Environmental Review Tribunal

Case Nos.: 06-160 to 06-181/06-183

Dawber v.
Director, Ministry of the Environment

In the matter of applications for leave to appeal by Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford and Jamie Stratford, J.C. Sulzenko, Janelle Tulloch, Sandra Willard, Susan Quinton on behalf of Clean Air Bath, Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie, Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay pursuant to section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended, for leave to appeal the decision dated December 21, 2006 of the Director, Ministry of the Environment, under section 9 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, to issue Amended Certificate of Approval (Air) No. 3479-6RKVHX to Lafarge Canada Inc. for air emissions from a cement manufacturing facility located at Lot 5 and 6, Concession 1, Loyalist Township in the County of Lennox and Addington; and

In the matter of applications for leave to appeal by Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford and Jamie Stratford, J.C. Sulzenko, Janelle Tulloch, Sandra Willard, Susan Quinton on behalf of Clean Air Bath, Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie, Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay pursuant to section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended, for leave to appeal the decision dated December 21, 2006 of the Director, Ministry of the Environment, under section 39 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, to issue Provisional Certificate of Approval (Waste Disposal Site) No. 8901-6R8HYF to Lafarge Canada Inc. for the operation of a waste disposal site located at 6501 Highway 33, Loyalist Township in the County of Lennox and Addington; and

In the matter of a written hearing.

Before: Bruce Pardy, Member

Appearances:

Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford and Jamie Stratford, J.C. Sulzenko, Janelle Tulloch, Sandra Willard	-	Applicants, on their own behalf
Susan Quinton	-	Applicant, on behalf of Clean Air Bath
Robert V. Wright	-	Counsel for the Applicants Loyalist Environmental Coalition as represented by Martin J. Hauschild and William Kelley Hineman
Richard D. Lindgren	-	Counsel for the Applicants Lake Ontario Waterkeeper and Gordon Downie
Joseph F. Castrilli	-	Counsel for the Applicants Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay
Sylvia Davis Isabelle O'Connor	-	Counsel for the Director, Ministry of the Environment
Doug Thomson Peter Brady	-	Counsel for the Instrument Holder, Lafarge Canada Inc.

Dated this **4th** day of **April 2007**.

Reasons for Decision

Background:

These are applications for leave to appeal the issuance of two Certificates of Approval ("CofAs"). On December 21, 2006, pursuant to section 9 of the *Environmental Protection Act* ("*EPA*"), Victor Low, Director, Ministry of the Environment ("MOE") issued Amended Certificate of Approval (Air) No. 3479-6RKVHX ("CofA (Air)") to Lafarge Canada Inc. ("Lafarge") for the operation of a Portland cement manufacturing facility located at Lot 5 and 6, Concession 1, Loyalist Township in the County of Lennox and Addington, Ontario. Also on December 21, 2006, pursuant to section 39 of the *EPA*, Tesfaye Gebrezghi, Director, MOE, issued Provisional Certificate of Approval (Waste Disposal Site) 8901-6R8HYF ("CofA (Waste Disposal Site)") to Lafarge for the operation of a waste disposal site at 6501 Highway 33, Loyalist Township in the County of Lennox and Addington. Directors Low and Gebrezghi will be referred to collectively as "the Directors".

Lafarge has operated a cement manufacturing facility near Bath, Ontario since 1973. It produces Portland cement, which consists primarily of calcium silicates, aluminates and alumino-ferrites, and is the main ingredient in concrete. In December 2003, LaFarge applied under Part V of the *EPA* for a CofA to operate a waste disposal site at the facility, and in February 2004 under section 9 of the *EPA* for a Comprehensive CofA (Air) to replace its existing CofAs (Air) for all sources of air emissions at the plant. An application to use alternative fuels was part of the section 9 application, and consisted of a proposal to discharge emissions into the air from the utilization of solid non-hazardous waste materials, including tires, animal meal, plastics, shredded tires, solid shredded materials and pelletized municipal waste as an alternative to primary fuels (coal, coke, natural gas and bunker C oil) in its cement kiln. Under the proposal, alternative fuels would provide up to 30% of the kiln's input heat value up to a maximum feed rate of less than 100 tonnes per day. Lafarge proposed to operate the facility 24 hours per day, seven days a week, 365 days a year. The waste disposal site in the Part V application was for the purpose of accepting, processing and incinerating the alternative fuels.

The proposals were amended and posted several times to the Environmental Registry under the *Environmental Bill of Rights, 1993* ("*EBR*"). Numerous citizens made comments on the proposal. Citizens also requested that the proposals be made subject to an environmental assessment under the *Environmental Assessment Act*, R.S.O. 1990, c. E.18 ("*EAA*"), but the Minister of the Environment denied those requests in November 2005.

On December 21, 2006, the Directors issued the CofAs to Lafarge. The CofA (Air) included approval for Lafarge's alternative fuels proposal, including two silos for alternative fuel storage and handling, one for the storage of shredded solid waste, cellulose based waste, pelletized municipal waste, and associated discharges to the atmosphere, and another for the storage of meat and bone meal waste in powder form, and associated discharges into the cement kiln during loading; one dry process rotary kiln modified to burn natural gas, petroleum coke, coal, bunker C oil, and municipal waste at a maximum rate of 100 tonnes per day consisting of whole and part used tires, shredded solid waste, meat and bone meal waste, and pelletized municipal waste at total maximum rate of 1.25 tonnes per day with associated air pollution equipment discharging to the atmosphere through the cement kiln exhaust stack; product processing, storage and transportation, and associated air pollution control equipment discharging to the atmosphere; processes and associated air pollution control equipment for the collection, transportation and disposal of cement kiln dust discharging into the atmosphere; and various ancillary and support processes and activities discharging into the atmosphere. The CofA (Waste Disposal Site) granted approval for a waste disposal site for the receipt, storage and burning of solid non-hazardous waste consisting of whole and part used tires, shredded solid waste, pelletized municipal waste, and meat and bone meal waste.

In January 2007, Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford and Jamie Stratford, J.C. Sulzenko, Janelle Tulloch, Sandra Willard, Susan Quinton on behalf of Clean Air Bath, Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie, Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay (collectively "the Applicants") applied under section 38 of the *EBR* for leave to appeal the decisions of the Directors to issue the CofAs to Lafarge.

The Tribunal acknowledges the thorough and substantial submissions and materials provided by counsel for the Applicants, the Directors, and Lafarge in this application, which have been most helpful to the Tribunal.

Standing to Seek Leave to Appeal:

Section 38(1) of the *EBR* states:

> Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:

1. The person seeking leave to appeal has an interest in the decision.
2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal.

Under section 2(2) of Ontario Regulation ("O. Reg.") 681/94 made under the *EBR*, Director Low's decision to issue the CofA (Air) was a decision to implement a Class I proposal; and under section 5(2) of the same regulation, Director Gebrezghi's decision to issue the CofA (Waste Disposal Site) was a decision to implement a Class II proposal, both of which required notice under section 22 of the *EBR*. Under section 139(1) of the *EPA*, had the Directors refused to issue the CofAs, Lafarge would have had the right to appeal those decisions, thus satisfying the second condition under section 38(1) of the *EBR*.

Lafarge does not contest the standing of any of the Applicants to seek leave to appeal. The Director does not dispute the standing of any Applicant with the exception of Mark and Jamie Stratford and J.C. Sulzenko. The Director argues that the Stratfords have provided no information about their interest in the Directors' decisions other than their residence in Stella, Ontario. Stella is located on Amherst Island, separated from Bath by the North Channel of Lake Ontario, and is less than 10 kilometres from the Lafarge cement facility. The Tribunal finds that the Stratfords are Ontario residents living in the immediate vicinity of the facility, and as such have an interest in the environmental consequences of the Directors' decisions. J.C. Sulzenko is a resident of Ottawa whose son lives and studies in Kingston. Sulzenko also claims to have close connections on Amherst Island, but does not describe the nature of those connections. The Directors argue that these facts are not sufficient to amount to an interest beyond a general public concern in the decisions, which is not an interest within the meaning of section 38 of the *EBR*. Neither the Director nor Sulzenko refer to authority to establish the meaning of "interest" in section 38, or to determine whether having a child living in the vicinity of the facility is sufficient to establish an interest. It is not clear whether Sulzenko's child is a minor, or whether Sulzenko purports to bring the application on the child's behalf. Given the Tribunal's finding on the substance of Sulzenko's application below, the Tribunal need not come to a conclusion on the standing of this Applicant.

With the exception of Lake Ontario Waterkeeper ("LOW"), the rest of the Applicants are local residents applying on their own behalf or representing organizations of other residents. LOW is a federal corporation and as such is a person within the meaning of section 38(1) and section 29(1) of the *Interpretation Act*, R.S.O. 1990, c. I.11. LOW, along with many of the other Applicants, filed written comments on the proposal, which under section 38(3) of the *EBR* is evidence that they have an interest in the decisions. Therefore, these Applicants have an interest in the decisions within the meaning of section 38, and have standing to seek leave to appeal.

