

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: May 1, 2017

CASE NOS.: 11-061, 11-144
and 11-155

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended

Appellant: See Appendix 1 - Appellant List (11-061)
Respondent: Director, Ministry of the Environment and Climate Change
Subject of appeal: Order to carry out work and provide financial assurance with respect to the Mud Lake Waste Disposal Site
Reference No.: 6248-8GRHU2
Property Address/Description: Mud Lake Waste Disposal Site
Municipality: City of Kenora
Upper Tier: Kenora District
ERT Case No.: 11-061
ERT Case Name: Dea v. Ontario (Environment and Climate Change)

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended

Appellant: See Appendix 2 - Appellant List (11-144)
Respondent: Director, Ministry of the Environment and Climate Change
Subject of appeal: Order to carry out work and provide financial assurance with respect to the Margach Waste Disposal Site
Reference No.: 8301-8HFPUQ
Property Address/Description: Margach Waste Disposal Site
Municipality: City of Kenora
Upper Tier: Kenora District
ERT Case No.: 11-144
ERT Case Name: OfficeMax Incorporated v. Ontario (Environment and Climate Change)

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended

Appellant: See Appendix 3 - Appellant List (11-155)
 Respondent: Director, Ministry of the Environment and Climate Change
 Subject of appeal: Order issued to carry out work and provide financial assurance with respect to the Bowater Mercury Waste Disposal Site
 Reference No.: 4345-8HFPHW
 Property Address/Description: Bowater Mercury Waste Disposal Site
 Municipality: City of Dryden
 Upper Tier: Kenora District
 ERT Case No.: 11-155
 ERT Case Name: Grandmont v. Ontario (Environment and Climate Change)

Heard: January 29, March 12, April 3, April 24, May 14, May 27, July 15, July 29, September 18, and November 27, 2014; February 3, April 8, April 9, June 23, August 5, and September 1, 2015; February 4, March 24, April 29, May 27, June 29, August 12, October 17, and December 21, 2016; and February 21, 2017 by telephone conference call

APPEARANCES:

Parties

AbitibiBowater Inc., AbiBow Canada Inc., Abitibi-Consolidated Company of Canada, Pierre Rougeau, David J. Peterson, Allen Dea, Jacques P. Vachon, William G. Harvey and Alain Grandmont

OfficeMax Incorporated

Weyerhaeuser Company Limited

Ministry of Environment and Climate Change

Counsel

Tyson Dyck

Jennifer Fairfax, Elizabeth Putnam and Patrick Welsh

Gabrielle K. Kramer and Marcus F. Kremer

Justin Jacob and Alexandra Mingo

ORDER DELIVERED BY ALAN D. LEVY

REASONS

[1] As discussed further below, this is the fifth in a series of interim orders issued by the Environmental Review Tribunal (“Tribunal”) with respect to a group of complex and inter-related appeals involving three separate sites in northern Ontario. The other four Tribunal orders were issued on June 13, November 18, and December 2, 2011, and January 10, 2014.

Background

[2] Three separate Director’s Orders were issued in 2011 by Trina Rawn, Director, Ministry of the Environment, each one dealing with a different facility. The name of the Ministry has since been changed to the Ministry of the Environment and Climate Change (“MOECC”). Most of the orderees named in these Orders have appealed to the Tribunal pursuant to s. 140(1) of the *Environmental Protection Act* (“EPA”). As indicated in more detail below, three interim orders were issued by the Tribunal on consent in 2011 and a fourth one in 2014, pending the outcome of the appeals. Progress with the trilogy of appeal proceedings since then is described in this order.

[3] 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 requested that the initial phase of the appeals be dealt with in a series of joint telephone conference calls (“TCCs”) prior to the Tribunal convening one or more preliminary hearings (now called pre-hearing conferences). In addition to counsel, some of the TCCs discussed below have also been attended by the Director and/or other MOECC staff members.

[4] The Appellants are variously alleged in 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 MOECC 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 should be held responsible for dealing with current environmental issues at these sites, and seek to have the Tribunal dismiss the Orders.

[5] The first Director's Order ("DO-1"), No. 6248-8GRHU2, is dated May 13, 2011, and has been referred to by counsel as the Mud Lake Order. 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 when it reached its capacity of one million cubic metres of waste.

[6] Among other things, the concerns of the Director as reflected in DO-1 relate to abandonment of the site by an insolvent owner, a failure of the leachate pumping system, an overflow of surface water drainage collected in Mud Lake, discharge of contaminants into the environment, and the need for provision of additional financial assurance.

[7] The parties involved with DO-1 reached an agreement pending hearing with respect to a stay of some of that Order's provisions and amendments to others, as well as a series of adjournments to permit ongoing settlement discussions. These matters were addressed in my order of June 13, 2011, along with an extension of time for the Appellants to provide information required by the Tribunal to convene a preliminary hearing.

