



# Environmental Review Tribunal

Case Nos.: 11-058/11-059/11-060/11-061/11-062/  
11-063/11-064/11-065/11-066/11-074

## **Dea v. Director, Ministry of the Environment**

In the matter of an appeal by AbiBow Canada Inc., AbitibiBowater Inc., Abitibi-Consolidated Company of Canada, Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey and Alain Grandmont filed May 27, 2011 and OfficeMax Incorporated filed May 30, 2011 for a Hearing before the Environmental Review Tribunal pursuant to section 140 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, with respect to Order No. 6248-8GRHU2 issued by the Director, Ministry of the Environment, on May 13, 2011 under sections 18, 44, 132 and 196 of the *Environmental Protection Act* regarding the property known as the Mud Lake Waste Disposal Site located in the City of Kenora, Ontario; and

In the matter of a teleconference held on June 3, 2011 at 11:00 a.m.

**Before:** Alan D. Levy, Member

### **Appearances:**

- Dennis Mahony - Counsel for the Appellants, AbitibiBowater Inc, AbiBow Canada Inc., Abitibi-Consolidated Company of Canada, Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey and Alain Grandmont
- Daniel Kirby - Counsel for the Appellant, OfficeMax Incorporated
- Brian Blumenthal  
and Justin Jacob - Counsel for the Director, Ministry of the Environment

**Dated** this 13<sup>th</sup> day of **June, 2011.**

## Reasons for Decision

### Background:

This case involves the future safeguarding of an old industrial landfill which has been closed for many years.

As part of a pulp and paper production facility in the City of Kenora, a waste pile consisting primarily of wood bark was created in 1973 and continued in use until the mid-1980s. The waste pile, also referred to as a landfill, has been named the Mud Lake Waste Disposal Site (the "Site"). A Provisional Certificate of Approval, Number A600605, was issued for the Site by the Ministry of Environment (the "MOE") in 1982 and revised in 2004.

The landfill closed when it reached its capacity of one million cubic metres of waste, and another waste pile was established nearby. It was capped with clay cover and seeded in 2003 pursuant to the Mud Lake Closure Plan Design Report (July 2003) approved by the MOE. It has been described as a large hill covered with grass. At the time of closure, financial assurance in the amount of \$258,748 for the maintenance and monitoring of the Site was provided to the MOE in the form of a letter of credit from a bank.

The pulp and paper facility and the Site have been owned and operated by many companies over the years. The current owner is 4513541 Canada Inc. ("451") which acquired the facility and the Site from Abitibi-Consolidated Inc. ("ACI") in late 2010. 451 was at that time and remains insolvent.

Surface drainage from the waste pile is collected by a series of ditches and flows by gravity to a pond named Mud Lake, located adjacent to and north of the landfill. Leachate generated within the waste pile is collected by a French drain system, a rock-lined trench, with gravity flow to a pumping station. From there, the leachate is pumped to municipal sewers which flow into Kenora's sewage treatment plant. The primary outlet from the pond also directs water to the leachate pumping system ("LPS") and ultimately to the sewage treatment plant. There is a secondary outlet from Mud Lake which is used only when the level of water in the pond rises to a point which exceeds the capacity of the LPS. At that stage, this outlet discharges to a wetland located at the west end of Rabbit Lake, which ultimately flows into the Winnipeg River, a drinking water source for many rural residences and First Canadian communities.

On May 13, 2011, a Director's Order, No. 6248-8GRHU2 (the "Director's Order"), was issued by MOE Director Trina Rawn to the Appellants and 451, pursuant to the *Environmental Protection Act* ("EPA") sections 18, 44, 132(1) and 196, among others. By way of overview, the Director's Order requires the named orderees to:

- conduct and report on weekly inspections of surface water and leachate collection systems, and the LPS;

- conduct and report on annual inspections of the final cover, leachate seeps, slope erosion, nuisance factors (for example, litter, rodents and bears) and the perimeter ditches;
- initiate and report on a surface and ground water monitoring program;
- arrange for Kenora to continue to accept and treat leachate from the Site;
- arrange for the continuation of electricity supply to operate the LPS; and
- deliver additional financial assurance in the sum of \$1 million.

