ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 2, 2018

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by Cherokee Canada Inc., 1510837 Alberta Inc. and Domtar Inc. with respect to the decisions of the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR, Amendment No. 1 to EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR, EPEA Enforcement Order No. EPEA-EO-2018/02-RDNSR, EPEA Enforcement Order No. EPEA-EO 2018/03-RDNSR, EPEA Enforcement Order No. EPEA-EO-2018/04-RDNSR, Amendment No. 2 to EPEA-EO-2018/02-RDNSR, and EPEA Enforcement Order No. EPEA-EO-2018/06 to Cherokee Canada Inc., 1510837 Alberta Inc., and Domtar Inc.

Cite as: *Cherokee Canada Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (2 August 2018), Appeal Nos. 16-055-56, 17-073-084, and 18-005-010-ID2 (A.E.A.B.).

BEFORE:	Ms. Meg Barker, Panel Chair; Dr. Nick Tywoniuk, Board Member; and Mr. Dave McGee, Board Member.
SUBMISSIONS BY:	
Appellants:	Cherokee Canada Inc. and 1510837 Alberta Inc., represented by Mr. Ron Kruhlak, Q.C., Mr. Ken Fitz, and Mr. Sean Parker, McLennan Ross LLP. Domtar Inc., represented by Mr. Gary Letcher, Ms. Andrea Akelaitis, Mr. Michael Clark, Letcher Akelaitis LLP, and Mr. Curtis Marble, Walsh LLP.
Director:	Mr. Michael Aiton, Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Mr. Wally Braul, Mr. Josh Jantzi, and Mr. Mark Youden, Gowlings WLG (Canada) LLP.
Intervenors:	City of Edmonton, represented by Mr. Michael Gunther and Mr. Stephen Ho, City of Edmonton Law Branch. Alberta Health Services, represented by Ms. Jennifer Jackson and Ms. Linda Svob, Alberta Health Services Law Branch.

EXECUTIVE SUMMARY

Cherokee Canada Ltd., 1510837 Alberta Inc. (a subsidiary of Cherokee), and Domtar Inc. (collectively the Appellants) have appealed five enforcement orders and two significant amendments to those orders, which were issued by the Director (the Director). The Director is a statutory decision-maker employed by Alberta Environment and Parks. The orders relate to an abandoned treated wood products manufacturing plant (which produced railway ties and telephone poles) in northeast Edmonton. Cherokee purchased the property from Domtar and is undertaking further clean up of the property. Cherokee is cleaning up the property so it can be developed for residential and commercial uses. The work Cherokee is doing is known as brownfield redevelopment.

Most notably, the orders require the Appellants to develop and implement plans for the immediate removal of contaminated material from the property. The Appellants have appealed because the removal of material is inconsistent with their plans to manage the contaminated material on the property (which is a common approach to brownfield redevelopment) and because of the very significant cost of removing and disposing of the material, which is estimated to be about $52,000,000.

The appeals were to be considered at a hearing on their merits, starting on July 23, 2018. Unfortunately, on June 15, 2018, the Board's Chair, who had been dealing with the preliminary matters leading up to the hearing, discovered Domtar had hired the Montreal office of his law firm.* This created a conflict of interest for the Board's Chair, and he decided it was necessary to recuse himself from any further dealings with these appeals.

As a result of this conflict, the Director brought a challenge to the preliminary decisions made by the Board's Chair. According to the Director, the fact Domtar was a client of the law firm creates a reasonable apprehension of bias. The Director asked the Board to declare all of the preliminary decisions made by the Board's Chair void and asked the Board to rehear and redecide all of the preliminary matters.

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* The Chair's law firm is an international law firm with over 6500 lawyers located across Canada and around the world. The Chair was not aware that Domtar was a current client of the law firm until July 15, 2018.

The Board held a preliminary motions hearing and decided it did not need to decide whether a reasonable apprehension of bias existed. Instead, the Board decided to rehear and redecide the preliminary matters decided by the Board's Chair.

The Board decided three matters. First, the Board decided it did have jurisdiction to accept the appeals that were filed. The Director argued, based on how the legislation is written, there are two types of enforcement orders, enforcement orders that can be appealed and enforcement orders that cannot be appealed. The Director argued the orders the Appellants are challenging are not appealable. The Board reviewed the legislation and the orders and decided the effect of the orders on the Appellants were such that they could be appealed. Among other concerns raised, the Board explained that when an appeal is heard on its merits, the Board prepares a report and recommendation for the Minister of Environment and Parks. Based on this report and recommendations, the Minister makes the final decision on the appeal and decides whether to confirm, reverse, or vary the Director's decision. If the Board were to accept the Director's argument these orders are not appealable, this would remove this final Ministerial decision-making responsibility in favour of the Director's discretion, exercised without a hearing and subject only to a potential challenge through judicial review. Based on this, the Board is of the view, the Director's argument these orders are not appealable is not consistent with the overall scheme of the legislation.

Second, the Board reheard and redecided the application for a stay of the orders brought by the Appellants. The Board decided the requirements to issue a stay had been met. In particular, the Board held that given the very short timelines included in the orders, failure to issue a stay would be a denial of justice to the Appellants. Further, the Board was of the view excavating and removing the contaminated material from the property, as required by the Director in the orders, may not be the best way to deal with these materials. It may be treating the materials on the property may be a better choice and therefore, maintain the status quo – keep the material on the property – is the better choice until a full hearing can be held.

