors' allegation that they were not afforded procedural fairness in regard to condition 3.4b. CCOB submits that the Directors contradict their own assertion by stating that "the evidence already before the Tribunal demonstrates how infrequently fines will have to be removed from the settling pond." CCOB submits that the Directors' submissions on condition 3.4b only serve to reinforce the ambiguity of the wording of condition 3.4b that troubled the Leave Panel. Use of the phrase "when necessary" does not provide an indication of how frequently the temporary increases in water taking for the purpose of refilling the settling and recirculation pond is authorized under the PTTW.

CCOB's Submissions on Condition 3.6 of the PTTW

[48] CCOB submits that there was ample evidence based on the documents filed on the leave application to support the Leave Panel's conclusion on condition 3.6. CCOB submits that the Directors provided evidence and submissions that related to condition 3.6. CCOB submits that condition 3.6 is a "study-while-you-operate" type of condition.

CCOB's Submissions on Objectives for Monitoring Requirements in the PTTW

[49] CCOB submits that based on the evidence at the leave stage, the Leave Panel was entitled to be concerned about a monitoring program that failed to include any clear objectives. CCOB submits that objectives are necessary for evaluating the monitoring program and determining whether objectives in the conditions are being met.

CCOB's Submissions on Condition 5 of the ECA

[50] CCOB submits that the Directors' characterization of condition 5 as a spill contingency plan does not address the concern which was central to condition 5, that of exposure to toxic substances and the potential for contamination of soil, sediments, and water resources. CCOB submits that the title of the condition itself, "Contingency and Pollution Prevention Plan," demonstrates that more than spills were contemplated. CCOB submits that condition 5 should employ an approach such as that contained in s. 56 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, which outlines what a pollution prevention plan entails. CCOB submits that the Directors have tried to limit the scope of condition 5 in order to minimize the Leave Panel's concerns about the lack of a trigger mechanism in relation to toxic substances. CCOB submits that the Directors' argument is not supported by a purposive interpretation of the *EPA.*

CCOB's Submissions on Condition 4.8 of the ECA

[51] CCOB submits that the Directors' submission that the ECA Director cannot regulate, within the sewage works ECA, the ultimate disposition of the accumulated sediment is at odds with the wording of condition 4.8, which provides that the "Director and Owner shall discuss suitable uses for the sediment for on-site rehabilitation". On its face, CCOB submits, condition 4.8 appears to address the issue of disposal of accumulated sediment from sewage works. CCOB submits that the Directors' position is

also inconsistent with s. 53(6) of the *OWRA* and the MOECC's "Guide to Applying for an Environmental Compliance Approval".

CCOB's Submissions on Right of Appeal and Threshold

[52] CCOB states that it has filed a Notice of Appeal with respect to all the conditions in the instruments for which leave was granted. Therefore, the Directors will have an opportunity to raise the issues in this motion in the upcoming *de novo* hearing under s. 145.2(1) of the *EPA*. CCOB argues that the stringent threshold from *Trent Talbot* should therefore apply. CCOB argues that the Directors' motion does not come remotely close to meeting the high threshold test.

CCOB's Submissions on Finality and Other Considerations

[53] CCOB submits that the public interest in the finality of the leave Decision weighs against a review. CCOB also submits that Rule 238 is not exhaustive and the Tribunal is entitled to look at other relevant circumstances. Here, CCOB relies on *Sigrist and Carson v. London District Catholic School Board et al*, 2008 HRTO 34 ("*Sigrist*") in stating that reconsideration processes prolong proceedings and work to the advantage of well-resourced parties. CCOB points to para. 16, which states:

> …since the power to reconsider decisions has the potential to lengthen legal proceedings, the public interest in the economy and finality of litigation requires the Tribunal to take care in deciding when to exercise that power. The rationale for this is not hard to imagine. It is not unusual for the Tribunal to make orders at various stages of a complaint, even before its final disposition. The prospect of expeditiously reaching the conclusion of a Tribunal proceeding would be considerably diminished if every ruling made during the course of the proceeding could give rise to a reconsideration request. Likewise, even a final Tribunal decision will not result in the anticipated closure of issues if there is broad access to reconsideration. In both scenarios, parties who are better able to withstand the costs of litigation will have an unfair advantage, whether these costs are financial, emotional, or simply the diversion of attention from other important activities. It should also be noted that it is not only the parties to the litigation that bear the costs of prolonged proceedings. The Tribunal's resources are finite and the manner in which one case proceeds has an effect, directly or indirectly, on others.

[54] CCOB states that frivolous reconsideration motions can have a negative effect on public participation.

Reply Submissions of the Directors

Directors' Reply Submissions on the Test for a Review Motion

[55] The Directors generally agree with CCOB's articulation of the analysis that the Tribunal undertakes under the review Rules. The Directors submit that they have met the threshold for review set out in Rule 238 on the basis of a breach of procedural fairness and material errors of fact and law. The Directors submit that no right of appeal lies from a leave decision so a lower threshold should apply here. The Directors quote *Trent Talbot*, at para. 39, in arguing for a lower threshold of review:

> … this Tribunal's threshold test should be a stringent one for reviews of decisions for which a right to appeal is provided, which is the case for most, but not all, of the Tribunal's decisions. There may be good reasons to have a somewhat lower threshold of review for decisions without rights of appeal because the motion to review may be a party's final option.

[56] The Directors disagree with the proposition that the upcoming main appeal of the instruments weighs against a review of the Decision. Rather, the Directors submit that, since there is no right of appeal from the leave Decision, this weighs in favour of granting a review.

[57] The Directors submit they are not seeking to reargue the case because the findings that formed the basis of the Decision were never raised or addressed at the leave stage. The Directors also state that they are not requiring an analysis of the substantive merits of the appeal by way of this motion, as suggested by the County. The Directors state that, because the Tribunal relies heavily on previous rulings in determining matters before it, the Directors want to correct the Decision so it does not

stand as a precedent. Therefore, public policy considerations weigh in favour of granting the reconsideration.

Directors' Reply Submissions on Condition 3.3 of the PTTW

[58] The Directors submit that CCOB's interpretation of this condition as having two possible interpretations is at odds with a plain reading of the PTTW. The Directors state that the end use of the water taken does not determine the number of takings approved; it is the source of the water that determines the number of takings. The Directors point to CCOB's submissions on the ecosystem approach and note that nowhere does it suggest that water taken for dust suppression is not part of the overall water taking. The Directors state that the first time CCOB raised a concern about an apparent lack of a limit was in response to this request for review, which further demonstrates procedural unfairness.

[59] The Directors do not agree with CCOB's allegation of ambiguity. They state that nothing in the reports by CCOB's and the County's consultants speak to uncertainty with respect to the amount to be taken and its uses.

[60] The Directors ask that the Tribunal to reject CCOB's submission that "as a general rule, every condition of a PTTW must be unambiguous in its meaning if it is to be capable of being complied with and enforced." The Directors state that it appears CCOB is referencing the principle of "strict construction" according to which a penal law must be interpreted. The Directors reference *Bell ExpressVu Ltd. v. Rex,* [2002] 2 S.C.R. 559 at paras. 28-29 and *Ontario v. Tenny,* 2015 ONCA 841 at para. 17 as more relevant guidance on the interpretation questions raised here.

Directors' Reply Submissions on Condition 3.4b of the PTTW

[61] The Directors submit that CCOB misapprehends the issue and law in regard to their allegation that there was a denial of procedural fairness. The Directors state that neither CCOB nor the County raised an issue with respect to the frequency of removal of accumulated sediment in their applications for leave. As the issue was not raised, the Directors did not have the opportunity to respond. Alternatively, the Directors state that there was some evidence in the record to address the Leave Panel's concern about the frequency of removal of accumulated sediment.

[62] The Directors submit that they are not seeking to introduce new evidence at this point but rather, in light of the denial of natural justice, submit that the Tribunal may wish to receive additional expert evidence on the question of frequency of removal of fines and its impact on the overall water taking.

Directors' Reply Submissions on Condition 3.6 of the PTTW

[63] The Directors submit that, with respect to the maximum water taking permitted under the PTTW, the Leave Panel misunderstood the statutory regime. Therefore, the Directors reiterate that there is no statutory authority to increase the amount of water taken pursuant to a permit without amending the permit.

Directors' Reply Submissions on Monitoring Requirements

[64] The Directors reiterate that the PTTW and ECA both contain extensive and precisely articulated monitoring parametres, with a clear, overarching purpose.