The Appellants have appealed all aspects of the Director's Order to the Tribunal pursuant to section 140(1) of the *EPA*. 451 is the only order which has not filed an appeal. On behalf of his clients, Dennis Mahony requested the Tribunal to convene a meeting on short notice via teleconference, in order to consider a joint proposal being developed by the Parties. He indicated that the proposal would include a stay of some provisions of the Director's Order, an amendment of others, and an adjournment to permit ongoing settlement discussions.

Counsel for the Appellants and Director agreed that the teleconference would be held on June 3, 2011. Just prior to the commencement of that meeting Mr. Mahony circulated a document entitled "Interim Order," a copy of which is attached at Appendix A (the "Draft Interim Order"). It sets out the joint proposal which the Parties have asked the Tribunal to approve. The meeting was attended by the Director as well as Counsel.

### **Relevant Legislation:**

#### *Environmental Protection Act:*

132(1) The Director may include in an approval or order in respect of a works a requirement that the person to whom the approval issued or the order is directed provide financial assurance to the Crown in right of Ontario for any one or more of,

- (a) the performance of any action specified in the approval or order; ...
- (c) measures appropriate to prevent adverse effects upon and following the cessation or closing of the works.

143(1) The commencement of a proceeding before the Tribunal under this Part does not stay the operation of a decision or order made under this Act ...

- (2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,
  - (a) an order to monitor, record and report; or
  - (b) an order issued under section 168.8, 168.14 or 168.20.
- (3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,
  - (a) danger to the health or safety of any person;
  - (b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or
  - (c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

**Issue:**

Whether the Tribunal should approve the terms of the Draft Interim Order prepared by the Parties, which includes a stay of some of the provisions of the Director's Order.

**Discussion and Analysis:**

The Director's Order states that the landfill has been abandoned, resulting in a serious risk of contaminants being discharged into the environment and causing adverse effects. This concern was attributed to several factors, including the following:

- The Receiver for the insolvent owner of the Site, 451, was granted permission by an order of the Quebec Superior Court to abandon the landfill, effective on May 16, 2011.
- 451 will stop making payments for supply of electric power to run the LPS and treatment of leachate by Kenora.
- Routine inspect of the landfill and monitoring of leachate will be discontinued.
- The passive and electrical mechanical systems required to drain surface water and leachate will fail.
- When the primary outlet from Mud Lake becomes obstructed by the accumulation of debris, the water level will rise and overflow into the wetland.

In 2009, the pumps had ceased to operate causing contaminated water to discharge through the Mud Lake outlet. In 2010, a blockage of the primary outlet was discovered.

The Notice of Appeal filed by Mr. Mahony claims that for a variety of reasons, none of his clients should be included as Parties to the Director's Order. As a result of insolvency and restructuring, some of the corporate Appellants he represents have been released of any legal obligation they might otherwise have had to maintain the landfill and respond to the Director's Order. He submits that, as a shareholder in Abitibi-Consolidated Inc., AbitibiBowater Inc. should not be held liable for any of ACI's environmental obligations. He argues that the individuals named in the Order should not be held liable merely because they were corporate directors. He states that these Appellants were not in "management and control" of the landfill, as defined in the *EPA*. Overall, Mr. Mahony's clients claim that the Director's attempt to impose liability on them "is unfair, oppressive and unlawful, and an abuse of power."

The Notice of Appeal by OfficeMax Incorporated ("OMI") claims it has never had management or control of the Site, or a legal or beneficial interest in it, nor has OMI ever participated in operations which had been carried on there. Boise Cascade Corporation ("BCC") acquired OfficeMax in 2003. BCC was the owner of Boise Cascade Canada Ltd. ("BCCL"), an independently managed subsidiary which had established the landfill in 1973 and operated the mill at this location until 1994. A series of corporate changes occurred over the next few years involving Rainy River Forest Products Inc., Stone-Consolidated Corporation and ACI. After creditor protection proceedings were concluded, AbiBow Canada Inc. emerged in December 2010 as a new entity and the property was promptly sold to 451.

