Ontario

Environmental Review Tribunal

Case Nos.: 07-164/07-165

Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment

In the matter of an application for Leave to Appeal by Sierra Club of Canada and Greenspace Alliance of Canada's Capital pursuant to section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended, with respect to a decision of the Director, Ministry of the Environment, under section 34 of the *Ontario Water Resources Act*, to issue a Permit to Take Water Number 1446-76SP2H, dated February 22, 2008, to Findlay Creek Properties Ltd. and 1374537 Ontario Limited for the water taking from the Excavated Trench Sump located at Lot 19 and 20, Concession IV in the City of Ottawa, Ontario; and

In the matter of a Motion to Dismiss heard on Wednesday, May 14, 2008 in the Craft Room, McNabb Community Centre, 180 Percy Street in the City of Ottawa, Ontario.

Before: Dirk VanderBent, Vice-Chair

Appearances:

Linda McCaffrey	-	Counsel for the Applicants, Sierra Club of Canada and Greenspace Alliance of Canada's Capital
Paul McCulloch	-	Counsel for the Director, Ministry of the Environment
Jennifer Mesquita	-	Counsel for the Instrument Holder, Findlay Creek Properties Ltd. and 1374537 Ontario Ltd.

Dated this **21st** day of **July, 2008.**

Reasons for Decision

Background:

On March 11, 2008, the Sierra Club of Canada ("Sierra") and Greenspace Alliance of Canada's Capital ("Greenspace") (collectively the "Leave Applicants") submitted an application for Leave to Appeal (the "Leave Application") to the Environmental Review Tribunal (the "Tribunal") under the *Environmental Bill of Rights, 1993* ("*EBR*"). The Leave Application concerns Permit To Take Water, PTTW Number 1446-76SPH2, dated February 22, 2008, (the "PTTW") issued by the Director, Ministry of the Environment ("MOE"), pursuant to section 34 of the *Ontario Water Resources Act*, ("*OWRA*") to Findlay Creek Properties and 1374537 Ontario Limited (the "Instrument Holder") for the purpose of temporary dewatering to facilitate construction of sewage and water lines at a housing development site located near Ottawa, known as the Findlay Creek Housing Development (the "Site"). The Site includes a recognized provincially significant wetland known as the Leitrim Wetland.

On April 8, 2008, the Instrument Holder filed a Motion seeking:

- an Order that the Tribunal exercise its discretion under Rule 110(b) of the Tribunal's Rules of Practice to dismiss the Leave Application without a hearing, on the basis that the proceeding relates to matters outside the jurisdiction of the Tribunal, and
- In the alternative, that the Tribunal:
    - Strike evidence filed in support of the Leave Application, specifically Appendices B and C to the Leave Application; and
    - Extend the deadline for delivery of Reply materials until 15 days from the issuance of a decision on this Motion.

With the consent of the Parties, the Tribunal has already directed that the date for filing response and reply materials respecting the Hearing of the Leave Application has been extended to a date to be determined upon the disposition of this Motion.

Appendix B is a series of photographs which the Instrument Holder asserts were taken on the Site. Appendix C contains two reports authored by G. Clarke Topp, Ph.D., Soil Physicist.

The Instrument Holder requests dismissal of the Leave Application on the basis that the Instrument Holder's application for the PTTW does not, under the *EBR,* fall within the class of proposals for which the Leave Applicants may seek leave to appeal. The Instrument Holder's

alternate request to strike evidence is on the basis that the evidence was produced either through the unauthorized practice of professional geoscience, or by means of trespass on the Instrument Holder's privately owned property.

The factual background giving rise to the issuance of the PTTW is mostly undisputed. Findlay Creek Village is a housing development that has been approved through a plan of subdivision under the *Planning Act*. It has been in development since the 1990s. Construction works have occurred on the site for approximately the past five years in different phases. The Instrument Holder's application for the PTTW was received by the Ministry on August 8, 2007. The application indicated that the water would be taken for 360 days for the purpose of temporary dewatering for the construction of sewage and water lines at the Findlay Creek Housing Development. A few months earlier, the Instrument Holder had applied for another permit to take water to install an outlet control structure on the same property. In addition, a number of other short-term permits (less than one year) had been issued for construction dewatering at the same property for the construction of a storm water management system and the installation of water and sewer servicing. The Instrument Holder explains that the construction of residential housing proceeds in phases, and, therefore, it is very difficult to forecast final design specifications for the entire project. This also determines the necessary information to be filed in support of an application for a permit to take water. The Director has also ascertained that construction activity that will require dewatering may continue at the Site until 2014.

The Director concluded that, despite what was indicated in the application for the PTTW, the water taking could occur for more than one year. As such, the Director advised the Instrument Holder that he would prefer to have the subject permit posted on the *EBR* registry for a 30-day comment period in accordance with section 22 of the *EBR*. The Director further indicated that any future permit applications for dewatering related to the construction of service trenches at the Findlay Creek Development should be submitted as a long-term permit application that would include all on-site takings for a period up to ten years. The Director considered the PTTW to govern a transition phase from a shorter-term (1-2 years) permit approach to a long-term permit approach (up to 10 years).

On August 24, 2007, the Instrument Holder submitted what the Director considered to be an amendment to its application for the PTTW, changing the proposed time period of the taking from 360 days to two years. The subject permit was posted on the *EBR* registry for a thirty-day comment period commencing on September 6, 2007 and ending on October 6, 2007. Seven comments were received, all opposing the issuance of the permit on the grounds that the taking would adversely affecting the provincially significant Leitrim Wetland.

