



Environmental Review Tribunal

Case Nos.: 09-076/09-090/09-091

Superior Fine Papers Inc. v. Director, Ministry of the Environment

In the matter of appeals by Superior Fine Papers Inc. filed July 31, 2009, and by Cascades Inc. and Cascades Fine Papers Group Inc. filed August 7, 2009, for a Hearing before the Environmental Review Tribunal pursuant to section 140 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, with respect to an Order issued by the Director, Ministry of the Environment, on July 29, 2009, under sections 18, 132 and 196 of the *Environmental Protection Act*, regarding the operation of a paper mill located at 550 Shipyard Road, City of Thunder Bay, District of Thunder Bay, Ontario; and

In the matter of Motions for a stay of the Director's Order held on October 9, 2009, at 10:00 a.m. in Hearing Rooms #1 and 2, 12th Floor, 655 Bay Street, Toronto, Ontario.

Before: Dirk VanderBent, Vice-Chair

Appearances:

- David J. Christie - Counsel for the Appellant, Superior Fine Papers Inc.
Lana J. Finney - Counsel for the Appellants, Cascades Inc. and Cascades Fine Papers Group Inc.
Nicholas Adamson - Counsel for the Director, Ministry of the Environment

Dated this 23rd day of November, 2009.

Reasons for Decision

Background:

On July 29, 2006, pursuant to sections 18, 132, and 196 of the *Environmental Protection Act* (“EPA”), Jim Fry, Director, Ministry of the Environment (“MOE”) issued a Director’s Order to Cascades Inc. (“Cascades”), Cascades Fine Papers Group Inc. (“Cascades Fine Papers”), Thunder Bay Fine Papers Inc. (“Thunder Bay Fine Papers”), and Superior Fine Papers Inc. (“Superior”), respecting a paper manufacturing facility located at 550 Shipyard Road, Thunder Bay City, District of Thunder Bay (the “Facility”). The Director’s Order requires, among other things, that work be conducted to prepare and implement a plan to repair industrial sewage works, specifically a lagoon berm. The Director’s Order also requires preparation of detailed plans for removal of waste sludge from sewage lagoons regulated by Certificate of Approval (Industrial Sewage Works) No. 3758-5NTJ43.

On July 31, 2009, Superior filed an appeal of the Director’s Order with the Environmental Review Tribunal (the “Tribunal”). On August 7, 2009, Cascades and Cascades Fine Papers also jointly filed an appeal of the Director’s Order with the Tribunal. Cascades Fine Papers asserts that it is no longer responsible for the Facility, having sold it almost two years prior, and subsequently paying Thunder Bay Fine Papers \$500,000.00 to discharge Cascades Fine Paper’s responsibilities in relation to dredging the lagoon. Additionally, Cascades Inc. asserts that it has never owned the Facility or had management or control of it. Both companies assert that principles of fairness dictate that they should not to be held liable for this work.

Cascades and Cascades Fine Papers jointly served on the Director a Motion requesting a stay of the Director’s Order in its entirety, and filed it with the Tribunal on August 17, 2009. On September 11, 2009, Superior similarly served and filed a Motion requesting a stay of section 2.14, as it relates to the Bark Storage area, and section 2.16, which requires financial assurance by the way of irrevocable letter of credit in the amount of five million dollars.

The Tribunal gave procedural directions for the hearing of these two Motions, confirmed in its Order dated September 11, 2009. The Parties submitted affidavit evidence, transcripts of cross-examination on affidavit evidence, and written submissions. In addition, the Director filed a Motion requesting an order striking two paragraphs of a reply affidavit filed by Cascades. The Tribunal heard oral argument on October 9, 2009. Lana Finney, Counsel for Cascades and Cascades Fine Paper, and Nicholas Adamson, Counsel for the Director, appeared in person, and

David Christie, Counsel for Superior, participated by teleconference. In the course of this oral argument, the Director also requested that the Tribunal strike any opinion evidence tendered by one of the affiants, on the basis that Cascades Fine Papers acknowledges that it does not seek to qualify the affiant as an expert for the purpose of giving opinion evidence.

In the main proceeding, Cascades and Cascades Fine Papers assert different grounds of appeal. However, for the purposes of the stay Motion, Ms. Finney confirms that both Cascades and Cascades Fine Papers advance the same position and submissions. Accordingly, for the purposes of this Order, Cascades Fine Papers and Cascades, will be collectively referred to as the “Cascades Appellants”.

Relevant Legislation:

Environmental Protection Act

When stay may not be granted

- 143.** (3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,
- a) danger to the health or safety of any person;
 - b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or
 - c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Rules of Practice of the Environmental Review Tribunal

- 101.** The Party shall provide evidence and submissions in support of its motion respecting:
- (a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
 - (b) whether there is a serious issue to be decided by the Tribunal;
 - (c) whether irreparable harm will ensue if the relief is not granted; and
 - (d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

Issues:

There are two preliminary issues to be addressed:

1. Whether the Tribunal should reject opinion evidence of Leon Marineau, on the ground that Cascades has not sought to qualify him as an expert for the purpose of giving evidence in support of Cascades’ Motion.

2. Whether the Tribunal should grant an order striking Paragraphs 3 and 4 of the reply affidavit of Leon Marineau, sworn September 23, 2009.

The main issue in this proceeding is:

3. Whether the Tribunal is precluded from granting a stay of the Director's Order under section 143(3) of the *Environmental Protection Act*, and, if not, whether the tests for granting a stay, as set out in Rule 101, have been met.

Discussion and Analysis:

Description of the Facility

The Facility is a paper mill that has operated for almost 90 years, and has had several owners as described below.

Paper production operations produced wastewater which required treatment before discharge to Lake Superior. The sewage works include an extensive lagoon system, located on two adjacent water lots totaling 23.14 acres in the Thunder Bay harbour on Lake Superior, used for storage and treatment of the Facility's wastewater ("the Lagoon"). The purpose of the Lagoon is to allow paper processing materials suspended in the water, to settle as sludge before the water ultimately flows over a weir and into the lake. The Lagoon is comprised of water channels that loop back and forth within these two water lots. These channels have been created by constructing berm walls, made of earth and shale, which direct the flow of the wastewater. The area covered by the adjacent water lots is roughly rectangular in shape. Berm walls (at passes 5 and 10) separate the water in the Lagoon from the water in Lake Superior .

The channels were originally constructed without a liner. Because of the nature of the construction, the berm has had cracks in it over the years. As well, because of the nature of its construction, and the absence of a liner for most of its history, the berm was not impervious. As a result of the discovery that wastewater was leaking through the berms into Lake Superior, in 2000/2001, PVC liners were installed in the passes which border on the lake.

The Director asserts that the vast majority of sludge now in the lagoon system was deposited there after 1997, the year when Cascades Fine Papers purchased the Facility.

The Lagoon sewage treatment system was eventually regulated as an approved on-Site sewage works, currently governed by Amended Certificate of Approval (Industrial Sewage Works) No. 3758-5NTJ43, which the Director issued to Cascade Fine Papers on August 29, 2003 (the “Lagoon CofA”).

As of June 23, 2008, the Director estimates that there is 144,068 m³ of sludge in the lagoon system. The total capacity of the Lagoon system is believed to be 154,361 m³. Based on these estimates, it appears that the Lagoon system is essentially full. It is not disputed that the Lagoon needs to be dredged.

The Tribunal received limited evidence regarding the constituency of the sludge. It includes a fibre flocculent type material with clay. As of the date of these Motions, the precise chemical constituency of the sludge is unknown. In a memorandum prepared by Todd Kondrat, a Surface Water Specialist employed by the MOE, dated August 21, 2009, he indicated that he considered the chemical character may be variable depending on when it was deposited. He also confirmed that when he attempted to take core samples on August 19, 2009, he could only obtain surface samples due to the non-cohesive nature of the sludge. He also stated:

... a significant volume of sludge ... would cover the natural sediments thus eliminating critical habitats for littoral zone benthic organisms and aquatic plants. The smothering of natural sediments by the sludge can affect invertebrates by filling up their crevice homes, muddying over their attachment surfaces, and eliminating interstitial spaces. The sludge could also cover substrates used for fish spawning and rearing. It is likely that the sludge is anaerobic and would exert a significant oxygen demand within a confined area.

The Parties agree that, over the years, sludge has leaked through and accumulated on the lake side of the bordering berms. However, the evidence provided does not describe how this accumulated sludge is distributed along these berm walls.

In addition to the Lagoon sewage treatment system, Cascade Fine Papers’ operations also generated wood wastes which were stored on Site in an area referred to as the Bark Storage Area, or Bark Pile (the “Bark Storage area”). The Director states that the Bark Storage area is a waste disposal site, for which a Certificate of Approval is required under the *EPA*. No such Certificate has ever been issued.

Ownership of the Facility

Cascades Fine Papers Group Thunder Bay owned and operated the Facility from 1997 until December, 2007. This corporation was owned by Cascades Fine Papers and its corporate predecessor.

On December 21, 2007, Cascades Fine Papers Group Thunder Bay sold the Facility to the Appellant, Cascades Fine Papers, who owned the Facility for three weeks. Then, pursuant to an Asset Purchase Agreement dated December 21, 2007, Cascades Fine Papers sold the Facility to Thunder Bay Fine Papers (the "Sale Agreement") for nominal consideration of one dollar. Transfer of the real property occurred on the same date. However, as additional consideration, Cascades Fine Papers paid Thunder Bay Fine Papers the sum of \$4.5 million to be used for start-up costs.

On October 29, 2008, a Receiver in respect of the assets of Thunder Bay Fine Papers was appointed pursuant to Court Order. According to the first report of the Receiver, production at the Facility commenced in May, 2008, but was halted in mid-July 2008 due to surplus inventory and a lack of cash. Production never resumed. Thus, Thunder Bay Fine Papers operated the Facility for less than three months before going into receivership. Pursuant to a further Court Order dated February 5, 2009, the Facility was sold by the Receiver to Superior.

Superior purchased the Facility from the Receiver on February 4, 2009 for \$2,750,000, paid by \$750,000 paid on closing, with the balance payable by a promissory note in the principal amount of \$1,750,000, repayable 6 months after closing by a vendor-take-back mortgage on the lands and a general security agreement in favour of the Vendor.

