

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 28, 2022

IN THE MATTER OF sections 91, 92, 94, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Lac La Biche County and WSP Canada Inc., with respect to the decision of the Compliance Manager, Regulatory Assurance Division – North Region, Alberta Environment and Parks, to issue Notice of Administrative Penalty No. WA-20/06-AP-NR-20/06 to Lac La Biche County and WSP Canada Inc.

Cite as: Costs Decision: *Lac La Biche County and WSP Canada Inc. v. Compliance Manager, Regulatory Assurance Division – North Region, Alberta Environment and Parks* (28 January 2022), Appeal Nos. 20-020-021-CD (A.E.A.B.), 2022 ABEAB 5.

BEFORE:

Dr. Brenda Ballachey, Panel Chair; Dr. Nick Tywoniuk, Board Member; and Mr. Kurtis Averill, Board Member.

PARTIES:

Appellants: Lac La Biche County and WSP Canada Inc., represented by Mr. Sean Ward, Reynolds Mirth Richards and Farmer, LLP.

Director: Mr. Simon Tatlow, Compliance Manager, Regulatory Assurance Division - North, Alberta Environment and Parks, represented by Mr. Paul Maas, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued two approvals under the *Water Act* to Lac La Biche County (the County) for construction on the Elinor Lake Road Rehabilitation Project (the Project). The County hired WSP Canada Inc. (WSP) to manage the Project. After completion of the Project, AEP issued a Notice of Administrative Penalty to the County and WSP (the Appellants) in the amount of \$11,000.00 for allegedly conducting work in wetlands without authorization and failing to provide information when requested by AEP. The Appellants appealed the issuance of the Administrative Penalty to the Environmental Appeals Board (the Board).

The Board set a date for a hearing and requested written submissions from the Appellants and the Director. The Appellants provided its written submission first as per the Board's schedule. After reviewing the information in the Appellants' written submission, the Director decided to withdraw the Administrative Penalty, rendering the appeals moot. The Appellants agreed with the Board's proposal to dismiss the appeal for being moot without prejudice to a costs application. The appeal was determined to be moot and the Board accepted a costs application for preparation for the hearing. The Board received written submissions from the Appellants and the Director on whether costs against the Director were appropriate.

The Board determined the Director had acted in good faith, conducted himself appropriately as a regulator, and did not make an egregious error in decision-making. As there were no extraordinary circumstances that would warrant an award of costs against the Director, the Board dismissed the Appellants' application for costs.

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I. BACKGROUND

[1] This is the costs decision of the Environmental Appeals Board (the “Board”) dealing with appeals of the Notice of Administrative Penalty No. WA-20/06-AP-NR-20/06 (the “Administrative Penalty”), issued under the *Water Act*, R.S.A. 2000, c. W-3. The Administrative Penalty was issued by the Compliance Manager, Regulatory Assurance Division - North, Alberta Environment and Parks (the “Director”), to Lac La Biche County (the “County”) and WSP Canada Inc. (“WSP”) (collectively, the “Appellants”), for alleged contraventions of the *Water Act*.

[2] The County applied to Alberta Environment and Parks (“AEP”) for approvals related to the Elinor Lake Road Rehabilitation Project (the “Project”). The County hired WSP to be the Senior Site Coordinator for the Project. AEP issued two approvals to the County in relation to the Project: (1) *Water Act* Approval 00393959-00-00 on October 27, 2017, and (2) *Water Act* Approval 00402960-00-00 on December 15, 2017.

[3] On July 30, 2020, the Director alleged the Appellants conducted work in wetlands without authorization and failed to submit documentation when requested. The Administrative Penalty was assessed at \$11,000.00.

[4] On August 28, 2020, the Appellants filed a Notice of Appeal with the Board appealing the Administrative Penalty. The Board notified the Director of the appeal and requested all documents related to the Administrative Penalty (“Director’s Record”). The Director provided the Director's Record to the Board on October 16, 2020, which the Board distributed to the Director and the Appellants (the “Parties”) on October 26, 2020. The Board held a mediation meeting with the Parties on November 26, 2020, but the Parties were unable to resolve the appeal.