The Test for Granting Leave to Appeal:

Section 41 of the *EBR* establishes a two-pronged test for leave to appeal. Section 41 states:

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

(a) The nature of the section 41 test

In *Simpson v. Ontario (Director, Ministry of Environment)* (2005), 18 C.E.L.R. (3d) 123, the Tribunal described the nature of the section 41 test:

> This section does not require that the Applicants establish that no reasonable person could have made the decision, or that significant harm will result. Instead, the Applicants must show that it *appears that there is good reason to believe* no reasonable person could have made the decision in question, and that it *appears that the decision could result* in significant harm to the environment.
>
> While the two-pronged test in section 41 is a stringent one, the standard of proof is a lower standard than a balance of probabilities, and must be applied in conjunction with the stated intent of the *EBR* to enable the people of Ontario to participate in the making of environmentally significant decisions by the government of Ontario (*Vallentin v. Director (Ministry of the Environment),* indexed as *Haldimand Against Landfill Transfers (HALT) v. Ontario (Director, Ministry of Environment),* (2005), 16 C.E.L.R (3d) 104); *Lacombe Waste Services Ltd. v. Ontario (Ministry of Environment),* (2005), 14 C.E.L.R. (3d) 47). It is sufficient for applicants to establish that their concerns "have a real foundation sufficient to give them the right to pursue them through the appeal process." (*Barker, Re* (1996), 20 C.E.L.R. (N.S.) 72 at para. 47). An application must be founded on a substantial and relevant information base (see for example, *Friends of the Jock River v. Ontario (Director, Ministry of the Environment)* (2002), 44 C.E.L.R. (N.S.) 69 at para. 3).
>
> In summary, it is not necessary at this stage for the Tribunal to determine whether the Director's decision was unreasonable, or whether significant harm to the environment will materialize. Instead, to be granted leave to appeal, the Applicants must show that it appears that there is good reason to believe no reasonable person could have made the decision in question, having regard to relevant law and government policies, and that it appears that the decision could result in significant harm to the environment.

With the exception of cases in which applications were dismissed due to settlements, lack of standing or lack of jurisdiction, the above approach to the section 41 test has been cited and adopted by the Tribunal in every *EBR* leave application decision since *Simpson.* (See *County of Grey v. Ontario (Ministry of Environment)*, (2005), 19 C.E.L.R. (3d) 176 ("*County of Grey*") at paras. 16 and 17; *Safety-Kleen Canada Inc. v. Ontario (Director, Ministry of Environment)* (2006), 21 C.E.L.R. (3d) 88 ("*Safety-Kleen*") at para. 17; *Davidson v. Ontario (Director, Ministry of Environment)* (2006), 24 C.E.L.R. (3d) 165 ("*Davidson*") at para. 18; *Bogan v. Ontario (Ministry of the Environment*), [2007] O.E.R.T.D. No. 12 ("*Bogan*"); and *Robins v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 15 ("*Robins*")).

(b) The standard of proof in section 41

The Directors submit that the decisions cited above are in error because they apply a standard of proof lower than a balance of probabilities. In paragraph 73 of their submissions, they argue that under section 41, "the Tribunal must be satisfied that there is substantial evidence that the Director's decision was unreasonable. Anything less than that is not consistent with the purpose of the EBR and ignores the MOE's role as regulator in respect of the environment." The Directors cite *Re Hunter v Director* (1995), 18 C.E.L.R. (N.S.) 22 ("*Hunter*") for the proposition that section 41 requires proof on a balance of probabilities.

In reply, the Applicants submit that *Hunter*, the first case to apply section 41 in an application for leave, was decided by former Chair John Swaigen of the Ontario Environmental Appeal Board (now the Tribunal), who shortly thereafter repudiated his conclusion on this point in *Residents Against Company Pollution Inc.* (1996), 20 C.E.L.R. (N.S.) 97 ("*Residents*") where he stated at paragraphs 52 and 53:

> In *Hunter*, I stated that the standard of proof that a leave applicant must meet is the balance of probabilities. The basis for this statement was the general principle that unless otherwise stated in legislation, the standard of proof for Ontario administrative tribunals is the balance of probabilities. … Having read the decision of member John Jackson in *Barker, Re*, [(1996), 20 C.E.L.R. (N.S.) 72] (Ont. Environmental App. Bd.) and having recently become aware of the decision of the Ontario Court of Appeal in *R. v. Peckham* (1994), 19 O.R. (3d) 766, I now believe that this statement was incorrect. The Legislature can set different standards from the general standard of proof. In this case, the Legislature has directed that to support the leave applicant, the Board need not find that the Director was actually unreasonable. It is sufficient to find that it appears to the Board that there is good reason to believe this. The phrase "good reason to believe" is similar to the standard required of an informant in laying charges for criminal or regulatory offences, namely, reasonable and probable grounds to believe that the offence was

> committed. It is also similar to the standard imposed on a Director to justify issuing orders under various sections of the EPA. For example, under section 18(2), a Director may make an order "where the Director is of the opinion, upon reasonable and probable grounds" that the order is necessary. This is [a] lower standard than proof on a balance of probabilities.

The Tribunal agrees with the conclusions in *Simpson* and *Residents* that section 41 does not require Applicants to establish on a balance of probabilities that the Director's decision was unreasonable or that significant harm will result. Instead, Applicants must prove that "it appears … that there is good reason to believe" that no reasonable person could have made the decision and "it appears … that the decision could result" in significant harm to the environment. The use of these additional words in the section has the effect of setting a threshold that is lower than the Directors suggest. As held in *Simpson* and *Residents*, this threshold reflects a standard of proof for unreasonableness and significant harm lower than a balance of probabilities. The same conclusion can be expressed in an alternative way: Applicants must satisfy the section 41 test on a balance of probabilities, but what they must prove to that standard is that *it appears there is good reason to believe* (that no reasonable person could have made the decision) in the first branch, and that *it appears that the decision could result* (in significant harm) in the second branch.

(c) Second branch of section 41 – significant harm to the environment

Recent Tribunal decisions have held that section 41 requires that the decision as a whole must be assessed against the test in section 41, and the ground or grounds that satisfy the first branch may be different from the ground or grounds that satisfy the second branch. Nevertheless, leave cannot be granted unless both parts of the test are satisfied. In *County of Grey*, Vice-Chair Jerry DeMarco referred to *Smith v. Ontario (Environmental Review Tribunal)* (2003), 1 C.E.L.R. (3d) 245 (Div. Ct.), and stated at para. 45:

> Applicants must provide arguments that satisfy both parts of the test and those arguments must relate to the decision being challenged. However, nothing in the *EBR* or *Smith* requires each ground or argument raised to simultaneously meet both parts of the test.

The Directors and Lafarge agree that it is the decision as a whole that is subject to scrutiny. However, the Directors submit that in *County of Grey*, Vice-Chair DeMarco held that the fact that the instrument in question was a Class I or II instrument was itself sufficient to satisfy the second branch of the section 41 test. The Directors argue that such an approach strips the second branch of meaning and is contrary to the purpose of the *EBR* and established principles of

statutory interpretation. In *County of Grey* at paragraphs 77 and 78, Vice-Chair DeMarco, citing the decision in *Residents, supra,* at 110-111, observed that the fact that an instrument has been classified as a Class I or II instrument is an indication of its environmental significance and is a good starting point for the analysis of the second branch of the section 41 test. However, he did not conclude the analysis with that observation, but proceeded to consider evidence provided by the parties on the potential for environmental harm posed by the particular decision in question. In the case at hand, the Tribunal also relies on evidence from the parties in coming to a conclusion under the second branch of section 41.

Issue:

The main issue before the Tribunal is whether the Applicants meet the two-pronged test for leave to appeal in section 41 of the *EBR*.

Discussion and Analysis:

Grounds for Leave to Appeal:

1. The Individual Applicants

In their application letters to the Tribunal, the Applicants Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford and Jamie Stratford, J.C. Sulzenko, Janelle Tulloch, and Sandra Willard express genuine concerns about the environmental consequences of the CofAs. They are articulate about the nature of their objections and their reasons for challenging the Directors' decisions. Some outline specific grounds for their applications. However, none of these applications are accompanied by supporting material of any real weight. They have not provided expert evidence on the technical facts that they allege, nor substantive analysis about why they meet the leave test in section 41 of the *EBR*. Applicants must establish that their concerns "have a real foundation sufficient to give them the right to pursue them through the appeal process." (*Barker, Re,* (1996), 20 C.E.L.R. (N.S.) 72, at para. 47). An application must be founded on a substantial and relevant information base (see for example, *Friends of the Jock River v. Ontario (Director, Ministry of the Environment)* (2002), 44 C.E.L.R. (N.S.) 69 at para. 3). Therefore, these Applicants have not met the requirements of the section 41 leave to appeal test, and the Tribunal dismisses their applications.

