2017 Hfx. No. 466745

SUPREME COURT OF NOVA SCOTIA

Between:

LYDIA SORFLATEN, FRED BLOIS, JIM HARPELL, KENDALL McCULLOCH and **ALLAN SORFLATEN**

Applicants

- and -

NOVA SCOTIA MINISTER OF ENVIRONMENT, THE ATTORNEY GENERAL OF NOVA SCOTIA representing Her Majesty the Queen in Right of the Province of Nova Scotia, and **LAFARGE CANADA INC**., a body corporate

Respondents

SUBMISSION OF THE RESPONDENT NOVA SCOTIA MINISTER OF ENVIRONMENT

APPLICANTS MOTION SEEKING LEAVE TO FILE EXPERT EVIDENCE

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INTRODUCTION

1. Lafarge Canada Inc. ("Lafarge") has proposed a pilot project to test a new "Lower Carbon Fuel: Tire Derived Fuel (TDF) System" at its cement plant facilities located in Pleasant Valley, Colchester County, Nova Scotia ("the TDF System" or "Undertaking").

2. On March 16, 2017, Lafarge filed its Environmental Assessment Registration Document with Nova Scotia Environment ("NSE"), subjecting the Undertaking to a required Environmental Assessment ("EA") process under Part IV of the *Environment Act* ("the Act")[1] and its related *Environmental Assessment Regulations* ("the EA Regulations").[2]

3. On July 6, 2017, in completion of the EA process required by the Act and the EA Regulations, the Minister of Environment ("the Minister") exercised his sole discretion to issue an Environmental Assessment Approval to Lafarge subject to various attached Terms and Conditions, and subject to the usual requirement to obtain all other necessary approvals, permits or authorizations required by municipal, provincial and federal laws prior to commencing the Undertaking (the "EA Approval").

4. The burning of scrap tires as a fuel replacement in cement production is not without some controversy. The Applicants are a group of local residents opposed to approval by government of the proposed TDF System, that participated in required public consultations conducted by Lafarge as part of the EA process.

5. The Applicants exercised their legal right to challenge the Minister's EA Approval by filing this judicial review proceeding on August 11, 2017.

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[1] *Environment* Act, S.N.S. 1994-1995, c.1 (as amended).
[2] *Environmental Assessment Regulations*, N.S. Reg. 26/95 (as amended to N.S. Reg. 171/2016).

6. A two-day hearing of the merits of the Applicant's judicial review is currently scheduled in Halifax on March 6 and 7, 2018 ("Merits Hearing"). The Applicants are currently required to file their written submissions for the Merits Hearing on January 26, 2018, with the Respondents to file their respective written submissions on February 16, 2018.

7. The Applicants have filed this motion pursuant to CPR 7.27 seeking leave to file evidence beyond the Record, in the form of a proposed "expert report" to be authored by Dr. Douglas Hallett of Kingston, Ontario in compliance with the requirements of CPR 55 (Expert Opinion) based on his "thorough review" of the Record filed by the Minister ("the Expert Report").[3]

8. The Minister opposes this novel motion. The Expert Report the Applicants seek to file is "opinion" evidence that is not relevant to any determination of whether the Minister's decision is reasonable at law, and does not meet the requirements for the Court to exercise its discretion on an exceptional basis to admit additional evidence beyond the Record on judicial review.

FACTUAL BACKGROUND

9. Based on current research findings and global experience, Lafarge proposes to use scrap tires as a lower carbon fuel to replace up to 15% of its existing fossil fuel supply (coal or coke) burned in Kiln #2 at the Brookfield Cement Plant ("the Cement Plant").[4]

10. Reduction of fossil-fuel use is an important public policy goal for governments and industry, globally and here in Nova Scotia. Lafarge currently is approved to burn used oils, asphalt

[3] Although not confirmed within the motion materials, counsel for the Applicants advised the Respondents that if allowed, this Expert Report will be filed at the same time as the Applicant's submissions on January 26, 2018 prior to the Merits Hearing of March 6-7, 2018.
[4] Record, Tab 7, pages 10-11.

shingles, glycerin, and shredded non-recyclable plastics, as lower carbon fuel replacements in Kiln #2 of the Cement Plant.[5]

