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

Case Nos.: 11-144/11-146/11-147/11-148/11-149/
11-150/11-151/11-152/11-153/11-154

Office Max Incorporated v. Director, Ministry of the Environment

In the matter of appeals by Office Max Incorporated filed August 30, 2011 and 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 August 31, 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 an Order issued by the Director, Ministry of the Environment, on August 16, 2011 under section 18, 44, 132, 196 and 197 of the *Environmental Protection Act*, regarding the property known as Margach Waste Disposal Site located in the City of Kenora, Ontario; and

Case Nos.: 11-155/11-156/11-157/11-158/11-159/
11-160/11-161/11-162/11-163/11-175

Grandmont v. Director, Ministry of the Environment

In the matter of appeals by AbiBow Canada Inc., Abitibibowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Forest Productions Inc., Pierre Rougeau, David J. Paterson, Jacques P. Vachon, William G. Harvey and Alain Grandmont filed September 9, 2011 and by Weyerhaeuser Company Limited filed September 16, 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 an Order issued by the Director, Ministry of the Environment, on August 25, 2011 under section 18, 44, 132, 196 and 197 of the *Environmental Protection Act*, regarding the property known as Bowater Mercury Waste Disposal Site located in the Town of Dryden, Ontario; and

In the matter of teleconferences held October 31, and November 4, 2011.

Before: Alan D. Levy, Member

Appearances:

Dennis Mahony and Tyson Dyck	-	Counsel for the Appellants, AbitibiBowater Inc, AbiBow Canada Inc., Abitibi-Consolidated Company of Canada, Abitibi-Consolidated Inc., Bowater Canadian Forest Productions Inc., Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey & Alain Grandmont
Elizabeth Putnam	-	Counsel for the Appellant, Office Max Incorporated
Gabrielle Kramer	-	Counsel for the Appellant, Weyerhaeuser Company Limited
Brian Blumenthal and Justin Jacob	-	Counsel for the Director, Ministry of Environment

Dated this **2nd** day of **December, 2011**.

Reasons for Decision

Background:

Three separate Director's Orders have been issued by Trina Rawn, a Director in the Ministry of Environment ("MOE"). Most of the orderees named in these Orders have appealed to the Environmental Review Tribunal (the "Tribunal") pursuant to section 140(1) of the *Environmental Protection Act* ("*EPA*") and progress with these appeals is updated in this order. Many, but not all, of the Appellants are the subject of all of these Director's Orders, and are represented by the same Counsel. They have requested that the early stages of the appeals be dealt with in a series of joint teleconferences prior to the Tribunal convening one or more Preliminary Hearings.

The first Director's Order ("DO-1"), MOE No. 6248-8GRHU2, is dated May 13, 2011, and has been referred to by Counsel as the Mud Lake Order. It was the subject of a Tribunal Order issued by me on June 13, 2011. The Mud Lake Waste Disposal Site ("WDS") is located in the City of Kenora and constitutes a waste pile consisting primarily of wood bark from a now-closed pulp and paper production facility. This WDS was created in 1973 and continued in use until the mid-1980s. The Parties involved with DO-1 reached an agreement with respect to a stay of some of that Order's provisions and amendments to others, as well as an adjournment to permit ongoing settlement discussions. These matters were addressed in my June 13, 2011 Order, along with an extension of time for providing information required by the Tribunal to convene a Preliminary Hearing.

The second Director's Order ("DO-2"), No. 8301-8HFPUQ, is dated August 16, 2011, and has been referred to by Counsel as the Margach Order. The Margach WDS, also located in the City of Kenora, is an 11-acre landfill which received non-hazardous waste material from the same facility as the Mud Lake WDS. This waste included wood room bark, primary clarifier sludge, biosolids from a secondary treatment facility, sludge from a recycle facility, general wood waste, ground scrapings, boiler ash and clinkers. This WDS was in use from 1986 until 2009, and contains a reported volume of 1,204,700 cubic metres of waste.