On November 29, 2007, the Instrument Holder submitted to the MOE an application for a ten-year permit to take water, again for construction dewatering at the Findlay Creek Development. On December 20, 2007, the Instrument Holder subsequently requested that the application be withdrawn, indicating that a future application would likely be submitted in the late spring of 2008, which would include a change in the development area and provide additional technical information. The Instrument Holder also committed to engaging in additional public consultation beyond the mandatory *EBR* posting period for this future application. On January 21, 2008 the application for the long term permit (EBR 010-2230) was closed, and on January 25, 2008 the *EBR* registry decision notice was posted reflecting that the file had been withdrawn.

The Director decided that he was not comfortable issuing the PTTW for two years as requested in the application dated August 24, 2007, due to his view respecting the level of public concern and because the application for the long-term permit had been withdrawn. Once this was communicated to the Instrument Holder, a request was submitted on December 21, 2007 to limit the length of the water taking to a period of nine months from January 1, 2008 to September 30, 2008.

The PTTW was issued to the Instrument Holder on February 22, 2008 with an expiry date of September 30, 2008. The decision notice was posted on February 26, 2008. The decision notice explains how the comments submitted in response to the proposal were taken into account.

Issues:

1. Whether the Instrument Holder's application for the PTTW constitutes a Class I proposal for an instrument, pursuant to paragraph 1 of section 3 of *O.Reg. 681/94 – Classification of Proposals For Instruments* ("the *Classification Regulation*")

2. Whether the Tribunal should strike evidence obtained in contravention of the *Trespass to Property Act*. If so, whether the evidence in Appendices B and C to the Leave Application was obtained in contravention of the *Trespass to Property Act.*

3. Whether the Tribunal must disqualify a witness from giving evidence produced through the practice of professional geoscience as defined in the *Professional Geoscientists Act, 2000* (the "*PGA*"), if the proposed witness is not authorized under this statute to practice professional geoscience.

The legislation relevant to this Motion is found at Appendix B.

Discussion and Analysis:

Issue #1: Whether the Instrument Holder's application for the PTTW constitutes a Class I proposal for an instrument.

In support of the request to dismiss the Leave Application, the Instrument Holder asserts that, as both its initial application for the PTTW and the final amendment to the application were for a period of less than one year, the application is not subject to the *EBR* as a Class I proposal for an instrument. Pursuant to the *Classification Regulation*, a Class I Proposal is defined as a proposal for a permit under section 34 of the *OWRA* that would authorize the taking of water over a period of one year or more. Therefore, the Instrument Holder argues that no statutory right to seek leave to appeal exists under section 38 of the *EBR*.

In support of this argument the Instrument Holder advances the following submissions:

1. The decision in relation to which the Leave to Appeal is sought is not a decision to issue a Class I proposal for an instrument, because it is a decision to implement a proposal for water taking of less than one year's duration.

2. The Director's decision was based on the final application for the PTTW dated December 21, 2007, which requests water taking for a nine-month term. As this application replaced the previous application, which requested a two-year term, the proposal in relation to which the Leave Applicants seek Leave to Appeal ceased to exist.

3. Pursuant to sections 19 and 21 of the *EBR*, it is the Minister who is required to prepare a regulation to classify proposals for instruments, and to review these classifications from time to time. Section 20 of the *EBR* details the criteria by which the Director determines these classifications. Accordingly, it is only the Minister who is authorized to establish which proposals will qualify as a Class I proposal. It is contrary to the clear and unambiguous wording and intention of the *EBR* and the *Classification Regulation* for the Director to unilaterally decide to elevate any proposal to Class I status by making a determination that a proposal may require water taking in excess of one year notwithstanding that the length of water taking applied for on the face of the permit application is for less than a year. To allow the Director to do so would permit the Director to exercise discretion, unfettered by the

statutory criteria that binds the Minister, and without any requirement to act consistently from one permit application to the next.

4. To hold that the Director has no authority to elevate a proposal for a permit to Class I status does not deprive the Director of the necessary authority to address problematic applications. For example, in cases where an application for a Permit To Take Water arbitrarily proposes a term of less than one year, the Director has the necessary statutory authority under the *OWRA* to reject a proposal, or approve it subject to terms and conditions. The Director may also request, as he has done in this case, that the permit applicant submit a single global application for all future work.

5. Neither the Director nor the Leave Applicants have advanced any principles of statutory interpretation in support of the Director's submission that his evaluation of the Instrument Holder's application for the PTTW was factual rather than legal. The Leave Applicants have not articulated any competing statutory interpretation of the statutory provision at issue and have failed to identify any ambiguity in the wording of the *EBR* that would justify an exercise of statutory interpretation. In order to engage principles of statutory interpretation, the Supreme Court of Canada has clearly held that the statutory provision(s) in question must reasonably be capable of two or more plausible interpretations. Where the statute is clear and unambiguous, no exercise of statutory interpretation is required (*Bell Express Vu Limited Partnership v. Rex,* [2002] 2 S.C.R. 559) ("*Bell Express Vu*").

6. In this case, the statutory provisions in question could not be clearer. The *Classification Regulation* states very simply that Class I proposals are proposals that would authorize water taking of more than one year in duration.

7. Although the Leave Applicants submit there is ambiguity in the PTTW, the Instrument Holder disagrees that any such ambiguity exists. The issue before the Tribunal is not whether the PTTW is clear, but whether the Director acted outside his statutory authority under the *EBR* in processing the permit application.

In response, the Director advances the following arguments:

1. A proposal is a Class I, II, or III proposal for an instrument if it is so prescribed by the regulations. Section 3 of the *Classification Regulation* indicates that a proposal to issue a permit to take water is a Class I instrument if the permit "would authorize the

taking of water over a period of one year or more". In this case, the Director determined that despite what was indicated in the application for the subject permit, the water taking could continue for a period of more than one year.