Directors' Reply Submissions on Condition 5 of the ECA

[65] The Directors submit that the use of the terms "spill" and "pollutant" are interchangeable as they relate to spill contingency plans. This, they submit, is reflected in Part X of the *EPA* where the definition of "spill" makes reference to a "pollutant". The Directors further state that the *Canadian Environmental Protection Act, 1999* is not relevant.

Directors' Reply Submissions on Condition 4.8 of the ECA

[66] The Directors submit that, as the accumulated sediment in the recirculation pond is not sewage, it may not be regulated within a sewage works ECA. Condition 4.8 does not purport to grant the Director the authority to regulate its use within the sewage works ECA.

Analysis and Findings

The Review Rules in General

[67] As with other situations involving the exercise of discretion under its Rules, the Tribunal is guided by the wording of the applicable Rules and the overall purposes of the Rules and the relevant legislation (e.g., *SPPA, EBR, OWRA,* and *EPA*). As set out in *Baker,* at paras. 15-19, the Tribunal's power to order a review is a discretionary power to be used only rarely:

> Under the Rules, review of a decision is a two-step process. The first step is a determination of whether a review is "advisable." It is only if the answer to this question is yes that the second step, the review itself, is conducted. ..
>
> The Rules give the Tribunal broad discretion to determine when a review is advisable. In making this determination, Rule 230 [now 238] states that the Tribunal "may consider any relevant circumstances," including the six listed criteria. In *Trent Talbot*, the Tribunal held that this list is not

> exhaustive and that the "first three criteria generally set out examples of possible grounds for when the Tribunal may exercise its authority to grant a review, and the last three criteria set out examples of the circumstances weighing against a review" (para. 37).
>
> The role of the Tribunal here is not to assess whether the decision is "correct", but to determine
>
> > whether there were errors that meet the criteria set out in Rule [230] [now 238], so as to warrant a review. The review process should not be used as an opportunity for a party to reargue the case. A panel hearing a motion to review should refrain from granting a review simply because a different outcome could have been reached by another panel of the Tribunal. (*Trent Talbot*, para. 41).
>
> This means that the Tribunal should not re-weigh the evidence to see if a different decision could have been reached, but should review the record and the submitted material only with a view to determining whether the original panel made a material error that warrants a review in the circumstances.
>
> In *Trent Talbot*, the Tribunal determined that "the power to review should only be exercised in exceptional circumstances under the criteria set out in Rule [230] [now 238]" (para. 43). This high threshold test for review acknowledges the importance of the finality of Tribunal decisions.

[68] As noted in *Miller,* at para. 18, "any number of reasonable outcomes might be under consideration in a proceeding". Therefore, the review motion panel should not find that a review is advisable simply because it would have reached a different decision. It is not the role of the panel hearing a review motion to merely substitute its decision for that of the original panel and grant a review hearing too readily. Rather, the power to review should only be used in exceptional circumstances.

The Review Rules and the Threshold for Reviewing EBR Leave to Appeal Decisions

[69] This motion to review seeks to narrow the scope of the leave which was granted in the Decision. Thus, even if the Directors were successful on the motion seeking a review and the review hearing itself, there will still be further steps leading up to the main hearing in this matter.

[70] The only decision on a motion to review a Tribunal *EBR* decision is *Miller*. That case involved a dismissal of a leave application, which effectively ended the litigation at an early stage. Here, the Directors take issue with a leave decision that granted leave in part, meaning that there will now be a preliminary hearing and a main hearing of the matter. As is standard practice, mediation will also be offered to the parties by the Tribunal. The leave Decision is not the final stage of this litigation.

[71] The Directors argue that the lower threshold contemplated in *Trent Talbot,* at para. 43, should apply to this motion because there is no right to appeal the Decision. Where the lower threshold applies, the factors to be considered under the Rules remain the same but the Tribunal's approach to the advisability of a review should be different (*Miller*, at para. 20). That is, the Tribunal will be more likely to determine that it is advisable that a review take place in situations where the lower threshold applies.

[72] The answer to the question of which threshold should apply is not as simple as stating that decisions without a right of appeal automatically get a lower threshold. As specifically stated in *Trent Talbot*, at para. 43, the Tribunal left the door open for a lower threshold "for decisions without rights of appeal because the motion to review may be a party's final option" (emphasis added). *Miller* involved a request for a review of a Tribunal *EBR* decision without a right of appeal. As contemplated in *Trent Talbot*, *Miller* adopted a lower threshold because the moving party in that matter had his case ended before the Tribunal through a decision under the *EBR* dismissing the leave application. The Tribunal, at para. 20 of *Miller*, made note of the fact that the moving party in that case had no right of appeal and the "only option" for raising his concerns (other than judicial review) was through a motion to review. No right of appeal existed and there was no next stage for the parties before the Tribunal. The review request was the moving party's "final option" before the Tribunal.

[73] Here, the decision was under the *EBR* and again there is no right of appeal. However, in this case, the substance of the matters raised in the review motion (i.e., the

proper wording or interpretation of conditions in the instruments) was not finally settled by the Decision. Indeed, the Decision simply permits the applicants (now appellants) to raise any or all of the conditions and issues listed in para. 119 of the Decision in the upcoming main hearing. So, the Decision at issue shares one similarity with the decision at issue in *Miller* (i.e., no right of appeal), but not another (i.e., the review request is not the final option, aside from judicial review, on the substantive matter).

[74] From a substantive point of view, decisions granting leave to appeal under the *EBR* are among the least final types of decisions that the Tribunal issues. Decisions granting leave are not a party's "final option" before the Tribunal. Indeed, nothing about the substance of the Directors' concern (i.e., that the final wording of the conditions in the instruments should remain as they are now) has been decided at this early stage.

[75] The lack of finality of the essential subject matter of this review request (i.e., the wording of conditions in the instruments) is illustrated well through a comparison of what the Directors seek in a review and what will be in store when this matter proceeds to a preliminary hearing. At the outset of their submissions, the Directors state the purpose of their motion: "correcting the errors will allow the Tribunal to appropriately narrow the grounds of appeal so that the appeal will be focussed and proceed expeditiously". Under the Rules, whose purposes explicitly include efficiency and timeliness (Rule 1), this matter is to be scheduled for a preliminary hearing, where "identifying, defining or narrowing issues" and the "settlement or withdrawal of any or all of the issues" are to be addressed (Rules 132 (e) and (j); see also Rule 180). Especially since the Directors are not seeking to review the entirety of the Decision (and thus a preliminary hearing is sure to take place), there is no reason to utilize the review motion process to address matters that are about to be addressed in any event. The within review motion, and the review hearing itself if this motion were granted, would simply unnecessarily duplicate processes and slow down the proceeding.

[76] Based on the above analysis, the Tribunal finds that the lower threshold in *Miller* is to be applied only in a subset of cases under the *EBR*, namely those that are without rights of appeal and are final substantive determinations. A dismissal of a leave application, as in *Miller*, is the clearest example of where the lower threshold applies as the substantive decision subject to the leave application becomes final.

[77] The lower threshold is not applicable in cases where leave to appeal is granted in whole. In those cases, a Director's entire substantive decision will be subject to a preliminary hearing and main hearing; the leave decision will not have removed any aspects from consideration. For partial leave decisions, the basis for a lower threshold in *Miller* does apply to those aspects of the instrument for which leave was not granted, as those aspects will proceed no further.

[78] Here, the only aspects of the instrument subject to the Directors' review motion are a subset of those conditions and issues for which leave was granted. No final decision has been made on those aspects and the substance of those issues can be debated at the main hearing. While there is no right of appeal *per se* in this matter, there is clearly a right of the Directors to bring forward all their evidence and argument at the main hearing, which will be a "new hearing".

[79] It follows that the lower threshold in *Miller* does not apply here. The Tribunal will therefore use the higher threshold in *Trent Talbot*, but observes that the Directors' motion would not have succeeded even if the lower threshold had applied.

The Rule 238 Considerations

[80] Rule 238 contains a list of non-exhaustive considerations for the Tribunal to consider in determining whether a review is advisable. Generally speaking, the first three considerations in Rule 238 are examples of situations where the Tribunal will consider ordering a review hearing. The last three considerations "are not grounds for

review *per se*, but rather relevant considerations for a panel hearing a Motion to review to examine in determining whether a review is warranted" (*Trent Talbot*, at para. 191). A party submitting a motion to review should not ignore the final three factors on the assumption that meeting one of the first three automatically generates a review hearing. Determining the advisability of a review involves more than just the first three factors in Rule 238. Advisability is to be determined in the context of all relevant factors listed in Rule 238 and any other relevant considerations.