2. The Applicant Clean Air Bath

Susan Quinton applies for leave to appeal on behalf of Clean Air Bath ("CAB"), a local citizens' group representing about two hundred residents living in the vicinity of Lafarge's Bath cement facility. In the application, CAB cites two grounds for concluding that no reasonable person, having regard to relevant law and government policies, could have made the Directors' decisions. First, CAB submits that there is an inconsistency between the CofAs and the Notice of Proposal for Regulation to ban the burning of tires in Ontario, issued by the MOE on the same day that the Directors issued the CofAs. CAB argues that given the nature and rationale for the proposed ban, the Directors' decisions conflict with the precautionary principle, an element of the MOE's Statement of Environmental Values ("SEV") under the *EBR*. Second, CAB submits that the manner in which the Director's decisions were made defeats the objective of public participation and government accountability in the *EBR* and in the MOE SEV. CAB also refers to the language of the proposed ban, above, in support of its argument under the second branch of section 41 that the decisions could result in significant harm to the environment.

The grounds cited by CAB overlap with grounds submitted by the remaining group of Applicants, Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition ("LEC"); by LOW and Gordon Downie ("Downie"); and by Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay ("the Landowners"). CAB also adopts and relies upon the materials submitted by this group of Applicants. Therefore, the Tribunal will consider CAB's application together with the applications of LEC, LOW, Downie, and the Landowners, below.

3. The Applicants Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie, and the Landowners

The most substantial application for Leave to Appeal is jointly filed by LEC, LOW and Downie, and the Landowners. These Applicants together with CAB will hereafter be referred to collectively as "the Applicants".

The Applicants list four grounds under the first branch of section 41 on which they base their argument that no reasonable person, given relevant law and government policies, could have made the decisions in question:

1. The decisions of the Directors failed to take into account the MOE SEV:
    a) Ecosystem approach
    b) Precautionary approach

c) Resource conservation
d) Public participation

2. The Directors failed to obtain information on local airshed and watershed conditions.

3. The Directors failed to consider the common law rights of landowners in the area.

4. The decisions of the Directors discriminate against the community of Bath.

The Applicants specify three grounds under the second branch of section 41 on which they base their argument that the decisions in question could result in significant harm to the environment:

1. Lafarge lacks operational experience with waste incineration in Ontario, and the MOE lacks monitoring experience with tire-burning facilities in Ontario.

2. The existing air quality and water quality conditions in the area already risk significant environmental harm that will be exacerbated by the impact of Lafarge's use of waste-derived fuels.

3. The terms and conditions in the CofAs do not appear adequate to prevent significant environmental harm.

I First Branch of Section 41 – Reasonableness

1. Ground 1: The decisions of the Directors failed to take into account the Ministry Statement of Environmental Values

Under Ground 1, the Applicants argue that in making their decisions, the Directors did not consider or apply guiding principles in the MOE's SEV.

In response, the Directors submit that the Lafarge applications were in compliance with regulatory standards, and in particular with the emission standards described in Ontario Regulation ("O.Reg.") 419/05, and to a lesser extent MOE Guideline A-7, and O.Reg. 194/05. Therefore, the Directors argue, the decisions must be considered to be reasonable. To the extent that the Applicants challenge the adequacy of O.Reg. 419/05 to protect the environment, the Directors and Lafarge submit that the adequacy of laws and policies are not in issue in this application for leave, and the Tribunal has no mandate to assess their reasonableness or sufficiency. The Directors' submissions state at paragraphs 74 and 137:

> Under [the first branch of section 41] a decision will only be unreasonable if the Director did not apply the relevant laws or government policies in respect of the decision. The reasonableness of the laws and policies themselves is not at issue and they are not subject to the Tribunal's scrutiny on a leave application.
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> …
>
> The Director's decision regarding the issuance of the Certificate of Approval (Air) was centred on the fact that all evidence indicated that Lafarge would be in compliance with the emissions standards required by Regulation 419/05.

The Tribunal agrees that the laws and policies that apply to the Directors' decisions are not themselves the subject of the test under the first branch of section 41, and the Tribunal is not seized with the task of assessing the reasonableness or adequacy of their content, at least not directly. The Tribunal does not have the mandate to require changes to those laws and policies or to impose upon the Directors a duty to achieve a higher standard of environmental protection than those laws and policies require. Instead, the reasonableness of the Directors' decisions must be assessed in the context of the legal regime within which they occur. The first branch of section 41 is explicit in this respect. It states that leave shall not be granted unless it appears to the appellate body that no reasonable person could have made the decision in question "having regard to the relevant law and to any government policies developed to guide decisions of that kind". Therefore, it is not the task of the Tribunal in an application for Leave to Appeal to assess the reasonableness of the statutory regime as a whole. (See *Residents, supra*, at para. 25 and *Goulbourn Wetlands Group v. Ontario (Ministry of the Environment*, [2002] O.E.R.T.D. No. 3 at para. 46.) However, it is appropriate to inquire whether and to what extent the Directors' decisions considered, incorporated and reflected relevant laws and policies.

If regulatory emission standards were the only laws and policies that applied to the Directors' decisions, and if emissions from the Lafarge proposal were indeed lower than those standards, then the decisions would appear to be reasonable and the application for Leave to Appeal would fail to meet the section 41 test. However, those regulatory emission limits are not the only laws and policies that apply to the Directors' decisions. O.Reg. 419/05, O.Reg. 194/05 and MOE Guideline A-7 are parts of a larger statutory regime to which the decisions are subject. Within this regime are principles, prohibitions, objectives and policies that apply to the exercise of the discretion authorized under sections 9 and 39 of the *EPA*. For example, section 14 of the *EPA* prescribes a general prohibition against causing adverse effects, notwithstanding any other provision of the Act or the regulations; section 33 of O.Reg. 419/05 prohibits emissions that cause discomfort to persons or loss of enjoyment of normal use of property, notwithstanding compliance with numerical standards in the regulation (see *Simpson, supra* at para. 27; and

Residents, supra at para. 44); and the MOE SEV establishes principles for making decisions within the MOE.

The MOE SEV is promulgated under sections 7 to 11 of the *EBR* and sets out MOE policy on "how the purposes of the *EBR* are to be applied when decisions that might significantly affect the environment are made" and "how consideration of the purposes of the *EBR* should be integrated" into decisions. Part III of the MOE SEV establishes guiding principles for making decisions that might significantly affect the environment. Under section 20 of the *EBR*, decisions on proposals for Class I and II instruments are decisions that could have a significant effect upon the environment. Under section 2(2) of O.Reg. 681/94 made under the *EBR*, Director Low's decision to issue the CofA (Air) was a decision to implement a Class I proposal, and under section 5(2) of the same regulation, Director Gebrezghi's decision to issue the CofA (Waste Disposal Site) was a decision to implement a Class II proposal. Therefore, the Directors' decisions in this case are decisions that might significantly affect the environment within the meaning of Part III of the SEV. Therefore, the principles described in Part III of the MOE SEV are relevant to the Directors' decisions to approve Lafarge's application for the CofAs.

The Tribunal does not agree that approval of a CofA based upon compliance with numerical standards in regulations is automatically or necessarily a reasonable decision if reliance upon those standards results in a failure to observe provisions in other laws and policies also applicable to the decision. The first branch of the section 41 test may be met where a decision to issue a CofA is made without regard for the impacts of the proposal in light of the guiding principles of the SEV. (See *Robins, supra*, at para. 14; *County of Grey, supra* at para. 74; and *Simpson, supra* at para. 20.)

(a) Ecosystem Approach

The MOE SEV states:

> The Ministry will adopt an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water, and living organisms, including humans, and the interactions among them. When making decisions, the Ministry will consider: the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the interrelations among the environment, the economy and society.

Under an ecosystem approach, decisions are made by measuring effects on the system rather than on their constituent parts in isolation from each other. An ecosystem approach is inherently effects-based: what matters under an ecosystem approach is the overall consequence of human

activity, rather than an assessment of particular human actions isolated from the effects of other actions affecting the same ecosystem. As the MOE SEV stipulates, one of the key features of an ecosystem approach is measurement of cumulative effects.

