

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

**SUBMISSIONS OF THE RESPONDENT MINAKI ON THE RIVER INC., 2262608
ONTARIO INC., and 2262609 ONTARIO INC.**

I. OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Application

1. Alex Rheault (the "**Applicant**") seeks leave to appeal, through an application dated March 25, 2020 (the "**Application**"), the decision of the Director, Ministry of the Environment, Conservation and Parks (the "**Ministry**") to issue the Amended Environmental Compliance Approval 7133-BCPLA4 (the "**the 2020 Amended ECA**"), dated March 6, 2020, to Minaki on the River Inc., 2262608 Ontario Inc. and 2262609 Ontario Inc. (collectively, the "**Respondent**" or "**MOTR**").¹ The basis for seeking leave to appeal is that in order to make his decision, the Director ought to have required MOTR to update the water quality baseline studies for the Winnipeg River, and to provide even more treatment of the effluent from the existing, previously approved sewage treatment plant.

2. The Applicant does not meet the statutory test for standing to appeal the decision of the Director to amend the 2014 Amended ECA and issue the 2020 Amended ECA as set out in subsection 38(1) of the *Environmental Bill of Rights, 1993* (the "**EBR**"), or in the alternative, the allegations contained in the Application are outside of the scope of what the Tribunal may consider in an application for leave to appeal.²

3. In the alternative, the Applicant does not meet the two-part test for leave to appeal the Director's decision as set out in section 41 of the EBR.³

4. The Applicant has failed to provide a good reason to believe that no reasonable person, having regard to the relevant law and to government policies developed to guide decisions of that kind, could have made this decision (namely the amendment to the existing 2014 Amended ECA that resulted in the issuance of the 2020 Amended ECA), and that the Director's decision to amend

¹ Application for Leave to Appeal to the Ontario Environmental Rights Tribunal dated March 25, 2020 ("**Application**").

² EBR, s. 38(1). Submissions of the Director, Ministry of the Environment, Conservation and Parks ("**Director's Submissions**"), Schedule "B".

³ EBR, s. 41. Director's Submissions, Schedule "B".

the existing approval and issue the 2020 Amended ECA could result in significant harm to the environment.

5. There is no basis for the Tribunal to grant the leave to appeal in this Application.

6. The Respondent respectfully requests that the Tribunal dismiss the Application.

A. Overview of Respondent's Submissions

7. There is no basis in fact or law to support the leave to appeal application. The sewage works were previously authorized at the site located in the unorganized northern Ontario community of Minaki, in the District of Kenora, on the Winnipeg River (the "Site"). In 2014, an amendment was obtained to the approval to upgrade the existing sewage works with the addition of a chemical phosphorus removal system, which resulted in the Director issuing Amended ECA 7471-9LVPLH dated August 28, 2014 (the "**2014 Amended ECA**"). The 2014 Amended ECA authorized a sewage works that provided significant treatment capabilities, and included a primary clarifier / equalization tank, a rotating biological contractor ("**RBC**"), a chemical phosphorous removal system, a final clarifier, a chlorine contact disinfection system, and blowers to supply air to the aforementioned equipment.

8. The application to amend the existing 2014 Amended ECA, which resulted in the issuance of the 2020 Amended ECA that is the subject of the Application, was simply to accommodate a change to the use and servicing of the Site (from detached buildings and apartment units to recreational vehicles). During consultation with the Director, the Respondent agreed to include an upgraded ultraviolet disinfection system to be used instead of the existing chlorine contact disinfection system.

9. The Director's decision to amend the 2014 Amended ECA and issue the 2020 Amended ECA is the only decision that can be the subject of the Applicant's leave to appeal application. The Director's decision included very limited changes to the sewage works and the existing approval. These changes will provide benefits to the environment through improved treatment and more stringent controls. The Director's decision does not change the capacity of the sewage works, the limits that the treated effluent must meet prior to discharge, the required monitoring and sampling of the effluent or the discharge location for the treated effluent.

10. There is, and was, no reason or basis for any further study or additional treatment equipment to be imposed in order for the Director to have amended the 2014 Amended ECA and to have issued the 2020 Amended ECA. All submissions and relevant matters raised by the Applicant were considered by MOTR and the Director. There is no reason to provide the Applicant with leave to appeal the Director's narrow and beneficial decision. Granting such leave would not benefit the environment, and would simply further delay this project for no valid reason.

B. History of the Sewage Works and the ECA

11. The 2020 Amended ECA was issued by the Director on March 6, 2020 with respect to the sewage works installed at the Site.

12. The Site is the location of the former Minaki Lodge, which operated as a recreational tourist site for over 90 years consisting of a main lodge, 7 cabins, and a 128-seat restaurant. The main lodge was destroyed by fire in 2003.

13. The RBC sewage treatment plant at the Site was installed in 1988 and has been upgraded since that time. Approvals from the Director have been issued for this sewage works at the Site since that time.

14. Amended Environmental Compliance Approval 8254-8UAK3P was issued by the Director on June 6, 2012 in respect of the sewage works, authorizing the continued use of key elements of the existing sewage works that remain in place today, and permitting the discharge of treated effluent to the Winnipeg River at a maximum rate of 186 m³ / day, average daily flow.

a) The 2014 Amended ECA

15. MOTR has spent significant time and resources to bring the Site back into operation after the lodge was destroyed in 2003. In 2014, as part of the plans to return the Site to use, MOTR obtained the 2014 Amended ECA.⁴

16. The 2014 Amended ECA approved the change of servicing for the sewage works to serve a "proposed seasonal residential development (formerly serving the Minaki Lodge) consisting of

⁴ 2014 Amended ECA. Director's Submissions, Hitesh Vaja Statement Exhibit "A"- 2014 ECA.