Rule 238(a): Jurisdiction

[81] Rule 238(a) addresses "whether the Tribunal acted outside its jurisdiction". No party provided any submissions on this factor. Consequently, it will not enter into the Tribunal's analysis of whether it is advisable to review the Decision.

Rules 238(b): Material Error of Law or Fact

[82] Rule 238(b) addresses "whether there is a material error of law or fact such that the Tribunal would likely have reached a different decision but for that error". In their submissions regarding alleged material errors, the Directors also take issue with the Leave Panel's relatively short discussion of the *EBR* leave test. That matter addressing an alleged insufficiency in reasons will be addressed first. This will be followed by an analysis of the Directors' specific allegations of material errors of law or fact relating to the Leave Panel's treatment of various conditions and issues. The Tribunal will conclude its analysis by addressing the Directors' allegations of procedural unfairness, which would be an error of law.

The Decision's Treatment of the EBR Leave to Appeal Test

[83] As part of their argument that the Leave Panel committed a material error regarding condition 3.3 of the PTTW, the Directors submit that the "Tribunal pointedly

declined to discuss" the legal test for granting leave to appeal "despite vigorously contested submissions on what the applicants are required to demonstrate in order to be granted leave to appeal". The Directors submit that the Leave Panel granted leave based on "speculation about an entirely implausible interpretation of conditions of the PTTW".

[84] Presumably, in making this argument about the alleged insufficiency of the Leave Panel's discussion of the leave test, the Directors are alleging a legal error in the Decision's interpretation or application of the test. The Directors did not provide submissions on what sufficiency standards, if any, ought to apply to non-final decisions such as leave decisions. However, it is not necessary to address this question as, for the reasons stated below, the Tribunal finds that the Decision is not insufficient in any way in regards to its treatment of the parties' submissions on the leave test or in its interpretation and application of the leave test itself.

[85] CCOB states that the Directors' argument that the Leave Panel failed to discuss the leave test "is flatly contradicted by a review of the leave decision". CCOB states that the Leave Panel did not decline to address the leave test, but in fact discussed it in some detail at pp. 16-19 of the Decision. CCOB submits that the Leave Panel correctly observed that sufficient guidance on the test is found in the statute and case law, and followed the approach set out in *Lafarge*. The Leave Panel also followed the approaches in *Concerned Citizens of Tyendinaga and Environs v. Ontario (Ministry of the Environment)*, [2012] O.E.R.T.D. No. 17 and *Guelph v. Director (Ministry of the Environment),* [2014] O.E.R.T.D. No. 25 ("*Guelph*").

[86] For the purposes of the specific matters raised in this motion to review, the main relevant question before the Leave Panel involved the first part of the *EBR* leave to appeal test, which states:

> 41. 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…

[87] Among the various statutes that come before the Tribunal, the *EBR* is unique in that it has a leave stage. Whereas the instrument holder could have appealed the instruments directly, third parties must obtain leave to appeal. If leave is granted and the leave applicant subsequently files a notice of appeal, then the processes used for a direct appeal by the instrument holder generally apply (i.e., preliminary hearing, mediation if applicable, and main hearing).

[88] To obtain leave under the *EBR*, an applicant must meet the stringent leave test but it does not need not prove that the decision under review was "unreasonable" under the first part of the leave test. The standard established by the legislation requires less than that by employing the words “appears” and “good reason to believe” prior to the reference to “no reasonable person”.

[89] The Directors submit that the parties devoted considerable portions of their arguments to the interpretation of the leave test, but that the Leave Panel did not. For example, the Directors’ leave submissions at paras. 54-66 include arguments about the leave test, including reference to *Lafarge*. The Directors also relied on general standard of review case law regarding “reasonableness” such as *Dunsmuir v. New Brunswick,* 2008 SCC 9 and *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.,* 2013 SCC 34.

[90] As is common in recent Tribunal leave to appeal decisions, the Leave Panel followed the precedent in *Lafarge*, which discussed the leave test in depth. The Leave Panel declined to engage in a lengthy re-analysis of all the parties’ arguments on the nature of the test and cited the following important passage from *Lafarge*, at para. 45:

> At the leave to appeal stage, the 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 issue 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.

[91] At para. 36 of the Decision (see also para. 7), the Leave Panel stated:

> The parties provided submissions on the appropriate application of the leave test. Each has its own gloss on the test, emphasizing some words rather than others and some passages of the applicable case law and not others. There are allegations from one party that another has misapprehended the standard of proof. The Tribunal does not see any utility in canvassing these submissions in detail. Sufficient guidance on the test is found in the wording of the *EBR* and the applicable case law and there is no need here to reanalyze many of the statutory interpretation issues that were conclusively addressed in *Lafarge*. The Tribunal simply follows the approach set out in *Lafarge* in assessing this application for leave to appeal.

[92] It was open to the Leave Panel to engage in a detailed analysis of the parties' arguments on the leave test if it chose to do so. However, the parties to a case do not dictate to a tribunal how much attention a given issue will receive in a decision, whether it is a merits decision or a leave decision. There is no requirement for the treatment of, or even articulation of, issues in a tribunal decision to coincide with the treatment of those issues by the parties. The Tribunal can control its process (see *Lafarge* at para. 76), address the issues it determines to be important (see Rule 180), and analyze them to the depth it sees fit without committing an error in so doing.

[93] The Decision applies the specific wording of the leave test in several sections. For example, the finding in para. 56 follows the leave test wording closely (see also, paras. 66, 76, 79, 86, 112, 119 with respect to the first part of the test and paras. 125 and 131 for the second part):

> The Tribunal therefore finds that it appears that 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 (in particular, the ecosystem approach), could have issued a 10 year PTTW with the possibility that the permitted water taking levels could be increased after two years based on two years of water taking reporting, and other uncertainties in the PTTW regarding the actual water takings that are likely to occur. (emphasis added)

[94] This is in keeping with *Lafarge*, at paras. 60-61, which used similar wording:

> …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.
> 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… (emphasis added)

[95] As noted in *Lafarge*, the wording in s. 41 is lower than demonstrating unreasonableness because of the "appears" and "good reason to believe" wording before "no reasonable person". Therefore, if a panel were to find, based on the evidence and submissions in a leave hearing, that no reasonable person could have made the decision, this would meet the leave test. So too would a finding that there is good reason to believe that no reasonable person could have made the decision. Finally, a finding like the ones in the Decision that it appears that there is good reason to believe that no reasonable person could have made the decision would also meet the test as interpreted in para. 45 of *Lafarge*. This panel's reading of the Decision leads it to conclude that the Leave Panel was aware of the test to be met and followed the guidance in s. 41 of the *EBR* and the *Lafarge* case.

[96] To summarize, it was open to the Leave Panel to refer to the wording of the leave test and applicable precedent and move on to other more central matters. This was especially appropriate here, where the Directors sought to apply case law on general unreasonableness to the *EBR*, where the unreasonableness concept is embedded in a context that has two important qualifiers ("appears" and "good reason to believe") (see *Guelph* at para. 78). Given that the Leave Panel had binding

precedential authority before it on the actual *EBR* leave test in the form of the *Lafarge* decision, it follows that it was not required to analyze more general case law about a different legal test (i.e., general unreasonableness) that was submitted by the Directors. Here, the Leave Panel appropriately and reasonably followed *Lafarge* and declined to retrace what is now a well-trodden path in respect of the interpretation of s. 41. The Leave Panel then went on to apply the test in a manner that was consistent with the wording of s. 41 and the guidance from *Lafarge*.

[97] The Tribunal finds no material error in the Leave Panel's treatment of the interpretation and application of s. 41. The Tribunal also finds that the reasons in the part of the Decision relating to the leave test were sufficient and that it was open to the Leave Panel to decide not to devote further pages of analysis to that issue.

The Decision's Treatment of Several Conditions and Issues Relating to the Instruments

[98] The bulk of the Directors' submissions on this motion allege material errors on the part of the Leave Panel in its interpretation of various conditions in the instruments.

[99] The Directors take issue with numerous statements in the Decision and offer their views on where the Leave Panel erred in respect of each statement. Some errors are alleged to be factual errors, while others are alleged to be legal errors. Some alleged errors are not specified by type. To the extent that the condition-specific submissions also relate to the Directors' fairness argument, they are dealt with in a separate section further below.

