Court File No. M36552

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

LAFARGE CANADA INC.

Moving Party

-and-

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

Respondents

- and –

THE ENVIRONMENTAL COMMISSIONER OF ONTARIO

Intervenor

FACTUM OF THE RESPONDENTS LAKE ONTARIO WATERKEEPER AND GORDON DOWNIE

PART I – THE FACTS

1. The Respondents Lake Ontario Waterkeeper and Gordon Downie ("the Respondents") agree with the facts set out in paragraphs 1, 2, 3, the first two sentences of paragraph 4, the final sentence in paragraph 5, paragraphs 6, 7, the first sentence in paragraph 8, and paragraphs 11 and 12 in the factum of the moving party Lafarge Canada Inc. ("Lafarge").

2. The Respondents disagree with the facts set out in paragraphs 8 (excluding the first sentence), 9, and 10 in Lafarge's factum.

3. The Respondents have no knowledge of the facts set out in the final sentence in paragraph 4 and the first sentence in paragraph 5 of Lafarge's factum.

4. The Respondents submit that paragraphs 13 to 19 of Lafarge's factum are not "facts" but instead constitute legal argument.

PART II – ISSUES AND LAW RAISED BY THE MOVING PARTY

5. If leave to appeal is granted, Lafarge proposes that this Honourable Court should answer the seven questions set out in paragraph 20(a) to (g) of Lafarge's factum.

6. For the reasons set out below, the Respondents respectfully submit that Lafarge has failed to demonstrate that leave to appeal should be granted, in whole or in part, in relation to any of these seven questions. Moreover, each of the seven questions can and should be answered in the negative by this Honourable Court.

7. The Respondents accept that the test for granting leave in the instant case is set out in the leading decisions of *Re Sault Dock* and *United Glass*. However, Lafarge has not satisfied this test because Lafarge has not presented an "arguable case" that the Divisional Court committed any errors in relation to any of the seven proposed questions. Moreover, Lafarge has not shown that its intended appeal raises legal issues of sufficient public importance which warrant this Honourable Court's appellate intervention.

8. In particular, the Respondents respectfully submit that leave should be refused on the following grounds:

(a) Lafarge is attempting to appeal a unanimous, carefully crafted and legally sound judgment of a three justice panel of the Divisional Court;

(b) there is no public interest or benefit in granting leave since the Divisional Court judgment did not create or alter any general rules of law; instead, the judgment simply (and correctly) applied well-established principles of administrative law and statutory interpretation to the particulars of the instant case;

(c) Lafarge has been unable to identify or cite any caselaw that conflicts with the Divisional Court judgment, or that otherwise requires reconciliation by this Honourable Court;

(d) the mere fact that Lafarge's intended appeal may involve interpretation of statutory provisions does not necessarily mean that leave to appeal should automatically be granted;

(e) given the unique wording of the section 41 leave test under the *Environmental Bill of Rights* ("EBR"), any pronouncement by this Honourable Court on the interpretation of section 41 is unlikely to have any bearing or effect on other regulatory or administrative tribunals (or approval processes) in Ontario;

(f) it would serve no useful purpose to grant leave and have this Honourable Court re-try this case for the third time, as Lafarge is essentially advancing the same propositions that were properly rejected below by a specialized

administrative body (the Environmental Review Tribunal ("Tribunal")) and a superior court exercising supervisory jurisdiction (the Divisional Court);

(g) because section 43 of the EBR prohibits appeals of the Tribunal's leave decisions, granting Lafarge leave to appeal to this Honourable Court (and creating more protracted legal proceedings) is contrary to the intent of the Ontario Legislature to have EBR leave applications determined in an expeditious manner by an administrative adjudicator with specialized expertise in matters of environmental law and policy; and

(h) since the Divisional Court judgment is plainly right on the seven issues in dispute, Lafarge's intended appeal has little or no prospect of success and has insufficient merit to even constitute an "arguable" case.

9. Each of the foregoing grounds is examined in more detail below in the context of the seven questions proposed by Lafarge.

Lafarge Issue #1: The EBR Leave Test

10. In paragraph 27 of its factum, Lafarge argues that the Tribunal's interpretation of the section 41 leave test under the EBR was "incorrect and unreasonable", and further argues that the Divisional Court "erred when it endorsed the formulation of the test for leave to appeal put forward by the Tribunal."