Finally, shortly before the July 23, 2018 hearing was set to begin, the Director issues a further amendment and another enforcement order. The amendment and the order again contained requirements to remove contaminated material from the property under very short timeframes. The Appellants appealed and asked for a stay of the further amendment and the further

enforcement order. The Director challenged the Board's jurisdiction to hear these appeals. The Appellants and the Director asked the Board to hear these motions on an expedited basis, and in particular, the Director asked for an oral motions hearing and Cherokee asked for the motions hearing to be heard by the entire hearing panel. Unfortunately, given the various requests, the earliest the Board can hear the motions is August 14, 2018. Therefore, having considered the new amendment and the new order, the Board has decided to grant an interim stay until the matter can be heard. The Board is again concerned that not granting a stay will effectively be a denial of justice for the Appellants, and the Board is again concerned that excavating and removing the contaminated material from the property, may not be the best course of action.

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I. INTRODUCTION

[1] These appeals deal with a property in northeast Edmonton used for the manufacture of treated wood products, such as telephone poles and railway ties, since 1924. The chemical preservative used to treat the wood products, commonly referred to as creosote, is a concern because it does not easily break down in the environment, and is now known to be a carcinogen.

[2] In 1987, the wood products manufacturing plant closed, the property was cleaned up to the standard of the day, and then effectively abandoned.[1] Since then residential neighbourhoods have grown up around the property, so there are now homes in relatively close proximity to this former industrial site.

[3] In 2010, the property was purchased by Cherokee Canada Ltd. from the original owner, Domtar Inc.[2] Cherokee is in the business of brownfield redevelopment, which involves purchasing abandoned industrial property, undertaking further cleanup, and once the cleanup is acceptable to environmental and municipal authorities, selling the property for residential and commercial uses. Brownfield redevelopment is typically done in phases, where the sale of part of the property pays for the cleanup of the remaining part of the property. Cherokee has been working on the property since approximately 2012 and obtained approval from Alberta Environment and Parks ("AEP") and the City of Edmonton (the "City") to sell the eastern part of the property.[3] This eastern part of the property has been developed into a residential neighbourhood, approximately half of which is now occupied by homes. Cherokee continues to work on the remainder of the property.

[4] The project came to the attention of the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director") in approximately 2015. The Director is the statutory-decision maker under EPEA, responsible for

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[1] Abandoned industrial sites, commonly referred to as brownfields, are somewhat common in Alberta, as there have been some challenges in requiring further cleanup of such sites where they were abandoned before 1993, when the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") was enacted. In the case of the property, monitoring continued.

[2] This property is now owned by Cherokee Canada Ltd. and its wholly owned subsidiary 1510837 Alberta Inc. (collectively "Cherokee"), who are Appellants in this matter. Domtar Inc. ("Domtar") is the other Appellant.

[3] For regulatory purposes, AEP is divided into two parts: approvals and compliance. Until the project came to the attention of the Director (compliance), Cherokee had been dealing with the approvals group within AEP.

ensuring compliance with this legislation. In the Director's view, Cherokee and Domtar have contravened EPEA. Between December 2016 and July 2018, he issued five enforcement orders and two significant amendments[4] directing Cherokee and Domtar to undertake certain actions, the most notable of which is the immediate removal of contaminated material from the property. Cherokee and Domtar have appealed the enforcement orders for a number of reasons, including because the actions ordered by the Director are inconsistent with Cherokee's brownfield redevelopment plan, which is based on the contaminated material being managed on the property, and because of the very significant cost of removing the material from the property, which is estimated at approximately $52,000,000.[5]

II. BOARD PROCESS

[5] The first appeals in this matter were filed at the end of 2016. Since then Cherokee and Domtar have been anxious to proceed with a hearing on the merits of their appeals because they believe the Director's approach and requirements are unjustified. The Director has challenged the jurisdiction of the Environmental Appeals Board (the "Board") to accept the appeals of the enforcement orders. The Director has also, for related reasons, refused to provide the Board with the customary Director's Record (the information on which the order was based), which the Board routinely requires to process such appeals. The Board has had to deal with a series of preliminary objections, which resulted in an extended process leading up to the planned hearing on the merits, scheduled to begin on July 23, 2018. Just before July 23, 2018, as explained below, matters came to the attention of the Board's Chair who had been handling the preliminary matters in these appeals, and he recused himself from further dealing with these appeals. The Chair's reasons for doing so are reproduced here:

> "Statement of Alex G. MacWilliam - Chair and Member - Alberta Environmental Appeals Board
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> This statement is placed on the Board record following issues raised alleging a reasonable apprehension of bias and my decision not to participate further in proceedings involving Domtar

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[4] The Director issued: EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR ("EO-2016/03"), Amendment No. 1 to EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR ("Amendment No. 1"), EPEA Enforcement Order No. EPEA-EO-2018/02-RDNSR ("EO-2018/02"), EPEA Enforcement Order No. EPEA-EO 2018/03-RDNSR ("EO-2018/03"), EPEA Enforcement Order No. EPEA-EO-2018/04-RDNSR ("EO-2018/04"), Amendment No. 2 to EPEA Enforcement Order No. EPEA-EO-2016/02-RDNSR ("Amendment No. 2), and EPEA Enforcement Order No. EPEA-EO-2018/06-RDNSR ("EO-2018/06"). The Director also issued an environmental protection order on December 20, 2016, but this order was cancelled on May 18, 2018.

[5] "Approximate Contaminated Soil Volumes at 4439 127th Avenue, Edmonton, Alberta," dated June 25, 2018, by Mr. Travis Tan of EXP (Engineering).

Inc.

I am the Chair of the Environmental Appeals Board, a part-time position. I am also an income partner in Dentons Canada LLP (Dentons), part of an international law firm with offices throughout Canada and the world.

When this appeal arose, I was aware that, and advised General Counsel at the Environmental Appeals Board that, my law firm had acted for one of the Appellants, Domtar Inc., in Ontario and Quebec and further that I had provided advice to a client approximately 20 years earlier relating to impacts to its property from a site in Cochrane formerly owned by Domtar. None of these matters related to the appeals before the Board.

