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THIRD-PARTY APPEALS UNDER THE *ENVIRONMENTAL BILL OF RIGHTS* IN THE POST-*LAFARGE* ERA: THE PUBLIC INTEREST PERSPECTIVE

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PART I - INTRODUCTION

In recent years, there has been considerable debate among proponents, regulatory officials, concerned citizens, and the Environmental Commissioner of Ontario about the proper interpretation of the "third-party" appeal provisions in the *Environmental Bill of Rights* ("EBR").[2] However, it now appears that this debate has been definitively resolved by the recent outcome of the *Lafarge* case.[3]

In its landmark decision in April 2007, the Environmental Review Tribunal ("ERT") granted residents and environmental groups leave under the EBR to appeal two waste-burning approvals that had been issued to Lafarge Canada Inc. ("Lafarge") by the Ministry of the Environment ("MOE") under the *Environmental Protection Act* ("EPA").[4]

Lafarge then applied for judicial review of the ERT's leave decision, but this application was unanimously dismissed by the Ontario Divisional Court in June 2008. A motion by Lafarge Canada Inc. for leave to appeal the Divisional Court judgment was dismissed without reasons by the Ontario Court of Appeal in November 2008.

In the result, the *Lafarge* case provides important direction to EBR leave applicants and respondents on a number of key issues, including: (i) the appropriate standard of proof at the leave stage; (ii) the applicability of the MOE's *Statement of Environmental Values* ("SEV") to instrument decisions; and (iii) the relevance of common law rights to instrument decisions.

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[2] S.O. 1993, c.28.

[3] *Dawber v. Ontario (Director, Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281; affd. (2008), 36 C.E.L.R. (3d) 191 (Ont.Div.Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008).

[4] R.S.O. 1990, c.E.19. In particular, the proponent was issued a certificate of approval (air) under section 9 of the EPA and provisional certificate of approval (waste) under section 39 of the EPA.

The threefold purpose of this paper is to:

- review the legislative context and jurisprudential background of the *Lafarge* case;

- analyze the *Lafarge* decisions of the Environmental Review Tribunal and the Ontario Divisional Court; and

- discuss the strategic and practical implications of the *Lafarge* case for persons seeking leave to appeal under the EBR.

To assist counsel representing EBR leave applicants, a checklist of leave-related considerations is attached to this paper as Appendix A.

PART II - BACKGROUND

(a) Third-Party Appeals under the EBR: Legislative History

After extensive public consultation, and acting on the advice of a multi-stakeholder advisory committee,[5] the Ontario Legislature enacted the EBR in 1993 and proclaimed it in force in 1994. Among other things, the EBR established new statutory tools intended to ensure environmental protection, enhance public participation, and increase governmental accountability for environmental decision-making.[6]

One of the key new tools included within the EBR was the creation of "third-party" appeal rights,[7] which enables Ontario residents to seek leave to appeal certain environmentally significant "instruments"[8] to an independent appellate body. The rationale for creating the third-party appeal mechanism was to redress the historical

[5] *Report of the Task Force on the Ontario Environmental Bill of Rights* (July 1992) ("EBR Task Force Report").
[6] EBR., section 2. Generally, see Muldoon & Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Emond Montgomery, 1995).
[7] EBR, sections 38 to 48.
[8] "Instruments" are defined by section 1 of the EBR as including "permit, licence, approval, authorization, direction or order issued under an Act."

imbalance between the appeal rights of instrument-holders and those persons who may be interested in, or affected by, the issuance of such instruments:

> The public participation provisions also include expanded appeal routes for instruments. Before the EBR was enacted, many instruments, such as licences, permits and orders issued by the Ministry of Environment and Energy (MOEE), could only be appealed by the person who has applied for the licence or permit, or by the person ordered to take some specified action… The EBR creates a new opportunity for citizens to appeal these decisions, at least in some instances. These public appeal rights differ from the proponents' appeal rights in that citizens are required under the EBR to obtain leave to appeal, and the EBR contains various criteria for the adjudicator or tribunal to consider when deciding whether or not leave to appeal should be granted.[9]

Significantly, the EBR Task Force recommended that an EBR leave applicant should be required to demonstrate that the intended appeal had "preliminary merit", in the sense that there was a *prima facie* case that the impugned instrument was unreasonable as issued and required review.[10]

The Ontario Legislature accepted the EBR Task Force's advice by enacting a leave test which prohibits the granting of leave unless it appears that: (a) there is good reason to believe that the decision to issue the impugned instrument was unreasonable; and (b) the decision could result in significant environmental harm.[11] In light of these two branches, the EBR leave test has been described as "stringent,"[12] and it appears that the majority of EBR leave applications have been dismissed by the ERT over the years, as discussed below.

(b) Third-Party Appeals under the EBR: Practice and Procedure

At the outset, it should be noted that the EBR's third-party appeal provisions do not automatically apply to all environmentally significant licences, permits, orders or approvals issued under Ontario law.

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[9] Muldoon & Lindgren, *supra*, p.48.
[10] EBR Task Force Report, *supra*, p.54.
[11] EBR, section 41.
[12] *Smith v. Ontario* (2003), 1 C.E.L.R. (3d) 245 (Ont. Div.Ct.), para.8.

Instead, the third-party appeal is only available in relation to instruments which have been prescribed by regulation as "Class I" or "Class II" for the purposes of the EBR. At the present time, such instruments include many types of approvals issued by the MOE under the EPA, *Ontario Water Resources Act*, and *Pesticides Act*.[13]

It should be further noted that the EBR establishes three conditions precedent before third-party appeal rights may be pursued by concerned Ontario residents in relation to Class I or II instruments.

First, subsection 38(1) of the EBR provides that Ontarians' right to seek leave to appeal only applies to those instrument decisions for which notice on the EBR Registry is required under section 22. Thus, if the impugned instrument is subject to EBR provisions which effectively exempt the instrument decision from being posted on the EBR Registry for notice purposes, then the EBR's third-party appeal rights are not available. For example, Class I or II instruments issued for emergency situations are expressly exempted from notice requirements under the EBR,[14] and therefore cannot be appealed via the third-party appeal provisions.

Second, the EBR specifies that another person must have a statutory right to appeal the instrument decision under another Act.[15] For example, since instrument-holders generally enjoy statutory rights to appeal certain Class I and II instruments under the EPA to the ERT, then corresponding third-party appeal opportunities exist for Ontario residents under the EBR in relation to such instruments. Conversely, if there is no statutory right of appeal under other legislation, then the third-party appeal provisions are inoperative.

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[13] O.Reg.681/94, as amended.
[14] EBR, section 29. Similar notice exemptions are found in section 30 (substantially equivalent public participation processes), section 32 (EA-approved or exempted undertakings), and section 33 (budget proposals).
[15] EBR, subsection 38(1), para.2.