11. The use of shredded non-recyclable plastics and asphalt shingles as fuel replacements have allowed Lafarge to replace a maximum of 35% of fossil fuels in its front-end burner systems. To move further from 35% to 50% carbon fuel replacement, the goal of the TDF System pilot project is to replace a further 15% of fossil fuels used at the Cement Plant through use of the mid-kiln injection scrap tire system (currently in use throughout North America at other Lafarge facilities).[6]

12. A team of researchers at Dalhousie University, led by Dr. Mark Gibson from the Department of Process Engineering and Applied Science, have been studying this issue locally for some time. In their July 21, 2015 report titled, "Use of scrap tires as an alternative fuel source at the Lafarge cement kiln, Brookfield, Nova Scotia, Canada", they document the development of the use of alternative and lower carbon fuels in cement production, and the history of this issue in Nova Scotia.[7]

13. In 2016, Lafarge commenced a series of public consultations to engage the public and local residents to explore its proposals to introduce a TDF System pilot project at the Cement Plant, that would require EA Approval and an amendment to its existing Industrial Approval issued under Part V of the Act.[8]

[5] Record, Tab 3, Tab 4 (page 11).
[6] Record, Tab 7, page 11.
[7] Record, Tab 37.
[8] Record, Tab 3: "Consultation Report: Public Engagement in Support of Amendment to IA – Lafarge Brookfield Cement Plant", submitted to NSE on December 15, 2016.

14. Public consultation meetings with local residents (that included 2 or more of the Applicants) were held on September 28, 2016, October 20, 2016, and January 26, 2017, as detailed in the final Consultation Report submitted to NSE.[9]

15. Questions were raised and discussed during all consultations with regard to a wide range of concerns, including toxic and harmful chemicals, their combustion, chemical toxicity, testing protocols, water and air quality monitoring and reporting, and other (economic) issues such as recycling versus using some tires as fuel.[10]

16. On December 15, 2016, Lafarge contacted NSE and provided a project description and draft Consultation Report, seeking confirmation as to the scope of any required EA process.[11]

17. On January 26, 2017, NSE confirmed to Lafarge, following review of its project description, that the Minister required a full EA process to be completed pursuant to Part IV of the Act.[12]

18. On March 16, 2017, Lafarge filed its complete EA Registration Document seeking approval for the TDF System pilot project, commencing the EA Approval process pursuant to Part IV of the Act and the EA Regulations.[13]

19. As part of the required public notification and comment period, NSE received written responses from 8 federal and provincial government departments and agencies, 2 aboriginal organizations involving the Nova Scotia Mi'kmaq, and 5 members of the public (including the

[9] Record, Tab 12.
[10] Record, Tab 12, pages 4-17.
[11] Record, Tab 3.
[12] Record, Tab 4.
[13] Record, Tabs 6-14.

Ecology Action Center, Halifax C&D Recycling, and a professional engineer).[14] Although the Applicants had participated in the previous series of public consultations, no Applicant submitted a written comment to NSE during the formal EA process itself.

20. Following completion of the public comment period, a Report & Recommendation prepared by technical staff in the EA Branch of NSE was prepared and provided to the Minister, along with proposed draft Terms & Conditions and other background materials, should the Minister be prepared to grant an EA Approval.[15] Various internal meetings and briefings with the Minister were held in May and June 2017 to assist in the decision-making process.[16]

21. On July 6, 2017, the Minister provided his written decision to Lafarge approving the TDF System pilot project, subject to various Terms & Conditions imposed by the Minister pursuant to s. 40(1) of the Act and s. 13(1)(b) of the EA Regulations ("the Decision").

LEGAL ISSUE

22. The sole issue to be determined on this motion is whether the Court should exercise its discretion to grant leave to the Applicants to file the proposed Expert Report, as described by Dr. Hallett in his affidavit sworn November 15, 2017, as additional evidence beyond the Record pursuant to CPR 7.27.

23. The Minister opposes the introduction of such expert opinion evidence to be used on judicial review.

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[14] Record, Tabs 21-35.
[15] Record, Tabs 36-37.
[16] Record, Tab 38.

LAW & ARGUMENT

24. The Applicants submit that the Expert Report, as described by Dr. Hallett, is required to allow them to properly argue the grounds outlined in their Notice of Judicial Review to be determined by the Court at the Merits Hearing on March 6-7, 2018.

