

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: December 13, 2018

CASE NO.: 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, Conservation and Parks
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, Conservation and Parks)

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, Conservation and Parks
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, Conservation and Parks)

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, Conservation and Parks
 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, Conservation and Parks)

Heard: April 25, August 16, October 17 and December 19, 2017 and February 20, April 23, July 4, September 5 and November 8, 2018 by telephone conference calls

APPEARANCES:

Parties

Counsel

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

Tyson Dyck

OfficeMax Incorporated

Jennifer Fairfax and Patrick Welsh

Weyerhaeuser Company Limited

Gabrielle K. Kramer and Markus F. Kremer

Director, Ministry of Environment, Conservation and Parks

Justin Jacob

ORDER DELIVERED BY MAUREEN CARTER-WHITNEY

REASONS

Background

[1] As discussed further below, this is the sixth 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 Kenora and Dryden, Ontario.

[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, Conservation and Parks (“MECP”). 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, a fourth interim order in 2014 and a fifth in 2017, pending the outcome of the appeals. This order describes the progress of the proceedings in this trilogy of appeals since those orders were issued.

[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 a Pre-hearing Conference (“PHC”) in one or more of the matters. In addition to counsel, some of the TCCs discussed below have also been attended by the Director and/or other MECP 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 MECP to be outstanding with respect to one or more of the three sites. For a variety of 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 ("cu m") 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 the 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 the Tribunal's order of June 13, 2011 (*AbiBow Canada Inc. (Re)*, 2011 CanLII 152152), along with an extension of time for the Appellants to provide information required by the Tribunal to convene a PHC.

[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 cu m 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 a 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 the Tribunal’s order of December 2, 2011 (*AbiBow Canada Inc. (Re)*, 2011 CanLII 152154), along with a further extension of time for providing information required from the Appellants to convene a PHC.

[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 chlor-alkali 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 a 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 the Tribunal’s order of November 18, 2011 (*AbiBow Canada Inc. (Re)*, 2011 CanLII 152153), along with an extension of time for providing information required from the Appellants to convene a PHC.

[16] Further information concerning the background of this trilogy of proceedings may be found in the Tribunal’s order of May 1, 2017 (*OfficeMax Incorporated v. Ontario (Environment and Climate Change)*, 2017 CanLII 27466).

[17] Over the past 19 months, a series of further TCCs were conducted on April 25, August 16, October 17 and December 19, 2017 and February 20, April 23, July 4, September 5 and November 8, 2018, all with the agreement of counsel. Each successive adjournment has included the extension of the deadline for the Appellants to provide information requested by the Tribunal in order to convene a PHC. To date, no PHCs have been convened by the Tribunal with respect to any of the appeals.

[18] During the TCCs held over the period of April 25, 2017 to November 8, 2018, counsel for the parties in the appeals of DO-1 and DO-2 reported that they have been moving forward incrementally with information exchange and negotiations in a continuing effort to resolve these appeals. During the most recent TCC, held on

November 8, 2018, counsel requested on consent that these two matters be adjourned to a status update TCC in two months' time.

[19] As described in more detail in the Tribunal's May 1, 2017 order, there is related litigation ongoing in respect of DO-3, between Weyerhaeuser and the Ontario Ministry of the Attorney General, which has caused a delay in the proceeding before the Tribunal. During the TCC held on November 8, 2018, the parties advised the Tribunal that Weyerhaeuser was granted leave to appeal to the Supreme Court of Canada in the related litigation and a court date is now scheduled for March 2019. Consistent with a request by counsel, this proceeding has been adjourned to a status update in May 2019.

[20] As noted in the May 1, 2017 order, it is highly unusual for interim matters to continue in this fashion for several years before convening one or more PHCs. However, the Tribunal has continued to grant repeated adjournments, as requested on consent by the parties, in order to support their efforts to resolve this unusual, complex and inter-related trilogy of appeals.

ORDER

[21] 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 **January 14, 2019 at 4 p.m.**, and thereafter as may be ordered from time to time.

[22] The deadline for the Appellants to provide information that has been requested by the Tribunal in relation to convening a PHC with respect to DO-1 and DO-2 is hereby extended until January 21, 2019, or thereafter as may be ordered from time to time.

[23] 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 **May 9, 2019**, at **4 p.m.**, and thereafter as may be ordered from time to time.

[24] The deadline for the Appellants to provide information that has been requested by the Tribunal in relation to convening a PHC with respect to DO-3 is hereby extended until May 16, 2019, or thereafter as may be ordered from time to time.

*Adjournments Granted
Procedural Directions Ordered*

"Maureen Carter-Whitney"

MAUREEN CARTER-WHITNEY
VICE-CHAIR

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