As of the date of these Motions, production at the Facility has not resumed.

Summary of provisions in the Director's Order and circumstances relating to its issuance

In summary, the relevant parts of the Director's Order are as follows:

Repair damaged berm

Parts 2.2 - 2.3 require Cascades Fine Papers and Cascades to develop and implement a plan to repair a damaged berm in the lagoon system that is part of the Facility's industrial sewage works, and to implement the plan. (Superior is already subject to similar obligations as a result of a previously issued Provincial Officer's Order.)

Monitor, record and report on effluent from lagoon system

Parts 2.4 - 2.5 require Cascades Fine Papers and Cascades to monitor, record and report on sewage works and the effluent in the sewage lagoon in the immediate area of the seepage from the lagoon. (Superior is already subject to similar obligations as a result of a previously issued Provincial Officer's Order.)

Removal of waste sludge from sewage lagoons

Parts 2.11; 2.12 (a), (b), (d) and (e); and 2.13 require all parties to the Order to retain a consultant to develop a plan to remove waste sludge from the sewage lagoon system and to bring the Facility into full compliance with the terms of its Certificate of Approval for an industrial sewage works, and to implement the plan.

Bark Pile removal and application for Certificate of Approval for the unapproved disposal site

Parts 2.11, 2.12 (c) and (e), and 2.13 – 2.14 require all parties to the Order to develop a plan to remove as much waste as feasible from the Site's unapproved bark waste disposal site, to implement the plan, and to have the consultant submit an application for a Certificate of Approval for the unapproved bark disposal area, including a leachate management plan.

Monitoring, recording and reporting on all environmental risks at the Facility

Parts 2.11, 2.12(f) and 2.13 require all parties to retain a consultant to develop a plan to monitor, record and report on environmental risks at the Facility and to implement the plan.

Application to amend Certificate of Approval for approved waste disposal site

Part 2.15 requires all parties to the Order to ensure that a consultant submits an application to amend the Certificate of Approval for the approved waste disposal area at the Facility to include a closure plan, a site management plan, documentation to support a request for an increase in the approved area of the site, as waste has been dumped beyond the approved area, and a financial assurance evaluation report.

Financial assurance

Part 2.16 requires all parties to the Order to provide financial assurance for the work ordered in the amount of \$5,000,000.

On May 5, 2009, prior to the issuance of any effective Orders, Superior obtained an estimate of the cost to dredge the lagoons from Sacchetti Construction Ltd. The estimate was \$1,210,000 for the necessary labour and equipment. However, the Tribunal was not provided with a detailed analysis in support of this estimate.

On June 29, 2009, Superior's environmental manager reported to the MOE that water levels in the lagoon system had dropped 7 cm over the weekend and that there might be a leak. The environmental manager reported that he had inspected the system and found that the lagoon was "slumping" on pass #5 and that there appeared to be holes in the lagoon liner.

On June 30, 2009, Sherry Hakala, a Provincial Officer employed by the MOE, attended the Facility and observed a crack at the top of the berm located at pass #5. She took photographs of this crack, as well as some tears in the liner above the surface of the water. As a consequence, she became concerned about the structural integrity of the berm and the potential for adverse effects should the berm fail and release the sludge into Lake Superior. On July 8, 2009, Ms. Hakala issued Provincial Officer's Order 3174-7THMM3 to Superior alone (the "Superior Order") requiring immediate repairs to the berm, water sampling and daily inspections of the integrity of the berm.

As a result of the Superior Order, Superior installed two checkpoints on the cracked berm for the purpose of tracking whether the berm wall was moving. The Director has filed the daily reports submitted to Ms. Hakala by Superior from August 1 to August 20, 2009. These reports will be discussed in greater detail below.

On July 17, 2009, Superior received a quotation for Lagoon berm repair in the amount of \$248,000.

On the consent of the Parties, during the hearing of oral argument on the Motions on October 9, 2009, Andrew Sinclair, President of Superior provided an update regarding the status of the berm repairs. He advised that Superior had obtained and spent \$100,000 on berm repairs, but he confirmed that only approximately 40 feet of 200 feet of berm wall had been repaired. He also advised that the repairs did not include the section of the berm where the crack observed by Ms. Hakala is located.

Issue # 1: Whether the Tribunal should reject opinion evidence of Mr. Marineau, on the ground that Cascades has not sought to qualify him as an expert for the purpose of giving evidence in support of Cascades' Motion.

Evidence was given on behalf of Cascades Fine Papers by Mr. Marineau, the Vice-President, Environment, for Cascades Inc. Mr. Marineau holds a bachelor's degree in geological engineering and a master's degree in environmental chemistry. A portion of his training related to the engineering of earth berms. In this capacity, he also provided technical assistance to Cascade Fine Papers Group Inc., and is familiar with environmental matters related to the

Facility. In cross-examination, Mr. Marineau stated that the environmental manager at the Facility reported to him, and that he had personally visited the Facility four or five times. In his affidavit evidence, Mr. Marineau also confirmed that he attended the Facility with the Director in April 2009, and visited the lagoon berms at that time.

Prior to joining Cascades Inc. in June 2002, Mr. Marineau was employed for ten years as a consultant with an environmental consulting firm. In this capacity he conducted hydrogeological investigations, did geotechnical work and provided services in the waste management area.

In oral argument, Ms. Finney confirmed that the Cascades Appellants did not seek to qualify Mr. Marineau as an expert for the purpose of giving opinion evidence in support of their stay Motions. However, she submits that the Tribunal can, nonetheless, consider Mr. Marineau's opinion and attribute weight to this evidence. The Director asserts that the Cascades Appellants could have sought to qualify Mr. Marineau as an expert. As they have not done so, the Director argues that the Tribunal should give such evidence no weight. Superior took no position on this issue.

Findings on Issue #1:

Section 15 of the *Statutory Powers Procedure Act* (“SPPA”) provides that a tribunal may admit any oral testimony as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court. Accordingly, it is within the Tribunal's jurisdiction to consider Mr. Marineau's opinion, notwithstanding that he has not been formally tendered as an expert witness for purposes of this Motion. However, paragraph 5 of the Tribunal's Practice Direction for Technical and Opinion Evidence states:

To give opinion evidence, a witness must have specialized education, training, or experience that qualified him or her to reliably interpret scientific or technical information or to express opinions about matters for which untrained or inexperienced persons cannot provide reliable opinions. Such matters often include whether pollution has caused or is likely to cause significant harm to the environment. Such witnesses are often called “expert witnesses” or “opinion witnesses”.

In keeping with this Practice Direction, the Tribunal accepts that it should avoid admitting opinion evidence where an affiant is not being tendered as an expert witness. Therefore, the Tribunal will not accept Mr. Marineau's opinions as opinion evidence within the parameters of Paragraph 5 of the Practice Direction. Accordingly, Mr. Marineau's opinions, in and of themselves, cannot be determinative of any of the issues raised in these Motions.

However, the Tribunal also notes that the hearing of a motion for a stay of a Director's order is usually based on affidavit evidence only. In exercising its discretion to admit evidence in such circumstances, the Tribunal may allow wider latitude than would be afforded at the main Hearing. In this regard, the Tribunal notes that even the Director relies to some degree on such latitude. The leading paragraphs of Ms. Hakala's affidavits state:

To the extent that expert opinion is provided in this affidavit that lies outside my personal professional expertise, it is based upon the expert professional advice and observations of members of the staff of the Ministry with whom I have consulted and I believe that the advice and observations to be competent and reliable.

This indicates an expectation by the Director that expert opinion will be considered by the Tribunal, even though it is introduced as hearsay by Ms. Hakala, without direct formal qualification of the expertise of the person who has given the opinion. Furthermore, the Director has not sought to formally qualify Ms. Hakala as an expert, notwithstanding that she expresses her belief and concerns regarding the structural integrity of the berm, and the consequent likelihood that the failure of the berm could cause significant harm to the environment.

The underlying purpose of Paragraph 5 of the Practice Direction is to ensure the *reliability* of the information provided. Mr. Marineau's professional qualifications and his work experience at the Facility, are clear indicators that his views are not merely personal lay opinion expressed in circumstances where he has no direct experience with the Facility and its operations. For this reason, although his opinions cannot be accepted as determinative, the Tribunal is prepared to consider Mr. Marineau's views, informed by his professional qualifications and personal experience with the Facility, just as the Tribunal is prepared to consider Ms. Hakala's views informed by her experience as the Senior Environmental Officer who has had responsibility for environmental inspections and abatement response since April 2008.

Issue # 2: Whether the Tribunal should grant an order striking Paragraphs 3 and 4 of the reply affidavit of Leon Marineau, sworn September 23, 2009.

In his Motion, the Director seeks an Order striking paragraphs three and four of Mr. Marineau's affidavit, sworn September 23, 2009 as reply evidence. Superior did not take a position or make submissions respecting this request.

Director's submissions:

The Director submits that the offending paragraphs address the issue of the integrity of the Lagoon berm, an issue that was known by the Cascades Appellants to be at issue in their stay Motions when they delivered their Notices of Motion for a stay and their original record in support of their Motions, consisting of an affidavit of Mr. Marineau sworn August 12, 2009. At paragraphs 13 and 14 of this affidavit, Mr. Marineau outlined his view that there was no issue with the integrity of the berm and provided his basis for holding that view. Paragraphs 3 and 4 of his reply affidavit sworn September 23, 2009 provide further evidence on the same issue of berm integrity. When cross-examined on his affidavits, Mr. Marineau indicated that he was aware of the matters he addressed in his reply affidavit - seepage from the Lagoon and the alleged presence of sludge on both sides of the berm - as early as 2003 when he first became Vice-President (Environmental) for Cascades Inc.

The Director asserts, therefore, that paragraphs 3 and 4 of Mr. Marineau's reply affidavit improperly split the Cascades Appellants' case. He maintains that the information in the paragraphs was known to the Cascades Appellants when their motion record was delivered, and asserts that the information is intended to bolster their evidence on the issue of berm integrity, an issue that the Cascades Appellants were aware was at issue in their Motions and on which they provided evidence in paragraphs 13 and 14 of Mr. Marineau's original affidavit.