[100] Dufferin supports the Directors' submissions and offers a few brief additional comments on the interpretation of some of the conditions under scrutiny. CCOB responds to the Directors' submissions on each condition while the County takes the position that the Directors' submissions are best addressed at the main hearing.

[101] The leave Decision contains 132 paragraphs and runs 52 pages. Within the context of s. 41 of the *EBR*, it addresses a range of broad principles while also focusing on specific conditions and issues. It was rendered following a written hearing on the basis of a record of materials that consisted of evidence, submissions and authorities that occupy a banker's box of documents.

[102] The structure of the analysis of the first part of the leave to appeal test in the Decision is set out in para. 32, which states (see also para. 34):

> The Applicants raise the following specific arguments in respect of the first part of the Leave Test (Reasonableness) in relation to both the PTTW and the ECA:
>
> - Ground 1: Failure to Consider, Incorporate, Reflect or Apply the Statement of Environmental Values ("SEV")
>
> - Ground 1(a) – Ecosystem Approach
> - Ground 1(b) – Cumulative Effects Concerns
> - Ground 1(c) – Sustainable Development Principles
> - Ground 1(d) – Precautionary Approach
> - Ground 1(e) – Adaptive Management Principles
>
> - Ground 2 - The Common Law Rights of the Applicants

[103] The Decision found that the first part of the leave test was met in respect of most of the above grounds. However, many of these findings are specific to certain conditions or issues in one or both of the instruments. Examples of the findings on five grounds that are based on principles of environmental decision-making in the SEV are:

- Paragraph 56, which relates to the ecosystem approach and the PTTW,
- Paragraph 76, which relates to cumulative effects and PTTW,
- Paragraph 79, which relates to cumulative effects and the ECA,
- Paragraph 86, which relates to sustainable development/sustainability and the PTTW, and
- Paragraph 112, which relates to precaution and adaptive management and the PTTW and ECA together.

[104] The Decision found that the first part of the leave test had not been met in other respects. Examples are:

- Paragraph 66, which relates to the ecosystem approach and the ECA, and
- Paragraph 118, which relates to common law rights and the PTTW and ECA together.

[105] The Decision also found that some aspects of the grounds advanced were outside the scope of the applications and declined to address them (see para. 88). It also declined to re-analyze specific aspects of the decisions under the common law ground given that the first part of the leave test had already been met under other grounds relating to principles of environmental decision-making found in the SEV (see para. 118).

[106] To summarize, under the first part of the leave test with respect to the PTTW, the Decision found in favour of the applicants in part on leave grounds relating to the following SEV-related principles: ecosystem approach, cumulative effects, sustainable development/sustainability, precaution and adaptive management. For the ECA, the successful leave grounds were cumulative effects, precaution and adaptive management.

[107] It is also clear that, for many of the grounds that did satisfy the first part of the leave test, the Leave Panel made findings that linked the grounds to the Leave Panel's concerns with specific conditions or issues in the instruments. In many sections of the Decision, there are examples where the Leave Panel finds that a particular ground meets the test in respect of only some aspects of the instruments. For example, paras. 109-111, which deal with precaution and adaptive management together, state:

> The Tribunal again finds that the Directors made significant and laudable efforts to apply both precaution and adaptive management as seemed appropriate in the circumstances. The sewage system was redesigned and many new conditions were added to the instruments. It seems clear

> that the new design will result in significant water conservation and additional aquifer protection and that it is innovative in that these are the first of their kind conditions to deal with concerns expressed by interested parties.
>
> … However, there are no specific objectives for the various components of the monitoring program. Dufferin's argument that the overall context of the instruments creates the objective of environmental protection is too vague to provide the kind of information required for adaptive management.
>
> Of greater concern is the fact that these contingency plans have not yet been received or reviewed by MOECC even though several years of analysis and consultation have occurred since these instruments were first applied for…

[108] Paragraph 119 of the Decision ties together all of the Leave Panel's detailed analysis and sets out the specific "aspects" of the instruments that satisfy the first part of the leave test in light of the leave grounds that were advanced by the applicants. Paragraph 119 states:

> The Tribunal finds that it appears that there is good reason to believe that no reasonable person could have issued the PTTW and ECA in regard to the following specific aspects of the decisions:
>
> - Condition 3.3 of the PTTW, which does not specify whether the water taking permitted for dust suppression is *in addition* to the maximum amounts set out in condition 3.4a.
> - Condition 3.4b of the PTTW, which does not clarify *how* often Dufferin may revert to the maximum rate of water taking in Condition 3.2 "for one month following removal of sediment from the settling pond".
> - Condition 3.6 of the PTTW, which states that "[w]ithin 60 days following two full years of operation, the Permit Holder shall submit to the Director a report evaluating water taking needs and making recommendations regarding future water needs and potential changes to the permitted rates and volumes." This means that the permitted water taking for almost eight years of the PTTW is unknown and will not be known for over two years.
> - The lack of clear and specific objectives for the monitoring requirements in the PTTW.
> - Condition 4.7 of the PTTW (Trigger Mechanism and Contingency Plan) and Condition 5 of the ECA (Contingency and Pollution Prevention Plan). These Plans are not available and will only be subjected to scrutiny by the MOECC and the Proponent, after the instruments have been granted.
> - The ECA Contingency and Pollution Prevention Plan, which does not contain a trigger mechanism.

- Condition 4.8 of the ECA, which does not specify future uses of sediment for on-site rehabilitation.

[109] The final disposition in the Decision states at para. 132:

> The Tribunal finds that the Applicant has satisfied the two-part test for leave to appeal found in s. 41 of the *EBR*, in relation to the PTTW and ECA. Leave to appeal is granted in part. The grounds for appeal shall be limited to only those aspects of the instruments set out in paragraph 119 above.

[110] On this motion to review, the Directors take issue with most, but not all of the aspects listed in para. 119. In particular, they submit that there are material errors in respect of three conditions of the PTTW (plus the issue pertaining to monitoring) and two conditions of the ECA from the list set out in para. 119 of the Decision. In at least one instance, the Directors also allege that the Leave Panel erred in respect of the second part of the leave test (e.g., condition 5 of the ECA).

[111] The County submits:

> In its 52-page decision, the Leave Tribunal carefully considered the extensive evidence and argument put to it by the Applicants, the Directors, and CRH, the Instrument Holder. It weighed these facts and arguments in a nuanced and reasoned fashion.
>
> There is no evidence to suggest that the Leave Tribunal made a material error of fact or law within the meaning of Rule 238.
>
> With respect, the Directors appear to disagree with, or misunderstand, the approach the Leave Tribunal took in coming to its decision.
>
> The Tribunal took a principled approach to its decision, assessing the evidence and arguments before it in light of the MOECC's own Statement of Environmental Values ("SEVs"). The SEVs that both CCOB and the County argued that the PTTW and ECA failed to consider, incorporate, reflect or apply include: an ecosystem approach; cumulative effects concerns; sustainable development principles; precautionary approach; and adaptive management principles.
>
> The Leave Tribunal agreed with both CCOB and the County that the SEV factors were intrinsically important to its analysis of the leave applications; it also agreed with CCOB and the County that the PTTW and ECA conditions could not reasonably be said to have adequately accounted for them.

> It was neither unreasonable nor a material error of any kind for the Leave Tribunal to take this approach.

[112] A challenge for the Tribunal in assessing the Directors' request is that it largely ignores the structure of the Decision and the broad leave grounds relating to the SEV. The Directors' submissions proceed immediately into arguments about the Leave Panel's alleged misinterpretation of the aspects of the instruments on which leave was granted, and the related fairness arguments. The Directors' submissions are extremely detailed and lengthy, as are CCOB's in response. The County states that the Directors' submissions are more suited to the upcoming merits hearing.

[113] At this point of the analysis, it is helpful to address certain terminology used by the Leave Panel. For some of the terms in the Decision, there is no single correct use of the terms and they have been employed differently by the parties and Leave Panel in different contexts. For the purposes of this motion, the Tribunal will call the list of items in para. 119 of the Decision the seven "conditions and issues" or "aspects" that can be addressed at the upcoming main hearing if the appellants raise them in their notices of appeal. All other aspects of the instruments that were subject to the application for leave to appeal, but were not listed in para. 119, are not on the table any more. Like the Leave Panel, the Directors refer to the seven remaining "conditions and issues" as the "aspects" on which leave has been granted (paras. 4 and 52 of the Directors' written submissions).

