Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: January 31, 2019 **CASE NO.:** 17-072

PROCEEDING COMMENCED UNDER section 139(1)(e) of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended

Appellant:	Corporation of the United Counties of Leeds and Grenville
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of appeal:	Notice of Suspension of conditions with respect to an Environmental Compliance Approval for the use and operation of a waste disposal site
Reference No.:	A420009
Property Address/Description:	Lots 14 and 15, Concession 4
Municipality:	Township of Edwardsburgh/Cardinal
Upper Tier:	United Counties of Leeds and Grenville
ERT Case No.:	17-072
ERT Case Name:	Leeds and Grenville (United Counties) v. Ontario (Environment, Conservation and Parks)

Heard: November 6 and 7, 2018 in Brockville, Ontario

APPEARANCES:

Parties	**Counsel/Representative[+]**
Corporation of the United Counties of Leeds and Grenville	Tony Fleming and Matt Benson
Director, Ministry of the Environment, Conservation and Parks	Paul McCulloch
Citizens Against the ED-19 Dump	Richard Lindgren and Rashin Alizadeh (Student)

Presenters

Clare Kinlin	Self-represented
1364269 Ontario Limited	Philip Parent[+]

DECISION DELIVERED BY MARCIA VALIANTE

REASONS

Background

[1] This decision determines whether a settlement objected to by an added party should be accepted and the appeal dismissed.

[2] The appeal relates to a landfill, proposed by the Corporation of the United Counties of Leeds and Grenville ("UCLG" or "Appellant") to be located on a 66-hectare property, specifically Parts of Lots 14 and 15, Concession IV, in what is now Edwardsburgh/Cardinal Township ("Site" or "ED-19"). Approval to proceed with the landfill was given by the Minister of the Environment, now the Minister of the Environment, Conservation and Parks ("Minister") under the *Environmental Assessment Act*, R.S.O. 1990, c. E-18 ("*EAA*"), on January 20, 1998. Provisional Certificate of Approval No. A420009 ("ECA") was issued to the UCLG by the Ministry of the Environment (now the Ministry of the Environment, Conservation and Parks ("MECP" or "Ministry")) on June 24, 1998 pursuant to the *Environmental Protection Act* ("*EPA*").

[3] At the time of the original *EAA* approval and issuance of the ECA, public comments were invited, but no comments were received. No appeal, application for leave to appeal or legal challenge was brought.

[4] The landfill was approved to accept a total of 980,000 tonnes of solid non-hazardous waste, generated in the UCLG, the City of Brockville, the Town of Prescott

and potentially the Town of Gananoque, over a 20-year period. Neither the *EAA* approval nor the ECA is subject to an expiry date, either on its face or under any applicable law, and there is no requirement to construct or operate the landfill by a specific date, or at all. This appears to be the usual practice of the Ministry, but is under review.

[5] Despite getting approvals 20 years ago, the UCLG never developed the landfill. Several times over 12 years, the UCLG considered developing the landfill, but each time determined that it was not economically feasible, primarily due to the capital costs of construction. In 2010, the UCLG invited proposals from the private sector to develop the landfill and received an expression of interest. Since then, the UCLG has been in "intermittent discussions" about possible sale of the Site to a private contractor, identified as R.W. Tomlinson Limited ("Tomlinson").

[6] In March 2017, Andy Brown, Chief Administrative Officer of the UCLG, inquired of the MECP as to the status of the *EAA* approval and the ECA. The MECP advised that the approvals were still legally valid. In a letter dated March 30, 2017 to Mr. Brown, Mansoor Mahmood of the Ministry's Environmental Approvals Branch further advised that, although the *EAA* approval did not include an expiry date, the undertaking had not yet been constructed and therefore, the MECP requested that the UCLG "confirm that the conditions, assumptions and circumstances that were made in the [Environmental Assessment ("EA")] are still applicable, and that the proposed landfill design is still appropriate based on the recommendations of the EA prior to proceeding with applying for any subsequent approvals and the ultimate construction of the landfill, if that is the proposed intention." Specifically, the MECP requested that UCLG submit a report by the end of June 2017 containing the following information: documenting whether the purpose and rationale of the undertaking are still applicable and valid; reviewing the environmental effects to demonstrate that the effects identified in the EA are still applicable and there are not significant changes; documenting that the proposed mitigation measures are still appropriate "and/or the enhanced/additional landfill systems proposed will meet or exceed what was proposed in the approved project"; and

regarding other relevant matters. The letter further indicated that the MECP would review the report and stated:

> Once the ministry is satisfied that the environmental conditions and circumstances of the site and project have not changed significantly, and that the proposed mitigation measures and enhancements are still appropriate, the proponent may proceed to apply for the required [ECA] amendments if necessary, and any other approvals or permits that may be required prior to construction. If this is not the case, then we will be in touch to discuss the next steps.

[7] Mr. Brown responded to Mr. Mahmood on April 11, 2017, advising him that the UCLG did not plan to develop the landfill but was seeking to sell the Site to a private developer, who would become the proponent and assume the ECA, and that the June 2017 date for submission of the report was premature as a sale was not imminent.

[8] On September 21, 2017, UCLG Council passed a resolution to recommence negotiations for the sale of the Site. The MECP Director, Dale Gable, became concerned that the request in the March 30, 2017 letter for updated information from the UCLG would not be legally enforceable against a third-party purchaser of the Site. As a result, on November 9, 2017, the Director, pursuant to s. 20.7 and s. 20.13 of the *EPA*, issued Notice of Suspension to the ECA ("Suspension Notice") suspending Conditions 10 and 11 of the ECA relating to construction and operation of the landfill. After outlining the background, the Suspension Notice states that the Ministry "considers it necessary in the circumstances to temporarily suspend the construction and operation" of the landfill "as approved by the ECA until such time as the Owner (or any future ECA-holder) confirms that the conditions, assumptions and circumstances that were made in the EA are still applicable, and that the proposed landfill design is still appropriate based on the recommendations of the EA." On November 24, 2017, the UCLG filed a notice of appeal of the Suspension Notice with the Environmental Review Tribunal ("Tribunal").

[9] In the meantime, the Citizens Against the ED-19 Dump ("CAD") submitted a request to the Minister to exercise discretion under s. 11.4 of the *EAA* to reconsider and/or revoke the *EAA* approval for the landfill and also filed an Application for Review

of the ECA with the Environmental Commissioner of Ontario, pursuant to Part IV of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 ("*EBR*"). A second *EBR* Application for Review of the ECA was later filed by Clare Kinlin, a local resident, raising similar issues. On November 10, 2017 and March 6, 2018, Paul Nieweglowski, Assistant Deputy Minister, Operations Division of the MECP, advised the UCLG and the applicants that the MECP will conduct a review of the ECA and that he anticipated the review will be completed by May 31, 2019.

[10] The Tribunal held a pre-hearing conference with respect to UCLG's appeal of the Suspension Notice on March 12, 2018. At that time, the Tribunal granted party status to CAD, participant status to Shawn Carmichael, and presenter status to 1364269 Ontario Limited, Mr. Kinlin, the Township of Edwardsburgh/Cardinal and Adrian Wynands. The Tribunal also scheduled the hearing of a motion that the Appellant intended to bring seeking a determination of whether the Director had authority to issue the Suspension Notice under the *EPA* even though past approval for the landfill had been given by the Minister under the *EAA*.

[11] However, before the motion could be heard, the UCLG and the Director entered into Minutes of Settlement ("MOS"). CAD was not a party to their discussions but was provided with the MOS afterwards. Under the terms of the settlement, the ECA would be amended to include a new Condition 9.1 and, if the settlement were to be approved by the Tribunal, the Director would revoke the Suspension Notice and the Appellant would withdraw its appeal. Condition 9.1 would prohibit the UCLG from commencing any development, construction or operation of the landfill until it completes certain work and submits certain reports to the Director and the Director has amended the ECA.

