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October 13, 2021

Tyler Schulz, PhD
Assistant Auditor General/ Commissioner of the Environment
Office of the Auditor General of Ontario
20 Dundas St. West, Suite 1530
Toronto, ON
M5G 2C2

Dear Mr. Schulz:

RE: EBR #: 21EBR004.I Application for Investigation of Alleged Contraventions of the Ontario Water Resources Act (s.107(3)) by C.H. Demill Holdings Inc., Long's Quarry

Please be advised that I am counsel for the Citizens Against Melrose Quarry ("CAMQ").

As you know, I assisted my client (and the second applicant) in preparing and filing the above-noted Application for Investigation pursuant to Part V of the *Environmental Bill of Rights* ("*EBR*"). A copy of this Application was provided to your office in June 2021.

We have recently received a copy of the Ministry's letter dated September 21, 2021 in which the Ministry indicates that it will not conduct the investigation requested by the two applicants. An unsigned and undated Decision Summary was attached to the Ministry letter to rationalize the Ministry's inaction on the well-founded complaint outlined in the Application for Investigation.

In conjunction with both applicants, we have carefully considered both documents, and we have been instructed by CAMQ to express grave concerns about the outcome of the Application for Investigation process and the reasons for decision offered by the Ministry.

As described below in more detail, CAMQ submits that the Ministry decision is highly objectionable, legally erroneous, and wholly unpersuasive, especially in light of the company's lengthy history of non-compliance under Ontario's environmental legislation.

1. Failing to Investigate Confirmed Contraventions does not Provide Deterrence

The Decision Summary correctly recognizes that the Ministry's "role is to ensure that owners and operators of quarries, such as C.H. Demill Inc., comply with all applicable environmental regulations" (page 6). In our view, this role is not being satisfactorily discharged by the Ministry in this case since it has knowingly refrained from investigating, or taking adequate abatement or

enforcement action in relation to, the confirmed contravention under the *Ontario Water Resources Act* ("*OWRA*").

In particular, the Decision Summary confirms that the Ministry is aware that the company did not comply with the low-water conditions and monitoring requirements contained within the Permit to Take Water ("PTTW"):

> The ministry acknowledges that the Company did not strictly comply with the Permit to Take Water requirements when taking water during a low-water advisory and there are precipitation monitoring data gaps as have been raised in the Application (page 7).

For comparative purposes, the Ministry reached an almost identical conclusion[1] in 2018 in relation to CAMQ's previous Application for Investigation of the company's *OWRA* non-compliance, which is briefly mentioned in the current Decision Summary (page 6).

However, despite confirming the company's non-compliance in 2018 and again in 2021, the Ministry neither conducted the requested investigations, nor used the abatement and enforcement tools available to the Ministry under the *OWRA*. On both occasions, the Ministry's decision was largely premised on the assertion that the contraventions did not result in any apparent environmental harm. This questionable proposition is addressed in more detail below.

In our view, the Ministry's forbearance might be appropriate in the context of a first-time offender who has committed a relatively inconsequential breach of a minor administrative provision within a statutory authorization. However, none of these considerations apply in this case for several reasons.

First, as described in the 2021 Application for Investigation, there is a lengthy history of non-compliance by the company at the Long's Quarry, which was also discussed in the decisions by the Environmental Review Tribunal[2] ("ERT") and the Local Planning Appeal Tribunal.[3]

Second, the confirmed contravention of the low-water conditions of the PTTW is not a trivial or insignificant matter. To the contrary, from CAMQ's perspective, these conditions are some of the most important components of the PTTW (particularly in light of increasingly adverse climate change threats to the local water resources), and they are clearly intended to safeguard the environment and other groundwater users in the vicinity of the Long's Quarry.