These facts were disclosed to counsel for the parties in the Board's letter of February 3, 2017. All counsel advised the Board that they had no concerns with my participation in the appeals.

I presided over or chaired a variety of preliminary and procedural steps in this appeal, the last being a procedural hearing, by conference call, held on June 4th, 2018. I decided the matters raised in that hearing and had discussions with the Board's General Counsel in the process of ensuring that the letters of June 18 and June 21 accurately reflected the decisions made arising from that hearing.

On June 14, 2018 I received an e-mail from David Goult, Canada Region General Counsel at Dentons. He asked me whether I am involved in a matter where I am chairing a Board and Domtar is a party. As a result, I spoke with Mr. Goult on the phone on June 15 and was advised that the firm is currently acting for Domtar in Ontario and Quebec. I advised Mr. Goult that I would raise this with the Board's General Counsel.

Mr. Goult, within Dentons, has a specific responsibility to monitor the firm's business for potential conflicts.

I did not receive any information from Mr. Goult with respect to the nature of the retainers. Prior to my discussion with Mr. Goult, I was not aware that Dentons had any current retainers for Domtar. I subsequently spoke with a Dentons partner in Montreal only to confirm with him that Dentons is indeed currently acting for Domtar and to obtain his view that it would be inappropriate to seek a waiver of conflict from the client. I determined that in the circumstances, it would be advisable to recuse myself from sitting further on the matters before the Environmental Appeals Board involving Domtar.

I raised this matter with the Board's General Counsel, Gilbert Van Nes, advising him that I had now learned that Domtar was a current client of Dentons and that, because of that fact, the most appropriate thing to do would be to recuse myself from the Panel hearing the appeals. Mr. VanNes agreed. This decision was communicated to counsel for the parties in the letter from Mr. VanNes dated June 26, 2018.

Other than the past retainer issues disclosed to the parties in February 2017, I had no knowledge of any ongoing dealings between Dentons and Domtar. After learning of the current retainer from Mr. Goult, and except as described above, I have had no involvement with this appeal except for my decision to recuse myself from further participation in the appeal, my discussions with Board Counsel over that decision and related scheduling issues, and confirmation that the parties had been advised of that decision.

Dated at Calgary, Alberta on July 5th, 2018.

- original signed -

Alex G. MacWilliam

Chair, Environmental Appeals Board"

[6] A new panel has been appointed to deal with this matter. The Appellants remain anxious to proceed to the hearing of these appeals on their merits, particularly given the urgency the Director has required in the various enforcement orders, in some cases with deadlines as

short as two weeks, and the cost of what the Appellants maintain is unjustified requirements to remove contaminated soil from the property.

[7] The pattern of challenging the Board's jurisdiction and refusing to provide the Board with the Director's Record continued with the subsequent appeals, which were filed when further enforcement orders were issued in March 2018. The Director has again challenged the jurisdiction of the Board to accept the appeals filed this last week, in response to another enforcement order and an additional amendment to a previous enforcement order, each on July 19, 2018. In each case, the Director stated he decided to issue enforcement orders that were "unappealable" because it was necessary for the contaminated material to be removed from the property immediately. In fact, the latest enforcement order and amendment are said to be issued, in part, under the Director's emergency powers.

[8] Challenges to the Board's jurisdiction, applications for further and better Director's Records, and other matters, resulted in a number of preliminary motions before the Board, almost all of which were decided by the Board's Chair, Mr. MacWilliam. The hearing into the merits of all the appeals related to all of the enforcement orders, except the enforcement order and amendment issued during the past week, was scheduled to start on July 23, 2018, and run for 10 days.[6]

[9] Unfortunately, on June 15, 2018, as described in his statement above, Mr. MacWilliam learned that Domtar – one of the Appellants before the Board – had retained the law firm where he works, to act for them in Ontario and Quebec. Until that date, Mr. MacWilliam had been unaware his law firm was acting for Domtar on an unrelated matter in eastern Canada. Mr. MacWilliam recused himself from these appeals on June 26, 2018. The Director's response was to bring an application asking the Board to find that the circumstances of Mr. MacWilliam's recusal indicated a reasonable apprehension of bias meaning that all of the preliminary decisions made by Mr. MacWilliam – and underlying the pending hearing – are void. The Director argued the only course of action was for the Board to remake all of the preliminary motions decisions, before proceeding to a hearing.

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[6] A hearing on the merits of the appeals were scheduled to be held from July 23, 2018 to July 27, 2018, and August 27, 2018 and August 31, 2018.

[10] On July 18, 2018, the Board decided it was not possible to proceed with the hearing on the merits in the face of this challenge. Therefore, the Board decided instead to hold a preliminary motions hearing to deal with the Director's motion to have all the preliminary decisions declared void, and at the same time, in the event it might be necessary to redecide these matters,[7] rehear all of the preliminary motions heard by Mr. MacWilliam. That preliminary motions hearing was held on July 24, 2018 to July 26, 2018, during which the Board heard extensive oral arguments and received additional written submissions.

[11] This decision addresses the application to declare the preliminary decisions made by Mr. MacWilliam void. The Board has decided in any event to reconsider the preliminary matters *de novo*, so no detailed analysis of the bias issue is required. This decision, made anew by the new panel, will address the Board's jurisdiction to hear the appeals and the stay application for the appeals.