Third, the EBR provides that in order to seek leave to appeal, the EBR applicant must have an "interest" in the instrument decision.[16] This "interest" requirement is largely intended to serve as a legislative "screen" to ensure that complete strangers, who lack any tangible connection to the impugned instrument decision, cannot initiate the quasi-judicial third-party appeal process under the EBR.[17]

Nevertheless, it is not difficult for an EBR leave applicant in most cases to demonstrate that he/she has a sufficient "interest" to satisfy the standing requirements under the EBR. For example, subsection 38(3) stipulates that the fact that the EBR applicant made written submissions on the proposed instrument during the EBR comment period "is evidence that the person has an interest in the decision on the proposal." Therefore, where the EBR applicant did, in fact, make such submissions, then the standing requirement under subsection 38(1) is fully satisfied.

However, where the EBR leave applicant failed or declined to make written submissions on the proposed instrument before it was issued, the third-party appeal mechanism may be still be available, provided that the applicant has a demonstrable "interest" in the matter. For example, it is open to an EBR leave applicant to show that he/she has a direct (or private law) interest in the matter, such as a pecuniary, proprietary or personal interest that may be adversely affected by activities permitted by the impugned instrument decision. Alternatively, an EBR leave applicant, such as a municipality or an environmental organization, may argue that it has public interest standing to challenge the impugned instrument.

Where all three conditions precedent under subsection 38(1) are satisfied, the EBR leave application must be served and filed no later than the 15th day after the date that notice of the instrument decision was posted on the EBR Registry.[18] Since the ERT has no legal authority to extend this short statutory deadline, it is incumbent upon EBR leave applicants to ensure that their leave materials are promptly served on the appropriate

[16] EBR, subsection 38(1), para.1.
[17] Muldoon & Lindgren, *supra*, p.98.
[18] EBR, section 40.

parties (e.g. instrument-holder, governmental decision-maker, and Environmental Commissioner) and filed (with proof of service) with the Secretary of the ERT.[19]

Arguably, the most important third-party appeal provision in the EBR is section 41, which frames the leave test as follows:

> **41.** Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
>
> (a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
>
> (b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

As described below, the EBR jurisprudence of the ERT has confirmed that both branches of the section 41 leave test must be satisfied before leave to appeal can be granted. Accordingly, the written argument and documentary evidence (e.g. correspondence, expert reports, studies, maps, emissions data, photographs, certificates of analysis, etc.) filed by EBR leave applicants must be aimed at demonstrating that the impugned instrument decision is unreasonable and could result in significant environmental harm.

Section 17 of the "general regulation" under the EBR provides, *inter alia,* that EBR leave applications shall generally be heard and determined in writing, and that the appellate body shall render its EBR leave decision within 30 days (unless it gives notice that additional time is required).[20] These general requirements have been augmented by the ERT's Rules of Practice, which set out specific rules regarding the service, content and processing of EBR leave applications heard by the ERT.[21] In essence, these rules provide that:

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[19] See, for example, *Miller v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 305 (ERT), where the ERT declined to hear an EBR leave application because it was not filed on time due to a courier delivery error. A request for reconsideration was denied: (2008), 37 C.E.L.R. (3d) 214 (ERT).
[20] O.Reg. 73/94, section 17.
[21] ERT Rules of Practice and Practice Directions (November 15, 2007), Rules 37 to 52.

- if an EBR applicant cannot submit all of the required information by the 15 day deadline, then the ERT may permit subsequent filing of the missing information within a specified timeframe (Rule 39);
- evidence tendered in relation to an EBR application does not need to be in the form of an affidavit (Rule 43);
- the written response by the instrument-holder and governmental decision-maker is due within 15 days of the filing of the EBR leave application (Rule 45);
- the EBR leave applicant may file a reply within three days after the written response of the instrument-holder and governmental decision-maker has been filed (Rule 47);
- the ERT may grant the EBR leave application in whole or in part (Rule 51); and
- where leave to appeal has been granted, the actual Notice of Appeal must served and filed within 15 days that the EBR applicant received the leave decision (Rule 52).

It should be noted that the mere filing of an EBR leave application does not stay or suspend the impugned instrument decision. However, where leave to appeal has been granted, the EBR imposes an automatic stay of the instrument decision, unless the appellate body orders otherwise.[22] Significantly, the EBR expressly prohibits any appeals from an EBR leave decision (presumably including any ancillary decision to lift or maintain the automatic stay).[23]

The EBR provides that the appellate body's ultimate determination of the appeal shall be made on grounds similar to those which would apply had the instrument-holder (or orderee) had exercised its statutory right of appeal under other legislation.[24] Moreover, in determining the appeal, the appellate body generally has the same powers that it would have if the instrument-holder (or orderee) had exercised its statutory right of appeal under other legislation.[25]

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[22] EBR, section 42.
[23] EBR, section 43.
[24] EBR, section 44.
[25] EBR, section 45.

In light of the foregoing provisions, there are a number of fundamental questions which must be considered by the appellate body when it is determining an EBR leave application:

- was the impugned decision made in relation to a Class I or II instrument for which EBR Registry notice was required under section 22 of the EBR?
- does the EBR applicant have an interest in the impugned instrument decision?
- was the EBR leave application served and filed on time and in accordance with prescribed requirements?
- has the EBR applicant satisfied both branches of the section 41 leave test?
- if so, should full or partial leave to appeal be granted? and
- should the automatic stay be lifted?

These and related questions are reflected in the checklist attached to this paper as Appendix A.

It should be noted that the Environmental Commissioner of Ontario plays a central role in monitoring and reporting upon the use of third-party appeal provisions under the EBR. For example, EBR leave applicants are required to serve their applications upon the Environmental Commissioner,[26] and the Environmental Commissioner is obliged to place notice of leave applications on the EBR Registry.[27] In addition, one of the specific functions of the Environmental Commissioner is to review and report upon the third-party appeal provisions to the Ontario Legislature.[28] Accordingly, every EBR leave application since the EBR came into force has been summarized in the Environmental Commissioner's Annual Report Supplements.

[26] O.Reg.73/94, subsection 17(2) and ERT Rules of Practice (November 15, 2007), Rule 41.
[27] EBR, section 47.
[28] EBR, subsection 57(h).

(c) History of EBR Leave Decisions: The Section 41 Track Record

After the EBR came into force in 1994, a limited number of third-party leave applications were brought by Ontarians in relation to prescribed instruments issued by the Ministry of the Environment ("MOE"). Most of these early applications were dismissed by the Environmental Appeal Board [now the ERT] for various procedural, substantive or jurisdictional reasons.