Third, the Decision Summary reports that a "new Environmental Compliance Approval No. 9075-AHNKJD was issued on March 27, 2017 to align with the monitoring requirements and water taking amounts in Permit to Take Water No. 8467-A32L6G (page 3)." Notably, however, the Decision Summary inexplicably fails to mention that in August 2021, the company was convicted

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[1] CAMQ's previous Application for Investigation alleged that the company had contravened the conditions of the PTTW and the related Environmental Compliance Approval (ECA) for discharging the ponded water from the Long's Quarry into Blessington Creek. The Ministry's 2018 Decision Summary confirmed that "there were some instances of noncompliance in 2016" in relation to the PTTW and ECA requirements (pages 1 and 12).

[2] *CAMQ v. Ontario*, 2015 CanLII 59648 (ERT), para 28.

[3] *Bates v. Ontario*, 2021 CanLII 4264 (LPAT), paras 20, 69-75.

and fined for contravening this Environmental Compliance Approval (see Appendix A to this letter).

Fourth, the Ministry's own compliance policy stipulates that "responsible persons who have a history of disregarding Ministry legislation or responsible persons who commit violations deliberately or with negligence may be treated differently from those who do not (section 8.2.3)." However, there is no evidence on the record that the Ministry took this important consideration into account when refusing the CAMQ's Application for Investigation, and the Decision Summary makes no mention of the company's chronic non-compliance under provincial environmental laws. It should be further noted that the company did not voluntarily disclose the commission of the latest PTTW offence to the Ministry.

Accordingly, the Ministry's apparent tolerance of another confirmed contravention of the PTTW requirements is not only inconsistent with the Rule of Law, but it also undermines the stated purpose[4] of the *OWRA*. In addition, the Ministry's intransigence regarding PTTW enforcement conflicts with its commitments in its *EBR* Statement of Environmental Values ("SEV") to use "a precautionary, science-based approach in its decision-making to protect human health and the environment," and to undertake "compliance and enforcement actions to ensure consistency with environmental laws." This latter commitment to the public is also reflected on the Ministry's website, which assures Ontarians that the Ministry enforces "compliance with environmental laws."

In short, the Ministry's disturbing tendency to discount or disregard the company's *OWRA* contraventions will not secure PTTW compliance at the Long's Quarry, and will not ensure future compliance with a new PTTW if issued for the Melrose Quarry.

2. The Unsubstantiated Claim that the Contraventions are not Serious or Harmful

Although the Decision Summary is seven pages long, it cannot be construed as a detailed, comprehensive, or credible response to the Application for Investigation. For example, most of the Decision Summary consists of "filler," such as uncontested background information, a lengthy excerpt from the PTTW itself, and a selective recounting of CAMQ's appeal of a previous PTTW to the Environmental Review Tribunal over six years ago. In fact, it appears that some of this content was simply copied and pasted verbatim from the substantially similar 2018 Decision Summary.

More importantly, the 2021 Decision Summary attempts to rationalize the Ministry's refusal of CAMQ's Application on the following grounds:

> The ministry acknowledges that the Company did not strictly comply with the Permit to Take Water requirements when taking water during a low-water advisory and there are precipitation monitoring data gaps as have been raised in the Application. However, these contraventions are not serious enough to warrant an investigation and are unlikely to cause

[4] Section 0.1 of the *OWRA* provides that "the purpose of this Act is to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being."

> harm to the environment. The ministry is currently actively involved in this file and regularly assesses the Permit to Take Water and Environmental Compliance Approval as described in the Application.
>
> Considering all the above, the ministry has concluded that an EBR investigation is not required under Section 77(2)(c) and 77(3) of the *Environmental Bill of Rights Act*, as the alleged contravention is not likely to cause harm to the environment, and it would duplicate the ministry's 2018 investigation in response to the 2018 EBR Request for Investigation (page 7).".

Similarly, the Decision Summary asserts that "there was no impact to the environment or human health," and that "there have been no demonstrated impacts to residential wells (as shown through a groundwater monitoring program) or Blessington Creek (as shown through a surface water monitoring program) as a result of water taking from Long's Quarry (page 6)."