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[7] Specifically, the Board stated it would hear the following motions:

1. (a) Do the circumstances surrounding the Board Chair's recusal decision establish a reasonable apprehension of bias?
   (b) If so, is the appropriate remedy to vacate the preliminary decisions?
   (c) Alternatively, is it possible for the Board's Chair to issue reasons?
   (d) In any event, should any of the preliminary decisions be vacated where they were issued without reasons?
2. Does the Board have jurisdiction to hear the appeals of Cherokee and Domtar with respect to EO-2016/03, Amendment No. 1, EO-2018/02, EO-2018/03, and EO-2018/04? This includes:
   (a) whether the enforcement orders fall under section 210(1)(a), (b), and (c) of EPEA and are therefore appealable;
   (b) whether the Board can accept the amended Notice of Appeal of Cherokee with respect to Amendment No. 1; and
   (c) whether the Board can accept the Notice of Appeal of Domtar with respect to Amendment No. 1.
3. If the Board does have jurisdiction to hear these appeals, should the Board grant a stay of EO-2016/03, Amendment No. 1, EO-2018/02, EO-2018/03 and EO-2018/04?
4. If the Board proceeds to a hearing on these appeals, what are the issues that should be heard at the hearing?
5. If the Board proceeds to a hearing on these appeals, should the Board order the Director to produce a further and better Director's Record, and if so, what should the terms of such an order be?
6. If the Board proceeds to a hearing on these appeals, should the Board order the Director to produce other records, and if so, what should the terms of such an order be?

There were two other matters, related to intervenors and the use of records provided to the Board in other related appeals in these appeals, which were initially set to be heard, but the parties resolved these matters by consent.

III. ANALYSIS

[12] This decision is shorter than the Board would typically issue in a case such as this because of the need to proceed with the hearing of these appeals as soon as possible. The Board agrees that the significant uncertainty these matters have created for all parties, in particular, the residents who live adjacent to the property, must be resolved as soon as possible.

A. Reasonable Apprehension of Bias

[13] All of the parties agree, and the Board accepts, the effect of Mr. MacWilliam's decision to recuse himself is that he can no longer act (i.e. prospectively) in these appeals. However, the Director argues because of Domtar being an existing client of Mr. MacWilliam's law firm, there is automatically a reasonable apprehension of bias, and therefore, the preliminary motions decisions made by Mr. MacWilliam are void (i.e. retroactively). The basis of the Director's argument is the concept of deemed knowledge that applies to lawyers at the same firm. (See: *MacDonald Estate* v. *Martin*, [1990] 3 SCR 1235, 1990 SCC 32.) This is an approach was referred to by the parties in the preliminary motions hearing as the "relationship approach." Under the relationship approach, where the moment the relationship – here a solicitor-client relationship - is established there is automatically a reasonable apprehension of bias. The Board does not accept this argument as a correct statement of the law.

[14] As argued by Cherokee and Domtar, an approach which the Board accepts, the Director is confusing the basis for Mr. MacWilliam's recusal, which is the conflict of interest, and the test for a reasonable apprehension of bias. The fact Domtar is a client of Mr. MacWilliam's law firm creates the conflict of interest for Mr. MacWilliam, but it does not automatically create a reasonable apprehension of bias. This is because Mr. MacWilliam was unaware his law firm was acting for Domtar on an unrelated matter in eastern Canada until June 15, 2018. As is discussed at length by Cherokee and Domtar, the correct law is stated in the Supreme Court of Canada case *Wewaykum Indian Band* v. *Canada*, 2003 SCC 45, which at paragraph 72 states:

> "… in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by a reasonable person …."

The key aspect of the Supreme Court of Canada's decision is that for a reasonable apprehension of bias to exist, there must be actual knowledge to create the bias or a reasonable perception that there was knowledge. As Mr. MacWilliam did not know Domtar was a client of his firm until June 15, 2018, it is difficult to conclude there was a reasonable apprehension of basis before this date. However, because the Board has determined the best course of action is to redecide the preliminary motions, in any event, the Board does not have to decide conclusively whether a reasonable apprehension of basis exists and what the effect such a finding would have.

B. Reasons

[15] The Board has still decided to vacate the decisions and redecide the preliminary motions decisions.[8] The Director has argued the Board is required to give reasons for its preliminary decisions. Cherokee and Domtar have argued the Board is not required to give reasons for its preliminary decisions. The Board agrees with Cherokee and Domtar that it is not legally required to give reasons for its preliminary decisions. (See: *McCain Foods (Canada)* v. *Alberta (Environmental Appeal Board)*, 2001 ABQB 701 at paragraphs 31 and 32.) However, it is the Board's usual practice to give reasons, and given the importance of these preliminary decisions to the parties, and particularly the Director, the Board has decided it would be appropriate to give reasons. As Mr. MacWilliam can no longer act in these appeals, he cannot give reasons. Therefore, the only way to give reasons is to vacate the previous preliminary motions decisions and rehear them anew, based on the written submissions and oral arguments received from the parties during the preliminary motions hearing on July 24, 2018 to July 26, 2018.[9]

C. Jurisdiction

[16] There are three jurisdictional questions that have been raised: whether the enforcement orders and related amendments are appealable having regard to section 91(1)(e) and 210(1) of EPEA, whether an amendment to an enforcement order can be appealed, and whether a

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8 In particular, the Board will rehear and redecide the matters including in its letter of May 31, 2018.

9 All parties, to a degree, also relied upon their earlier submissions and materials.

party that is added to an enforcement order by an amendment can be appeal by that party.[10] The Board will deal with each of these questions in turn.

