Case No. 20-019

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF sections 38 to 48 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 and section 20.3 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19,

AND IN THE MATTER OF an application by Alex Rheault for leave to appeal the decision of the Director, section 20.3 of the *Environmental Protection Act*, to issue Amended Environmental Compliance Approval No. 7133-BCPLA4, dated March 6, 2020, to Minaki on the River, Inc., 2262608 Ontario Inc., and 2262609 Ontario Inc., for the purposes of a sewage works, located at 1 Western Avenue, Former Minaki Lodge Site, Minaki, Ontario, Unsurveyed Territory (Kenora Area Office) Unorganised Area, District of Kenora P0X 1J0, Ontario

ALEX RHEAULT

Applicant

- and -

DIRECTOR, MINISTRY OF THE ENVIRONMENT, CONSERVATION AND PARKS AND MINAKI ON THE RIVER INC., 2262608 ONTARIO INC., AND 2262609 ONTARIO INC.

Respondents

REPLY OF THE APPLICANT, ALEX RHEAULT

I. A Preliminary Matter of Form

In my application, I used the term "MOTR" to stand for the set of developer entities that owns the Minaki Lodge site. That has been the standard designation in our resident group's dealing with the Ministry of the Environment, Conservation and Parks (the "Ministry") and other Provincial Ministries on the concerns raised by the scale and density of MOTR's development plans.

As various of the attachments to the Ministry's response submission show, the Ministry's staff members use "MOTR" in their internal communications. MOTR's lawyers use "MOTR" in their response submission. MOTR's engineering firm WSP uses "MOTR" in its reports that appear in several exhibits.

In the response submission of the Ministry Director, however, and in each of the accompanying witness statements of Ministry staff, the developer entities are shorthanded to "Minaki." That usage is disorienting and misleading. It has had a jarring effect on the community residents who stand with me in this request for leave and who have read the Ministry response. More important, it carries a substantive impact in the text: it seems to bring the community of Minaki as an operative party into the long process associated with the Minaki Lodge sewage treatment plant. "Minaki" takes action and holds permits. Calling the developer "Minaki" relegates me to the role of a lone and cranky outlier, complaining about progress, while the community and the Ministry work together to facilitate redevelopment of the site.

So let's be clear. Minaki is a place. It's a small, 110-year old unincorporated community in a spectacular wilderness setting on the Winnipeg River in remote Northwestern Ontario. As I stated in my application, I am applying formally on my own behalf and informally on behalf of the large group of year-round residents who have strong concerns about the environmental and cultural impacts of MOTR's development proposals. Minaki is where we live. We ask the Tribunal to take care not to be lulled into confusion or affirmatively misled by the co-opting of our community's name in the Ministry's statements.

II. Overview of My Reply

1. In this reply, I will address in Part III my standing to make my application, address in Part IV the test for the reasonableness of the Ministry's decision, address in Part V the test for significant harm to the environment, and offer a conclusion in Part VI. I will be as brief as I can, but there are a few topics to cover.

III. Standing

The Ministry's and MOTR's Argument

2. The Ministry and MOTR argue that (a) under Section 38 of the Environmental Bill of Rights, I can request leave to appeal the decision to issue the 2020 Amended ECA with respect to certain terms or conditions only if another person (in this case MOTR) is able to request leave with respect to those terms and conditions, and (b) under Section 139(3)(b) of the Environmental Protection Act, MOTR could not have requested leave to appeal with respect to the two topics that I raised in my application because they didn't change from the 2014 Amended ECA. The effect of that statutory structure is that if a decision amends an instrument already in effect, the public cannot seek leave to appeal with respect to terms or conditions that did not change. That makes sense; the instrument holder is relying on those previous terms and conditions and to open them up after the fact is unfair. But that is not our situation.

Section 139(3)(b)

3. Section 139(3)(b) provides that an instrument holder may not appeal a decision with respect to terms and conditions that are substantially the same as terms and conditions in "an approval that was previously issued and is still in effect at the time the decision is made." At the time of the Ministry's decision to issue the 2020 Amended ECA, the 2014 ECA was not in effect within the meaning of Section 139(3)(b) for purposes of determining my standing to request leave to appeal. To see this, we need to elaborate on the historical information provided in my application. There will be some repetition, but given the focus on the 2014 Amended ECA in the Ministry's and MOTR's standing arguments, the Tribunal should see in one place a short history of the life of the 2014 Amended ECA.