[12] The Appellant and the Director jointly requested that the Tribunal accept the settlement, direct the Director to amend the ECA in accordance with it, and dismiss the appeal. However, CAD objected to the terms of the settlement. At a telephone conference call on September 5, 2018, the Tribunal set a settlement hearing and scheduled the filing of materials in advance of the hearing.

[13] On November 6 and 7, 2018, in Brockville, Ontario, the Tribunal held the settlement hearing, where the parties cross-examined on the affidavits that had been filed and made oral submissions. The Tribunal also heard presentations from two presenters in attendance, Mr. Kinlin and Philip Parent representing 1364269 Ontario Limited. As part of the materials filed, the Appellant provided proposed revised wording for Condition 9.1 and other amendments to the ECA, together with highlighting showing further amendments proposed by CAD and whether these were agreed to by the Appellant. This document was entered into the record as Exhibit 4.

Issue

[14] The issue is whether to accept the proposed settlement and dismiss the appeal.

Relevant Legislation and Rules

EPA

[15] The purpose of the *EPA* is set out in s. 3(1):

> 3(1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Tribunal's *Rules of Practice* ("Rules")

[16] Rules 200 and 202 address a proposed withdrawal of an appeal not agreed to by all Parties and a proposed revocation of a decision under appeal:

> 200. Where there has been a proposed withdrawal of an appeal not agreed to by all Parties, the Tribunal shall consider whether the proposed withdrawal is consistent with the purpose and provisions of the relevant legislation and whether the proposed withdrawal is in the public interest. The Tribunal shall also consider the interests of Parties, Participants and Presenters. After the consideration of the above

> factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.
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> …
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> 202. Where a Director, Risk Management Inspector or Official, Authority or municipality proposes to revoke a decision that is the subject of an appeal, the Tribunal shall consider whether the proposed revocation is consistent with the purpose and provisions of the relevant legislation and whether the proposed revocation is in the public interest. The Tribunal shall also consider the interests of Parties, Participants and Presenters. After the consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.

Discussion, Analysis and Findings

The Parties' Evidence

The Appellant's Evidence

[17] The UCLG filed two affidavits of Paul Smolkin, P. Eng., Principal and Senior Geo-Environmental Engineer with Golder Associates Ltd. Mr. Smolkin described the context of the Site and the elements of the original approvals. He went on to outline the proposed new ECA Condition 9.1. In summary, he stated that Condition 9.1 requires studies be carried out that "specifically address both potential changes in the conditions on and in the area around the ED-19 site and changes in applicable regulations over the past 20 years." He stated that he expects additional approvals from other regulatory agencies will be required, including from the Federal Department of Fisheries and Oceans respecting fish habitat, the Ministry of Natural Resources and Forestry or MECP respecting species at risk ("SAR"), and the South Nation Conservation Authority respecting drainage and wetlands. In his affidavits, Mr. Smolkin gave his opinion that Condition 9.1 will provide the proponent with all the information to determine whether changes to site design and the Design and Operations ("D&O") Report are appropriate and will provide the MECP with "all the information necessary to determine whether any further amendments to [the ECA] are warranted to provide protection of the environment and to issue an ECA Amending Notice." However, on cross-examination, Mr. Smolkin

agreed that, as a result of the environmental and regulatory changes, changes in the landfill design are required and it is not a question of “whether” changes are necessary, but “what” those changes should be.

The Director’s Evidence

[18] The Director filed two affidavits from Mr. Gable. The Director outlined the elements of the ECA, describing the scope of its 47 conditions, which include requirements for environmental monitoring, trigger mechanisms and contingency plans. The Director noted that the original hydrogeological study and D&O Report were among the studies submitted in support of the joint *EAA*/ECA application and were incorporated by reference into the ECA. He stated that Condition 10 in the ECA requires UCLG to develop, operate and maintain the landfill in accordance with these supporting documents. He stated further that Condition 11 in the ECA requires UCLG to prepare an Operation and Maintenance Manual for the landfill and operate in accordance with it.

[19] The Director noted that he had received information about environmental changes in the Site area, although the cause and extent of the changes were not evaluated or determined. He also stated that he was aware of regulatory changes applicable to landfills that have been adopted since 1998, including changes that prohibit waste from being deposited in a lake and that support landfill gas collection. He stated that the assessment by Wilf Ruland, witness for CAD, of the potential hydrogeological impacts of the landfill is based on the design in the original D&O Report, but there is a “high likelihood” that aspects of the D&O Report, including the leachate collection system, leachate management method and liner construction, will have to be updated.

[20] According to the Director, after being advised of the UCLG’s intentions, he became concerned that if it sold the landfill, “there was nothing legally prohibiting a new owner from starting to construct the landfill without first addressing the ministry’s request” for confirmation that the conditions, assumptions and circumstances in original

supporting documents were still applicable and the landfill design was still appropriate. For these reasons, he stated, he issued the Suspension Notice. In doing so, he "determined that it was not necessary to revoke the ECA in its entirety. Rather, it was only necessary to ensure that the Landfill was not constructed or operated until a report was submitted that provided the necessary confirmations and updated information…" The Director noted that the UCLG had been aware of the need to provide an updated D&O Report for some time and that "it was and still is unfair to revoke the ECA without giving UCLG a reasonable opportunity to provide information demonstrating whether the site is still suitable for the development and operation of this landfill as designed in June 1998 with certain modifications given existing site conditions." The Director stated further that, in deciding to suspend the ECA rather than revoke it, he "took into consideration that the Ministry had communicated to UCLG on a number of occasions over the past two years … that the ECA remained valid. It would have been inconsistent with the Ministry's position to suddenly revoke the approval."

[21] The Director stated that the Suspension Notice was drafted in "very general terms in order to provide flexibility to UCLG to demonstrate that the suspension should be lifted." He noted that "[b]y its very nature, a suspension is intended to be a short-term measure…" He stated that he considers it reasonable to replace the suspension with the new Condition 9.1, which provides more certainty as to the details of the information the Ministry needs in order to review the circumstances and determine whether proceeding with the landfill will be protective of the natural environment. He is of the view that the settlement has the same legal effect as the Suspension Notice.

CAD's Evidence

[22] CAD filed the affidavits of Mr. Ruland, P. Geo. and Environmental Consultant with Citizens' Environmental Consulting, Kim Logan, P. Geo. (Limited), P. Biol. (Alberta) and Senior Ecologist with Groundwater Environmental Management Services Inc., and Marcus Kyle Johnston, Chair of CAD.

[23] Mr. Ruland reviewed the report of the hydrogeological investigation that was submitted in support of the *EAA* approval and the original ECA in 1998 ("Hydrogeology Assessment"). He outlined a series of deficiencies in that investigation and concluded that the Hydrogeological Assessment "does not provide the required technical foundation for the safe design and operation of a waste disposal site." He also reviewed the D&O Report submitted in support of the original approvals and identified numerous deficiencies in the design and proposed operations of the landfill, with particular reference to leachate collection and management, surface water monitoring and impact mitigation. He concluded that the D&O Report "does not provide the required technical foundation for the safe design and operation of a landfill site, and does not meet current landfilling standards and requirements in Ontario." He recommended that the ECA be revoked in its entirety, as well as the *EAA* approval, although he acknowledged that the *EAA* approval is not before the Tribunal in this proceeding. Mr. Ruland stated that, if the *EAA* approval remains intact, then a new ECA should be developed. He noted, "[i]n my professional opinion, it is a mistake to try to amend the existing ECA, which is now 20 years old and which should not have been issued in the first place."

[24] Mr. Ruland provided his opinion that the settlement and new Condition 9.1 represents "a threat to the natural environment and to the public interest, because they open the door to landfilling at the ED-19 site without properly addressing the multitude of deficiencies" identified earlier. However, he conceded that he would need to know the final design and the ultimate changes to the D&O Report before he could reach a conclusion about the risks to the environment. Mr. Ruland stated that "[i]f the Tribunal determines that the ECA should be further amended rather than revoked, then it is my recommendation that the more detailed ECA conditions proposed by CAD should be considered and ordered by the Tribunal." (These proposed changes are identified in Exhibit 4). On cross-examination, Mr. Ruland agreed that these proposed conditions would be protective of the natural environment.