The third Director's Order ("DO-3"), No. 4345-8HFPHW, dated August 25, 2011, deals with the Bowater Mercury WDS and has been referred to by Counsel as the Dryden Order. This WDS is located in the Town of Dryden and was created in 1971 for the disposal of mercury contaminated waste from the demolition of a local mercury chloroalkali plant. The plant's owner, Reed Ltd., had produced chemicals (sodium hydroxide and chlorine) used for bleaching paper. The production process caused the plant's building and associated equipment to become contaminated with trace amounts of mercury. During the period from 1971 until 1981, eight concrete cells containing mercury-contaminated rubble, stabilized sludge and equipment, were buried at this WDS. The Parties in this matter reached an interim agreement pending

appeal, and I approved the same in a teleconference on September 28, 2011. This was subsequently confirmed in my Order issued on November 18, 2011.

The Appellants are variously alleged by the Director's Orders to have some degree of current or historical responsibility, in one capacity or another (as former owners or operators, corporate officers or directors, etc.) to address environmental issues which are considered by the MOE to be outstanding with respect to one or more of the three sites. For a variety of similar and different reasons the Appellants deny that they are responsible for dealing with current environmental issues at these sites, and seek to have the Tribunal dismiss the Orders.

In a teleconference held on October 31, 2011, the issue of terms of an interim Order dealing with the Margach WDS and appeals from DO-2 was discussed. The Parties required additional time in order to negotiate a resolution of this matter, and this resulted in their reaching an agreement. The terms of this resolution are contained in the Draft Interim Order which was jointly submitted by Counsel to the Tribunal and is attached as Appendix A. Another teleconference, the most recent one in the series of seven telephone meetings dealt with by the Tribunal in these proceedings, was held on November 4, 2011, to discuss same. I approved the terms of this agreement at that time, and this decision confirms that determination and provides my reasons for doing so.

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:

The issue for determination is whether the Tribunal should approve the terms of the Draft Interim Order at Appendix A, prepared by the Parties with respect to the Margach WDS. It includes a stay of some of the provisions of the Director's Order dated August 16, 2011 (DO-2).

Discussion and Analysis:

According to DO-2, the Margach WDS ("the Site") was established in 1986 by Boise Cascade Canada Ltd. as a landfill to service its pulp and paper mill in Kenora. The mill ceased operations in 2005, and was demolished between 2007 and 2009. Demolition debris from the mill was also deposited at the Site, concluding in October 2009. Its present state is described by the Director as follows (DO-2, sections 1.41 and 1.42):

> Currently the WDS consists of a large hill of waste with a reported volume of 1,204,700 cubic metres. Some natural revegetation of the WDS has occurred but an impervious cover has not been placed over the waste. These seeps are being captured in an engineered wetland for attenuation prior to discharge to the natural environment.
>
> In December, 2006, the Ministry ascertained that information presented in the 2004 and 2005 annual monitoring reports for the WDS showed contaminant levels in excess of the Ministry's Reasonable Use Guidelines at the southeast boundary of the WDS which indicated that contaminants from the WDS were having an off-site impact.

Ground water monitoring has detected contamination in monitoring wells south of the Site and indicates that a leachate plume from the fill area, characterized by elevated levels of some parameters (iron, manganese, conductivity and total dissolved solids) has extended beyond the southern boundary of the property. A contaminant attenuation zone ("CAZ") was created to the south of the Site, occupying the neighbouring Hydro One right of way. Attenuation is occurring within the CAZ although some parameters do exceed reasonable use limits.

Leachate generation is continuing to occur at the Site. The Director has been advised that proper closure of the WDS would significantly reduce leachate production, and a closure plan should be provided which considers ways to reduce infiltration of precipitation. This would include a low permeability cover and grading to enhance runoff. Accordingly, the primary objective of DO-2 "is to require the Parties to prepare and implement a closure plan in order to

prevent or reduce any adverse effects to the natural environment by preventing or reducing the amount of Leachate generated by the WDS" (section 1.49).

The property was owned by Abitibi-Consolidated Inc. until November 2010 when it was sold to 4513541 Canada Inc. ("451 Inc."). 451 Inc. was at that time and remains insolvent. It is in receivership and has no directors or officers.