The interim changes to the Director's Order proposed by the Parties are summarized briefly below:

- The provisions regarding financial assurance in work items 18 and 19 of the Director's Order will be stayed pending the outcome or final resolution of the appeals.
- The timing for the requirements in work items 1 through 12 will be delayed by a few days or weeks in some instances.
- Arrangements to be made with Kenora for accepting and treating leachate will continue until the outcome or final resolution of the appeals.
- Arrangements to be made with Hydro One Networks Inc. to continue supplying electricity to the Site will continue until the outcome or final resolution of the appeals.

Sections No. 3 and 4 of the Draft Interim Order are intended to provide the Parties with a period of approximately two months in order to focus on settlement negotiations without the distraction of scheduling and preparing for a Preliminary Hearing.

During the teleconference the Parties agreed to participate in another meeting via teleconference to be held on August 17, 2011, commencing at 3:00 p.m. If approved by the Tribunal, the Parties agreed that the Draft Interim Order will be considered effective as of June 3, 2011.

A letter from the Tribunal Case Manager to Mr. Mahony (dated May 31, 2011) and another to Mr. Kirby (dated June 1, 2011) established a deadline of June 14, 2011 for providing information requested by the Tribunal in relation to matters involving scheduling, convening and providing notice of the Preliminary Hearing. The Parties requested that this deadline be postponed until August 24, 2011.

## **Findings:**

In light of the rather long and complicated history of the establishment, operation, ownership, closure and subsequent management of the Mud Lake Waste Disposal Site, and the complex issues raised by the appeals, it is understandable that the Parties and Counsel need additional time to fully canvass matters and attempt to negotiate a final settlement addressing all concerns. In my view the Draft Interim Order represents a constructive step forward.

During the teleconference, which was convened pursuant to Rule 108 of the Tribunal's Rules of Practice, the Director and all Counsel agreed that none of the statutory bars to a stay, identified in *EPA* section 143(3), apply in the circumstances of this case. In any event, I am satisfied that all of the financial concerns about the continuation of proper management of the landfill are addressed by the commitments made by the Appellants in the draft Interim Order. On this basis, and mindful of the requirements of Rule 110, I informed the Parties at the conclusion of the teleconference that I would approve the terms of the draft Interim Order and I hereby confirm that decision.

In addition, I confirm my decision to grant the Appellants' request for an extension until August 24, 2011, of the deadline for providing information to the Tribunal in relation to the Preliminary Hearing. I am satisfied that this extension is reasonable and appropriate under the circumstances.

## Order

1. The Tribunal hereby approves the terms set out in the Draft Interim Order prepared by the Parties and attached as Appendix A.
2. In accordance with section 2 of the Draft Interim Order, work items 1 through 17 and 20 through 23 of Director's Order No.6248-8GRHU2, issued on May 13, 2011, are hereby amended on an interim basis pending the outcome or final resolution of these Appeals.
3. In accordance with section 1 of the Draft Interim Order, work items 18 and 19 of the Director's Order regarding financial assurance are hereby stayed pending the outcome or final resolution of these appeals.
4. The deadline for the Appellants to provide information requested by the Tribunal in relation to the Preliminary Hearing is hereby extended until August 24, 2011.
5. In accordance with section 3 of the Draft Interim Order, these appeals are adjourned to a teleconference with the Parties on August 17, 2011, commencing at 3:00 p.m.