[25] Ms. Logan stated that she reviewed the original documentation in support of the *EAA* and ECA applications, collected and reviewed records and additional materials, walked the perimeter of the Site and interviewed local residents. She prepared a report in which she concluded that natural heritage features and functions on and near the Site have changed significantly since the 1990s and that the original assessments are outdated with respect to surface water and groundwater features, a heronry, breeding bird surveys, and land cover. In addition, she concluded that the original natural heritage assessments did not include assessment of significant woodlands, significant wildlife habitat, SAR, amphibians and aquatic habitat.

[26] Ms. Logan provided her opinion that the ECA is inadequate to protect against adverse impacts to natural heritage features and functions on and near the Site if the landfill is constructed in accordance with it. She recommended that a new ECA be developed "with meaningful public participation and updated information, to ensure that the current ecological site conditions are fully identified and properly assessed, and to ensure that the ED19 Landfill is subject to ECA conditions that reflect current site constraints and satisfy current legislative and regulatory requirements regarding natural heritage protection." It was her opinion that the proposed settlement does not adequately address all her concerns and does not address all the data gaps she identified. She stated that, if the Tribunal "determines that the ECA should be further amended rather than revoked, then it is my recommendation that the more detailed ECA conditions proposed by CAD [in Exhibit 4] should be considered and ordered by the Tribunal." She conceded that these proposed conditions would protect the natural environment.

[27] Mr. Johnston provided background information regarding CAD, which was established in 2016. He described CAD and its members' involvement with the Site and efforts to prevent development of a landfill, including applying to the Minister to reconsider the *EAA* approval and applying for review of the ECA. He described his personal observations of the Site area, emphasizing the presence of surface water.

The Presenters' Evidence

[28] Mr. Kinlin stated that he does not consider the Site to be an appropriate location for a landfill. He stated further that he does not consider the studies required by the settlement to go far enough to address concerns he has with respect to SAR, changes in the environment, ecosystem integrity, identification of flora and fauna and the potential for groundwater contamination. He recommends that the ECA be revoked and the process started over. He also expressed concern about a lack of public involvement in the process.

[29] Mr. Parent, who runs a campground near the Site, stated that he is opposed to the landfill and the settlement because his business relies on environmental quality. He noted the economic investment in the area since 1998, which could be adversely affected by the development of the landfill.

The Parties' Submissions

The Appellant UCLG's Submissions

[30] The Appellant submits that under Rules 200 and 202, the Tribunal must consider three issues: the purpose and provisions of the *EPA*, the public interest, and the interests of parties, participants and presenters. The UCLG argues that, when considering a settlement, the role of the Tribunal is not to determine if it is the best alternative for resolution of the issues, but only if it protects the environment and is in the public interest. It cites *Elstone v. Ontario (Environment and Climate Change)*, 2018 CanLII 37721 (ON ERT) ("*Elstone*") in support of this argument.

[31] The UCLG submits that the settlement is consistent with the purpose of the *EPA* to protect the environment because any landfilling activity at the Site is precluded prior to studies being done, the proponent demonstrating that the Site is suitable for landfilling, and the ECA being amended to reflect the results of those studies. The

Appellant argues that the Suspension Notice was issued because of physical changes on the Site and regulatory changes applicable to landfills since the time the ECA was issued; thus, the settlement will address the potential environmental harm that the Suspension Notice was issued to prevent. It further argues that the settlement replicates the essential terms of the Suspension Notice. According to the UCLG, the technical work and reports that are required by the settlement will satisfy current regulatory requirements, will provide appropriate mitigation measures to prevent unacceptable adverse impacts, and will identify what further regulatory approvals are needed.

[32] The Appellant asserts that there is no credible evidence before the Tribunal demonstrating that the studies required by the proposed Condition 9.1 are insufficient or that other studies are needed to protect the natural environment; rather, CAD's witnesses only suggested adding more prescriptive direction for the required studies. The UCLG submits that Mr. Ruland is not impartial and acted as an advocate, which should limit the weight the Tribunal gives to his evidence. Nevertheless, the Appellant submits, although Mr. Ruland stated that he does not trust the MECP to protect the environment and recommended revocation of the ECA, both he and Ms. Logan conceded that their recommended amendments to Exhibit 4 would protect the environment.

[33] The UCLG submits that the settlement is in the public interest because it ensures that a landfill will not be constructed or operated if it will pose a risk to the natural environment. The Appellant argues that the settlement, by requiring that technical studies be done and be reviewed by the MECP and by requiring further amendment of the ECA before development of the landfill can occur, which will provide an opportunity for the public to comment, protects the public interest. The UCLG further argues that it would not be in the public interest to hold a full hearing in these circumstances. The Appellant also submits that continuing the proceeding and holding a hearing would be potentially unfair to it, because it would not know what case it would have to meet.

[34] The Appellant asserts that CAD, by requesting that the settlement be rejected and the proceeding be continued, is seeking revocation of the ECA, but that the Tribunal lacks jurisdiction to revoke the ECA even if the hearing went forward. Citing *RPL Recycling & Transfer Ltd. v. Ontario (Ministry of the Environment)*, [2006] O.E.R.T.D. No. 13 ("*RPL*"), the UCLG argues that the Tribunal's jurisdiction is constrained by the "subject matter of the proceeding", which is informed by such factors as the nature of the original action of the Director and the scope of the Appellant's Notice of Appeal. In this proceeding, according to the UCLG, the Tribunal lacks jurisdiction to revoke the ECA because the Suspension Notice is the only decision before the Tribunal, UCLG's Notice of Appeal challenged only the Suspension Notice, neither it nor the Director introduced evidence relevant to revocation of the ECA, and reconsideration of the *EAA* approval and review of the ECA are being conducted by the Minister and the MECP and are not before the Tribunal.

The Director's Submissions

[35] The Director submits that the proposed new Condition 9.1 is consistent with the purposes of the *EPA* because it requires the UCLG to demonstrate that the Site is still environmentally suitable for the proposed landfill and because it prohibits the UCLG from carrying out any landfill development until the Director has issued a further amendment to the ECA. The Director asserts that the settlement is in the public interest because it sets out a definitive and transparent process by which the Director can make an informed decision as to whether the Site is suitable for the landfill, including provision for receipt of information from interested persons. He further asserts that the settlement avoids the time and resources that would be expended on a hearing, thereby providing for an efficient use of public resources.

[36] The Director further submits that the settlement is consistent with previous Tribunal decisions in which settlements have been considered, including *RPL*, *Krek v. Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 9 ("*Krek*"), *Uniroyal Chemical Ltd. v. Director, Ministry of the Environment*, [1992] O.E.A.B. No. 63

("*Uniroyal*"), and *CanRoof Corp. v. Ontario (Ministry of the Environment)*, [2008] O.E.R.T.D. No. 33 ("*CanRoof*"). Citing *Krek*, the Director argues that the first consideration for the Tribunal is whether the settlement achieves at least the same result as, and does not weaken, the instrument under appeal. The Director submits that, by prohibiting the UCLG from developing the landfill until certain information is provided, the settlement achieves the same legal result as the Suspension Notice and that, by providing more clarity and precision as to the information to be provided and requiring an ECA amendment before the landfill may be developed, it is arguably stronger than the Suspension Notice.

[37] The Director argues, citing *Uniroyal*, that the Tribunal can consider whether to strengthen the proposed settlement, within the scope of the appeal, after considering a number of factors. In the Director's submission, these factors are satisfied here. First, the settlement is supported by sworn evidence. Second, CAD has had an opportunity to lead evidence respecting the terms of the settlement. Third, the settlement is technically satisfactory because it requires the collection and submission of proper technical information.

[38] The Director submits that this case is akin to *CanRoof* and *Krek* in that it involves a two-step process, with the first step being the investigations and the second step being the Director's consideration of the information before making a decision on any application to amend to the ECA. The Director argues that some of CAD's suggested changes to Condition 9.1 would possibly circumvent the two-step process and interfere with the Director's decision-making.

