

(Continued from page 14)

"unavoidable expenses" clause. This amended contract was then submitted to the proponent for acceptance or rejection. In an astonishing turnabout, the proponent announced that the amended contract posed unacceptable business risks, and that the contract could not be signed by the consortium.

Thereafter, Toronto began to negotiate with another short-listed bidder which operated the Michigan landfill which is currently receiving Toronto's waste. Recent statements from Toronto's mayor suggest that the Adams Mine contract is dead, and that Toronto's long-term disposal needs will be met by the Michigan landfill.

Other Recent Events

Before, during and after the Toronto bidding process, opponents of the Adams Mine proposal undertook other steps and pursued other angles in relation to the proposed undertaking. For example, numerous Northern On-

tario residents (including members of the Temiskaming First Nation) established a widely publicized blockade on the railway tracks that were to be used to transport Toronto's waste to the Adams Mine. In addition, the Temiskaming First Nation announced that it would assert a land claim which included the very property upon which the Adams Mine is located.

Similarly, public opinion polls demonstrated that local residents were opposed to the Adams Mine proposal. Given that the site is located in the unorganized Township of Boston — not the Town of Kirkland Lake (which is upstream of the site)—these poll results clearly suggest that there is no "willing host" community. Indeed, public opinion polls suggest that Torontonians, too, were not in favour of the Adams Mine proposal, and instead preferred more comprehensive 3R activities.

The nature of the First Nation's interest in this matter (as well as other potential areas of federal jurisdiction)

prompted dump opponents to request a federal EA under the *Canadian Environmental Assessment Act* (CEAA). Indeed, the proposed contract between Toronto and the Adams Mine proponent indicated that the deal would be terminated if a federal EA were ordered by the federal Environment Minister in the near future. At the present time, this request for CEAA coverage is still being reviewed by federal officials, despite the demise of the Toronto contract.

CELA is continuing to monitor this situation as a part of a legal team consisting of other lawyers in Northern Ontario and Toronto. One positive development arising out of recent events is the Toronto mayor's apparent commitment during the municipal election campaign to aggressively pursue 3R programs to minimize the volume of waste requiring disposal. Further developments regarding the Adams Mine will be reported upon in future issues of the *Intervenor*. ☉

Negotiating a pit expansion

Ric Holt and George McKibbon*

"S"pruce or cedar?", asked Richard Seibel in late 1997. He told Marie Holt that the Bowman pit was being expanded, and that she could agree to have a row of either kind of tree planted on her property to hide the new pit expansion, to be about 300 meters from her home. As Vice President of the pit operator (the Murray Group), he asked Marie and her husband Ric to choose either kind of tree, accept the company's offer to pay for this shielding row, so the Murray Group could get on with its expansion. Is this how things are done, she asked herself—is it a done deal? She had little idea of her rights or the process for such expansions—but it seemed to her that "spruce or cedar" was not the right question, and she simply said "no",

wondering what would happen next.

Marie's neighbour could not safely operate his farm equipment, because the noise from the all-night crushing in the Bowman pit kept him from sleeping. He had been told that the pit had the right to run all night, and didn't see what could be done. For Marie, the expansion meant the machines would be practically at her doorstep, running all night.

The Pilkington Township meeting, slated to review the expansion, was a few weeks away. The stage was set: the operator had briefed the Township Councillors, prepared all the documentation and effectively ran the public meeting. The neighbours hastily organized themselves, gave presentations at the Township meeting with the help of a planner, George McKibbon, and

were trounced and humiliated. This would be the end of the story, as it is in many cases like this, because to continue to oppose this expansion would mean considerable expense, opposing an aggressive, well financed, and well connected opponent.

What happened is that the neighbours organized themselves held regular meetings, and appointed two neighbours, Ric Holt and Harry Panjer, as negotiators. They, with Mr. Holt as the point man, studied the applicable laws, regulations and government policies, notably the ARA (*Aggregate Resources Act*), the *Planning Act*, the EPA (*Environmental Protection Act*), the current pit licenses (the Bowman pit is actually a collection of individually licensed pits, run as a single op-

(Continued on page 16)

(Continued from page 15)

eration), the annual pit inspection reports, the licenses (called Certificates of Approval) for the asphalt plant and crushers, etc. They photographed the operation and studied how it worked. What they saw and heard was a consistent pattern of violations, including excavating into the water table, making noise in violation of EPA Guideline NPC-232 (limits on rural noise), and operating the asphalt plant without a valid license. They contacted government agencies to act on these violations. Three of these contacts are particularly noteworthy.