[114] The Directors also refer to the "grounds on which leave was granted" (para. 3 of Directors' written submissions) in discussing the aspects listed in para. 119 and related reasons in the Decision. Part II of the Directors' written submissions refer again to "grounds on which leave granted" and include detailed submissions on alleged errors regarding the aspects listed in para. 119. The Decision uses "grounds" differently as between the leave and appeal stages. With respect to the leave stage, it uses "grounds" to describe the applicants' arguments based on five key SEV principles (ecosystem, cumulative effects, sustainable development, precaution, and adaptive

management) and common law rights (see para. 32 of the Decision). For example, ground 1(a) in the Decision relates to the applicants' arguments that the Directors failed to consider, incorporate, reflect or apply the ecosystem approach in the SEV. In referring to what can be raised at the upcoming main appeal, the Leave Panel refers to the "grounds" for the appeal (para. 132). In that context, it is referring to the seven aspects that have been permitted to be raised in the main appeal of the merits. As noted above, the Directors' motion submissions largely ignore the leave grounds relating to the SEV principles, despite the central role the SEV principles play in the Decision, the *EBR* and *Lafarge*. The Directors focus almost entirely on specific details relating to the conditions and issues listed in para. 119 of the Decision (i.e., the appeal grounds as used in para. 132).

[115] For clarity, this Order will use the following terminology. With respect to the first part of the leave test, the Leave Panel considered six "grounds" for leave, five of which emanate from principles of the SEV that are meant to guide government decisions under the *EBR*. The Leave Panel found that the first part of the leave test had been met in respect of some of those leave "grounds", and granted leave to appeal seven "conditions and issues" or "aspects" of the instruments that relate to the broader leave "grounds" that met the first part of the leave test. Now that partial leave has been granted, the appeal grounds (as opposed to leave grounds) are limited to only those aspects of the instruments set out in paragraph 119 of the Decision (see para. 132 of the Decision).

[116] The Tribunal now turns to a consideration of whether the Leave Panel's treatment of the leave grounds, conditions and issues gives rise to a material error of fact or law. The Tribunal finds that, in main hearings and leave to appeal hearings, it is often the case that there is more than one viable outcome for the Tribunal to consider. Just as a court would defer to a specialized tribunal's decision to choose one preferred option from a range of reasonable alternatives, one Tribunal panel reviewing a decision of another Tribunal panel under Rule 235 should consider the motion to review in a

manner that offers considerable deference to the original panel, which examined the evidence and submissions in depth. This deferential approach is reflected in the wording of the Rules and the relevant case law discussed above (i.e., *Trent Talbot, Miller*, and *Baker*).

[117] In this regard, the County argues:

> …the Leave Tribunal clearly considered the voluminous expert evidence that was presented to it. It appropriately limited the scope of its analysis to those aspects that it deemed directly relevant to the Section 41 Test when considering whether or not to grant leave to appeal.
>
> In taking such an approach, the Tribunal, followed existing Tribunal jurisprudence. In particular, the Leave Tribunal highlighted that:
>
> > A leave to appeal hearing is not meant to be a written version of the ultimate hearing of the merits. While there is inevitably some overlap between the matters that may be raised at the leave stage and those at an appeal hearing, it remains important that the focus remains on the former. […]
>
> Put another way, Tribunals must avoid collapsing an analysis of the substantive merits of an appeal when undertaking a Section 41 Test analysis.
>
> Respectfully, the Directors appear to insist that the Leave Tribunal do precisely that. They appear [to] believe they are owed a right to argue the detailed technical merits of its decisions around the PTTW and ECA conditions as part of the Leave Tribunal's Section 41 Test analysis.
>
> The bulk of the Directors' motion submissions are focussed upon the detailed technical merits of its decisions around the PTTW and ECA, even going so far as to invite the Tribunal to consider further expert evidence as part of its reconsideration.
>
> It is premature for such an analysis. The Directors will have ample opportunity to advance these arguments, and introduce further evidence as they deem appropriate, during the hearing on the merits of the appeal.

[118] In this case, the Leave Panel examined voluminous materials in deciding to grant leave only in respect of certain identified conditions and issues in the instruments. The Tribunal agrees with the County that the Leave Panel took a SEV-related principled approach to the first part of the leave test and determined which specific conditions and issues should be subject to scrutiny in a main hearing. The Tribunal finds that this is not

a case where there was only one reasonable outcome that could be arrived at, which the Leave Panel either had to reach, or commit a material error in failing to find. It was open to the Leave Panel to find that the s. 41(a) test was met in respect of the various leave grounds vis-à-vis specific conditions and issues in the instruments.

[119] With respect to s. 41(a), the Leave Panel highlighted numerous aspects of the instruments that gave rise to no significant concerns. However, it also set out a range of very significant concerns with some parts of the instruments. The Leave Panel's SEV-related principled analysis, which it groups together as "Ground 1", starts at para. 41 and ends at para. 112. The SEV-related grounds are clearly the central lens through which the Leave Panel considered the applications. This is completely appropriate given that the SEV is the "relevant policy" that has the widest application of the many laws and policies that are considered under s. 41(a). The SEV principles were central in the *Lafarge* case and occupy a very important place in the *EBR* itself, which states:

> 11. The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.

[120] The Tribunal agrees with the Leave Panel's emphasis on the importance of ensuring that government decisions consider, incorporate, reflect and apply the SEV principles, which are entrenched in modern environmental decision-making and constitute a main source of guidance in implementing the *EBR* and the other laws, regulations, policies and instruments to which the *EBR* applies.

[121] Inquiring into how a Director's decision "took into account", "considered", "incorporated", "reflected", or "applied" relevant laws and policies such as the SEV is a central aspect of the Tribunal's role under s. 41 of the *EBR* (see *Lafarge*, at paras. 49 and 57; see also *Guelph*, at paras. 20-30). The s. 41 test is not limited to assessing compliance with s. 11 of the *EBR* (i.e., was the SEV "considered"?). Under s. 41, the Tribunal is tasked with determining whether the leave test has been met. In addressing

a relevant law or policy under s. 41, the Tribunal can look at how a Director considered a policy and also how a Director took into account, incorporated, reflected or applied a policy.

[122] The Decision recognizes the central importance of the SEV to environmental decision-making in accordance with *Lafarge* and the *EBR*'s purposes and provisions. As submitted by the County, it may be accurate to state that the Directors fundamentally disagree with the Leave Panel's principled approach, to the point that the Directors' submissions on this motion largely ignore the SEV and make only brief reference to some of the relevant principles of environmental decision-making, including those referred to in *Lafarge*.

[123] In *Lafarge*, the Divisional Court noted at paras. 5-7:

> The [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.
>
> 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.
>
> 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.

[124] The current MOECC SEV also refers to the ecosystem approach, environmental protection, precaution, and natural resource conservation, among other principles. The

specific relevance of the SEV in *EBR* leave to appeal proceedings before the Tribunal was addressed in *Lafarge*, at paras. 55-57:

> … 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.
>
> 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.
>
> 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.

[125] The SEV is likely the most frequently cited relevant policy in Tribunal leave decisions under the *EBR*. It was issued under the *EBR* itself, with particular reference to the purposes of the legislation. It is of general application and includes many principles that are broadly reflective of modern environmental-decision-making. Consistent with the reasoning in *Lafarge*, it can be reasonably said that SEVs are meant to occupy an important role in government decision-making, including decisions of Directors. SEVs also play an important role in s. 41 proceedings before the Tribunal.

[126] The identified SEV-related concerns with the instruments set out in the Decision include, for example, a lack of emphasis on environmental considerations under the rubric of sustainable development/sustainability. Such concerns are not minor, but rather go to the heart of sound environmental decision-making. At para. 85, the Leave Panel noted:

> The SEV refers to both “sustainability” and “sustainable development”. The Director defines sustainable development as “economic development without depletion of natural resources”. However, this is quite different from the well-known definition from the World Commission on Environment and Development (Brundtland Commission) report *Our Common Future* (Oxford: Oxford University Press, 1987), p. 43): “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” A similar definition is found in the *Federal Sustainable Development Act,* S.C. 2008, c. 33. Two statutes directly implicated in these Leave to Appeal applications, the *EBR* and the *OWRA*, refer to sustainability. The purposes of the *EBR*, set out in section 2(1), are to “(a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act; (b) to provide *sustainability of the environment* by the means provided in this Act; and (c) to protect the right to a healthful environment by the means provided in this Act.” [emphasis added] The purpose of the *OWRA,* set out in section 0.1, is “to provide for the conservation, protection and management of Ontario’s waters and for their efficient and *sustainable use*, in order to promote Ontario’s long-term environmental, social and economic well-being.” Based on these definitions, the Tribunal finds that the Directors’ definition of sustainable development is too limited: “economic development without depletion of natural resources” places more emphasis on economic development than sustainability *of the environment* as required by the *EBR* and the sustainable use of Ontario’s waters, as required by the *OWRA*. In the analysis that follows, the Tribunal focuses on environmental sustainability, whether viewed as a separate principle of its own or an approach to implementing sustainable development principles that emphasizes the importance of environmental sustainability.