In response, CAMQ has several concerns arising from the Ministry's cavalier claim that the PTTW non-compliance is not environmentally significant, and the Ministry's misguided suggestion that it is up to CAMQ to supply evidence of actual harm before an investigation can be undertaken.

First, it should be noted that the Decision Summary is internally inconsistent as to whether there was – or was not – PTTW non-compliance. For example, the Decision Summary readily acknowledges that the company did not comply with the PTTW requirements, but then concludes with a reference to the "alleged" contravention. On the evidence, the contravention is not mere conjecture on behalf of CAMQ; to the contrary, the essential elements of the contravention have been confirmed by the Ministry itself. Accordingly, it is disingenuous for the Decision Summary to characterize the contravention as merely "alleged."

Second, the Ministry's position about the lack of environmental impact is inconsistent with the Ministry's own reasons for imposing the low-water conditions in Condition 3.3 of the PTTW in the first place. For example, the PTTW states that:

> Conditions 3 through 6 are included to protect the quality of the natural environment so as to safeguard the ecosystem and human health and foster efficient use and conservation of waters. These conditions allow for the beneficial use of waters while ensuring the fair sharing, conservation and sustainable use of the waters of Ontario. The conditions also specify the water takings that are authorized by this Permit and the scope of this Permit (page 7).

Accordingly, it is reasonable to anticipate that at the very least, the company's failure to comply with Condition 3.3 has the potential for environmental harm or interference with other groundwater users.

Fourth, CAMQ submits that the Ministry's refusal of CAMQ's Application does not reflect a prudent or precautionary approach, as mandated by the Ministry's SEV. In CAMQ's view, the Ministry's apparent preference to await proof of actual harm before using its regulatory powers under the *OWRA* is a reactive *ex post facto* approach that is the antithesis of precaution. Moreover,

the ERT originally directed the Ministry to impose the low-water condition (which, ironically, was first suggested by the company itself) for precautionary reasons:

> 175. [T]o address concerns over dewatering during low-water periods, the Permit Holder suggested the insertion of language in the PTTW stating that "where the Permit Holder is advised by the Quinte Conservation Authority of a low-water advisory, the Permit Holder shall only take an amount of water each day equal to the amount of precipitation received at the site in the preceding day".
>
> 178. [T]he Tribunal accepts as a further precautionary measure the Permit Holder's proposal to reduce the volume of water taking at the Quarry...
>
> 179. The Tribunal further orders that a new paragraph is inserted immediately after Table "A" of the PTTW that reads:
>
> > 3.3 Where the Permit Holder is advised by the Quinte Conservation Authority of a low-water advisory, the Permit Holder shall only take an amount of water each day equal to the amount of precipitation received at the site in the preceding day. The calculation of the amount of precipitation received at the site for purposes of this provision shall be determined by the Permit Holder based on its on-site precipitation monitor and the area of the site.

Fifth, we note that the Decision Summary makes no reference to any field work (e.g., monitoring, sampling, or analysis) conducted by Ministry staff to substantiate its claims about the absence of environmental impacts. Instead, it appears that the Ministry merely conducted a desktop review of the company's submitted reports without verifying or ground-truthing any of the data, findings, or conclusions set out in the reports. On this point, the Decision Summary simply indicates that the Ministry considered, *inter alia*, "information obtained from ministry staff, and information found in ministry files."

Sixth, the Ministry has misinterpreted or misapplied the relevant sections of the *EBR* in determining that the requested investigation should not be undertaken. For example, the Decision Summary seems to suggest that section 77(2)(c) provides an automatic or complete bar to requested investigations under Part V of the *EBR* if the Ministry surmises that there is no likelihood of environmental harm. To the contrary, it is clear that under the *EBR*, the Ministry has discretion to conduct an investigation and undertake enforcement action, even where there is no evidence of actual adverse effects. However, for the reasons set out in this letter, CAMQ submits that this discretion was unreasonably exercised in the circumstances of this case.