11. In reply, the Respondents make the preliminary observation that Lafarge does not propose to appeal on the question of whether the Divisional Court erred or wrongly applied the *Dunsmuir* decision when it concluded that the appropriate standard of review

in the instant case is "reasonableness" rather than "correctness". Paragraph 12 of the Lafarge factum confirms that Lafarge raised the standard of review as a threshold issue in the judicial review proceedings. However, this issue is now conspicuously absent from Lafarge's factum, proposed seven questions, and notice of motion for leave to appeal. In light of this significant omission, the Respondents respectfully submit that Lafarge and the Ministry of the Environment ("MOE") Directors are now estopped (or precluded by the principle of *res judicata*) from challenging the Divisional Court's ruling that the appropriate standard of review in the instant case is "reasonableness".

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.36

12. The Respondents further submit that there is no merit to Lafarge's unsubstantiated claim that the Divisional Court has erroneously interpreted the section 41 leave test under the EBR. To the contrary, the Respondents respectfully submit that the Divisional Court committed no error in principle or law when it upheld the Tribunal's long-standing approach to interpreting and applying the two branches of the section 41 leave test.

13. In particular, the Respondents submit that:

(a) it was appropriate for the Divisional Court to uphold the Tribunal's approach to the section 41 leave test because the Tribunal has acquired highly specialized institutional expertise, and is habitually called upon to determine the broad matters arising within its distinct legislative context under the EBR;

(b) the Tribunal's expertise under the EBR has also been recognized by the Divisional Court in the *Smith* decision, which is cited by Lafarge's factum;

(c) when construing and applying the section 41 leave test, the Tribunal is not merely seeking to resolve a private dispute or *lis* between two parties, but is instead determining mixed matters of law, fact, policy and the public interest, and the Tribunal's resulting determination (e.g. to grant or refuse leave under the EBR) is entitled to considerable deference by the courts; and

(d) curial deference is also appropriate because an EBR leave decision involves the Tribunal's interpretation of its constituent statute (the EBR), the weighing of conflicting technical or scientific evidence, and the consideration of other environmental policy or planning matters which engage its core expertise (e.g. ecosystem approach, precautionary principle, cumulative effects, etc.).

14. In paragraphs 6 and 7 of its factum, Lafarge seems to suggest that "public participation" is the sole or predominant purpose of the EBR. However, having regard for the EBR's broadly worded statement of purpose (section 2), the Respondents submit that the EBR is primarily intended to: (a) protect the environment and public health; (b) enhance public participation rights; and (c) ensure governmental accountability for environmental decision-making. Pursuant to section 64 of the *Legislation Act, 2006*, and in accordance with the modern purposive approach to statutory construction, section 41 of the EBR should be interpreted in a "fair, large and liberal" manner which best achieves these important legislative purposes.

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

15. The Respondents respectfully submit that the section 41 interpretation adopted by the Tribunal – and upheld by the Divisional Court – best achieves the stated purposes of the EBR. Conversely, the narrow (and mistaken) interpretation of section 41 reflected in Lafarge's factum (and presumably still shared by the MOE Directors) does not attain the purposes of the EBR. Since Lafarge's interpretation of section 41 was persuasively and properly rejected by both the Tribunal and the Divisional Court, this matter does not have to be revisited or reconsidered by this Honourable Court.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.42, 44-48

16. Paragraph 27 of the Lafarge factum claims (without elaboration) that the Divisional Court's judgment regarding the section 41 leave test will have "far-reaching effect on all applications for leave to appeal." In reply, the Respondents respectfully submit that the Divisional Court's judgment does not break new or unprecedented ground regarding the section 41 leave test. Instead, the judgment merely approves the section 41 interpretation that the Tribunal has been using in numerous EBR leave decisions for over a decade. Thus, the only "far-ranging effect" of the Divisional Court judgment will be that it provides additional clarity and guidance regarding the appropriate approach to the section 41 leave test.

17. Accordingly, the Respondents respectfully submit that leave to appeal should be refused on the section 41 interpretation issue proposed by Lafarge. Having regard for the language of the EBR's leave test (e.g. section 41) and the EBR's prohibition of appeals against Tribunal leave decisions (e.g. section 43), there can be no doubt that the Ontario Legislature intended to create an expedited leave procedure that merely requires EBR leave applicants to demonstrate that there is "preliminary merit" to their concerns,

meaning that there is a *prima facie* case that the instrument, as issued, is unreasonable and requires review. The Tribunal's interpretation of section 41 of the EBR – as upheld by the Divisional Court – is clearly consistent with, and gives effect to, this important legislative intent. Accordingly, there is no public interest need for this Honourable Court to further consider this issue.