[39] In the alternative, if the Tribunal were not to accept the settlement, the Director submits that the Tribunal should continue the hearing and not make a finding at this stage that the ECA should be revoked. The Director argues that the evidence does not support such a finding. The Director also raises concerns with Mr. Ruland's evidence, which he argues, goes beyond his area of expertise as a professional geoscientist.

CAD's Submissions

[40] CAD opposes the settlement and requests that the Tribunal reject it and continue the proceeding. CAD argues that doing so would foster government accountability, ensure just consideration of the merits of the matter, and provide interested parties an opportunity to introduce evidence of environmental impacts and propose alternative solutions. CAD suggests that scheduling a hearing could result in improved settlement terms that reflect the interests of all parties, participants and presenters.

[41] CAD submits that the settlement is not consistent with the purpose of the *EPA* or the public interest because it opens the door to landfilling at the Site without addressing the deficiencies in the original studies, and thus represents a threat to the natural environment, as outlined in the evidence of Mr. Ruland and Ms. Logan. It is CAD's position that the studies and new reports required by proposed Condition 9.1 are inadequate to remedy the deficiencies and outstanding issues with a landfill at the Site.

[42] CAD further argues that the settlement contains no meaningful opportunities for CAD or neighbouring residents to review and comment on the studies and reports required. In addition, even though the Director acknowledges that CAD and others should have the opportunity to comment on the application to amend the ECA that will be required for the landfill to be developed, CAD points out that notice, comments and appeal rights will not be available to it with respect to an ECA amendment because of s. 32(1) of the *EBR*. Furthermore, CAD submits, there are no mandated opportunities for CAD or others to be "meaningfully involved" in the Minister's reconsideration of the *EAA* approval or the internal MECP review of the ECA. Thus, CAD argues, the Tribunal should continue the proceeding and hold a hearing in which CAD and others are given "a full, fair and efficient opportunity to present evidence and argument on what the Tribunal should do in relation to the stale-dated ECA."

[43] CAD argues that, rather than requiring updates to a few reports but leaving the ECA intact, it is preferable to revoke the ECA in its entirety and require the UCLG or its

successor to file an application for a new approval that will be assessed against current regulatory requirements. For example, CAD submits that the prohibition in s. 27(3.1) and s. 27(3.2) of the *EPA* on landfilling in a "lake", added to the *EPA* in 2004, would prohibit landfilling on the Site as demonstrated by Mr. Ruland's evidence. CAD argues that the Tribunal should not keep the door open to the possibility of landfilling on the Site but should close the door by taking all necessary steps to ensure compliance with these and other recent regulatory constraints. CAD submits that the effect of Condition 9.1 is a plea from the Director to "trust us" to collect the appropriate information and to implement the appropriate changes; however, in CAD's view, the MECP has not earned the public's trust because it approved the ECA in 1998 based on inadequate information.

[44] CAD submits that the Tribunal has jurisdiction to continue the hearing and, based on the evidence it hears, to go beyond the Director's decision and revoke the ECA. CAD argues that s. 145.2(1) of the *EPA* gives the Tribunal jurisdiction to "stand in the shoes of the Director" and provides it with broad authority to make an order that is justified on the evidence, so long as the Tribunal does not usurp the Director's ongoing regulatory role and so long as the Tribunal does not go beyond the "subject matter of the proceeding". CAD argues that the subject matter of the proceeding is not limited to what the Director did (that is, it is not limited to suspending two conditions in the ECA) but includes what the Director could have done with respect to the ECA, pursuant to his authority in s. 20.13 of the *EPA*, in response to changes on the Site and in the regulatory requirements. CAD further argues that the full scope of the subject matter of the appeal should not be defined at a settlement hearing, but should be left to the panel hearing the matter, as occurred in *Nestlé Canada Inc. v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 54 ("*Nestlé*").

[45] CAD submits that the suggested wording changes in Exhibit 4 should be understood as an alternative approach, to be considered only if the Tribunal decides not to proceed to a full hearing.

Analysis and Findings

The Tribunal's Approach to Settlements

[46] The Tribunal's approach to proposed settlements is laid out in the Rules and in a number of previous cases. To summarize, in reviewing a settlement in circumstances such as those here, where there is a "proposed withdrawal of an appeal not agreed to by all parties" and a "proposed revocation of the decision that is the subject of the appeal", the Tribunal considers whether the withdrawal or revocation is consistent with the purpose and provisions of the *EPA* and is in the public interest. The Tribunal also considers the interests of parties, participants and presenters and may decide to continue the hearing or dismiss the proceeding. In this proceeding, the parties generally do not disagree on this approach or what factors the Tribunal must consider, but do disagree on how they apply in the circumstances.

[47] Some of the general principles arising from previous cases were reviewed in *Krek*. The starting point in the case law is *Uniroyal*, where a settlement was proposed at the end of a hearing and the Tribunal's predecessor, the Environmental Appeal Board, stated, at paras. 37-38 and 58-60:

> The normal result of withdrawing an appeal is that the original order or decision of the Director remains intact and in effect. Thus, there will normally be no prejudice to the public or to other parties from the withdrawal of an appeal.
>
> However, the possibility of prejudice will arise in the following circumstances:
> 1. If the withdrawal is part of a settlement which undermines or weakens the original order or decision of the Director,
> 2. If the Board has a right to change the original order or direct the Director to take further action, and the withdrawal deprives other parties of the opportunity to attempt to persuade the Board to do so. This would be of particular concern where, prior to the withdrawal, the Board had heard evidence that the order which continues in effect is inadequate to protect the environment, or
> 3. If the Director has somehow fettered his discretion to make further orders or decisions needed to protect the environment.

> The need to protect the welfare of the community and the public interest support an interpretation of s. [145.2] that will give the Board a broad power to enlarge or expand an order before it to the extent necessary to protect the public. … On the other hand, there are policy considerations that weigh against an approach that completely deprives an applicant of any control over a process that it has initiated. … If the mere fact of appealing an order left an applicant vulnerable to an even more stringent and costly order, this would create a high level of uncertainty. … Where the rights of other parties are affected by the settlement or parties or the public interest may be prejudiced by the settlement, the Board has jurisdiction to make clarifications or improvements to the existing order, at least where this will not impose substantial new burdens on the applicant.

[48] In *RPL*, where certain provisions of a director's order were appealed, the parties reached a settlement under which the appeal would be withdrawn and the order amended to add new conditions. An added party objected to the new conditions. The Tribunal stated at para. 17:

> A variety of matters may be considered by the Tribunal in determining whether to proceed with a hearing where parties propose to conclude a proceeding through a settlement agreement ([*Johnson*]). The Tribunal will not take a mechanistic approach to this task but rather focus on the substance of an appeal. The Tribunal will examine the substantive matters raised in an appeal and examine how they may be affected by a proposed settlement. The focus will not so much be on whether a particular condition has been changed but rather on how the issues raised in the appeal will be affected by the settlement regardless of whether conditions in an Order are altered, added, deleted or whether a side-agreement is reached that may affect the issues raised in the appeal.

[49] The Tribunal in *RPL* found that the issues of concern to the objecting party were not related to any issue raised in the notice of appeal and thus were not proximate enough to the subject matter of the appeal for the hearing to be continued. The Tribunal stated, at para. 24, that it "is not the Tribunal's role to oversee all dealings between the Director and a regulated entity where those dealings are clearly beyond the scope of appeal and matters that would have been raised in an appeal hearing."

[50] In *Krek*, the Tribunal found that the issue before it was whether the Tribunal had "a right to change the original order to take further action and allow the parties the opportunity to persuade the Tribunal to do so." The Tribunal had to determine whether

the third party's request for additional requirements to the Order fell within the "subject matter of the proceeding". At para. 51, it stated that "the Tribunal has relatively wide authority to determine what should be done with respect to the 'subject matter' of the hearing. However, even with respect to matters within the subject matter of the appeal, the Tribunal must be cognizant of the implications and burdens of imposing new or more stringent requirements on appellants," citing the above-quoted text from *Uniroyal*.