The 2014 Amended ECA

4. In 2012, instead of requiring a new operating permit to allow the Minaki Lodge sewage treatment plant to serve MOTR's proposed condominium development, the Ministry took the 1988 approvals that had lain dormant for nine years, revived them, and assigned them to MOTR. The terms remained in large part the same, although the Ministry generalized the permitted use of the serviced site and did add a phosphorus target as that effluent component had not been regulated at all in 1988.

5. Unfortunately, the Ministry staff and MOTR's engineer, WSP, missed the circumstance that the plant contained no phosphorus removal equipment. At

this time, our resident group and The Minaki Conservancy had been working together since 2010 to try to address concerns associated with the proposed development, and in correspondence we alerted the Ministry to the missing equipment, including the sending of the letter to the Minister that was included with my application.

6. In February, 2014, after our prodding, the Ministry posted notice of a proposed amended approval, noting that phosphorus removal equipment would now be required. The posting made no mention of a change in use.

7. The Conservancy commented on the proposal through the Registry, noting that the additional equipment was a plus but repeating past assertions that the Ministry should bring the 2010 permit up to current standards by adding actual enforceable limits and that updated water quality baseline studies should be required.

8. When the 2014 Amended ECA issued on August 28, 2014, the Ministry had added enforceable limits, in accordance with our comment, but had not required baseline studies. In addition, though, the Ministry had added a detailed restriction on use, limiting the use of the serviced site to exactly the condominium development then proposed by MOTR.

9. At that time in 2014, our resident group and the Conservancy were carrying on a complex and expensive effort with the Ministry of Municipal Affairs and Housing under the *Planning Act*, attempting to have MMAH address our concerns about the condominium development. We were likely headed toward an even more expensive appeal to the Ontario Municipal Board, regardless of the MMAH decision. We looked at the 2014 Amended ECA and elected to deal with its shortcomings by focusing on the *Planning Act* process, through which we hoped to prohibit the condominium use completely. It did not seem sensible to devote a simultaneous and significant effort to appeal the decision to issue the 2014 Amended ECA to the Tribunal, when as voluntary community organizations we were already at capacity in challenging the specific planning proposal on which it was based.

10. In April, 2016, MMAH approved the condominium plan. Our resident group and the Conservancy both appealed that decision to the Municipal Board. After a two-week hearing in July, 2017, the Municipal Board reversed the MMAH approval in the following October, on grounds related to sewage treatment. MOTR asked the Municipal Board chair to review that reversal, and that request was denied in May, 2018.

11. In February, 2019, MOTR applied for an amendment to the 2014 Amended ECA, keeping the terms and conditions of the 2014 Amended ECA but changing the site use to a trailer park.

The Effectiveness of the 2014 Amended ECA

12. The 2014 Amended ECA applied only to a specific condominium development project. That project did not exist when the 2014 Amended ECA issued in August; it was not even approved. It was twenty months later that the project received MMAH approval and the approval was immediately appealed. It was thirty-eight months later that the Municipal Board reversed the approval, and forty-five months later that the request for review was denied. It was fifty-four months later that MOTR applied for another amended approval.

13. The Ministry Director and the lawyers for MOTR point to several past Tribunal decisions -- *Kagawong Power, Hughes, Marshall,* and *Fairfield* -- where Section 139(3)(b) was applied to bar a request for leave. In all of those cases, the permit being amended was in force, actually regulating the activity in question.

14. The Lodge sewage treatment plant never operated under the 2014 Amended ECA. MOTR and the Ministry never relied on it for any purpose. MOTR in October, 2018, conducted the engineering review described in the 2014 Amended ECA, but that review occurred after the required condominium use had been finally disposed of the previous May, and as Senior Environmental Officer Cathy Debney confirms in paragraph 8 of her statement, the review was as part of MOTR's pre-consultation work which had already started with the Ministry regarding its application for the 2020 Amended ECA. MOTR did not undertake the installation of the phosphorus removal equipment required by the 2014 Amended ECA until the summer of 2019, after it had submitted its application for the 2020 Amended ECA; that installation was not done in conformance with the terms of the 2014 Amended ECA but as a precondition to and in contemplation of the new one.

15. The 2014 Amended ECA held terms and conditions, under Section 139(3)(b), those terms and conditions were never in effect in any sense under Section 139(3)(b). It was an environmental compliance approval in mere theory only, tied to a project that never came to be. Neither MOTR, nor the Ministry, nor the public ever relied on it in any respect. The 2020 Amended ECA added a number of substantive new terms and conditions, further demonstrating the 2014 version's irrelevance.