Several companies have held (i.e., been named in) the Provisional Certificate of Approval ("CofA"), No. A600606, issued by the MOE for the Site. Since October 2002 the CofA has been held by Abitibi Consolidated Company of Canada ("ACC"), one of the Appellants.

The Receiver for 451 Inc. was granted permission by an order of the Quebec Superior Court to abandon the landfill, effective on April 30, 2011. DO-2 states that this WDS "is now an abandoned property that is owned by a company that is insolvent and that has no directors, officers, or employees" (section 1.32, page 8).

The CofA required ACC to submit an estimate of the cost of final closure, and monetary security, or financial assurance ("FA"), in an amount required by the MOE. This amount would cover closure costs and long term monitoring of the Site. FA of $1,796,511 was provided in the form of a letter of credit. The CofA required updating of these costs and adjustment of the amount of FA every three years, but this has not yet been done by ACC.

The Director cited an excerpt from material filed by AbitibiBowater Inc. ("ABI"), one of the Appellants, in August 2010 with respect to proceedings pursuant to the federal *Companies' Creditors Arrangement Act* ("*CCAC*") in the Quebec Superior Court. This material stated as follows (section 1.38 of DO-2):

> With respect to the Kenora Margach Landfill Property, the maximum Environmental Exposure that could be incurred is estimated to be $4,000,000 for the capping and closure of the landfill as well as the post closure groundwater monitoring for the next thirty (30) years. The Kenora Margach Landfill Property is assessed at $242,000. On July 2, 2010, the [MOE] informed the Petitioners that following the inspection of the landfill on May 27, 2010, and the future closure of the site, the Petitioners would have to submit a closure plan and an application to amend the certificate of approval. The Petitioners had until August 2, 2010 to provide a written response indicating their commitment to full closure of the site and a timetable submission of a closure plan and an application to change the status of the site closed. The Petitioners have yet to provide the response requested by the Ministry.

The Director also referred to the following information provided on behalf of ABI in August 2010 (section 1.39 of DO-2):

> With respect to the maximum estimated set out in the motion materials of $4 million (for capping, closure and post-closure groundwater monitoring for the next 30 years), Abitibi views this as a conservative estimate. Monitoring and maintenance costs for this site are currently in the range of $75,000/yr with such costs to decrease to approximately $36,000/yr following closure. Closure activities at the site have been estimated to be in the range of $2 million for capping and vegetation with additional costs of approximately $100,000 for general decommissioning, leachate seep repair and [related] costs. The 30-year timeframe is conservative, 25 years is more consistent with MOE post-closure monitoring requirements.

Based on these figures and the FA currently held by the MOE, the Director has estimated that about $2.3 million now remains unsecured or unfunded.

The Notice of Appeal filed by Dennis Mahony, Counsel for a number of Appellants, claims that for a variety of reasons, none of his clients should be included as orderees to the Director's Order. It maintains that there is no material threat to the environment as the engineered wetland is controlling surface water impacts, and the extended CAZ is sufficient to attenuate ground water contamination. Furthermore, the calculation of the amount of additional FA was not prepared on a reasonable basis.

As a result of insolvency and restructuring, the appeal claims that at least some of the corporate Appellants have been released of any legal obligation they might otherwise have had to maintain the Site and respond to DO-2. The individual orderees have also been released as part of the *CCAC* proceedings. In addition, they should not be held liable merely because they were corporate directors during the relevant period of time. The appeal asserts that Mr. Mahony's clients were not in "management and control" of the landfill, as defined in the *EPA*. Overall, they 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 Office Max Incorporated ("OMI") claims that it has never had management or control of the Site, or a legal or beneficial interest in it, nor has it ever participated in operations which had been carried on there. In addition, OMI maintains that it does not have access to the WDS and cannot take action or steps with respect to it. Accordingly, it should not have been named in DO-2.

For the most part, the interim changes to DO-2 proposed by the Parties fall into two categories:

- the requirement to provide FA of $2.3 million in item 16 of the Order, and an FA re-evaluation report in item 17, are to be stayed pending the outcome or final resolution of the appeals;

- the deadlines for implementing the requirements in items 5 through 15 are to be delayed somewhat.