The Directors submit that their decisions to issue the CofAs to Lafarge were made in a manner consistent with an ecosystem approach. According to paragraph 137 of the Directors' submissions, the decision to issue the CofA (Air) "was centred on the fact that all evidence indicated that Lafarge would be in compliance with the emissions standards required by Regulation 419/05. Regulation 419/05, by its very nature, takes a global, ecosystem approach to regulating air quality." The Directors essentially argue that the decision to issue the CofA (Air) reflects an ecosystem approach because the applications from Lafarge appeared to be in compliance with O.Reg. 419/05. The Directors' statements on this issue suggest that compliance with the regulation is all that is needed to integrate the principles of Part III of the SEV into the decision, and that it was not otherwise necessary for them to turn their minds to the question whether, despite compliance with regulatory standards, the proposed activity might cause a detrimental effect upon ecosystems, either alone or in combination with other actions or background conditions. The Directors acknowledge that they did not measure baseline conditions of air or water quality or consider the question of cumulative impacts, and argue that it was not incumbent upon them to do so. In paragraphs 160 and 161 of their submissions the Directors state:

> The air and watershed information that the Applicants cite as critical [is] unnecessary given the global approach of setting regulatory standards.
> …
>
> Nothing under the legislation or pertinent policies requires a baseline determination of ambient air quality, monitoring for cumulative impacts from other facilities in the area or developing an air-monitoring network. The regulations instead focus on the individual applicant meeting emission standards which have been determined based on global standards.

O.Reg. 419/05 came into force in November 2005. It replaced Regulation 346 as Ontario's primary air pollution control regulation. Regulation 346 required facility operators to use modelling to predict the concentrations for contaminants to be released into the air once those contaminants reached an off-site location or the nearest resident, and to compare the modelled prediction against Point-of-Impingement ("POI") standards in the regulation. O.Reg. 419/05 was introduced to update and correct outdated POI standards and air dispersion models in Regulation 346. However, it still relies on the concept of POI standards, which control the emissions and short-term concentrations of contaminants from particular facilities.

The Directors state that O.Reg. 419/05, "by its very nature, takes a global, ecosystem approach to regulating air quality", that air and watershed information is unnecessary "given the global approach of setting regulatory standards" and that the emission standards in O.Reg. 419/05 "have been determined based on global standards". The Directors do not define "global approach" or "global standards", and the Tribunal does not know what these terms mean. As described above, an ecosystem approach is based upon the principle that assessment of proposed activities will be based upon the cumulative effect of all human activities upon the ecosystems within which they occur. An ecosystem approach is not one that considers effects only on a global scale. Ecosystems exist in an infinite variety of kinds and sizes, lacking identifiable boundaries. Effects upon a local ecosystem may, but do not necessarily, affect systems on a global scale.

"Global standards" may refer to the notion that the most appropriate emission standards are those that are consistent with comparable standards elsewhere in the world. However, the Directors' materials are bereft of any material that purports to describe current global standards for the kinds of processes in issue in this application, or for that matter to establish that standards around the world do not consist of widely varying rules and regulations in different jurisdictions. In any event, emission standards, even standards that purport to be roughly comparable from jurisdiction to jurisdiction, cannot reflect an ecosystem approach because the cumulative effects present in each ecosystem will vary from place to place and time to time. An approach to ecosystem protection that could reflect consistent ecosystem protection regardless of location would need to be based upon prohibitions of cumulative ecosystem *effects*, rather than upon individual facility *emissions*.

The Tribunal agrees that O.Reg. 419/05 focuses on individual emission standards, but disagrees that this fact means that consideration of cumulative effects is not necessary. Numerical standards for the emission of particular contaminants, such as those provided in O.Reg. 419/05, cannot take cumulative impact into consideration because it is not possible to know the surrounding activities and baseline conditions of local ecoystems at the time the standard is set. A Director may impose more stringent standards in a CofA than prescribed in O.Reg. 419/05, and in such circumstances, the contaminant concentration standards of O.Reg. 419/05 do not apply to the discharge of the contaminant pursuant to section 21 of the regulation. Emission standards of the kind contained in O.Reg. 419/05 limit emissions from single facilities to particular levels, but they do not measure overall ecosystem effects.

In their affidavits, Director Low states at paragraph 15 and Director Gebrezghi states at paragraph 13:

> Instruments such as certificates of approval, permits, licenses and orders are issued under the authority of Acts and made pursuant to specific Ministry policies and regulations. As the guiding principles in Part III [of the MOE SEV] are incorporated into the development of Acts, regulations and policies, decisions on instruments will in turn reflect these principles.

This language mirrors that of the SEV itself. The Tribunal agrees: to the extent that the guiding principles in Part III are incorporated into Acts, regulations and policies, decisions on instruments will reflect those principles. But to the extent that the guiding principles are not incorporated into Acts, regulations and policies, decisions on instruments will not reflect those principles unless decision-makers specifically apply them to the particular decision in question. POI standards are helpful guidelines or signposts, but they can only estimate acceptable levels because it is not possible to know the circumstances in which individual applications will arise, such as whether the facility is in an isolated location or a heavy industrial area; in a pristine or polluted region; whether cumulative impacts are low or high; the type and nature of other contaminants in the area; the additive and/or synergistic effects of the proposed emissions with other materials in the environment; and so on.

The 2005-2006 Annual Report Supplement of the Environmental Commissioner of Ontario ("ECO 05-06 Report") comments upon the ability of O.Reg. 419/05 to control cumulative ecosystem effects, where it states at page 83:

> The continued reliance on a POI approach means that while the ministry has some control over short-term *concentrations* of contaminants (measured over minutes or hours), the ministry is not directly controlling annual *loadings* of contaminants. For some types of persistent contaminants that accumulate in the environment, such as lead or mercury or certain organic toxic substances, the annual load to the environment is a parameter with a great deal of significance. Nor does [Regulation 419/05] address the impacts that mixes of various contaminants may have on the environment or health. It also does not offer a strong remedy for local "hot spots"; industrial airsheds with significant background concentrations of pollutants from multiple facilities. MOE acknowledges that more work is required in these areas, stating: "The regulation does not explicitly deal with background concentrations, cumulative or synergistic effects, persistence and bioaccumulation of contaminants. However, a section has been added to the regulation that clarifies the existing director's authority to require more stringent standards where warranted." … With regard to controlling cumulative loadings of persistent toxic substances over time, a number of commentators, including Environment Canada, have noted that MOE will never be able to assess or control cumulative loadings effectively until the point of impingement approach is replaced. [Emphasis in original.]

The report of the Commissioner also criticizes the regulation for its lack of finalized standards for "high priority" contaminants, including arsenic, benzene, mercury, dioxins and furans. As of December 21, 2006, the date of the Directors' decisions, these standards had still not been completed, according to the MOE's website.

The Directors also cite compliance with O.Reg. 194/05 and MOE Guideline A-7. Guideline A-7 sets out additional air pollution control requirements for new municipal waste incinerators, and O.Reg. 194/05 sets out particular limits for nitrogen oxides and sulphur dioxide. Neither replaces the basic methodology of O.Reg. 419/05. Guideline A-7 sets emission limits at the stack rather than at the property line, as in O.Reg. 419/05, but like O.Reg. 419/05, the guideline does not control annual loadings of contaminants. O.Reg. 194/05 identifies limits on total nitrogen oxide and sulphur dioxide emissions by industrial sector, including the cement industry sector, and introduces an emissions trading system for these contaminants. However, it does not require significant overall reductions in emissions in either contaminant over the next ten years, nor does it control cumulative emissions or effects within particular ecosystems or airsheds (see ECO 05-06 Report at page 97).

The POI approach relied upon by the Director in O.Reg. 419/05 does not reflect an ecosystem approach. An ecosystem approach is about preventing ecological consequences of the total load of human activity, wherever or whenever the sources of that impact may originate. Under an ecosystem approach, it does not matter how much of which contaminant is coming from which facility. What matters is the cumulative or overall ecological impact to which the approved activity is contributing. Therefore, an ecosystem approach requires a consideration of cumulative impacts and baseline conditions. The approach described by the Directors is not consistent with the MOE SEV because it would allow ecosystem deterioration to be caused by contaminants emitted from multiple sources, each in compliance with regulatory POI standards. Therefore, POI regulatory standards can act only as a floor in an application for a CofA. Compliance with the POI standards in the regulation is necessary, but it is not sufficient. That the regulation sets out standards for individual facilities simply means that compliance with those standards is a first requirement, not a final determinant of an application's acceptability. Therefore, ensuring compliance with a regulation that prescribes emission standards for individual facilities could constitute part of a decision-making process that reflected an ecosystem approach, but it could not by its nature constitute or reflect an ecosystem approach if the decision was limited to that consideration alone.

Given that the MOE SEV endorses an ecosystem approach as a guiding principle, and that an ecosystem approach explicitly and necessarily includes assessment of cumulative effects upon

ecosystems, the Tribunal finds that it appears that there is good reason to believe that no reasonable person could have made the decisions to issue the CofAs without assessing the potential cumulative ecological consequences of approving the Lafarge applications. The Tribunal finds that Ground 1 meets the first branch of the section 41 test for leave to appeal.

(b) Precautionary Approach

The MOE SEV states:

> The Ministry will exercise a precautionary approach in its decision-making. Especially when there is uncertainty about the risk presented by particular pollutants or classes of pollutants, the Ministry will exercise caution in favour of the environment.