[8] 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 that 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 recycling facility, general wood waste, ground scrapings, boiler ash and clinkers.

This WDS was in use from 1986 (after the Mud Lake WDS reached capacity) until 2009, and contains a reported volume of 1,204,700 cubic metres of waste.

[9] According to DO-2, the Margach WDS 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 this site, concluding in October 2009.

[10] Among other things, the concerns of the Director as reflected in DO-2 relate to abandonment of the site by an insolvent owner, closure of the landfill, the lack of impervious final cover, off-site migration of surface and ground water contaminated by leachate, and the need for provision of additional financial assurance. OfficeMax Incorporated ("OfficeMax") is named in DO-2 and is one of the Appellants from that Order. DO-2 is the only Order in the trilogy involving OfficeMax.

[11] The parties involved with DO-2 reached an agreement pending hearing with respect to a stay of some of that Order's provisions and amendments to others, as well as a series of adjournments to permit ongoing settlement discussions. These matters were addressed in my order of December 2, 2011, along with a further extension of time for providing information required from the Appellants to convene a preliminary hearing.

[12] 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.

[13] Among other things, the concerns of the Director as reflected in DO-3 relate to the development of erosion gullies observed along the edge of the property, sagging security fencing, mercury and chlorine concentrations detected in shallow ground water, lack of financial assurance, and abandonment of the site by an insolvent owner.

[14] Weyerhaeuser Company Limited (“Weyerhaeuser”) is named in DO-3, and is one of the Appellants from that Order. DO-3 is the only Order in the trilogy involving Weyerhaeuser.

[15] The parties involved with DO-3 reached an agreement pending hearing with respect to a stay of some that Order’s provisions and amendments to others, as well as a series of adjournments to permit ongoing settlement discussions. These matters were addressed in my order of November 18, 2011, along with an extension of time for providing information required from the Appellants to convene a preliminary hearing.

[16] The above-noted orders of the Tribunal addressed matters that arose in TCCs conducted by me on June 3, July 15, August 17, September 26, September 28, October 31 and November 4, 2011. All of these TCCs were scheduled with the agreement of counsel. Each successive adjournment has also included the extension of the deadline for the Appellants to provide information requested by the Tribunal in order to convene a preliminary hearing. The same holds true with respect to all of the TCCs that have followed since then, and are discussed below.

[17] Leading up to my fourth order, another series of TCCs were held in 2011-2013 on the following dates: December 6, 2011; January 27, March 8, April 16, May 23, July 26, September 18, and November 19, 2012; and January 29, March 28, May 23, July 23, September 24 and December 3, 2013. At some point along the way, the Appellant AbitibiBowater Inc. changed its name to Resolute Forest Products/Resolute FP Canada Inc. (“Resolute”).

[18] In November 2013, the parties involved with DO-1 and DO-2 filed material with respect to a further agreement that they reached pending hearing. This agreement

involved proposed amendments to the terms of the Tribunal's interim orders regarding the Mud Lake (my June 13, 2011 Order) and Margach sites (my December 2, 2011 order).

[19] My fourth interim order was issued on January 10, 2014, and granted the proposed amendments with one exception. The amendments involved some changes in the ongoing requirements imposed on the Appellants on an interim basis pending hearing. These requirements relate to such things as frequency of site inspections, reporting deadlines, surface and ground monitoring programs, etc. The exception relates to the ground water monitoring program for the Mud Lake WDS, which was terminated on a final rather than interim basis.

[20] Since then, an additional 25 TCCs have been conducted in 2014-2017 on the following dates: January 29, March 12, April 3, April 24, May 14, May 27, July 15, July 29, September 18, and November 27, 2014; February 3, April 8, April 9, June 23, August 5, and September 1, 2015; February 4, March 24, April 29, May 27, June 29, August 12, October 17, and December 21, 2016; and February 21, 2017.

[21] During this time, counsel have reported that they have been moving forward incrementally with information exchange and negotiations in a continuing effort to resolve these appeals. To date, no preliminary hearings have been convened by the Tribunal with respect to any of the appeals.

Issue

[22] The purpose of this order is to briefly discuss the progress of these matters through various TCCs and adjournments occurring since my previous and fourth order, issued on January 10, 2014.

Discussion and Analysis

[23] As indicated in some of my previous orders, a significant delay in these proceedings has been due to a relevant appeal to the Supreme Court of Canada (“SCC”) from a decision of the Quebec Court of Appeal. It involved the issue of whether certain types of provincial environmental protection orders constitute ‘claims’ under the federal *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Among the respondents in that appeal were AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.

