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.

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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

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[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.

residential neighbourhood, approximately half of which is occupied. Cherokee continues to work on the 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 comparison 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.

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[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.

[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, 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

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[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 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 consider 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 authorized 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.

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.

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

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[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.

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 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.

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

[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
>
> (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, investigator or Director considers necessary.
>
> **(2)** Subsection (1) applies whether or not the release of the substance into the environment is or was expressly authorized by or is or was in compliance with an approval, a registration or the regulations.
>
> **Enforcement orders by Director**
>
> **210(1)** 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:
>
> (a) the suspension or cancellation of an approval, registration or certificate of qualification;

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

> (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.
>
> **(2)** Where an enforcement order specifies measures that must be taken under subsection (1)(e), the measures may impose requirements that are more stringent than applicable requirements in the regulations.
>
> **(3)** An enforcement order issued under subsection (1) shall contain the reasons for making it and must be served on the person to whom it is directed.

[28] The circumstances where the Board and Minister may hear an appeal from the Director are listed in Section 91(1).

> **91(1)** A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
>
> (e) 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…;
>
> …
>
> (h) where the Director issues an environmental protection order, except an environmental protection order directing the performance of emergency measures under section 114, 151 or 160 and an environmental protection order referred to in clause (g),
>
> the person to whom the order is directed may submit a notice of appeal …;

[29] The Director asserts that, his having specified his authority as s. 210(1)(d) and (e) as well as s. 114, the Board has no authority, on an appeal, to assess whether the specified authority is correct or adequate. He cites the Supreme Court of Canada's decision in *R.* v. *O'Brien* (2011) SCC 29 for the view that decision-makers "… are entitled to have their reasons

reviewed based on what they say…." According to the Director, the Board must not speculate about the indirect effects the orders may have in the future.[12]

[30] Domtar says the *O'Brien* case does not apply. It "…does not stand for the proposition that, in determining the jurisdictional issue, the Board must accept the Director's characterization as to which section [of] EPEA is applicable." It is up to the Board to determine its jurisdiction and it need not defer to the Director.

[31] The facts and legal context giving rise to this comment in *O'Brien* fall a long way from the situation here. A masked man robbed a store. The mask was recovered in close proximity to the store that had been robbed. The mask revealed traces of Mr. O'Brien's DNA. During the trial before a Judge sitting alone, the prosecution made an inappropriate reference to the accused having a criminal record; inadmissible character evidence. The Judge found the accused guilty saying, in part, that "he relied <u>entirely</u> on the DNA evidence to identify the accused". The appeal was based on the proposition that the Judge heard the character evidence and had not said expressly that he took no account of it. It is in this context that the Supreme Court of Canada observed, based on his saying he relied entirely on the DNA evidence, that he did not need to go on and say he had not relied on the reference to the accused's record.

> "A trial judge has an obligation to demonstrate through his or her reasons how the result was arrived at. This does not create a requirement to itemize every conceivable issue, argument or thought process. Trial judges are entitled to have their reasons reviewed based on what they say, not on the speculative imagination of reviewing courts. As Binnie J. noted in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55, trial judges should not be held to some "abstract standard of perfection".

[32] The *O'Brian* case does not support the Director's view that a statutory decision maker, potentially subject to appeal, can preclude even the acceptance of an appeal by choosing to frame his or her authority in one way when, arguably, it is justified in another way that is subject to appeal. Saying so does not automatically make it so. The Board finds more convincing on this point the administrative law authorities put forward, particularly by Domtar in its argument.

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[12] Director's Motion, dated July 30, 2018, at paragraph 3. Director's Submission, dated July 31, 2018, at paragraphs 3, 72, and 73.

[33] The Supreme Court of Canada in *Regina Police Association* v. *Regina (City) Board of Police Commissioners*, 2000 SCC 14 ("*Regina Police Association*") set out a useful framework to follow in determining jurisdiction. The question is "…whether the essential character of a dispute, in its factual context, arises expressly or inferentially from [the] statutory scheme…."[13] Further, in determining the essential character of the dispute, the "…determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed…."[14] Thus the Board must "…determine the essential character of the appeal[s] on the basis of the facts surrounding the dispute … between the Director and the Appellants."[15]

V. The Director's Jurisdictional Objection

[34] Despite the Boards earlier rulings, the Director now raises the same plus additional jurisdictional objections related to the "set three" directives and orders. In the Director's view, this third set create unappealable obligations on Cherokee and Domtar that cannot be stayed must be complied with notwithstanding any Board processes. By challenging the Board's authority to even receive the appeals here, the Director challenges:

(a) The Board's authority to rule on jurisdictional objections at all, and

(b) To rule on the merits of the Director's jurisdictional objection.