[51] In *Elstone*, where the applicant appealed a director's refusal to issue an ECA for land spreading of sewage, the parties reached a settlement under which the director agreed to issue an ECA subject to stringent conditions and additional water monitoring. The participants objected to the settlement, arguing that land spreading was not necessary as other sites were available. At para. 40, the Tribunal stated that its "role in this situation is not to determine the best site but to consider whether the settlement is consistent with the purpose and provisions of the relevant legislation and whether the agreement is in the public interest."

The General Approach in the Settlement

[52] In this case, the result of the Tribunal accepting the proposed settlement would be revocation of the Suspension Notice and the addition of new conditions to the ECA. From previous cases and the Rules, the Tribunal must consider the factors outlined above, including the following questions: Is CAD's request to revoke the 1998 ECA within the subject matter of the appeal? Is the settlement consistent with the purpose of the *EPA*? Does it weaken the original decision? Does it create any prejudice to the public interest or any party? How are the issues raised in the appeal affected by the settlement?

[53] In making their submissions, the parties take very different positions. CAD argues that it was a "mistake" to have issued the *EAA* approval and the ECA back in 1998, and, to support its position, proffers Mr. Ruland's opinion that the original studies relied on by the Ministry in 1998 were deficient. CAD claims that the new studies

required by proposed Condition 9.1 will not address the deficiencies identified in the original hydrogeological and natural heritage studies and the original D&O Report, nor respond to the environmental and regulatory changes since 1998, and thus will not adequately protect the environment. In contrast, the Director focuses on the changes since 1998 in the environment on and near the Site and in the regulatory requirements and argues that the studies required by Condition 9.1 would adequately evaluate these changes and the new D&O Report would have to incorporate corresponding design changes.

[54] The question of whether the *EAA* approval for the ED-19 landfill should be reconsidered and revoked is currently before the Minister, pursuant to s. 11.4 of the *EAA*, which provides that an approval can be reconsidered, and then amended or revoked, if there is a change in circumstances or there is new information concerning an approval. The question about whether the ECA in its entirety should be revoked is under review by the MECP in accordance with the *EBR*. In their Agreed Statement of Facts, the parties acknowledge and agree that these are independent processes that are not before the Tribunal for adjudication. The outcome of these processes could render this proceeding moot. Despite this, CAD asks the Tribunal to continue the appeal so that it will have an opportunity at a public hearing to lead evidence, including evidence that the original decision was grounded in deficient technical studies, and convince the Tribunal to revoke the entire ECA.

[55] CAD's position raises a question about whether the Tribunal has jurisdiction in the circumstances here to re-open the original approvals. While there appears to be ample statutory authority for the Minister and/or the Ministry to reconsider the 1998 approvals in a comprehensive way, addressing issues such as need and social and economic impacts, the Tribunal's jurisdiction is more limited. It does not have broad jurisdiction to re-open a final administrative decision. In this proceeding the source of the Tribunal's jurisdiction is s. 145.2(1) of the *EPA*, which provides that the Tribunal shall hold a "new hearing" and may confirm, alter or revoke the "action of the Director that is the subject matter of the hearing" and may direct the Director to take "such action

as the Tribunal consider the Director should take…" CAD does not directly address the issue of the Tribunal's jurisdiction to re-open the 1998 decisions but submits that, because the Director acted under s. 20.13 of the *EPA* when he issued the Suspension Notice and because under that provision he *could* have revoked the ECA, this, together with s. 145.2(1) under which the Tribunal "stands in the shoes of the Director", permits the Tribunal to continue the hearing and ultimately revoke the ECA.

[56] The Tribunal agrees it has broad authority under s. 145.2(1) but the cases make it clear that the Tribunal's jurisdiction is confined to the subject matter of the proceeding. In *RPL*, the Tribunal stated (at para. 20) that the "limits of the subject matter of a proceeding are informed by such factors as the nature of the original action of the Director, the scope of the Appellant's appeal, and any procedural determinations..."

[57] Here the original "action of the Director that is the subject matter of the hearing" is the decision to issue the Suspension Notice; it is not the 1998 decision to issue the ECA.

[58] The Suspension Notice states that the Ministry considers it necessary, because of the environmental and regulatory changes, to temporarily suspend the two ECA conditions "until such time as the Owner (or any future ECA-holder) confirms that the conditions, assumptions and circumstances that were made in the EA are still applicable, and that the proposed landfill design is still appropriate…" The Suspension Notice does not address what will happen after the confirmatory studies are done and reviewed and do not confirm the original conditions, assumptions and circumstances.

[59] In its notice of appeal, the UCLG raised the following grounds of appeal: (1) that the Director lacks the authority under the *EPA* to suspend the ECA conditions because his decision would effectively invalidate the Minister's 1998 decision to give approval under a different statute, the *EAA*; and (2) that the Director, by failing to provide a reasonable scientific justification that the Suspension Notice was necessary, did not follow Ministry policy that requires an objective, science-based approach to decision-

making. The Tribunal does not agree with CAD's assertion that these are broad grounds of appeal.

[60] From these two indicia, the subject matter of the appeal is similar to that in *Krek*, where the Director imposed a requirement to produce a site conceptual model ("SCM") that would generate detailed information about site contamination, which the Director would then use as the basis for his or her consideration of remediation options and determination of the best approach to remediation. In *Krek*, the Tribunal reviewed the justification for, and requirements of, the Director's Order and the grounds of appeal and found that the subject matter of the hearing did not extend to the nature of the remedial measures themselves. The Tribunal stated, at para. 60:

> There does not seem to be any discussion in the Director's Order or anywhere else that the Director is prepared and able to require remedial measures at this time. It appears quite the opposite. The SCM would be a step in the process for the Director to consider what other measures, if any, would be the subject of an Order. The Notice of Appeal filed by the Appellant is another factor to be considered in determining what is the subject matter of the appeal… The appeal is premised… on the debate as to whether the SCM is needed or worthwhile. The focus is not on what remedial measures should be undertaken now or in the future. … The Tribunal finds that the subject matter of the proceeding relates to the development of a SCM that would assist the Director in reviewing remedial and other options with respect to the Site.

[61] Similarly here, the justification for and effect of the Suspension Notice is to require the UCLG to carry out a range of technical studies because crucial information about current environmental conditions, at any level of detail, is not available but is necessary for determining whether, and under what conditions, landfilling at the ED-19 Site would be permitted. The evidence is that the Director is not prepared at this time to permit landfilling at the Site and will not be able to specify what design might be acceptable under current regulations until the studies are completed. The information generated by the required studies will provide important details about relevant environmental conditions and will provide the basis for the next step. In the meantime, no steps toward development of a landfill are permitted. The scope of the appeal does not extend to what design specifications or conditions should be instituted if the UCLG,

after carrying out the required studies, decides to apply for an ECA amendment or whether the Director should deny such an amendment.

[62] What is the impact of the settlement on the issues raised in the appeal? The first ground raised by the Appellant, the jurisdictional issue, was to be the subject of a motion. That issue is not now being pursued by the UCLG, but the UCLG did indicate that, if the proceeding is not dismissed, it would seek to revive its motion. With respect to the second ground, whether there was a sufficient scientific basis for the Director to take action, by agreeing to the settlement and leading Mr. Smolkin's evidence in support, it can be assumed that the UCLG now concedes that the environmental and regulatory changes have been significant enough to warrant further study, design changes and amendment of the ECA before there is any development of a landfill. Thus, at this time, all parties and their expert witnesses accept that changes have occurred that warrant further study. Although the parties hold different views on the extent and implications of those changes, there would be little point in holding a hearing to receive evidence on whether sufficient changes have occurred to require detailed investigation.