*Stay Granted on Consent  
Interim Agreement Approved  
Teleconference Scheduled*

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Alan D. Levy, Member

Appendix A – Draft Interim Order

## Draft Interim Order

ERT File Nos. 11-058 to 11-066 and 11-074

### ENVIRONMENTAL REVIEW TRIBUNAL

**IN THE MATTER OF** an Appeal by AbiBow Canada Inc., AbitibiBowater Inc., Abitibi-Consolidated Company of Canada, Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey, and Alain Grandmont filed May 27, 2011 with the Environmental Review Tribunal pursuant to Section 140 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended (the "EPA") with respect to Order No. 6248-8GRHU2 issued by the Director, Ministry of the Environment, under sections 18, 44, 132, and 196 of the EPA (the "Director's Order") concerning the property known as the Mud Lake Waste Disposal Site located in Kenora, Ontario (the "Site");

and

**IN THE MATTER OF** an Appeal by OfficeMax Incorporated filed May 30, 2011 with the Environmental Review Tribunal pursuant to Section 140 of the EPA with respect to Director's Order No. 6248-8GRHU2 issued by the Director, Ministry of the Environment, under sections 18, 44, 132, and 196 of the EPA concerning the property known as the Mud Lake Waste Disposal Site located in Kenora, Ontario

### INTERIM ORDER

1. On consent of the parties to this Appeal, work items 18 & 19 identified in Director's Order # 6248-8GRHU2 are stayed pending the outcome or final resolution of this Appeal;
2. On consent of the parties to this Appeal, work items 1 through 17 and items 20 through 23 identified in Director's Order # 6248-8GRHU2 are, as set out below, amended on an interim basis pending the outcome or the final resolution of this Appeal;

**Item No. 1**

By no later than June 3, 2011 the Parties shall submit to the undersigned Director, written confirmation of having retained a Qualified Consultant to prepare and complete all work specified in items 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Interim Order. The written confirmation shall include the name and professional contact information for the retained Qualified Consultant.

**Item No. 2**

Beginning no later than June 3, 2011 and continuing for the duration of this Interim Order, the Parties shall assess whether there is a discharge of Leachate or any other contaminants from the Landfill, by undertaking a weekly inspection program to ensure that all aspects of the surface water and leachate collection systems and the leachate pumping station are operating correctly.

**Item No. 3**

The Parties shall report, in writing, the results of each weekly inspection required by Item No.2 of this Interim Order, including the particulars of any malfunctions, deficiencies or corrective action taken, to the District Manager no later than seven (7) days after the end of the calendar month in which the weekly inspections or corrective action took place.

**Item No. 4**

Beginning no later than July 31, 2011 and continuing on an annual basis thereafter for the duration of this Interim Order, I order the Parties, both jointly and severally, to inspect and evaluate the following components of the Landfill

- (a) the final cover integrity;
- (b) the vegetative cover;
- (c) leach seeps;
- (d) slope erosion;
- (e) nuisance factors such as litter, rodents and bears;
- (f) perimeter ditches

for obstruction or damage and to record the results of the inspection and evaluation, and any corrective action taken, in writing within one business day of the inspection and evaluation.

**Item No. 5**

The Parties shall report, in writing, the recorded results of the inspection and evaluation required by Item No.4 of this Interim Order, and any corrective action



taken, to the District Manager no later than thirty (30) days from the date of the inspection or corrective action, as the case may be.

**Item No. 6**

The Parties shall initiate by June 3, 2011 and continue for the duration of this Interim Order a surface water monitoring program in accordance with the requirements of Appendix "A" of this Order.

**Item No. 7**

The Parties shall report the results of the sampling required by Item No. 6 in writing to the District Manager as soon as they become available and no later than thirty (30) days from the date of sampling.

**Item No. 8**

The Parties shall initiate by June 3, 2011 and continue for the duration of this Interim Order a groundwater monitoring program in accordance with the requirements of Appendix "B" of this Order.

**Item No. 9**

The Parties shall report the results of the sampling required by Item No. 8 in writing to the District Manager as soon as they become available and no later than thirty (30) days from the date of sampling.