[35] The Director's position requires a broader view of the Act. The Act, except for certain preliminary matters, gives the Minister of Environment and Parks (the "Minister") oversight of decisions of the Director, oversight exercised with the assistance of the Board's expert advice following a hearing process.[16] Following a hearing on the merits of an appeal, the

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13 *Regina Police Association* v. *Regina (City) Board of Police Commissioners*, 2000 SCC 14 at paragraph 39.

14 *Regina Police Association* v. *Regina (City) Board of Police Commissioners*, 2000 SCC 14 at paragraph 25.

15 Domtar's Submission, dated July 31, 2018, page 11, paragraph 8.

16 See: *Sarg Oils Ltd*. v. *Environmental Appeal Board*, 2007 ABCA 215 at paragraph 13:

> "The Board is an expert appellate tribunal, established to decide polycentric fact and policy intensive issues about the protection of the environment. While its decisions are in form only recommendations to the Minister, they can have a significant effect on the rights of those before it. The Board recognized this, by affording the respondents a full viva voce hearing with the right to cross-examine and call witnesses."

Board provides the Minister a report and recommendations. It recommends whether the Director's decision should be confirmed, reversed, or varied. The Minister then makes an independent decision as to how the appeal should be resolved; either confirmed, reversed, or varied.[17] The Director's argument that the Board cannot even accept appeals and then decide its jurisdiction, if accepted, would remove final decision-making responsibility from the responsible Minister. Instead, for many of the Director's important decisions, such decisions would only be subject to limited supervision by judicial review. This argument has been made before and rejected by the Courts.

[36] As long ago as the *McCain* decision, a similar limited view was rejected. A Director had inserted a condition in an appeal. McCain's view was that it was inserted without legal authority. The reviewing Court framed the issue as follows, at paragraphs 10 and 11:

> "This is a unique application. Two creatures of the same statute, the Director and the Board, both of whom serve the same function, namely those persons enunciated in s. 2 of the Act, are fighting over who has jurisdiction to do what.
>
> The issues as identified by counsel for the Director are:
>
> > (a) Did the EAB act without jurisdiction, exceed its jurisdiction or err in law when it decided that it has the jurisdiction to determine whether the Director exceeded his legal authority under the Act? In other words, does the EAB have a supervisory jurisdiction with respect to the Director similar to that of a Superior Court of Record?"[18]

[37] The Court analyzed the scheme of the Act at paragraph 12 saying in part:

> "The Act and Regulations made thereunder set out a comprehensive scheme for attempting to attain its purposes. The Minister is the person ultimately responsible for seeing that the purposes of the Act are realized. An integral part of the process is the work that various Directors do. These people are appointed pursuant to the provisions of the Act and the ambit of their responsibilities is set out in the Act, …
>
> Alta. Reg. 113/93. Section 6(2) outlines eight matters that might be addressed by the Director in reviewing an application for an approval. These include proposed

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[17] See: sections 99(1) and 100(1) of EPEA.

[18] *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* [2000] (unreported decision, Murray J., Alta. Q.B. Action No. 9903-23265, April 20, 2000).

> methods of minimizing release of substances into the environment, conservation and reclamation and site suitability, all matters of environmental concern. The Act goes on to deal with appeals from decisions of Directors respecting such approvals and, except in certain specific cases, the Board is fixed with the responsibility of conducting a hearing of an appeal and preparing a written report for the Minister, which includes its recommendations and the representations or summary of the representations made to it by the parties to the appeal. The Board brings to bear upon its decisions a considerable degree of expertise."

[38] As here, the Director in *McCain*[19] challenged the Board's jurisdiction, saying he was only subject to judicial review.

> "The Director argues that the Board does not have the jurisdiction to consider questions of law, and therefore has no jurisdiction to determine the jurisdiction to the Director. His position is that the jurisdiction of the Director must be determined by the Court of Queen's Bench as part of a judicial review application.
>
> In my view, the Director's position is, as submitted by the respondents, inconsistent with the provisions of the Act, and prior case authority."[20]

[39] In support of its conclusion the Court quoted the following passage with approval:

> "In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection."[21]

[40] At paragraph 22, the Court considered several earlier cases upholding the Board's jurisdiction in such matters, and then concluded:

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[19] *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* [2000] (unreported decision, Murray J., Alta. Q.B. Action No. 9903-23265, April 20, 2000).

[20] *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* [2000] (unreported decision, Murray J., Alta. Q.B. Action No. 9903-23265, April 20, 2000), at paragraphs 16 and 17.

[21] *R.* v. *Consolidated Maybrun Mines Ltd. et al*, [1998] 1 S.C.R. 706.

