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Quarrying the Niagara Escarpment: Conflicting Decisions Leave Observers Puzzled

By David Donnelly* and Anne Sabourin**

Two recent decisions of the Joint Board pursuant to the *Consolidated Hearings Act*[1] create a very confusing legal landscape, with the future direction of development approvals on the Niagara Escarpment hanging in the balance. Very similar facts and arguments in both hearings led to very disparate decisions and a potentially precedent-setting judicial review application by of one of the decisions the Niagara Escarpment Commission ("NEC").

In *Walker Aggregates Inc.*[2] ("*Walker*"), the proponent applied for approval of a 42 million tonne quarry on the highest point of the Niagara Escarpment in the Township of Clearview, near the village of Duntroon. Donnelly Law represented the Clearview Community Coalition ("CCC"), a citizens' group opposed to the new quarry. CCC summonsed the Environmental Commissioner of Ontario to provide evidence on the protection of natural heritage features, Ministry of Natural Resources ("MNR") policy, and planning principles.

In *Nelson Aggregate Co.*[3] ("*Nelson*"), the proponent applied to quarry approximately 26 million tonnes on Mount Nemo, in the City of Burlington. We represented Sarah Harmer's citizens' organization, Protecting Escarpment Rural Land ("PERL").

Both hearings spanned over a year, with hundreds of exhibits, and dozens upon dozens of expert witnesses. In both cases, the NEC, local Conservation Authorities and citizens' groups opposed the respective quarries. In the case of *Nelson*, PERL was joined by Halton Region and the City of Burlington in opposition. In both cases, the MNR withdrew its opposition to the development proposals just before the hearings commenced. The MNR's tacit support of the two quarries sets up a new debate between the NEC and MNR over who has the final word on the protection of the Escarpment.

Our clients and the NEC argued that the redesignation of land to "Mineral Resource Extraction Area" under the Niagara Escarpment Plan ("NEP") would adversely affect the purpose and objective of the *Niagara Escarpment Planning and Development Act*[4] ("NEPDA"). Section 2 of the NEPDA states:

> The purpose of this Act is to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment.

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[1] R.S.O. 1990, c. C.29.
[2] Office of Consolidated Hearings Case No. 08-094, June 18, 2012 (http://www.ert.gov.on.ca/files/201206/00000300-BPQ1IK6FIN0026-CFI4BD7E8HO026.pdf).
[3] Office of Consolidated Hearings Case No. 08-030, October 11, 2012 (http://www.ert.gov.on.ca/files/201210/00000300-BOYL6ZVUKY0026-CJB51EE09TO026.pdf).
[4] R.S.O. 1990, c. N.2.

The aggregate companies in both cases argued that destroying significant natural heritage features is permissible, provided these features can be re-created nearby.

On June 18, 2012 a majority of the *Walker* Joint Board allowed the application to amend the NEP and approved the proposal. There was a lengthy and impassioned 100-page dissent from Member R. Wright,[5] who disagreed with the judgment of the *Walker* majority. Member Wright would have rejected the quarry application, stating at page 258:

> The majority decision in this matter sets a perilous course for increased development in the NEP Area that is not compatible with the natural environment of the Niagara Escarpment and land in its vicinity.

On November 13, 2012 the NEC filed an application for judicial review of the *Walker* decision.

The majority and the dissent in the *Walker* decision has left NEC commissioners, legal counsel and the public with two very different and incongruous perspectives on the application of the Provincial Policy Statement ("PPS") versus the NEP.

In allowing the removal of significant ecological features on the Escarpment, the majority of the Board in *Walker* stated:

> Natural heritage issues are a significant part of this appeal. **However, the NEP provides little direction about how to satisfy its provisions related to natural heritage areas.** The policies and objectives of the NEP relating to natural heritage resources and the Escarpment environment provide general direction and use terms such as "protection" of these areas, "minimizing the impact", and "preserve as much as possible". There is little definitive guidance in the NEP regarding what constitutes protection, when impact is not minimized, and the amount of area that needs to be preserved. Many of these areas find higher levels of protection in other land use designations contained within the NEP.
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> **Clearer direction is provided in the PPS**.[6] [*Emphasis added*]

In contrast, Member Wright stated in his dissent:

> While my colleagues acknowledge the primacy of the *NEPDA* and the NEP in regards to the proposed development, on key issues they do not utilize the *NEPDA* and NEP tests for the threshold NEP amendment and development permit applications, and, instead, they apply the policies of the Provincial Policy Statement ("PPS") and the provisions of the *Planning Act*. The practical result is that, in this special area of the province that is the geological backbone of southern Ontario and a World Biosphere Reserve, **crucial aspects of the proposed development are not analyzed through the protective lens of the statutory provisions of the *NEPDA* and the policies of the NEP**.[7] [*Emphasis added*]

Observers waited with anticipation to see what position the *Nelson* decision, released October 11, 2012, would take on the issue.

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[5] Member Wright, a vice-chair of the Environmental Review Tribunal, was the sole Niagara Escarpment Hearing Officer on the Joint Board panel in *Walker*.
[6] *Walker*, *supra* note 2 at p. 12.
[7] *Walker*, *supra* note 2 at p. 166.