Lafarge Issue #2: Application of the SEV

18. In paragraphs 28 to 33 of its factum, Lafarge takes issue with the Divisional Court's upholding of the Tribunal's decision that the MOE's *Statement of Environmental Values* ("SEV"), promulgated under the EBR, was relevant to the MOE Directors' decision-making on the two impugned approvals in the instant case. Significantly, a close reading of the Lafarge factum reveals that Lafarge does not actually argue that the Divisional Court (or Tribunal) erred in reaching this conclusion. Instead, Lafarge's principal objection seems to be that the Court's judgment may force MOE Directors to change their apparent practice of not directly considering their own SEV in relation to environmental approvals (paragraph 32).

19. In reply, the Respondents submit that Lafarge's apocryphal concerns and speculative comments should be given no weight or credence by this Honourable Court. In particular, Lafarge's unsubstantiated allegation that MOE Directors may have to "change the approvals process" cannot serve as the basis for granting leave in the instant case. If administrative changes are necessary for the MOE Directors to now bring themselves into compliance with EBR requirements, then that is an inevitable and appropriate consequence to remedy the MOE's ill-advised practice of not considering or

applying the SEV when making decisions regarding instruments, contrary to section 11 of the EBR.

20. The Respondents further note that when this matter was still before the Tribunal at the EBR leave stage, neither Lafarge nor the MOE Directors took the position that the SEV was an irrelevant consideration. Instead, these parties claimed that the Directors' decisions to issue the two impugned approvals, in fact, complied with SEV principles. On the facts, however, the Tribunal properly rejected this claim in relation to the SEV principles regarding the ecosystem approach and precautionary principle.

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, pp.11-21

21. Moreover, the Respondents submit that under the "reasonableness" branch of the section 41 leave test, the Tribunal is required to have regard, *inter alia*, to relevant policies developed to guide decisions on environmental approvals. Given the broad definition of "policy" under the EBR, the Divisional Court was correct in upholding the Tribunal's conclusion that the SEV was among the various government policies relevant to the two impugned approvals. The Divisional Court was also correct in noting that the Tribunal's decision to consider the SEV was consistent with long-standing Tribunal jurisprudence. Indeed, the SEV itself states that the guiding principles within the SEV "will be among the tools used by the [MOE] to apply the environmental values set out in the purposes of the EBR when making decisions that might significantly affect the environment."

Schedule B, EBR, section 1

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.57

Record of Proceeding, Vol. III, Tab 5b43, MOE SEV, page 1

22. It is beyond dispute that the two impugned approvals in the instant case are environmentally significant, and are, in fact, prescribed by regulation as environmentally significant instruments for the purposes of Part II of the EBR. Thus, the Tribunal – and by extension, the Divisional Court – was correct in concluding that the MOE Directors' decisions on whether to issue the two approvals should have directly triggered the proper application of the SEV principles as a matter of policy.

23. In addition, the Divisional Court carefully reviewed the MOE's legal duty to promulgate its SEV pursuant to section 7 of the EBR, and correctly found that section 11 of the EBR specifically requires the Minister to "take every reasonable step to ensure that the [SEV] is considered <u>whenever decisions that might significantly affect the environment are made in the Ministry</u> (emphasis added)." This language is also reproduced *verbatim* in the MOE SEV itself. In light of this legal duty imposed upon the MOE by the EBR, the Respondents respectfully submit that it was reasonably open to, and jurisdictionally proper for, the Tribunal to have regard to the SEV for the purposes of the section 41 leave test. In upholding the Tribunal's decision on this issue, the Divisional Court committed no reversible error.