2. Once a decision is made with respect to the proposal to implement a Class I, II or III instrument, the Director must provide notice of the decision as required under subsection 36(2) of the *EBR*. The requirement in subsection 36(2) to give notice of the decision emanates from the requirement to post the notice of the proposal in the first place. Therefore, it is the nature of the proposal that determines whether a notice of a decision must be provided, not the nature of the decision.

3. The same logic governs whether the right to seek Leave to Appeal applies to an instrument – it depends upon the nature of the proposal. Section 38(1) indicates that the requirement to post notice of the proposal triggers the right to seek leave to appeal. It is not the nature of the decision.

4. As it is the nature of the proposal that determines whether a notice of the proposal should be posted on the *EBR* registry, it is not relevant that in the end the Director decided to issue a permit for only eight months. It was sufficient that the Director had determined that the water taking activities on the property could in fact continue for more than one year. One would expect there to be many situations where the Director makes a decision to implement an instrument in a manner that is different from what was proposed, as the Director has a legal duty to consider the public comments before making a decision. In this case, the Director received seven public comments opposing the issuance of the permit. The substance of those submissions played a part in his decision not to issue the permit for a two-year period. However, the nature of the proposal did not change; only the Director's decision as to how to implement the instrument changed. The second amendment to the original application and the same proposal was submitted because the Director made a partial decision as to the length of permit, not due to any change to the nature of the proposal.

5. At no point in time after the Director made the decision that this proposal was for a Class I instrument and therefore posted it on the *EBR* registry did the Instrument Holder withdraw the application and submit a new application. It was at all times the same application addressing the same proposal to take water for the purposes of

temporary dewatering for the construction of sewage and water lines at the Findlay Creek Housing Development.

In response, the Leave Applicants rely on the submissions made by the Director. They also advance the following arguments:

1. It is reasonable to infer that the Instrument Holder hoped, by submitting an application to take water for a period of five days short of one year, to avoid a posting to the Environmental Registry and public scrutiny.

2. In resolving issues relating to the interpretation of legislation or instruments issued pursuant to the legislation, the consequences of interpretation must be taken into account. To give effect to the contention of the Instrument Holder would produce absurd consequences, defeating the purpose of the *EBR* which was enacted to protect and conserve the natural environment by ensuring public participation in decision making, accountability for decisions taken, and access to courts and tribunals. An interpretation which defeats these declared purposes violates the norms of reasonableness, fairness, and plausibility.

Findings on Issue #1:

There is no dispute that the application for a Permit to Take Water submitted on November 29, 2007 was a separate application. Apart from this application, the Director asserts that the amendments to the PTTW submitted after August 8, 2007, are not separate applications for new proposed water takings. The Director characterizes the Instrument Holder's submissions to be a single application subject to two amendments. Although the Instrument Holder maintains that it made three separate applications for a Permit to Take Water, the Instrument Holder agrees that, for the purposes of this Motion, the difference in characterization is immaterial. The Instrument Holder does note, however, that its second and third applications applied to geographical areas that are different in size from the initial application.

The Tribunal finds that the Instrument Holder submitted an application for the PTTW on August 8, 2007, followed by two amendments of this application, confirmed by written correspondence dated August 24, 2007, and December 21, 2007, which were filed as exhibits to an affidavit filed by the Instrument Holder in support of its Motion to dismiss. The Tribunal finds that both letters clearly indicate that the Instrument Holder sought to revise its initial

application for the PTTW, as opposed to withdrawing its application and submitting a new application.

It is clear that the right to seek Leave to Appeal under section 38 of the *EBR* is available only in respect of a proposal for a Class I or Class II instrument for which the Minister is required to give notice to the public. Such proposals are specified in the *Classification Regulation.* The section relevant to this Leave Application is paragraph 1 of section 3, which states:

> 3. The following is a Class I proposal for an instrument:
> 1. A proposal for a permit under section 34 of the *Ontario Water Resources Act* that would authorize the taking of water over a period of one year or more, except a proposal for a permit to take water only for the purpose of irrigation of agricultural crops.

The fundamental question raised by this Motion to dismiss the Leave Application is whether the term "proposal for an instrument" in the *EBR* and the *Classification Regulation* is restricted to consideration of the written application requesting the Permit To Take Water, or a broader evaluation of the undertaking giving rise to the application.

The term "proposal for an instrument" is not defined in the *EBR.* The *Classification Regulation* provides some limited clarification. Section 0.1 provides:

> In this Part, a proposal for an instrument includes a proposal to issue it, amend it or revoke it, whether the amendment or revocation is authorized by the same provision of an Act or regulation that authorizes the issuance of the instrument or by a different provision.

Section 13 of the *EBR* also provides:

> Fundamental changes in a proposal
> 13. For the purposes of sections 15, 16 and 22, the question of whether a proposal has been so fundamentally altered as to become a new proposal is in the sole discretion of the minister.

It must be noted that, pursuant to section 12 of the *EBR*, the obligation to provide public notice respecting a proposal for an instrument under section 22 applies to all ministries. Furthermore, the term "instrument" is broadly defined under the *EBR* to include permits, licences, approvals, authorizations, directions or orders issued under an Act. Hence the term "proposal" must be interpreted in the context of its broad application in varied circumstances under a number of

environmental statutes. Also, the underlying purpose for identifying a "proposal for an instrument" is to ensure that the public receives notice of the proposal and is afforded the opportunity to participate in decision-making on the proposal, as provided in section 27 of the *EBR*. Accordingly, the term "proposal" must be interpreted in the context of the purpose of Part II of the *EBR* (Public Participation in Government Decision Making). Section 3 of the EBR states the purpose of Part II:

> Purpose of Part II
>
> (1) This Part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.
>
> (2) This Part shall not be interpreted to limit any rights of public participation otherwise available.