> "Since the Minister has the same powers as the Director insofar as this matter is concerned, it follows that he must also be able to consider what the Director's jurisdiction is in dealing with this question. The Board's role is one of reporting and making recommendations and in doing so it must deal with the same questions as the Minister will, including the question of whether or not the Director in fact had the jurisdiction to insert the condition in the approval. It seems incongruous that one might say that the Minister who has the same powers as the Director insofar as these matters are concerned, should be deprived of the Board's recommendations when giving his decision as required by the Act."[22]

[41] On the basis of this well-established authority, the Board finds it has the authority to receive these appeals and to assess its jurisdiction with respect to them.

VI. Section 114

[42] What is new with the third set of orders and amendments is the Director's assertion that they amount to Environmental Protection Orders made under s. 114, and are unappealable due to s. 91(1)(h):

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances: …
>
> (h) where the Director issues an environmental protection order, except an environmental protection order directing the performance of emergency measures under section 114, 151 or 160 and an environmental protection order referred to in clause (g),
>
> the person to whom the order is directed may submit a notice of appeal …"

[43] Cherokee and Domtar argue that the "third set" orders are not "environmental protection orders directing the performance of emergency measures" as contemplated by the Act and describing them as such does not preclude the ability to appeal. For several reasons the Board agrees.

[44] The orders the Director issued and later amended were, on their face, appealable enforcement orders; they did not morph into Environmental Protection Orders simply due to a reference to s. 114. In addition, the history of these matters gives the appearance of an effort to

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22 *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* [2000] (unreported decision, Murray J., Alta. Q.B. Action No. 9903-23265, April 20, 2000) at paragraph 28.

preclude an appeal to the Minister through the Board. Combining orders in such a way would lead to the illogical result that only part of the entire order would be subject to appeal, while other parts would stand amenable only to judicial review. The Board has already found that the enforcement order now amended by the "third set" is appealable. The Director effectively asserts that he has changed its nature, now making it unappealable.

[45] Further and in any event the Board is not persuaded that the appropriate circumstances existed for an Environmental Protection Order. Section 247 adds procedural requirements.

> "247(1) An inspector or investigator shall make all reasonable efforts to consult with the Director before issuing an environmental protection order directing the performance of emergency measures under section 114, 151 or 160.
>
> (2) An environmental protection order directing the performance of emergency measures under section 114, 151 or 160 shall contain the reasons for making it and where it is issued by an inspector or investigator, the inspector or investigator shall submit a copy of it to the Director immediately after issuing it."

[46] Inspectors and investigators are allowed to issue orders, but they must make reasonable efforts to consult with the Director. This implies that these orders are intended to be issued immediately upon discovering an environmental emergency. Here, the Director had the information for over a month before choosing to act. In the Board's view, where there is time to properly consider another type of order, as there was here, with the Director issuing an enforcement order and amendment to an enforcement order, there is no "emergency" to justify the use of s. 114.

[47] The Director's core concern and the expressed foundation for invoking section 114 was the presence of dioxins and furans on the property. Their presence was known well before the "third set" issued on July 18, 2018. Dioxins and furans were already the subject matter of the second set of orders on March 16, 2018.

[48] The Board has reviewed the sampling data said to support the orders, specifically Table 1 from the fifth enforcement order (see Appendix B) and Table 1 from the second significant amendment (see Appendix C). The tables supporting the "third set" identify a

borehole, a sampling result (in ng/kg), and the depth below ground level of the sampling result (in m). The results are then compared to (1) the Tier 1/Tier 2 Limits, (2) the Alberta Health (AH)/Alberta Health Services (AHS) Screening Level, and (3) the "SWGCSA" Acute Exposure Limit, a level developed by staff working for the Director. In considering this data in context, the Board agrees that it is something the Appellants must deal with in a timely manner, but it is not something that constituted an emergency.

[49] Table 1 of the fifth enforcement order is data from the Parcel C Berm, located adjacent to a number of newly developed homes in Parcel C. This area has been fenced off to ensure that no one can access the area. Other measures have been taken to create a barrier to limit possible exposure. These requirements were established by Alberta Health Service to prevent possible exposure.[23] Of the 13 sampling results, only 2 are near the surface – a reading of 36 ng/kg is in the 0.0 to 0.75 metre zone, and the reading of 327 ng/kg is in the 0.2 to 0.5 metre zone. All of the remaining readings are below 1.5 metres.

[50] This means that there is a very low likelihood that anyone from the local community could come in contact with these materials. With the exception of two samples, the results are generally within the same order of magnitude as the Acute Exposure Limit established by the Director. In toxicology terms, it is very unlikely there is an exposure pathway that would allow materials from the Parcel C Berm to reach any of the residents in the area, making the risk associated with these materials very low.