25. The legal principles applied by the Court on such motions seeking to introduce additional affidavit evidence on judicial review are not in dispute. The Applicants cite recent and relevant authorities that confirm the four general exceptions to the rule against admitting additional evidence beyond the Record, which are:

1. lack of jurisdiction (including "no evidence" to support a material finding of fact);

2. reasonable apprehension of bias;

3. breach of procedural fairness or natural justice, and;

4. fraud.[17]

26. Simply put, the Applicants do not meet these exceptional circumstances as outlined in various authorities for the introduction of such additional evidence beyond the Record.

27. Further, there are no authorities, cited by the Applicants or that I have found, to support the introduction and use of this Expert Report as opinion evidence required to determine the reasonableness of the Decision on judicial review. In fact, a careful review of such authorities demonstrates that such expert opinion evidence is both improper, and irrelevant, to the upcoming determination of the "reasonableness" of the Decision.

28. In the recent case of *Scotian Materials Limited* v. *Minister of Environment*, Justice Murray confirmed that an assessment of the Applicants' grounds of review and the proposed evidence is necessary for the Court to determine a motion to admit additional evidence beyond the Record pursuant to CPR 7.27.[18]

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[17] Applicant Submission, para. 22-23.
[18] *Scotian Materials Limited* v. *Minister of Environment* [2016] NSSC 62, para. 13. [see Tab 1, attached].

Grounds of Review?

29. There is no dispute that the standard of review to be applied at the Merits Hearing will be reasonableness. While this Motion is not the forum to determine this ultimate issue, it is critical to understand the grounds of review and the standard to be applied by the Court, as a basis for determining the relevance and admissibility of the proposed additional evidence.

30. The Applicants' sole ground of review is that the Decision granting EA Approval does not meet the standard of reasonableness, to be argued in four (4) respects:

1. It is contrary to the goals and purposes of the Act;

2. It does not properly consider the factors and relevant evidence required by the EA Regulations;

3. No adverse effects or significant adverse environmental effects of the Undertaking can be mitigated;

4. The terms and conditions attached to the EA Approval are inadequate to prevent significant environmental harm.

31. The Applicants do not argue a lack of jurisdiction, that there were procedural irregularities or a denial of natural justice, or that there was bias or some type of fraud. What issues then, does the proposed Expert Report intend to address?

The Expert Report

32. In his own words, Dr. Hallett provides an overview of his proposed expert evidence as follows:

> [6] If I am permitted to prepare and file a report in this matter, the report will address several **technical issues** involved with assessing the reasonableness of the Minister's decision to permit tire burning.

33. Various excerpts from his explanation of these technical issues and their "relevance"

clearly demonstrate the legal irrelevance and improper nature of his proposed opinion evidence for the issues to be determined by the Court in March 2018:

I. My report will **analyze the scientific and empirical evidence relied on** by the Minister…

II. Does the Record **reasonably present the fact** that when tires are burned, they emit the cancer causing chemical NDMA…

III. Has the Record **accurately considered the realities of cement kiln production**…

IV. …information available in the Record regarding the **operational reliability of the plant**…

V. My proposed report will…comment on the **need for a proper engineering assessment of the process being proposed prior to a proper environmental assessment**…

VI. My proposed report **will further analyze the air dispersion and emission modelling** presented in the Record.

VII. My proposed report will **further analyze the importance of analyzing NDMA, other priority pollutants, and toxic metal oxides**…

VIII. Does the Record disclose **adequate consideration of the local residents and their uses of the area**…**Farming, particularly dairy farming would be impacted by the plume.**

IX. Does the Record **disclose consultations with Environment Canada?**

X. **…the deficiencies referenced above cannot be adequately addressed by deferring them to a test or experiment period…**When these engineering measures are **designed and proven to work then a proper environmental assessment might be completed**…

34. Dr. Hallett concludes by stating in paragraph 8 that:

[8] Based on my review of the Record to date, the proposed burning of tires, even on a test basis, will cause carcinogenic chemicals to be emitted into the environment. **My proposed report will fully consider the issues outlined above and present an objective assessment of the technical adequacy of the Record.**

35. The introduction of such expert opinion evidence, intended to provide what is called "an objective assessment of the technical adequacy of the Record", clearly goes far beyond the types of factual evidence the Courts have allowed by affidavit on a limited basis beyond the Record to support a ground of review based on reasonableness (such as jurisdiction, bias, fraud or denial of natural justice).