[5] The Board scheduled a hearing of the appeal for May 5, 2021 and set a schedule for the Parties to provide written submissions. The Appellants provided their written submission on March 17, 2021. On March 30, 2021, the Director wrote to the Board and the Appellants and withdrew the Administrative Penalty. The Director stated:

“Further to the March 17, 2021 letter and submissions of the Appellants, please be advised that new information has come to the Director’s attention in those submissions that had not been provided to him at the time of his decision to issue the Administrative Penalty... AEP has withdrawn the Administrative Penalty.”¹

[6] On April 12, 2021, the Appellants submitted that the withdrawal of the Administrative Penalty should not prevent them from seeking costs against the Director. On April 16, 2021, the Board wrote to the Parties and cancelled the May 5, 2021 hearing and dismissed the appeals for being moot. The Board also allowed the Appellants to apply for costs in relation to preparation for the cancelled hearing. The Appellants provided a costs application on April 29, 2021, and the Director provided a response on May 14, 2021.

II. SUBMISSIONS

A. Appellants

[7] The Appellants stated they were seeking to recover their legal costs in the amount of \$12,687.00 plus GST, incurred in appealing the Administrative Penalty. The Appellants said they were required to retain legal counsel when the Director refused to allow them the opportunity to reach out to relevant parties and gather materials before the Director made his final decision regarding the Administrative Penalty. The Appellants submitted the Director had no basis for issuing the Administrative Penalty.

[8] The Appellants submitted the appeals met the test established under the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 (“EPEA”) and the Board for awarding costs against the Director in the following manner:

- (a) The Appellants’ appeal submissions made a substantial contribution to the issues for the hearing as it was only when the Director reviewed the Appellants’ submissions that he acted to withdraw the Administrative Penalty;
- (b) the Appellants’ submissions were timely and efficient and did not unduly delay or prolong the appeal proceedings;

¹ Director’s Letter, March 30, 2021.

- (c) the costs sought by the Appellants are reasonable and reflect the actual costs incurred;
- (d) the Appellants acted in good faith throughout the appeal process;
- (e) an interim costs application was not necessary due to the timing of the appeal process;
- (f) the Appellants' initial submissions indicated the Appellants would seek costs; and
- (g) additional factors the Appellants stated the Board should consider in making its decision, included staffing cost, inconvenience, and damage to the Appellants' reputation.

[9] The Appellants noted they did not allege the Director acted in bad faith or behaved as an overly persistent litigant instead of a regulator. However, the Appellants submitted the Director made an egregious error in decision-making by issuing the Administrative Penalty without any basis to do so. The Appellants said if the Director had reviewed the documentation provided previously by the Appellants before the Administrative Penalty was issued the appeal could have been avoided. The Appellants stated:

“While the Director indicated that the Administrative Penalty was being withdrawn based on his review of the information in the appeal submissions, the same information was available in the Appellants' Notice of Appeal, and even before that in the responses the Appellants provided to Alberta Environment during the project itself. Having instead forced the Appellants to pursue this appeal and complete all of their written submissions - only to drop this matter within weeks of the hearing - amounts to sufficiently exceptional circumstances to warrant an award of costs.”²

[10] The Appellants submitted that while they “appreciated “the Director’s candour in that it has reduced the costs they would have paid had the full appeal hearing been required, the Appellants would not be seeking costs at all, if the matter had been addressed earlier.”³

² Appellants' Final Costs Submission, April 29, 2021, at page 4.

³ Appellants' Final Costs Submission, April 29, 2021, at page 4.

B. Director

[11] The Director stated no costs should be awarded to the Appellants as the Director did not act in bad faith, did not behave as an overly persistent litigant, and there were no special circumstances or egregious error to warrant an award of costs.

[12] The Director noted in past costs decisions the Board had found that even if the Director made an error it was not sufficient to warrant a costs award against the Director unless special circumstances existed. The Director submitted the Board, in its costs decision in *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (“Cherokee”),⁴ awarded costs against the Director because the Board found the director’s judgment had been “distorted away from his statutory duty.”⁵

[13] The Director stated that in the appeals currently before the Board, there was no evidence the Director acted in bad faith or behaved as an overly persistent litigant rather than a regulator, and noted the Appellants expressly noted the same.

