

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: July 27, 2020

CASE NO:

20-019

PROCEEDING COMMENCED UNDER section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28

Applicant:	Alex Rheault
Instrument Holder:	Minaki on the River Inc.
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of leave to appeal:	Decision to issue an Amended Environmental Compliance Approval under Part II.1 of the <i>Environmental Protection Act</i> to accommodate a change to servicing for the sewage works from condominium development to a recreational vehicle seasonal park development
Reference No.:	7133-BCPLA4
Property Address/Description:	1 Western Avenue
District:	District of Kenora
ERT Case No.:	20-019
ERT Case Name:	Rheault v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

Alex Rheault

Minaki on the River Inc.,
2262608 Ontario Inc. and
2262609 Ontario Inc.

Director, Ministry of the
Environment, Conservation and
Parks

Counsel

Self-represented

Sarah Gilbert

Sylvia Davis

HEARD: In writing
ADJUDICATOR: Laurie Bruce, Member

DECISION

BACKGROUND

[1] Alex Rheault (“Applicant”) seeks leave to appeal Amended Environmental Compliance Approval No. 7133-BCPLA4 (“2020 Amended ECA”) pursuant to s. 38 of the *Environmental Bill of Rights, 1993* (“EBR”). On March 6, 2020 the Director (“Director”) of the Ministry of the Environment, Conservation and Parks (“Ministry”) issued the 2020 Amended ECA under Part II.1 of the *Environmental Protection Act* (“EPA”) to Minaki on the River Inc., 2262608 Ontario Inc. and 2262609 Ontario Inc. (collectively, “MOTR”) for the operation of a sewage works. The type of sewage works is a Rotating Biological Contractor Sewage Treatment Plant (“STP”).

[2] The STP discharges into the Winnipeg River and is located at 1 Western Avenue at the Former Minaki Lodge Site in the community of Minaki, District of Kenora (“site”). This site originally comprised a main lodge, seven cabins, a restaurant and the STP (constructed in 1988). In 2003, the main lodge burned down but the cabins, restaurant and STP survived.

[3] Following the fire, in 2014, the Ministry issued an Amended Environmental Compliance Approval (“2014 Amended ECA”) approving a change in the servicing for the STP to a proposed seasonal residential development consisting of 104 single detached units, 56 apartment units and a restaurant. The 2014 Amended ECA authorized the continued use of the STP and required the installation of a chemical phosphorus removal system within five years, which was installed in 2019.

[4] The seasonal residential development required approval under the *Planning Act*, which was not received.

[5] In 2019, MOTR applied to amend the 2014 Amended ECA to accommodate a change to the servicing for the STP from condominium development to a recreational vehicle seasonal park development. MOTR did not seek any other changes to its 2014 Amended ECA.

[6] In response to MOTR's application to amend the 2014 Amended ECA, the Director issued the 2020 Amended ECA with additional conditions including:

- Changing the disinfection method (i.e. the use of an ultraviolet disinfection system with the existing chlorine system retained as backup);
- Adding backup power;
- Providing financial assurance (consistent with Ministry Guideline F-15);
- Updating bypass and overflow conditions (wording change for clarity);
- Establishing limited operational flexibility;
- Adding a total residual chlorine objective and effluent monitoring parameter; and
- Establishing a seasonal effluent discharge limit.

[7] The Director's decision did not change the:

- Capacity of the sewage works;
- Standards that the treated effluent must meet prior to discharge;
- Required monitoring and sampling of the effluent; or
- Discharge location for the treated effluent.

[8] The Director posted the proposed 2020 Amended ECA to the Environmental Registry for 45 days from March 28, 2019 to May 12, 2019 for public comment.

Nature of the Intended Appeal

[9] In applying for leave to appeal the 2020 Amended ECA, the Applicant argues that the Director ought to have required MOTR to: i) undertake water quality baseline studies for the Winnipeg River (i.e. the point of discharge for the STP); and ii) provide further, tertiary treatment of the effluent from the STP. The Applicant raises concerns about the impact of the effluent from the STP on the Winnipeg River.

ISSUES

[10] The issues in this application are:

1. Whether the Applicant meets the test under s. 38 of the *EBR* for the right to seek leave to appeal the 2020 Amended ECA; and if so,
2. Whether the Applicant meets the test under s. 41 of the *EBR* for leave to appeal the 2020 Amended ECA.

RESULT

[11] The Applicant meets the test under s. 38 of the *EBR* for the right to seek leave to appeal the 2020 Amended ECA. However, the Applicant has not satisfied the Tribunal that no reasonable person could have made the decision to issue the 2020 Amended ECA with due regard to the applicable laws and policies. The Applicant has therefore failed the test under s. 41 of the *EBR* for leave to appeal the 2020 Amended ECA. The Tribunal accordingly dismisses the application for leave.