The Director observes that it is trite law that a party to litigation cannot use reply to bolster or split its case. In *Tomagatick v. Ontario (Ministry of the Environment)*, (2009), 42 C.E.L.R. (3d) 39 ("*Tomagatick*") (a leave to appeal case under the *Environmental Bill of Rights, 1993*), at paragraph 38 the Tribunal outlined the general principles with respect to reply evidence:

It is expected that an applicant for Leave to Appeal will put forward its entire case, that is raise all issues that could reasonably be anticipated and provide all relevant supporting documentation of which it is aware, at the first stage. The Director and Instrument Holder then file their responses. Those responses may raise new issues and in reply an applicant may make submissions and adduce evidence that address those new issues. However, *an applicant in reply may not raise issues it could have raised earlier or address issues that do not flow directly from a response. Otherwise, this would allow an applicant to split its case. If the Director and the Instrument Holder are not then given an opportunity to respond to these new issues and evidence, it could be unfair to them.* While it is open to the Tribunal to allow such an opportunity to respond, to do so regularly would unduly prolong what is meant to be an expeditious process and possibly cause confusion. If an applicant, because of tight deadline, finds that it does not have sufficient opportunity to amass the documentation and make its best case, it can

approach the Tribunal for an extension of time within which to provide its submissions. This in fact occurred in this case. It is not appropriate to use reply to try and solve this problem. [emphasis added]

The Director asserts that the Tribunal's jurisprudence on reply evidence is founded on long standing court precedent, citing *Allcock Laight & Westwood v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (C.A.).

The Director submits that to admit paragraphs 3 and 4 into evidence would be unfair to the Director as the Director has been deprived of the opportunity to provide responding evidence.

The Director further argues that Mr. Marineau's new evidence in his reply affidavit not only seeks to bolster evidence already provided on berm integrity, but portions of the new evidence, on their face, contradict his previous evidence on the issue of seepage through the berm.

Cascades Appellants' submissions:

The Cascades Appellants agree that the integrity of the berm was an issue in the Director's Order issued. However, this issue was characterized as a matter of the "long-term structural integrity" of the berm and not as the imminent and catastrophic failure of the berm resulting in an unregulated release of a significant volume of sludge, which it became apparent was the Director's position after reviewing the more than 700 pages of the Director's Response. They maintain that the Director's Response entailed evidence and raised issues that could not have been reasonably anticipated by the Cascades Appellants prior to receipt of the Director's Response. As such, it is submitted that it would be unfair to the Cascades Appellants to prevent them from replying to the Director's Response.

The Cascade Appellants submit that, at common law, at the close of the defendant's case, the plaintiff or Crown has the right to adduce rebuttal evidence to contradict or qualify new fact issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. In this regard they cite *Krause v. R.*, 1986 Carswell BC 330 (SCC).

They observe that, in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed., the authors note that, although the authorities are not entirely clear on this point, the better view is that reply evidence that conforms to the principles stated in *Krause v. R.* can be adduced as of right.

The Cascade Appellants cite *Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of Environment)* (2009), 44 C.E.L.R. (3d) 130, in which the Tribunal recently summarized its approach to the application of Rule 47, which pertains to replies in relation to leave to appeal applications under the *Environmental Bill of Rights, 1993*. Rule 47 provides as follows: "An Applicant may file a reply to the response of the Director or Instrument-holder no later than three days from the date the response is filed." The Tribunal stated:

...[I]t is necessary to determine whether introducing the challenged material in Reply amounts to the Applicants' splitting their case; that is, whether this issue could have been reasonably anticipated and thus included in the original application of Leave to Appeal or whether the issue flows directly from the Director's Response, or whether the material amplifies or clarifies a position on an issue the Applicants advanced in their initial application. [emphasis added]

The Cascades Appellants submit that the challenged reply material is proper and necessary to respond directly to the Director's Response, the new issues raised therein and the evidence tendered in support of the Director's position. Therefore, they maintain that the inclusion of the impugned paragraphs in the reply does not result in the Cascades Appellants splitting their case. The Cascades Appellants argue that the Director's Response raised new issues that could not have been reasonably anticipated and included in the original motion materials for three reasons: (1) the Order under appeal was vague; (2) the nature of a stay motion; and (3) the circumstances of the Cascades Appellants in relation to the property that is the subject of the Order. Furthermore, they argue that the Director's Response contained evidence that the Cascades Appellants have a right to reply to. Therefore, they submit that this material flows directly from the Director's Response and is properly included in the Cascades Appellants' Reply.

The Order under appeal states that:

- 1.30 The long term structural integrity of the Site's sewage works is uncertain in particular the lagoon berm structures. The lagoon system contains contaminated sludges and waste water that, if discharged to the environment, could cause adverse effect.

They assert, however, that the Director's Response was not limited to the "long term structural integrity" of the lagoon berm structures, but rather the alleged imminent failure of the entire berm. The affidavit of Sherry Hakala, sworn September 3, 2009, and filed on behalf of the Director, states:

22. I observed the crack in the top of the berm on June 30, 2009 and took the photographs attached as exhibits “L”, “M”, “N” and “O”. Exhibits “L” and “M” show that there is a crack on top of the berm. Exhibits “N” and “O” show the tearing in the liner of the lagoon through which water can leak. The crack in the top of the berm is at the opposite end of pass #5 from where CFPG had completed repairs in April 2005. **As a result of my inspection, I became concerned about the structural integrity of the berm and the possibility that it could fail entirely, spilling the contents of the lagoon directly into Lake Superior.**

...

26. Because of the cracking on top of the berm and holes in the liner, the structural integrity of the lagoon berm structures is uncertain. **Given the adverse effects that could be caused by the release of sludge into Lake Superior, I believe that repairs to the berm are required to ensure that it does not fail.** [emphasis added]

The Cascades Appellants maintain that the Order makes no mention of the lining of the berm at all. They assert that there is no reference to the liner leaking or that there was a drop in the water levels in the lagoon over the course of a weekend. However, they observe that the Hakala affidavit addresses these matters:

17. Liners were installed in the passes of the lagoon system that have berms separating them from Lake Superior - what Exhibit “G” refers to as passes #5 and #10 of the lagoon system - in 1999, 2000 and 2001, as a result of the discovery that wastewater was leaking through the berms into Lake Superior.
18. Provincial Officer’s Order 5827-67BMH2 was issued to CFPG in December 2004 to repair the seepage from the lagoon originating with pass #5. ...
19. CFPG fixed the leaking liner in pass #5 of the lagoon system by adding a second liner in the area of the leak and weighing it down with chains. The repair was completed in April 2005. A subsequent inspection report, with cover letter dated February 23, 2006 and attached as Exhibit “I”, notes the repair in section 3.0.
20. On June 29, 2009, SFP contacted me to advise that there appeared to be a leak in the lagoon system. A copy of the Incident Report I completed as a result of this call is attached as Exhibit “J”. Water levels in the lagoon had dropped 7 cm over the weekend. As a result, the environmental manager inspected the system and found that the lagoon was slumping on pass #5 and that there appeared to be holes in the lagoon liner.

In Exhibit B to his affidavit sworn August 21, 2009, and filed on behalf of the Director, Todd Kondrat states the issue of concern was that:

A site visit was undertaken by Ministry staff on June 30, 2009 at which time the Environmental Officer observed a crack on top of the berm approximately 3 m in length. There is concern that the berm will continue to leak and its structural integrity is suspect. Should the outside containment berm of the aerated lagoon at Superior Fine Papers experience a **catastrophic failure** it would result in the unregulated discharge of the lagoon contents. [emphasis added]

At page 3 he states: “However, failure of the containment berm would result in the release of a significant volume of sludge that would cover the natural sediments thus eliminating critical habitats for littoral zone benthic organisms and aquatic plants.”

The Cascade Appellants submit that there is a significant difference between preparing a stay motion in relation to concerns about the long term structural integrity of the berm versus the possibility of an imminent catastrophic failure of the berm resulting in an unregulated discharge of a significant volume of sludge. Accordingly, the Cascades Appellants could not have reasonably anticipated the necessity of including evidence relating to the construction of the berm and its resulting permeability, including the fact that it is only partially lined, and the likelihood of a major wash-out of sludge in the event of a catastrophic failure of the berm, in its original motion materials. Therefore, they submit that the necessity of the inclusion of challenged material in the Cascades Appellant’s Reply flows directly from the evidence contained in the Director’s Response.

The Cascade Appellants maintain that an application for the stay of a Director’s order is different from the other types of proceedings before the Tribunal, and proceedings in the civil and criminal context. A motion for a stay generally occurs at a very early stage before the issues have been elaborated upon and when the only material from the Director defining the issues of concern to the Director is the Director’s Order. They submit that a stay motion differs from an application for leave to appeal under the *Environmental Bill of Rights*, which was the nature of the proceeding in *Tomagatick*. In that type of proceeding an applicant has the ability to define the scope of the proceeding through its own application for leave to appeal. In a civil proceeding, the parties have mutual discovery obligations that are fulfilled well before the parties are required to tender any evidence to the court. In a criminal proceeding, there is a duty on the Crown to provide disclosure of its case, which generally occurs well before a trial date is set. They maintain that there is no equivalent information exchange under the Tribunal Rules prior to, or at the time of, a stay application.

The Cascade Appellants submit that, in a stay motion, an appellant is limited to anticipating the Director's response based upon what may be gleaned from the Director's Order, which in this case provided extremely limited and vague information regarding the Director's concerns in relation to the berm and the sludge. Therefore, they submit that the standard for what an applicant may reasonably anticipate as an issue in a stay motion where the applicant has no control over framing the issues, where it may be faced with a vague order, and where it has not had the benefit of any documentary exchange with the Director, is lower than the standard for what an applicant may reasonably anticipate in other types of proceedings, where an applicant has the power to define the relevant issues and/or where the parties have exchanged information in advance of calling their case.

Cascades Fine Papers has not operated the site on which the lagoon berm structures are situated in three and a half years. Further, Cascades Fine Papers has not owned the site for almost two years. As such, the Cascades Appellants argue that Cascades Fine Papers' representatives would not be expected at the outset to be privy to the same kind of detailed information regarding the current condition of the berm or its operation or maintenance as the Director and/or current owner of the site. As such, they submit that the standard for what the Cascades Appellants would be expected to reasonably anticipate in the Director's Response ought to be lower than the standard applied to the current owner and/or operator of a site.

