

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 10, 2020

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, Operations Division, 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-RDNSR 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* (10 February 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-ID3 (A.E.A.B.), 2020 ABEAB 7.

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. and Mr. Sean Parker, McLennan Ross LLP.

Domtar Inc., represented by Mr. Gary Letcher, and Ms. Andrea Akelaitis, Letcher Akelaitis LLP, Mr. Curtis Marble, Walsh LLP, and Mr. Micah Clark, Aldridge & Rosling, 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

The Environmental Appeals Board had arranged for 12 days of appeals hearings preceded by three preliminary motions days to hear appeals from enforcement orders against Cherokee and Domtar. They concerned a brownfield development of industrial property in north Edmonton.

About a month before the scheduled hearings, the Director issued a fifth enforcement order and significant amendments to the earlier orders. He purported to justify these orders under Section 210(1)(d) and (e) as well as Emergency Protection Orders under s. 114.

Cherokee and Domtar again appealed and sought to have these further matters added to the pending hearing and sought stays in the interim. The Director argued that the Environmental Appeals Board had no jurisdiction to accept these new appeals to the Minister through the Board. The Director's position was that the only challenge to his further orders could be by judicial review.

The Board found it had jurisdiction to receive the new appeals, and decided that, based on the substance and form of the matters they were not Emergency Protection Orders, and they were in fact appealable matters under s. 210(b) and (c).

The Board found that stays were justified pending the scheduled hearings based on irreparable harm, serious issues to be tried, and the balance of convenience including the public interest.

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SCHEDULING	4
III. STATUTORY AUTHORITY – THE BOARD.....	6
IV. STATUTORY AUTHORITY – THE DIRECTOR.....	8
V. THE DIRECTOR’S JURISDICTIONAL OBJECTION	11
VI. SECTION 114.....	14
VII. SECTION 210(1)(D) AND (E).....	18
VIII. STAY REQUESTS	22
IX. DIRECTOR’S AUGUST 20 TH LETTER	25
X. CONCLUSION.....	27

I. Introduction

[1] After an expedited preliminary hearing on August 14, 2018, the Environmental Appeals Board (the “Board”) held that it had jurisdiction to hear certain new appeals. It also granted a stay of a further amended enforcement order. These are the reasons for those decisions. They are best understood by situating them within what has been series of steps by Cherokee to remediate and put to use some former industrial lands, and by the Director to regulate and restrain those activities.

[2] All the matters before the Board deal with directions and orders issued by the Director to Domtar and Cherokee.

[3] The property is in northeast Edmonton, formerly used by Domtar to manufacture treated wood products, such as telephone poles and railway ties, starting in 1924. Creosote, a chemical preservative used to treat the wood products, is a concern because it does not easily break down and is now known to contain carcinogens.

[4] Domtar closed the plant in 1987. The property was cleaned up to the standard of the day and then left vacant.¹ Since then, residential neighbourhoods have grown up around the property, so there are now homes in relative proximity to the site.

[5] In 2010, Domtar sold the property to Cherokee. Domtar is a party to these matters. Cherokee is in the business of brownfield redevelopment, which involves purchasing former industrial property, undertaking further cleanup, and once the cleanup is acceptable to environmental and municipal authorities, selling the property for residential and commercial use. Cherokee has been working on this property since about 2012.

[6] Cherokee obtained approval from Alberta Environment and Parks (“AEP”) and the City of Edmonton to sell the eastern part of the property, known as Parcel C, now a residential neighbourhood, approximately half of which is occupied. Cherokee continues to work on the

¹ The Board is not suggesting Domtar did anything different than has occurred with many other industrial sites in Alberta. The practice of closing a plant, undertaking some cleanup work, and then allowing the site to remain effectively vacant has been a common practice in Alberta. Usually, this is because, at the time the plant is closed, the cost of fully cleaning up the site outweighs the resale value of the land. The effect of this practice has allowed some sites in Alberta to remain vacant and unused for decades. As time passes, and the value of the land increases, it can become financially viable to complete the cleanup of the land and resell it for residential or commercial use. This practice is referred to as brownfield redevelopment.

remainder of the property, known as Parcel Y.² All of Parcel Y is part of the former industrial site undergoing remediation and reclamation work. (See: Appendix A – Map.)