First, an EBR (*Environment Bill of Rights*) request for investigation was filed, alleging, among other things, that the operator had excavated illegally into the water table and below depth limits. These allegations were backed up by photographs and measurements, unassailable evidence, it would seem. The MNR (Ministry of Natural Resources) carried out an investigation and concluded that there was "no evidence" of violations. Based on later FOI (*Freedom of Information*) requests for government records, the neighbours found that the APAO (Aggregate Producers Association of Ontario, the industry's lobbying organization of which Mr. Seibel has been a Director) as well as the Minister's office had been in repeated contact with the MNR investigating team, leaving doubts as to whether the investigation was truly independent. While the MNR's "no evidence" conclusion was discouraging, this investigation was important in later negotiations because it publicly recorded their concerns, with documentation of environmental violations.

Second, by monitoring the web-based Environmental Registry, the neighbours learned that the operators were attempting to appeal their own asphalt plant license. This strange state of affairs arose when the plant was shut down by the MOE (Ministry of Environment), due to neighbours' complaints of operating without a valid license. Almost immediately, the MOE re-issued the license, but in a

more onerous form than the company had wanted. The operator appealed this new license, hoping to get it changed to something more to its liking. The matter was referred to a public hearing before the Environmental Appeal Board (EAB). The neighbours gained full party status to this hearing and were thereby able to participate in negotiations for the tougher license conditions—something that the operator dearly wished to avoid.

Third, the neighbour's found that the MNR had recently approved the operator's request for a pit site plan change which violated the MNR requirement for a 15 meter setback from the neighbour's property. The MNR subsequently removed the infraction by again modifying the site plan. These efforts by the neighbours, to ensure compliance to the ARA, demonstrated the lack of Ministry procedures to guide MNR staff in executing the requirements of the ARA.

Repeated informal negotiating attempts between the neighbours and the operator ended in failure. The neighbours appealed both the ARA license for the new pit and the *Planning Act* matters to the Ontario Municipal Board (OMB). The OMB initiated formal mediation sessions to try to get the operator and the neighbours to settle and thus avoid a full-scale OMB hearing. The operator agreed to link the pit license negotiations with the asphalt plant license negotiations in hopes of getting the neighbours to withdraw from both the OMB and EAB hearings.

The neighbours were fortunate to have an intelligent, fair, and highly experienced OMB hearing officer, Bruce Krushelnicky. His goal was to get facts on the table, to avoid confrontation, to look for mutually acceptable solutions, and to organize the negotiating sessions in a step-by-step constructive manner. The neighbours, represented by lawyer Peter Pickfield, came to the table with a well organized list of concerns, which in the end served as the basis of negotiation. The neighbours prioritized their goals, and knew within the group what they were willing to sacrifice. They knew that actu-

ally stopping the expansion was probably impossible, but that controlling its noise and limiting its environmental impact was probably attainable.

OMB negotiations took place from August to December, 1999. They were long, strenuous, and sometimes fragile. The preceding interactions by the neighbours with the government agencies regarding alleged violations were essential in providing background, credibility and understanding of the current and future pit operations.

The neighbours were fortunate to have the services of an excellent noise expert, John Coulter, who could both find shortcomings in the operator's proposals and could make alternate, constructive suggestions. As a result, the negotiated licenses for both the pit expansion and the asphalt plant specify groundbreaking testing protocols and mechanical controls to mitigate noise to legal limits. The residents also achieved tough conditions for the monitoring and protection of local groundwater, wetlands and ecological resources. Monitoring to control historical noise and odour problems from the asphalt plant was achieved through the EAB process.

Perhaps the most important outcome from the negotiations was the establishment of a Liaison Committee, between neighbours and operator, with required meetings, and with guaranteed access to key pit information by the neighbours. It is hoped that this mechanism will lead in the future to a better understanding and respect between neighbours and operator, and by its open nature will encourage an operation that obeys the laws—and literally lets the neighbours sleep at night.

* Ric Holt is the Nortel Network Chair of Software Engineering at the University of Waterloo, Ontario. He lives in a 100-year old farmhouse which is near the Village of Elora and also near a gravel pit.

George McKibbin is an environmental planning consultant with McKibbin Wakefield Inc. He has 25 years of professional experience and an office in Hamilton, Ontario.