104 single detached units, 56 apartment units and a 128-seat restaurant". The description of the servicing of the Site in 2014 reflected the redevelopment plans for the Site at that time.

17. The 2014 Amended ECA authorized the continued use of the sewage works, referred to herein as the 2014 Previous Works, and authorized the new works, referred to herein as the 2014 Proposed Works.

18. The 2014 Previous Works consisted of: i) a primary clarifier and equalization tank, ii) a rotating biological contractor or RBC, iii) a secondary or final clarifier, iv) a chlorine contact disinfection system, v) three blowers to supply air to the primary clarifier, equalization tank, the first stage of the RBC and the final clarifier, and vi) an effluent flow meter, including a 24 hour circular chart recorder.

19. The 2014 Proposed Works consisted of the installation of the chemical phosphorus removal system.

20. The Director posted the draft 2014 Amended ECA on the Environmental Bill of Rights Registry for 45 Days, from February 14, 2014 to March 31, 2014. No applications for leave to appeal were submitted and no appeal of the 2014 Amended ECA was made.

b) The 2020 Amended ECA

21. The plans for the use of the Site were updated to include a seasonal recreational vehicle site. Instead of the approved seasonal residential development consisting of 104 single detached units, 56 apartment units, and the 128-seat restaurant, the plan was updated to reflect 198 recreational vehicle sites, 7 cabins, and the existing 128-seat restaurant (the cabins and restaurant being associated with the former Minaki Lodge).

22. WSP was retained by MOTR to help prepare the application for the 2020 Amended ECA. WSP has extensive experience with wastewater treatment systems, including the sewage works at the Site. WSP had been involved in the sewage works and the Site since 2011. WSP was the design firm for the 2014 ECA Amendment to include the chemical phosphorus removal system.

23. An application dated February 14, 2019 was submitted to the Director to authorize the changes described in paragraph 21 above. There were no other changes proposed to the sewage

works. There was no change required to the capacity of the sewage works (186 m³/day average daily flow), the effluent limits, the effluent testing or the effluent discharge location. These had been approved in the existing 2014 Amended ECA.⁵

24. The Director posted the proposed 2020 Amended ECA to the Environmental Registry of Ontario for public comment between March 28, 2019 to May 12, 2019 (45 days).⁶

25. As part of the consultation with the Director after the application for the 2020 Amended ECA was submitted, the Director recommended, and MOTR agreed, to install an ultraviolet disinfection (UV) system to the sewage works. This was an upgrade to the disinfection system in the sewage works over the existing chlorine contact disinfection system. The existing chlorine contact disinfection system was retained as a back-up disinfection system, which provides redundancy if ever needed. This change is inherently a benefit to the environment and cannot result in any harm.

26. The 2020 Amended ECA authorized the continued use of the existing approved sewage works, expressly referred to in the approval as Previous Works, and the authorization of the new works, expressly referred to in the approval as Proposed Works. For clarity, the Previous Works and Proposed Works identified in the 2020 Amended ECA will be referred to as the 2020 Previous Works and the 2020 Proposed Works, respectively.⁷

27. The 2020 Previous Works, which were already approved in the 2014 Amended ECA, include: i) a primary clarifier and equalization tank, ii) a rotating biological contractor or RBC, iii) a secondary or final clarifier, iv) a chemical phosphorus removal system, v) a standby chlorine contact disinfection system, vi) three blowers to supply air to the primary clarifier, equalization tank, the first stage of the RBC and the final clarifier, and vii) an effluent flow meter, including a 24 hour circular chart recorder.

⁵ Application dated February 14, 2019 for 2020 Amended ECA. Director's Submissions, Hitesh Vaja Statement, Exhibit "B"- Minaki 2019 Application.

⁶ Application, Exhibit "D".

⁷ 2020 Amended ECA. Application, Exhibit "C".

28. The 2020 Proposed Works in the 2020 Amended ECA are simply an ultraviolet irradiation (UV) system consisting of a pre-assembled UV disinfection system rated for effluent flows up to 473 m³/day, complete with an alarm system.

29. The 2020 Amended ECA does not change the capacity of the sewage works, the limits that the treated effluent must meet prior to discharge, the required monitoring and sampling of the effluent or the discharge location for the treated effluent. The 2020 Amended ECA improves the sewage works by requiring the use of an upgraded UV disinfection system, while retaining the existing chlorine contact disinfection system as a backup (and thus providing redundancy).

II. THE LAW

A. Environmental Compliance Approvals

30. Subsection 53(1) of the *Ontario Water Resources Act* (the "OWRA") requires an environmental compliance approval to use, operate, establish, alter, extend or replace new or existing sewage works.⁸

31. The Director's authority for issuing environmental compliance approvals for sewage works is set out in section 20.3 of Part II.1 of the *Environmental Protection Act* (the "EPA"). Paragraph 20.3(1)(c) of the EPA provides the Director with the discretion to impose terms and conditions in the environmental compliance approval.⁹

32. The EBR provides for public participation in decisions to issue Class I or Class II instruments. Section 22 of the EBR requires the Minister to do everything in his or her power to give notice to the public of a classified proposal for an instrument under consideration at least 30 days before a decision is made whether or not to implement the proposal.¹⁰

33. Environmental compliance approvals under subsection 53(1) of the OWRA are classified as Class II instruments for the purposes of the EBR. An amendment to such an approval is also considered to be a Class II instrument due to subsection 1(4) of the EBR, which provides that "a

⁸ OWRA, s. 53(1). Director's Submissions, Schedule "B".