[7] Mr. Michael Aiton is the Director, Regional Compliance, Red Deer – North Saskatchewan Region, Alberta Environment and Parks (now referred to simply as “the Director”). Such Directors have statutory powers and authority under the *Environmental Protection and Enhancement Act*, R.S.A. 2000 c. E-12 (the “Act”). The project came to the attention of the Director in 2015. In the Director’s view, Cherokee and Domtar contravened and continue to contravene the Act. Between December 2016 and July 2018, the Director issued five enforcement orders plus two significant amendments directing Cherokee and Domtar to undertake certain actions, the most notable of which was the immediate removal of contaminated material from the property. These were issued in the following three “sets.”³

[8] **The first set.** The first enforcement order (EO 2016/03) was issued on December 16, 2016, under section 210 of EPEA and was based on the Director’s view that Cherokee had illegally constructed the Parcel Y Berm. A companion environmental protection order was issued to Domtar and Cherokee on December 20, 2016.⁴

[9] **The second set.** In early 2017, the Director entered the property and retained two engineering firms to design and implement a “Compliance Investigation Sampling Program” for the entire property. Hundreds of soil samples were taken and analyzed for substances of concern associated with the manufacture of treated wood products.

[10] This sampling provided the Director with additional evidence regarding the presence of certain substances on the property.⁵ This evidence led the Director on March 16, 2018,

² Parcel Y is often referred to as having a “residential” area. This is the area of Parcel Y that is proposed to be redeveloped into a residential area. However, currently it remains a former industrial site.

³ The first enforcement order (EO 2016/03) was issued with a “companion” environmental protection order, dated December 20, 2016. The enforcement order was issued to Cherokee and the environmental protection order was issued to Cherokee and Domtar. With respect to jurisdiction, there was no challenge to the Board’s jurisdiction to accept an appeal of the environmental protection order. However, with respect to each of the enforcement orders, the Director argued the Board did not have jurisdiction to accept an appeal based on the “type” of enforcement order.

⁴ An enforcement order requires the Director to find the person to whom it is issued to have contravened the Act. (See section 210.) An environmental protection order requires the Director to find the person to whom it is issued to have “... caused an adverse effect.” A contravention of the Act is not required for an environmental protection order. (See section 113.) The Director subsequently cancelled the environmental protection order on May 18, 2018, when the Director added Domtar to the first enforcement order (EO 2016/03) by way of the first significant amendment.

⁵ Among the substances discovered on the property were naphthalene and dioxins and furans. Naphthalene is a polycyclic aromatic hydrocarbon, which is found in coal tar (a compound associated with creosote). Naphthalene

to issue a second set of orders, specifically: the first significant amendment (amending EO 2016/03) and the second (EO 2018/02), third (EO 2018/03), and fourth (EO 2018/04) enforcement orders. These orders were said to be issued, more specifically, under the authority of sections 210(1)(d) and 210(1)(e) – as compared to the first enforcement order, which was based more generally on section 210.

[11] **The third set.** The ongoing Sampling Program gave the Director further information as it progressed. In the middle of 2018, the Director received results for dioxins and furans for Parcel C (see Table 1 of the fifth enforcement order (EO 2018/06), attached as Appendix B) and Parcel Y (see Table 1 of the second significant amendment, attached as Appendix C).⁶ These results led to the second significant amendment (amending EO 2018/02) and the fifth enforcement order (EO 2018/06), which, for convenience, we now refer to as the “third set”; which are the subject of these reasons.

[12] These orders were again said to be issued under section 210(1)(d) and (e) of the Act, but also under section 114, which gives the Director authority to issue an environmental protection order requiring emergency action on the part of the person to whom the order is issued.⁷ Again, the Director argued the Board is without authority to accept appeals of orders issued under section 114. The Board’s jurisdiction to accept the appeals of the “third set” and the related stay applications, are thus the subjects of these reasons.

is the chemical found in mothballs, which gives mothballs their distinctive smell.