[63] Is the Director's action weakened by the settlement and is it consistent with the purpose of the *EPA*? The Director's approach to the environmental and regulatory changes, as is clear from both the correspondence from Mr. Mahmood and the Suspension Notice, has been to prohibit any steps toward development of a landfill on the Site until studies are done to delineate and assess the physical changes and determine whether the conditions and assumptions underlying the 1998 approvals are still valid and whether the approved landfill design and operations remain appropriate. The correspondence from Mr. Mahmood suggested that an amendment to the ECA *may* be necessary, depending on the results of the studies; however, it did not require it. The Suspension Notice was similar. The settlement goes a step further than the Suspension Notice to *require* the Appellant to apply for an ECA amendment before any steps toward development of the Site may be taken; thus, by agreeing to the settlement, it appears that the Director accepts that environmental and regulatory changes are

significant enough that the landfill cannot be developed as originally approved. This is unlike *Nestlé*, where the Tribunal compared the settlement to the original conditions imposed by the Director to address a concern with maximum groundwater pumping during droughts and found that the settlement, which removed a key element of those conditions, was not consistent with the purpose of the legislation.

[64] CAD initially supported the Director's decision to issue the Suspension Notice, but now opposes the settlement. Mr. Ruland's opinion is that the settlement does not meet the purpose of the *EPA* because it "opens the door to landfilling" without adequate understanding of the current environmental conditions or studies that will correct what he sees as deficiencies in the original studies.

[65] Based on the evidence presented, it cannot fairly be said that the settlement "opens the door to landfilling" on the Site. Rather, that door was opened in 1998. The settlement closes the door on development of a landfill unless and until new studies are completed and reviewed and the UCLG applies for and obtains an ECA amendment. The settlement has a similar effect as the Suspension Notice but, by *requiring* an ECA amendment, strengthens its effect. By amending the terms of the ECA to prohibit development of the landfill until detailed studies and reports are completed and reviewed and a further ECA amendment is issued, the settlement protects the environment and is consistent with the purpose of the *EPA*. Without this prohibition in place, development of the landfill could proceed without any further studies being done or any design changes being made, which, in light of the evidence, would likely not ensure protection of the natural environment.

[66] The settlement offers no commitment that a landfill will ever be developed on this Site and does not fetter the Director's discretion. No studies will be completed until after the expected date for the Minister and the MECP to determine whether the original 1998 decisions will be revoked. If they are not revoked through these other processes, the decision about whether it is appropriate to permit landfill development will be informed by the results of the very studies that the settlement requires. The onus will be on the

UCLG to demonstrate to the satisfaction of the Director that landfilling is appropriate in light of the environmental conditions at the time of application, and that the design meets up-to-date standards. Approvals from other agencies will be necessary. The UCLG's intentions regarding sale of the Site and the timing of that sale are unknown, but could occur several years from now. If the studies done at that time demonstrate that landfilling is not appropriate, but the UCLG nevertheless applies for an ECA amendment to permit landfilling, the Director has the authority to refuse the amendment. Most importantly, the Director's decision at that time will be informed by more complete evaluations regarding contemporary conditions and will be made in accordance with then-current regulatory standards. It will be subject to appeal if the UCLG disagrees with the Director's decision. In saying this, the Tribunal makes no findings on the jurisdictional argument raised by the UCLG in its notice of appeal.

[67] Is there any prejudice to a party? Should CAD be given an opportunity to present evidence to convince the Tribunal to require revocation of the ECA? The evidence indicates that as a practical matter it would be premature to hold a hearing until further detailed studies are done. Despite Mr. Ruland's categorical statement that the Site is not appropriate for a landfill, and never was, his opinion is based on his critique of the studies that were submitted in support of the original approvals and not on any detailed hydrogeological studies that he himself has conducted, either in the past or recently. He visited the Site with Mr. Smolkin, but was only able to observe the presence of surface water. Ms. Logan testified that she had not been on the Site and did not carry out any of the natural heritage evaluations of the type she considers should be done. Thus, the scientific foundation for making a final determination of whether or not a landfill would be appropriate at this Site is incomplete. The evidence presented to the Tribunal to date is that there have been significant environmental changes since 1998 on and near the Site. While this evidence may be sufficient to raise serious doubts about the continuing relevance of the original assumptions and to justify further investigation, it is unlikely that evidence consisting only of general observations of changes would be sufficient for the Tribunal to be able to reach a final conclusion on whether or not all or part of the Site is suitable for landfilling activity.

[68] CAD raises two further arguments against the Tribunal accepting the general approach in the settlement. First, it submits that the Director and the Ministry cannot be trusted to protect the environment, so the Tribunal should continue the hearing and revoke the ECA without waiting for further studies to be done. Second, it submits that, if the Director were at some later time to issue an amendment to the ECA permitting landfilling on all or part of the Site, CAD would not be able to challenge that decision because of the operation of s. 32(1) of the *EBR*.

[69] With respect to CAD's first submission, there is no indication in the record that the Director has failed to fulfil his statutory responsibility in accordance with applicable law, regulations and policies, or could be expected to do so in future. Nor is there any basis for a finding that any successor to the current Director would not act likewise. It should be noted that the Director acts under statutory authority and, when exercising that authority, is expected to act in accordance with the principles of administrative law. These principles provide that discretion conferred by statute must be exercised for a proper purpose, "to promote the policies and objects of the governing Act", and a decision must be based only on relevant considerations. In addition, "decision makers are expected to act in good faith. Powers must not be abused and should not be exercised arbitrarily or dishonestly" (see, Sara Blake, *Administrative Law in Canada*, 5th Ed. (Toronto: LexisNexis Canada, 2011), pp. 99-101). Remedies are available by way of judicial review if these responsibilities are not met.

[70] The only evidence before the Tribunal even potentially pointing to a lack of trust in the Ministry is Mr. Ruland's opinion, which is based on his critique of the studies submitted in support of the original approvals. In fact, the evidence shows that the MECP and the Director have been responsive to the changes identified by CAD and others. Mr. Mahmood, aware of the regulatory changes, responded to the information provided by CAD and others about environmental changes by requesting updated studies and designs from the UCLG. The Director then responded to a concern that the environment would not be adequately protected if the UCLG sold the Site to Tomlinson

by issuing the Suspension Notice. Despite CAD's submission that the Director cannot be trusted, Mr. Johnston on behalf of CAD voiced support for the Director's approach at the time he issued the Suspension Notice, calling it "an important, if not long overdue, step in the right direction. We commend the Ministry for hitting the pause button on this questionable landfill project..." In addition, the Director stated in his evidence that the Ministry agreed to undertake the actions requested by CAD (when it utilized the available statutory processes to challenge the *EAA* approval and the original ECA) because of the changes identified.

[71] CAD certainly disputes that the Director has gone far enough in responding to its concerns, but there is no foundation for CAD's allegation that the Director cannot be trusted to carry out his responsibilities or to act in accordance with the purpose of the *EPA* when it comes time to consider an application to amend the ECA. This is not a legitimate basis for the Tribunal to continue this proceeding.

[72] With respect to its second submission, CAD argues that the approach in the proposed settlement, of requiring amendment of the ECA before landfill development could occur, raises a "serious legal barrier to meaningful public involvement…" and therefore, the Tribunal's continuation of the hearing is the only opportunity it will ever have to present evidence and argument on the ECA. This is because, under s. 32(1) of the *EBR*, there is an exception to the requirement in s. 22 of the *EBR* for public notice of a Class II proposal or decision – such as an ECA amendment – to be posted on the Environmental Registry where, "in the minister's opinion, the issuance, amendment or revocation of an instrument would be a step towards implementing an undertaking or other project approved by … a decision made under the *Environmental Assessment Act*." Public notice under s. 22 of the *EBR* is a necessary precondition to a resident of Ontario being able to apply to the Tribunal for leave to appeal a decision on an instrument such as an ECA amendment. CAD also points out that the *EAA* reconsideration and the *EBR* review of the ECA do not mandate an opportunity for public participation.

[73] While the Tribunal recognizes the importance of public participation to environmental decision-making, the Tribunal, exercising authority under one statute, does not have authority to convene a hearing in order to remedy what one person considers to be inadequate participation rights afforded under that or another statute. In addition, a Tribunal hearing is not the only method of effective participation. In the circumstances here, if s. 32(1) of the *EBR* ultimately applies, that does not mean there will be no opportunity for "meaningful public involvement" in the process established by the settlement. The Director stated that, although he does not make the decision about whether s. 32(1) applies, he welcomes information provided by CAD and agrees that CAD should have an opportunity to provide input into the studies required by Condition 9.1. He does not object to adding a condition requiring the UCLG to make draft reports available for public comment. The proposed settlement provides an opportunity for continuing public involvement, as discussed in the next section.