Schedule B, EBR, sections 7, 11

Record of Proceeding, Vol. III, Tab 5b43, MOE SEV, page 1

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para. 56

24. In its factum, Lafarge has been unable to produce any authorities which support its SEV views, or which suggest that the Tribunal or Divisional Court erred in relation to the SEV's applicability to instruments. Instead, in paragraph 29 of its factum, Lafarge simply alludes to the "position" of the MOE that "the SEV is used to develop Acts,

Regulations and Policies" (not instruments *per se*), and that SEV principles are "incorporated" indirectly into instrument decisions because those "decisions are based on the Acts, Regulations and Policies that were developed in consideration of the SEV." Assuming that the MOE Directors still hold this "position" attributed to them by Lafarge, the Respondents respectfully submit that such arguments are completely without merit for the following reasons:

(a) the relevant statute – the *Environmental Protection Act* ("EPA") – was enacted in 1971, over two decades before the EBR came into existence in 1993, and thus the EPA was not "developed in consideration of the SEV", as claimed by Lafarge;

(b) even after the enactment of the EBR, the specific EPA sections authorizing the issuance of air approvals (section 9) and waste approvals (section 39) have never been amended to incorporate or reflect SEV principles (e.g. ecosystem approach, precautionary principle, cumulative effects analysis, etc.);

(c) the relevant air pollution regulations (O.Reg. 419/05 and O.Reg.194/05), waste management regulations (Ontario Regulation 347), and policies (Guideline A-7) have not been amended to expressly require the consideration of ecosystem approach, precautionary principle, or cumulative impacts analysis. Moreover, the Tribunal's leave decision (pages 14-17) specifically found that the MOE's existing regulatory framework for air pollution does not reflect the ecosystem approach, primarily because it still relies upon "point of impingement" emission

standards to regulate individual facilities, and because it does not incorporate cumulative impacts analysis or the consideration of baseline conditions of local airsheds; and

(d) in order for the foregoing regulations and policies to properly reflect SEV principles such as the ecosystem approach, they would require language similar to O.Reg.387/04, which now governs the issuance of water-taking permits by MOE Directors under the *Ontario Water Resources Act*. In particular, section 4 of O.Reg. 387/04 specifically requires MOE Directors to, *inter alia*, consider impacts on ecosystem functions, resource sustainability, and vulnerability of watercourses or aquifers due to drought conditions or water withdrawals by other current and future users. This regulatory precedent undermines any suggestion by Lafarge or the MOE Directors that it is impossible to define or implement SEV principles in relation to instrument decisions.

Schedule B, O.Reg. 387/04, section 4

25. In summary, there is not a scintilla of evidence to substantiate Lafarge's (and MOE Directors') claims that SEV principles are somehow embodied within the EPA, regulations and policies that are relevant to the two impugned approvals in the instant case. Accordingly, the Respondents respectfully submit that leave to appeal should be refused in relation to the SEV issue proposed by Lafarge.

26. If Lafarge and/or the MOE Directors continue to have concerns about SEV applicability to instrument decisions, then it is open to them to pursue their concerns with the Ontario Legislature (not this Honourable Court), since it was the Legislature which

made the public policy choice over a decade ago to enact the EBR and to impose certain obligations upon the MOE, especially the section 11 duty to consider the SEV in relation to all environmentally significant decisions, including instruments (such as section 9 and 39 approvals under the EPA).

Schedule B, EBR, section 11

27. Moreover, given the all-inclusive nature and mandatory language of section 11 of the EBR, it is not open to the MOE Directors to thwart the intention of the Ontario Legislature by adopting policies or practices which purport to unilaterally exclude instrument decisions from SEV coverage. Indeed, the Divisional Court correctly held that in section 11 of the EBR, "there is no exclusion for Directors when they are making a decision whether or not to implement a proposal for a Class I or II instrument." Similarly, it follows that the MOE itself has no statutory authority to override or ignore section 11 of the EBR by developing SEV provisions which purport to exclude its applicability to instrument decisions.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para. 56

28. In these circumstances, the Respondents respectfully submit that this Honourable Court should refrain from questioning or interfering with the Legislature's choice to impose a legal duty under the EBR to ensure that SEV principles are considered whenever environmentally significant decisions respecting instruments are being made by provincial officials. Accordingly, Lafarge's intended appeal fails to raise an arguable (or even justiciable) issue in relation to the MOE's SEV in the instant case.

Lafarge Issue #3: Common Law Rights of Local Landowners

29. In paragraph 34 of its factum, Lafarge takes issue with the Divisional Court's upholding of the Tribunal's ruling that common law rights of neighbouring landowners were relevant considerations for the MOE Directors' decisions to issue the two impugned approvals in the instant case. Lafarge further claims that this result "requires consideration of a factor that was not previously considered relevant to the approvals process for instruments pursuant to the *Environmental Protection Act*."