Findings on Issue # 2:

Part 1 of the Director's Order is entitled "Legal Authority and Reasons". As noted by the Cascades Appellants, Part 1.30 expressly refers to uncertainty about the long term structural integrity of the Lagoon berm structures. In addressing the application of section 143 of the *EPA* to this stay motion, the question is not whether the berm structures are in need of repair but whether granting a stay of the provisions of Director's Order respecting berm repair and Lagoon dredging would result in:

- impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or
- injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Therefore, the Tribunal must address whether the risk of environmental harm associated with berm conditions affecting the long term integrity of the berm, may be different from the risk associated with conditions suggesting an imminent or immediate failure of the berm. The Tribunal accepts that there are no other provisions in the Director's Order that clearly indicate that long term integrity of the berm referenced in the Director's reasons, includes conditions of

structural integrity which would suggest its imminent or immediate failure. The Tribunal accepts the Cascades Appellants' submission that they have not, for the past two years, been privy to detailed information regarding current condition of the berm or its operation or maintenance, and, consequently, it cannot be assumed that they were aware of concerns related to imminent failure. Therefore, the Tribunal does not accept the Director's submission that the impugned paragraphs of Mr. Marineau's reply affidavit provide only further evidence on what the Director has characterized as a singular issue of berm integrity. The Tribunal accepts the Cascades Appellants' submission that the Director's response affidavits and supporting materials raised or, at least, clarified that the Director's Order is intended to include concerns regarding imminent failure of the berm as well as its long term integrity. For this reason, the Tribunal accepts that the Director's response to the Cascades Appellants' motion raised a new and substantive issue regarding the potential for imminent failure of the berm, to which the Cascades Appellants are entitled to reply. Accordingly, the Director's request to strike paragraphs three and four of the Mr. Marineau's affidavit sworn September 23, 2009, is dismissed.

The Director has submitted that it would be unfair to the Director to admit paragraphs 3 and 4 into evidence, as the Director would be deprived of the opportunity to provide responding evidence. During oral argument the Tribunal enquired whether the Director would require an opportunity to file further evidence in response, if the reply evidence was not struck. Mr. Adamson indicated that the Director had no further evidence to file on an immediate basis, and any other evidence which the Director may seek to obtain could not be produced in a timely manner. Accordingly, the Tribunal does not find that the admission of this reply evidence would be unfair to the Director. In this regard, the Tribunal also notes that, where a stay is granted, a party may apply for a removal of the stay pursuant to section 143(5) of the *EPA*, if relevant circumstances have changed or have become known since the stay was granted.

Issue # 3: Whether the Tribunal is precluded from granting a stay of the Director's Order under section 143(3) of the *Environmental Protection Act*, and, if not, whether the tests for granting a stay, as set out in Rule 101, have been met.

Cascades Appellants' Motion

Consent matters

The Director has conceded that Parts 2.15 (the requirement to apply for an amendment to the Waste Disposal Site CofA) and 2.16 (the requirement to provide financial assurance) should be stayed as against the Cascades Appellants, pending a full Hearing.

Regarding the Cascades Appellants' request for a stay of Parts 2.6 to 2.10 of the Director's Order, the Director and the Cascades Appellants agree, and Superior does not oppose, that a stay should be granted on the following terms and conditions:

Parts 2.6 to 2.10 of the Director's Order dated July 29, 2009 are stayed with respect to Cascades Inc. and Cascades Fine Papers Group Inc. unless the Director serves written notice that (i) Superior Fine Papers Inc. is no longer on site and no receiver or trustee in bankruptcy has been appointed; or that (ii) a receiver or trustee in bankruptcy having been appointed for Superior Fine Papers Inc., the receiver or trustee in bankruptcy does not intend to take control of the site; or that (iii) a receiver or trustee in bankruptcy having been appointed for Superior Fine Papers Inc. and the receiver or trustee in bankruptcy having been on site, the receiver or trustee in bankruptcy is no longer on site; or that (iv) Superior Fine Papers Inc. remains on site but is no longer satisfying its obligations under some or all of Parts 2.6 to 2.10.

If the Director serves such notice, then the date specified in Parts 2.6 to 2.9 of the Director's Order shall be deemed to be three days following the service of the notice.

In the event that the notice is sent in circumstance (iv) above, where Superior Fine Papers Inc. remains on site but is no longer satisfying its obligations under some or all of Parts 2.6 to 2.10, the notice shall specify which of Parts 2.6 to 2.10 Superior Fine Papers Inc. is no longer able to satisfy and the stay shall be lifted only with respect to those Parts so specified in the notice.

By agreeing to a conditional stay of Parts 2.6 through 2.10 in the form set out above, neither Cascades Inc., nor Cascades Fine Papers Group Inc., shall be precluded by virtue of this agreement from moving for a stay of some or all of Parts 2.6 through 2.10 of the Director's Order at any time after the Director serves written notice referred to above. For greater certainty, in the event that the Director serves written notice referred to above, it shall remain open to Cascades Inc. and Cascades Fine Papers Group Inc. to seek a stay of the Director's Order regardless of their agreement to a conditional stay herein.

For the purposes of these Motions, the Cascades Appellants concede that there are portions of the Order pertaining to monitoring, recording and reporting, and, as such, the Tribunal does not have the jurisdiction to grant a stay pursuant to Section 143(2) of the *EPA*. The relevant portions of the Order are Sections 2.4, 2.5, 2.12(f) and 2.13 (to the extent that it entails implementation of 2.12(f)).

Regarding the requirement to submit a completed application for a Certificate of Approval for the unapproved Bark Storage area (Parts 2.12(c), 2.14, and portions of 2.11, 2.12(d) & (e) as they

relate to this requirement), the Parties advise that this matter is under settlement discussion. Therefore, they agree that the request for the stay of these provisions should be adjourned to the Preliminary Hearing to be held on November 24, 2009, to be spoken to at that time.

As a result of the foregoing, the only portions of the Order for which a stay is presently being requested by the Cascades Appellants, which the Director opposes, relate to the berm repair and sludge removal. The provisions are as follows, subject to the exception that a stay is not sought in respect of the portions shown with strikethrough text as they pertain to the bark pile as noted the previous paragraph.

Parts 2.2 and 2.3 of the Order are directed at the Cascades Appellants and Thunder Bay Papers jointly and severally. Superior is not subject to these portions of the Order, as this requirement is imposed on Superior by the Provincial Officer's Order dated July 9, 2009.

- 2.2 By no later than August 5, 2009 at 2 p.m., provide to the Director a written plan detailing the steps necessary, the time required, and the name of the person licensed by the Professional Engineers Ontario to repair the industrial sewage works (lagoon berm) to stop the seepage from the industrial sewage works (lagoon berm) from entering into Lake Superior.
- 2.3 Implement the plan delivered pursuant to Article 2.2, as approved by the Director, within three (3) days of the date of the Director's approval.

Parts 2.11 to 2.13 of the Director's Order have been directed at the Cascades Appellants, Thunder Bay Papers and Superior jointly and severally.

- 2.11 No later than August 4, 2009 at 2 p.m., provide to the District Manager the name, professional address and C.V. of a consultant or consultants (the "Consultant") with the experience and training sufficient to make him, her or they proficient in the maintenance, repair and operation of industrial sewage works, ~~the decommissioning of waste disposal sites and the submission of applications for Ministry-issued Certificates of Approval.~~
- 2.12 By no later than August 5, 2009 at 2 p.m., provide to the Director, for his approval, a detailed written plan (the "Plan") produced by the Consultant and containing the following:
 - (a) a schedule detailing the steps necessary and time required to remove the waste sludges from the sewage lagoons regulated by Certificate of Approval (Industrial Sewage Works) No. 3758-5NTJ43;

(b) a schedule detailing the steps necessary and time required for bringing the components and operation of the Site's sewage works into full compliance with its Certificate of Approval;

~~(c) a schedule detailing the steps necessary and time required for removing all wastes that it is practicable to remove from the Site's Bark Storage Area and transporting and disposing of those wastes in an approved manner;~~

~~(d) the name(s) of the contractor(s) approved and available for the transport of the wastes located at the Site's sewage works and Bark Storage Area;~~

(e) the name(s) and location(s) of a disposal site or sites available and approved to receive the waste from the Site's sewage works ~~and Bark Storage Area~~; and,

2.13 Implement the plan delivered pursuant to Article 2.12 as approved by the Director, within three (3) days of the date of the Director's approval.

Cascades Fine Paper's submissions:

The Cascades Appellants first address whether the Tribunal is precluded from granting a stay under section 143(3) of the *EPA*.

The Cascade Appellants indicate that Mr. Marineau gave evidence that he was not aware that there was any current seepage from the lagoons into Lake Superior. Nor was he aware that there is any immediate risk of any seepage from the lagoons, nor that the lagoons are a danger to the health or safety of any person. He gave evidence that he does not believe that the lagoons or their contents presently impair or pose a risk of impairment to the quality of the natural environment for any use that can be made of it. Furthermore, he stated that he did not believe that the lagoons or their contents will presently cause injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

The Cascade Appellants also indicate that Mr. Marineau gave evidence that assuming a worst case scenario where the lagoon is full of sludge, the sludge level within the lagoon would be at the same level, or very close to the same level, as the sludge on the lake side of the berm. Therefore, they submit that in the event of a berm failure, the probability of a major wash-out of sludge into the lake is minimal because of the similarity in the levels of the sludge in the lagoon and lake, and maintain that there is no room for the sludge in the pond to wash-out into the lake because the lake at that point is already occupied with sludge. Furthermore, even in a worst case

scenario of a slope slide failure of the berm, storm and wave erosion would be unlikely to cause a major sludge spread in the lake.

The Cascade Appellants note that, when he visited the facility in April 2009 with the Director, Mr. Marineau observed one small crack that had been there for some time, which he said was not causing any seepage into Lake Superior at that time. Mr. Marineau became aware around the time when Cascades Inc. received the Order that the Director was concerned with a different crack, although Mr. Marineau did not know if the Director was of the view that the crack was more serious than the one observed in April 2009.