In *Davidson, supra,* at para. 44, the Tribunal stated:

> A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be.

On December 21, 2006, the same day on which the Directors issued the CofAs to Lafarge, the MOE posted a "Notice of Proposal for Regulation" on the *EBR* Registry (Registry No. RA06E0024). The notice described a proposal to ban the incineration of tires, and included the following description and purpose:

> The Ministry of the Environment (MOE) is proposing to develop a regulation under the Environmental Protection Act to ban the incineration of tires, for a 24 month period, possibly starting in the spring of 2007. The ban could be extended to 36 months if sufficient information is not available within the 24-month period. The proposed ban will not apply to any facility with approval to incinerate tires issued before the ban is in effect.
>
> Purpose of the Proposal:
>
> Currently, no facility in Ontario incinerates tires, including those with approval to do so for use as a replacement fuel in a manufacturing process. As a result, MOE has had no experience monitoring the environmental performance of facilities that incinerate tires.

> The purpose of the proposed time-limited ban is to allow for the collection of information confirming the environmental performance of facilities using tires as fuel. If a ban is introduced, MOE will not issue any new approvals for the incineration of tires (including for use as fuel) until this information has been obtained.

The Applicants make two arguments relating to the Notice of Proposal for Regulation. First, they submit that in the notice, the MOE acknowledges its lack of experience in monitoring the environmental performance of tire-burning facilities, which is the rationale for the proposed ban. Thus, they argue, the Directors have approved the Lafarge CofAs as a "pilot project" to be undertaken in part for the purpose of gathering data about tire-burning in cement kilns – but in so doing, have approved an activity for which the environmental consequences are unknown in a sensitive location for a significant period of time, contrary to the precautionary principle.

The Applicant's second argument relating to the Notice of Proposal for Regulation is that its effect is to discriminate against the community of Bath, Ontario. This issue will be dealt with below under Ground 4.

In response, the Directors deny that the Lafarge CofAs constitute a pilot project, and submit that the Notice of Proposal for Regulation is irrelevant to the application for leave to appeal and cannot be considered by the Tribunal in applying the section 41 test under the *EBR*. Paragraph 52 of the Directors' submissions states:

> The Tribunal cannot consider the proposed regulation in determining whether or not the Directors' decisions were unreasonable. This is particularly so given that the notice for the proposed regulation was not posted on the Environmental Registry until the Lafarge Certificates were issued. In other words the posting did not exist during the period in which the Directors were making their decisions.

If the ban had been in effect at the time of the approval, then of course the ban would preclude the CofAs. But as of the date of the Directors' decisions, this regulation had not yet been developed. Therefore, it did not preclude the Directors from assessing the Lafarge application and making a decision about whether to issue an approval. However, that is not the same thing as saying that the Notice of Proposal for Regulation was irrelevant to the Directors' decisions.

A proposal for regulation is not a regulation, but it is an MOE policy document. As of December 21, 2006, MOE policy was to develop a ban on the burning of tires because of the MOE's lack of experience with such practices. If the Notice of Proposal for Regulation had been released before the CofAs were issued, would reasonable decisions have taken it into account? The

answer to that question must be yes, since the proposal would ban the very activity for which approval was sought.

But the Directors issued the CofAs to Lafarge on the same day that the Notice of Proposal for Regulation was posted. Would reasonable decisions nevertheless have taken this MOE policy into account? The Directors do not say whether they were aware of this policy or its development at the time of their decisions. Instead, their submissions are characterized by a resolve to exclude consideration of the proposal based on the fact that it was not yet a formal regulation. In his affidavit, Director Low states at paragraph 13:

> Lafarge's application for approval was submitted approximately three years ago and long before the MOE filed a proposed regulation on the Environmental Registry on December 21, 2006 that would ban the burning of used tires in Ontario except where an approval to do so exists. The approval of Lafarge's proposal is a result of the review of this application and public consultation that took place over the past three years. As a Director, I must determine whether to approve an application based on the laws and policies that currently exist. Whether a regulation is proposed to be made sometime in the future that may affect similar applications is not something that I can consider in reviewing an application currently before me as the making of a regulation is not something that I can control and is within the sole discretion of the Lieutenant Governor in Council.

Although it is difficult to understand how the Directors could not have been aware of the development of a proposal to ban the very kind of activity they were assessing for approval, there is no direct evidence that they were, and the Tribunal makes no findings on this question. Instead, the Tribunal finds that the proposed ban was relevant to the Directors' decisions in a different respect: the irrefutable evidence that it provides that as of December 21, 2006, and therefore at all times prior to December 21, 2006, the MOE had no experience with the environmental performance of facilities that incinerate tires.

This fact exists independently of the Notice of Proposal for Regulation. In other words, the MOE's lack of experience with burning tires does not depend on whether there is a regulation in force, or whether there is a proposal to develop a regulation. The notice is relevant not because of the fact of the notice, but because of the evidence that the notice contains. As of December 21, 2006, the MOE had no experience with the environmental performance of facilities that incinerate tires, and the MOE considered it advisable to ban tire burning for this reason until greater expertise could be established. There is no indication that there was such significantly improved information and expertise at hand in this case that it overcame the MOE's lack of experience with tire-burning. In light of these facts, it is difficult to take at face value the

assurance of the Directors that "the Lafarge facility will utilize alternative fuels safely and without significant impact on the environment and human health" since the Directors are reliant upon MOE expertise to assess the Lafarge proposals.

Indeed, while the Directors deny that the Lafarge CofAs constitute a pilot project to investigate whether burning tires and other waste can be done safely, the wording of an MOE news release on December 21, 2006 uses this term to describe the proposal. The news release states:

> The Ministry of the Environment will impose strict conditions on two certificates of approval that will be granted under the Environmental Protection Act to Lafarge Canada to replace about 30 per cent of the fuel it currently uses at its cement manufacturing plant in Bath through a gradual phasing-in of used tires and other municipal wastes. In a pilot project, Lafarge will be allowed to burn these wastes under strictly controlled conditions in order to confirm that the process can safely meet Ontario's stringent air emission standards.

As stated in *Davidson*, a precautionary approach presumes risk in the absence of proof to the contrary. "It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could possibly be." The MOE's Notice of Proposal for Regulation essentially says that the MOE is uncertain about the adverse effects of tire burning. Therefore, the application of the precautionary approach calls upon the Directors to consider the incineration of tires to be as hazardous as it could possibly be, and to place the onus of establishing the absence of environmental harm upon the source of the risk. Instead, the CofAs were approved in the face of uncertainty about environmental risk, and possibly for the purpose of investigating whether the risk would come to pass. Such an approach is not consistent with the precautionary principle. Therefore, it appears that there is good reason to believe that decisions to approve the CofAs in December 2006 for the processing and incineration of tires were decisions that no reasonable person could make, given the direction in the MOE SEV to apply a precautionary approach. The Tribunal finds that Ground 1(b) meets the first branch of the section 41 test for leave to appeal.

(c) Resource conservation

The MOE SEV states:

> The Ministry will seek to ensure a safe, secure and reasonably priced supply of energy in an environmentally sustainable manner and will place priority on improving energy efficiency. It will also promote energy and water conservation,

> as well as encourage the use of the 3RS - reduction, reuse and recycling - to divert materials from disposal.

The Applicants submit that the decisions of the Directors to issue the CofAs failed to take resource conservation into account, as directed in the MOE SEV. The Applicants allege that nothing in the CofAs would prevent Lafarge from incinerating whole used tires that would otherwise be recyclable. They also submit that one of the justifications for the use of alternative fuels in the Lafarge proposal – the reduction in the use of fossil fuels, which in turn will reduce the emission of nitrogen oxides – is more apparent than real because corresponding increases in other types of contaminants will result.

In response, the Directors submit that conditions in the CofA (Waste Disposal Site) require Lafarge to restrict its use of recyclable used tires and waste plastics, and report annually on its efforts to restrict the use of potentially recyclable materials at the plant. The Directors and Lafarge also argue that the use of alternative fuels will reduce the consumption of non-renewable resources such as coal and coke. Paragraph 8 of Director Gebrezghi's affidavit also refers to the environmental and public benefit of using non-recyclable waste to produce energy. Lafarge cites tire-burning as a preferable option to disposing of tires in stockpiles or landfills.

The Tribunal finds the submissions on this point less than persuasive in either direction. Paragraph 36 of the CofA (Waste Disposal Site) states that Lafarge shall restrict its use of recyclable used tires and waste plastics "in accordance with the methodology outlined in Item 4 of Schedule A". Item 4 of Schedule A refers to the Design and Operations Manual of the Bath Alternative Fuel Management System dated December 2006. In the manual, the only reference to restricting the used of recyclable used tires is two paragraphs on page 39 that state:

> The steps Lafarge has taken to [sic] give priority in its sourcing of scrap tires to tires stockpiled at waste storage or disposal sites and to tires generated by tire recycling facilities that are not useable by or surplus to the requirements of those facilities as well as tires that are in excess of markets for products produced from Ontario scrap tires. Lafarge will also take steps to inform Ontario municipalities and other known stockpile owners including First Nations of its ability to beneficially use tires from stockpiles.
>
> Lafarge's annual report will also include information on the quantities of tires received, and where known, the types of tires received from Ontario generators to determine how the tires were not recyclable.