Seventh, the Ministry has no factual basis for invoking or relying upon section 77(3) of the *EBR* in this case. For example, since the two Applications for Investigation filed by CAMQ targeted acts and omissions that occurred on different dates during different years, there is no factual overlap or "duplication" even if the same offence section of the *OWRA* is applicable. Moreover, it is obvious that in both instances, the requested investigations were refused by the MECP, and there is no evidence that the Ministry is conducting its own ongoing investigation of the most recent PTTW contravention.

Eighth, the CAMQ Application for Investigation expressly referred to section 107(3) of the *OWRA*, which prohibits persons from contravening the terms or condition of permits, licences, or approvals issued under the Act. For the purposes of this section, there is no legal requirement to demonstrate that the contravention resulted in adverse environmental harm (although the presence or absence of such harm may be a relevant sentencing factor). Therefore, the Decision Summary's speculative comments about the alleged lack of environmental harm is neither relevant to, nor dispositive of, a company's liability for contravening section 107(3) of the *OWRA*.

Nineth, the Ministry's position is inconsistent with the Ministry's own conduct in successfully prosecuting the company for not complying with the testing requirements imposed by the ECA pursuant to the *Environmental Protection Act* (*EPA*). Like section 107(3) of the *OWRA*, the relevant offence-making provision of the *EPA* (section 186(3)) prohibits non-compliance with terms and conditions of *EPA* instruments, and does not require proof of actual environmental harm arising from such non-compliance. However, as reflected in the case disposition summarized in Appendix A below, there appears to be no evidence that the company's ECA non-compliance caused any environmental harm and yet the Ministry (to its credit) proceeded with the *EPA* charges and secured a conviction.

Tenth, CAMQ draws no comfort from the Decision Summary's statement that the Ministry is already "engaged" in this file and conducts "site visits and inspections (page 1)." Even if there is some merit to this statement (see below), it goes without saying that the Ministry's ongoing involvement has manifestly failed to prevent the commission of the offences that were confirmed by the Ministry in the 2018 and 2021 Decision Summaries.

Eleventh, there is no merit to the Decision Summary's suggestion that the company's licence under the *Aggregate Resources Act* (*ARA*) "limits the quarry operator such that they are not able to access the site to respond to inclement weather events to manage stormwater outside the prescribed hours of operations as identified in the licence." No legal authority or principle is referenced in the Decision Summary in support of the apparent (and erroneous) proposition that the company (or its consultant) cannot check the rain gauge, or take other measures required under the PTTW, outside of the quarry's operating hours. In our view, the PTTW conditionally approves water-taking at the site and does not purport to regulate aggregate blasting, extraction or processing at Long's Quarry. Moreover, the PTTW conditions are binding and enforceable, irrespective of the requirements of the *ARA* licence or site plan that govern aggregate activities. In short, as matter of law, the *ARA* licence does not trump, supersede, or override the low-water conditions of the PTTW, including Condition 3.3.

3. <u>The Fundamental Inadequacy of the Ministry's Proposed Next Steps</u>

The Decision Summary indicates that the Ministry is presently reviewing the company's application to renew the PTTW, and will be proposing unspecified "changes to reduce operational conflicts and reduce redundant requirements at Long's Quarry (page 7)." On this latter point, the Ministry's cover letter that accompanied the Decision Summary similarly states that the Ministry has "determined that greater compliance could be achieved by improving permit conditions… which may ultimately help to address some of the concerns" raised by CAMQ (page 2).

Alarmingly, the draft PTTW that was initially provided to CAMQ this past summer for review/comment proposed to delete the low-water conditions originally ordered by the ERT and incorporated in the PTTW that was the subject matter of the 2021 Application for Investigation. It is difficult to understand how deleting these key provisions "improves" the PTTW or addresses CAMQ's concerns, and CAMQ representatives have recently met with Ministry officials to strongly oppose the elimination of the critically important low-water conditions. Since CAMQ has not yet been provided with an updated copy of the draft PTTW, it remains to be seen whether the low-water conditions will be revised or retained.