⁹ EPA, s. 20.3. Director's Submissions, Schedule "B".

¹⁰ EBR, s. 22. Director's Submissions, Schedule "B".

proposal to issue, amend or revoke an instrument is a proposal for an instrument" [emphasis added].¹¹

34. Subsection 139(2) of the EPA provides the notice and appeal rights available to instrument holders:

When Director refuses licence, permit or approval

(2) When the Director,

(a) refuses to issue or renew or revokes or suspends a licence, permit or approval;

(b) imposes terms and conditions in issuing an environmental compliance approval;

(c) imposes terms and conditions in issuing or renewing a renewable energy approval, licence, permit or approval;

(d) *alters the terms and conditions in an environmental compliance approval, renewable energy approval, certificate of property use, licence or permit or approval after it is issued; or*

(e) *imposes new terms and conditions in an environmental compliance approval, renewable energy approval or certificate of property use,*

the Director shall serve notice together with written reasons therefor upon the applicant or the person to whom the licence, permit, approval, environmental compliance approval, renewable energy approval or certificate of property use is issued, as the case may be, and the applicant or person may, by written notice served upon the Director and the Tribunal within 15 days after the service of the notice, require a hearing by the Tribunal. [emphasis added]

35. Paragraph 139(3)(b) of the EPA provides that the notice and appeal rights in subsection 139(2) do not apply with respect to terms and conditions in an environmental compliance approval as a result of an application under Part II.1 of the EPA, which includes an application for an environmental compliance approval to operate sewage works pursuant to subsection 53(1) of the

¹¹ EBR, s. 1(4); Classification of Proposals for Instruments, O. Reg. 681/94 s. 5(2). These Submissions of the Respondent Minaki on the River Inc., 2262608 Ontario Inc., and 2262609 Ontario Inc. ("**Respondent Submissions**"), Schedule "B".

OWRA, if the terms and conditions are substantially the same as those contained in an approval that was previously issued and is still in effect at the time the decision [by the Director] is made in respect of the application.¹²

B. Applicant's Standing for Leave to Appeal and Scope for Leave to Appeal

36. The test for standing for seeking leave to appeal is set out in section 38 of the EBR. Section 38 of the EBR provides that a person who is resident in Ontario may apply for leave to appeal a decision *whether or not to implement a proposal* for a Class II instrument of which notice is required to be given under section 22 if the following two conditions are met: 1) the person seeking leave to appeal has an interest in the decision, and 2) another person has a right under another Act to appeal *from a decision whether or not to implement the proposal*.¹³

37. Subsection 38(3) of the EBR provides that the fact that a person has exercised a right under the EBR to comment on a proposal is evidence that the person has an interest in the decision on the proposal.¹⁴

38. An applicant's right to seek leave to appeal under subsection 38(1) of the EBR and the Tribunal's jurisdiction on a leave to appeal application are restricted to the substance of the Director's immediate decision. A proposal to amend an instrument, such as an environmental compliance approval, does not permit a leave applicant to open up aspects of the instrument that are not being amended.¹⁵

39. The instrument holder is subject to limitations with respect to the appeal of an environmental compliance approval. When the Director takes certain actions, such as a decision to *alter* the terms and conditions in an environmental compliance approval, or *impose* new terms and conditions in an environmental compliance approval, the Director is required to serve notice, together with written reasons, on the applicant for the environmental compliance approval, who

¹² EPA, s.139(3)(b). Director's Submissions, Schedule "B".

¹³ EBR, s. 38. Director's Submissions, Schedule "B".

¹⁴ EBR, s. 38(3), Respondent's Submissions, Schedule "B".

¹⁵ *Hughes v. Director, Director of the Environment*, 2012 CarswellOnt 10904 (ERT) at para 35 [*Hughes*]. Director's Submissions, Schedule "A"; *Fairfield v. Director, Director of the Environment*, 2014 CarswellOnt 13104 (ERT) at paras 64-65 [*Fairfield*]. Respondent's Submissions, Schedule "A".

may then seek a hearing to appeal the Director's decision. The Director's decision, in this case, is limited to the decision to *alter* existing terms and conditions, or *impose* new terms and conditions, in an existing environmental compliance approval.¹⁶

40. Subsection 139(2) of the EPA establishes a "...statutory opportunity available to an instrument holder to appeal terms and conditions. If that opportunity is not used, the instrument holder cannot use the later imposition of new conditions on the permit as a wedge to reopen what the Director considers as a closed matter."¹⁷ Similarly, the participation rights for the public available under the EBR are limited to a "proposal" and a "decision" with respect to a proposal, and the exercise of those rights is strictly time limited. The Tribunal has concluded that there is no language in the EBR to justify that instrument holders and members of the public are held to "different standards of vigilance in the exercise of their appeal rights".¹⁸

41. In *Haldimand Against Landfill Transfers*, the Tribunal held that it had jurisdiction to consider only the matters addressed in the amendments to the approval, and not the terms and conditions established in the original approval and unchanged in the amendments.¹⁹ Similarly, in *Kagawong Power*, the Tribunal held that it had no jurisdiction to consider conditions in an amended Permit to Take Water that "remained essentially unchanged".²⁰ In other words, for any applicant seeking leave to appeal, whether they are an instrument holder or a member of the public, "it is the actual decision made by a director at that stage in an ongoing regulatory relationship for which leave to appeal may be requested."²¹

¹⁶ EPA, s.139(2). Director's Submissions, Schedule "B".