The Tribunal notes that neither the *EBR* nor the *Classification Regulation* refer to an 'application for an instrument'. While "proposal for an instrument" may be synonymous with "application" in some circumstances, this not necessarily the case in the context of the broad application of the term "proposal" under the *EBR* as noted above. Accordingly, the Tribunal does not accept the Instrument Holder's submission that there is no ambiguity in the wording of the *EBR* that would justify an exercise of statutory interpretation. The Tribunal accepts that the decision of the Supreme Court of Canada in *Bell Express Vu* applies to this proceeding. Therefore, in order for the Tribunal to engage principles of statutory interpretation, the Tribunal must find that the statutory provision(s) in question must reasonably be capable of two or more plausible interpretations. However, the Tribunal finds that the submissions of the Instrument Holder and the Director, respecting the meaning of "proposal for an instrument", are both plausible interpretations.

Section 13 of the *EBR* indicates that this statute contemplates that the Minister, and, therefore, the Director as the Minister's delegate, has the jurisdiction to evaluate the nature and extent of a proposal, at least for the purpose of determining whether a proposal has become so fundamentally altered as to become a new proposal. In this context, the Director is not bound by an applicant's evaluation of the nature of the proposal being advanced.

It must also be noted that section 3 of the *Classification Regulation* refers to "A proposal for a permit **under section 34 of the *Ontario Water Resources Act***" (emphasis added). Therefore, a

Class I proposal in this case, refers to the permit process under section 34 of the *OWRA*. Subsections 34(3) and (6) provide:

> (3) Despite any other Act, a person shall not take more than 50,000 litres of water on any day by any means except in accordance with a permit issued by the Director.
>
> (6) A Director may in his or her discretion issue, refuse to issue or cancel a permit, may impose such terms and conditions in issuing a permit as he or she considers proper and may alter the terms and conditions of a permit after it is issued.

The Director's consideration of an application to issue a permit under section 34(3) is governed by *O.Reg. 387/04* (the "*Water Taking Regulation*"). Pursuant to section 4(2) the Director is required to consider several matters:

- Issues related to the need to protect the natural functions of the ecosystem
- Issues related to water availability
- Issues related to the use of water
- Other issues including interests of other persons who have an interest in the water taking or proposed water taking, and any other matters the Director considers relevant.

Consideration of all these matters requires a realistic assessment of the duration of the water taking based on the purpose for which the water taking is requested. Hence, under the *OWRA* and the *Water Taking Regulation*, the Director has the authority and, indeed, the obligation to determine the nature and extent of a proposed water taking, independent of the time period stipulated in the application as the term for the permit. In other words, the Director is required to determine whether the proposal would require authorization to take water for a time period different than the duration of the permit requested by an applicant.

In summary, the Tribunal finds that it is the nature of the proposal that determines whether a proposal is a Class I proposal under paragraph 1 of section 3 of the *Classification Regulation.* The duration specified in the application as the term for the permit, in and of itself, is not conclusive of whether the proposal "would authorize the taking of water over a period of one year or more". This must be determined through realistic assessment of the undertaking giving rise to the application for the permit, based on the criteria set forth in the *Water Taking Regulation.*

In light of this finding, the question which must be answered is whether the Director has correctly assessed that the proposal authorize water taking for period of one year or more. The Tribunal notes that the Instrument Holder has not challenged the Director's evaluation that the water taking at the Site will be required for a number of years. In fact, the Instrument Holder has confirmed that it is co-operating with the Director in preparing and submitting a long-term application for a period of up to ten years. Therefore, the Tribunal accepts the Director's evaluation that the Instrument Holder's application for the PTTW would authorize the taking of water for one year or more. As a result, the Tribunal has the jurisdiction to hear the Leave Application filed by the Leave Applicants in relation to the Director's decision to issue the PTTW. Accordingly, the Instrument Holder's motion to dismiss the Leave Application is denied.

The Tribunal also finds that, even if "proposal" is considered synonymous with "application", the Motion to dismiss the Leave Application must nonetheless be denied in the circumstances of this case. It is not disputed that on August 24, 2007, the Instrument Holder amended its application to specify a term of two years, and that the application for the PTTW continued on this basis until December 21, 2007. As the Parties did not dispute that an application for two years qualifies as a Class I instrument, the amendment triggered the Director's statutory obligation to give notice to the public under section 22 of the *EBR*. Accordingly, although the application was subsequently amended to a term of nine months, the Director's decision was nonetheless in respect of a proposal of which notice was required to be given under section 22. Under section 38 of the *EBR*, it is this requirement to give notice that triggers the right to seek Leave to Appeal. In his evidence, the Director confirmed that the Instrument Holder never sought to withdraw its application and submit a new application. Furthermore, the Director submitted that he did not conclude that the amendment so fundamentally altered the proposal as to become a new proposal. As such, the Tribunal has the jurisdiction to hear the Leave Application filed by the Leave Applicants in relation to the Director's decision under section 38 of the *EBR*, notwithstanding that the final amendment to application for the PTTW requested a nine-month term for duration of the permit.

Issue #2: Whether the Tribunal should strike evidence obtained in contravention of the *Trespass to Property Act*.

The facts relating to this issue are either in dispute or not admitted by the Leave Applicants. Appendix B to the written submissions filed by the Leave Applicants in support of the Leave Application includes a series of photographs (four groups) which relate to the Leave Applicants' assertions that :

1. back flooding has occurred in a significant portion of the wetland that was supposed to be protected, killing plants and trees;

2. silt laden water was channelled into Findlay Creek, a trout stream, from a setting pond;

3. water pumped into a temporary pond was subsequently released overland carrying sediment into Findlay Creek; and

4. water has been flowing out of a 'till' into an excavation for storm water.

The Instrument Holder asserts that the only means by which these photographs could have been obtained is by taking these pictures while situated on the Site. It is not disputed that the lands comprising the Site are owned by the Instrument Holder and two other corporations. None of the materials filed in respect of the Leave Application or the Instrument Holder's Motion to strike the evidence confirms who took these photographs or the dates on which they were taken.