For example, the very first EBR leave application was brought in 1995, and involved a proposed appeal by a local resident against the MOE's issuance of an air approval under section 9 of the EPA for a wood manufacturing plant in northwestern Ontario.[29] While the EBR applicant was found to have sufficient standing to seek leave to appeal, the leave application was dismissed on its merits because the applicant failed to present sufficient evidence that the impugned decision was unreasonable and could cause significant environmental harm. In this case of first impression, the Environmental Appeal Board held that at the leave stage, an EBR applicant must prove both branches of the section 41 leave test on a balance of probabilities.

In 1996, however, for the first time the Environmental Appeal Board granted leave to appeal to citizens concerned about a proposed amendment to an EPA approval that would facilitate the re-opening of a long-dormant private landfill site.[30] More significantly, the Board's leave decision in this case disagreed with the previous ruling regarding the standard of proof, and concluded that the standard of proof at the leave stage is less than a balance of probabilities. Instead, this Board decision held that the EBR applicant must show that that his/her concerns about the instrument decision have a real foundation and are supported by substantial and relevant evidence.

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[29] *Re Hunter* (1995), 18 C.E.L.R. (N.S.) 22 (E.A.B.).
[30] *Barker v. Director* (1996), 20 C.E.L.R. (N.S.) 72 (E.A.B.).

This 1996 precedent was subsequently adopted and followed by the Board in a long line of EBR leave decisions,[31] including the ERT leave decision in *Lafarge* (which was upheld by the Divisional Court). Thus, the current state of the law is that while an EBR applicant is obliged to satisfy both branches of the section 41 leave test, the standard of proof is less stringent than the normal civil standard (e.g. balance of probabilities). Nevertheless, the EBR applicant must still demonstrate a *prima facie* case that there is reason to believe that the instrument decision is unreasonable and could result in significant environmental harm. It appears that this interpretation of the EBR leave test is entirely consistent with the "preliminary merits" approach recommended by the EBR Task Force, as discussed above.

Overall, however, it seems that leave to appeal has been refused far more often than it has been granted under the EBR. For example, a statistical review of all EBR leave applications brought during the first ten years of the EBR revealed that out of an estimated 14,000 instrument decisions issued by the MOE, only 54 were subject to EBR leave applications, and only a small handful of these applications were granted over the decade.[32]

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[31] See, for example, *Re Residents Against Company Pollution* (1996), 20 C.E.L.R. (N.S.) 97 (E.A.B.); *Re Ridge Landfill Corp.* (1998), 31 C.E.L. R. (N.S.) 190 (E.A.B.); *Federation of Ontario Naturalists v. Ontario (Director, Ministry of the Environment)* (1999), 32 C.E.L.R. (N.S.) 92 (E.A.B.); *Friends of Jock River v. Ontario (Director, Ministry of the Environment)* (2002), 44 C.E.L.R. (N.S.) 69 (ERT); *Simpson v. Ontario (Director, Ministry of the Environment)* (2005), 18 C.E.L.R. (3d) 123 (ERT); *Grey (County) v. Ontario (Director, Ministry of the Environment)* (2005), 19 C.E.L.R. (3d) 176 (ERT); and *Safety-Kleen Canada Inc. v. Ontario (Director, Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 88 (ERT).

[32] Birchall Northey, *Legal Review of the EBR Leave to Appeal Process* (September 2004), p.i. This study was conducted for the Environmental Commissioner of Ontario during his 10th anniversary review of the EBR, and is available upon request from the ECO office.

The annual breakdown of the 54 leave applications is as follows:[33]

YEAR	CASES: LEAVE DENIED	CASES: LEAVE GRANTED
1995	3	1[34]
1996	3	1
1997	2	1
1998	2	1
1999	5	4
2000	5	1
2001	6	0
2002	9	2
2003	5	2
2004	1	0

In summary, it appears that of the 54 EBR leave applications brought from 1995 to 2004, 41 were denied and only 13 were granted, in whole or in part. In other words, approximately two-thirds of all EBR leave applications were dismissed during this timeframe. It further appears that while 9 leave applications were brought in 2002, on average only 5 or 6 EBR leave applications were brought per year. It seems likely that

[33] *Ibid.,* Summary Chart.
[34] This is *Re Residents Against Company Pollution, supra.* The EBR leave application was filed in September 1995 but was decided in June 1996 after *Re Barker, supra.*

the relatively low number of EBR leave applications, and the relatively low success rate of EBR applications, has continued from 2004 to date.

(d) Overview of the Lafarge Case

Interestingly, despite the above-noted body of EBR leave decisions, and despite the fact that the EBR has been in effect for almost 15 years, the third-party appeal provisions were not judicially construed in detail until 2008 during the *Lafarge* litigation.[35]

In the *Lafarge* case, a number of concerned residents and environmental groups applied under the EBR for leave to appeal two waste-burning approvals that had been issued by MOE Directors to Lafarge Canada Inc. in December 2006. In particular, the two approvals purported to allow Lafarge Canada Inc. to collect, store and burn "alternative fuels" (e.g. scrap tires, pelletized plastic waste, meat/bonemeal waste, and cellulose-based waste) at its cement manufacturing facility on the Lake Ontario shoreline near Bath.

In its precedent-setting decision in April 2007, the Environmental Review Tribunal ("ERT") granted leave to appeal to some – but not all – of the EBR leave applicants.[36] The successful applicants then filed notices of appeal, and the ERT held a series of preliminary hearings to identify parties, define the issues in dispute, impose disclosure obligations, and address other procedural matters.

However, while these preliminary proceedings were underway, Lafarge commenced a judicial review application to quash the ERT's leave decision. This application was supported by the MOE Directors, but was opposed by the parties who had obtained leave from the ERT. In light of the pending judicial review application, the ERT adjourned the main hearing, which had been scheduled for 10 weeks in late 2008.

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[35] The EBR's third-party appeal provisions were briefly referenced in *obiter* in *Smith v. Director, supra*, but this case centred on an interlocutory decision by the ERT to strike out an issue from a Notice of Appeal, rather than the substantive requirements of the EBR leave test.

[36] *Dawber v. Ontario (Director, Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 (ERT).

Prior to the Divisional Court hearing, a coalition of industry associations applied under Rule 13 for leave to intervene in the judicial review application, but this motion was dismissed by a motions judge.[37] The Environmental Commissioner of Ontario also brought a motion for leave to intervene as a friend of the court on issues related to the MOE's SEV. This motion, too, was dismissed at first instance by the motions judge, but this dismissal was subsequently overturned by a three-judge panel of the Divisional Court,[38] and the Environmental Commissioner was permitted to make written and oral submissions regarding the SEV aspects of Lafarge's judicial review application.