¹⁷ *Hughes, supra* note 15 at para 32. Director's Submissions, Schedule "A".

¹⁸ *Ibid*, at para 35. Director's Submissions, Schedule "A".

¹⁹ *Hughes, supra* note 15 at para 33, citing *Haldimand Against Landfill Transfers (HALT) v. Ontario (Director, Director of the Environment)*, [2005] O.E.R.T.D. No. 29 [*Haldimand*]. Director's Submissions, Schedule "A".

²⁰ *Kagawong Power Inc. v. Ontario (Director, Ministry of the Environment)*, 2007 CarswellOnt 9989 (ERT), at para 34 [*Kagawong Power*]. Director's Submissions, Schedule "A".

²¹ *Hughes, supra* note 15 at para 35, citing *Haldimand, supra*. Director's Submissions, Schedule "A".

C. The Test for Leave to Appeal

42. Section 41 of the EBR sets out two requirements that the Applicant must satisfy to obtain leave to appeal, namely:

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.²²

43. Section 41 of the EBR creates a presumption against granting leave to appeal. The Tribunal has consistently cited the *Lafarge* decision for its interpretation of the leave test under section 41 of the EBR.²³ In that case, the court noted that the wording of section 41 of the EBR is unusual in that it begins with a negative, the express prohibition "leave to appeal a decision shall not be granted..." Thus, section 41 of the EBR creates a "stringent threshold". Leave to appeal under section 41 of the EBR should only be granted in exceptional cases to challenge decisions that were made "egregiously in error".²⁴

44. The standard of proof for meeting the test for leave to appeal is an evidentiary one. An applicant for leave must satisfy the Tribunal that there is a real foundation to its case, sufficient to give the parties a right to pursue the matter through the appeal process.²⁵

²² EBR, s. 41. Director's Submissions, Schedule "B".

²³ See *spar Le Clair v. Ontario (Environment, Conservation and Parks)*, 2019 CarswellOnt 14795 (ERT) at paras 23-24. Respondent's Submissions, Schedule "A".

²⁴ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 3460 at para 40 [*Lafarge*]. Director's Submissions, Schedule "A".

²⁵ *Lafarge, supra* note 24 at para 45. Director's Submissions, Schedule "A".

45. When considering a leave to appeal application, the Tribunal must focus on the evidence and argument directly relevant to the two-branch test set out in section 41 of the EBR. The Tribunal has previously declined to descend into a consideration or assessment of the merits of the appeal.²⁶

46. The question under the first branch of the leave to appeal test in paragraph 41(a) of the EBR is whether an applicant has put forward a *prima facie* case showing no reasonable person could have made the decision, having regard for the relevant law and policies. Reasonable persons in this context are those that have regard for relevant law and policies taking the factual record into account. The question is not whether or not the content of the relevant laws and policies is adequate.²⁷

47. The question under the second branch of the test at paragraph 41(b) requires the applicant to put forward a *prima facie* case showing that the decision, in this case the decision to issue the 2020 Amended ECA, could result in *significant* environmental harm.²⁸

48. The evidentiary burden is on the applicant. If an applicant is not able to supply sufficient evidence to allow the Tribunal to assess allegations of environmental harm, this branch of the test is not satisfied. Merely asserting that the decision should not have been taken without further investigation into environmental impacts is not enough. The Tribunal must be satisfied, based on the evidence before it, that significant harm to the environment could result from the decision.²⁹

49. Leave to appeal must only be granted where the applicant for leave to appeal has met the stringent threshold in respect of each of these two branches of the test.³⁰

²⁶ *Young v. Ontario (Director of the Environment and Climate Change)*, [2016] O.E.R.T.D. No. 43 at para 36 citing *Guelph v. Ontario (Director of the Environment)*, [2014] O.E.R.T.D. No. 25 at paras 16, 17. Director's Submissions, Schedule "A".

²⁷ *Lafarge, supra* note 24 at paras 46 and 49. Director's Submissions, Schedule "A".

²⁸ *Lafarge, supra* note 24 at paras 47. Director's Submissions, Schedule "A".

²⁹ *McRae v. Ontario (Director of the Environment)*, [2009] O.E.R.T.D. No. 41 at paras. 27, 37 [McRae]. Director's Submissions, Schedule "A"; *Levesque v. Ontario (Director of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 42 at paras. 54-58 [Levesque]. Director's Submissions, Schedule "A".

³⁰ *Freshway Investments Inc. v. Ontario (Director of Environment, Conservation and Parks)*, [2018] O.E.R.T.D. No. 66 at para. 88. Director's Submissions, Schedule "A"; *Young, supra* note 26 at para. 88. Director's Submissions, Schedule "A".

50. For the reasons set out below, MOTR submits that the Applicant does not have standing to seek leave to appeal on the issues raised in the Application, or in the alternative, that the issues raised in the Application are beyond the scope of the Tribunal to consider in application for leave to appeal. Further, even if he had such standing, the Applicant has failed to establish that there is good reason to believe that no reasonable person could have made the decision to approve the 2020 Amended ECA, and that significant environmental harm could result from the decision to issue the 2020 Amended ECA.

III. SUBMISSIONS

51. The Applicant has provided two grounds in the Application on which he is seeking leave to appeal the Director's decision to issue the 2020 Amended ECA: 1) the Director did not require updated water quality baseline studies for the Winnipeg River, and 2) the Director did not require additional treatment of effluent from the sewage works.