Sections 3 and 4 of the Draft Interim Order are intended to provide the Parties with additional time in order to focus on settlement negotiations without the distraction of scheduling and preparing for a Preliminary Hearing. Section 5 provides a mechanism for any Party to apply to the Tribunal on 15 days' notice in order to revoke or amend the terms of the Draft Interim Order. Section 6 provides that the Parties' agreement to comply with the terms of the Draft Interim Order, including the preparation and submission of a CofA amendment application, is without prejudice to any position they might take in future in the appeals.

The Parties agreed that the terms of the Draft Interim Order should become effective immediately upon approval by the Tribunal.

Findings:

The above summary of factual details and issues is based on information contained in DO-2 and the Parties' Notices of Appeal. It is the basis for, among other things, my determination of the request for a stay. However, this summary does not constitute findings of fact or a determination of the Parties' positions, and does not bind any of them as the appeal process progresses further.

I agree that it is reasonable for the Parties and Counsel to take additional time to fully canvass matters, await the outcome of the appeal to the Supreme Court of Canada as discussed in my Order of November 18, 2011, and attempt to negotiate a final settlement addressing all concerns. I am satisfied that the Draft Interim Order at Appendix A represents an appropriate step forward in this process.

In the most recent teleconference, 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. It is my understanding that the Director's concerns about the continuation of proper management of the Margach WDS have been satisfied by the commitments made by the Appellants in the Draft Interim Order.

On this basis, and mindful of the requirements of Rule 110, I accepted the joint position of the Parties and indicated my approval of the terms of the Draft Interim Order during the teleconference, with written reasons to follow. I hereby confirm that determination.

Order

1. The Tribunal hereby approves the terms set out in the Draft Interim Order submitted by the Parties and attached as Appendix A.
2. In accordance with section 2 of the Draft Interim Order, work items 1 through 15, 18 and 19 in Director's Order No. 8301-8HFPUQ, issued on August 16, 2011, are hereby amended on an interim basis pending the outcome or final resolution of these Appeals, or at such other time as might be determined pursuant to section 5 of the Draft Interim Order.
3. In accordance with section 1 of the Draft Interim Order, work items 16 and 17 of the Director's Order regarding financial assurance are hereby stayed, subject to section 5 of the Draft Interim Order, pending the outcome or final resolution of these Appeals.
4. The deadline for all Appellants involved in appeals from the three Director's Orders to provide information requested by the Tribunal in relation to the convening of Preliminary Hearings is hereby extended until December 13, 2011, or thereafter as ordered from time to time.
5. In accordance with section 3 of the Draft Interim Order, these proceedings are adjourned to a teleconference with the Parties on Tuesday, December 6, 2011, commencing at 2:30 p.m., and thereafter as ordered from time to time.

Stay Granted on Consent
Interim Agreement Approved
Teleconference Scheduled

_____
Alan D. Levy, Member

Appendix A - Draft Interim Order

Appendix A

Draft Interim Order

ERT File Nos. 11-144 and 11-146 to 11-154

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 August 31, 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. 8301-8HFPUQ 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 Margach Waste Disposal Site located in Kenora, Ontario (the "Site");

and

IN THE MATTER OF an Appeal by OfficeMax Incorporated filed August 30, 2011 with the Environmental Review Tribunal pursuant to Section 140 of the *EPA* with respect to Director's Order No. 8301-8HFPUQ issued by the Director, Ministry of the Environment, under sections 18, 44, 132, and 196 of the EPA concerning the Site.

INTERIM ORDER

1. On consent of the parties to this Appeal, work items 16 & 17 identified in Director's Order # 8301-8HFPUQ are stayed pending the outcome or final resolution of this Appeal;

2. On consent of the parties to this Appeal, work items 1 through 15 and items 18 and 19 identified in Director's Order # 8301-8HFPUQ are, as set out below, amended on an interim basis pending the outcome or the final resolution of this Appeal;

Item No. 1 Access

451 shall ensure that the Parties, including their employees, contractors, and representatives, are permitted access to the WDS for the purposes of complying with this Order until otherwise notified by the undersigned Director.