What is Reasonableness?

36. While the Applicants appear to acknowledge that reasonableness is the standard to be applied by the Court, they avoid outlining "what" reasonableness means as it will be applied to the Decision they seek to overturn and is it relates to their proposed Expert Report.

37. It is trite law to state that in completing a judicial review using the standard of reasonableness, the Court will never be in the position of "stepping into the shoes" of the administrative decision-maker, having to make its own "correct" judgment, or make determinations of fact outside its own expertise by re-weighing technical or complex scientific facts or opinions, or deciding competing social or economic policy considerations.

38. As often quoted from leading authorities, in applying the reasonableness standard on judicial review, the Decision being challenged must have some existence of "justification, transparency and intelligibility", within a "range of possible outcomes in respect of the applicable facts and law", when reviewed by the Court.[19]

39. Intelligibility and justification are not "correctness stowaways crouching in the reasonableness standard. Justification, transparency, and intelligibility relate to process".[20]

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[19] *BFIFA* v. *Minister of Environment* [2017] NSSC 96, para. 24. [see Tab 2, attached].
[20] *Lawton's Drug Stores Ltd. v United Food and Commercial Workers Union Canada, Local 864* [2016] NSSC 166, at para. 42. [see Tab 3, attached].

40. Such administrative decisions, particularly in the sphere of environmental regulation, deserve and are accorded the highest levels of deference:[21]

> "In deciding whether to affirm or reverse, the Court must bear in mind the approval decisions under review are, at bottom, non-adjudicative and discretionary. Decisions of that nature are accorded "the highest degree of deference": Brown and Evans, *Judicial Review of Administrative Action in Canada* at para. 15:2121. Such a high level of judicial deference is warranted because the decisions reflect policy choices that "[involve] the balancing of multiple sets of interests or considerations" and the Minister "is in a better position to make decisions directed toward the attainment of the purposes of the legislation than a court": *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment & Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (N.B.C.A.), at para.50, per Deschênes J.A. for the Court."

41. Finally, in another recent case involving the Minister and judicial review involving the EA Process under Part IV of the Act, this Court reaffirmed it cannot become an "academy of science":

> [28] In my view, it is not for the court to descend into this arena and commence scientific fact finding, on the merits of the project already approved. **Nor should it be my role to reweigh the comments made by DFO in the Science Report in response to the EEMP and substitute my view of how certain recommendations should be responded to by NSE**.
>
> [29] As expressed by Justice Wood in *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture)* 2012 NSSC 40 at para. 77:
>
> > It is not the function of this Court, sitting in appeal of the Minister's decision, to review the scientific and technical evidence, and resolve any inconsistencies or ambiguities which might exist. **To do so would turn this Court into an "academy of science" as that term has been used in other cases. Such an approach is inappropriate. It is the function of the Minister and his staff to review the scientific information and determine whether it supports the particular application**.

[21] *New Brunswick (Minister of Education) v. Kennedy* [2015] NBCA 58, para. 83. [see Tab 4, attached].

42. The only purpose of this proposed Expert Report containing Dr. Hallett's opinion evidence is to invite the Court to become an "academy of science". Using the same areas of intended inquiry from Dr. Hallett summarized above, the legal (not scientific) response should be as follows:

I. New analysis of scientific and empirical evidence reviewed or relied on by the Minister is not required or appropriate on judicial review.

II. Reasonableness does not require a re-weighing of scientific facts or opinion.

III. "Accurate" means "correct" and is not applicable.

IV. It is not the Court's role to re-weigh evidence to determine operational reliability, or Dr. Hallett's area of expertise to provide it.

V. Dr. Hallett may be a qualified expert in organic analytical chemistry and environmental biology, but he is not a qualified engineer with experience in engineering assessment or cement kiln production.

VI. "Further" scientific analysis is not relevant or required.

VII. "Further" scientific analysis is not relevant or required.

VIII. On what factual basis can Dr. Hallett give opinion evidence on the adequacy of consideration of local residents and land uses, or the impacts on dairy farming?