30. In reply, the Respondents submit that Lafarge's claim is clearly erroneous and legally unsound, as section 39 of the EPA specifically requires the Director to consider whether a proposed facility or activity "may create a nuisance" or "may result in a hazard to the health or safety of any person." If so, then the Director is expressly empowered by section 39 to refuse to issue the waste approval. Thus, contrary to Lafarge's submissions, the Tribunal did not unilaterally conjure up a "new" requirement to consider whether an actionable tort (e.g. nuisance) might be created by the proposed waste-burning activities. Instead, the Tribunal's ruling merely reflects a common sense criterion which is already entrenched within the relevant statutory framework (e.g. the EPA).

Schedule B, EPA, section 39

31. Second, the Respondents note that Lafarge has presented no authorities to support its contention that both the Tribunal and the Divisional Court panel erred by considering the potential effect of the Directors' decisions on the common law rights and interests of adjoining landowners. In the absence of such authorities, the Respondents respectfully submit that it was reasonably open to, and jurisdictionally permissible for, the Tribunal to have regard for such effects when assessing the reasonableness of the Directors'

decisions. The Respondents further submit that the Divisional Court committed no reversible error in leaving the Tribunal's ruling intact on this point.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.63-65

32. Third, the "reasonableness" branch of the section 41 leave test clearly requires the Tribunal to "have regard to the relevant law." There is nothing in section 41(a) that explicitly or implicitly excludes the common law as "relevant law", or that restricts this phrase to statutory enactments or regulations. While legislation may be used to alter the common law, it is presumed that legislatures generally do not intend to change common law rights, unless statutes contain clear and unambiguous provisions to achieve this result. No such legislative intent or language appears within section 41 of the EBR. Accordingly, the Divisional Court was correct when it concluded that deference should be given to this aspect of the Tribunal's interpretation of section 41.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.63

33. Fourth, the Tribunal was factually correct when it found that the Directors deliberately "declined to consider and weigh the common law rights of the Applicant Landowners or the potential consequences of the C of As upon them." Similarly, the Tribunal was legally correct when it concluded that "approvals may authorize activities that have potential to infringe upon common law rights," and that "regulatory approval of particular substances or processes can protect facilities from common law liability."

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, pp.25-26

34. Fifth, as a matter of law, the Divisional Court was correct when it noted that "in some instances, regulatory approval could negate common law rights." The Respondents

further note that the EBR itself provides that compliance with an approval is a defence to the statutory cause of action available to plaintiffs under section 84 of the EBR. Accordingly, the Divisional Court correctly concluded that "when a Director is considering approving [an] activity that 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."

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.64

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, pp.25-26

Schedule B, EBR, sections 84-85

35. For these reasons, the Respondents respectfully submit that the Tribunal did not commit jurisdictional error by considering common law rights when assessing the reasonableness of the Directors' decisions to issue the two impugned approvals. Similarly, the Divisional Court did not err in upholding the Tribunal's decision on this point, particularly in light of the Tribunal's overall finding that "the kinds of contaminants to be emitted from the Lafarge kiln… are potentially hazardous to the environment and human health", and that "the Applicants have produced a substantial information base that establishes the potential for significant harm to the environment from the use of alternative fuels at the Lafarge facility." Given these conclusions regarding the serious risk of off-site harm, the Respondents respectfully submit that it was reasonable, prudent and legally sound for the Tribunal to consider common law rights and interests in the instant case.

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, p.33

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.65

36. Accordingly, the Respondents submit that leave to appeal should be refused in relation to the "common law rights" issue proposed by Lafarge. In the alternative, even if it appears to this Honourable Court that common law rights ought not to have been considered by the Tribunal, the Respondents respectfully submit that such a finding would not nullify or invalidate the Tribunal's overall leave decision under the EBR, as there were ample other grounds and evidence before the Tribunal to justify the granting of leave in the instant case. This is also true in relation to the other six issues raised by Lafarge -- even if the Tribunal or Divisional Court erred on one or more of these other individual questions (which is not conceded by the Respondents), there is still a preponderance of evidence and an abundance of authorities to justify the Tribunal's decision to grant leave to appeal under the EBR in the instant case.

Lafarge Issue #4: Discrimination Against Local Communities

37. In paragraphs 41 to 43 of its factum, Lafarge takes issue with the Divisional Court's upholding of the Tribunal's decision that it was unreasonable for the MOE Directors to have issued the two impugned approvals when the MOE itself was proposing to ban tire-burning everywhere else in Ontario.