In April 2008, the Divisional Court held a three day hearing on Lafarge's judicial review application, and then reserved its decision. In June 2008, the Divisional released its detailed judgment and unanimously dismissed Lafarge's judicial review application. The Divisional Court subsequently made an order awarding costs to the three parties that opposed the Lafarge judicial review application, and made these costs 75 % payable by Lafarge and 25% payable by the MOE Directors.

Lafarge then brought a motion before the Ontario Court of Appeal for leave to appeal the Divisional Court decision. This application was supported, in part, by the MOE Directors, but was opposed by the three parties that had obtained EBR leave from the ERT. In November 2008, a three-judge panel of the Court of Appeal dismissed the Lafarge leave motion with costs and without reasons.

In the wake of this unsuccessful motion, Lafarge indicated that it will no longer be pursuing the "alternative fuels" project at the Bath facility. Lafarge then requested the ERT to terminate the appeal hearing and asked the MOE Directors to formally revoke the two EPA approvals, and the MOE Directors have agreed to do so. On this basis, it is anticipated that the ERT will issue an order dismissing the proceeding pursuant to ERT

[37] *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CarswellOnt 1026 (Ont. Div. Ct.).
[38] *Lafarge Canada Inc., v. Ontario (Environmental Review Tribunal)*, 35 C.E.L.R. (3d) 157 (Ont. Div. Ct.).

Rule 194, and the ERT may adjudicate cost claims made by the appellants against Lafarge if such claims are not otherwise settled by the parties.

The overall result of this litigation chronology is that the ERT's leave decision has been left wholly intact, and it continues to serves as an important precedent for prospective EBR appellants. In addition, the Divisional Court's decision provides additional clarity and judicial direction on the proper approach to interpreting and applying the EBR leave test.

Accordingly, the remainder of this paper will identify the highlights of both the ERT and Divisional Court decisions, and will explore some strategic and practical considerations for EBR appellants in the aftermath of the *Lafarge* case.

PART III – ANALYSIS OF THE *LAFARGE* CASE

Over the course of the *Lafarge* proceedings, there were a number of interlocutory decisions on various procedural and jurisdictional matters, both in court and before the ERT. However, this paper will focus on the two key substantive decisions: (a) the ERT's leave decision dated April 4, 2007; and (b) the Divisional Court's decision dated June 18, 2008 in relation to Lafarge's judicial review application.

(a) The ERT Leave Decision

The ERT's leave decision under the EBR is noteworthy – and potentially ground-breaking – in many respects. The most salient aspects of the ERT's leave decision are summarized below.

(i) Standing Requirements

The ERT referred to the standing requirement under subsection 38(1) of the EBR, and found that most EBR leave applicants in the case had an "interest" because they had

previously filed written submissions on the two proposed instruments during the EBR comment period. Similarly, two other EBR leave applicants were found to have a sufficient "interest" due to their proximity to the Lafarge's cement plant, although these applicants resided on an island several kilometres away from the Lafarge facility.

However, the ERT questioned whether one EBR leave applicant (who resided in Ottawa) had a sufficient "interest" merely because his son lived and studied in Kingston, which is located east of the Lafarge facility.[39] Ultimately, the ERT found it unnecessary to decide this particular standing issue since this person's EBR leave application was dismissed for lack of evidence in any event.

(ii) Standard of Proof

In relation to the section 41 leave test, the ERT followed the above-noted line of EBR jurisprudence, and held that the appropriate standard of proof at the leave stage is lower than 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.

(iii) Two Branches of the Leave Test

The ERT affirmed previous EBR jurisprudence that both branches of the section 41 leave test must be satisfied before leave to appeal may be granted. In considering the "environmental harm" branch of the test, the ERT concluded that the fact that an impugned instrument is prescribed under the EBR indicates the environmental

[39] Interestingly, the ERT panel which was subsequently seized with this matter granted party status to the City of Kingston so that the municipality could participate in the public hearings.

significance of the decision, but evidence relating to potential harm should also be considered by the ERT.

(iv) Evidentiary Considerations

When considering the EBR leave applications filed by unrepresented individuals in the case, the ERT acknowledged that these persons had articulated genuine concerns about the two waste-burning approvals issued to Lafarge. However, these EBR leave applications were dismissed because they were not accompanied by any supporting materials of any real weight, nor were they accompanied by expert reports or substantive analysis.

(v) Applicability of the SEV to Instrument Decisions

When considering the more detailed EBR leave applications submitted by local landowners, residents' groups, and an environmental organization based in Toronto, the ERT concluded that the MOE's SEV was part of the "relevant law or policy" framework that was developed to guide the MOE's decision-making respecting instruments. On this point, the ERT followed previous EBR leave decisions which had affirmed the applicability of the SEV to instrument decisions.[40]

(vi) Relevance of Regulatory Standards

The ERT rejected suggestions from the MOE Directors that the reasonability of their instrument decisions should be judged on whether Lafarge would be in compliance with numerical limits set out in the applicable regulatory emission standards. Similarly, the ERT held that while it is not necessary to assess the overall reasonableness of the statutory regime, it is open to the ERT go beyond the regulatory standards and consider other principles, policies or prohibitions (e.g. section 14 of the EPA) that are relevant to

[40] See, for example, *Dillon v. Ontario (Director, Ministry of the Environment)* (2002), 45 C.E.L.R. (N.S.) 9 (ERT). The Environmental Commissioner of Ontario has also concluded that the SEV should be directly applied to instrument decisions: see, for example, ECO 2002-03 Annual Report Supplement, at pp.58-59.

the MOE Directors' discretion to issue prescribed instruments. The ERT further noted that the relevant regulatory regime expressly empowered the MOE Directors to impose site-specific approval conditions which were more stringent than the province-wide standards.

(vii) The Ecosystem Approach

With respect to the "ecosystem approach" mandated by the MOE SEV, the ERT highlighted the need to undertake cumulative effects analysis, and to assess baseline conditions of local air and water conditions. On the evidence, the ERT found that the MOE Directors had not taken such steps prior to the issuance of the two impugned instruments.

In addition, the ERT strongly rejected arguments from the MOE Directors that the "ecosystem approach" was adequately reflected in the "point of impingement" air pollution standards which were applicable to the Lafarge facility. Accordingly, the ERT found that no reasonable person would have issued the impugned instruments without assessing the potential cumulative ecological consequences of waste-burning at the Lafarge facility.

(viii) The Precautionary Approach

With respect to the "precautionary approach" mandated by the MOE SEV, the ERT noted that the MOE appeared to be uncertain about whether tire-burning would cause adverse effects and, in fact, had proposed a province-wide regulatory ban on tire-burning on the same day that the two waste-burning approvals were issued to Lafarge. In proposing the ban, the MOE acknowledged that since no Ontario facility currently incinerates tires, the MOE had no experience in monitoring the environmental performance of tire-burning.