The Director's evidence regarding the current condition of the berm and lagoon, and the risks associated with the lagoon, was provided by Todd Kondrat, a MOE Surface Water Specialist, and Sherry Hakala, a Senior Environmental Officer with the MOE.

Mr. Kondrat indicated as follows regarding the berm and sludge:

- “*Should* the outside containment berm of the aerated lagoon at Superior Fine Papers experience a catastrophic failure it would result in the unregulated discharge of the lagoon contents.” (page 2) [Emphasis added]. Mr. Kondrat gave no evidence regarding the likelihood of catastrophic failure and testified he was not a structural engineer.
- Although Mr. Kondrat speculated what *might* be found in the sludge, he admitted he had no scientific data upon which to found this speculation.
- “...it was determined that no information was available to assess the physical and chemical character of the sludge contained within the aerated lagoon.” (page 2)
- “The sludge within the aerated lagoon and settling basin has not been physically or chemically characterized.” (page 6).
- “An unregulated release of the sludge contained within the aerated lagoon and settling basin would result in the smothering of nearby lake sediments that would negatively impact on benthic and fish communities.” (page 6) Again, Mr. Kondrat gives no opinion as to the likelihood of an unregulated release.
- “The wastewater contained within the aerated lagoon and settling basin represent a low to medium risk to the water quality of Thunder Bay Harbour of Lake Superior if an unregulated discharge was to occur.” (page 2)

Ms. Hakala gave the following evidence in her first affidavit sworn September 3, 2009:

- It was reported to her that there appeared to be a leak in the lagoon system, water levels had dropped 7 cm over the weekend, the lagoon was slumping on pass #5 and there appeared to be holes in the liner. (para. 20)
- She observed a crack in the top of the berm and tearing in the liner on June 30, 2009. (para. 22)
- As a result of her inspection she “became concerned about the structural integrity of the berm and the *possibility* it *could* fail entirely, spilling the contents of the lagoon directly into Lake Superior.” [emphasis added] (para. 22)
- The reports of Superior’s measurement of two checkpoints on the cracked berm note slight shifts that *may* indicate the berm is moving. [emphasis added] (para. 24)
- “The lagoon system contains sludge that, if discharged to the environment, *could* cause adverse effects.” [emphasis added] (para. 25)
- “Because of the cracking on top of the berm and holes in the liner, the structural integrity of the lagoon berm structures is uncertain. Given the adverse effects that *could* be caused by the release of sludge into Lake Superior, I believe that repairs to the berm are required to ensure that it does not fail.” [emphasis added] (para. 26)

According to Mr. Marineau, a 7 cm drop in the water level within the lagoon over a weekend is not unusual in relation to storm water. It could be evidence of seepage if there has not been any recent inflow of water through rain. The Cascade Appellants assert, however, there is no evidence before the Tribunal as to the weather conditions in the days preceding the purported 7 cm drop. Therefore, they argue that one cannot conclude whether the reported drop was due to seepage or other events.

The Cascade Appellants maintain that all of the remediation options that are being discussed to deal with the significant accumulation of sludge in the harbour on the lake side of the berm will disturb the benthic community living on the bottom of the sludge in the lake.

They note that, according to Ms. Hakala, Superior is measuring two checkpoints indicated by stakes that have been inserted into the berm as a way of monitoring whether there is movement in the berm. They observe that, if these measurements have been taken from the top of the stakes, they are not indicative of movement of the berm because any difference in measurement could be attributable to the stake tipping over for reasons completely unrelated to the movement of the

berm. They maintain that, in order to be indicative of any movement, measurements would have to have been taken at the toe of the stake.

The Cascade Appellants cite *Tembec Industries Inc. v. Ontario (Director, Ministry of the Environment)* (2009), 44 C.E.L.R. (3d) 84 (“*Tembec Industries*”), in support of the following submissions:

- Pursuant to section 143(3), the Tribunal inquires as to what would happen if a stay were granted. If any of the circumstances noted in clauses (a), (b), or (c) *would* happen if a stay were granted, the Tribunal has no jurisdiction to grant a stay. (p. 17)
- The Director bears the onus of showing that section 143(3) is applicable. (p. 18)
- While the Director does not have to show that environmental impairment will arise with certainty, the Director does have to show that danger or serious risk *will* result. The threshold is not as low as “*could* result in a danger or serious risk.” (p. 18)
- Furthermore, in a case with multiple parties subject to an order, the Director has to show that a stay as against both parties would result in the dangers or serious risk referred to in section 143(3) or that a stay against one party while the other party is not complying would result in the dangers or serious risk referred to in section 143(3). (pp. 18-19)

The Cascades Appellants submit that a stay of the Order would not result in the dangers or serious risk referred to above because the evidence before the Tribunal is that Superior, at least at the present time, is complying with the Superior Order, which requires it to repair the berm. Therefore, the berm is being repaired and the Director cannot establish that a stay of the Order under appeal in this proceeding would result in the danger or serious risk of one of the circumstances in section 143(3) of the Act.

They argue that, in any event, the Director’s evidence at its highest with respect to dangers or risks if the work required by the Order is not done pending the outcome of the appeal is Ms. Hakala’s concern with “the *possibility* it [the berm] *could* fail entirely”, that the slight shifts noted by Superior “*may* indicate the berm is moving,” and “the lagoon system contains sludge that, *if* discharged to the environment, *could* cause adverse effects” [emphasis added].

The Cascade Appellants argue that the evidence does not establish whether the checkpoint measurements were taken correctly.

They submit that Mr. Kondrat gave no opinion as to the likelihood of a berm failure, nor did he give an opinion with respect to the quality of the sludge beyond mere speculation. With respect to the quality of the water within the lagoon, he was of the opinion that it only presented a low to medium risk (the water was tested). Mr. Kondrat did say that an unregulated release of sludge would result in the smothering of nearby lake sediments that would negatively impact on benthic and fish communities. This is the benthic and fish community that will be disturbed by any remedial measures undertaken to remove the sludge that exists on the lake side of the berm in any event. They maintain that, again, there is no evidence regarding the likelihood of an unregulated release beyond it *could* or *may* happen.

The Cascade Appellants submit that “could”, “may” and “if” do not meet the standard required by section 143(3) of demonstrating that danger or serious risks *will* result. They maintain that there is simply no evidence that not completing the berm repair work in the next three months (the timeframe within which a decision is likely to be rendered in the appeal) would result in danger or serious risk of any of the circumstances described in section 143(3). There have been issues with the lagoon berm on and off over the years. They submit that cracks and/or indications of seepage are not necessarily indicative of imminent collapse of the berm.

Furthermore, they note that the sludge has been present for decades and there is no evidence before the Tribunal that the Director had ever ordered that the sludge be dredged until July of this year. While the Director prepared a Draft Order which was sent to Cascades Fine Papers Group Thunder Bay in early March of this year requiring a plan for sludge removal, no actual implementation of the plan was required. This Draft Order never became an effective order. Furthermore, the Superior Order issued July 8, 2009 did not contain any provisions pertaining to sludge removal. They submit that these facts demonstrate that there is no urgent circumstance requiring the removal of the sludge prior to the disposition of the Appeal. The very purpose of the lagoon is to serve as a vessel to accumulate the sludge. Its presence does not create a danger or serious risk of any of the factors described in section 143(3) of the *EPA* occurring. If it did, it would not be permitted to be used in the operations of the Facility.

And, in any event, even if there were to be a complete failure of the berm, the Cascade Appellants argue that the evidence before the Tribunal is that the probability of a major wash-out of sludge into the lake is minimal due to the similar levels of the sludge in the lagoon and lake. The sludge level on the lake side is the same, or nearly the same, as that inside the lagoon. Therefore, if the berm fails, there is nowhere for the sludge within the lagoon to go. They maintain that, because of the quiet environment in this part of the harbour as a result of the break walls surrounding the area, even in a worst case scenario of a slope slide failure of the berm,

storm and wave erosion would be unlikely to cause a major sludge spread in the lake, although some movement may occur.

The Cascades Appellants, therefore, submit that the Director has not demonstrated that any of the circumstances described in section 143(3) exist. Therefore, they submit that the Tribunal has jurisdiction to grant a stay in the circumstances.

The Cascades Appellants' submissions now turn to the considerations under Rule 101.

The Director concedes, for purposes of this stay motion only, that there is a serious issue to be decided by the Tribunal with respect to whether Cascades Inc. was in management and control of the Facility.

Regarding the second aspect of the test, irreparable harm, the Cascade Appellants submit that, at this stage, the only issue to be decided is whether a refusal to grant the stay could so adversely affect their own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. They cite *RJR Macdonald Inc. v. Canada (Attorney General)* (“*RJR*”), [1994] 1 S.C.R. 311, paras. 58 and 59, where the Supreme Court of Canada described irreparable harm as follows:

“Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

The Cascade Appellants note that the minimal costs to carry out the work of the Order that is the subject of this stay motion is \$1,458,000, based on the quotes obtained by Superior, of which Superior has paid \$100,000 to date.

Mr. Sinclair also testified that as of September 22, 2009 Superior had approximately \$80,000 in its bank account. The Cascade Appellants submit that, if Superior is, or becomes, insolvent and a receiver and/or trustee in bankruptcy is appointed, any claim that Cascades Fine Papers will have against Superior in relation to the Order under appeal will only rank as that of an unsecured creditor, sharing rateably with all other unsecured creditors, ranking after the secured creditors. This is because Cascades Fine Papers has no charge on the assets or other form of security for the work required by the Order and has no ability to obtain any security. They are unable to recover from the Director. All of Thunder Bay Papers' assets have now been sold or disposed of and it is not anticipated that there will be any funds available for distribution to the company's unsecured creditors. As such, it will be impossible for Cascades Fine Papers to recover the cost

of any of the work it has been ordered to do pursuant to the Order if a stay of the Order is not granted pending the outcome of the appeal.

The Cascades Appellants further note that, according to Ms. Hakala's Affidavit sworn September 16, 2009, Superior requires \$34 million to restart the Facility and it has advised if it does not receive this funding it will be insolvent resulting in an abandonment of the Facility.