52. The Respondent refers to the report prepared by WSP Canada Inc. ("**WSP**"), dated May 7, 2020 (the "**WSP Report**"), attached as Schedule "C" to this Response, to respond to technical issues raised by the Applicant.³¹

A. Standing to Seek Leave to Appeal and Scope of Leave to Appeal

53. For the reasons set out below, the Applicant does not have standing to seek leave to appeal the Director's decision under section 38 of the EBR based on the allegations contained in the Application, or in the alternative, the allegations contained in the Application are outside of the scope of what the Tribunal may consider in an application for leave to appeal with respect to the 2020 Amended ECA.

54. MOTR, as the instrument holder and applicant for the amendment to the 2014 Amended ECA, can only seek a hearing to appeal the Director's decision on the 2020 Amended ECA on a decision to alter the terms and conditions in the existing environmental compliance approval, or impose new terms in the existing environmental compliance approval. MOTR does not have any

³¹ Respondent's Submissions, Schedule "C"- WSP Report.

right to seek a hearing to appeal the Director's decision with respect to terms and conditions that are substantially the same as those contained in the 2014 Amended ECA.

55. The Applicant can also only seek leave to appeal based strictly on the Director's decision in question, which is the decision to amend the existing 2014 Amended ECA, resulting in the issuance of the 2020 Amended ECA. The Applicant cannot seek leave to appeal a decision of the Director that was made in 2014 when the 2014 Amended ECA was issued.

56. The proposal on which the Director made a decision to amend the 2014 Amended ECA was very limited in nature, and did not materially change the previously authorized sewage works, including the capacity of the sewage works, the limits that the treated effluent must meet prior to discharge, the required monitoring and sampling of the effluent and the discharge location for the treated effluent. These aspects of the sewage works were previously authorized in the existing 2014 Amended ECA and were not changed as part of the Director's decision.

57. The only change to the sewage works included in the Director's decision to amend the 2014 Amended ECA, resulting in the issuance of the 2020 Amended ECA, is a very specific change to the type of units available at the Site (recreational vehicles, as opposed to single detached units and apartments, which had been approved) and the addition of an upgrade in the form of a UV disinfection system (described as Proposed Works in the 2020 Amended ECA).

58. These changes are not the subject of the Application.

59. The Director's decision to amend the 2014 Amended ECA, resulting in the issuance of the 2020 Amended ECA, also resulted in the inclusion of several new and updated provisions in the 2020 Amended ECA, including updated language to reflect the current language used by the Director when issuing ECAs for sewage works.³² These changes include the following:

- (a) an obligation on the instrument holder to provide Financial Assurance (Condition 14);

³² Director's Submissions, Hitesh Vaja Statement, Exhibit "I"- 2020 ECA with new conditions highlighted.

(b) updated language with respect to prohibited bypasses and overflows, which clarifies the obligations under each scenario and, and requires mandatory sampling in the event of an overflow rather than best efforts to sample in the event of an overflow (Condition 5);

(c) the *addition* of an effluent objective of non-detect for Total Residual Chlorine (Condition 6) and the alteration of the existing effluent monitoring requirement for Total Residual Chlorine to clarify that monitoring is only required when the chlorine disinfection system is in use (Condition 9, Subsection (3));

(d) a revision to the seasonal effluent disinfection requirement to clarify that the effluent must be continuously disinfected during the seasonal effluent discharge period (Condition 7(3));

(e) the addition of standby power facilities (listed in supporting documents of Schedule A); and

(f) limited operational flexibility, which is subject to the restrictions contained in the Ministry Protocol included in Schedule B, and which permits identified maintenance, repairs and replacements to the existing system, but does *not* permit any change to a treatment technology, any extension or addition to the process structures, relocation of the effluent outfall or any change that results in a deterioration to the effluent quality (Condition 15).

60. These terms and conditions are not the subject of the Application.

61. Rather, the Applicant alleges that if updated water quality baseline studies were performed, then stricter limits or additional treatment processes such as tertiary filtration or discharge to a subsurface leaching bed may be required.

62. The effluent treatment limits were authorized in the 2014 Amended ECA and were not changed in the 2020 Amended ECA.

63. Similarly, the overall design of the sewage works, namely the primary clarifier, the RBC, the chemical phosphorus removal system, and the final clarifier, all of which discharges treated

effluent to the Winnipeg River, were all previously authorized under the existing 2014 Amended ECA. The only change made to the approved sewage works in the 2020 Amended ECA is the addition of an upgraded UV disinfection system to replace the existing chlorine contact disinfection system, which is retained as back-up (and provides redundancy). The disinfection system on a sewage works is designed to reduce microbiological parameters in the effluent prior to discharge. The upgrade to a UV disinfection system is logically more protective of the environment.³³ The Applicant has not challenged the Director's decision to upgrade the disinfection system by requiring the addition of a UV disinfection system. Rather, the Applicant is challenging the overall design of the sewage works, including the potential need for additional tertiary treatment and/or a change to how the treated effluent is discharged from the sewage works. These aspects of the sewage works were previously approved in the existing 2014 Amended ECA and were not changed as part of the Director's decision.

64. By seeking to appeal the effluent limits and the existing treatment and discharge of the effluent, the Applicant is, in effect, seeking leave to appeal the 2014 Amended ECA, which he did not do at the time when that approval was being considered. Respectfully, the Tribunal has no jurisdiction to consider such an appeal.

65. MOTR, as the instrument holder, would not be able to appeal the Director's decision with respect to the effluent limits or the overall treatment and discharge of the treated effluent included in the 2020 Amended ECA for the reason that these decisions were made at the time of the 2014 Amended ECA, they are not part of the current "proposal" and "decision" of the Director, and in any event, they are the same, or substantially the same as the provisions in the existing approval within the meaning of paragraph 139(3)(b) of the EPA.