[51] The Board does not believe an emergency exists, and in fact, the Board is more concerned about the potential impact of removing these materials from their current location and trucking them through the community as contemplated by the "emergency order" itself. Based

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[23] See also paragraph 22 of Cherokee's Submission, dated July 31, 2018, which states:

"The government's own update to impacted residents, published July 19, 2018 … confirms the absence of any emergency, noting:

a. 'This area has been fenced off, so it poses no risk to the public':

b. '…residents are not at risk of exposure or human health impacts. Further testing in these areas is underway…';

c. [Impacted areas] '…have been fenced off, which limits direct exposure to potential contaminants.'"

on the information currently before the Board, leaving the materials in place until a well considered plan can be developed is the more responsible course of action.

[52] Table 1 of the second significant amendment is data from what is referred to as the Parcel Y Residential Area – to distinguish it from the Parcel Y Berm area. In this case, there are no homes in the same proximity as the samples taken from the Parcel C Berm, and the parcel is again fenced off to prevent public access. Other measures have been put in place to provide a barrier to possible exposure. The remediation and reclamation work in this area is not complete and it remains a former industrial site. As such, it is not unexpected to find elevated levels of contaminants, and in fact, the work to address these elevated levels of contaminants is the very activity Cherokee is authorized to carryout under its approval.

[53] The Tier 1/Tier 2 Limits are the limits to which a fully remediated site must be cleaned up. It is not uncommon that normal background levels for certain perimeters can exceed Tier 1/Tier 2 Limits. These limits are also not the limits expected to be found on former industrial site that is undergoing reclamation. A screening level, as in the Alberta Health (AH)/Alberta Health Services (AHS) Screening Level, is a level that triggers further study; it does not necessarily trigger a cleanup response. The Acute Exposure Limit is a limit developed by Alberta Environment and Parks. That is one of the key factors in dispute in these appeals. There is no evidence before the Board at this point that it is a clean up standard that has been accepted elsewhere. More importantly it is the focus of the hearing into these appeals.

[54] There are 13 results in this sampling set. Six are in the 0 to 0.3 metre zone. The remainder are below 0.5 metres, which provides an adequate barrier to prevent any potential exposure to residents. One of the sampling results in the 0 to 0.3 metre zone is 38 ng/kg, which is below the Alberta Health (AH)/Alberta Health Services (AHS) screening level. Three of the sampling results are in the same order of magnitude (484 to 565 ng/kg) as the level proposed by the Director, and the remaining two (1577 and 2260 ng/kg) are within one order of magnitude of the level proposed by the Director. Given this is a former industrial site and access controls are in place, the Board does not believe an emergency exists. Again, the Board is more concerned about the potential impact of removing these materials from their current location and trucking them through the community as contemplated by the "emergency order." Based on the

information currently before the Board, leaving the materials in place until a well considered plan can be developed is the more responsible choice.

[55] Since this "third set" are not properly the subject of emergency protection orders and, in the Board's view, no emergency exists, these orders are not properly issued under section 114. As a result, the limitation on appeals of section 114 orders does not apply.

VII. Section 210(1)(d) and (e)

[56] The Director argues that the third set are "in form and substance" enforcement orders issued under section 210(1)(d) and (e) of the Act as well as environmental protection orders under section 114 requiring the Appellants to perform emergency measures. No part of these emergency measures, it is argued, order the stopping or shutting down of an activity as required under section 210(1)(b) or ceasing any operation or construction as required under section 210(1)(c).[24] The Director argues the Board has no jurisdiction over any parts of the orders that require emergency measures to be undertaken.[25] The Director maintains that the orders were made under section 210(1)(d) and (e) because they direct the "doing … of anything referred to in section 113" of Act and specify "… the measures that must be taken in order to effect compliance with [the Act]."[26]

[57] The Director argued that they were issued under sections 210(1)(d) and (e), and are not appealable because of the wording of section 91(1)(e) which indicates only enforcement orders issued under sections 210(1)(a), (b), and (c) are appealable. The Board accepts that sections 91(1)(e) and 210(1) mean that some enforcement orders are appealable and others are not. The question is how to determine which category applies to particular orders. None of the parties were able to provide the Board with a clear policy explanation as to why the legislation creates these two categories.

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[24] Director's Submission, dated July 31, 2018, paragraphs 70 and 71.

[25] Director's Motion, dated July 30, 2018, at paragraph 7. Submission, dated July 31, 2018, at paragraphs 3 and 59.

[26] Director's Motion, dated July 30, 2018, at paragraph 5. Director's Submission, dated July 31, 2018 at paragraphs 4, 65 and 69.