The Cascades Appellants submit that they have demonstrated that they will suffer irreparable harm if the stay is not granted pending the outcome of the appeal if the Cascades Appellants are ultimately successful.

Regarding the third aspect of the test, the balance of convenience, the Cascade Appellants submit that this involves a determination of which of the two parties will suffer the greater harm from the granting or refusing of an interlocutory injunction pending a decision on the merits. They cite *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110 ("*Manitoba v. Metropolitan Stores*"), paragraph 35, as authority for this position.

They submit that, in the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. The test will nearly always be satisfied upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. However, they submit that this does not mean that it should be assumed that inconvenience to the public interest outweighs the inconvenience to the moving party, citing *RJR*, at paragraph 71 as authority for this position.

The Cascade Appellants assert that, after July 10, 2008, Cascades Fine Papers no longer retained any obligations with respect to the lagoon. The Director was advised of this, by the latest, in March 2009 when he was provided with a copy of the Amended Environmental Indemnity.

They maintain that it is clear that an environmental indemnity was one of the assets sold to Superior when it purchased the Facility pursuant to Court Order in February 2009. As such, and as the current owner of the site, Superior is responsible for the berm repair and the sludge removal.

The Cascades Appellants submit, in this instance, that a stay of the portions of the Order at issue in these Motions would not result in any irreparable harm to the public interest, given that Superior is currently complying with the Superior Order to repair the berm, and removal of the

sludge is only an issue if the berm fails and there is an unregulated release of sludge into the lake. Therefore, they submit that there is no irreparable harm to the public interest and, as a result, the balance of convenience favours granting a stay.

In the alternative, if the Tribunal finds that there would be inconvenience to the public interest, they submit that the weighing of the inconvenience to the two parties in this case is akin to that presented in *Tembec Industries*, and that the comments of Vice-Chair DeMarco at paragraph 24, are directly on point:

The Tribunal acknowledges that some harm results from restraining a public authority from having work carried out. However, given the lack of urgency with respect to these particular portions of the Director's Order and the fact that complying with these provisions would result in financial harm to Tembec, the balance favours Tembec on an interim basis. ... This will avoid having Tembec expend monies that it cannot recover while ensuring that the aspects of the Director's Order that are of a more urgent nature remain in force as a result of the application of section 143.

The Cascade Appellants maintain that the inconvenience to the public interest that would be incurred here, if any, would be minimal given the lack of evidence of any urgency with respect to having this work carried out in the next three months. Weighing this against the financial harm to the Cascades Appellants in being unable to recover from the responsible parties if the Cascades Appellants are successful on their appeal, they submit that the balance of convenience favours the Cascades Appellants. Moreover, Section 146 of the *EPA* provides that: "Where an order or decision made under this Act is stayed, the Minister may cause to be done any thing required by the order or decision." Therefore, if the stay is granted, the Minister has the ability to carry out any of the work the Minister deems necessary and these costs can be recovered from the responsible party after the appeal pursuant to Section 150 of the *EPA*. Therefore, the Cascade Appellants submit that the Ministry's hands are not tied by a stay. It can proceed to have the work carried out.

In light of the foregoing, they submit that the balance of convenience clearly lies in granting the stay pending the outcome of the appeal.

Director's submissions:

The Director submits that sections 143(3)(b) and (c) preclude the Tribunal from issuing a stay with respect to the requirement to repair the berm. The Director acknowledges that the presence of the sludge in the Lagoon, in and of itself, does not pose a risk of environmental harm, as the

Lagoon is an approved sewage works governed by the Lagoon CofA. Thus, the Director acknowledges that the dredging portions of the Order could be stayed if the berm walls are repaired. The Director asserts, however, that if the berm walls are not repaired, then the lagoon system must be dredged as the potential for discharge of a large volume of sludge in the Lagoon into Lake Superior constitutes an imminent hazard. The Director maintains that this hazard constitutes both a serious risk of impairment of the quality of the natural environment and a serious risk of injury or damage to any plant or animal life.

The Director submits that the Cascades Appellants have not provided any expert opinion to dispute the expert evidence of Todd Kondrat regarding the risks posed by the sludge in the lagoons.

Further, the Director submits that it is not necessary that he establish actual impairment, injury or damage. The threshold set out in s. 143(3) is a serious *risk* of impairment to the environment or injury or damage to property or plant or animal life. In *Limoges v. Director (Minister of the Environment)*, [2007] O.E.R.T.D. No. 14, at para. 47 (“*Limoges*”) the Tribunal held:

The Tribunal must decide on the basis of the information it has before it, and in keeping with the words “risk” and “danger” in section 143(3), err on the side of caution, especially in this case where the Parties clearly agree that the Site is contaminated and a key issue in dispute is whether there are off-site impacts or a risk of them.

Respecting the considerations under Rule 101, the Director concedes that there is a serious issue to be decided, and the Cascades Appellants have an arguable case that they would suffer irreparable harm if the stay is not granted. Regarding the balance of convenience, the Director observes that, as Thunder Bay Fine Papers operated the Facility for less than four months, and Superior has never operated the Facility, the vast majority of the wastes contained in the Site’s sewage lagoons were put there while Cascades Fine Paper was operating the Facility. The Director submits that the risk of failure of the structural integrity of the berm walls, if not serious, is still substantial, and maintains that the Cascades Appellants have ample financial resources to complete the remaining repairs to the berm walls. The Director argues that, in these circumstances, it is not in the public interest that repairs to the berm walls be delayed. The Director submits, therefore, that the balance of convenience does not favour granting the stay.

Superior’s submissions:

Superior did not take a position or make submissions respecting this aspect of the Cascades Appellants’ request for a stay of the Director’s Order.

Findings:

Mr. Kondrat's evidence indicates that the water contained in the Lagoon represents low to medium risk to the water quality of the Thunder Bay Harbour if an unregulated discharge were to occur. The Facility is not currently in production, so there is consensus that new sludge is not being added to the Lagoon. However, stormwater does enter the Lagoon as it is an outdoor treatment system.

The Director acknowledges that the presence of sludge in the Lagoon, in and of itself, does not pose a risk of environmental harm, provided that it is contained in the Lagoon. The Cascades Appellants do not dispute Mr. Kondrat's evidence that release of a significant volume of sludge into the lake that covers natural sediments which are critical for littoral zone benthic organisms and aquatic plants, and for fish spawning, could cause harm to the aquatic environment and aquatic life. This is the harm which must be considered under section 143(b) and (c), which for ease of reference the Tribunal shall refer "the Environmental Harm" Accordingly, in determining whether the Tribunal is prevented from granting the requested stay under s. 143(3)(b) and (c), the factual determinations that the Tribunal must address are:

1. whether sludge is currently leaking through the berm walls in a manner that would result in the Environmental Harm, or a serious risk thereof; and
2. whether there is a serious risk that the structural integrity of the berm walls may fail spilling the contents of the Lagoon into Lake Superior in a manner that would result in the Environmental Harm, or a serious risk thereof.

Respecting the first question, there is no direct evidence, through observation of sludge going into the lake or other forms of testing, that sludge is leaking through the berm walls or is flowing over the weir into Lake Superior. The conclusion that this is occurring, or that there is a serious risk that this could occur, is inferential. The presence of sludge against the lake side of the berm walls is not determinative. The Parties all agree that sludge has, for a number of years in the past, leaked through the berm wall, as it was permeable. However, the evidence is also clear that PVC liners were installed to address this concern. Although Ms. Hakala has noted that there currently are some holes in the liner on pass #5, the photographs indicate only that these holes are above the surface of the water. While the evidence filed indicates that it is now time for the liners to be replaced, it does not indicate whether there are holes below the liner. Furthermore, there is no evidence to confirm, one way or the other, that even if there are holes below the surface, that a sufficient quantity of sludge could pass through the liner and the berm wall to amount to a "significant volume of sludge" as referenced by Mr. Kondrat. Ms. Hakala expresses

a concern that sludge could be leaking through the crack observed on the top surface of the berm wall, but she provides no further explanation detailing how this would occur. In cross-examination, Mr. Marineau expresses his view that the existence of a crack on the top of the berm does not have any direct impact on seepage. Therefore, the Tribunal finds that this evidence is insufficient to infer that sludge is leaking through the berm wall, or that there is a serious risk that this will occur.

The Director also relies on the observation by Superior's environmental manager that on a weekend in June 2009, the water level in the Lagoon dropped 7 cm., thereby suggesting that there may be a leak in the berm wall. While Mr. Marineau agreed in cross-examination that such a drop in water level could be evidence of a leak if there has not been any recent inflow of water into the system, he also testified that, in his view, a 7 cm drop in the water level is not unusual in relation to storm water, because water entering the Lagoon can still flow through the Lagoon and over the weir. The Director has filed no other evidence to confirm the suggestion that the drop in water level should reasonably be attributed to leaking from the berm walls, and furthermore, to confirm that if such leaking did occur, whether it would include sludge. As noted earlier in this decision, the Tribunal does not accept Mr. Marineau's opinion as determinative evidence on this issue. The Tribunal again finds that, at best, the evidence on this point is equivocal, and, accordingly, finds that this evidence is insufficient to infer that sludge is leaking through the berm wall, or that there is a serious risk that this will occur. For these reasons the Tribunal finds that it has not been established that sludge is currently leaking through the berm walls in a manner that would result in the Environmental Harm, or a serious risk thereof.

The Tribunal now turns to the second question relating to the structural integrity of the berm walls. Although the Director argues that the Cascades Appellants have not provided any expert opinion to dispute the expert evidence of Mr. Kondrat regarding the risks posed by the sludge in the Lagoon, the Tribunal notes that Mr. Kondrat did not express an opinion regarding the structural integrity of the berm. Based on his qualifications, education, and experience, as set out in his resume which is attached to his affidavit, Mr. Kondrat is a water quality and surface water specialist. In paragraph 2 of his affidavit, he restricts his professional opinion to a memorandum that he prepared, dated August 21, 2009, which is attached as an exhibit to his affidavit. This memorandum addresses the characteristics of the sludge and water in the Lagoon. Mr. Kondrat does not address the structural integrity of the berm walls or the engineering of earth berms. He simply reports that "There is concern that the berm will continue to leak and its structural integrity is suspect."