38. In reply, the Respondents submit that this issue does not raise a question of law, or mixed law and fact, of sufficient public importance. In essence, the Tribunal found on the evidence that the undesirable and unreasonable consequence of the Directors' decisions was to expose local Bath residents to potential environmental impacts to which no other Ontario community may be subject. This is a unique and highly case-specific consideration which is unlikely to arise in other instrument decisions made routinely by MOE Directors. More importantly, it is a question of fact or policy within the specialized

expertise and jurisdiction of the Tribunal for which an appeal does not lie to this Honourable Court.

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, pp.28-29

39. Accordingly, the Respondents submit that leave to appeal should be refused in relation to the "discriminatory impact" issue proposed by Lafarge. As correctly held by the Divisional Court, the Tribunal's findings on whether – or to what extent – administrative or environmental inconsistency arises in the circumstances of the instant case is a matter that was "within the realm of reasonableness". Moreover, these findings cannot be appealed by Lafarge to this Honourable Court, particularly in light of section 43 of the EBR and section 6 of the *Courts of Justice Act* ("CJA").

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.66

Schedule B, EBR, section 43; CJA, subsection 6(1)(a)

Issue #5: Possibility of Significant Environmental Harm

40. In paragraphs 44 to 47, Lafarge takes issue with the Tribunal's weighing of the conflicting expert evidence adduced by the parties at the EBR leave stage. Lafarge further criticizes the Divisional Court for upholding the Tribunal's evidentiary approach regarding the potential impacts of waste-burning upon the environment and public health.

41. In reply, the Respondents respectfully submit that this issue, as framed by Lafarge, does not raise a question of law, or mixed law and fact, of sufficient public importance. To the contrary, this Lafarge issue essentially invites this Honourable Court to scrutinize or second-guess the factual findings made by the Tribunal within its specialized expertise and jurisdiction. Simply put, these findings are highly case-specific

questions of fact for which an appeal does not lie to this Honourable Court, particularly in light of section 43 of the EBR and section 6 of the CJA.

Schedule B, EBR, section 43; CJA, subsection 6(1)(a)

42. Second, there is not a scintilla of evidence to support Lafarge's bald assertions (para. 45) that the Tribunal did not "analyze" the parties' expert evidence, and that the Tribunal "ignored" the conditions contained within the two impugned approvals. To the contrary, the Respondents submit that the extensive record before the Tribunal contained ample expert evidence upon which the Tribunal could reasonably base its conclusion that the two impugned approvals appeared to pose risks of significant environmental harm. Because there is some evidence (as opposed to no evidence) to support the Tribunal's decision, it would be highly inappropriate, in light of *Dunsmuir* and section 43 of the EBR, for this Honourable Court to attempt to review or analyze the extensive technical and scientific evidence placed before the Tribunal by the parties.

43. Third, the Tribunal's decision itself contains a detailed review of various expert evidence adduced by the parties. For example, commencing at page 29 of the leave decision, the Tribunal specifically refers to, summarizes, and even quotes "some" of the evidence of MOE engineers, Lafarge consultants, Respondents' air quality experts, and local medical officers of health. In addition, the Tribunal was clearly aware that both approvals contained various terms and conditions, and the Tribunal's decision refers to several of the key conditions in the two impugned approvals. However, the Tribunal found on the evidence that despite the existence of such conditions, there was good reason to believe that significant environmental harm may result from activities authorized under the two impugned approvals.

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, pp.4, 29-34

44. Fourth, while Lafarge questions the "adequacy" of the Tribunal's weighing of expert evidence, the Respondents note that the EBR leave decision is, in essence, an interlocutory decision which precedes the full appeal hearing under the EPA on the merits of the case. Therefore, in accordance with the principles of judicial economy, it was both prudent and appropriate for the Tribunal to decide only as much of the case as was required to determine the EBR leave applications. Rather than potentially prejudice the appeal hearing by making wide-ranging findings of fact (or credibility) in relation to the experts' evidence, the Tribunal drew only those conclusions which were necessary for the proper adjudication of the EBR leave applications. As correctly held by the Divisional Court, "it is not the function of the Tribunal member who is giving leave to determine the actual merits of the appeal".