Dr. Topp's Hydraulic Conductivity Report indicates that holes were hand-augered at four sites in the Leitrim Wetland. Although Dr. Topp does not expressly state that he attended on those sites, his report includes statements such as "We were able to auger a hole …", which indicates that he, and at least one other person augered the boreholes. The Hydraulic Conductivity Report contains a map showing the four sites. The Instrument Holder filed an affidavit with a map showing the property owned by the Instrument Holder and the two other corporations, which appears to confirm that the four sites are located on privately owned property. The Leave Applicants neither deny nor agree that the hand-augered holes were located on privately owned property.

In support of the request to strike Appendices B and C as evidence in support of the Leave Application, the Instrument Holder advances the following arguments:

1. The evidence filed by the Instrument Holder establishes that both the photographs and the borehole data used in the Hydraulic Conductivity Report were obtained through trespass on property owned by either the Instrument Holder or another corporation, Tartan Land Corporation. The Leave Applicants, or their members, were aware that the Site was privately owned, and one or more of their members, and Dr. Topp, entered the Site when they had received earlier notice that entry was prohibited, contrary to the provisions of the *Trespass to Property Act*.

2. To allow the introduction of the evidence contained in Appendices B and C would be to permit the Leave Applicants to usurp the Tribunal's jurisdiction, and would be contrary to the rules of procedural fairness.

3. It is up to the Tribunal to establish, upon notice to the affected parties and following a proper hearing, any directions it deems appropriate for site visits and sampling. Had the Leave Applicants sought leave to conduct Dr. Topp's program of sampling, the Tribunal may have elected to refuse their request, or to impose terms and conditions upon any procedural order granted. Instead, the Leave Applicants have acted unilaterally and unlawfully, entering private property and implementing a sampling program without obtaining the consent of either the landowner or the Tribunal.

4. The Tribunal should not sanction unlawful activity by permitting the Leave Applicants to rely on either Appendices B and C. To allow the Leave Applicants to rely on evidence obtained in disregard for the Tribunal's jurisdiction and the rights of the Instrument Holders would bring the processes of the Tribunal and the administration of justice into disrepute, contravene the rules of procedural fairness, and be more prejudicial than probative.

In response, the Leave Applicants advanced several arguments respecting some of the affidavit evidence filed by the Instrument Holder to the effect that it should be excluded as hearsay, lay opinion or legal advocacy, or on the ground that it is irrelevant. Given the Tribunal's findings in this matter, it is unnecessary to reproduce these arguments in detail. On the substantive issue of whether there was a contravention of the *Trespass to Property Act,* and if so, whether the Tribunal should strike the evidence as inadmissible, the Leave Applicants advanced the following arguments:

1. Assuming that Mr. Dugal (one of the Leave Applicant members) and Dr. Topp did enter the property owned by the Instrument Holder without the express permission of the owner, it is clear from the reading of the *Trespass to Property Act* as a whole, that their entries were lawful. Respecting evidence that Mr. Dugal was escorted from the Site in November, 2007, it is not alleged that he did not immediately leave the property after being directed to do so by the occupier or a person authorized by the occupier. Consequently, this allegation does not establish a contravention of the *Trespass to Property Act*, which requires a failure to leave immediately after being directed to do so.

2. In the circumstances alleged by the Instrument Holder, the *Trespass to Property Act* provides that entry may be prohibited by notice to that effect, or by enclosure in a manner that indicates the occupier's intention to keep persons off the premises. The Instrument Holder's evidence does not establish that the subject property was subject to notice prohibiting entry, or enclosed in a manner that indicated the occupier's intention to keep persons off the premises.

3. At common law, evidence that has been illegally obtained is admissible.

The Director states that he has no factual knowledge of the circumstances, and, therefore, does not take a position as to how this issue should be decided.

Findings on Issue #2:

The Tribunal accepts that, at common law, all relevant evidence is admissible regardless of the means by which it is obtained (see *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.)). In *R. v. Wray (1970)*, 11 D.L.R (3d) 673, the Supreme Court of Canada found that the trial judge had no discretion to exclude relevant evidence of real probative worth where the trial judge believed the evidence was obtained illegally or improperly. Even in criminal cases where it is established that there has been a breach of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), evidence is not automatically excluded. The Court must find that the admission of the evidence would bring the administration of justice into disrepute under section 24 of the *Charter* (see *R. v. Collins, supra*). None of the Parties asserted that the *Charter* applied in the circumstances of this proceeding.

The Instrument Holder argues that it would be contrary to the rules of procedural fairness for the Tribunal to allow the introduction of this evidence, thereby sanctioning the unlawful activity by which it is alleged this evidence was obtained. However, these concerns are implicitly addressed in the common law rule that all relevant evidence is admissible regardless of the means by which it is obtained. The Tribunal finds that this common law rule applies to proceedings before the Tribunal. Accordingly, it is unnecessary for the Tribunal to determine whether a contravention of the *Trespass to Property Act* has occurred, as Appendices B and C are admissible as evidence if they are relevant and of real probative worth.

The Tribunal also notes that Section 15 of the *SPPA* provides administrative tribunals with broader latitude to admit evidence which may not be admissible as evidence in a court. This does not support the Instrument Holder's submission that Appendices B and C should be

excluded from evidence, as to do so would constitute a more restrictive approach to the admission of evidence than has been adopted by the Courts.