In *Nelson*, a unanimous Joint Board dismissed the application to amend the NEP (the "keystone application"), and so did not render a decision on the *Planning Act* or *Aggregate Resources Act* applications required to approve a new quarry. Although the decision of the *Nelson* Joint Board turned in part on the impact of the quarry on the Jefferson Salamander (a provincially endangered species), its legal analysis more closely resembled the approach of Panel Member Wright's dissent in *Walker*.

The unanimous Joint Board in *Nelson* stated:

> While the ESA and PPS are instruments of general application across the province, the NEP offers an **additional** aspect of environmental protection through its own special legislation and plan that allows for compatible development.[8] [*Emphasis added*]

Another striking example of the divergence between the *Walker* majority and the *Walker* dissent and *Nelson* panel is the finding on the legal concept of "net gain", which is theoretically achieved through the re-creation of significant natural features in close proximity to the extraction area. This concept is gaining favour with proponents and the MNR, but not with the NEC or environmentalists.

In *Walker*, the proposal required the removal of 32.8 hectares of deciduous "Significant Woodland". In its revised site plan, the proponent proposed replanting 53.2 hectares of forest to mimic Significant Woodland on lost adjacent lands over time. The *Walker* majority considered this a net gain:

> Whether the mitigation measure is called reforestation, afforestation, replacement or net gain is not important. The PPS test is whether the mitigation activity being proposed has the ability to remove or ameliorate any negative impacts that "threatens the health and integrity of the natural features or ecological functions for which an area is identified" and **whether the mitigation measures will result in enhanced beneficial effects which might result from the loss of a portion of the significant woodland.** Based upon these considerations the Joint Board finds that the proposed reforestation is simply a mitigation measure and that it is appropriate.[9] [*Emphasis added*]

Member Wright disagreed:

> In my view, "net gain" and "compensation" are **not applicable to the destruction and removal of features, functions and systems of the natural environment in the existing NEP Area, and they should not be "read into" the NEP**. If the natural environment of the Niagara Escarpment and land in its vicinity is destroyed in one location of the NEP Area, it cannot be recreated somewhere else in the NEP Area without altering, or destroying, the features and functions in that new location.[10] [Emphasis added]

The *Nelson* Joint Board seems to agree with Member Wright's perspective:

> The NEP does not include the concept of net gain as a replacement for the removal of wooded areas or wildlife habitat.[11]

The Niagara Escarpment Commissioners voted 10-3 to seek a judicial review of the *Walker* decision. CCC, the City of Burlington and Halton Region and other concerned individuals and environmental organizations wrote letters in support of a judicial review to the NEC. On November 13, 2012, the NEC filed its application for judicial review on the grounds that four key errors of law were made:

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[8] *Nelson*, *supra* note 3 at p. 19.
[9] *Walker*, *supra* note 2 at pp. 58-59.
[10] *Ibid*. at pp. 204-205.
[11] *Nelson*, *supra* note 3 at p. 22.

1. The PPS was applied in substitution for key provisions of the NEP.

2. The *Walker* majority either refused to interpret or erred in its interpretation of key terms in the NEPDA and NEP, e.g. "maintain and enhance" and "unique ecologic areas", which require a higher standard of protection than the policies of the PPS.

3. Contrary to both the NEP and the PPS the majority accepted the "net gain" approach of the applicant.

4. The Joint Board did not require Walker to submit a final draft Adaptive Management Plan and improperly delegated the final decision on this Plan to the MNR.

At the time of writing this article, no response from Walker Aggregates Inc. has been received on the NEC's judicial review application.

The conflicting decisions of the Joint Board raise critical questions about the correct interpretation of the NEPDA and NEP, and the relationship between the provincial agencies responsible for the protection of the Escarpment, the NEC and MNR. Specifically, should the MNR apply different resource management policies to planning than the NEC? The decisions also raise a question concerning the selection of Joint Board panel members on hearings involving interpretation of the NEPDA; that is, should the majority of Joint Board members be drawn from the Ontario Municipal Board or the Environmental Review Tribunal?

The outcome of the judicial review will likely set the course on the interpretation of the NEPDA and NEP, at least leading up to the 2015 NEP review. We leave the final word to Member Wright:[12]

> The findings and conclusion of my colleagues reject the development control approach, and fail to analyze crucial aspects of this development proposal through the lens of the statutory provisions of the *NEPDA* and the policies of the NEP. The practical result is that the specific provisions and policies of the *NEPDA* and the NEP that protect the natural environment of the Niagara Escarpment and land in its vicinity are either wrongly equated with the PPS requirements, or given little, or no, legal effect, and the more general province-wide policies of the PPS are applied by default.

**David Donnelly is the principal of Donnelly Law; (416) 722-0220, david@donnellylaw.ca.*
***Anne Sabourin is an associate at the same firm; (416) 572-0464, anne@donnellylaw.ca.*

[12] *Walker*, *supra* note 2 at p. 259.