Dioxins and furans are a class of chlorinated organic chemicals that are by-products of certain industrial processes. However, they can also be produced by certain natural processes such as forest fires. There are 210 different dioxins and furans, each of which has a different degree of toxicity, which depends on a range of factors, including which dioxins and furans are present, what concentrations are present, and what “exposure pathways” are present. Certain dioxins and furans are considered among the most toxic chemicals known. The presence of dioxins and furans on the property was unexpected and came as a surprise to all of the parties to the appeals. (See: Remediation Certificate 325870-00-00.

⁶ Despite Parcel Y being referred to as a “Residential Area,” there are no homes on Parcel Y, and to date it remains an industrial site that is undergoing remediation.

⁷ In these orders, sections 112, 176, and 212 of EPEA were also cited as authority for issuing the enforcement orders. These sections do not authorize the Director to issue orders. Section 212 authorizes the Director to amend an enforcement order. Section 112 is the duty to take remedial measures and section 176 is the general prohibition against the disposal of waste. Violating sections 112 or 176 may form the basis for issuing an enforcement order, but these sections are not, in and of themselves, the authority for the Director to issue an enforcement order.

II. Scheduling

[13] The third set of orders, and the resulting Cherokee and Domtar appeals and stay applications, arose shortly before a 12-day hearing starting on August 27, 2018 scheduled to deal with the first and second set appeals. In addition, the Board had scheduled a three-day preliminary motion hearing for July 24 - 26, 2018.

[14] Cherokee and Domtar wanted the merits of its third set appeals and the Director's further jurisdictional arguments dealt with along with the first and second set proceedings scheduled to begin shortly. The Director's position was that the matters should not be heard in August or at all.

[15] Following the July 24-26 preliminary hearing the Board ruled that the first and second set matters were properly before it.⁸ Several reasons made it impractical to hear the "third set" of preliminary objections at that time.

[16] After July 26, 2018 hearing, the Board discussed with the Parties when to deal with the Director's further jurisdictional challenges.⁹ The Parties identified three competing interests. First, they wanted the matter dealt with on an expedited basis. Second, they wanted the matter to be heard in person, as opposed to in writing or via teleconference. Finally, they wanted the matter to be heard by the entire hearing panel, being Ms. Meg Barker, Mr. Nick Tywoniuk, and Mr. Dave McGee.

[17] The Board initially agreed to hold an in-person hearing on August 2, 2018, with Mr. Tywoniuk and Mr. McGee as the panel since Ms. Barker was not available. However, after reviewing the written submissions the Board decided to grant an interim stay of the third set until the full panel could hear the preliminary motions on August 14, 2018.¹⁰

[18] The issues raised in the jurisdictional objections and the application for a stay are both important. The Director asserts that for significant powers under the Act, particularly emergency powers, his actions are not subject to appeal to the Board or the Minister and instead

⁸ See: *Cherokee Canada Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (2 August 2018), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-ID2 (A.E.A.B.), 2018 AEAB 7.

⁹ On July 30 and 31, 2018, written submissions and supporting documents were filed by Cherokee, Domtar, and the Director on whether the Board has jurisdiction to accept the appeals of the fifth enforcement order and the second significant amendment.

¹⁰ See the Board's letter of August 10, 2018.

are only subject to judicial review, and then only on limited grounds. The matters are important to and urgent for Cherokee since, in its estimate, compliance with the new and amended step three order and directions could cost upwards of \$52 million dollars for actions that it views as unnecessary, and which it would have to take without any effective right to appeal.

[19] For the reasons given below, the Board ruled that it had jurisdiction to hear the “third set” appeals and would do so as part of the hearings to begin on August 27, 2018. It also granted a further stay. Those rulings were communicated to the parties on August 20, 2018 by letter reading:

“This is the Board's decision following the preliminary motions hearing held on August 14, 2018.

At this preliminary motions hearing, the Board had two motions before it. The first motion was whether the Board had jurisdiction to accept the appeals of (a) [the second significant amendment], and (b) the [fifth enforcement order (EO 2018/06)].