More fundamentally, CAMQ submits that merely inserting new or improved conditions in the PTTW does not necessarily guarantee compliance by the company, particularly given the company's history of non-compliance. This is precisely why timely and effective Ministry enforcement of the PTTW conditions is necessary, but the Ministry has steadfastly and unreasonably refused to conduct the investigations requested by CAMQ. This unfortunate track record regarding PTTW compliance does not inspire much confidence among CAMQ members that the Ministry will strictly enforce the legally binding requirements in the new PTTW if issued.

The Decision Summary goes on to vaguely state that the Ministry will continue to "conduct site visits and inspections at Long's Quarry to assess the Company's compliance with its Environmental Compliance Approval and Permit to Take Water (page 7)." However, an inspection or site visit is not equivalent to a formal investigation, and it is CAMQ's understanding that the Ministry's inspection activities in relation to the PTTW have been relatively infrequent over the years. For example, to CAMQ's knowledge, Ministry staff visited the site on just two occasions over a four-year span specifically for PTTW purposes (e.g., a site inspection on August 9, 2016 and a site visit that formed part of a PTTW "technical review" on November 5, 2020).

Given the company's history of non-compliance and the increasing prevalence of low-water declarations by Quinte Conservation, the four-year interval between these Ministry inspections involving the PTTW is unacceptable to CAMQ. Moreover, the Ministry's sporadic inspections have not induced the company to comply with the PTTW, and the Ministry's current refusal to undertake appropriate enforcement measures for known contraventions will also not incentivize compliance by the company.

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For the foregoing reasons, CAMQ concludes that the Ministry's refusal of the 2021 Application for Investigation is unjustifiable, contrary to the public interest, and inconsistent with the Ministry's professed commitment to securing compliance with environmental legislation. In our view, CAMQ's Application should not have been summarily dismissed by the MECP for specious reasons, particularly since the Decision Summary itself concedes that PTTW non-compliance occurred in this case. Instead, the matter should have been referred to the MECP's Investigation and Enforcement Branch so that an informed decision could be reached as to which abatement or enforcement tool (e.g., prosecution, environmental penalty, etc.) would be appropriate for specific and general deterrence purposes.

We trust that the foregoing information may be of assistance to you as your office reviews and reports upon the Ministry's mishandling of the 2021 Application for Investigation. Please feel free to contact the undersigned if you have any questions or comments arising from this letter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Sue Munro, CAMQ
Alison Pilla, MECP
Victor Castro, MECP

APPENDIX A

2021 CarswellOnt 12405
Ontario Court of Justice

R. v. C. H. Demill Holdings Inc.

2021 CarswellOnt 12405

R. v. C. H. Demill Holdings Inc.

A.M. Colterman J.P.

Judgment: August 11, 2021
Docket: 19-12685

Counsel: Madeline Ritchie (Sylvia Davis, Crown Counsel, at plea), for Crown
Tony Fleming, Spencer Putnam, for Defence

Subject: Environmental

Headnote

Environmental law

Table of Authorities

Statutes considered:

Environmental Protection Act, R.S.O. 1990, c. E.19
Generally — referred to

s. 186(3) — referred to

***A.M. Colterman J.P.*:**

PROSECUTION DISPOSITION REPORT (TRIAL)

1

File Name:	**R. v. C. H. Demill Holdings Inc.**
LSB File #:	19-12685
IEB File #:	7060-BAPP53
Person charged:	C. H. Demill Holdings Inc.
Date of Report:	August 11, 2021
Offence(s):	1) did commit the offence of failing to comply with Condition 3(4) of Environmental Compliance Approval 9075-AHNKJD, by failing to obtain samples representative of the discharge by conducting turbidity tests prior to discharging, according to item 3 of the Contingency Plan. 2) did commit the offence of failing to comply with Condition 3(4) of Environmental Compliance Approval 9075-AHNKJD, by failing to obtain samples representative of the discharge by conducting turbidity tests prior to discharging, according to item 3 of the Contingency Plan.