In such circumstances, the ERT concluded that the instrument decisions were inconsistent with the precautionary approach, which presumes harm in the absence of proof to the

contrary. Accordingly, the ERT found that there was good reason to believe that no reasonable person would have issued the waste-burning approvals in question.

(ix) Resource Conservation

With respect to the "resource conservation" principle mandated by the MOE SEV, the ERT found that the resource conservation justification for Lafarge's alternative fuels project had not been established, and further found that conditions in the two waste-burning approvals may be inadequate to prevent the burning of recyclable materials at the Lafarge facility. On the evidence, however, the ERT was unable to find there was reason to believe that this SEV principle was applicable in the instant case.

(x) Public Participation

With respect to the "public participation" principle mandated by the MOE SEV, the ERT acknowledged that certain technical documents generated by Lafarge were submitted to (and relied upon) the MOE after the close of the EBR comment period. Although these technical documents were not subject to public review and comment, the ERT was unable to find that this failure meant that it was unreasonable for the Directors to have issued the two waste-burning approvals.

(xi) Common Law Rights of Local Landowners

Over the objections of the MOE Directors, the ERT found that the common law rights of neighbouring landowners were relevant considerations during the decision-making process for the two instruments. The rationale for this approach is twofold: (a) statutory approvals may authorize activities which could create an actionable nuisance or contravene other common law rights; and (b) the existence of such approvals may give rise to the defence of "statutory authority" and thereby impair or prejudice the exercise of common law rights to protect the environment. In the circumstances, the ERT concluded that it appeared to be unreasonable for the MOE Directors to expressly decline to

consider the neighbours' common law rights prior to issuing the two waste-burning approvals.

(xii) Community Discrimination

The EBR leave applicants argued that the MOE's proposal to ban tire-burning across Ontario, and the MOE's simultaneous issuance of approvals to allow this very activity to occur at the Lafarge plant under the two waste-burning approvals, constituted unwarranted discrimination against the residents of Bath. Relying upon previous EBR jurisprudence,[41] the ERT affirmed the importance of consistency in environmental regulation, and concluded that it appeared to be unreasonable for the MOE Directors to authorize Lafarge's waste-burning activities and thereby expose Bath residents to potential adverse effects to which no other Ontario community may be subject.

(xiii) Significant Environmental Harm

In assessing the parties' conflicting evidence regarding the potential for environmental harm, the ERT held that predicted compliance with regulatory emission standards does not necessarily mean that significant environmental harm will not occur. In addition, while noting that the parties' evidence was "diametrically opposed" on the question of environmental harm, the ERT concluded as follows:

> 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.

In reaching this conclusion, the ERT noted that the evidentiary record submitted by the EBR leave applicants included opinion evidence from credible, qualified experts, and expressions of concern from local medical officers of health. Accordingly, the ERT

[41] *Safety-Kleen Canada Inc., supra.*

concluded that the MOE Directors' instrument decisions could result in significant environmental harm within the meaning of the section 41 leave test.

(xiv) Appropriate Remedy

For the EBR leave applicants who satisfied both branches of the section 41 leave test, the ERT granted full leave to appeal both waste-burning approvals in their entirety, and further specified that the grounds of appeal shall not be limited to those advanced at the leave stage, unless the ERT ordered otherwise.

(b) The Divisional Court Decision

As noted above, the Divisional Court unanimously dismissed Lafarge's judicial review application and, in effect, upheld the ERT leave decision in its entirety.

Nevertheless, the Divisional Court decision is noteworthy – and potentially ground-breaking – in its own right for several reasons, as discussed below. This is particularly true since the Ontario Court of Appeal refused to grant Lafarge leave to appeal the Divisional Court decision.

(i) Prematurity

On its own initiative, the Divisional Court raised the question of whether Lafarge's judicial review application was premature, especially in light of section 43 of the EBR (which prohibits appeals against leave decisions). The Court also referred to caselaw suggesting that in the absence of special circumstances, there should be no judicial review of interlocutory decisions, such as a decision to grant or refuse leave to appeal. Nevertheless, in light of the importance of the legal issues raised by the Lafarge judicial review application, the Divisional Court, in its discretion, proceeded to determine the application on its merits.

(ii) Standard of Review

The Divisional Court considered the recent Supreme Court of Canada decision in *Dunsmuir*,[42] and found that: (a) section 43 of the EBR was a "weak" privative clause that nonetheless indicated the Legislature's intention that EBR leave decisions should be final; (b) the ERT is a specialized body, with expertise in environmental law and policy; (c) the ERT is familiar with the EBR, and its interpretation of section 41 is entitled to deference; and (d) the ERT's consideration of the leave test involves mixed questions of fact and law, rather than a true question of jurisdiction or *vires*. Having regard for these factors, the Divisional Court held that the applicable standard of review was "reasonableness" rather than "correctness" [para.36].

(iii) Interpretation of the Section 41 Leave Test

In construing the section 41 leave test, the Divisional Court noted the "unusual wording" of the provision, and characterized the test as "stringent." However, the Court referred to the public participation objectives of the EBR, and observed that "although there is a presumption against it, the granting of leave is not insurmountable" [para. 42].

With respect to the standard of proof under section 41, the Divisional Court strongly affirmed the ERT's long-standing position that a *prima facie* case – rather than "balance of probabilities" – was appropriate at the EBR leave stage:

> The Tribunal held that the standard of proof was lower than a balance of probabilities, requiring the application be founded on a substantial and relevant information base…
>
> We are of the view that the Tribunal was not only reasonable, but correct, in stating that the standard of proof was less than a balance of probabilities. At the leave to appeal stage, the appropriate standard of proof is an evidentiary one – i.e. leading sufficient evidence to establish a *prima facie* case, or showing that the appeal has "preliminary merit", or that a good arguable case has been made out, or that there is a serious question to be tried. Although worded differently, all of

[42] *Dunsmuir v. New Brunswick*, [2008] SCC 9.

> these phrases point to a uniform standard which is less than a balance of probabilities, but amounting to satisfying the Tribunal that there is a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process…
>
> In our view, the Tribunal was not only reasonable, but correct in its interpretation given to s.41 of the EBR [para.43, 45, 48].