The Board has decided it has the jurisdiction to hear these appeals. These appeals will be heard as part of the upcoming hearing starting on August 27, 2018. The Director's Record regarding these appeals is due by 4:30 pm (Alberta time) on August 22, 2018. Any supplemental written submissions the parties wish to file regarding these appeals are due at 4:30 pm (Alberta time) on August 23, 2018

The second motion was whether to grant a stay of (a) [the second significant amendment], and (b) the [fifth enforcement order (EO 2018/06)].

The Board has decided to grant a stay of both of these orders. This stay shall remain in place until the Board orders otherwise or the Minister [of Environment and Parks] makes her decision in these appeals.”

The matters were then heard during the August 27 hearings.

[20] This decision followed two earlier decisions involving the Director's jurisdictional objections. *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.) and *Cherokee Canada Inc. et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (2 August 2018), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-ID2 (A.E.A.B.), 2018 AEAB 17. The second decision was a rehearing of the first, required when the Board's Chair, who presided over the first hearing, recused himself over a recently discovered conflict.

III. Statutory Authority – The Board

[21] The Act grants power and imposes duties on the Director. It also provides appeal processes. Most appeals are to the Minister, but they go through the Board, and result in a Report and Recommendations to the Minister who is the final decision maker. The pertinent sections of Part 4 of the Act are:

Environmental Appeals Board established

90(1) There is hereby established the Environmental Appeals Board consisting of persons appointed by the Lieutenant Governor in Council.

(2) The Board shall hear appeals as provided for in this Act or any other enactment.

The Courts have frequently recognized that, under the scheme of the Act and given its membership, the Board is an expert tribunal in its area of authority, empowered to decide questions of law and jurisdiction.

[22] The Act, in section 91(1) subsections (a)-(l) and s. 1.1 (m) to (p) sets a variety of specific circumstances where a person may submit an appeal. Subsections 91 (2) and (3) specifies when an appeal may not be submitted. The Act then addresses the appeal process (*Water Act* references and sections of no impact for this decision are omitted).

[23] It describes two types of appeal; those that go to the Board as the final decision maker (not relevant here) and those that go to the Board and result in a Report and Recommendation to the Minister as final decision maker. The pre-decision or report processes are essentially the same in each case.

Hearing of appeal

94(1) On receipt of a notice of appeal under this Act ... the Board shall conduct a hearing of the appeal.

(2) In conducting a hearing of an appeal under this Part, the Board is not bound to hold an oral hearing but may instead, and subject to the principles of natural justice, make its decision on the basis of written submissions.

Powers and duties of Board

95(1) The Board has all the powers of a commissioner under the *Public Inquiries Act*.

(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal

properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

(Certain provisions are then included to avoid duplicate regulatory review)

- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
- (e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.

(5) The Board

- (a) may dismiss a notice of appeal if

(Circumstances justifying dismissal are then listed).

(6) Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.

...

(8) Subject to the regulations, the Board may establish its own rules and procedures for dealing with matters before it.

[24] Section 98 deals with appeals to the Board and sections 99 to 100 with appeals resulting in a Report and Recommendations to the Minister.

Report to Minister

99(1) In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act ... the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.

(2) The Minister may extend the 30-day period referred to in subsection (1) on application by the Board before or after the expiry of the period.

Decision by Minister

100(1) On receiving the report of the Board, the Minister may, by order,

- (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make ...

...

(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.

(2) The Minister shall immediately give notice of any decision made under this section to the Board and the Board shall, immediately on receipt of notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the Board and to all other persons who the Board considers should receive notice of the decision.

[25] Both the Minister and the Board are afforded broad privative protection.

Privative clause

102 Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

[26] The Courts have reviewed this configuration on many occasions. It has been said that:

“The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signaled its intention for the Board and the Minister to deal with these issues through the strong privative clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal.”¹¹

IV. Statutory Authority – The Director

[27] The Act gives the Director the following powers and responsibilities as far as this case is concerned.

Emergency environmental protection order

114(1) Where an inspector, an investigator or the Director is of the opinion that

¹¹ *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)*, (20 April 2000) 263 AR 55 (“McCain”) at paragraph 20.