As neither Ms. Hakala or Mr. Marineau have been tendered as experts for the purpose of giving opinion evidence, the Tribunal has received no expert opinion evidence respecting the structural integrity of the berm, nor whether there is serious risk that the structural integrity of the berm walls may fail spilling the contents of the Lagoon into Lake Superior.

The evidence that has been tendered regarding the berm integrity is equivocal. Ms. Hakala expresses the view that as a result of her inspection on June 30, 2009, the crack observed in the berm wall and the holes in the liner, lead her to have concerns about the structural integrity of the berm and possibility that it could fail. However, other than a photograph which does not clearly indicate the depth or other physical parameters of the crack, the Director has not provided evidence to clearly describe and explain how the observed crack is indicative of the type of structural instability that would lead to the berm walls failing in such a manner that the contents of the Lagoon would spill into Lake Superior. Mr. Marineau expresses his view that that the crack is not indicative of structural instability. While his opinion is not determinative, his qualifications include expertise in the engineering of earth berms. Therefore, his views cannot be altogether discounted as mere lay opinion, although he provided no detailed analysis of this aspect of the berm wall's condition, other than to note that there were cracks in the past.

Ms. Hakala has testified that two checkpoints were placed on the cracked berm and were monitored daily to determine whether the berm is moving. Mr. Marineau's testimony further explains that these checkpoints were stakes from which measurements were made. Two of Superior's on-site staff took the daily measurements, which were recorded on daily log sheets for the period from August 1 to 20, 2009. These shift reports show increases of 1/8" and 3/4" for these two check points. Mr. Marineau has questioned whether this change may be the result of measuring from the top of the stake rather than the bottom, the implication being that the change in measurement may be the result of movement of the stakes on the berm, rather than the berm itself. The Tribunal ascribes very little weight to this aspect of Mr. Marineau's evidence, as it is merely suppositional, and the Cascades Appellants provided no evidence to confirm whether this supposition is correct. The Tribunal is similarly unable to draw any conclusions regarding the implications of the data from the shift reports. The Director adduced no evidence to explain how the measurements were taken. The variances are very small, and there is no evidence to explain, one way or the other, whether these variances could be the result of minor variances on how the measurements were taken and read. The Tribunal did not receive evidence to indicate whether any measurements may have been taken after August 20, 2009, and if not, why the monitoring ceased. Furthermore, no evidence was adduced to explain, one way or the other, how the described increase in the measurement, indicates that the structural integrity of the berm is failing or is at serious risk of failing.

As noted earlier in this decision, Ms. Hakala has testified that Superior advised her on June 29, 2009 that its environmental manager had inspected the Lagoon and “found that the lagoon was slumping on pass #5”. However, the Tribunal received no evidence to explain what the manager meant by this observation, nor any description of the physical dynamics associated with the term “slumping”. The Tribunal also did not receive any evidence to explain how this observation indicates that there is serious risk that the structural integrity of the berm walls could fail.

The Cascades Appellants have summarized Mr. Marineau’ evidence in which he expresses his view that, even if the berm wall failed, the probability of a major wash-out of sludge into the lake is minimal because of the similarity in levels of the sludge in the Lagoon and Lake Superior. However, the Cascades Appellants adduced no technical analysis to support this hypothesis. The Director has countered with the submission that wind and water turbulence in the harbour could cause sludge in the lake to move. However, the Director similarly adduced no technical evidence or expert opinion to support this theory. The Cascades Appellants point out there are break waters near the Facility which reduce wave action, resulting in a quieter environment, and Mr. Marineau explains that this is why sludge has in fact accumulated on the lake side of the berm walls.

Superior acknowledges the Lagoon should be dredged and the berm walls repaired or renovated before the mill resumes discharging the wastewater into the Lagoon. However, this requirement, in and of itself, is not conclusive evidence that there is a serious that the structural integrity of the berm wall will fail, spilling the contents of the Lagoon into Lake Superior.

In light of the above analysis, the Tribunal concludes that there is insufficient evidence to conclude, one way or the other, whether there is a serious risk or, as the Director as alternatively argued, a substantial risk that the structural integrity of the berm walls may fail spilling the contents of the Lagoon into Lake Superior in a manner that would result in the Environmental Harm, or a serious risk thereof. The Tribunal accepts, as stated in *Limoges*, that, when making its decision under section 143(3), the Tribunal should err on the side of caution. However, in *Limoges*, the Tribunal found that there was evidence before it that there was a serious risk of off-site impacts arising from the Site. In this case, however, the Tribunal has found that there is insufficient evidence to conclude that there is a serious risk of off-site impact.

As noted in *Limoges*, the Director has the onus of establishing that section 143(3) applies to preclude the Tribunal from granting a stay of the operation of the Director’s Order. In this case, the Tribunal finds that the Director has not done so. Accordingly, the Tribunal finds that it is not

precluded from granting the stay requested by the Cascades Appellants under the provisions of section 143(3) of the *EPA*.

The Tribunal now turns to the considerations under Rule 101. The Director does not dispute, for the purposes of this motion, that there is a serious issue to be decided, and does not dispute that the Cascades Appellants have established that they will suffer irreparable harm if the relief is not granted. Given Superior's current financial situation, the Tribunal accepts that the Cascades Appellants have established that there is, at present, no realistic prospect of recovering the costs they would incur in complying with the Director's Order, if they are ultimately found to be not responsible after the appeal.

Regarding the balance of convenience, there clearly would be inconvenience to the Cascades Appellants if they were required to dredge the Lagoon, and implement the remain repairs to the berm, prior to a determination of their claim that they are not legally obliged to do so.

Regarding consideration of the effect on the public interest, the Tribunal does not fully accept the Cascades Appellants' submission that Superior *is* currently complying with the Provincial Officer's Order to repair the berm. It is more accurate to say that Superior has expressed a willingness to do so, and has partially followed through on its commitment. However, Superior has been candid in advising the other Parties and the Tribunal that, as of the hearing of oral argument on October 9, 2009, it did not have the financing to complete the berm repairs, and did not know when or if it would be able to do so. Therefore, there is a negative impact in granting the stay, which affects the public interest.

The decision in *Tembec* is in respect of an interim stay. As noted in this decision, although the test for an interim stay is the same as it is for a stay, the Tribunal typically adopts a lower threshold for interim stays in light of the circumstances involved. However, in *Tembec*, an interim stay was granted on the basis that there would be no prejudice to the public interest, as in that case, there was another person who continued to discharge responsibilities in respect of the Site. This rationale can apply equally when considering whether to grant a stay or an interim stay. However, in this case, Superior has stated that it is currently unable to discharge its responsibilities under the Director's Order to complete the berm repairs, and does not know when or if it will be able to do so. Therefore, the circumstances in this case do not support the rationale applied in *Tembec*. Consequently, the Tribunal does not accept the Cascades Appellants' submission that weighing the inconvenience to the two parties in this case is akin to the situation presented in *Tembec*.

Weighing the balance of convenience requires a determination of which of the Parties will suffer the greater harm from the granting or refusal of a stay pending the determination of the merits. Some types of environmental harm can be considered even though section 143(3) does not apply (see: *Braun v. Director, Ministry of the Environment*, [2008] O.E.R.T.D. No. 47).

The harm that Cascades Appellants will suffer is the requirement to pay for the berm repairs where there is no recourse to recoup the funds expended if the Tribunal finds that they are not legally responsible to effect these repairs. Their financial ability to pay for the repairs does not alleviate against this harm. The harm asserted by the Director is the alleged risk that the integrity of the berm wall could fail. However, the Tribunal has ruled that this harm has not been established. Therefore, the effect on the public interest on granting the stay is the delay in effecting the repairs.

In weighing the balance, the Tribunal finds that the Cascades Appellants will suffer the greater harm if the stay is not granted. Therefore, the Tribunal finds that the balance of convenience favours the Cascades Appellants.

In conclusion, the Tribunal finds that the Cascades Appellants have established that the Tribunal is not precluded from granting the requested stay under section 143(3) of the *EPA*, and after due consideration of the factors enumerated in Rule 101, the Tribunal grants their request for a stay of the portions of Part 2.11 and 2.12 as they relate to berm repair and sludge removal.

Superior's Motion

Superior requests a stay of Part 2.14 of the Director's Order, as it relates to the Bark Storage area, which Superior asserts is the responsibility of Cascades Fine Papers, as well as a stay of Part 2.16 which requires financial assurance by way of irrevocable line of credit in the amount of five million dollars.

Consent matters

As noted earlier in this decision, Superior has agreed to adjourn its request for stay of the provisions relating to the Bark Storage area, to the Preliminary Hearing to be held on November 24, 2009, to be spoken to at that time. Consequently, this decision addresses only Superior's request for a stay regarding the requirement for Financial Assurance.

Superior's submissions:

In his affidavit sworn September 11, 2009 Mr. Sinclair testifies that “The Corporation is reliant for the time being on advances of funds from interested parties unless and until permanent mortgage financing is put in place the Corporation does not the financial ability to post the Letter of Credit.”

Superior notes that the Director has consented to a stay of the requirement for Financial Assurance as against the Cascades Appellants, and argues that it should receive the same consideration. Superior maintains that, at the very least, the required amount of Financial Assurance should be reduced by the financial costs related to remediation of the Bark Storage area. This submission is based on Superior's belief that the Cascades Appellants have confirmed that they have responsibility for the Bark Storage area.

Cascades Appellants' submissions:

The Cascades Appellants do not take a position on Superior's motion.

Director's submissions:

With respect to Financial Assurance, the Director submits that Superior has not presented an arguable case as to why Financial Assurance is not properly required, and consequently the stay should not be granted.

The Director notes that once it is established that neither section 143(2) nor section 143(3) of the *EPA* prohibits the Tribunal from issuing a stay, the Tribunal applies the threefold test set out at Rule 101, and submits that Superior fails at the first hurdle of this test: it has not shown that there is a serious issue to be tried. The Director maintains that the sole ground cited by Superior in support of its request for a stay is that it is not in a financial position to provide the required Financial Assurance. The Director submits that the precarious financial position of Superior is not a legal basis for disputing the Director's jurisdiction to require, pursuant to s. 132(1)(a) of the *EPA*, that a party to an order provide Financial Assurance for the performance of the requirements in the order. Indeed, the precarious financial position of a party is a very good reason for requiring it to provide Financial Assurance.