[58] The Director argued in making the decision as to whether orders are appealable, the Board must "… have regard to what the [o]rders explicitly require and their reasons …."[27] Further, they "… must not speculate what other indirect effects the [o]rders may or may not have if other government action is taken in the future."[28] The Board agrees. The Board is concerned with the direct effects of the order – their essential character – which is the stopping, shutting down, or ceasing the Appellants activities on the site.

[59] As the Board has previously discussed, 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 to the Minister. That is the Board's jurisdiction and not the Director's.

[60] There are other general rules for interpreting whether enforcement orders are appealable. Entire enforcement orders are appealable or they are not. It would be inappropriate and impractical to divide orders up line by line, trying to determine what provisions of an order fall under sections 210(1)(a), (b), or (c), and what provisions fall under sections 210(1)(d) and (e). Such an interpretation would mean that some provisions of an order would be appealable and other provisions of the same order would be subject only to judicial review. This is not a logical or workable interpretation. If 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.

[61] Similar logic applies if an enforcement 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 if part of the order could also fall under 210(1)(d) and (e). Nowhere in the Act does it say expressly that orders issued in part under section 210(1)(d) and

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27 Director's Motion, dated July 30, 2018, paragraph 3.

28 Director's Motion, dated July 30, 2018, paragraph 3.

(e) are not appealable. To give any other interpretation would take away an appeal right where the legislation suggests an appeal to the Minister should be available.[29]

[62] In the Board's view, the cornerstone in determining whether the third set is appealable is the effect they have on the Appellants, and whether this effect falls under section 210(1)(a), (b), or (c), which, in the Board's view, they do.

[63] As a final point over jurisdiction with respect to section 210(1)(a), (b), and (c), the Board is concerned by the Directors approach. A total of five orders (three of which were issued on the same date) for the same property have been issued. 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 issue several orders, the Board is concerned over the Director's suggestion that one order may be appealable, while others are not. This could result in a multiplicity of proceedings over to the same issue, with one or more orders being appealed to the Board and one or more orders being judicially reviewed in the Court of Queen's Bench. If this were to occur, it could result in two decision-makers – the Minister following the statutory appeal process and a Justice of the Court of Queen's Bench on a judicial review – 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, and the legislation should not be taken to have intended such a result without clear language.

[64] This interpretation is supported by *Consolidated Mayburn Mines*[30] and *McCain.*[31] The structure of the Act, affording affected parties an appeal to the responsible Minister through the Board, implies strongly that the right to appeal is not to be negated by the Director's claiming to rely upon a specific power, and by making orders by amendment. The right to appeal cannot by such means be negated in favour of judicial review. It is simply incongruous for the Director

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29 See: Domtar's discussion of *Unifor Local 2310* v. *Rio Tinto Alcan Inc.* 2017 BCCA 300. Domtar's Written Submission dated July 31, 2018, at paragraphs 17 to 19.

30 *R.* v. *Consolidated Maybrun Mines Ltd. et al*, [1998] 1 S.C.R. 706.

31 *Alberta (Director, Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)* [2000] (unreported decision, Murray J., Alta. Q.B. Action No. 9903-23265, April 20, 2000).

to suggest, because of a particular way he chooses to characterize his authority, he can in all practical terms stop the project entirely by ordering tens of millions of dollars of arguably unnecessary and potentially harmful reclamation work.

[65] Whether ultimately the Director's views are justified is for the Minister to decide, after a hearing and the resultant Board report and recommendations. What is not justified is the bald assertion that the scheme of the Act renders all such actions unappealable.

[66] The project Cherokee is undertaking is the brownfield redevelopment of a former treated wood products processing plant. In the terms used in the Act, this redevelopment or cleanup work is "reclamation." Under the *Activities Designation Regulation*, A.R. 273/2003 (the "Regulation"), Schedule 1, Division 2, Part 11, section (m), subsection (ii), the construction, operation, and reclamation of a wood treatment plant is a designated activity, which requires an approval. Specifically, section 2(2)(www) of the Regulation defines a "wood treatment plant" as a "… plant that preserves or protects wood or wood products through the use of wood treatment chemicals."

[67] As required by these provisions, Cherokee holds an approval for the reclamation of the former treated wood products processing plant. Specifically, the Approval for the Site, (Approval 9724-04-00), was transferred to Cherokee on April 26, 2010. The Approval includes Parcel C, the Parcel C berm, Parcel Y and the Parcel Y berm.

[68] The Parties accept, and the Board agrees, while there is an approval for this project, none of the provisions in the third set suspend or cancel that approval. Therefore, the third set were not issued under section 210(1)(a).