The Instrument Holders have argued that the Tribunal has jurisdiction to issue any directions it deems appropriate for site visits and sampling, and therefore the Tribunal should not accept evidence where the evidence was illegally obtained through the unilateral action of a Party. However, the Tribunal's jurisdiction to control its process only commences once a proceeding is instituted. Prior to a proceeding, evidence may be gathered for a number of different purposes other than court or administrative tribunal proceedings. The Tribunal finds that the true gravamen of the Instrument Holder's submission is a repetition of its argument that the evidence has been obtained illegally. The Tribunal received no evidence to indicate that the enforcement provisions of the *Trespass to Property Act* would be insufficient to discourage illegal activity prior to the commencement of a proceeding before the Tribunal.

Even if it were necessary for the Tribunal to determine whether Appendices B and C were obtained by trespass contrary to the provisions of the *Trespass to Property Act,* the Tribunal finds that it is unable to do so, as there is insufficient evidence filed on which the Tribunal can make factual findings respecting the persons who actually entered the property, the date and time the entry occurred, and the particulars of notice prohibiting entry which existed as of the date and time of such entry. The onus to establish that trespass has occurred, and that the evidence was obtained by means of this trespass, rests with the moving Party. As the Instrument Holder has failed to meet this onus, the Motion to strike Appendices B and C as evidence in this proceeding must fail on this basis as well.

Issue #3: Whether the Tribunal must disqualify a witness from giving evidence produced through the practice of professional geoscience as defined in the *PGA*, if the proposed witness is not authorized under this statute to practice professional geoscience.

In support of their Leave Application, the Leave Applicants have filed two reports by Dr. G. Clarke Topp. The first report is a study of the hydraulic conductivity of surface soils just south of Findlay Creek in the Leitrim Wetland, and the second report is a commentary on a hydrogeological evaluation filed in support of the Instrument Holder's application for the PTTW. Dr. Topp's Curriculum Vitae was filed as evidence respecting this Motion. He holds a M.Sc. degree in Physics (1962), and a Ph.D. in Soil Physics (1964). His current position is Honourary Research Associate (Soil Physicist) with Agriculture and Agri-Food Canada, in Ottawa. His Curriculum Vitae confirms that he has authored numerous research journal publications, and also

indicates that the intent of his recent research is aimed at improving the application of specialized knowledge in Soil Physics to the measurement of soil water properties in the field.

The Instrument Holder has filed an affidavit by Paul Smolkin, sworn April 3, 2008, which attached a copy of the member registry, as of March 18, 2008, of the Association of Professional Geoscientists of Ontario ("APGO"), which was published on their website. Dr. Topp was not listed as a member. However, this website listing indicates that it is not an official register.

In his affidavit, Mr. Smolkin indicates that he is a registered Professional Engineer in Ontario with expertise in geotechnical engineering, hydrology and a broad range of inter-related environmental engineering and science disciplines. Mr. Smolkin expresses his professional opinion that Dr. Topp's report regarding the hydraulic testing constitutes the practice of professional geoscience as defined in the *PGA*. Neither the Leave Applicants nor the Director filed any factual or opinion evidence challenging Mr. Smolkin's opinion.

In support of the request to strike the reports as evidence in support of the Leave Application, the Instrument Holder advances the following arguments:

1. Dr. Topp is not registered with the APGO as a professional geoscientist. When carrying out and reporting on his study, Dr. Topp clearly engaged in the practice of professional geoscience as defined in section 2 of the *PGA*, and therefore he was in violation of section 3 of the *PGA*, which provides that an individual shall not practice professional geoscience unless he or she is a member of the APGO.

2. Mr. Smolkin is a qualified geoscientist, who is exempt under the *PGA* from the requirement to be a member of the APGO, by virtue of paragraph 2 of section 3(3), as he is a Professional Engineer under the *Professional Engineers Act* who is competent by virtue of training and experience, in accordance with the regulations made under the *PGA*, to engage in practices that would also constitute the practice of professional geoscience. As a qualified geoscientist, Mr. Smolkin is qualified to express his opinion as to whether Dr. Topp engaged in the practice of professional geoscience.

3. The Tribunal has in the past refused to accept the evidence of unlicensed geoscientists, for example see *Trent Talbot River Property Owners Association, Marchand Lamarre and Jodi McIntosh v. Director, Ministry of the Environment*, Case Nos.: 02-214/02-217 and 03-188/03-189, September 21, 2005 ("*Trent Talbot*").

The Instrument Holder maintains that it would be against public policy to allow the admission of evidence produced in contravention of the *PGA*.

The Director concurs with the Instrument Holder's assessment that the activities carried out by Dr. Topp fall within the definition of the practice of professional geoscience, and therefore he should hold a licence under the *PGA* to carry out those activities. The Director submits that unless Dr. Topp has such a licence, or is otherwise exempt from this requirement, his evidence should not be considered. It is the Ministry's position that a person who is not a licensed professional geoscientist should not give evidence that would constitute the practice of geoscience. The Director submits that, as the Leave Applicants are attempting to participate in environmental decision-making, the facts must be clear to justify striking the evidence from the record. The Director states that he has no knowledge of Dr. Topp's qualifications or licensing status. Should Dr. Topp satisfy the Tribunal that he is licensed or otherwise exempt from the requirements of the *PGA*, the Director has no objection to his evidence being considered.

In response, the Leave Applicants advance the following arguments:

1. Expert evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify. The expertise must be specific to the relevant area of expertise.

2. Accreditation is not the legal test for the admissibility of expert evidence. Any relevance which it may have is minimal at best. Dr. Topp has the specialized knowledge and experience that is required in order to provide the Tribunal with reliable and independent expert evidence in soil sciences.

3. Mr. Smolkin does not offer any evidence that qualifies him as a person who is entitled to offer a legal opinion in respect of the interpretation of the meaning of professional geoscience as used in the *PGA*. According to his own evidence, Mr. Smolkin is not accredited as a professional geoscientist. In any event, this evidence is unnecessary. The Tribunal does not need any assistance from Mr. Smolkin on this issue. His evidence is inadmissible.