66. The Applicant does not have broader rights to seek leave to appeal an environmental compliance approval than the instrument holder. The scope of the Application under subsection 38(2) of the EBR is therefore limited to the extent of the appeal that the instrument holder (i.e. MOTR) could bring pursuant to section 139 of the EPA.

³³ Respondent Submissions, Schedule "C"- WSP Report at para 14.

67. If the Applicant were permitted leave to appeal on anything other than the limited changes made by the Director's decision to issue the 2020 Amended ECA, that would be contrary to the plain meaning and intent of the EBR, and would allow the Applicant to challenge the approval that was issued in 2014, despite the time limit for such appeal having expired long ago. This would open the door for anyone to appeal an entire approval whenever a minor change is made, contrary to the legislative words and intent in the EBR.

68. The Applicant does not meet the test for standing to seek leave to appeal in section 38 of the EBR because the grounds for appeal identified in the Application do not relate to the decision of the Director as to whether or not to implement the proposal, and because MOTR, as the instrument holder, does not have the right to appeal the terms and conditions over which the Applicant is seeking leave to appeal, which is a condition to the Applicant's right to seek leave to appeal.

69. Further, or in the alternative, the issues raised by the Applicant are beyond the jurisdiction of the Tribunal to consider in a leave to appeal application in connection with the Director's decision to amend the 2014 Amended ECA and issue the 2020 Amended ECA. The Tribunal has consistently held that a proposal to amend an environmental compliance approval does not permit a leave applicant to open up aspects of the instrument that are not being amended. The Applicant can only request leave to appeal the actual decision made by the Director at this stage in the ongoing regulatory relationship, being the decision to issue the 2020 Amended ECA. The Applicant has failed to reference, let alone appeal, any of the provisions unique to the 2020 Amended ECA in his Application.

B. Application of Test for Leave to Appeal

70. Notwithstanding MOTR's position that the Applicant has no standing to seek leave to appeal on the grounds put forward in the Application, or that the grounds put forward in the Application are beyond the jurisdiction of the Tribunal to consider in an application for leave to appeal, MOTR has provided the following additional responses to the Applicant's submissions regarding the alleged need for updated water quality baseline studies and/or additional treatment and the potential for significant harm to the environment.

a) Reasonableness under s. 41(a) of the EBR

i. Updated Water Quality Baseline Studies

71. The Applicant submits that an updated water quality baseline study was required to determine the potential impacts of the decision to amend the 2014 Amended ECA and issue the 2020 Amended ECA on the Winnipeg River, that Director did not follow its own rules to require updated water quality baseline studies, and as a result, there is a risk that the plant's treatment limits are inconsistent with the River's current condition, and that stricter limits and additional treatment are needed to avoid unacceptable degradation of the water quality.

72. The Applicant's position is not supported by reference to any specific law or policy, other than a general statement by the Applicant's consultant on page 5 of the Application; "It has been *our general experience* that the Ministry applies the most current guidelines at the time of their review, *therefore, an updated review of potential impacts to the receiver should be conducted* in accordance with current MECP guidelines" [emphasis added].³⁴

73. The Ministry has published a *Guide for Applying for an Environmental Compliance Approval* (the "**Guide**").³⁵

74. The Guide states at Section 4.5- Environmental Impact Analysis for Industrial Sewage Works of Part C, Section 9, "for *new* or *expanded* facilities with a direct surface discharge (including direct discharges to wetlands), you must report the present downstream use and assimilative capacity of the receiver [emphasis added]."³⁶

75. The 2020 Amended ECA does not relate to new or expanded sewage treatment works. The amendments to the 2014 Amended ECA that resulted in the issuance of the 2020 Amended ECA do not increase the amount of sewage that may be discharged into the Winnipeg River, nor do they change the limits that the treated effluent must meet prior to discharge, the required monitoring

³⁴ Application, p. 5 and Exhibit A.

³⁵ Director's Submissions, Statement of Hitesh Vaja, Exhibit "N"- Guide for Applying for an ECA, Part C, Section 9.

³⁶ *Ibid.*, at Section 4.5.

and sampling of the effluent or the discharge location for the treated effluent, in each case, from what was previously authorized in the 2014 Amended ECA.

76. Further, the Applicant does not provide any evidence to indicate that the water quality in the Winnipeg River is under stress. Publicly available water quality data for the Winnipeg River watershed, including the Winnipeg River, does not identify water quality concerns for the Winnipeg River, particularly with respect to the key parameters that are discharged from the sewage works and similar municipal treatment plans (e.g., Total Suspended Solids and nutrients (i.e., phosphorus and nitrogen)).³⁷ This data provides a strong indication of the overall health of the Winnipeg River and does not imply the need for additional baseline studies.³⁸

77. In the circumstances, and with respect to the decision by the Director to amend the 2014 Amended ECA and issue the 2020 Amended ECA, there was no need for any water quality baseline study. As such, it was reasonable and appropriate for MOTR not to conduct any such study, and for the Director to issue the 2020 Amended ECA without requiring any such study.

ii. Additional Treatment of Effluent

78. There is no reasonable basis for the Applicant's submission that additional tertiary treatment of effluent should be considered as part of the decision by the Director to amend the 2014 Amended ECA and issue the 2020 Amended ECA, either through additional equipment in the plant or through a leaching bed on land.