Legislation:	1) Section 186(3) of the *Environmental Protection Act* (*EPA*) 2) Section 186(3) of the *EPA*
Date(s) of offence(s):	1) August 8-9, 2018 2) October 2-3, 2018
Investigator:	David Fisher
Crown:	Madeline Ritchie (Sylvia Davis, Crown Counsel, at plea)
Defence Counsel:	Tony Fleming and Spencer Putnam
Date of charge:	March 26, 2021
First Appearance Date:	May 31, 2021
Date of plea:	August 11, 2021
Pleas:	Count 1: Guilty Count 2: Withdrawn
Disposition:	Count 1: Guilty Count 2: Withdrawn
Date of Disposition:	August 11, 2021
Justice of the Peace:	A. M. Colterman
Level of Court:	Ontario Court of Justice
Location of Court:	Belleville (held by tele-conference)
Jurisdiction:	Eastern Region
Other Ministry's prior convictions used in sentencing:	None
Prior Conviction(s):	None
Date of Sentence:	August 11, 2021
Sentence:	Count 1: Fined $4,250 plus Victim Fine Surcharge (given 2 months to pay)

Detailed reasons given/copy obtained:		**Given**	**Copy Ordered**
1.	Judgment	No	No
2.	Sentencing	No	No
Copy of Information, as sworn, in file:		Yes	
Appeal:		No	

FACTS IN SUPPORT OF DISPOSITION:

2 The following Agreed Statement of Facts was read into the court record:

1. C. H. Demill Holdings Inc., (The "Company"), is a duly incorporated company in the Province of Ontario. The Company operates as a limestone quarry at 13 Melrose Rd, Rural Route 1, Shannonville, Ontario ("Site").

2. The Company holds Environmental Compliance Approval No. 9075-AHNKJD, issued under the Environmental Protection Act, to operate an Industrial Sewage Works at the Site for the collection, transmission, treatment and disposal of precipitation and groundwater that accumulates at the Site ("ECA").

3. The ECA contains detailed terms and conditions regarding the pumping/discharge of water that collects at the Site. Condition 3(2) requires the Company to wait 48 hours after the termination of a rain event producing up to 25 mm of runoff before resuming pumping. This provides sufficient settling time for any rain runoff and groundwater collected in the settling pond at the Site.

4. However, condition 3(4) of the ECA states that, in the event that a low-water advisory is issued by the Quinte Conservation Authority, the requirement for a 48-hour settling wait time will not apply. Instead the provisions of the Contingency Plan apply with respect to discharges.

5. The Contingency Plan states that, during a low-water advisory issued by the Quinte Conservation Authority and within 24 hours of the termination of a rain event, the Company must obtain samples representative of the discharge and conduct turbidity tests prior to pumping or discharging from the settling pond. Provided the

Turbidity tests indicate an acceptable value, discharge may commence or continue.

6. On August 8, 2018, a low water advisory had been issued by the Quinte Conservation Authority and was in effect and a rain event occurred. Within 24 hours of the termination of the rain event, the Company discharged without first obtaining samples and conducting turbidity tests, and thus did not implement the Contingency Plan as required by condition 3(4) of the ECA.

7. Section 186(3) of the Environmental Protection Act makes it an offence to fail to comply with a term or condition of an ECA issued under that Act.

8. Therefore, between August 8, 2018 and August 9, 2018, C. H. Demill Holdings, Ltd. failed to comply with condition 3 (4) of Environmental Compliance Approval 2753-6VSNF9, by failing to obtain samples representative of the discharge by conducting turbidity tests, prior to discharging, according to item 3 of the Contingency Plan under Sec.186 (3) of the Environmental Protection Act.

3 Note that the ECA number in paragraph 8 (2753-6VSNF9) is a typo that was read into the record; it should have been the same as in paragraph 2 (ECA No. 9075-AHNKJD), as listed in the charges before the court.