These "conditions" do not prohibit Lafarge from burning recyclable used tires. The only requirement in these paragraphs is that Lafarge will include information on the quantities of tires

received in its annual report. There is no methodology outlined here for ensuring that Lafarge will not burn recyclable tires in its kiln. Furthermore, section 45 of the CofA (Waste Disposal Site) provides that Lafarge will conduct public drop-off days at least once a year to provide members of the public with an opportunity to drop off used tires at the plant. Neither the CofA nor the Design and Operating Manual suggest that only non-recyclable tires will be accepted on these occasions. While Director Gebrezghi's affidavit refers to the production of energy, no data of any kind is offered to substantiate the claim that waste incineration is a significant source of energy production. The Tribunal finds that the potential resource conservation justifications for Lafarge's use of alternative fuels have not been established.

On the other hand, while the Applicants do establish that it appears that the CofAs are not successfully accomplishing the goal of resource conservation, they do not show that in approving the Lafarge proposal, the Directors unreasonably ignored opportunities for resource conservation. The resource conservation justification for the Lafarge proposal may appear to be dubious, but it is not clear that the strict wording of the resource conservation principle in the SEV applies to the Lafarge proposals, since they do not deal with "energy and water conservation" or with diverting materials from disposal to recycling. As the Applicants have the burden of establishing a substantial and relevant information base, the Tribunal finds that Ground 1(c) has not met the first branch of the section 41 test.

(d) Public participation

The MOE SEV states:

> The Ministry is committed to public participation and will foster an open and consultative process in the implementation of the Statement of Environmental Values.

The Applicants submit that after the close of the *EBR* comment periods on the Lafarge applications, Lafarge supplied additional technical reports to the MOE, none of which were subject to further or formal *EBR* notice or comment opportunities. The Applicants allege that Lafarge relies upon these documents in support of their applications and the Directors rely upon them in their decisions, and argue that the Directors were unreasonable in failing to provide public comment opportunities given the commitment in the SEV to public participation.

In response, the Directors and Lafarge submit that both Lafarge applications were posted on the Environmental Registry for a total of 120 days, during which time the public had significant opportunity to comment upon the proposals. While the technical documents referred to by the

Applicants were not made the subject of further or formal *EBR* notice and comment opportunities, the documents were a matter of public record and available to the public upon request at MOE offices.

The Tribunal finds that the technical documents referred to by the Applicants should reasonably have been the subject of *EBR* notice and comment since they were sufficiently important to the Lafarge proposals to be relied upon by the Directors in their decisions and formally incorporated into the CofAs. However, the applications were posted on the Registry for a substantial period prior to the release of the technical documents and the documents did not represent a major change to the nature of the overall proposal. Therefore, the Tribunal finds that the failure to provide this additional opportunity for public comment was not such an error as to make it appear that no reasonable person could have made the decision in question. The Tribunal finds that Ground 3 fails to satisfy the first branch of the section 41 test for leave to appeal.

2. Ground No. 2: The Directors failed to obtain information on local airshed and watershed conditions

This Ground for leave to appeal has been considered under Ground 1(a).

3. Ground No. 3: The Directors failed to consider the common law rights of Landowners in the area

Common law causes of action are sometimes applicable to environmental circumstances. For example, occupiers of land have a common law right to quiet use and enjoyment of their property; remedies for unreasonable interference with that right can be pursued in actions for private nuisance. An action for negligence may be available where a defendant's lack of reasonable care has exposed a plaintiff to contamination and that contamination has caused personal injury or property damage.

The Applicant Landowners argue that in issuing the CofAs, the Directors failed to consider the interference with or breach of their common law rights that are threatened by Lafarge's use of alternative fuels. In response, the Directors submit that the common law rights of the Applicant Landowners have not been adversely affected, that they will continue to exist outside the rubric of environmental legislation, and that they are not a relevant consideration in assessing a proposal for a CofA.

Environmental regulation is often thought to be more effective than the common law for protecting the environment. (See for example J. Benidickson, *Environmental Law* (2nd ed.)

(Concord: Irwin Law, 2002) at 100-101.) Common law causes of action apply only in narrowly defined circumstances, and they are usually able to provide remedies only after damage or interference has occurred. In contrast, statutory regimes for environmental protection such as the *EPA* can be both remedial and preventative, and can contain prohibitions that apply to a wider range of circumstances.

However, statutory environmental law can also be an impediment to the effective application of common law rights, including those that provide environmental protection. Regulatory approval of particular substances or processes can protect facilities from common law liability. In negligence cases, for instance, compliance with statutory standards can be cited as evidence of proper conduct, and "may render reasonable an act or omission which would otherwise appear to be negligent." (*Ryan v. Victoria (City)* (1999), 168 D.L.R. (4th) 513 at para. 29 (S.C.C.) per Major J.) Courts hearing common law actions may also be reluctant to conduct their own assessment of the dangers of alleged environmental hazards, preferring instead to defer to the judgment of regulatory authorities. In *Palmer v. Stora Kopparbergs Bergslags AB* (1983), 12 C.E.L.R. 157, the plaintiffs sought an injunction to restrain the defendant forest company from spraying certain areas in Nova Scotia with phenoxy herbicides. Mr. Justice Nunn of the Nova Scotia Supreme Court, in rejecting the plaintiffs' claim, stated at para. 569:

> To some extent this case takes on the nature of an appeal from the decision of the regulatory agency and any such approach through the courts ought to be discouraged in its infancy. Opponents to a particular chemical ought to direct their activities towards the regulatory agencies or, indeed, to government itself where broad areas of social policy are involved. It is not for the courts to become a regulatory agency of this type. It has neither the training nor the staff to perform this function.

Statutory enactments are paramount to the common law, and where there is conflict, the statute governs. Where necessary or appropriate under the statutory regime, approvals may authorize activities that have the potential to infringe upon common law rights. Since courts are apt to defer to regulatory officials in their assessment of environmental dangers, one of the "effects" of issuing a CofA may be to diminish the status or viability of common law rights that might otherwise be utilized as a means to protect the environment. Therefore, a reasonable decision would consider the rights that are being diminished, in order to assess whether the detrimental effect upon those rights is appropriate and necessary, and in the interests of environmental protection. In this case, the Directors declined to consider and weigh the common law rights of the Applicant Landowners or the potential consequences of the CofAs upon them. The Tribunal finds that it appears there is good reason to believe that no reasonable persons could have made the decisions in question without turning their minds to the potential effect of the decision on the

common law rights of local landowners. The Tribunal finds that Ground 3 satisfies the first branch of the section 41 leave test.

4. Ground No. 4: The decisions of the Directors discriminate against the community of Bath

As reviewed under Ground 1(b) above, on December 21, 2006, the same day that the Directors issued the CofAs to Lafarge, the MOE released a "Notice of Proposal for Regulation" to ban the burning of tires in Ontario. The Applicants argue that in the face of the proposal to ban the burning of tires in the province, the effect of the Directors' decisions is to discriminate against the community of Bath, Ontario. The MOE notice states that no facility in Ontario currently incinerates tires. Therefore, the Applicants submit, the Lafarge facility will become the only facility in Ontario to do so. Since the purpose of the proposed ban is to gather information on the environmental performance of burning tires as fuel, the community of Bath may be the only community subject to tire burning while the MOE determines whether it is safe. The combination of the CofAs and the proposed regulation potentially exposes the residents of Bath to the effects of a process that will not be permitted anywhere else in Ontario.

In response, the Directors submit that no discrimination can occur if the processes for which CofAs are issued are in compliance with environmental regulations. Paragraph 172 of the Directors' submissions reads:

> Even if the regulation does become a reality, this does not result in discrimination against the Community of Bath. There can be no discrimination against a community so long as certificates of approval are only issued for those processes which will comply with government environmental regulation and guidelines. The vast preponderance of evidence in the present case indicates that the Lafarge facility will utilize alternative fuels safely and without significant impact on the environment and human health.

The *EPA* is an effects-based statute. Its purpose is defined in section 3(1), which states:

> The purpose of this Act is to provide for the protection and conservation of the natural environment.