(iv) Applicability of the MOE SEV to Instrument Decisions

The Divisional Court reviewed – and rejected – various legal arguments made by Lafarge and the MOE Directors that the SEV was not applicable to instrument decisions. Relying upon sections 7 and 11 of the EBR, the Court concluded that there was no legislative exemption that allowed the MOE Directors to exclude consideration of the SEV when making decisions on whether to issue Class I or II instruments:

> We conclude that the Tribunal was reasonable in finding that leave should be granted because of the failure to apply the SEV. The Tribunal concluded that the SEV falls within "government policies developed to guide decisions of that kind", which was consistent with past jurisprudence of the Tribunal on SEVs…
>
> Under an ecosystem approach, decisions are made by measuring the effects on the system as a whole, rather than on their constituent parts in isolation from each other. Therefore, it was reasonable for the Tribunal to have concluded that without assessing the specific potential cumulative ecological consequences of approving the Lafarge applications, and given the concern that the CofAs were made in the face of uncertainty about environmental risk from adverse effects, the Directors' decision was unreasonable because of the failure to take into account SEV principles…
>
> On this ground alone, we conclude that it was reasonable for the Tribunal to conclude that the test in the first part of s.41 was met. [para.57, 60, 61].

(v) Common Law Rights

The Divisional Court held that it was reasonable for the ERT to conclude that the Directors' decisions were unreasonable because of their failure to consider the common law rights of landowners, especially "given the Tribunal's findings the serious risk of off-site harm and its conclusion with respect to the SEV" [para.63]. Thus, the Court

concluded that for various reasons, the ERT's interpretation that the common law is "relevant law" for the purposes of section 41 should be given deference. The Court further noted that because regulatory approval may negate common law rights, "when a Director is considering approving an activity which might constitute a nuisance or another tort, it may be necessary to require more protective and stringent conditions, given the potential for migration of substances off-site" [para. 64].

(vi) Inconsistent Environmental Effects between Communities

The Divisional Court reviewed the ERT's reasoning in relation to "environmental inconsistency", and found that it was reasonable for the ERT to "conclude that it would be discriminatory to the community of Bath to potentially expose its residents to the effects of a tire-burning process while at the same time considering not permitting anywhere else in the province" [para.66].

(vii) Significant Harm to the Environment

The Divisional Court referred to the "diametrically opposed" evidence adduced by the parties on the potential risks to the environment, and noted the ERT's conclusion that the EBR leave applicants had presented a substantial information base that established the potential for significant environmental harm from the use of "alternative fuels" at the Lafarge facility. The Court went on to conclude:

> Despite the stringent approval process and the conditions in the CofAs, it was not unreasonable in the circumstances for the Tribunal to find that such tire-burning activity, with which there has been little or no experience, could result in significant environmental harm.
>
> The Tribunal gave adequate reasons for concluding that the second branch of s.41 had been satisfied. That decision was reasonable, and the Court should not second guess the Tribunal in this regard [para. 70, 71].

(viii) The Waste Approval under Part V of the EPA

During the judicial review hearing, Lafarge and the MOE argued that the ERT did not undertake a sufficient analysis of the waste approval issued to Lafarge, and did not adequately explain why leave to appeal was granted for both the air and waste approvals. The Divisional Court succinctly rejected such arguments, and held that "given the interrelatedness of the two CofAs, it was reasonable for the Tribunal to grant relief with respect to both certificates, and its reasons were adequate to reveal the basis for its decision" [para.74].

(ix) Scope of the Appeal

Lafarge and the MOE Directors argued that it was jurisdictionally improper for the ERT, when granting leave to appeal, to specify that the scope of the appeal was not limited to grounds or issues that had been raised in the EBR leave applications. The Divisional Court rejected such arguments, primarily on the basis that the wording of the section 41 leave test focuses on the Directors' decisions, not particular grounds that EBR leave applicants are able to advance at the leave stage. Thus, it was reasonable for the ERT to refrain from limiting the scope of the appeal at the leave stage, and the Court noted that the ERT's order allowed it to maintain its overall authority over the scope of the appeal as the matter proceeded to a hearing on the merits [para.76].

(x) *Laches*

The Divisional Court considered whether Lafarge's judicial review application was barred by the doctrine of *laches*, given that eight months elapsed between the ERT's leave decision (April 2007) and the perfection of the judicial review application (November 2007). Because the Court dismissed the application on its merits, the Court declined to make a specific finding regarding *laches*, but warned other prospective judicial review applicants to move in a timely fashion or risk having their applications dismissed for delay [para.81].

PART IV – IMPLICATIONS OF THE *LAFARGE* CASE FOR EBR LEAVE APPLICANTS

Given the timing constraints, cost implications, procedural steps, and evidentiary requirements of the EBR's third-party appeal provisions, it appears that the outcome of the *Lafarge* case will not open the floodgates to numerous EBR applications in the short- or long-term.

Instead, as long as the EBR's third-party appeal provisions remain unchanged by the Ontario Legislature, it seems reasonable to anticipate that the ERT will continue to receive the usual small number of EBR leave applications (e.g. about a half-dozen per annum, out of the thousands of prescribed instrument decisions that are posted yearly on the EBR Registry). Similarly, the ERT's overall track record in refusing/granting EBR leave applications will likely continue without radical change (e.g. the majority of leave applications will be unsuccessful).

Nevertheless, the *Lafarge* case clarifies and expands the types of appeal grounds which may find favour with the ERT in future EBR leave applications. Therefore, to maximize the likelihood of success under the third-party appeal provisions, prospective EBR leave applicants should have regard for the following considerations.

(a) The 15 Day Deadline under the EBR

As noted above, there is a tight 15 day timeframe for serving and filing an EBR leave application, and the ERT has no jurisdiction to alter or extend this statutory deadline. Therefore, it is critically important for prospective EBR leave applicants to closely monitor the EBR Registry for a notice of decision on the proposed instrument to ensure that they are aware of (and comply with) the deadline for an EBR leave application.

Where an interested person has been actively involved in an ongoing debate with a proponent or the governmental decision-maker over a proposed instrument, and where that person has made submissions on the proposal during the EBR comment period, monitoring the EBR Registry and keeping tabs on the status of the proposal usually does not pose any significant difficulties. For example, in the *Lafarge* proceedings, most of the individuals and groups who obtained leave to appeal had been involved in the "alternative fuels" dispute for several years, and had made detailed submissions on the proposal to MOE officials.

However, the daunting challenge for counsel representing an EBR leave applicant arises in situations where the client missed (or was unaware of) the EBR comment period, and only finds out about the instrument decision (e.g. through the media or other means) partway through the 15 day timeframe. In such cases, counsel must act quickly to collect the relevant documentation, craft the EBR leave application, and arrange to have it served and filed on time. If the client finds out about the instrument decision after the 15 day deadline has expired, then the only option for legally challenging the instrument may be through judicial review (e.g. if the governmental decision-maker fundamentally failed to comply with public notice/comment requirement s under Part II of the EBR).[43]

With respect to delivery of the leave application, personal service is usually the most practical and reliable method of service, especially since EBR leave applications (and supporting documents) are often too unwieldy to serve by fax or email, and delivery by courier or the postal service may be problematic if left to the last minute.[44] For example, in the *Lafarge* proceedings, the represented EBR leave applicants utilized personal service (e.g. articling students or professional process servers) to deliver the extensive EBR application and reply materials on time.