1. Section 210(1) of EPEA

[17] The first enforcement order (EO-2016/03) dated December 16, 2016, was issued "…pursuant to section 210 of EPEA…." (See: EO-2016/03 at page 6.) The Director argued this enforcement order was issued under 210(1)(d) and (e) of EPEA, and was not appealable because of the wording of section 91(1)(e) of EPEA, which suggests only enforcement orders issued under 210(1)(a), (b), and (c) are appealable. The Board held a preliminary motions hearing in writing and determined that EO-2016/03 was appealable.[11]

[18] The Director issued Amendment No. 1, EO-2018/02, EO-2018/03, and EO-2018/04, all dated March 16, 2018, more particularly, pursuant to section 210(1)(d) and 210(1)(e).[12] In the Director's view, this makes these orders unappealable on their face. The Board accepts that the operation of section 91(1)(e) and 210(1) means that some enforcement orders are appealable and others are not. The question is how to determine which category applies to a particular order. The Board notes none of the parties were able to provide the Board

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[10] Section 91(1)(e) of EPEA provides:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances: … where the Director issues an enforcement order under section 210(1)(a), (b) or (c), the person to whom the order is directed may submit a notice of appeal…."

Section 210(1) of EPEA provides:

> "Where in the Director's opinion a person has contravened this Act, except section 178, 179, 180, 181 or 182, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:
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> (a) the suspension or cancellation of an approval, registration or certificate of qualification;
> (b) the stopping or shutting down of any activity or thing either permanently or for a specified period;
> (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;
> (d) the doing or refraining from doing of any thing referred to in section 113, 129, 140, 150, 156, 159, 183 or 241, as the case may be, in the same manner as if the matter were the subject of an environmental protection order;
> (e) specifying the measures that must be taken in order to effect compliance with this Act.

[11] *Cherokee Canada Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (4 May 2018), Appeal Nos. 16-052-056-ID1 (A.E.A.B.). Note that the terms of this enforcement order were substantially replaced by Amendment No. 1.

[12] The latest orders, Amendment No. 2 to EO-2018/02 and EO-018/06, both dated July 19, 2018, are issued under 210(1)(d), 210(1)(e), and 114 (the Director's emergency power to issue an environmental protection order).

with a suitable policy explanation, and the parties noted there was an absence of information in the Hansard and in the policy document that supported the development of EPEA.

[19] In the Board's view, stating the provision under which an enforcement order is issued does not, in and of itself, make it unappealable. What is important, and what determines whether an order is appealable, is the substance of the order – what is it the order requires of the person named in the order. This is the legal principle that substance prevails over form. To give any other interpretation would effectively let the Director decide whether an enforcement order is appealable. Respectfully, that is the Board's jurisdiction and not the Director's.

[20] There are other general rules for interpreting enforcement orders the Board applies when decided whether orders are appealable. It would not be appropriate to divide an order up line by line, trying to determine what provisions of an order fall under sections 210(1)(a), (b), or (c), and what provisions of an order fall under sections 210(1)(d) and (e). Such an interpretation would mean that some provisions of an order would be appealable to the Board and other provisions of the same order would only be reviewable by judicial review to the Court of Queen's Bench. This is not a logical or workable interpretation. If any of the provisions of an enforcement order result in the order in substance rather than form falling under section 210(1)(a), (b), or (c) then the entire order is appealable.

[21] Similar logic applies if an order falls under the provisions of both 210(1)(a), (b), or (c), and 210(1)(d) and (e). If an order falls under 210(1)(a), (b) or (c) it is appealable. It does not matter that it also falls under 210(1)(d) and (e). In the Board's view, this interpretation is correct because nowhere in EPEA does it say that orders issued under section 210(1)(d) and (e) are not appealable. To give any other interpretation would take away an appeal right, where the legislation suggests an appeal should be available. At the preliminary motions hearing, the Board noted that Cherokee and Domtar supported these approaches to interpretation citing the Supreme Court of Canada case of Re: *Rizzo & Rizzo Shoes Ltd*., [1998] 1 SCR 27, 1998 SCC 837.

[22] It should also be noted, the scheme of this legislation, except for preliminary matters, is that following a hearing on the merits of an appeal, the Board provides a report and recommendations to the Minister of Environment and Parks. The Board recommends to the

Minister whether the Director's decision should be confirmed, reversed, or varied. The Minister, then acting on the advice of the Board given, makes her own independent decision as to how the appeal should be resolved. The effect of accepting the Director's jurisdictional arguments would be to remove from the process that final Ministerial decision-making responsibility in favour of the Director's discretion, exercised without a hearing and subject only to a potential challenge through judicial review. That approach, in a general sense, is not consistent with the overall scheme of EPEA.

[23] Turning to the orders, in the view of this panel of the Board, the cornerstone in determining whether the enforcement orders are appealable is the effect they are having on the Appellants, and whether this effect falls under section 210(1)(a), (b), or (c). Specifically, the relevant parts of section 210(1) provide:

> "Where in the Director's opinion a person has contravened this Act … the Director may … issue an enforcement order ordering any of the following:
>
> (a) the suspension or cancellation of an approval, registration or certificate of qualification;
>
> (b) the stopping or shutting down of any activity or thing either permanently or for a specified period; [or]
>
> (c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act …."

[24] As described, the project Cherokee is undertaking is the brownfield redevelopment of a former treated word products processing plant. In the terms EPEA uses, this redevelopment or cleanup work is "reclamation." Reclamation is defined in section 1(ddd) of EPEA as

> "… any or all of the following:
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> (i) the removal of equipment or buildings or other structures or appurtenances;
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> (ii) the decontamination of buildings or other structures or other appurtenances, or land or water;
>
> (iii) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land; [or]
>
> (iv) any other procedure, operation or requirement specified in the regulations;…"

Specifically, the core of the reclamation work being undertaken by Cherokee is the decontamination of the land by collecting the contaminated material and constructing (stabilizing, contouring, and reconstructing the surface of the land) a berm where the contaminated material will be managed over time, through a process of risk management. (The berm and contaminated material therein will be contained so that it is not released into the environment, and the contamination will break down over time.)