[127] Given that the Leave Panel’s findings included significant concerns relating to basic principles of environmental decision-making found in the SEV, it was reasonably open to the Leave Panel to exercise its discretion to grant leave in whole (see *Lafarge*, at paras. 61, 62 and 75). It was also reasonably open to the Leave Panel to decide to grant leave in part by identifying which specific conditions and issues should be addressed in a merits hearing. The Leave Panel chose to match the broad grounds that gave rise to concerns with specific conditions and issues in the instruments. This is an entirely appropriate approach under the *EBR* and *Lafarge*. SEVs are statements of broad principle that are meant to find life in everyday government decisions affecting the environment. The analysis in the Leave Decision is a good example of how broad SEV principles can be meaningfully brought to bear on specific decisions.

[128] With respect to granting partial leave, there was likely a range of reasonable alternatives (see *Miller*, at para. 18) in respect of scoping the leave decision. The Directors believe that several of the seven conditions and issues should not have been included. The applicants believe all were appropriately included (keeping in mind that the leave applicants actually sought leave in full and only obtained partial success from the Leave Panel). Given the voluminous record and the wording of the s. 41(a) test, which includes “appears” and “good reason to believe”, the Tribunal finds that the Leave Panel was dealing with various grounds, conditions and issues that raised mixed questions of law, policy and fact. A range of reasonable outcomes was possible and the Tribunal finds nothing in the Directors’ motion materials that demonstrates that any material error of law or fact is present in the Decision in respect of the broad grounds or specifically in the list of conditions and issues in the instruments that merit a full hearing.

[129] The Tribunal agrees with the County in concluding that it is unnecessary and unproductive in a review motion such as this for it to get into a condition-by-condition analysis of the wording used in the instruments as discussed in the Decision. Many of the Directors’ and CCOB’s submissions on this motion are of this nature and are better suited to the upcoming main hearing.

[130] Granting leave to appeal a particular condition is not synonymous with a conclusion that the condition must be changed in the main hearing. If the Directors believe that some of the conditions that are subject to leave are worded appropriately as is, they can raise that point at the preliminary hearing, in mediation or in the main hearing. The leave decision does not force the Directors to propose changes to address the concerns raised by the Leave Panel. Also, it is not the role of the Leave Panel to make a final decision on whether a condition will be changed (see para. 40 of the Decision).

[131] It is also not the role of the Tribunal on this review motion to get into a detailed analysis of the wording of each condition subject to leave, as noted by the County. The

application of the evidence and submissions to the first part of the leave test, including the interpretation of conditions in the instruments, was the central role of the Leave Panel in considering the voluminous materials submitted in the leave hearing. It was open to the Leave Panel to interpret the conditions as it did (including in some instances, simply noting ambiguity rather than concluding on their exact meaning; see para. 55 of the Decision for example), based on the materials that were submitted on leave. Accordingly, the Tribunal declines to address most of the detailed arguments put forward by the Directors and CCOB as they are arguments that have no bearing on the disposition of this motion. The Tribunal agrees with the County that they are arguments that can be advanced at later stages in this proceeding and are not arguments that demonstrate the types of errors meant to be addressed in review motions respecting leave to appeal findings, which do not finally settle the ultimate wording of the conditions.

[132] The above analysis largely focuses on the Decision's treatment of the first part of the leave test, which culminated in the list set out in para. 119. As noted above, the Directors also took issue with the Decision's treatment of condition 5 of the ECA vis-à-vis the second part of the s. 41 test. The Tribunal also sees no error in that regard. The Leave Panel assessed the second part of the test separately from the list of conditions and issues listed in para. 119 (see paras. 120-131). As noted in the Decision, at paras. 124-125 and 131, some arguments that were successful under the first part were also relevant to the second part. Where a leave panel decides to grant partial leave, there is no requirement that every condition that is of concern under the first part of the test itself also meet the second part. Both parts of the test must be met in respect of the instrument subject to a leave application, but a leave panel, in granting partial leave, can determine the appropriate scope of the main appeal and does not need to independently assess each condition in an instrument separately vis-à-vis both parts of the s. 41 test.

[133] To conclude on this section, the Decision's treatment of the grounds, conditions and issues relating to the instruments gave rise to no material error of law or fact. As no error has been identified, it is not necessary to determine whether the Tribunal would likely have reached a different decision under Rule 238(b).

Fairness

[134] The Directors state repeatedly that they were denied procedural fairness. The right to be heard is an element of procedural fairness. A denial of procedural fairness would be an error of law. The Directors' argument is that they were not given a right to be heard on the Leave Panel's "findings".

[135] The County submits that the process followed by the Leave Panel was fair:

> The Directors were provided the opportunity to be heard. As is evidenced throughout its lengthy Leave Decision, the Leave Tribunal considered thoughtfully and thoroughly the Directors' submissions. The Leave Tribunal simply did not agree with all of them.
>
> The Leave Tribunal made its decision based on the arguments and information it was presented. Although it may not have adopted precisely the arguments either side presented it in crafting its reasons, it also clearly did not ignore them.
>
> The Leave Tribunal did not rely upon evidence not presented by the parties to the proceeding The Leave Tribunal did not consider issues that it had not been presented. It analysed the permits and their conditions in light of the SEV factors—which was precisely the task that the County and CCOB in their leave applications had placed before it. The Directors were afforded the opportunity to make submissions, which they did. The fact that the Directors did not respond adequately in their submissions to those of the County and CCOB, and therefore did not succeed in convincing the Leave Tribunal to accept their position, in no way establishes the need for a review under Rule 235. Such a review should not provide the opportunity to the Directors to cure defects in their submissions in the leave application.
>
> Importantly, the Directors will not [be] deprived of the opportunity to the make the arguments that they feel they ought to have been able to make. They will be able to do so during the hearing on the merits of the appeal. That is the proceeding and forum within which these arguments are properly heard.

[136] In their reply submissions, the Directors state that their "request for review is not an attempt to reargue the case before the Tribunal. The findings that formed the basis of the Tribunal's decision at issue were never raised or addressed at the leave stage…" (emphasis added).

[137] For the reasons that follow, the Tribunal finds that there was no denial of procedural fairness because: 1) there is no right to be heard on Tribunal "findings"; 2) the entirety of the two instruments were the subject of the leave applications from the outset, and the conditions and issues subject to leave are a subset of the two instruments which were clearly before the parties and Leave Panel; and 3) the leave grounds on which the applicants relied and the Leave Panel concluded that the leave test had been met, which were based primarily on five principles of environmental decision-making in the SEV, were also known by all parties from the outset.

[138] Based on its examination of the leave record and the dates on which submissions were filed, the Tribunal is satisfied that the Directors are correct in stating that the Leave Panel's "findings" were not provided to the Directors for the purposes of soliciting additional input. The findings were only provided to all parties in the Decision itself at the end of the leave process. The question that arises here is whether any sort of procedural fairness concerns arises from the Leave Panel's failure to issue preliminary findings and seek additional evidence or submissions on those findings.

[139] There is a fundamental difference between "findings" and the evidence, arguments, grounds, issues and other matters heard in a hearing. Before making findings, the Tribunal provides the parties with an opportunity to be heard. Except in unusual situations (such as in some main merits hearings where findings may give rise to a need for further information regarding the revision of the wording of conditions of approval for example), there is normally no need to hear from the parties on the findings of the Tribunal. Rather, the Tribunal hears from the parties, and then makes its findings and disposition. That is the normal course of events. Thus, the Directors' general

position that it was not heard on the Tribunal's findings is no basis for an argument that procedural fairness principles were violated.

[140] In addition, the Tribunal notes that the findings in a decision granting leave do not constitute a final decision on the wording of any condition in an instrument. No right or interest of the Directors has been finally decided. The parties still have a full right to be heard on the merits.

[141] Without getting too far into the details, the Tribunal now turns to an examination of what matters were on the table in the written hearing. In its application for leave to appeal the PTTW, CCOB requested that the Leave Panel grant it leave to appeal the "decision in its entirety, including all general and special conditions in the Permit". Identical wording is found in CCOB's application for leave to appeal the ECA. The County's application for leave to appeal seeks "leave to appeal the decision of the Director to issue the [PTTW]". Similar wording is found in the County's application for leave to appeal the ECA.