In *Safety-Kleen*, the Tribunal stated in relation to section 3:

> There are no other purpose sections in the Act, so this provision states the sole purpose of the *EPA*. Decisions made under the Act are made to achieve the purpose of the Act. Therefore, decisions under the *EPA* are carried out for the

> purpose of the protection and conservation of the natural environment. Protection and conservation of the natural environment is achieved when effects upon the environment are prevented or curtailed. Therefore, decisions should be based upon the effects of the activity to be regulated. Therefore, one criterion for every decision made under the Act is whether the decision will prevent or curtail environmental effects. A decision made under the *EPA* without regard for environmental effects would be a decision no reasonable person could make. In assessing whether a challenged decision appears to be a decision that no reasonable person could make, the Tribunal should assess whether the environmental effects of the decision have been taken into account.

In *Safety-Kleen*, the Tribunal heard an application for leave to appeal the issuance of certificates of approval for the burning of waste-derived fuel in the production of hot-mix asphalt. One of the grounds for leave advanced by the Applicant was that the conditions in the certificates of approval issued to the Instrument-Holder were significantly less onerous than those in the Applicant's own certificate of approval issued earlier. The certificates of approval were inconsistent and unfair, the Applicant argued, and therefore the decision of the Director to issue them was unreasonable. The Tribunal made the following comments about inconsistency in the issuance of certificates of approval (at paragraphs 37 to 40):

> Consistency in environmental standards is highly desirable. Unpredictability and inconsistency produce uncertainty for those who would otherwise embrace environmentally beneficial change. Thus, unpredictability and inconsistency in the application of environmental laws can defeat the benefits such laws were created to achieve. Indeed, consistency is one of the characteristics of a system of governance based upon the rule of law. Inconsistency violates the principle that like cases should be treated alike. …
>
> On the other hand, facilities vary greatly in their nature, purpose, size, location and risk. They pose environmental dangers of different kinds and degrees, depending on the types of processes they carry out and the kinds of emissions they produce. The *EPA* deals with this variety by authorizing site-specific assessments.
> ….
>
> Since the purpose of the statute is the prevention and/or control of environmental effects, the principle that like cases should be treated alike means, in the context of the *EPA*, that environmental rules should provide for consistency in environmental effects … Certificates of approval are one of the tools provided under the *EPA* to achieve consistent observance of the statute's purpose. Differences in approval conditions are appropriately utilized to bring the effects of facilities down to consistent or comparable levels.

Consistency in the context of the *EPA* does not mean that all facilities should operate under the same conditions, but that facilities should be regulated as necessary to limit environmental effects to a consistent level across Ontario. This conclusion is reinforced by the identification of the ecosystem approach as a guiding principle in the MOE SEV, discussed above under Ground 1(a). Under an ecosystem approach, the most important consideration in environmental decision-making is cumulative effects upon ecological conditions. Therefore, consistency in environmental decision-making calls for limiting cumulative ecological effects to comparable levels from system to system. Site-specific assessments are one of the tools provided by the *EPA* to accomplish this objective. They are one means of regulating emissions of particular facilities in order to limit cumulative effects.

In this case, the Applicants argue that the effect of the approval of the CofAs is to subject the community of Bath to potential environmental effects to which no other Ontario community may be subject. As described under Ground 1(b) above, the CofAs and the Notice of Proposal for Regulation were released on the same day. There is no evidence whether the Directors were aware of the impending proposal prior to its release but, as observed under Ground 1(b), it is difficult to understand how the Directors could not have been aware of it. The Directors deny that the Lafarge CofAs constitute a pilot project, yet the MOE news release announcing the approvals uses this term to describe them. The news release states:

> The Ministry of the Environment will impose strict conditions on two certificates of approval that will be granted under the Environmental Protection Act to Lafarge Canada to replace about 30 per cent of the fuel it currently uses at its cement manufacturing plant in Bath through a gradual phasing-in of used tires and other municipal wastes. In a pilot project, Lafarge will be allowed to burn these wastes under strictly controlled conditions in order to confirm that the process can safely meet Ontario's stringent air emission standards.

The impression left by the news release, combined with the fact that the CofAs were issued on the same day as the Notice of Proposal for Regulation, is that the two steps were intended to coincide. Nevertheless, in the absence of evidence about the Directors' knowledge, the Tribunal makes no finding one way or the other. Fortunately, it is not necessary to make a determination on this question in order to decide the validity of this Ground for leave to appeal.

The test in section 41 is not based on fault. It does not require that an Applicant show that the decision-maker was careless, reckless, or lacking in judgment. It does not ask whether the decision-maker acted unreasonably. Instead, it asks whether the decision appears to be one that no reasonable person could have made. Thus, it requires assessment of the reasonableness of the *decision*, not the reasonableness of the *decision-maker*. The reasonable person contemplated in

section 41 is a hypothetical prudent person with knowledge of the law, policies and surrounding facts in existence at the time of the decision, whether or not the Directors shared in that knowledge.

Consistency in the context of the *EPA* means that facilities should be regulated as necessary to limit environmental effects to a consistent level across Ontario. Consistency is a relevant consideration in a reasonable decision-making process. A reasonable, prudent person with knowledge of the law, policies and surrounding facts would not expose the residents of Bath to the effects of an activity that the MOE proposes to ban without considering whether such a decision could produce inconsistent environmental effects between communities. Therefore, there appears to be good reason to believe that the decisions to approve the Lafarge CofAs are decisions that no reasonable person could make. Therefore, the Tribunal finds that Ground 4 satisfies the first branch of the section 41 test for Leave to Appeal.

II Second branch of Section 41 – Significant Harm to the Environment

The Applicants argue that it appears the Directors' decisions could result in significant harm to the environment. They submit that the terms and conditions in the CofAs are inadequate to prevent significant environmental harm; that the existing air quality and water quality conditions in the area of the Lafarge plant already risk significant environmental harm, which will be exacerbated by the impact of Lafarge's use of waste-derived fuels; and that the failure of the Directors to assess cumulative impacts and baseline conditions make significant environmental harm more likely, as do Lafarge's lack of operational experience with waste incineration and the MOE's lack of monitoring experience with tire-burning facilities. The Applicants offer evidence from a number of expert sources that indicate the hazardous nature of the emissions that will be generated by Lafarge's use of waste-derived fuel, and the significant amounts of contaminants that are already emitted and present in the area. Reference to some of this evidence will be made below.

In response, the Directors and Lafarge argue that the Lafarge proposal is in compliance with O.Reg. 419/05, MOE Guideline A-7, and O.Reg. 194/05, and that the CofAs contain sufficient conditions to protect the environment and human health. With respect to the CofA (Waste Disposal Site), Timothy Edwards, Senior Review Engineer in the Waste Unit, Certificate of Approval Review Section of the Environmental Assessment and Approvals Branch of the MOE, states in his affidavit at paragraph 11:

> In my opinion, the Lafarge Waste Approval contains in its sixty-eight (68) conditions, requirements that are appropriate for the proper receipt, storage and utilization of alternative fuels at the site. The conditions in the Approval have been imposed in order to minimize any environmental impacts.

With respect to the CofA (Air), Richard Lalonde, Senior Air Engineer in the Air and Noise Unit, Certificate of Approval Review Section of the Environmental Assessment and Approvals Branch of the MOE, states in his affidavit at paragraph 10:

> The application submitted by Lafarge has shown that the facility can operate in accordance with Regulation 419/05 while utilizing the proposed alternative fuels for the cements kiln. The terms and conditions, including the provisions of Ministry Guideline A-7, included in the CofA (Air) issued to Lafarge for this alternative fuels proposal, are sufficient to require Lafarge to operate the facility within the requirements of Regulation 419/05 and in a manner that is protective of human health and the environment.

These statements are consistent with the theme of the Directors' submissions on this issue: that in order to find that significant environmental harm could occur, it is necessary to find non-compliance with regulatory standards. For instance, their submissions state at paragraph 143:

> The Applicants have alleged that there is already significant air and water pollution in the Bath area, which must be considered prior to determining emission standards for the Lafarge facility. However, none of the applicants have substantiated these allegations by providing evidence that any emissions to either the air or water are outside the parameters deemed acceptable by either the air or waste regulations or the guidelines.

The issue under the first branch of section 41 is contextual: are the decisions reasonable given relevant laws and policies? In contrast, the issues under the second branch are not contextual, but absolute: what could the effects of the decisions be, and are those effects significant? The second branch does not require a significant *breach* of laws and regulations, which would be contextual, but an assessment of the potential for significant *harm*, which means that the only relevant criterion is evidence of environmental effects that could result. Thus, compliance with numerical POI standards in a regulation is not determinative of whether it appears the decisions could result in significant harm to the environment. In *Residents, supra,* the Environmental Appeal Board, the predecessor to the Tribunal, stated (at para 44):

> I do not agree that "significant harm" under Part II of the EPA is synonymous with a level or concentration of contamination exceeding a numerical limit in a regulation. In my view, it is open to leave applicants to show that the potential harm from smaller amounts of contaminant is significant; for example, by

> evidence that emissions are capable of causing adverse effects at a level that complies with the numerical standards.