[25] This reclamation work is defined as an activity under section 1(a) of EPEA and the Schedule of Activities included in EPEA. Specifically, section 1(a) defines activity as "… an activity or part of an activity listed in the Schedule of Activities ..." and the Schedule of Activities provides:

> "2 The construction, operation or reclamation of a plant, structure or thing for
> …
> (i) the manufacture or processing of wood or wood products, … [or]
> (gg) the preserving of wood …."

Therefore, returning to section 210(1), Cherokee is conducting an "activity" on the property; an activity authorized by an approval issued under EPEA. (See: EPEA Approval 9724-04-00, issued to Cherokee on April 26, 2010, for the construction, operation and reclamation of the Edmonton wood processing plant.)

[26] What the enforcement orders do is require Cherokee to stop or shut down their reclamation work (its activity) and cease the construction or operation of the berm (which is the core feature of its activity). These enforcement orders requirements fall into section 210(1)(b) and (c), which make the enforcement orders appealable. Specifically, the reclamation approach Cherokee is undertaking is to treat the contaminated material on site by using the contaminated material to construct a berm. This berm will be "risk managed" over time to deal with the contamination on the property. All of the enforcement orders require Cherokee, and now Domtar to (1) undertake further study of the property (delineation work), (2) develop a plan for the removal of material from the property, and (3) implement the plan and remove the material from the property. The enforcement orders result in the material that is supposed to remain on the property being removed from the property, and in all likelihood, results in the berm being

dismantled (its operation as a reclamation technique being stopped). In the Board's view, this makes all of the orders appealable.

[27] The Director has argued the Board is prejudging the effect of the enforcement orders. The Director argues it is not a foregone conclusion the material will have to be removed from the property, or the berm will have to be dismantled. The Board does not agree with this characterization. However, applying the Director's logic, the enforcement orders will only become appealable if either one of these events occurs. In the Board's view, such an approach to determine whether the enforcement orders are appealable is not sound. Rather, in the Board's view, if the removal of the material from the property or the need to dismantle the berm is a reasonable possibility, which the Board has concluded it is, that is sufficient to make the enforcement orders appealable.

[28] As a final point under jurisdiction with respect to section 210(1)(a), (b), and (c), the Board is also concerned about the approach taken by the Director to issue what is now a total of five orders (three of which were issued on the same date) for the same property. While the Director has not suggested this directly and the Board is not making a decision on this point, there has been an inference that the Board should treat each enforcement order separately. The Board notes this is one property with the same parties being held responsible for fundamentally one concern. While it may be more convenient for the Director to issues several orders, the Board is concerned the Director is suggesting that one order may be appealable, while others are not. This concerns the Board because it could result in a multiplicity of proceedings relating to the same issue, with one or more orders being appealed to the Board and one or more orders being judicially reviewed directly in the Court of Queen's Bench. If this were to occur, it could result in two decision-makers – the Minister in the statutory appeal process and a Justice of the Court of Queen's Bench – having to make decisions on the same subject matter. The Board's understanding of the law is that such a multiplicity of decision-making should be avoided wherever possible.

2. Appeals of an Amendment

[29] Another jurisdictional challenge raised by the Director is in response to Cherokee appealing Amendment No. 1. As the Board has previously decided in *Imperial Oil Limited* v.

Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (26 October 2001), Appeal No. 01-062-ID (A.E.A.B.), it is not possible to appeal an amendment to an enforcement order. This is because, while appeals of amendments to approvals and other types of decisions are expressly included the list of matters that may be appealed under EPEA (section 91(1)), appeals of amendments of enforcement orders are not listed. Therefore, where an enforcement order was issued, and the person to whom the order was issued does not appeal when it is initially issued, there is no subsequent right to appeal in the event an amendment is then issued.

[30] However, in the Board's view, this does not preclude the person who has appealed an enforcement order, when first issued, from amending their Notice of Appeal if an amendment is issued. The Board's authority for this is found in two sources. First, the Board can extend the deadline for completing the Notice of Appeal, which effectively allows the Board to let an appellant amend a Notice of Appeal.[13] Further, when the Board holds a hearing, it does so on a *de novo* basis. Keeping in mind the Board's ultimate role is to provide the Minister with the best possible advice to resolve an appeal, the Board has interpreted this to mean that the Board should decide the appeals based on the facts that exist on the date of the hearing of the appeals. To do this properly, the Board believes in the case where an enforcement order has been amended, the Board should make its report and recommendations to the Minister based on the amended enforcement order, having given the appellant the opportunity to present its concerns fully.

3. New Party by Amendment

[31] The final jurisdictional argument raised by the Director is over Domtar's right to appeal EO-2016/03 and Amendment No. 1. When EO-2016/03 was first issued in December 2016, Domtar was not named in the enforcement order. Domtar was added as a party to EO-2016 in Amendment No. 1, and as discussed above, an amendment to an enforcement order is not appealable.

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[13] Section 93 of EPEA provides:

"The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so."

[32] To apply the interpretation literally, would mean parties named in the original enforcement order could appeal, but parties named in the subsequent amendment – even if the amendment was issued the next day – could not. The Board does not believe this is a proper interpretation. Domtar again cited the Supreme Court of Canada case of *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27, 1998 SCC 837 to argue the correct interpretation is to consider Amendment No. 1 as new enforcement order for Domtar being able to file an appeal. The Board agrees. In addition, counsel for the Director agreed, when asked by the Board at the preliminary motions hearing, that the entire enforcement order (i.e. the original order EO-2016/03 and Amendment No. 1) now applies to Domtar, and therefore, would be appealable.