[24] A serious issue in the appeals from these Director’s Orders is the effect of the insolvency of some of the corporate Appellants on the MOECC’s authority to include them as orderees. Although the SCC appeal involved unrelated sites and some other parties, counsel correctly anticipated that the outcome would be important in determining the insolvency issue in these appeals before the Tribunal. The decision of the SCC was delivered on December 7, 2012. The reasons for judgment of the SCC are reported in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67. To make matters even more complex, a few other court decisions related to this issue have been issued since that time.

[25] In addition, grounds for appeal in the proceedings before the Tribunal included the issue of an indemnity agreement involving the Province of Ontario, and this subsequently became the subject matter of a parallel civil action in the Ontario Superior Court of Justice. An action was commenced in 2015 by Weyerhaeuser against the Province, and Resolute intervened in that proceeding. A motion for summary judgment was brought by Weyerhaeuser with respect to the indemnity agreement, including the question as to whether it would encompass the cost of complying with DO-3.

[26] After several lengthy adjournments, that motion was argued in April 2016 and a decision was issued by Justice Hainey on July 19, 2016: *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, [2016] O.J. No. 3900 (“*Weyerhaeuser*”). The

Province has appealed this decision. The latest indication from counsel is that the appeal will be argued before the Court of Appeal sometime in spring 2017.

[27] Over the course of these proceedings, counsel have continued to advise the Tribunal that they are attempting through direct negotiations and settlement discussions to determine the relevant facts, documents and issues with a view to resolving the entire trilogy of appeals before the Tribunal.

[28] During the TCC held on December 21, 2016, the appeals related to DO-3 were adjourned at counsel's request to another TCC to be held on June 7, 2017, at 4 pm. This adjournment was requested in order to allow time for completion of the above-noted appeal to the Court of Appeal in *Weyerhaeuser*.

[29] At counsel's request during the TCC held on February 21, 2017, the appeals related to DO-1 and DO-2 were adjourned to another TCC scheduled for April 25, 2017, at 3 pm. Counsel advised that more paperwork had been exchanged by the parties and good progress was being made in their negotiations to address these Orders.

[30] Although it is highly unusual for interim matters to continue in this fashion for several years before convening one or more preliminary hearings, I have continued to grant repeated adjournments in order to support counsel's direct efforts to resolve this very unusual, complex and inter-related trilogy of appeals.

ORDER

[31] The appeal proceedings related to Director's Order No. 6248-8GRHU2, dated May 13, 2011 (DO-1), and Director's Order No. 8301-8HFPUQ, dated August 16, 2011 (DO-2), are adjourned to a TCC with the parties to be held on April 25, 2017, at 3 pm, and thereafter as may be ordered from time to time.

[32] The deadline for the Appellants to provide information that has been requested by the Tribunal in relation to convening a preliminary hearing with respect to DO-1 and

DO-2 is hereby extended on consent until May 2, 2017, or thereafter as may be ordered from time to time.

[33] The appeal proceedings related to Director's Order No. 4345-8HFPHW, dated August 25, 2011 (DO-3), are adjourned to a TCC with the parties to be held on June 7, 2017, at 4 pm, and thereafter as may be ordered from time to time.

[34] The deadline for the Appellants to provide information that has been requested by the Tribunal in relation to convening a preliminary hearing with respect to DO-3 is hereby extended on consent until June 14, 2017, or thereafter as may be ordered from time to time.

Adjournments Granted

"Alan D. Levy"

ALAN D. LEVY
Member

Appendix 1 – Appellant List (11-061)
Appendix 2 – Appellant List (11-144)
Appendix 3 – Appellant List (11-155)

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

Environmental Review Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Appendix 1**Appellant List (11-061)**

Appellant Name	File No.
AbiBow Canada Inc.	11-058
AbitibiBowater Inc.	11-059
Abitibi-Consolidated Company of Canada	11-060
Allen Dea	11-061
Alain Grandmont	11-062
William G. Harvey	11-063
David J. Paterson	11-064
Pierre Rougeau	11-065
Jacques P. Vachon	11-066
OfficeMax Incorporated	11-074

Appendix 2**Appellant List (11-144)**

Appellant Name	File No.
OfficeMax Incorporated	11-144
AbitibiBowater Inc.	11-146
AbiBow Canada Inc.	11-147
Abitibi-Consolidated Company of Canada	11-148
Pierre Rougeau	11-149
David J. Paterson	11-150
Allen Dea	11-151
Jacques P. Vachon	11-152
William G. Harvey	11-153
Alain Grandmont	11-154

Appendix 3**Appellant List (11-155)**

Appellant Name	File No.
Alain Grandmont	11-155
Abitibowater Inc.	11-156
AbiBow Canada Inc.	11-157
Abitibi-Consolidated Inc.	11-158
Bowater Canadian Forest Products Inc.	11-159
Pierre Rougeau	11-160
David J. Paterson	11-161
Jacques P. Vachon	11-162
William G. Harvey	11-163
Weyerhaeuser Company Limited	11-175