IX. An expert opinion is not required to determine if the Record discloses consultation with Environment Canada, or whether there is a legal requirement to do so in this case.

X. Is Dr. Hallett qualified to give an opinion on what constitutes a "proper environmental assessment" under Nova Scotia law? Is such opinion relevant?

43. Finally, contrary to the Applicants' position, the proposed Expert Report does not fit within the *Keepright* or the *Palmer* tests sometimes applied to determine if new evidence is necessary and legally relevant on judicial review.

44. Contrary to the Applicants' claim that there is a "complete absence of evidence" on essential points before the Minister, what Dr. Hallett's proposed Expert Report clearly demonstrates in his own words is that the Applicants strongly disagree that the Minister <u>properly</u> considered such scientific and technical issues contained in the Record.

45. Similarly, the proposed Expert Report cannot meet the components of the *Palmer* or *Mohan* tests for new evidence or expert opinion:

> (1) as outlined in the factual background, the Applicants were actively involved in the pre-EA public consultations with Lafarge on the TDF issue, and had the same opportunity as every other concerned member of the public to submit this type of proposed "new" evidence regarding alleged inadequacy of the Registration Documents and scientific data/analysis with respect to various toxic chemicals within the public comment period of the EA process under Part IV of the Act. Having failed to do so, for whatever reason, is a lack of required "due diligence" by the Applicants that they should not be permitted to remedy after-the-fact with this motion. [22]
>
> (2) The proposed evidence, as argued, is not legally "relevant" to the issues on judicial review to be determined on a standard of reasonableness.

46. None of the case authorities cited by the Applicants support the introduction of expert opinion evidence as described by Dr. Hallett for purposes of judicial review. Rather, they all reject the admission and consideration of such opinion evidence as follows:

(a) *IMP Group International* v. *AGNS* – see para. 43 where the Court references paras 3-5 of *Friends of Cypress Provincial Park Society* 2000 BCSC 466, "**Clearly, opinion evidence as to what the Minister ought or ought not to have done is not admissible…"** [23]

(b) *Mr. Shredding Waste Management* v. *NB (Minister of Environment)* – see para. 67: "Much of Mr. Richards reply affidavit was not admitted into evidence, and rightly so. Without going into detail, suffice to say that some of the rejected parts did not comply with Rule 39.01(5), while others were merely argumentative **or were simply attempts to express opinions rather than facts or to adduce expert evidence or opinions of others…"** [24]

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[22] *Perreault* v. *Nova Scotia (Human Rights Commission*), 2013 NSSC 329, para. 14 [Applicant Authorities, Tab 8].
[23] Applicant Authorities, Tab 1.
[24] Applicant Authorities, Tab 3.

(c) *3076525 NS Ltd* v. *Nova Scotia Environment* – see para. 22: "I find that the affidavit of Andrew Blackner, although it recites many historical facts, **is in essence a new expert report and it contains many opinions. Based on the jurisprudence, it is not admissible as fresh or additional evidence** on the appeal of the Ministerial Order… that would in effect result in a retrial of the matter."

CONCLUSION

47. This is a novel motion without precedent. No reported decision supports the filing of evidence beyond the Record on such a judicial review based on a standard of reasonableness in the form of a comprehensive Expert Report providing opinion evidence.

48. Such motions, when allowed on an exceptional basis, are limited to factual evidence by affidavit, usually provided by a (non-expert) Applicant to support other grounds of review (such as lack of jurisdiction, reasonable apprehension of bias, breach of procedural fairness, or fraud). No such exceptional basis exists in this case.

49. There is a sound legal and public policy rationale to reject a request to file expert opinion evidence on a judicial review whose sole purpose is to determine if the impugned decision was "reasonable".

50. The Court on judicial review is not a "trier of fact" that may need assistance from a subject expert to determine and resolve complex or technical scientific and factual issues. Reasonableness is concerned with process – not correctness (scientific or otherwise).

51. Allowing such expert opinion evidence for purposes of judicial review would likely need a response by opposing parties, transforming the Court into an “academy of science”, causing further delay and unnecessary costs to all parties, and require rescheduling of the Merits Hearing set for March 2018.

52. The Minister respectfully requests that the Applicant’s motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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