[33] The Board's authority for this interpretation is the same as for the ability to amend a Notice of Appeal where an amendment to the enforcement order has been issued. First, the Board has the authority to extend the deadline for filing the Notice of Appeal. Second, to ensure the Minster gets the best possible advice, it is only appropriate that the Board's ability to hear *de novo* evidence include the ability of the Board to hear the appeal of an appellant that has been added to an enforcement order by way of an amendment.

D. Stay

[34] Cherokee and Domtar have applied to the Board to issue stays of the following orders: EO-2016/03, Amendment No. 1, EO-2018/02, EO-2018/03, and EO-2018/04. The Board has determined that a stay of these orders is appropriate.

[35] All the parties accept the Board has the power to issue a stay.[14] Further, all the parties agree the Board's test for a stay is found in the Supreme Court of Canada case of *RJR MacDonald.*[15] The steps in the test, as stated in *RJR MacDonald,* are:

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the

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[14] Section 97(2) of EPEA provides:

"The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[15] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR MacDonald"*). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. *(* See *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 41.)

> applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."[16]

Finally, all of the parties agree that the test for a serious question to be tried has been met. The Board also agrees; these appeals deal with serious matters that need to be addressed as soon as possible.

[36] The parties disagree on the irreparable harm and the balance of convenience, which the Board has always viewed as including a consideration of the public interest.

[37] The Director argues that where the harm suffered by an Appellant can be quantified in terms of damages, any harm the Appellants may suffer in not irreparable. The Director points to the civil action commenced against AEP, claiming damages with respect to the project, as evidence that any harm being suffered by Cherokee is not irreparable. Cherokee and Domtar state that it may not be possible to sue AEP successfully due to Crown immunity. Further, Domtar argues the Director's view of not irreparable is overstated. Domtar point to *Manitoba (Attorney General)* v. *Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, (1987) SCC 6 for the proposition that for the harm not to be irreparable it only needs to be difficult to collect damages. As paragraph 34, the Supreme Court of Canada states:

> "The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages."

Therefore, all the Appellants needs show is that AEP's claim of Crown immunity will make it difficult to obtain damages.

[38] Further, Cherokee and Domtar argue that because of the "urgent" nature of the Director's orders, unless a stay is granted, their appeal rights will be meaningless. They argue that if they are required to comply with the enforcement orders while the appeals are proceeding, all of the work they are required to do will be done by the time any decision is issued by the Minister. The case in support of this position is Alberta Court of Appeal decision in *Lubicon Lake Indian Band* v. *Norcen Energy Resource Ltd*., (1985) ABCA 12. At paragraph 30 of this decision, the Court of Appeal states:

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[16] *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."

In the Board's view, in the circumstances of this case if the stay were denied there would be a denial of justice to Cherokee and Domtar. Three key facts lead the Board to this conclusion. First, there are the very short timelines included in the orders, which in many cases are only two weeks. Second, there is the significant cost of the work that may be required, which Cherokee estimates at up to $52,000,000. Finally, the criteria being used by the Director as the basis to require materials to be removed from the property is not an independently derived standard. Instead, the criteria the Director is using to determine whether material needs to be removed from the property is found in a "provisional guidance" document developed by the Director's staff. The use of such criteria concerns to the Board, and on this fact alone, the Board would find that denying the stay would be a denial of justice to Cherokee and Domtar.

[39] Finally, as the Board has stated, as part of the balancing of convenience the Board considers the impact of granting a stay on the public interest. In previous decisions, the Board has held, based on *RJR MacDonald* [1994] 1 S.C.R. 311, when the Director issues an order, the order is a general a statement of the public interest. In the preliminary motions hearing, the Director took this argument further, suggesting it is unlikely that there would be a case where a stay could be issued against an order issued by the Director.

[40] The Board does not accept this view. In fact, in the circumstances of this case, the Board is very concerned about the potential for adverse impacts on the local residents, which could result from the Director's enforcement orders directing contaminated material be removed from the property. In the Board's view, without a full public hearing, it will not be possible to determine if the best and safest course of action will be leaving the contaminated material on the property and treat it there, or do as the Director has ordered, and remove the material from the property. The Board believes that before disturbing the status quo, it is necessary to fully consider the potential risks to public health and safety that may result from excavating and moving the material off the property versus allowing it to be treated on the property.

[41] In making this decision, the Board has had regard to the involvement of Alberta Health Services. Alberta Health Services has issued their own orders to ensure the immediate

protection of public health. In particular, Alberta Health Services has required Cherokee to fence the perimeter of the property and place signage on the fence to prevent people from entering the property. Further, Alberta Health Services has required Cherokee to hydroseed (spray wet grass seed) the property to limit soils from blowing off the property. All of these steps are directly aimed at taking immediate steps to protect public hearing. The Board notes there are discussions currently underway between Cherokee and Alberta Health Services to have a full-time security guard located on the property and to install geo-fabric on certain parts of the property, again to limit soils from blowing off the property. This is the proper role of Alberta Health Services, and it is a different role than that of the Director.

IV. NEW APPEALS AND STAY APPLICATION

[42] On July 19, 2018, days before the hearing on the merit of the appeals included in this decision, the Director issued Amendment No. 2 (amending EO-2018/02) and a new enforcement order (EO-2018/06). Amendment No. 2 and EO-2018/06 included a deadline of August 3, 2018, and again required the removal of material from the property.[17] Cherokee and Domtar appealed both of these decisions and applied for stays. The Director responded by stating the Board did not have jurisdiction to accept these appeals and should not consider issuing a stay until the issue of jurisdiction had been decided. In part, the Director indicated the Board did not have the jurisdiction to hear these appeals because Amendment No. 2 and EO-2018/06 were issued under the Director's emergency powers found in section 114 of EPEA.[18] (Specifically, Amendment No. 2 and EO-2018/06 are issued under sections 114, 210(1)(d), and 210(1)(d).) The Director argues because section 114 is not included in the list of decisions,

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[17] The new Enforcement Order does, theoretically at least, in condition 3(v), offer the possibility of a plan for thermal in place decontamination, but as only one line in a very weighty list of removal conditions. However, there is no obvious consideration of the possible impacts of the thermal heating of that volume of soil or the processing, stockpiling and replacement activities that might be involved. Nor is there any condition of the potential carbon and heat emissions from a plant of that scale, the noise involved and so on. The timeline for producing a plan that involves such a thermal treatment option is far too short to make that a realistic possibility under the order as issued.