**Item No. 10**

In the event that the surface water runoff exceeds leachate collection system/culvert capacity and results in a discharge of liquid from Mud Lake into the Rabbit Lake outlet, the Parties shall increase the frequency of water quality monitoring for SML-1 to a weekly basis, in accordance with the requirements of Appendix "A" of this Interim Order until the undersigned Director is satisfied that there is no longer a discharge of liquid from Mud Lake into the Rabbit Lake outlet.

**Item No. 11**

The Parties shall report the results of the sampling required by Item No. 10 in writing to the District Manager as soon as they become available and no later than fourteen (14) days from the date of sampling.

**Item No. 12**

By March 31, 2012, and on an annual basis thereafter for the duration of this Interim Order, the Parties shall submit to the District Manager, an annual monitoring report, which shall, at a minimum, include the following:

- (a) a drawing(s) of the Landfill indicating all surface water monitoring location;
- (b) tables outlining monitoring locations, analytical parameters sampled, frequency of sampling and measurements;
- (c) an analysis and interpretation of the surface water monitoring data;
- (d) an assessment of surface water quality in respect of the PWQO;
- (e) a review of the adequacy of the monitoring program and recommendations for any changes in the monitoring program;
- (f) a summary of inspections;
- (g) a summary of complaints made regarding the maintenance of the Landfill and the response and action taken by the Parties.

**Item No. 13**

The Parties shall make arrangements with the City of Kenora to ensure that the City of Kenora continues to accept leachate from the Landfill for treatment and disposal at the City of Kenora's Wastewater Treatment Plant for the duration of this Interim Order substantially in accordance with paragraphs 1 to 6 of the conditions of the agreement dated November 22, 2004 attached to the Director's Order as Appendix "C".

**Item No. 14**

The Parties shall provide written confirmation to the District Manager by July 15, 2011 that the arrangements described in Item No. 13 have been memorialized in a written agreement with the City of Kenora

**Item No. 15**

The Parties shall make arrangements with Hydro One Networks Inc. to deliver an adequate supply of electricity to the Landfill necessary to comply with the terms of this Interim Order, for its duration.

**Item No. 16**

The Parties shall provide written confirmation to the District Manager that the arrangements described in Item No. 15 have been made with Hydro One Networks Inc.

**Item No. 17**

The Parties shall correct any malfunctions or deficiencies described in Item No. 2 and Item No. 4 within thirty (30) days of the identification of the malfunction or deficiency, as the case may be. In the event that a malfunction or deficiency cannot reasonably be corrected within thirty (30) days, the District Manager will, in cooperation with the Parties, devise an alternative timeline and/or measures that will continue to be protective of the environment.

**Item No. 20**

451 shall ensure that ABH, ABI, ACC, the Corporate Directors, Office Max, the Qualified Consultant, including their employees, contractors and representatives are permitted access to the Landfill for the purposes of complying with this Interim Order until otherwise notified in writing by the undersigned Director.

**Item No. 21**

Before dealing in any way with the Landfill, 451 shall give a copy of this Interim Order to every person who will acquire an interest in the site as a result of the dealing.

**Item No. 22**

The Parties shall take all reasonable measures to ensure that their employees, contractors, agents and representatives comply with all applicable law in carrying out the measures required by this Interim Order.

**Item No. 23**

All times described in this Interim Order are Central Standard Time. Failure to comply with a term of this Order by the date or time specified does not absolve the Parties from compliance with that requirement.

3. On consent of the parties, this Appeal is adjourned to the earliest date available for the ERT and the parties after the end of July, 2011 so that the undersigned may focus on settlement discussions;

4. Without consent of the parties to this Appeal, unless the circumstances described in section 143(3)(a)(b) & (c) of the *Environmental Protection Act* exist, no motion or other proceeding in respect of this matter shall be brought before the ERT during the period of adjournment as prescribed in paragraph 3;

5. Any party to this Appeal may apply for leave of the ERT to revoke or amend this Interim Order on 15 days' notice to the other parties.

6. The parties consent to the terms of this Interim Order and compliance with the terms of this Interim Order shall be without prejudice to any position the parties may take with respect to all or any part of the Director's Order.