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.45

45. In addition, it is not necessary for a specialized administrative decision-maker to expressly make specific adverse findings regarding the credibility of individual experts whose evidence is not being given preferential weight. The Respondents submit that this is particularly true at the EBR leave stage, where it is reasonable to anticipate that the same expert evidence will be presented (if not expanded) by the parties at the EPA hearing on the merits. Thus, it is unnecessary and unrealistic to expect the Tribunal to render an EBR leave decision that exhaustively addresses all the detailed minutiae of all the voluminous technical and scientific evidence filed by the parties in the instant case.

46. Accordingly, the Respondents submit that leave to appeal should be refused in relation to the "significant environmental harm" issue proposed by Lafarge. At the EBR leave stage, the Tribunal preferred the submissions and expert evidence of the Respondents regarding the potential for significant environmental harm, and the inadequacy of the approval conditions to prevent, minimize or mitigate such harm. As correctly noted by the Divisional Court:

> Despite the stringent approvals process and the conditions in the C of As, 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.
>
> Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.70-71

47. To the extent that Lafarge or the MOE Directors still disagree with the Tribunal's findings on these points, then they are free to pursue such matters by presenting evidence and argument at the EPA hearing before the Tribunal, rather than on appeal to this Honourable Court.

Lafarge Issue #6: Adequacy of Reasons regarding the Waste C of A

48. In paragraphs 48 to 50 of its factum, Lafarge argues that the Tribunal erred by failing to separately analyze each of the two impugned approvals on their own individual "merits". In particular, Lafarge makes the astounding claim that the Tribunal's treatment of the two approvals was "cavalier", and Lafarge further alleges that the Divisional Court upheld the Tribunal's approach "without analysis".

49. In reply, the Respondents submit that the question of whether it was reasonable for the Tribunal to concurrently consider these two interrelated approvals, or whether the Tribunal's reasons respecting the section 39 (waste) approval were "adequate", do not raise a question of law, or mixed law and fact, of public importance. To the contrary, the Respondents respectfully submit that this issue, as framed by Lafarge, essentially invites this Honourable Court to scrutinize or second-guess the factual findings made by the Tribunal within its specialized expertise and jurisdiction. Simply put, these findings are highly case-specific questions of fact for which an appeal does not lie to this Honourable Court, particularly in light of section 43 of the EBR and section 6 of the CJA.

50. Second, the Respondents submit that there is nothing improper or jurisdictionally incorrect in the Tribunal's concurrent consideration of the section 9 (air) and section 39 (waste) approvals in the instant case for the following reasons:

(a) although the two approvals are, of necessity, issued under two different sections of the EPA, they are inextricably linked together and should be viewed as an integrated approval of a single project, *viz.* the collection, storage, handling and burning of solid waste as "alternative fuels" at Lafarge's cement manufacturing facility;

(b) the two approvals were applied for by Lafarge around the same time, and the two approvals were, in fact, issued by the two MOE Directors on the very same day (December 21, 2006);

(c) the two approvals extensively cross-reference each other, and Lafarge's "alternative fuels" project cannot proceed unless both approvals co-exist;

(d) of the two approvals issued to Lafarge, only the section 39 (waste) approval actually permits the physical act of "burning" solid wastes at the Lafarge facility, which may generate the toxic air contaminants referenced in the Tribunal's leave decision (page 32), such as lead, chromium, mercury, arsenic, inorganic compounds, dioxins and furans;

(e) a close reading of the leave decision reveals that the Tribunal carefully considered the two impugned approvals. In fact, the very first sentence of the Tribunal's decision defines and refers to both approvals in the plural as "C of As", and this acronym appears no less than 37 times throughout the 34 page leave decision as the Tribunal made a number of general and specific findings against both approvals;[1] and

(f) since the Tribunal also refers to the Directors' decisions in the plural at least 26 times throughout the leave decision, it cannot be seriously contended by Lafarge that the Tribunal somehow forgot to consider the section 39 (waste) approval, or that the Tribunal only examined the section 9 (air) approval.