[142] CCOB's written submissions on its application for leave to appeal the PTTW specifically refer to seeking leave respecting all conditions and make detailed submissions on their allegations that the Director failed to properly address the following SEV principles: ecosystem approach (pp. 24-32 of their PTTW submissions), cumulative effects (pp. 32-34), sustainable development (pp. 34-37), precaution (pp. 37-40), adaptive management (pp. 41-43). They also make submissions on common law rights (pp. 43-45) and the second part of the leave test (pp. 45-56). All of those categories of arguments are also included in CCOB's written submissions on its application for leave to appeal the ECA (pp. 12-23 of their ECA submissions).

[143] The County's leave submissions regarding both the PTTW and ECA also allege that the Directors failed to consider or properly apply the five SEV principles listed

above. The County's submissions are less detailed than CCOB's but make specific reference to CCOB's submissions rather than duplicating them.

[144] The Directors' leave submissions address the five SEV principles in detail (pp. 27-43), common law rights (pp. 43-45), and the second part of the leave test (pp. 45-47). Dufferin's leave submissions address the five SEV principles in detail (pp. 25-30 and 39-42), common law rights (pp. 31 and 42), and the second part of the leave test (pp. 31-37 and 42-45). There are also references to the SEV in the reply materials (e.g., pp. 14-16 of CCOB's reply regarding the PTTW).

[145] As noted above, the Leave Panel found that the first part of the leave test was met with respect to all of the SEV-related grounds for the PTTW and some of the SEV-related grounds for the ECA in relation to seven conditions or issues in the instruments. The Tribunal finds that all relevant leave grounds, including those relating to the SEV, were raised by the applicants from the outset. The Tribunal also finds that the applications for leave to appeal by both CCOB and the County sought leave to appeal the entirety of the instruments.

[146] As noted by the County, the Directors' review motion focuses on the wording of the conditions in the instruments rather than the broader SEV-related grounds. The Directors argue that they were denied procedural fairness in that they were not given an opportunity to be heard on the condition-specific findings of the Leave Panel. CCOB makes detailed condition-specific submissions that seek to demonstrate that all relevant aspects of the instruments were before the Leave Panel at the leave stage. CCOB points to specific passages of the record where various conditions were debated by the parties or discussed in the evidence (see pp. 8-22 of CCOB's submissions on the review motion). Based on the submissions made on this motion (without re-reading the entirety of the written record in the leave proceeding), the Tribunal is satisfied that all the relevant leave grounds and the instruments as a whole were before the Leave Panel

from the outset of the leave to appeal application process and that the Directors had ample opportunity and time to submit whatever they felt to be relevant.

[147] The applicants sought leave to appeal the entirety of two decisions and brought evidence and argument in support of the s. 41 test in respect of the decisions. The Tribunal has determined in past cases that it has the jurisdiction to grant leave in whole or in part. This is reflected in Rule 60 and discussed in *Lafarge* at paras. 75-76:

> 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.
>
> 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.

[148] The above passage from *Lafarge* confirms that it is open to the Tribunal to exercise its judgment in deciding how to scope an appeal proceeding, such that, had the Tribunal in *Lafarge* granted leave only in part, that would also have been proper.

[149] Here the Leave Panel found that the s. 41 test had been met in respect of many of the SEV-related grounds, but decided to exercise its discretion to grant leave only in part. That approach is consistent with the role of a specialized tribunal seeking to carry out a summary application for leave process while simultaneously seeking to avoid creating a full main appeal hearing where only a scoped one is more appropriate given the nature of the findings it has made.

[150] It cannot be said that in scoping its grant of leave, the Leave Panel effectively denied the Directors fairness to address the specific elements of the instruments that

the Leave Panel determined to merit leave. The whole of the instruments were subject to the application and the Leave Panel found the s. 41(a) test to have been met on a number of important and significant grounds. Notably, many of those grounds addressed the Directors' treatment of key principles set out in the SEV. The Leave Panel exercised the discretion set out in para. 76 of *Lafarge* by electing to focus the appeal on a subset of conditions that were of most concern and that were tied to the identified concerns regarding the treatment of various key wide-ranging principles of environmental decision-making.

[151] As noted above, given the relief requested by the applicants and the significance of the findings made, the Leave Panel could have reasonably granted leave in whole, which would have raised no issue of fairness. From that perspective, the Leave Panel's decision to focus the appeal on a relatively short list of conditions and issues is presumably preferable, from the Directors' view, than to have granted leave in full as it will result in a more efficient process on appeal. Nevertheless, the Directors attempt to turn the Leave Panel's decision to focus the appeal only on those matters of greatest concern into an argument that fairness was somehow violated because they did not get an opportunity to weigh in on the Leave Panel's findings relating to the seven conditions and issues before the Leave Panel rendered its Decision granting leave in part.

[152] The Tribunal notes that implementing the Directors' view of fairness would likely draw out the leave process and require another round of submissions whenever the Tribunal was contemplating giving partial leave regarding a decision for which full leave was sought. Putting into place such a "two stage" approach runs contrary to the summary written leave to appeal process that is contemplated by the *EBR* and Ontario Regulation 73/94. To avoid drawing out the process, the Tribunal would likely have to employ an "all or nothing" approach and simply grant leave in whole so long as the leave test was met. This would create lengthier main hearings and undermine the efficiency and effectiveness goals sought to be achieved by the Tribunal's practice of granting leave only in part in appropriate cases.

[153] However, the Tribunal does not have to choose from either the “all or nothing” or “two stage” options above as it does not agree with the Directors that the process followed by the Leave Panel was unfair in any respect. The Leave Panel provided all parties a full opportunity to be heard on all relevant matters, and indeed granted the Directors additional time to respond to the applications for leave to appeal. The Leave Panel’s exercise of discretion in scoping the upcoming main appeal was not procedurally unfair, or in the words of *Lafarge,* “improper or jurisdictionally incorrect”. Indeed, it was a reasonable and appropriate approach to carrying out a summary leave to appeal process while at the same time promoting an efficient main hearing where only the identified conditions and issues would be up for debate.

[154] To summarize, there is nothing procedurally unfair to the Directors in allowing the seven “conditions and issues” to proceed to a preliminary hearing and main hearing, after the Leave Panel conducted a written hearing that could have fairly and reasonably resulted in the entirety of the two instruments being subject to leave to appeal. There is also nothing procedurally unfair in the Leave Panel making its own independent findings on grounds, conditions and issues even if those findings are not exactly consistent with the way those were advanced by one or more parties. A specialized tribunal with a mandate to implement public interest legislation can consider all relevant materials and reach the findings that it determines to be most suitable in the circumstances in light of the purposes of the applicable statutes.

Rule 238(c): New Evidence

[155] Rule 238(c) addresses “whether there is new evidence admissible under the conditions of Rule 234”. This factor essentially incorporates Rule 234 by reference. Rule 234 states:

> The Tribunal shall not admit new evidence unless it decides that the evidence is material to the issues, the evidence is credible and could affect the result of the Hearing, and either the evidence was not in

> existence at the time of the Hearing or, for reasons beyond the Party's control, the evidence was not obtainable at the time of the Hearing.

[156] As part of its argument regarding condition 3.4b of the PTTW, including the allegation that the Leave Panel unfairly considered this issue, the Directors submit:

> The Tribunal may be more comfortable receiving additional expert evidence on this issue as part of its reconsideration of this issue. Such evidence would certainly have been provided to the Tribunal by the Director (and undoubtedly by CRH) had this issue been raised by the applicants, or had the Tribunal invited submissions on this issue.

[157] To the extent that this argument is part of the Directors' overall argument regarding the Leave Panel's alleged misinterpretation of conditions in the instruments and alleged unfair process, it is dealt with above.

[158] In reply, the Directors state that they are not seeking to introduce new evidence at this stage. Nevertheless, to the extent that this argument merely suggests that the Tribunal exercise its discretion to have new evidence introduced in a review hearing, it clearly falls short of the requirements in Rule 234, as noted by CCOB in their written submissions regarding paras. 168 and 170 of *Trent Talbot*. The test in Rule 234 has not been met and, therefore, the Tribunal's consideration of Rule 238(c) does not favour granting the Motion to Review.