[14] The Director submitted the timing of the withdrawal of the Administrative Penalty was not a special circumstance warranting awarding of costs. The Director stated:

“Imposing costs because of one party’s decision not to proceed to a particular stage in the Board process would decrease regulatory efficiency. Such a rule might influence a Director into proceeding to hearing with mixed prospects for success, while driving up costs for all parties involved.”⁶

[15] The Director said the Appellants had suffered no damage to their environmental record as a result of the appeal. The Director also noted that the amount of costs incurred is not a determining factor whether costs should be awarded.

⁴ *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10.

⁵ *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 19.

[16] The Director stated the decision to withdraw the Administrative Penalty was not an egregious error. The Director said that “it was only once he had the information in the Appellants’ written submissions for hearing that he reconsidered the merits of proceeding to hearing on this matter.”⁷

[17] The Director submitted the costs matter was not an exceptional circumstance as in *Cherokee* and no award of costs should be awarded against the Director.

III. ANALYSIS

A. Legal Basis for Costs

[18] Section 96 of EPEA provides the Board with the legislative authority to award costs:

“The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.”

The Board has wide discretion under this section in awarding costs.

[19] In *Cabre v. Exploration Ltd. v. Alberta (Environmental Appeal Board)* (“*Cabre*”), the Court stated:

“Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs ‘of and incidental to any proceedings before it...’. The legislation gives the Board broad discretion in deciding whether and how to award costs.”⁸

The Board finds the *Cabre* decision is particularly relevant to this case because it involves an appellant seeking costs against a director.

⁶ Director’s Final Costs Response, May 14, 2021, at paragraph 21.

⁷ Director’s Final Costs Response, May 14, 2021, at paragraph 21.

[20] The *Environmental Appeal Board Regulation*, A.R. 114/93 (the “Regulation”) provides the following regarding final costs:

“18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

(a) the matters contained in the notice of appeal, and

(b) the preparation and presentation of the party’s submission.

...

20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

(a) whether there was a meeting under section 11 or 13(a);

(b) whether interim costs were awarded;

(c) whether an oral hearing was held in the course of the appeal;

(d) whether the application for costs was filed with the appropriate information;

(e) whether the party applying for costs required financial resources to make an adequate submission;

(f) whether the submission of the party made a substantial contribution to the appeal;

(g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party’s submission;

(h) any further criteria the Board considers appropriate.

⁸ *Cabre v. Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 294, at paragraph 23.

- (3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of
 - (a) any other party to the appeal that the Board may direct;
 - (b) the Board.
- (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate.”

The Board also considers the purposes of EPEA as stated in section 2.⁹

[21] The Board evaluates each costs application against the criteria in EPEA and the Regulation and the following:

“To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:

- (a) substantially contributed to the hearing;

⁹ Section 2 of the EPEA provides:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta’s economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act.”

- (b) directly related to the matters contained in the Notice of Appeal; and
- (c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."¹⁰

[22] Section 18(2) of the Regulation requires that costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.

[23] Costs in civil litigation is distinct from costs in quasi-judicial tribunals such as the Board. The Board must consider the public interest when it makes a final decision or makes recommendations to the Minister of Environment and Parks. The Board is not bound to apply the "loser-pays" principle used in civil litigation.¹¹ The Board considers the public interest generally and the purposes identified in section 2 of EPEA when it determines whether it is appropriate to award costs in an appeal.

[24] The Court and the Board have expressly addressed the issue of costs awards against the Director. In *Cabre* the Board held there must be special or exceptional circumstances for a cost award against the Director:

"The legislation protects departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the [Director] differently than the role of those proposing projects. Where, on the facts of this case, the [Director] has carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs."¹²

¹⁰ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

¹¹ Re *Mizera*, 1999 CarswellAlta 1187, (A.E.A.B.) at paragraph 9.

¹² Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 18.

[25] The Court confirmed the Board's analysis, stating:

"I find that it is not patently unreasonable for the Board to place the [Director] in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory community, and based on the other factors mentioned in the Board's decision, that the [Director] should be treated differently from other parties to an appeal.