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[43] EBR, subection 118(2).
[44] *Miller v. Ontario (Director, Ministry of the Environment), supra.*

(b) Standing

The easiest and most effective way to demonstrate an "interest" in the impugned instrument decision is for the EBR leave applicant to make a written submission during the EBR comment period on the proposed instrument. In such cases, it is good practice to append a copy of the written submission (as well as the relevant EBR Registry notice for the proposal) as an attachment to the EBR leave application. In the *Lafarge* proceedings, for example, standing was essentially a non-issue for the successful EBR leave applicants because they had filed submissions when the instruments were first proposed.

However, it is conceivable that an interested person may have missed the EBR Registry notice on the instrument proposal, or may have failed to file any written submissions on the instrument proposal. If so, then his/her counsel should ensure that the EBR leave application adequately demonstrates that the client has private or public interest standing to bring the application, despite the absence of a previous written submission. Where appropriate, the EBR leave application could also briefly explain why no written submission was previously made on the instrument proposal (e.g. work/holiday travel, language barrier, computer/internet difficulties, etc.).

(c) Access to Information

In many instances, there is a lengthy and detailed paper trail that is created in relation to instrument proposals subject to Part II of the EBR. For example, proponents' approval applications under MOE statutes generally include voluminous technical reports, studies and other supporting documentation. In addition, MOE officials often generate correspondence, reports, memoranda and other records in relation to the proposed instrument and its potential environmental effects. Other ministries, agencies, municipalities, or other public authorities may also send or receive documents that are relevant to the proposed instrument.

To the maximum extent possible, and as early as possible, EBR leave applicants should attempt to collect and review these documents in order to identify facts, technical data, or scientific information which support their EBR leave applications. These documents can be directly requested from the MOE and/or the proponent, or can be accessed by filing Freedom of Information ("FOI") requests under federal, municipal or provincial legislation. For example, in the *Lafarge* proceedings, one of the EBR leave applicants filed a provincial FOI request before the instrument decisions were made, and thereby obtained access to a number of useful records held by the MOE.

It should be noted, however, that the timeframe for governmental response under FOI legislation is typically longer than the 15 day appeal period under the EBR. Similarly, where access is refused, it can take a considerable amount of time for FOI appeals to be resolved through mediation or adjudication. Accordingly, FOI requests should be filed as expeditiously as possible in order to obtain access to relevant records well before the EBR appeal period expires.

(d) The MOE SEV

In the *Lafarge* proceeding, both the ERT and the Divisional Court affirmed the importance of the MOE SEV, and held that the various principles set out in the MOE SEV (e.g. precautionary principle, ecosystem approach, etc.) should be considered when decisions respecting instruments are being made by MOE officials, pursuant to section 11 of the EBR.

Thus, EBR leave applicants should carefully consider whether impugned instrument decisions properly reflect, or are consistent with, these SEV principles. Similarly, EBR leave applicants should assess whether there is any evidence that the decision-maker did, in fact, consider and apply the SEV principles, particularly in cases where the decision-maker may claim to have done so, but cannot point to any persuasive proof that this actually occurred.

It should be noted that the MOE SEV at issue in the *Lafarge* case has recently been replaced by a newer version which was publicly released in late 2008, mere weeks before the Ontario Court of Appeal refused leave to appeal the Divisional Court decision. Significantly, the new MOE SEV still does not expressly address or acknowledge its applicability to instrument decisions, but the Divisional Court decision in the *Lafarge* clearly held that the SEV should be considered when decisions respecting prescribed instruments are being made.

In addition, the new MOE SEV still contains various commitments to ensuring environmental protection, resource conservation, and cumulative effects analysis, and still affirms the importance of public participation in environmental decision-making. However, there is some concern that the well-known precautionary principle, as articulated in the former SEV, has been supplanted by a curiously worded provision that purports to commit the MOE to a "precautionary, science-based" approach to decision-making. Given the uncertainty surrounding this phrase, it remains to be seen what this new approach will mean in practice, and how it may be interpreted by the ERT in future EBR leave applications.

(e) Indicia of Unreasonable Decisions

In the *Lafarge* case, the ERT based its finding that the two EPA approval decisions appeared "unreasonable" on a number of considerations: (a) failure to undertake the "ecosystem approach" since baseline conditions and cumulative effects were not assessed; (b) failure to implement the precautionary principle, given the lack of MOE experience and uncertainty regarding tire-burning in Ontario; (c) failure to consider common law rights of nearby landowners; and (d) "community discrimination" caused by the potential creation of environmental risks not faced by other Ontario residents.

Accordingly, EBR leave applicants will be well-advised to carefully examine whether one or more of these considerations arise in the context of the instrument decision being challenged. If so, then appropriate evidence and argument should be assembled within

the EBR leave application to substantiate these allegations. Consideration should also be given to whether the impugned instrument decision is consistent with other relevant laws, regulations, policies, and guidelines.

(f) Evidence of Significant Environmental Harm

It cannot be overemphasized that in order to obtain leave to appeal, EBR leave applicants must present a real and substantial evidentiary basis for their allegations that the impugned instrument decision could result in significant environment harm. In other words, it is insufficient for EBR leave applicants to simply raise general concerns or state vague objections to the activity or facility that is authorized under the impugned instrument decision.

It should be noted that to satisfy the section 41 leave test, EBR leave applicants do not have to prove actual harm to the environment (which, in any event, would be difficult to demonstrate for proposed activities or facilities which have not yet been implemented). Instead, EBR leave applicants must show that despite any terms and conditions in the impugned instrument, there is a potential for significant environmental harm to occur in the circumstances.

To satisfy this evidentiary burden in the *Lafarge* case, the represented EBR leave applicants appended three detailed expert reports to their leave application, and filed further expert reports in reply to opinion evidence presented by Lafarge and the MOE Directors. While it may not be necessary (or even possible) to retain experts in all EBR leave cases (particularly in light of the timing issues and cost implications), the filing of expert evidence is highly advisable in order to maximize the chances of success on EBR leave applications.

The ERT has recently indicated that in some situations, where the alleged deficiencies in the instrument or its supporting documentation are readily apparent, it may be sufficient for EBR leave applicants to point out these problems without the benefit of expert

evidence. However, where it is not clear on the record whether – or to what extent – there may be problems with the impugned instrument decision, then there is an obligation on EBR leave applicants to go further by presenting evidence supporting the allegations in their leave applications.[45] In short, simply filing newspaper clippings, internet articles, or other general materials in support of an EBR leave application may be insufficient for the purposes of satisfying the ERT, on a *prima facie* or "preliminary merits" basis, that the impugned instrument decision could result in significant environmental harm.