[18] Section 114 of EPEA provides:

> "Where an inspector, an investigator or the Director is of the opinion that
> (a) a release of a substance into the environment may occur, is occurring or has occurred, and
> (b) the release may cause, is causing or has caused an immediate and significant adverse effect,
> the inspector, investigator or Director may issue an environmental protection order to the person responsible for the substance directing the performance of emergency measures that the inspector,

found in section 91(1) EPEA, that can be appealed, Amendment No. 2 and EO-2018/06 are not appealable.

[43] During the case management meeting, which occurred immediately after the preliminary motions hearing, the Board heard submissions from the parties as to how to address these appeals and the two motions. The parties asked to be heard by the Board on the challenge to the Board's jurisdiction and the stay applications on an expedited basis. In particular, the Director requested an oral hearing before the Board members hearing and deciding the matter. Cherokee indicated its preference that the three Board members comprising the hearing panel hearing and decided the matter.

[44] The Board advised it was not possible for an in-person preliminary motions hearing to be held and that it was unlikely the full panel would be available. As a result, various options were discussed including a telephone conference call instead of an in-person hearing, having either one or two of the hearing panel members hearing the motions, or having a new panel hear the motions. The Board also indicated that the first available date to convene an in-person hearing of the hearing panel was August 14, 2018. Based on this, the Board asked the Director to consider postponing the deadline included in Amendment No. 2 and EO-2018/06 to August 14, 2018. The Director considered this request but ultimately declined.

[45] The hearing panel has considered the various options and determined, despite the concerns raised by the Director, would be appropriate to issue a short interim stay of Amendment No. 2 and EO-2018/06. This interim stay will remain in place until the Board orders otherwise, but keeping the stay in place or lifting the stay will be considered when the Board convenes on August 14, 2018.

[46] The short interim stay will permit the parties to make full arguments before the full hearing panel, in person, as requested by the Director. In deciding to grant an interim stay, the Board is of the view that having the opportunity to hear the submissions of the parties in person and being able to ask questions is the best course of action. Further, given the complexity of these matters, it is preferable for the entire hearing panel to hear these applications, and that it would not be appropriate to constitute another panel just for these applications. In this regard,

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investigator or Director considers necessary."

the Board notes the decision of the Director to issue Amendment No 2. (being an amendment to an enforcement order) and the new enforcement order (EO-201/06) under section 114, which is the authority for the Director to issue a different type of order known as an environmental protection order. The Board believes that a full explanation of this decision is necessary to enable the Board to make a proper decision on its jurisdiction to accept these new appeals.

[47] In granting the interim stay, the Board has also considered the test from *RJR MacDonald* [1994] 1 S.C.R. 311. In the Board's view, and for the interim stay only, the Board has determined that many of the same considerations apply. There is a serious issue to be decided. Given the very short timeline included in the order, it would be a denial of justice to Cherokee and Domtar not to grant an interim stay until the parties can be heard fully on the matter. Finally, on the balance of convenience and the public interest, the Board continues to have concerns about whether excavating and removal of material from the property is in the public interest. In the Board's view, even given the concerns expressed by the Director, that maintaining the current status quo until full arguments can be heard two weeks from now is a preferable course of action.

V. OTHER MATTERS

[48] At the preliminary motions hearing, the Board also heard arguments on the issues to be set for the hearing of these appeals and on document production. These matters will be dealt with in a separate decision. The Board also notes the parties agreed that at the hearing the City of Edmonton and Alberta Health Services will be permitted to participate in the hearing as if they were parties. However, the Board notes that Alberta Health Services has indicated its evidence will be presented as part of the Director's witness panel.

VI. CONCLUSION

[49] Having heard the oral arguments of the parties and reviewed the written submissions provided to the Board, the Board has decided it need not decide the question of whether a reasonable apprehension of bias exists. Instead, the Board has decided to rehear and redecide the preliminary matters decided by the Board's Chair.

[50] With respect to Board's jurisdiction to accept appeals by Cherokee and Domtar of EO-2016/03, Amendment No. 1, EO-2018/02, EO-2018/03, and EO-2018/04. In the Board's

view, these enforcement orders and the amendment fall under section 210(1)(b) and (c) of EPEA and are therefore appealable.

[51] Further, the Board has determined that a stay of EO-2016/03, Amendment No. 1, EO-2018/02, EO-2018/03, and EO-2018/04 is appropriate. Therefore, these orders and this amendment are stayed until directed otherwise by the Board, or until the Minister makes her decision on these appeals.

[52] Finally, the Board has determined that an interim stay of Amendment No. 2 and EO-2018/06 is also appropriate. On August 14, 2018, the Board will hear the Director's motion challenging the Board's jurisdiction to accept the appeals of this new amendment and new order, and the Board will hear the application for a stay from the Appellants. August 14, 2018, is the first date the Board can properly hear these motions.

Dated on August 2, 2018, at Edmonton, Alberta.

- original signed by -

Meg Barker
Panel Chair

- original signed by -

Nick Tywoniuk
Board Member

- original signed by -

Dave McGee
Board Member