Further, the Director submits that s. 143(3)(b) and (c) preclude the Tribunal from issuing a stay of the portion of the financial assurance directed to repair of the berm, estimated at \$250,000.

This portion of the Financial Assurance is required to ensure that sufficient funds are available to perform berm repairs necessary to avoid the serious risk that the berm will breach, releasing sludge and causing harm to the aquatic habitat and life.

Findings:

As the Tribunal has already found that the evidence adduced on these Motions does not establish that there is serious risk that the berm will breach and release the sludge, thereby, causing harm to the aquatic habitat and life, the Tribunal does not accept the Director's submission that 143(3)(b) and (c) preclude the Tribunal from issuing a stay of the portion of the Director's Order requiring Superior to provide Financial Assurance directed to repair of the berm.

Accordingly, the Tribunal turns to the considerations set out in Rule 101, starting with the Director's submission that there is no serious issue to be decided by the Tribunal. The MOE has issued a Guideline entitled "Financial Assurance Guideline" (the "FA Guideline"). The Director has filed a copy of this document in this proceeding which indicates that it was last reviewed by the MOE in November 2005. The relevant sections of the FA Guideline regarding proponents who assert financial hardship are set out in sections 6.10.1 and 7.2.4:

6.10.1 Regulated parties sometimes ask to have Financial Assurance obligations reduced because of financial hardship. Some regulated parties may ask to provide only a fraction of the total Financial Assurance required at the outset of their operation until they "build up their business" or "can better afford the Financial Assurance." Parties who ask for such considerations should be reviewed carefully before an approval is issued. They could be vulnerable to failure if economic conditions deteriorate and could constitute a risk of leaving a site remediation problem with little or no Financial Assurance. Financial Assurance is a necessary cost of doing business and is needed to internalize the environmental risks that would otherwise be borne by the public. Businesses should not be subsidized and should provide their fair share of Financial Assurance.

7.2.4 If the regulated party claims that provision of the Financial Assurance may cause unemployment or undue financial hardship, an economic or financial analysis should be carried out to verify these claims. This analysis should be completed in accordance with appropriate Ministry guidelines, procedures or policies, such as *Guideline F-14, Economic Analyses of Control Documents on Private Sector Enterprises and Municipal Projects*.

Section 6.10.1 clearly indicates that the Financial Assurance obligation otherwise required under the Guideline, may be reduced for reasons of financial hardship. At this stage in the hearing of Superior's appeal, the issue is not whether Superior's request will ultimately be granted. The

issue is whether Superior has established that there is a serious issue to be decided by the Tribunal. Superior has not commenced production at the Facility and is still in the process of seeking private investment until permanent mortgage financing is obtained. Consequently, Superior's circumstances clearly fall within the circumstances described in section 6.10.1 of the FA Guideline. In its appeal, Superior has requested that it be relieved of its obligation to provide Financial Assurance, and, therefore, the Tribunal finds that there is a serious issue to be decided.

The Tribunal must, therefore, consider whether irreparable harm will ensue if the requested stay is not granted, and whether the balance of convenience, including effects on the public interest, favours granting the stay. Given the nature of the circumstances in this case, the Tribunal finds that it is appropriate to address these two considerations together. In this regard, the Tribunal has considered all the circumstances of this case, and, in particular, the following factors:

- Superior has not sought a stay of the Provincial Officer's Order requiring berm repair and Lagoon dredging, nor any of the other provisions of the Director's Order (other than those related to the Bark Storage area, which may yet be resolved).
- As the Director has pointed out, the FA Guideline requires that Superior prepare a calculation of the Financial Assurance requirements which it asserts should apply to the Facility, but it has not yet done so. Therefore, in issuing the Director's Order requiring Financial Assurance in the amount of five million dollars, the Director was left to estimate the amount of Financial Assurance that should be required. While there is no suggestion that MOE staff adopted an unreasoned approach to this calculation, the amount is, nonetheless, an approximation.
- Superior has demonstrated a commitment to comply with the Orders for environmental remediation of the Site, in particular, by securing \$100,000 in funds to commence repair of the berm walls.
- The Facility has only recently emerged from bankruptcy. Mr. Sinclair has indicated that, as of September 22, 2009, Superior had approximately \$80,000.00 in its bank account. Ms. Hakala, in her Affidavit sworn September 16, 2009, indicates that Superior requires \$34 million to restart the Facility and it has advised if it does not receive this funding it will be insolvent, resulting in an abandonment of the Facility.

Superior has not yet been able to secure financing to complete the berm repairs, and based on Mr. Sinclair's evidence regarding the amount it had in the bank, Superior is cash-strapped. The Tribunal cannot ignore that the imposition of the requirement to post a letter of credit in the amount of five million dollars may interfere with Superior's ability to raise the \$34 million dollars which Superior says it requires to restart the Facility. Superior would then face insolvency. Therefore, the Tribunal must consider whether, in light of Superior's precarious financial position, it will suffer irreparable harm if the requirement for Financial Assurance in the full amount of five million dollars, secured by a letter of credit, is imposed at the present time. While it is clearly in the public interest that the cost of the required environmental remediation be secured by Financial Assurance, it is equally clear that it is not in the public interest that the Facility become an orphaned site. The practical reality is that Superior's ability to secure the Financial Assurance requested by the Director ultimately depends on the economic viability of the corporation and its ability to resume operations at the Facility.

In light of the above considerations, the Tribunal finds that the balance of convenience favours granting Superior's request for a stay of the Financial Assurance requirement to allow Superior an opportunity to submit a proposal to the Director regarding the requirement for Financial Assurance in accordance with the FA Guideline. This will also afford Superior and the Director an opportunity to consider whether a graduated implementation schedule for Financial Assurance is appropriate under sections 6.10.1 and 7.2.4 of the FA Guideline.

In conclusion, the Tribunal grants Superior's request for a stay of Part 2.16 of the Director's Order until January 31, 2009. If required, Superior may apply for an extension of the stay at that time. However, the Tribunal emphasizes that it is important that Superior immediately address its responsibilities under the FA Guideline respecting the requirement to provide Financial Assurance.

Order

Parts 2.15 and 2.16 of the Director's Order dated July 29, 2009, are stayed, on consent, as against the Cascades Inc. and Cascades Fine Papers Group Inc. until the final disposition of the hearing of their appeals.

Parts 2.6 to 2.10 of the Director's Order dated July 29, 2009 are stayed, on consent with respect to Cascades Inc. and Cascades Fine Papers Group Inc. unless the Director serves written notice that:(i) Superior Fine Papers Inc. is no longer on site and no receiver or trustee in bankruptcy has been appointed; or that (ii) a receiver or trustee in bankruptcy having been appointed for Superior Fine Papers Inc., the receiver or trustee in bankruptcy does not intend to take control of the site; or that (iii) a receiver or trustee in bankruptcy having been appointed for Superior Fine Papers Inc. and the receiver or trustee in bankruptcy having been on site, the receiver or trustee in bankruptcy is no longer on site; or that (iv) Superior Fine Papers Inc. remains on site but is no longer satisfying its obligations under some or all of Parts 2.6 to 2.10.

If the Director serves such notice, then the date specified in Parts 2.6 to 2.9 of the Director's Order shall be deemed to be three days following the service of the notice. In the event that the notice is sent in circumstance (iv) above, where Superior Fine Papers Inc. remains on site but is no longer satisfying its obligations under some or all of Parts 2.6 to 2.10, the notice shall specify which of Parts 2.6 to 2.10 Superior Fine Papers Inc. is no longer able to satisfy and the stay shall be lifted only with respect to those Parts so specified in the notice.

By agreeing to a conditional stay of Parts 2.6 through 2.10 in the form set out above, neither Cascades Inc., nor Cascades Fine Papers Group Inc., shall be precluded by virtue of this agreement from moving for a stay of some or all of Parts 2.6 through 2.10 of the Director's Order at any time after the Director serves written notice referred to above. For greater certainty, in the event that the Director serves written notice referred to above, it shall remain open to Cascades Inc. and Cascades Fine Papers Group Inc. to seek a stay of the Director's Order regardless of their agreement to a conditional stay herein.

Part 2.11 and 2.12 of the Director's Order dated July 29, 2009, as they relate to berm repair and sludge removal, are stayed as against the Cascades Inc. and Cascades Fine Papers Group Inc. until the final disposition of the hearing of their appeals.

Part 2.16 of the Director's Order dated July 29, 2009 is stayed as against Superior Fine Papers Inc. until January 31, 2009. If required, Superior may apply for an extension of the stay at that time.

The request by the Appellants for the stay of the requirement to submit a completed application for a Certificate of Approval for the unapproved Bark Storage area (Parts 2.12(c), 2.14, and portions of 2.11, 2.12(d) & (e) as they relate to this requirement) of the Director's Order dated July 29, 2009, is adjourned to the Preliminary Hearing to be held on November 24, 2009, to be spoken to at that time.

*Stay Granted in Part
Motion Requesting Stay Adjourned in Part
Procedural Directions Ordered*

Dirk VanderBent, Vice-Chair

Appendix A - List of Parties

Appendix A

List of Parties

Appellant:	Superior Fine Papers Inc.
Counsel for the Appellant:	David J. Christie Christie & Potestio LLP 920 Tungsten St. Thunder Bay, ON P7B 5Z6
Appellant (Case No.: 09-090):	Cascades Inc.
Appellant (Case No.: 09-091):	Cascades Fine Papers Group Inc.
Counsel for the Appellants:	Lana J. Finney Davis LLP 1 First Canadian Place Suite 5600, P.O. Box 367 100 King Street West Toronto, ON M5X 1E2
Director:	Jim Fry Director, Sections 18, 132 and 196 <i>Environmental Protection Act</i>
Counsel for the Director:	Nicholas Adamson Ministry of the Attorney General Legal Services Branch, Environment 135 St. Clair Avenue West, 10 th Floor Toronto ON M4V 1P5