The Board states in its written submission for this application:

"There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision-maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision."¹³

[26] Section 220 of EPEA provides some protection for the Director and other government officials carrying out duties under the legislation:

"No action for damages may be commenced against (a) a person who is an employee or agent of or is under contract to the Government ... for anything done or not done by that person in good faith while carrying out that person's duties or exercising that person's powers under this Act including, without limitation, any failure to do something when that person has discretionary authority to do something but does not do it."

While costs is not the same as an award of damages, section 220 does provide some general guidance that costs against the Director is not to be taken lightly.

¹³ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293, at paragraphs 33 and 34.

B. Egregious Error

[27] In *Cabre* the Board found EPEA provides protection to the Department from costs unless extraordinary circumstances warrant it. In *Cherokee* the Board identified three special or extraordinary circumstances where costs could be awarded against the Director:

- (a) the Director acted in bad faith;
- (b) the Director made an egregious error in decision-making; and
- (c) the conduct of the Director.

[28] The Board notes the Appellants were clear that they were not claiming the Director acted in bad faith or conducted himself as an overly persistent litigant rather than a regulator, therefore, the only remaining extraordinary circumstance for the Board to consider is whether the Director made an egregious error in decision-making that warranted an award of costs against the Director. If an award of costs is warranted, then the Board must determine the appropriate amount to award to the Appellants.

[29] For the Board to award costs against the Director for an egregious error in decision-making, the Director's behaviour must meet the definition of "egregious," which is defined as "extremely or remarkably bad; flagrant."¹⁴ The Courts have defined "egregious" as having "a meaning which entails or connotes a marked departure from normal behaviour."¹⁵ While it is unfortunate that the Director did not withdraw the Administrative Penalty before the Appellants provided submissions for the hearing, it does not equal an egregious mistake in decision-making that is extremely or remarkably bad or a marked departure from normal behaviour.

[30] The Board considered a costs application in *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*,¹⁶ where a hearing was not held because the appeal was withdrawn by the appellant. The Board found no costs should be awarded as the

¹⁴ "Egregious", Black's Law Dictionary (11th ed. 2019).

¹⁵ *Brown v. Newton* (2010), 2010 NSSM 28, at paragraph 172.

¹⁶ *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: Gilbertson (28 August 2018), Appeal No. 16-005-CD (A.E.A.B.).

Board could not speculate on the value of the parties' contributions if the hearing had proceeded.

The Board stated:

“The Board has always held that appellants have the right to withdraw their appeal at any time in the appeal process, up to and including the date of a hearing. The Board acknowledges this may result in the parties incurring expenses they might not have incurred had an appeal been withdrawn earlier in the process, but often appellants have legitimate reasons for choosing to withdraw.”¹⁷

The Director also has the right to withdraw an Administrative Penalty at any time in the appeal process, even though an appellant may incur expenses in preparing the hearing.

[31] The Director's behaviour did not approach the same scale as the Board found in *Cherokee*. In *Cherokee* the Board found the Director “acted with hubris, without balance, and that he did not consider the broader consequences of his approach,”¹⁸ did not comply with the Board's requests regarding provision of the Director's Record,¹⁹ and acted outside of his statutory jurisdiction.²⁰

[32] The Board finds the Director acted in good faith, conducted himself appropriately as a regulator, and did not make an egregious error in decision-making. The Director's behaviour was not on the same scale as in *Cherokee*. The Board finds no special circumstances that would warrant a costs award against the Director.

¹⁷ *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: Gilbertson (28 August 2018), Appeal No. 16-005-CD (A.E.A.B.), at paragraph 82.

¹⁸ *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 32.

¹⁹ *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 33.

²⁰ *Cherokee Canada Inc. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 45.

IV. DECISION

[33] The Board has determined that costs should not be awarded in this appeal and, therefore, dismisses the application for costs by the Appellants.

Dated on January 28, 2022, at Edmonton, Alberta.

“original signed by”

Brenda Ballachey
Board Member &
Panel Chair

“original signed by”

Nick Tywoniuk
Board Member

“original signed by”

Kurtis Averill
Board Member