4. Whether or not Dr. Topp engaged in the practice of professional geoscience is a mixed question of fact and law, which should be determined by APGO in accordance with the provisions of the *PGA* and its regulations.

Findings on Issue 3:

Pursuant to section 2 of the *PGA* an individual practices professional geoscience when "he or she performs an activity that requires the knowledge, understanding and application of the principles of geoscience and that concerns the safeguarding of the welfare of the public or the safeguarding of life, health or property including the natural environment." Section 3 of the PGA provides that, subject to exemptions of certain classes of individuals, an individual shall not practice professional geoscience, or imply or represent that he or she is qualified to practice professional geoscience, unless he or she is a member of the APGO. Under section 7, it is an offence for any person to practice professional geoscience in contravention of section 3. The APGO has issued an interpretation publication which states that it considers the practice of professional geoscience as defined within the *PGA* to include activities such as sampling, interpreting, processing, analyzing, evaluating, and opining, aimed at a variety of functions which are also described in the publication. The activity relevant to this case is the assessment of potential impacts of activities and developments on groundwater or other natural systems. The publication also cites expert testimony as an example of an activity by professional geoscientists for which registration is required.

In order to succeed in their request to have Dr. Topp's reports struck from the evidence, the onus is on the Instrument Holder to clearly demonstrate that the Leave Applicants are seeking to qualify Dr. Topp as an expert in professional geoscience for the purpose of providing evidence in this subject area. If so, the Instrument Holder must also establish that Dr. Topp is required under the *PGA* to register as a member of the APGO, and that he is not, in fact, a registered member.

If the Leave Applicants are seeking to qualify Dr. Topp as an expert in professional geoscience for the purpose of providing evidence in this subject area, and he is not authorized to practice professional geoscience under *PGA*, the Instrument Holder must also establish that his evidence is consequently inadmissible.

The Tribunal accepts the Director's submission that, because the Leave Applicants are attempting to participate in environmental decision-making under the *EBR*, the facts must be clear to justify striking the evidence from the record. The Leave Applicants' submissions in response to the Instrument Holder's Motion state only that Dr. Topp has the specialized knowledge and experience that is required in order to provide the Tribunal with reliable and independent expert evidence in soil sciences. The Leave Applicants have not specifically particularized the subject area for which they seek to qualify Dr. Topp as an expert, nor have they provided any information to indicate whether the proposed qualification would involve any

aspects of the practice of professional geoscience. Similarly, the Leave Applicants have not advised whether Dr. Topp is registered as a member of the APGO, or whether he has been qualified to give expert evidence in other proceedings. The Tribunal finds that it is premature to address the aspect of the Instrument Holder's motion that relates to Dr. Topp's evidence, as issues related to an unauthorized practice of professional geoscience only apply if the Leave Applicants seek to qualify Dr. Topp as an expert in this area. It is not clear from the materials presently before the Tribunal, that the Leave Applicants are proposing that Dr. Topp be qualified as an expert in the field of professional geoscience. Therefore, the Tribunal dismisses the Instrument Holder's Motion to strike Dr. Topp's evidence. However, the Tribunal also finds that the Instrument Holder may raise issues related to an unauthorized practice of professional geoscience in the context of the Tribunal's consideration of whether to admit Dr. Topp's opinion evidence, described below.

Pursuant to Rule 37, applications for Leave to Appeal pursuant to the provisions of the *EBR* shall be made and disposed of wholly in writing, except to the extent that the Tribunal directs otherwise. In light of the submissions of the Instrument Holder and the Director, the Tribunal directs that there will be a *viva-voce* hearing conducted to determine the subject area for which the Leave Applicant seeks to qualify Dr. Topp as an expert, and whether the proposed qualification would involve any aspects of the practice of professional geoscience. The Tribunal directs that Dr. Topp attend this hearing for the purpose of giving evidence respecting his qualifications, including whether Dr. Topp is registered as a member of the APGO, and whether he has been qualified to give expert evidence in other proceedings. The Instrument Holder and the Director may also cross-examine Dr. Topp respecting his qualifications, and if they elect to do so, may call witnesses in reply on this issue. Mr. Smolkin should attend and be available for examination and cross-examination, if the Instrument Holder seeks to rely on Mr. Smolkin's affidavit sworn April 3, 2008. The Parties should also be prepared to provide further argument on the relationship (if any) between any unauthorized practice and the admissibility of expert evidence. The time, date, and location for this hearing will be arranged by the Case Manager.

Order

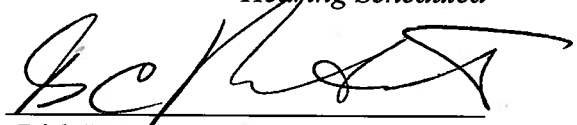
1. The Motion filed by Findlay Creek Properties and 1374537 Ontario Limited to dismiss the Applicants' Application for Leave to Appeal the decision of the Director, Ministry of the Environment to issue a Permit To Take Water, PTTW Number 1446-76SPH2, dated

February 22, 2008, or alternatively to strike Appendices B and C filed in support of the Application for Leave to Appeal is dismissed.

2. The Tribunal will receive oral submissions respecting the proposed date for the delivery of Reply materials by teleconference, on a date to be scheduled by the Case Manager.

3. The Tribunal will conduct a *viva-voce* Hearing to determine the admissibility of the opinion evidence of Dr. Topp. The Leave Applicants are directed to have Dr. Topp attend to give evidence at this *viva-voce* Hearing, which will be scheduled by the Case Manager in consultation with the Parties. The Instrument Holder and the Director may call witnesses in reply on this issue. If the Instrument Holder wishes to rely on the affidavit of Mr. Smolkin sworn April 3, 2008, the Instrument Holder is directed to have Mr. Smolkin attend to give evidence at this *viva-voce* Hearing.