DISCUSSION

The Applicant's Right to Seek Leave to Appeal under s. 38 of the *EBR*

[12] Under s. 38(1) of the *EBR*, any Ontario resident may seek leave to appeal a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given, if the following conditions are met:

1. The person seeking leave to appeal must have 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] There is no dispute that the Applicant has an interest in the 2020 Amended ECA and therefore satisfies s. 38(1)1 of the *EBR*.

[14] With respect to s. 38(1)2 of the *EBR*, we must consider the provisions of s. 139 of the *EPA*. This legislation, under which the 2020 Amended ECA was issued, identifies circumstances where a person may appeal or require a hearing by the Tribunal, including at s. 139(2)(b):

139 (2) When the Director...(b) imposes terms and conditions in issuing an environmental compliance approval...

[15] Subsection 139(3) of the *EPA* states that s. 139(1) and s. 139(2) setting out notices of the Director's decision and the ability to appeal do not apply with respect to:

...(b) terms and conditions in an environmental compliance approval as a result of an application under Part II.1, **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 that the decision is made in respect of the application [*emphasis added*]

[16] The Director argues that the Applicant's concerns about baseline water quality and tertiary treatment are matters related to effluent quality. The standards for effluent quality, the Director submits, were addressed in the terms and conditions of the preceding ECAs including the 2014 Amended ECA which required the installation of the phosphorus removal equipment. Further, the Director argues that the conditions

associated with the 2020 Amended ECA are substantially the same as conditions in the previous 2014 Amended ECA. Relying on s. 139(3)(b) of the *EPA*, the Director argues that there are, therefore, no terms and conditions in the 2020 Amended ECA that the MOTR could appeal. With no appealable decision, the Director argues that the Applicant does not satisfy the test under s. 38(1)2 of the *EBR* and therefore does not have the right to seek leave to appeal the 2020 Amended ECA.

[17] The Applicant advanced an unpersuasive argument that since the sewage works approved in the 2014 ECA applied to a specific condominium development and that the project did not exist when the 2014 Amended ECA was issued “it was an environmental compliance approval in theory only, tied to a project that never came to be.” It was the Ministry and MOTR’s position that the 2014 Amended ECA was valid.

[18] The Tribunal has considered the direction provided in s. 139(2) and s. 139(3) of the *EPA* with respect to whether all conditions attached to the 2020 Amended ECA were substantially the same as conditions in place for the 2014 Amended ECA. As seen in Witness Vaja Exhibit I, the 2020 Amended ECA included new conditions that were not substantially the same as those associated with the 2014 Amended ECA. For example, on page 1 of the 2014 Amended ECA (Vaja, Exhibit A), there is an explicit statement that there is no requirement for financial assurance, whereas Condition 14 of the 2020 Amended ECA requires financial assurance (Vaja Exhibit I, page 14). Further, the 2014 Amended ECA did not include a condition for Limited Operational Flexibility, while it was included as Condition 15 in the 2020 Amended ECA. As such, an appeal of the 2020 Amended ECA is not barred by virtue of s. 139(3)(b) of the *EPA* since the new terms and conditions in the 2020 Amended ECA are not substantially the same as those contained in the 2014 Amended ECA.

[19] Since MOTR had the right to appeal the 2020 Amended ECA under s. 139(2) of the *EPA*, then s. 38(1)2 of the *EBR* is satisfied and the Applicant meets the test for the right to seek leave to appeal.

The Test for Leave to Appeal under s. 41 of the EBR

[20] The Tribunal, having concluded that the Applicant meets the test for the right to seek leave to appeal, now considers whether leave should be granted.

[21] The Applicant, the Ministry and MOTR were at odds over whether the Applicant satisfies the following two-part test for leave to appeal under s. 41 of the *EBR*:

1. Has the Applicant that is seeking leave to appeal shown that there is good reason to believe that no reasonable person, having regard to the relevant law and government policies developed to guide such decisions, could have made the decision to issue the 2020 Amended ECA?
2. Has the Applicant demonstrated that the decision to issue the 2020 Amended ECA could result in significant environmental harm?

[22] The standard of proof associated with this two-part test, as applied by the Tribunal, is explained in *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CanLII 30290 (ON SCDC) ("*Lafarge*"), at para. 45:

At the leave to appeal stage, the appropriate standard of proof is an evidentiary one - i.e., leading sufficient evidence to establish a *prima facie* case, or showing that the appeal has "preliminary merit", or that a good arguable case has been made out, or that there is a serious issue to be tried. Although worded differently, all of these phrases point to a uniform standard which is less than the balance of probabilities, but amount to satisfying the Tribunal that there is a real foundation, sufficient to give the parties a right to pursue the matter through the appeal process.