[69] The work that Cherokee is undertaking is reclamation, defined in section 1(ddd) of the Act as:

> "… any or all of the following:
>
> (i) the removal of equipment or buildings or other structures or appurtenances;
>
> (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; …."

[70] The core of Cherokee's reclamation work 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. According to Cherokee, 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. Therefore, returning to section 210(1), Cherokee is conducting an "activity" on the property; an activity authorized by an approval issued under the Act. (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.)

[71] What the enforcement orders effectively 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). In the Board's view, these requirements fall into section 210(1)(b) and (c), which make the enforcement orders appealable.

VIII. STAY REQUESTS

[72] The Appellants applied to stay the "third set" of orders. The Board determined that such a stay was appropriate. All parties accept the Board has the power to issue a stay[32] and all agree the test for a stay is found in the case of *RJR MacDonald.*[33] The steps in the test 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 applicant would suffer irreparable harm if the application were refused. Finally,

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32 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."

33 *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),* at paragraph 41.)

> 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."[34]

[73] The Director argues that the Appellants have failed to demonstrate a serious issue to be tried or a "strong possibility of success". The Director, citing a decision of the Saskatchewan Court of Queen's Bench, argues that there is a higher standard when seeking an injunction against a public authority.

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought."[35]

The Director argues that his orders properly represent the public interest in this matter.

[74] In the Board's view, this reference is a subset of the concept of judicial deference to expert tribunals. Under the Act, the Director is not the sole repository of the public interest. The Minister, and this expert Board in its role as the Minister's fact finder and advisor, is bound by the same purpose as set out in the Act itself. This is somewhat different from a reviewing court addressing an expert administrative authority with unappealable statutory powers.

[75] Cherokee argues there are several serious issues to be tried. Among these, Cherokee points to the basis of the orders being the criteria established in the provisional guidance documents, and the evidence before the Board from Cherokee's experts that the criteria are "not scientifically defensible." Domtar argues the consequences to Domtar are significant, real, and substantial issues to be considered. By the "third set" the Director has amended an order that is already subject to a stay. By doing so the Director is trying to lift a stay already in place by amending the order. That, in and of itself, creates a serious issue. Domtar argues that the stay of the original order should automatically apply to the amendment, rather than lifting the

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34 *RJR MacDonald Inc.* v. *Canada (Attorney General),* at paragraph 43.

35 *Metz* v. *Board of Education of the Prairie Valley School Division No. 208 of Saskatchewan*, 2007 SKQB 269

stay. Domtar questions whether the Director even has the ability to amend an order that is subject to a stay. In its view, these concerns too lead to serious issues to be tried.

[76] The evidence before the Board at this point, particularly with respect to the provisional guidance documents, shows serious issues to be tried. The Director has based his orders largely on the fact the samples exceed the criteria established by those documents. The Appellants have raised serious concerns about these criteria, which they maintain are scientifically indefensible. There are also serious issues to be tried regarding these orders, on the facts, on the underlying legislative authority to make them, and on the question whether, by a purported amendment, a stayed order can be varied or rendered unappealable.

[77] The Director argues that the Appellants will not suffer irreparable harm, which must be clear and non-speculative. According to the Director, the Appellants have no evidence of any such harm and no evidence that following the orders would be unduly onerous. The concerns, it argues, are entirely speculative. The Director notes an Alberta Court of Appeal ruling that: "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of a 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."[36]

[78] Cherokee argues that not granting the stay will cause it irreparable harm. In Cherokee's view, the damage to its reputation in this regard is sufficient. However, Cherokee also argues that it may be unable to recover damages from the regulator. The unrealistic timelines in the orders put Cherokee at great risk of being in contravention of the orders. Domtar argues that denying stays will result in Domtar effectively losing its right to appeal. Complying with the orders, within the timelines they require, will render the appeals moot. The work would be completed long before the Board could effectively hear the appeals.[37]

[79] The Board is concerned that Appellants appeal rights will be moot if the orders are not stayed. This itself, given the timelines involved, could led to a denial of justice. The

[36] *Lubicon Lake Indian Band v. Norcen Energy Resources* (1985) 58 A.R. 161 at paragraph 30

[37] Domtar's Submission, page 4, paragraph 14, citing *Maverick Equities Inc.* v. *The Owners of Condominium Plan No. 9422336,* 2008 ABCA 190.

potential cost of immediate compliance is very high. The argument that any financial harm might be recovered from the Director is unappealing.

[80] On the balance of convenience, Domtar notes the timing of these appeals. At the time these preliminary motions the pending hearing was less than 2 weeks away. According to Domtar, the core issue in the balance of convenience is the Director's use of the disputed provisional guidance documents as the basis for his orders. According to Domtar, it "…is not in the public interest that a hurried approach to addressing these issues occur nor is it in the public interest that the anxiety and loss of property occur as a consequences of a risk that has not been properly addressed.