16. Had the 2014 Amended ECA contained terms that MOTR didn't like, MOTR could have objected to those terms as they appeared in the 2020 Amended ECA and could have asked for leave to appeal their inclusion, on the basis that we have just described, and we have every confidence that MOTR's experienced counsel would have done so. Under Section 38 of the Environmental Bill of Rights there is another person who had the right to appeal the 2020 Amended ECA, and I have standing, too.

17. In summary, I and our resident group have been working on sewage treatment issues associated with the Minaki Lodge site for over seven years. If I am denied standing, the only force or effect of any kind or in any circumstance that the 2014 Amended ECA will ever have had will be to have denied me the opportunity to get past the Ministry and take our case regarding the 2020 Amended ECA to the Tribunal.

IV. Good Reason to Believe that No Reasonable Person Could Have Made the Decision

18. In making our decision to ask for leave to appeal, we chose to focus on just two of the issues raised in our comment -- the lack of water quality baseline studies and the lack of tertiary treatment -- as those items directly affect what should, and what does, come out of the end of the effluent discharge pipe in the Winnipeg River. We assert in my application that given the specific circumstances of the Minaki Lodge plant, no reasonable person would have refused to include them in the 2020 Amended ECA. In all of the Ministry's and MOTR's responses to that assertion, there are only a few topics that warrant a reply.

19. (To avoid confusion, I note that Paragraph 68 of the Ministry Director's statement includes the statement that "The Applicant argues that it was unreasonable to issue the 2020 ECA where there is no responsibility agreement in place between Minaki [MOTR] and a municipality." That statement is incorrect. I did not in my comment to the Environmental Registry or in my application argue that the 2020 Amended ECA should not be issued at all in the absence of a responsibility agreement, and said specifically in my application that we were not asking for leave to appeal the Ministry's failure to arrange a responsibility agreement as required under its Guideline F-15.)

The 2020 Amended ECA is Good Enough

20. Neither the Ministry nor MOTR makes a case, or even attempts to make a case, that there is some issue or problem or difficulty with adding water quality baseline studies and tertiary treatment to the 2020 Amended ECA. The

closest they come is in paragraph 15 of the 2020 report of WSP, Schedule C to the statement of MOTR's counsel, where WSP states without explanation that updated water quality baseline studies "would not justify the resources required."

21. Instead, the Ministry and MOTR responses devote a great deal of space to multiple additions to the 2020 Amended ECA. The claim, articulated in paragraph 28 of the statement of the Ministry Director, is that those additions resulted from the rigor of Ministry staff review and as crafted improve environmental protection and, by implication, help offset the lack of a responsibility agreement.

22. Paragraph 28 describes seven additional terms to the 2014 Amended ECA. The first three of them are substantive -- UV treatment instead of chlorine dosing, back-up power generation, and financial assurance. The other four either clarify or amplify drafting matters in the 2014 Amended ECA or relate to the UV change. While we do appreciate those additions, and agree that the 2020 Amended ECA offers better environmental protection as a result, we should check where the three substantive concepts came from and whether they were calibrated at all to the special circumstances of the Minaki Lodge plant, justifying a refusal to add the additional protection we urged.

- **UV Treatment Instead of Chlorine**

23. The 1988 design of the Lodge treatment plant used chlorine dosing to deal with *e coli* in the effluent. Regulations under the *Fisheries Act* outlawed that technique, and the phase-in of the ban reached the Lodge plant. As a result, the change away from chlorine was required by the *Act*.

- **Back-up Power Generation**

24. This vulnerability in plant design was brought to the Ministry's attention by WSP, at least as early as the 2018 inspection report included with Exhibit B to the witness statement of Senior Wastewater Engineer Hitesh Vaja.

- **Financial Assurance**

25. As described in my application, financial assurance had always been required under the Ministry's Guideline F-15, as the plant is a communal sewage treatment operation in unorganized territory. Still, the Ministry had not required financial assurance with the 2012 or 2014 permit amendments.