[159] The Tribunal notes, however, that once leave is granted, parties are not subject to the new evidence rule in respect of the main hearing. The main hearing is considered to be a fresh proceeding by the Tribunal. Also, as a result of the interplay among s. 45 of the *EBR*, s. 145.2 of the *EPA* and s. 100(10) of the *OWRA*, the main hearing will be a "new hearing", which can include relevant evidence that was not before the Directors in the first instance or the Tribunal at the leave stage. It can include new information that was not in existence at the time of the leave hearing (e.g., new data). The parties may introduce any relevant evidence they believe will assist the Tribunal's

deliberations over condition 3.4b or any of the other aspects of the instruments for which leave was granted.

Rule 238(d): Reliance on the Decision

[160] Rule 238(d) addresses "the extent to which any person or any other Party has relied on the order or decision". The Tribunal received few submissions on this point. The County states:

> The County has relied upon the Leave Tribunal's decision. It has incurred costs in doing so — namely by proceeding with its appeal of the PTTW and ECA conditions specified by the Leave Tribunal.

[161] The Directors reply as follows:

> It should be noted that the County filed its notice of appeal after the Directors filed their motion for reconsideration. Furthermore, the Tribunal has indicated it will not hold a preliminary hearing for the appeal until the motion for review has been determined.

[162] Reliance on a decision would normally be a factor weighing against a review. The County's above submissions on reliance are very brief. CCOB has not brought forward any specific argument related to reliance.

[163] It is clear that a successful review by the Directors would not end the proceeding, as the Directors' request for review relates to most but not all of the aspects listed in para. 119 of the Decision. The County can proceed with an appeal regardless. The only question is what the scope will be if a review takes place. As well, as pointed out by the Directors, the Tribunal essentially put the preliminary hearing process on hold while addressing this review motion. The County can await the result of this motion before relying further on those aspects of the Decision that are subject to this motion. In this case, the Tribunal finds that Rule 238(d) would not occupy an important role in the list of considerations that weigh against a review.

Rule 238(e): Decision under Judicial Review

[164] Rule 238(e) is directed at whether the decision is under appeal or is the subject of judicial review. This factor is meant to address considerations relating to economy. If a decision is simultaneously the subject of two similar proceedings, one before the Tribunal and one appeal /judicial review, this fact will be considered by the Tribunal in determining whether it is advisable to conduct a review.

[165] CCOB provides general submissions on this factor, arguing that the Directors have other avenues to pursue their concerns in the upcoming main appeal. Those general submissions on whether a class of decisions can be appealed and/or be addressed in a main hearing are more relevant to Rule 238(f) and the *Miller/Trent Talbot* threshold question and therefore addressed elsewhere in these reasons.

[166] The Directors did not indicate in their materials that they are seeking judicial review of the Decision and the Tribunal has not received notice of such under Rule 245. The Tribunal, therefore, assumes that the requested review would not duplicate a court process. Therefore, viewed on its own, this consideration does not weigh against granting a review.

Other Considerations and Rule 238(f): Finality and Prejudice

[167] Rule 238(f) addresses "whether the public interest in finality of orders and decisions is outweighed by the prejudice to the requester". It involves balancing one factor that generally weighs against a review (i.e., finality) and one that generally weighs in favour (i.e., prejudice to the requester if a review is not ordered).

[168] The opening sentence of Rule 238 uses the word "including" before a list of six considerations, which means that the list is not exhaustive and other relevant matters can be raised. In this case, CCOB makes submissions on what it believes to be other

relevant circumstances, with a particular emphasis on access to justice issues. The Tribunal finds that those CCOB submissions are related in part to Rule 238(f), so it deals with that Rule and other relevant circumstances together in this section for convenience.

[169] In light of *Sigrist* and *Trent Talbot*, CCOB argues:

> …that there are also important public policy considerations beyond those set out in Rule 238 that arise when leave is sought by a Director after leave to appeal has been granted under the *EBR*. In *Sigrist* the HRTO observed that the reconsideration process prolongs proceedings and allows parties who are able to better withstand the costs of litigation to have an unfair advantage. These concerns are particularly relevant in the context of applications for leave to appeal under the *EBR*, which are generally brought by individuals or citizen groups with limited resources. A motion for reconsideration by the Director or a proponent has the potential to significantly increase the complexity of the proceeding and be time consuming and expensive. It can also negatively impact public participation in the government's environmental decision-making process under the *EBR*, thereby undermining its purpose of ensuring environmental protection and a role for the public in that process. Therefore, a frivolous motion for reconsideration can serve as diversionary tactic by parties with superior resources to suppress public participation and obviate third appeal rights under the *EBR*.

[170] The County argues:

> Subrule 238(f) directs a Tribunal to consider whether the public interest in finality of orders is outweighed by prejudice to the requester. In other words, the finality of orders ought presumptively to be preserved, and it is in the public interest to do so, barring only prejudice to the requestor.
>
> As requestors, the Directors face no prejudice whatsoever should the Tribunal hearing its motion refuse to grant their request and allow the appeal to proceed. They will not be deprived of the ability to defend their decisions to issue the PTTW and ECA with their respective conditions. In fact, the County submits that the Directors may stand to benefit from the additional public input.
>
> Finally, a refusal to grant the Directors' request would serve the public good by facilitating public participation in an important environmental decision with impacts on a wide range of communities. This, in turn, is in keeping with the spirit of the *Environmental Bill of Rights*.

[171] The Directors make no reference to Rule 238(f) in their initial or reply submissions. The following general submission, however, appears to have some relevance to the "prejudice to the requester" aspect of that Rule and some of the other submissions made by CCOB and the County:

> The Directors are aware that their motion might slightly prolong these proceedings. Their request for review is not, as suggested by CCOB, frivolously made. It is their view that the matters at issue in their request for review are significant (denial of natural justice and fundamental errors with respect to the statutory regime) and that if not corrected will stand as precedent for other Tribunal decisions. The Directors are aware that the Tribunal is not bound by *stare decisis*; however, as is evident from the leave decision itself, the Tribunal relies heavily on previous rulings in determining matters before it. The Directors submit that public policy considerations weigh in favour of the Tribunal reconsidering its decision and granting the relief sought.

[172] The Directors are correct that the Tribunal is not bound by *stare decisis* but does rely heavily on its accumulated jurisprudence. This enables each case to be decided on its merits according to the purposes and provisions of the relevant legislation while also providing an appropriate level of predictability and certainty to those affected by Tribunal decisions. However, as noted above, the Tribunal does not agree that there has been any material error respecting the statutory regime (or otherwise) or denial of natural justice. It follows that the Tribunal will not grant a review on such an allegation if it does not agree with the Directors that the allegation has been made out on the facts of this case.

[173] With regard to the "finality" aspect of Rule 238(f), a decision granting leave does not finally dispose of any substantive matters vis-à-vis the final wording of the instrument subject to the application. However, as the Directors point out, it does finally dispose of the leave application itself. The leave to appeal process can be a resource-intensive stage on its own.

[174] In cases where leave is granted following a detailed written hearing, there is a strong argument in favour of deferring to the finality of the leave decision and refusing to

add an unnecessary step to an already complex legal process (see *Sigrist*). A review hearing would add another layer in the litigation, duplicate processes that have been or will be undertaken, and unnecessarily draw on the limited resources of all parties.

[175] As noted by CCOB, *EBR* applications are often initiated by individuals and citizen groups with limited resources. Adding unnecessary steps to the process is time consuming and expensive, without any obvious benefit to the environmental protection and public participation purposes of the legislation. The Tribunal agrees with the County and CCOB that granting reviews in situations like this, where the moving party wishes to have a new panel substitute its views for that of the Leave Panel, would detract from the access to justice and public participation goals of the Rules and the *EBR*.

[176] In light of the above, the Tribunal finds that there is a public interest in the finality of Tribunal decisions granting leave to appeal. The Tribunal finds that there is no significant prejudice to the Directors in upholding that finality as any concerns that the Directors have can still be raised at the preliminary hearing, mediation (if the parties agree to that process), and main hearing.

[177] The Tribunal concludes that Rule 238(f) and the other relevant considerations raised by the County and CCOB weigh against granting the motion to review.

Overall Conclusion

[178] The Directors have not demonstrated that any of the factors that weigh in favour of a review under Rule 238 apply to the Decision. Having considered the factors in Rule 238 and the additional relevant circumstances raised by the parties, the Tribunal concludes that it is not advisable to review the Leave Panel's Decision.

ORDER

[179] The motion to review is dismissed.

Motion Dismissed

"Jerry V. DeMarco"

JERRY V. DEMARCO
ASSOCIATE CHAIR