[81] On the balance of convenience, Cherokee argues there is no emergency and that the Director's actions are "alarmist." The Government's own statements attest to the fact that there is no immediate health risk. Cherokee says the Appellants have taken steps to ensure the site is safe through the installation of fencing and signage, as well as ensuring dust control. Maintaining the status quo protects the interests of all parties and properly protects the public interest until appeals can be heard.

[82] 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 orders that contaminated material be removed from the property on an immediate basis. Excavation and removal of the contaminated material could result in its being released further into the environment. Without a full public hearing, it will not be possible to determine if the best and safest course of action. It may well be to leave the contaminated material on the property until there is an opportunity to fully consider the potential risks to public health and safety that may result from excavating and moving the material off the property in an expedited manner. Taking the time to put together a properly considered and informed plan will better serve the public interest.

[83] In making this decision, the Board had regard to the involvement of Alberta Health Services. Alberta Health Services issued their own orders to ensure the immediate protection of public health. In particular, Alberta Health Services required Cherokee to fence the perimeter of the property and place signage on the fence to prevent people from entering the

property. All of these steps are directly aimed at taking immediate steps to protect public health. This is the proper role of Alberta Health Services, and it is a different role than that of the Director.

IX. DIRECTOR'S AUGUST 20TH LETTER

[84] On August 20, 2018, contemporaneously with the Board sending out its August 20, 2018 decision letter, the Director's Counsel provided the Board with a letter from the Director dated August 17, 2018 advising that it has come to his attention that dioxins and furans have been detected in the backyard of the homes adjacent to Parcel C Berm. Counsel for the Director requested that this information be added to the Director's submission regarding jurisdiction and the stay application considered by the Board on August 14, 2018.[38] Counsel for the Director requested that on the basis of this information that the stay of EO 2018/06 be lifted immediately.

[85] On August 24, 2018, the Board responded stating,

> "The Board has reviewed this information, and the subsequent information and arguments presented by the other parties and by counsel for the Director. The Board notes it is unclear how these contaminants ended up in the backyard. Further, the Board notes Cherokee is undertaking steps, in consultation with the Director and Alberta Health Services, to address these findings. Therefore, the information and arguments have not changed the Board's views. The Board affirms its decision it has jurisdiction to hear the appeals of the Parcel C Berm Order.
>
> Further, the Board affirms its decision the best course of action, until these matters can be properly addressed at a hearing on the merits of the appeals, is to maintain the status quo. (It is important to note [that EO 2018/06] relates to the entire Parcel C Berm and not solely to the backyard where these contaminants have been found.) Therefore, the stay of the Parcel C Berm Order remains in place until directed otherwise by the Board or until the Minister makes her decision regarding these appeals."

[86] Specifically, the information provided by the Director stated,

> "Recent follow up sampling conducted on August 8, 2018 (results received yesterday by AEP) in surface soils has discovered dioxin and furan contamination at 89 ng/kg, within a few meters of the Parcel C Berm in the backyard of a Parcel

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38 See Board's letter dated August 24, 2018.

> C homeowner, whose home backs onto the Parcel C Berm.
>
> The specific reason or cause of this contamination at this home is presently unknown, and AEP is currently collecting further information as part of our ongoing investigation. It may result from subsurface presence or migration of contaminants from the Parcel C Berm, or also from recent landscaping activities that took place at this home.
>
> Landscaping activities took place on this property on or about July 28th, 2018, and were conducted by a landscaping contractor. Preliminary information suggests that the landscaping contractor accessed [Cherokee's] land in the Southeast Corner of Parcel C, through bypassing the security fencing and ignoring the clear signage regarding the presence of contaminated soils, and removed soil from [Cherokee's] lots, and placed them in this home's backyard. At the request of the homeowner, the landscaping company subsequently removed the 'placed' soils on Monday, July 30th, 2018. However, the AEP sampling took place on this property on August 8th, after the removal, and the results indicate that contaminants still remain."

[87] As the Board stated in its August 24, 2018 letter, this specific incident does not change the Board's view that stay of EO 2018/06 – which deals with the entire Parcel C Berm - is appropriate. As noted by the Director, the situation appears to be the result of a contractor "illegally" taking material from the lands adjacent to the homeowner's property. While this specific incident is a matter of concern the Board is satisfied that Cherokee, in consultation with the Director and Alberta Health Services will properly address this matter. The Board notes that the contractor removed the soil at the homeowner's request. The Board further notes that the sample 89 ng/kg is within the same order of magnitude of the Alberta Health/Alberta Health Services Screening level and below the 230 ng/kg leave established by the Director.