26. The 2017 Ontario Municipal Board decision reversing the condominium approval was based on a sewage treatment issue with respect to which the lack of financial assurance was noted. In its request for review of that decision to the Municipal Board chair, MOTR submitted a package of materials that included an affidavit of Doug Johnson, MOTR's on-site employee. (The affidavit is attached as an exhibit to Exhibit A to my application.) In the affidavit, Mr. Johnson describes how Senior Environmental Officer Cathy Debney, in some capacity, proposed that the Ministry and MOTR work together to influence the decision of the Municipal Board chair in the review request. The thought was that the Ministry would begin a process of adding financial assurance to the 2014 Amended ECA that MOTR could point to. With respect to Ministry initiative, affidavit paragraph 4 states:

> At this meeting I advised MOECC that MOTR was willing to provide the required financial security and enter into a financing agreement. In fact, MOTR never opposed doing so but since it was never made a condition of the ECA, such matters were never provided.

27. This plan did not keep the Municipal Board chair from denying MOTR's request. It did, however, bring to the Ministry a focus on financial assurance that led finally to its inclusion in the 2020 Amended ECA.

- **Management by the OCWA**

28. The statement of the Ministry Director, in paragraph 38, in addition touts the benefits of plant management by the Ontario Clean Water Agency. Again, we agree with that benefit, but note that staff apparently has only MOTR assurances that OCWA management will occur. There is a letter of interest from the OCWA from 2017 in Exhibit B to the witness statement of Senior Wastewater Engineer Hitesh Vaja, but no evidence of any binding arrangement. Worse, staff did not take the time to make management by OCWA, or any independent professional manager, a requirement under the 2020 Amended ECA, even for an initial period of time.

29. In short, the Ministry and MOTR responses argue that the Ministry worked hard to improve the terms of the 2020 Amended ECA and that the 2020 Amended ECA is good enough. There is no evidence that the Ministry's work was anything but reactive, however, or attuned to the particular and unusual circumstances of the Lodge plant, and the Ministry and MOTR make no attempt to explain why it would be unreasonable to make it better.

The Winnipeg River is Big

29. With respect to the updating of water quality baseline studies as a check on whether the effluent standards in the 2020 Amended ECA are appropriate, Ministry staff and WSP repeatedly point to the size of the Winnipeg River flow. At that size, they assume that the effluent standards are safe.

30. That's all speculation, however. The actual water of the Winnipeg River is right there, ten metres from the treatment plant, available for sampling and study. The Ministry's Statement of Environmental Values urges a precautionary and scientific approach. In the opinion of our engineering consultant, R.J. Burnside and Associates, it is time for water quality baseline studies that are thirty years old to be renewed. It may well be, as Ministry staff and WSP predict, that updated studies will show that the effluent limits are appropriate. But that's fine. The point is that we would no longer be assuming; we would know. In the special circumstances of the Minaki Lodge treatment plant, the Ministry's resistance to gaining that knowledge through routine studies is unreasonable.

Part 4.10.4 of the Guide

31. The statement of the Ministry Director asserts in paragraph 66 that Part 4.10.4 of the Ministry's Guide to Applying for an Environmental Compliance Approval supports the failure to require updated water quality baseline studies, as that Part provides that studies are not required where the sewage works in question are pre-existing and no expansion is proposed. There are two problems with that contention.

32. First, as noted in my application, at the time of the Ministry's review the Minaki Lodge treatment plant had operated for one year out of the past twenty-four and not at all in the past fourteen. To deem it "pre-existing" in the context of Part 4.10.4 is not appropriate.

33. Second, the purpose of Part 4.10.4 is clearly to avoid needless repetition of water quality studies. The assumption must be that the pre-existing works are already supported by useful baseline studies that fit its size. Part 4.10.4 can't be used to deny water quality baseline studies where no functional studies exist at all.

No Evident Water Quality Concerns

34. Counsel for MOTR, in paragraph 76 of its statement, relies on the 2020 WSP report to assert that

> "publicly available water quality data for the Winnipeg River watershed, including the Winnipeg River, does not identify significant water quality concerns for the Winnipeg River, particularly with respect to the key parameters that will be discharged from the sewage workds ... ."

The experience of those of us who live in Minaki seems like publicly available water quality data, and we for example see extensive algae blooms at the end of every summer, lying like thick green paint on the river's surface, with the color changing to blue where the algae is toxic. Algae blooms result from phosphorus, one of the contaminants of the effluent, to be regulated by supposition in the 2020 Amended ECA.

Assertion That There Already Is Enough Tertiary Treatment

35. Based on the 2019 report of R.J. Burnside and Associates that is included with my application, we asserted that given the direct discharge to surface water, the 2020 Amended ECA should provide for tertiary treatment of the effluent. In response, the Ministry and MOTR use the 2020 WSP report to argue that the phosphorus and UV equipment that is or will be in the plant are forms of tertiary treatment and are good enough.