(g) Order Requested

It should be noted that EBR leave applicants essentially have two options when framing the order that they are requesting from the ERT: (a) they can ask for leave to appeal the impugned instrument in its entirety, including all general and special conditions attached thereto; or (b) they can ask for leave to appeal only in relation to specific terms and conditions in the impugned decision. In the *Lafarge* case, the EBR leave applicants requested – and obtained – leave to appeal both EPA instrument decisions in their entirety.

The Divisional Court decision in *Lafarge* affirmed that it was permissible for the ERT, when granting leave to appeal an instrument decision, to specify that the appeal grounds are not limited to those raised in the EBR leave application, unless the ERT orders otherwise. Therefore, it is good practice for an EBR leave applicant to request the ERT to provide similar direction in other cases, particularly where full leave to appeal is being sought. Ultimately, however, it is up to the ERT to decide whether leave to appeal should be granted in whole or in part, or whether leave to appeal should be refused.

[45] *Marshall v. Ontario (Director, Ministry of the Environment)* (2008), 38 C.E.L.R. (3d) 291 (ERT), para.28-33.

(h) Request for Reconsideration

If the EBR leave application is dismissed by the ERT, the leave applicant should consider whether there is reason to bring a motion for reconsideration of the leave decision, pursuant to ERT Rules 230 to 235. For example, if the leave decision contains a material error of fact, law or jurisdiction that may have affected the outcome, or if there is fresh evidence that should be admitted and considered by the ERT, then counsel for EBR leave applicants should review the possibility of bringing a motion for reconsideration. In light of section 43 of the EBR, and in light of the Divisional Court's decision in *Lafarge*, a motion for reconsideration may be the only viable alternative to seeking judicial review in most instances.

PART V – CONCLUSIONS

The outcome of the *Lafarge* case may lead to renewed public interest in utilizing the third-party appeal provisions of the EBR to challenge the issuance of instruments which authorize activities or facilities which create the risk of off-site impacts to the environment or public health.

However, given the procedural and substantive hurdles associated with the leave to appeal process, it seems unrealistic to expect a proliferation of EBR leave applications across Ontario. Instead, there is likely to be a slight increase in the number of leave applications, but given the overall number of EBR instrument decisions that are made in Ontario each year, the actual percentage of decisions that are challenged by third-party appeals will likely remain minimal.

In addition, given the "stringent" two-branch leave test under section 41 of the EBR, it seems reasonable to anticipate that most leave applications will continue to be dismissed for factual, legal or jurisdictional reasons. Nevertheless, by focusing EBR leave applications on grounds that were successful in the *Lafarge* case, and by presenting

credible evidence and cogent argument in support of these grounds, then EBR applicants can clearly improve their odds of obtaining leave to appeal under the EBR.

APPENDIX A

CHECKLIST OF CONSIDERATIONS FOR EBR LEAVE APPLICANTS

Before serving and filing an application for leave to appeal under the EBR, counsel representing leave applicants should have regard for the following considerations:

(a) Conditions Precedent

- is the approval or order prescribed as a Class I or II instrument under O.Reg. 73/94 (as amended) for which EBR Registry notice is required? In particular, are there any EBR provisions which exempt the instrument decision from the notice requirements under section 22 of the EBR?

- does another person have a statutory right of appeal under another Act in relation to the approval or order?

- does the leave applicant have an interest in the approval or order by reason of:

  (i) submission of a written comment during the EBR comment period?
  (ii) personal, proprietary, or pecuniary interest? or
  (iii) public interest standing?

(b) Timing Requirements

- is the EBR leave application being brought within 15 days after the date upon which:

  (i) notice of the instrument decision was posted on the EBR Registry; or
  (ii) notice that another person is exercising a statutory appeal right was posted on the EBR Registry?

(c) The EBR Leave Test

- with respect to the "unreasonability" branch of the leave test, is there evidence or argument indicating that:

  (i) the SEV was not considered or properly reflected in the instrument decision (e.g. the decision is not "precautionary" or "science-based"; the ecosystem approach was not undertaken due to inadequate assessment of baseline conditions/cumulative effects, etc.)?

  (ii) common law rights of nearby landowners were not considered, or were not adequately protected?

(iii) the local community may be exposed to risks/impacts to which other Ontario communities are not exposed?

(iv) the instrument is inconsistent with applicable laws, regulations, policies or guidelines?

- with respect to the "significant environmental harm" branch of the leave test, is there evidence or argument indicating that:

(i) the proponent's application/supporting documentation is incomplete, or contains errors and omissions, or is based upon flawed methodology/assumptions, or lacks site-specific or empirical data, or does not address key issues at a sufficient level of detail?

(ii) the terms/conditions in the instrument decision are inadequate to protect the environment or public health (e.g. inadequate provisions relating to site design/operation, pollution prevention, monitoring/reporting, mitigation/contingency measures, expiry date/renewal, etc.) ?

(iii) qualified experts conclude that the instrument decision will cause risks/impacts upon the environment or public health?

(iv) the instrument-holder's environmental performance has not been acceptable in relation to other similar undertakings?

- with respect to the appropriate remedy, should the EBR leave application request leave to appeal the instrument decision in its entirety, or just in relation to certain terms and conditions?

- should the EBR leave application request the ERT to specify that if leave to appeal is granted, then the grounds of appeal should not be limited to those advanced at the leave stage, unless otherwise ordered by the ERT?

(d) Documentary Requirements

- does the EBR leave application (and supporting documentation) address all the content requirements prescribed by ERT Rule 38?

- does the EBR leave application indicate whether additional time is required to supply the prescribed information, pursuant to ERT Rule 39?

(e) Service Requirements

- have suitable arrangements been made to ensure timely delivery of the EBR leave application upon:

(i) the governmental decision-maker?
(ii) the instrument-holder?
(iii) the Environmental Commissioner of Ontario?
(iv) the Environmental Review Tribunal?

- does notice and/or EBR Registry text regarding the leave application have to be provided to the Environmental Commissioner under section 47 of the EBR?

(f) Reply

- is there evidence or argument that should be submitted as reply within three days of receipt of the response from the instrument-holder and/or decision-maker?

(g) Automatic Stay

- if leave to appeal is granted, are there reasons why the automatic stay of the impugned decision should be lifted, or should it remain intact?

(h) Request for Reconsideration

- if the leave application is denied, are there grounds for requesting a reconsideration of the leave decision under ERT Rules 227-234?

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