The expert evidence offered by the Applicants on the issue of significant environmental harm includes a report by Dr. Brian McCarry of the Department of Chemistry at McMaster University that characterizes the conditions in the CofA (Air) as inadequate to protect against potential environmental and health effects. The report is highly critical of the information base upon which the CofAs were approved. It states at pages 5, 6 and 11:

> In addition to the lack of local air quality data, there is a lack of information on the potential human and ecological health effects impacts of emissions from the Lafarge plant on the local area. The documentation provided does not discuss or address any potential health effects impacts due to current or proposed emissions from the Lafarge facility. … There is strong scientific evidence that the health effects impacts of airborne contaminants are additive or cumulative. The strongest evidence for this comes from the numerous large-scale epidemiological studies conducted around the world over the past 15 years. The re-analysis of the "Six Cities Study" led by R. Burnett of Health Canada about five years ago showed that these health impacts are cumulative; this re-analysis study was reviewed twice by two separate panels of international experts because the public policy implications of this work … were truly enormous. … The list of chemicals in Schedule "E" of the C of A – Air is deficient. It falls far short of the list of compounds that will be released to the atmosphere during the burning of tires, plastics and materials of biological origin. The MOE has admitted in separate documentation that it does not have the technical wherewithal to monitor for a suite of compounds that would be indicative or, at best conclusive, of a tire burn.

Dr. A.C. Goddard-Hill, Acting Medical Officer of Health for Hastings & Prince Edward Counties, in a letter to the Minister of the Environment in October 2004, expressed concern about potential health implications of the Lafarge proposal to burn waste. The letter states in part:

> Although the proponent claims that "total combustion" occurs in the Cement Kiln process he at the same time allows that incomplete combustion may occur. This is evidenced by the generation of CO and particulate matter in the process. Therefore the generation of PICs, products of incomplete combustion, may occur. Some of these PICs constitute Toxic and Persistent Toxic Substances as defined under the Great Lakes Water Quality Agreement (Canada and the United States) … The repeated recommendation of the International Joint Commission (of the GLQA) in the last six of their twelve Biennial reports including the 12th Biennial Report, 2004, has been for Zero Discharge, or Virtual Elimination, of these Toxic and Persistent Toxic Substances, for reasons related to human health.

The Applicants' evidence on this issue also includes a letter from Dr. Ian Gemmill, Medical Officer of Health for Kingston, Frontenac, Lennox & Addington to Susan Quinton of CAB confirming a motion passed unanimously in November 2006 by the Kingston, Frontenac, Lennox & Addington Board of Health and staff of KFL&A Public Health and communicated to the Minister of the Environment expressing their concern about the "potential adverse health effects" of the Lafarge proposals; and a report by Dr. Neil Carman, Clean Air Program Director with the Sierra Club in Texas, who has extensive experience with air pollution control in a number of jurisdictions, primarily in the United States. Dr. Carman's report makes reference to numerous stack test reports cited both in the published literature and available at regulatory agencies that confirm the potential for significant emissions of airborne contaminants from cement kilns burning tires, including toxic metals such as lead, chromium, mercury and arsenic, inorganic acidic compounds, dioxins and furans. He cites published studies that report significant increases in airborne contaminants from burning scrap tires in cement plants, and cites reports that conclude that there is no scientific basis for concluding that burning waste tires in cement kilns is safe.

Expert evidence offered by Lafarge is starkly different. It attests to the lack of harmful effects that will be produced by the use of alternative fuels in the Lafarge kiln. For example, Mike Lepage, the principal of RWDI Air Inc., a firm of consulting engineers and scientists retained by Lafarge to conduct the air dispersion modelling in support of its application for the CofA (Air), states in his affidavit at paragraphs 6 and 11:

> The stack testing and our dispersion modelling results for the Lafarge operations indicate that its current impact on air quality in the surrounding area is very small compared to applicable standards and criteria. This data indicates that the Bath facility is not causing significant local air quality impacts over and above background levels recorded at the Kingston and Belleville monitoring sites. … Lafarge's already small contribution to air pollutant levels in the surrounding area will not change in any material way with the use of alternative fuels. The background air quality in the general area appears to be generally good, with levels of common air contaminants being, for the most part, far below acceptable limits. Lafarge's use of the alternative fuels in question at Bath will not in my opinion adversely affect local air quality or increase the risk of exceeding applicable air quality standards.

Lafarge also produces a human health risk assessment conducted by Cantox Enviromental dated January 2007, although the Tribunal notes that the authors of the report are not identified and their qualifications are not provided, and that the assessment was conducted after the CofAs were approved. The report concludes:

> [T]he results of the [Human Health Risk Assessment] indicated that no acute or chronic adverse human health risks would be expected to occur as a result of exposure to ground level air concentrations at the maximum point of impingement … resulting from 'typical', 'upper bound' or 'maximum (A-7 Guideline)' emission scenarios.

In short, the expert evidence provided by the parties on the question of significant harm to the environment is diametrically opposed.

The Tribunal finds that the kinds of contaminants to be emitted from the Lafarge kiln from the use of both traditional and waste-derived fuels are potentially hazardous to the environment and human health. Their toxicity and impact depend upon their level of emissions, concentrations, and total loading in the environment.

The Directors' arguments that no significant environmental harm will result are derivative of compliance with the regulations. The affidavits produced by the Directors essentially state that the Lafarge proposals comply with standards in the regulations, and since the regulations were developed to protect the environment and human health, the Lafarge approvals will not cause significant environmental harm. As found above under Ground 1(a) of the first branch of section 41, the regulations do not incorporate consideration of cumulative effects, total ecosystem loading, synergistic effects, or bioaccumulation, and O.Reg. 419/05 does not contain completed standards for high priority contaminants. By their own admission, the Directors did not identify a baseline determination of air or water quality in the area of the plant, take account of or provide for the monitoring of cumulative impacts in the region of the plant, or require the development of an air monitoring network. The information submitted in support of the proposal does not include baseline air or water quality data or background concentrations of contaminants, effects from cumulative or synergistic effects, persistence or bioaccumulation of contaminants. It lacks particulars on potential human and ecological health effects of emissions from the Lafarge plant. The Directors maintain that conditions included in the CofAs are sufficient to protect the environment and human health, but the MOE has no experience in monitoring the performance of facilities that incinerate tires.

The evidentiary record established by the Applicants includes opinions from credible, qualified experts, including expressions of concern from two local Medical Officers of Health, that articulate serious doubts about the environmental and health implications of the Lafarge proposal. The Tribunal concludes that, although the environmental effects of the CofAs cannot be determined with certainty, the Applicants have produced a substantial information base that establishes the potential for significant harm to the environment from the use of alternative fuels

at the Lafarge facility. The Tribunal finds that it appears that the Directors' decisions could result in significant harm to the environment within the meaning of the second branch of the test in section 41 of the *EBR*.

Decision

The Tribunal finds that the Applicants Diane and Chris Dawber, Hugh and Claire Jenney, Mark Stratford and Jamie Stratford, J.C. Sulzenko, Janelle Tulloch, and Sandra Willard have not met the requirements of the test for Leave to Appeal in section 41 of the *Environmental Bill of Rights 1993*, and the Tribunal dismisses their applications.

With respect to the Applicants Susan Quinton on behalf of Clean Air Bath; Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay, the Tribunal finds that on Grounds 1(a), 1(b), 3 and 4 under the first branch of section 41 of the *Environmental Bill of Rights 1993*, it appears there is good reason to believe that no reasonable person, having regard to relevant law and government policies, could have made the decisions dated December 21, 2006 to issue Amended Certificate of Approval (Air) No. 3479-6RKVHX and Provisional Certificate of Approval (Waste Disposal Site) 8901-6R8HYF to Lafarge Canada Inc.; and under the second branch of section 41 of the *Environmental Bill of Rights 1993*, the Tribunal finds that it appears that those decisions could result in significant harm to the environment. The Tribunal grants to the Applicants Susan Quinton on behalf of Clean Air Bath; Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition; Lake Ontario Waterkeeper and Gordon Downie; and Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay, Leave to Appeal the decisions to issue Amended Certificate of Approval (Air) No. 3479-6RKVHX and Provisional Certificate of Approval (Waste Disposal Site) 8901-6R8HYF to Lafarge Canada Inc., pursuant to section 41 of the *Environmental Bill of Rights 1993* and Rule 50 of the Tribunal's Rules of Practice. The Applicants may appeal the decisions in their entirety; the scope of the Appeal shall not be limited to the Grounds on which the Applications have been granted or to the issues raised by the Applicants in their Applications for Leave to Appeal, unless the Tribunal orders otherwise. Pursuant to Rule 51 of the Tribunal's Rules, any Applicant who wishes to file a Notice of Appeal must do so no later than 15 days from the date the Applicant receives the decision granting Leave to Appeal.

Applications for Leave to Appeal Granted

Bruce Pardy, Member