The Proposed Draft Conditions

[74] Beyond its concerns with the general approach of the settlement, CAD raises several detailed criticisms of the conditions set out in Exhibit 4 and proposes further amendments. These fall roughly into three categories: issues related to the required studies, the mechanism for ensuring public involvement, and language regarding a potential change in ownership of the Site. Some proposed changes in definitions were said by the Director to be unnecessary at this stage, and the Tribunal accepts that view.

[75] Proposed Condition 9.1 requires the UCLG to conduct the following studies: groundwater monitoring, surveys of natural heritage features (including surface water bodies, drainage, wetlands, and vegetation), an inventory of SAR and their habitats, and a survey of water supply wells. Reports on this work are to be submitted to the MECP for review and comment and will be posted on UCLG's website for a public comment period prior to submission. Following submission of these reports, the UCLG is to submit a proposed revised D&O Report, providing information "to ensure that … elements of the Landfill satisfy applicable regulatory requirements…" These elements

include landfill design, landfill gas controls, leachate collection and leachate management system, stormwater management system, operating conditions for control of litter, dust, noise and odour, inspections and maintenance.

[76] CAD does not argue that these studies should not be done and does not identify other studies that should be done. Rather, CAD argues that the requirements in Condition 9.1 regarding the design of the required studies are not prescriptive enough. For example, with respect to natural heritage surveys, Ms. Logan suggested additional wording to ensure that the surveys do not leave out relevant features and functions. With respect to groundwater monitoring, Mr. Ruland suggested that the proposed Condition 9.1 be amended to include the specific number and location of new monitoring wells, the number of rounds of initial testing, and other details of the study design. CAD would also add specific design parameters for the leachate collection system in the D&O Report. In response, the Director argues that, because it is "difficult to predict exactly what UCLG might discover during its environmental investigations, condition 9.1 was designed to not be overly prescriptive." Instead, the Director expects that the qualified persons carrying out the studies will exercise their professional judgment and adjust as the specific circumstances and results they encounter may demand. Regarding whether to include leachate system design parameters, the Director argues that this would fetter his discretion when it comes to determining at some unspecified later date the terms of an amendment to the ECA.

[77] The proposed Condition 9.1 is more prescriptive than the earlier direction from the MECP to the UCLG. Whereas Mr. Mahmood initially asked the UCLG to confirm the conditions, assumptions and circumstances outlined in the original studies and asked for studies of "environmental effects", Condition 9.1 outlines the specific categories of information that must be provided. CAD does not disagree with these categories, but argues that the condition should be more directive. The Tribunal agrees that the condition should be worded so as to ensure that the studies conducted address all relevant environmental features and functions, and agrees with some of the changes suggested by Ms. Logan. However, the Tribunal finds that CAD has not adequately

justified including the level of detail it has proposed respecting the groundwater monitoring program or the prohibitions in the D&O Report. While CAD's motivation appears to be to ensure that a comprehensive study is done and that a landfill will meet current regulations, the Tribunal agrees with the Director that it is appropriate to leave the details, for example the number and location of boreholes, to the professional judgment of those tasked with designing and carrying out those studies, as overseen by the Ministry. It is expected that the studies will be done in accordance with relevant protocols and guidelines. CAD again appears to believe the Director cannot be trusted to approve an appropriate monitoring program or natural heritage evaluation protocol or to follow the applicable regulations and MECP policy if a landfill were to go ahead. As was noted above, the Director has the responsibility to exercise discretion in accordance with statutory authority and there is no evidence that the Director will not do so. This is not a sufficient basis for mandating the inclusion of CAD's proposed amendments to Condition 9.1.

[78] CAD's second area of criticism of the proposed conditions relates to the mechanism for ensuring public involvement. CAD proposes replacing existing Condition 9 in the ECA, which requires the formation of a landfill liaison committee ("LLC"), with a new Condition 9. The new condition would require formation of the LLC by December 31, 2018, would specify the objectives and membership of the LLC (to specifically include a representative of CAD), would set the schedule of meetings, and would require the UCLG to provide sufficient funds for the LLC to retain independent experts to review technical documents. In addition to adding this new condition, CAD proposes: to amend the ECA to ensure CAD's participation in technical meetings between the UCLG and the MECP and submissions on all work plans and reports; to require all reports be provided to CAD and the LLC; and to require the soliciting and consideration of comments from CAD and the LLC on those reports before the Director makes a decision.

[79] The Director and the UCLG expressed support for public involvement in the process but not for these suggested amendments. The UCLG proposes adding a new

provision, Condition 9.1(f), stating that, prior to the submission of the required reports to the MECP, it "shall provide the public with copies of the reports by posting all final drafts on its website…" and invite comments for a 60-day period and consider all comments before finalizing the reports. The Director in his affidavit stated that he agrees CAD should have an opportunity to provide input into the reports required by Condition 9.1 prior to their submission to the MECP, but that he does "not have a strong opinion on whether this opportunity should be facilitated through a liaison committee or through another means." He noted that it "has become more common for larger landfill operators to provide information directly to the public through dedicated internet sites."

[80] Existing Condition 9 in the ECA provides for the formation of the LLC "to give residents the opportunity to … make recommendations to the design of monitoring programs; … review monitoring data and results; and … recommend new mitigation measures and improvements to existing practices..." This condition does not detail who the members should be or who they should represent, but provides that the terms of reference, membership and meeting protocols are to be established by the LLC itself. It appears that the LLC was set up after the 1998 approvals were issued, but because the Site was never developed, at some point the LLC disbanded.

[81] Condition 9 was not affected by the Suspension Notice and thus was not appealed. The condition remains in effect. The need to revise it has not been demonstrated and all the parties do not consent to CAD's recommended changes. The purpose of the LLC is to provide a mechanism for local residents to receive and review reports and make recommendations to the operator of the landfill on monitoring programs and operational practices. The wording suggests that the major role of the LLC occurs once a landfill is constructed and in operation; however, it may be a useful forum in the circumstances here. The LLC could be re-established at any time, if the parties and the community agree that it would be useful in the current circumstances. However, it was also suggested that other mechanisms, such as using websites, might be more convenient and effective in addition to or lieu of using the LLC as the only vehicle for public input. The Tribunal recommends that the parties discuss the matter of

how best to provide information and materials to, and receive comments and feedback from, local residents and when to re-establish the LLC. The wording of Condition 9.1 should provide flexibility on this point.

[82] In addition to any participation in the LLC and the opportunity to review and provide comments on the draft reports before they are submitted to the MECP as set out in Condition 9.1, CAD would also like to have a designated seat at the table in technical meetings and a right to provide submissions on work plans for the studies required under Condition 9.1. The Tribunal agrees in principle that interested members of the public should have an opportunity to review and comment on all of the reports required by Condition 9.1. In Exhibit 4, this opportunity is provided via Condition 9.1 (f), which applies to all reports required by Condition 9.1 (c), including the report required in Condition 9.1 (c)(i), as well as those required by Condition 9.1 (d) and (e). CAD has not sufficiently explained why this opportunity would not be an effective mechanism of participation in the circumstances. The Tribunal also considers it fair and appropriate in the circumstances that the proposed revised D&O Report, required by Condition 9 (g), should be made available to the public once it has been submitted to the Director.

[83] To single out CAD for inclusion in the ECA has not been justified. Other stakeholders and residents may also have an interest or particular information or expertise to offer that could prove of value to those conducting the studies and to the MECP. The timing on the Condition 9.1 studies is uncertain and may not occur for several years in the future. It is not at all certain that CAD will be active at that time. Providing an opportunity for the public to comment would not exclude CAD but would leave open the possibility of including other groups, agencies or individuals who might be equally interested and able to participate at the relevant time.