79. No further treatment of the effluent is required for any parameter in order to meet the stringent effluent limits that are included in the 2020 Amended ECA, which were also included in the 2014 Amended ECA.³⁹

80. Upgraded disinfection of the effluent was recommended by the Director, and agreed to by MOTR, as part of the 2020 Amended ECA through the installation of the UV disinfectant system. As described in the WSP Report, the UV disinfectant system is considered to be the most effective

³⁷ Respondent Submissions, Schedule "C"- WSP Report at para 29.

³⁸ *Ibid*, at para 33.

³⁹ *Ibid*, at para 20.

system for microbial inactivation, and does not contribute to the formation of potentially harmful by-products that are associated with chlorine-based disinfection.⁴⁰

81. The recommendation of the Applicant's consultant, RJ Burnside & Associates, that additional treatment should be considered is from a report dated May 10, 2019. This report pre-dates the inclusion of UV disinfection in the 2020 Amended ECA.

82. Ministry Policy F-5-1 *Determination of Treatment Requirements for Municipal and Private Sewage Treatment Works*, published October 11, 2016 provides that secondary treatment is the "normal" level of treatment for sewage works in Ontario, unless receiving water studies indicate the need for higher levels of treatment.⁴¹

83. Notwithstanding this, and even though this is a small sewage system discharging to a watershed with significant flow, the sewage works are already equipped with a form of tertiary treatment through the chemical phosphorus removal system, which was authorized under the 2014 Amended ECA.⁴²

84. Discharge of treated effluent through a subsurface leaching bed instead of the Winnipeg River is a completely different disposal method than what has been approved in prior approvals, including the 2014 Amended ECA. This type of disposal can present a greater risk to the environment compared to the mechanical treatment system currently in place.⁴³

85. In the circumstances, and with respect to the decision by the Director to amend the 2014 Amended ECA and issue the 2020 Amended ECA, it was reasonable and appropriate for the Director to issue the 2020 Amended ECA without requiring additional treatment or an alternate location for the discharge of the treated effluent.

b) Significant Harm to the Environment under s. 41(b) of the EBR

86. The Application does not provide any evidence showing how or why the Director's decision to amend the 2014 Amended ECA and issue the 2020 Amended ECA could result in any harm to

⁴⁰ *Ibid*, at paras 14-15.

⁴¹ Director's Submissions, Statement of Hitesh Vaja, Exhibit "L"- Guideline F-5-1.

⁴² Respondent Submissions, Schedule "C"- WSP Report at para 19.

⁴³ *Ibid*.

the environment, let alone significant harm to the environment. This is understandable because when one considers the scope of the changes made, they could not result in any harm.

87. Instead, changes made to the 2014 Amended ECA resulting in the issuance of the 2020 Amended ECA, as described above, necessarily result in benefits to the environment.⁴⁴

88. There are numerous robust, proactive and strict conditions included in the 28-page 2020 Amended ECA, just as with the 2014 Amended ECA, that impose multiple layers of protection for the environment, including:

- (a) strict effluent limits and objectives for parameters in the effluent (Conditions 6 and 7);
- (b) weekly monitoring of the effluent for all regulated parameters (Condition 9);
- (c) robust reporting requirements to the District Manager, including reporting prior to the start-up the works and reporting any exceedance of any effluent limit orally, as soon as reasonably possible, and in writing within seven days (Condition 10);
- (d) annual performance reporting describing all aspects of the use and operation of the system (Condition 10);
- (e) prohibitions on bypasses from the system except in limited emergency or planned repair or maintenance circumstances, in each case, with immediate notification to the Spills Action Centre and the District Manager (Condition 5);
- (f) prohibitions on overflows from the system except in limited emergency or planned repair or maintenance circumstances, in each case, with immediate notification to the Spills Action Centre, the local Medical Officer of Health and the District Manager (Condition 5);
- (g) the preparation and implementation of an operations manual detailing all operating procedures, inspection programs, testing methodologies, inspection and

⁴⁴ Respondent Submissions, Schedule "C"- WSP Report at para 14.

calibration of monitoring equipment, repair and maintenance programs, spill prevention control and countermeasure plan, and procedures for addressing any public complaints (Condition 8);

(h) the system must be operated by an operator who holds a licence that is the same class or higher as the class of facility in accordance with Ontario Regulation 129/04 (Condition 8, Subsection 5);

(i) odour and noise assessment, including a pre start-up odour and noise emissions assessment to be completed by a qualified consultant (Condition 12); and

(j) financial assurance in the amount of \$91,000 to provide security to the Director with respect to the funds required for compliance with the 2020 Amended ECA as well as the performance of any action specified in the 2020 Amended ECA, including cleanup, monitoring and post closure care (Condition 15).

89. Further, and in any event, the Site will be used for a seasonal recreational vehicle park. The Site cannot be used for permanent residents. The operation of the sewage works is prohibited between November 15 and April 15 of each year. The sewage works can easily be closed down in the unlikely event of any unanticipated maintenance or repair.

90. A comparison of the quantity of treated effluent that is permitted to be discharged under the sewage works against the flow rate in the Winnipeg River indicates a dilution ratio of 1:750,000. The treated effluent flows from the sewage works are minimal and there is no basis to allege that they could negatively impact the Winnipeg River.⁴⁵

91. A comparison of the effluent limits in the Amended 2020 ECA against the effluent limits in the approvals of other waste water treatment plants in the Winnipeg River watershed shows that the sewage works are subject to more stringent effluent limits, notwithstanding the significantly smaller size and seasonal use for the sewage works and the highest average flow rate and dilution factor in the receiving water.⁴⁶

⁴⁵ Respondent Submissions, Schedule "C"- WSP Report at paras 36-39.