Motion Dismissed
Teleconference Hearing Scheduled
Hearing Scheduled



Dirk VanderBent, Vice-Chair

Appendix A – List of Parties
Appendix B – Relevant Legislation

Appendix A

List of Parties

Applicants:	Sierra Club of Canada and Greenspace Alliance of Canada's Capital
Counsel for the Applicants:	Linda McCaffrey Ecojustice Canada #107-35 Copernicus Street Room 109 Ottawa, ON K1N 6N5
Director:	Peter Taylor Director, Section 34 *Ontario Water Resources Act*
Counsel for the Director:	Paul McCulloch Legal Services Branch Ministry of the Environment 2430 Don Reid Drive Ottawa, ON K1H 1E1
Instrument Holder:	Findlay Creek Properties Ltd. and 1374537 Ontario Ltd.
Counsel for the Instrument Holder:	Jennifer Mesquita Gowling Lafleur Henderson LLP Suite 1600, 1 First Canadian Place 100 King Street West Toronto, ON M5X 1G5

Appendix B

Relevant Legislation

Environmental Bill of Rights, 1993

12. For the purposes of sections 15, 16 and 22, where a proposal is under consideration in more than one ministry, "ministry" means the ministry with primary responsibility for the proposal and "minister" has a corresponding meaning.

[...]

22. (1) The minister shall do everything in his or her power to give notice to the public of a Class I, II or III proposal for an instrument under consideration in his or her ministry at least thirty days before a decision is made whether or not to implement the proposal.

[...]

38. (1) Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or 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.
    2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal.

Professional Geoscientists Act, 2000

3. (1) An individual shall not practise professional geoscience unless he or she is a member of the Association and practises in accordance with the terms, conditions and limitations imposed on his or her membership.
   (2) An individual shall not imply or represent that he or she is qualified to practise professional geoscience unless he or she is a member of the Association.
   (3) Subsections (1) and (2) do not apply to the following individuals:
    1. An individual who is in training to be a geoscientist or professional geoscientist and who is,
        i. employed or engaged by a member or by a certificate holder, and
        ii. supervised by a member when the individual is practising professional geoscience.

2. An individual who is licensed as a professional engineer under the *Professional Engineers Act* and who is competent by virtue of training and experience, in accordance with the regulations made under that Act, to engage in practices that would also constitute the practice of professional geoscience.
3. An individual who is an Ontario land surveyor within the meaning of the *Surveyors Act* whose practice is confined to managing geographic information.
4. An individual who is a land information professional whose practice is confined to managing geographic information.
5. An individual who is engaged in activities that are confined to prospecting within the meaning of the *Mining Act*.
6. Such other classes of individuals as may be prescribed.

[...]

7. Every person who contravenes subsection 3 (1) or (2), 4 (1), 5 (1) or (2) or 6 (1) is guilty of an offence and on conviction is liable,
   (a) to a fine of not more than $25,000 for a first offence;
   (b) to a fine of not more than $50,000 for a subsequent offence.

Ontario Water Resources Act – O.Reg 387/04

4. (1) This section applies when a Director,
   (a) is considering an application; or
   (b) is otherwise considering under section 34 of the Act whether to cancel, amend or impose conditions on a permit to take water.

   (2) The Director shall consider the following matters, to the extent that information is available to the Director, and to the extent that the matters are relevant to the water taking or proposed taking in the particular case:
   1. Issues relating to the need to protect the natural functions of the ecosystem, including,
      i. the impact or potential impact of the water taking or proposed water taking on,
         A. the natural variability of water flow or water levels,
         B. minimum stream flow, and
         C. habitat that depends on water flow or water levels, and
      ii. ground water and surface water and their interrelationships that affect or are affected by, or may affect or be affected by, the water taking or proposed water taking, including its impact or potential impact on water quantity and quality.
   2. Issues relating to water availability, including,

i. the impact or potential impact of the water taking or proposed water taking on,
A. water balance and sustainable aquifer yield, and
B. existing uses of water for large municipal residential systems and small municipal residential systems, both as defined in subsection 1 (1) of Drinking Water Systems, for sewage disposal, livestock and other agricultural purposes, for private domestic purposes, and for other purposes,

ii. low water conditions, if any,

iii. whether the water taking or proposed water taking is in a high use watershed or a medium use watershed,
A. as shown on the Average Annual Flow Map, or
B. as shown on the Summer Low Flow Map, and

iv. any planned municipal use of water that has been approved,
A. under a municipal official plan in accordance with Part III of the *Planning Act*, or
B. under the *Environmental Assessment Act*.

3. Issues relating to the use of water, including,
i. whether water conservation is being implemented or is proposed to be implemented in the use of the water, in accordance with best water management standards and practices for the relevant sector if these are available,
ii. the purpose for which the water is being used or is proposed to be used, and
iii. if the water is not currently being used, whether there is a reasonable prospect that the person will actually use the water in the near future.

4. Other issues, including,
i. the interests of other persons who have an interest in the water taking or proposed water taking, to the extent that the Director is made aware of those interests, and
ii. any other matters that the Director considers relevant.

(3) If clause (1) (a) applies, the Director may, in order to be able to consider the matters set out in subsection (2), require the applicant to submit further information, including plans, specifications, reports and other materials and documents relating to the water taking or proposed water taking.

Trespass to Property Act

2. (1) Every person who is not acting under a right or authority conferred by law and who,
(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or
(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,is guilty of an offence and on conviction is liable to a fine of not more than $2,000.

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he or she had title to or an interest in the land that entitled him or her to do the act complained of.

3. (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,
[...]
(b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited.

[...]

5. (1) A notice under this Act may be given,
(a) orally or in writing;
(b) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or
(c) by means of the marking system set out in section 7.

(2) Substantial compliance with clause (1) (b) or (c) is sufficient notice.