36. Attached as Exhibit A to this reply is a supplement to Burnside's 2019 report. This supplement clarifies that Burnside is recommending a system of tertiary filtration, either on land or in the plant, that accomplishes a final polishing of the effluent through additional removal of solids after all other treatment. The supplemental report also holds Burnside's opinion that tertiary filtration after rotating biological contactor systems has is a typical installation.

Assertion That Tertiary Filtration is Affirmatively Bad

37. Counsel for MOTR, in paragraph 84 of its statement, relies on paragraph 19 of the 2020 WSP report to make an argument against tertiary treatment, opining that one form of that treatment, in a leaching bed on land, offers "greater risk to the environment" than a mechanical treatment system. This statement is jarring, and deserves a brief reply.

38. WSP states that the greater risk with the leaching bed comes from "the dissipation of the treated effluent into the surrounding environment," and from "the short proximity from MOTR to the Winnipeg River." We remind MOTR and WSP that the pouring of treated effluent out the end of a pipe submerged in the Winnipeg River is already a dissipation of the effluent into the surrounding

environment, and that the distance from the end of that pipe to the Winnipeg River is zero.

39. Finally, if there is a concern with tertiary filtration in a leaching bed, the desired filtration can be accomplished with sand filters within the plant, allowing for all required effluent sampling to occur after the filtration has been accomplished.

Summary

40. We urged the Ministry in our comment in 2019 that updated water quality baseline studies and tertiary filtration should be included as requirements in the 2020 Amended ECA. Those additions are beneficial, routine and expected. The Ministry and MOTR have in their responses to my application offered no meaningful justification for the Ministry's refusal to include them. As a result, the 2020 Amended ECA is not as protective of the Winnipeg River as it could easily have been. It is R.J. Burnside's opinion that the addition of those terms is warranted. There are good grounds to believe that no reasonable person would have made the decision to reject them.

V. Significant Harm to the Environment

41. We understand that to be granted leave to appeal we must also show that the Ministry's decision will result in significant harm to the environment. We have not provided an expert study on that point, and do not intend to provide such a study if leave is granted. The following points are sufficient to demonstrate significant harm.

Harm Will Occur, and Could Easily Have Been Avoided

42. If updated water quality baseline studies are not required, and the effluent limits in the 2020 Amended ECA are a mismatch with the Winnipeg River's actual condition, then harm to the river will occur. If tertiary filtration is not required, then harm to the Winnipeg River will in all events occur, as all solids that would have been captured by the additional filtration will instead pollute the river's water.

43. The Ministry and MOTR are content to have the Winnipeg River handle that harm with the restorative powers of its size. But as we have shown, that harm is easily and readily avoidable. It is unreasonable for the Ministry to hold the opportunity to prevent that harm and choose to pass, unreasonable for that

harm to occur at all, unreasonable to force the river to devote some of its power to curing it.

Avoidable Harm is Significant

44. Under the Ministry's Statement of Environmental Values, the Ministry in its decision-making must be mindful of cumulative effects. With the Winnipeg River in Minaki, we who live there have are knowledgeable about the existing pressure on its water quality, but no one knows in a scientific sense its current condition and stresses, and no one knows what stresses and challenges it will face on the future, and how those effects will combine and compound. Every ounce of its ability to protect itself should be conserved.

45. For purposes of Section 41 of the *Environmental Bill of Rights,* that harm to the Winnipeg River, which is completely unnecessary, when balanced against the Ministry's ready opportunity to avoid it, must be held to be significant. Any other result frees the Ministry, when dealing with large surface water receivers, to substitute the healing power of those receivers for its own failings in its decision-making. The bigger the receiver, the more unreasonable the Ministry's performance can be. That cannot be the intention of the two-part test in Section 41.

VI. Conclusion

46. It is apparent from the Ministry's response that it looks at the Winnipeg River and sees a large number on a flow rate table. In contrast, we who live in Minaki see a precious resource that we use and rely on every day and that defines our community and gives it value. We cannot fathom why the Ministry, claiming that it understands the special circumstance of this plant in unorganized territory, would undertake a process of admitting some additional protections to the 2020 Amended ECA that guards the river's water quality and then just stop, refusing to add two more. The Ministry says the 2020 Amended ECA is good enough. We ask the Tribunal to rule that it is reasonable to require the Ministry to make it even better.

Respectfully submitted,

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Alex Rheault

May 19, 2020