⁴⁶ *Ibid.*

92. WSP conducted an inspection of the WWTP in October 2018 in the presence of a representative from the Ministry. The purpose of the inspection was to assess the physical condition of the WWTP with the RBC unit in operation. In WSP's opinion, the WWTP is capable of operating within the requirements of the 2020 Amended ECA.⁴⁷

93. WSP has also been retained by MOTR to conduct a follow-up inspection and to provide an Engineer's Statement, following the start-up of the Works, as required under Condition 4 of the 2020 Amended Approval. This will include an assessment of whether the WWTP has been restarted in accordance with the 2020 Amended ECA.⁴⁸

94. All relevant information relating to the sewage works and the proposed changes to the 2014 Amended ECA were provided to the Director for review as part of the Director's decision to issue the 2020 Amended ECA, including with respect to any potential for harm to the environment. The Applicant provided comments to the Director on the proposal to amend the 2014 Amended ECA (ERO Number 013-4986, Ministry Reference Number 6643-B9MM8A) in the form of a letter dated May 10, 2019 (attaching the report prepared by RJ Burnside & Associates, dated May 10, 2019 that was also submitted in support of the Application). The Applicant expressed his concern regarding the RBC treatment, and that discharge to a septic field or installation of additional treatment technology should be considered by the Director. The Applicant also identified to the Director at this time its concern regarding the baseline studies of the Winnipeg River.⁴⁹ As such, these concerns were raised to, and considered by, the Director as part of the decision to amend the 2014 Amended ECA and issue the 2020 Amended ECA.

95. In our submission, the Director properly amended the 2014 Amended ECA and issued the 2020 Amended ECA, in all of the circumstances, and the application for leave to appeal should be dismissed.

IV. ORDER SOUGHT

96. The Respondent requests that this application for leave to appeal be dismissed.

⁴⁷ Respondent Submissions, Schedule "C"- WSP Report at para 22.

⁴⁸ *Ibid*, at para 23.

⁴⁹ Application, Exhibit A.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 8th day of May, 2020

Per:



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SCHEDULE "A"

Fairfield v. Director, Director of the Environment, 2014 CarswellOnt 13104 (ERT)

Le Clair v. Ontario (Environment, Conservation and Parks), 2019 CarswellOnt 14795 (ERT)

SCHEDULE "B"

Environmental Bill of Rights, 1993, S.O. 1993, c. 28

Proposals for instruments

1(4) For the purposes of this Act, a proposal to issue, amend or revoke an instrument is a proposal for an instrument. 1993, c. 28, s. 1 (4).

...

Right to seek leave to appeal a decision on an instrument

Same

38 (3) For the purposes of subsection (1), the fact that a person has exercised a right given by this Act to comment on a proposal is evidence that the person has an interest in the decision on the proposal. 1993, c. 28, s. 38 (3).

Classification of Proposals for Instruments, O. Reg. 681/94 under the Environmental Bill of Rights, 1993

Class II Proposals- Environmental Protection Act

5 (2) The following are Class II proposals for instruments:

...

6. A proposal for an environmental compliance approval under section 20.3 or 20.5 of the *Environmental Protection Act* in respect of an activity mentioned in subsection 27 (1) of that Act that relates to a waste disposal site, or in respect of an activity mentioned in subsection 9 (1) of that Act or subsection 53 (1) of the *Ontario Water Resources Act*, except a proposal for an environmental compliance approval that would only permit engaging in one or more of the following activities:
 - i. An activity mentioned in subsection 9 (1) of the *Environmental Protection Act* that would permit the discharge of a contaminant from any one discharge point for a total of less than 10 hours in any seven-day period.
 - ii. An activity mentioned in subsection 9 (1) of the *Environmental Protection Act* that would permit the discharge of a contaminant resulting from the preparation of food at a site for the purpose of selling the food at the site at retail or distributing it at the site free of charge.
 - iii. An activity mentioned in subsection 9 (1) of the *Environmental Protection Act* that would permit the discharge of a contaminant as a result of operating combustion equipment, if the equipment is not fired with fuel derived from waste, other than

- wood waste, and is not operated for the purpose of generating heat or electricity for sale.
- iv. An activity mentioned in subsection 9 (1) of the *Environmental Protection Act* that would permit the discharge of a contaminant from a storage tank or vessel.
 - iv.1 An activity mentioned in subsection 9 (1) of the *Environmental Protection Act* that would permit the discharge of a contaminant if,
 - A. the activity is related to the combustion of alternative low-carbon fuel at an alternative low-carbon fuel site, and
 - B. the proposal is in respect of a demonstration project at the site.
 - v. An activity mentioned in subsection 27 (1) of the *Environmental Protection Act* in respect of mobile waste processing equipment.
 - vi. An activity mentioned in subsection 27 (1) of the *Environmental Protection Act* in respect of a waste disposal site if the proposal relates to an organic soil conditioning site within the meaning of Regulation 347 of the Revised Regulations of Ontario, 1990 (General — Waste Management) made under the *Environmental Protection Act*.
 - vii. An activity mentioned in subsection 27 (1) of the *Environmental Protection Act* in respect of a waste disposal site if the proposal relates to operating a waste disposal site for household hazardous waste for a period of not more than 12 days per year.
 - vii.1 An activity mentioned in subsection 53 (1) of the *Ontario Water Resources Act* in respect of a demonstration project at an alternative low-carbon fuel site.
 - viii. An activity that would permit the discharge of specific contaminants from a discharge point if,
 - A. the discharge point is already subject to an environmental compliance approval within the meaning of the *Environmental Protection Act*, and
 - B. the proposed approval would not permit an increase in the discharge of any of the specific contaminants from the discharge point.