Record of Proceeding, Vol. I, Tab 1, Lafarge Waste Approval (December 21, 2006); Tab 2: Lafarge Air Approval (December 21, 2006)

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, pp.3-4

51. Accordingly, the Respondents submit that leave to appeal should be refused in relation to the "inadequate reasons" issue proposed by Lafarge. The Tribunal's concurrent consideration of the content (and potential environmental consequences) of the two impugned approvals was anything but "cavalier". Indeed, the Tribunal's

[1] These concurrent references are in addition to the Tribunal's individual references in the text to either the section 9 or 39 approvals.

pragmatic and integrated approach to the two impugned approvals was both reasonable and well within its specialized expertise and jurisdiction. Similarly, contrary to the submissions of Lafarge, the Divisional Court did, in fact, analyze this matter, but the Court concisely (and correctly) rejected Lafarge's complaints regarding the Tribunal's consideration of the section 39 (waste) approval.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.72-74

Lafarge Issue #7: Scope of the EBR Appeal

52. In paragraphs 51 to 53 of its factum, Lafarge takes issue with the Tribunal's decision – as upheld by the Divisional Court – to grant full leave at large to the Respondents to appeal both approvals in their entirety. Lafarge's specific objection appears to be that in granting leave at large in this manner, the Tribunal may be permitting the Respondents to pursue issues at the EPA hearing which were not specifically raised at the EBR leave stage.

53. In reply, the Respondents submit that the Divisional Court was correct in holding that there was nothing improper or jurisdictionally incorrect in the Tribunal's decision to grant the Respondents full leave to appeal both approvals, even though the Tribunal found that two specific grounds (e.g. public participation and resource conservation) had not satisfied the leave test under the EBR. Clearly, the wording of both branches of the section 41 leave test focuses upon the Directors' decisions themselves, not the individual grounds that a leave applicant may be able to identify and advance in the 15 day timeframe for filing an EBR application for leave to appeal.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.75-76

Respondents' Joint Book of Authorities, Tab 4: *Grey (County) Corp. v. Ontario* (2005), 19 C.E.L.R. (3d) 176, para.39,43-52 (ERT)

Schedule B, EBR, sections 40, 41

54. Since the Tribunal concluded in the instant case that "it appears that no reasonable person, having regard for the relevant laws and government policies, would have made the decisions" to issue the two impugned approvals, and having further concluded that these decisions "could result in significant harm to the environment," it was reasonably open to, and jurisdictionally permissible for, the Tribunal to grant the Respondents unrestricted leave to appeal both decisions "in their entirety."

Lafarge Motion Record, Tab 4: Tribunal Leave Decision, p.34

55. Similarly, it was reasonably open to, and jurisdictionally permissible for, the Tribunal to specify that the scope of the Respondents' appeal was not limited to the specific grounds advanced at the leave stage, "unless the Tribunal orders otherwise." As correctly noted by the Divisional Court, this latter qualification is entirely consistent with the Tribunal's ability to "control its own procedures" (as recognized in the *Smith* case cited by Lafarge), and ensures that the Tribunal will continue to retain overall authority over the scope of the appeal as the matter proceeds to the main hearing under the EPA.

Lafarge Motion Record, Tab 3: Reasons for Judgment of the Divisional Court, para.76

PART III – ADDITIONAL ISSUES RAISED BY THE RESPONDENTS

56. The Respondents do not raise any additional issues in relation to Lafarge's motion for leave to appeal to this Honourable Court.

57. In summary, the Respondents submit that Lafarge appears to be rationalizing its intended appeal on the primary basis that the Tribunal's leave decision – as upheld by the Divisional Court – injects uncertainty into the MOE's approval process and/or the EBR

appeal procedure. To the contrary, the Respondents submit that Lafarge's speculative concerns are unsubstantiated by evidence, unsupported by authorities, and raise no legal questions of public importance which warrant this Honourable Court's attention.

58. Accordingly, the Respondents submit that granting leave in the instant case will itself create considerable uncertainty by appearing to call into question the Tribunal's long-standing and well-founded approach to interpreting section 41 of the EBR. Such uncertainty should be strenuously avoided by this Honourable Court, particularly since Lafarge has failed to present even an arguable case that the Tribunal lost or exceeded its jurisdiction in the instant case, or that the Divisional Court erred in upholding the Tribunal's leave decision.

59. By imposing a leave requirement under section 6 of the CJA, the Ontario Legislature has created a screen aimed at preventing unmeritorious, inconsequential or ill-conceived appeals from reaching this Honourable Court. In the Respondents' submission, Lafarge's intended appeal is precisely the type of fact-based dispute which should not receive leave, in whole or in part, under section 6 of the CJA.

60. For the foregoing reasons, the Respondents respectfully request an order dismissing Lafarge's motion for leave to appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 11, 2008

_____

Richard D. Lindgren
Counsel for the Respondents
Lake Ontario Waterkeeper and Gordon Downie