[23] The Tribunal follows the approach set out in *Lafarge* in assessing this application for leave to appeal.

[24] At this stage, it is not the Tribunal's role to decide the merits of the appeal sought by the Applicant, but to determine whether the statutory test set out in s. 41 of the *EBR* has been met by focusing on those aspects of the evidence and argument directly

relevant to the test for leave to appeal. For leave to be granted, both parts of the test under s. 41 of the *EBR* must be satisfied.

[25] The Tribunal considered each of the Applicant's arguments: i) the need for Winnipeg River water quality baseline studies; and ii) to provide further, tertiary treatment of the effluent from the STP.

[26] The Applicant provided expert technical evidence in the form of a letter report prepared by R.J. Burnside and Associates and a supplemental report dated May 19, 2020. Both reports were prepared by Ann Egan, P. Eng, Manager of Onsite Wastewater of R.J. Burnside and Associates.

[27] MOTR submitted a report dated May 7, 2020 by WSP Canada Inc. ("WSP") authored by:

1. Dr. Charles Goss, Ph.D., C.I.T – Water Treatment Specialist WSP – letter report dated May 7, 2020
2. Justin Rak-Banville, P.Eng – Manager - Water and Wastewater

[28] The Director submitted witness statements and associated exhibits from the following individuals:

1. Hitesh Vaja, P.Eng, Senior Wastewater Engineer, Ministry Approval Services Section, Environmental Assessment and Permissions Branch.
2. Fariha Pannu, P. Eng, Senior Wastewater Engineer, Manager Wastewater, Environmental Permissions Branch
3. Cathy Debney, Senior Environmental Officer, Kenora Area Office
4. Paula Spencer, Surface Water Specialist, Technical Section

Baseline Studies

[29] The Applicant's position that baseline studies are needed is based on his concern about the impact of the effluent on the Winnipeg River. He states that water quality baseline studies that are 30 years old should be renewed and the Ministry's resistance to gaining knowledge through routine studies is unreasonable. This opinion was generally supported by Ann Egan who stated that "the last time any sort of receiving water impact assessment was completed for this [STP] was 1988 and the premise on which that approval was granted (i.e. background water quality at that time) may need to be updated. Given the length of time that had passed an updated impact assessment would normally be expected".

[30] The Applicant acknowledges that s. 4.10.4 of the Ministry's Guide to Applying for an ECA states that such studies are not required where the sewage works in question are pre-existing and no expansion is proposed. He questions whether this should be considered pre-existing given it operated "one year out of past 24" and that while it is intended to avoid needless repetition of water quality studies, in this case there are "no functional studies".

[31] The Applicant provides the following anecdotal description of water quality issues on the Winnipeg River:

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.

[32] MOTR retained WSP to assess the wastewater system including the existing and approved rotating biological contactor STP system, chemical phosphorous removal system and the UV disinfection system.

[33] Dr. Goss of WSP states in his May 7, 2020 report that “Based on WSP’s experience, expertise and judgement, there was no reason or need to conduct water quality baseline studies for the changes and improvement to the [STP] that were incorporated into the 2020 Amended Approval” (para. 11). Dr. Goss references the availability of public water quality data. He states that, although there is no reason to conduct additional water baseline studies of the Winnipeg River, the publicly available water quality data does not identify significant water quality concerns, particularly with respect to the key parameters that will be discharged from the STP, specifically Total Suspended Solids and nutrients such as phosphorous and nitrogen.

[34] Dr. Goss in his May 7, 2020 report compares the volume of effluent from the STP to other sources in the area. These were presented in Item 3 in his report. He states that given the volume of the effluent discharge, combined with the estimated dilution factor arising from the high flow volumes and the effluent parameter discharge limits, that this STP will not contribute appreciable nutrient loading to the Winnipeg River Watershed compared to Dryden or Kenora STPs. He summarizes: “Given the relatively small amount of effluent to be discharged from the [STP¹] combined with the stringent requirements and treatment limits in the 2020 Amended ECA there is no reasonable basis to conclude that the [STP] could cause any harm to the environment, let alone significant harm”.

[35] Dr. Goss stated that the Director did not require any water quality study to issue the 2020 Amended ECA. He states that the updated STP does not change the nature of the sewage or treated effluent, does not increase the permitted volume and does not change the discharge location. It was his opinion that the 2020 Amended ECA improves the treatment of sewage and the quality of the treated effluent through the addition of the UV disinfection system, providing effective microbial inactivation while not contributing to the toxic by-products associated with chlorine based disinfection. It was his opinion the additional water quality studies would not have impacted the design

¹ Dr. Goss uses the phrase Wastewater treatment plant. To avoid confusion the terminology sewage treatment plant (STP) has consistently been used in this decision.

of the system and that the effluent from the STP will be required to meet strict parameter limits which are protective of the Winnipeg River.