Item No. 2 Disclosure

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

Item No. 3 Qualified Consultant

By no later than November 4, 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 5, 8, 9, 10, 11, 12 and 13 of this Order. The written confirmation shall include the name and professional contact information for the retained Qualified Consultant.

Item No. 4 Prohibition

By November 4, 2011, and for the duration of this Order, the Parties shall take all reasonable care to ensure that no further waste is deposited at the WDS.

Item No. 5 Application – Closure of the WDS

By March 15, 2012, the Parties shall submit a completed application for an amendment to the PCA to the Director of the Environmental Assessment and Approvals Branch, 2 St. Clair Avenue West, Floor 12A, Toronto, Ontario M4V 1L7 for approval. The application shall include a copy of a WDS closure plan and an implementation schedule complete with the appropriate fee and a copy of this Interim Order. The Parties agree that the implementation of the WDS closure plan shall not commence until after the Appeal has been resolved. The application shall be completed in accordance with the "Guide for Applying for Approval of a Waste Disposal Sites, version 2.2, Section 27, 30, 31 and 32, *Environmental Protection Act,* R.S.O. 1990.

Item No. 6 Copy of Application

By March 15, 2012, the Parties shall submit to the District Manager a copy of the application, including all attachments, submitted to the Director of the Environmental Assessment and Approvals Branch under Item No.5 of this Order.

Item No. 7 Site Inspection

By November 4, 2011 the Parties shall submit to the undersigned Director, written confirmation of having retained a person to inspect the WDS once every two weeks, from April 1 to November 30 each year, for the purpose of determining whether any further waste has been deposited at the WDS and to record their observations. Within fifteen (15) days of the last day of the calendar month in which the Parties receive the record of such observations, the Parties shall report same, in writing, to the District Manager. The written confirmation shall

include the name and professional contact information for the person retained to undertake site inspections.

Item No. 8 Surface water monitoring

By November 4, 2011 the Parties shall initiate, and continue for the duration of the Order, a surface water monitoring program in accordance with the requirements of Appendix "A".

Item No. 9 Report

Within fifteen (15) days of the last day of the calendar month in which the Parties receive the results of the sampling required by Item No. 8 of this Order, the Parties shall report same, in writing, to the District Manager.

Item No. 10 Groundwater monitoring

By November 4, 2011 the Parties shall initiate, and continue for the duration of the Order, a groundwater monitoring program in accordance with the requirements of Appendix "B".

Item No. 11 Report

Within fifteen (15) days of the last day of the calendar month in which the Parties receive the results of the sampling required by Item No. 10 of this Order, the Parties shall report same, in writing, to the District Manager.

Item No. 12 Outlet Monitoring

By November 4, 2011, and continuing between April 1st and November 30th of each year throughout the duration of this Order, the Parties shall undertake a bi-weekly inspection of the outlet from the engineered wetland at the WDS to ensure that the outlet is operating correctly and is not plugged or otherwise blocked by debris.

Item No. 13 Report

Within fifteen (15) days of the last day of the calendar month in which the Parties receive the results of the inspections required by Item No. 12 of this Order, the Parties shall report same (including the particulars of any malfunctions, deficiencies or corrective action taken), in writing, to the District Manager.

Item No. 14 Corrective Action

The Parties shall correct any malfunctions or deficiencies described in Item No. 12 of this Order 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 30 days, the District Manager will, in cooperation with the Parties, devise an alternative timeline and/or measures that will continue to protect the environment.

Item No. 15 Implementation of Closure Plan

The Parties shall initiate and complete the implementation of the closure plan, as approved by the Director of the Environmental Assessment and Approvals Branch (EAAB), in accordance with the implementation schedule and the terms described in Item No. 5 above.

Item No. 18 Reasonable Care

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. 19 Other

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

3. On consent of the parties, this Appeal is adjourned to December 6, 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. For greater certainty, the PCA Amendment Application submitted pursuant to Item No. 5 of this Interim Order shall also be without prejudice; and the Application shall not be approved by the Director for the EAAB, nor shall the PCA be amended, with respect to any party unless and until such time as the final decision in this Appeal concludes that the obligations referred to in Item No. 5 of the Director’s Order will apply to such party.