[84] The third area CAD raises is the need for the ECA to include provisions regarding the potential change in ownership of the Site. It proposes the addition of new Condition 7.1, which would require the Director, in advance, to be notified of a transfer of ownership rights and to confirm in writing that he or she is satisfied that the conditions

of the ECA will be carried out and that sufficient financial assurance is provided. The UCLG proposes to adjust CAD's wording to be consistent with current MECP practice. It objects to a requirement for the Director to consider the operating history and compliance record of a proposed owner or lessee on the grounds that it is not consistent with conditions imposed in other landfill approvals. The Director does not object in principle to including a provision on change in ownership, but requests that the MECP's standard form of condition be used in lieu of CAD's wording.

[85] Given that all parties consent to including a new condition addressing the issue of a change in ownership, the Tribunal accepts that, in the circumstances of a possible sale by the UCLG, the ECA should be amended to include such a condition. The Director and the UCLG agree that the standard MECP wording for such circumstances should be the form of such a condition. CAD provided no evidence or submissions as to why this standard wording is not suitable or why additional conditions are needed. The Tribunal agrees that the standard wording is appropriate.

Conclusions

[86] The Tribunal concludes that the settlement, as modified by the Tribunal, is consistent with the purpose and provisions of the *EPA* and is in the public interest. In summary, the settlement prohibits any steps toward development of a landfill at the Site unless and until detailed studies of contemporary environmental conditions are completed and reviewed by the Ministry. The results of those studies will form the foundation for any subsequent steps that are taken. If those studies indicate that landfilling may still be appropriate for the Site, the settlement requires that the landfill design must be adjusted to reflect the study results and to conform to current regulations and requires that the ECA be amended, which will be done in accordance with the provisions of the *EPA*. The Director's discretion under the *EPA* is not restricted by the settlement. The settlement strengthens the terms of the Suspension Notice, which was adopted as a temporary measure, and incorporates these terms into the

ECA. It also provides for public participation. There is no evidence that the settlement causes prejudice to the interests or any party, participant or presenter.

DECISION

[87] The Tribunal orders:

a. The Director shall amend ECA No. A420009 to add new provisions, substantially in the form set out in Attachment 1;
b. Once the ECA is amended, the Director shall revoke the Suspension Notice; and
c. The appeal is dismissed.

Director Ordered to Amend ECA
Director Ordered to Revoke Suspension Notice
Appeal Withdrawn
Appeal Dismissed

"Marcia Valiante"

MARCIA VALIANTE
VICE-CHAIR

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

Attachment 1

Approval No. A420009 shall be amended as follows:

1. Add the following:

DEFINITION OF TERMS

1(l) "Technical Support Manager" means the Ministry's Eastern Region Technical Support Manager.

2. Add the following:

Condition 7.1 NO TRANSFER OR ENCUMBRANCE

a. No portion of the Landfill Site shall be transferred or encumbered prior to or after closing of the Site unless the Director is notified in advance and is satisfied with the arrangements made to ensure that all conditions of this Approval will be carried out and that sufficient financial assurance is deposited with the Ministry to ensure that these conditions will be carried out.

b. The Owner shall notify the Director, in writing, and forward a copy of the notification to the District Manager, within 30 days of the occurrence of any changes in the following information:

I. the ownership of the Site;

II. the Operator of the Site;

III. the address of the Owner or Operator;

IV. the partners, where the Owner or Operator is or at any time becomes a partnership and a copy of the most recent declaration filed under the *Business Names Act*, R.S.O. 1990, c. B.17, shall be included in the notification; and

V. the name of the corporation where the Owner or Operator is or at any time becomes a corporation, other than a municipal corporation, and a copy of the most current information filed under

the Corporations Information Act, R.S.O. 1990, c. C.39, shall be included in the notification.

c. In the event of any change in the ownership of the site, other than a change to a successor municipality, the Owner shall notify in writing the succeeding owner of the existence of this Approval, and a copy of such notice shall be forwarded to the Director and District Manager.

3. Add the following:

9.1 WORK REQUIRED

(a) No waste shall be received, stored or disposed of at the Landfill Site, nor shall the Corporation commence any development, construction or operation of the Landfill on any portion of the Site, until the Corporation has completed the work and submitted the reports required by Conditions 9.1(c), (d) and (e) below to the Director for review and comment, and the Director has approved the revised Design and Operations Report required by Condition 9.1(g) and amended this Approval. For greater certainty, any work needed to conduct any of the required investigations or to prepare any required report shall not constitute development, construction or operation of the Landfill.

(b) The Corporation shall ensure that a qualified person(s) with the necessary experience carries out the work referred to in Conditions 9.1 (c), (d), (e) and (g) and that the Corporation and/or the qualified person(s) conduct one or more consultation technical meetings with the Technical Support Manager prior to conducting the work.

(c) The Corporation shall:

i. Conduct an inventory of the existing on-site and off-site monitoring well network and submit a report to the Technical Support Manager that provides the findings of the inventory and:

a. evaluates the operation condition and adequacy of these wells to provide representative groundwater information;

b. assesses the need for replacement/substitute monitoring wells; and

c. proposes which wells will be used as monitoring wells for the purposes of the groundwater program required by Condition 9.1 (c)(ii);

ii. Once the Technical Support Manager has accepted the report referred to in Condition 9.1(c)(i) in writing, as amended if necessary, install all new wells and replacement wells, if any, then conduct groundwater monitoring over three consecutive seasons (spring, summer and fall) in accordance with the following requirements, and prepare a report summarizing the results:

a. Conduct a groundwater elevation survey of the monitoring wells;

b. Sample and analyze the monitoring wells for all parameters set out in column 1 of Table C.2; and

c. Sample and analyze the monitoring well intervals in BH8-95, or alternate intervals in another borehole(s), during one of the sampling events, for tritium.

(d) The Corporation shall complete a survey of the following features located on the Landfill Site and within a 1 kilometre study area radius and prepare a report summarizing the results of the survey and assessing the implications of the current conditions of these features on proceeding to project implementation:

i. Surface water bodies and receptors (including mapping of the areal extent of surface water bodies in both wet and dry seasons);

ii. Drainage (including mapping of current pathways of surface water flow on and around the Site and the area of the proposed downstream flow path for surface water discharge from the proposed storm water management pond);

iii. Wetlands; and

iv. Ecological and biological features and vegetation (including a current inventory of species at risk and their habitats).

(e) The Corporation shall prepare a report:

i. After completing a survey to determine if any additional dwellings and/or water supply wells have been established within one kilometre of the Landfill (the “study area radius”), including an analysis of whether the Landfill design will ensure that there will be no adverse impacts on any such wells and any mitigation measures that should be implemented; and

ii. Providing any additional information obtained regarding the geology, topography, and soil types at the Landfill.

(f) The Corporation shall submit the reports required by Conditions 9.1 (c), (d) and (e) to the Technical Support Manager for review and comment. Prior to submitting each report, the Corporation shall provide the public with a copy of the report by posting the final draft on its website and/or providing it to the LLC. The Corporation shall invite comments from the public for a minimum period of 60 days and shall consider all comments prior to finalizing and submitting the report(s).

(g) No sooner than three months after the last of the reports have been submitted as required by Condition 9.1 (f), the Corporation shall submit to the Director, and post on its website and/or provide to the LLC, a proposed revised Design & Operations Report that either confirms or modifies the items in the Design & Operations Report referred to in Schedule “A” and adds all required additional changes or information, in order to ensure that the following elements of the Landfill satisfy applicable regulatory requirements:

i. the landfill design;

ii. landfill gas controls;

iii. the leachate collection and leachate management system;

iv. the stormwater management system (including confirmation that sizing and other operational details are correct based on recent data for storm events); and

v. the operating conditions for litter control, dust control, noise control, odour control and site inspections and maintenance. The report shall also include a description of the haul route to the Site.

(h) On December 1 and June 1 of each year until the Corporation submits an application for amending this Approval in accordance with this Condition, the Corporation shall notify the Director and the District Manager in writing, and post on its website and/or notify the LLC, as to whether the application for amendment will be submitted within the next six-month period.