Tertiary Treatment

[36] In his May 7, 2020 report, Dr. Goss states that the Canadian Council of Ministers of the Environment (“CCME”) Municipal Wastewater Effluent in Canada (2006) defines tertiary wastewater treatment as: “additional treatment to remove suspended, colloidal and dissolved constituents after secondary treatment”. Dr. Goss states that WSP is of the opinion that the existing and previously approved (2014 Amended Approval) chemical phosphorous removal system constitutes a tertiary system that provides additional treatment of the effluent”.

[37] The Applicant states that without tertiary filtration, solids that would have been captured will instead pollute the Winnipeg River. He argues that instead of considering this additional treatment, the Ministry and MOTR have relied on the volume of water in the Winnipeg River to dilute the effluent. He states that, in accordance with the Ministry’s Statement of Environmental Values, the respondents must be mindful of cumulative effects. He states that “harm to the Winnipeg River is unnecessary and the Ministry has an opportunity to avoid it. Instead the Ministry substitutes the “healing power” of those receivers for its own failings in decision-making. The Ministry is failing to include additional protections to the 2020 Amended ECA that will guard the river’s water quality.” The Applicant did not provide evidence in support of his position that the effluent, even when meeting the required standards, will harm the Winnipeg River.

[38] The Applicant references the 2019 report of R.J. Burnside and Associates which states: the majority of systems that include the technology proposed for this site appear to also include additional treatment processes such as tertiary filtration or discharge to a subsurface leaching for final polishing (or in some cases both). Mr. Vaja states that “requirements for individual sewage treatment plants are case specific depending on whether the discharge is to groundwater or surface water and what effluent criteria the

plant has to meet”. He states that generalizations are not helpful in determining whether a particular system requires tertiary treatment.

[39] Fariha Pannu stated that the normal level of sewage treatment in Ontario is secondary treatment or its equivalent unless the individual receiving water studies indicates the need for higher or “tertiary” levels of treatment. She stated that she relied on Mr. Vaja’s opinion that secondary treatment was appropriate.

Analysis

[40] In *Lafarge* at para. 40, the Tribunal stated that:

The wording of [section 41 of the *EBR*] is unusual in a number of respects. Most notably, it begins with a negative, i.e. the express prohibition “leave to appeal a decision shall not be granted...” Thus, there is a presumption against granting leave. Moreover, the decision must be so egregiously in error that there is good reason to believe that “no reasonable person... could have made the decision.” Appeals by third parties are, therefore, intended to be an exceptional remedy.

[41] The Tribunal must consider whether the Applicant has established that this is, in fact, an exceptional situation that warrants leave and whether he has met the standard of proof.

[42] The Applicant’s position that there is need for a baseline study and tertiary treatment presupposes an issue with the standards the STP effluent must meet. While the Tribunal agrees it has been a long time since baseline water quality data was collected specifically for this site, there was no evidence advanced by the Applicant that the effluent criteria set out in the 2014 ECA and are carried forward in the 2020 ECA are inadequate. Conversely, the evidence from Dr. Goss is that publicly available data shows that this STP will not contribute appreciable nutrient loading to the Winnipeg River and there is no evidence to conclude that the effluent will harm to the river.

[43] The Applicant states in his Reply Statement at paragraph 20 that “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 baselines studies and tertiary treatment to the 2020 Amended ECA”. It is not sufficient for an applicant to assert that the Director’s decision should have been different. The Applicant must demonstrate that given the relevant facts, law and policy, that there is good reason to believe that no reasonable person could have made the decision to issue the 2020 Amended ECA. It is the Applicant’s responsibility to provide *prima facie* evidence in support of this application. He has not done this. While he is motivated to ensure that rigour has been applied to the 2020 Amended ECA, he has failed to provide evidence that the 2020 Amended ECA issued without a baseline study and without tertiary treatment leads to a decision that no reasonable person would make. Conversely the evidence provided by MECP staff and Dr. Goss suggest the 2020 Amended ECA, supported with additional conditions, was issued following a thorough consideration of the potential environmental effects and relevant legislation and guidelines.

[44] As the Applicant’s application for leave to appeal has not met the first branch of the leave test under s. 41 of the *EBR*, and as both branches of the leave test must be met, the Tribunal is not required to make a finding on the second branch of the test.

DECISION

[45] The application for leave to appeal is dismissed.

Application for Leave to Appeal Dismissed

“Laurie Bruce”

LAURIE BRUCE
MEMBER

If there is an attachment referred to in this document,
please visit www.olt.gov.on.ca to view the attachment in PDF format.

Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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