[88] In the Board's view, while this specific incident needs to be addressed, it does not change the Board's overall view that the risks associated with removing all of the materials associated with the Parcel C Berm from their current location and trucking them through the community as contemplated by EO 2018/06. Based on the information currently before the Board, leaving the materials in place until a well-considered plan can be developed is remains a more responsible course of action.

X. CONCLUSION

[89] Having heard oral arguments and reviewed the written submissions, the Board has concluded the appeals of the fifth enforcement order and the second significant amendment (the "third set") are properly before the Board. Further, the Board concluded in the circumstance of the case – particularly with respect to providing protection of the public interest – it was appropriate to stay both the fifth enforcement order and the second significant amendment, as was ordered on August 20, 2018.

Dated on February 10, 2020, at Edmonton, Alberta.

- original signed by -
Meg Barker
Panel Chair

- original signed by -
Nick Tywoniuk
Board Member

- original signed by -
Dave McGee
Board Member

Appendix A – Map

Appendix A Domtar Site

Parcel X

Parcel C

Parcel C Berm

Parcel Y

Parcel Y Berm

Greenbelt

Date: 12/9/2016

Appendix B – Table 1 from the Fifth Enforcement Order

Table 1: Sampling Locations in the Parcel C Berm taken by Golder in 2018 with the associated applicable limits and screening values for dioxins and furans, and the actual sampling results

Borehole	Tier 1 and 2 Limit	SWGCSA Acute Exposure Criteria	AH/AHS Screening Level	Depth (mbgs)	Sample Results
BHC18-12	4 ng/kg	230 ng/kg	50 ng/kg	1.5-2.25 3.0-3.75	239 ng/kg 214 ng/kg
BHC18-11	4 ng/kg	230 ng/kg	50 ng/kg	1.5-2.25 2.25-3.0	114 ng/kg 100 ng/kg
BHC18-10	4 ng/kg	230 ng/kg	50 ng/kg	0.0-0.75 3.0-3.75	36 ng/kg 270 ng/kg
BHC18-09	4 ng/kg	230 ng/kg	50 ng/kg	3.0-3.75	468 ng/kg
BHC18-08	4 ng/kg	230 ng/kg	50 ng/kg	1.5-2.25	259 ng/kg
BHC18-07	4 ng/kg	230 ng/kg	50 ng/kg	1.5-2.25	240 ng/kg
BHC18-06	4 ng/kg	230 ng/kg	50 ng/kg	1.5-2.25	233 ng/kg
BHC18-01	4 ng/kg	230 ng/kg	50 ng/kg	0.2-0.5 1.7-2.0	327 ng/kg 729 ng/kg
BHC18-41	4 ng/kg	230 ng/kg	50 ng/kg	1.5-2.25	150 ng/kg

Appendix C – Table 1 from the Second Significant Amendment

Thurber Borehole (with nearest Golder Borehole)	Tier 1 and 2 Limit	SWGCSA Acute Exposure Criteria	Alberta Health (AH) and Alberta Health Services (AHS) Screening Level	Depth (mbgs)	Sample Results (at relative increasing depth)
BHY18-01 (Golder: BHY17-35)	4 ng/kg	230 ng/kg	50 ng/kg	0-0.3	1577 ng/kg
				0.5-0.7	3440 ng/kg
				1.3-1.5	50 ng/kg
BHY18-02 (Golder: BHY17-35)	4 ng/kg	230 ng/kg	50 ng/kg	0-0.3	38 ng/kg
				0.5-0.8	9 ng/kg
BHY18-03 (Golder: BHY17-35)	4 ng/kg	230 ng/kg	50 ng/kg	0-0.3	484 ng/kg
				0.5-0.8	2100 ng/kg
				0.5-0.8	1840 ng/kg
BHY18-04 (Golder: BHY17-35)	4 ng/kg	230 ng/kg	50 ng/kg	0-0.3	559 ng/kg
				0.5-0.8	236 ng/kg
BHY18-05 (Golder: BHY17-35)	4 ng/kg	230 ng/kg	50 ng/kg	0-0.3	565 ng/kg
				0.5-0.8	274 ng/kg
BHY18-06 (Golder: BHY17-41)	4 ng/kg	230 ng/kg	50 ng/kg	0-0.3	2260 ng/kg

Note: While the sampling location refers to the Parcel Y Residential Area, it is not a residential area. It is the area that Cherokee proposes to develop into a residential area through the brownfield redevelopment process. The Parcel Y Residential Area is currently a former industrial site undergoing remediation and reclamation.