ALBERTA
ENVIRONMENTAL APPEAL BOARD

Cost Decision

Date of Cost Decision: October 17, 2000

IN THE MATTER OF sections 84 and 88 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3;

-and-

IN THE MATTER OF an application for costs related to an appeal filed by the New Dale Hutterian Brethren with respect to the issuance of Enforcement Order No. 99-WA-02 by the Lethbridge Area Manager, Prairie Region, Alberta Environment.

Cite as: Cost Decision re: *Monner*.

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I. BACKGROUND

[1] This decision concerns a request for costs by an intervenor, Mr. Michael J. Monner, in relation to an appeal filed by the New Dale Hutterian Brethren (the "Colony"). The Environmental Appeal Board (the "Board") discontinued its proceedings in this matter on January 24, 2000 for the reason set out in the formal written discontinuance.[1]

[2] The background to this matter is as follows. Mr. Monner and the New Dale Hutterian Brethren each farm in an area near Vulcan, Alberta. Mr. Monner's land abuts Indian Lake. Certain drainage ditches on the Colony's lands lead off these lands and feed into the lake. Mr. Monner was concerned that the Colony's drainage ditch system raised the level of the lake, causing flooding on the adjacent secondary highway and interfering with his efforts to reclaim land adjacent to the lake for hay cropping.

[3] In 1998, Mr. Monner filed a complaint with Alberta Environment that the Colony's drainage ditches lacked the necessary regulatory approval.

[4] An investigation ensued and correspondence and other contact took place between Alberta Environment and the Colony. In the course of these proceedings, the Colony was advised that one option was to seek regulatory approval for its off-site discharge. However, to do so it would need the consent of Mr. Monner and another landowner.

[5] On November 16, 1999, Mr. David Perraton, Director, Prairie Region, Alberta Environment (the "Director") issued Enforcement Order 99-WA-02 (the "Enforcement Order") under the *Water Act*, S.A. 1996, c.W-3.5 to the Colony in the following terms:[2]

> "THEREFORE, I, David Perraton, Manager, pursuant to sections 135 and 136 of the Act, DO HEREBY ORDER THAT:
>
> 1. New Dale Hutterian Brethren shall immediately cease all operation of the Non-Approved Works and render them ineffective;

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1 Discontinuance of Proceedings, Appeal No. 99-166-DOP.

2 The preambles are omitted.

> 2. By 12:00 noon, December 31, 1999, New Dale Hutterian Brethren shall submit to the Manager written confirmation of the actions taken to comply with the Order."

[6] On November 25, 1999, Mr. Alan Harvie of MacLeod Dixon, legal counsel for the Colony, filed an appeal of the Enforcement Order. In summary, the appeal alleged that the ditches were dug over 36 years ago when no licence or approval was required by law. The grounds for the appeal and the request for relief were as follows:

> "4. The New Dale Hutterian Brethren pursuant to section 115(1)(p) of the *Water Act* hereby appeals Enforcement Order No. 99-WA-02 to the Board on the grounds that:
>
> (a) the New Dale Hutterian Brethren is not presently carrying on an "activity" and has not since the *Water Act* came into force carried on an "activity" as defined in the *Water Act* for which an approval is required; and
>
> (b) the *Water Act* pursuant to which Enforcement Order No. 99.WA-02 was issued does not have retroactive or retrospective effect and therefore the New Dale Hutterian Brethren cannot and should not be prosecuted for constructing the ditch nearly 40 years ago at a time when no regulatory approval or licence was required.
>
> 5. The New Dale Hutterian Brethren request:
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> (a) the Enforcement Order No. 99-WA-02 be vacated;
>
> (b) the Board make any further order it considers necessary for the purposes of carrying out its decision to vacate the Enforcement Order No. 99-WA-02; and
>
> (c) the New Dale Hutterian Brethren be awarded costs on a solicitor and his own client basis."

[7] In the Notice of Appeal, the New Dale Hutterian Brethren also asked the Board to stay the Enforcement Order pursuant to section 89 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act"). In summary, the basis on which the stay was sought was that:

(a) No activity for which approval may be required under the *Water Act* has in fact taken place.

(b) The *Water Act* is presumed not to be retroactive or retrospective and the Colony should not be prosecuted for constructing a ditch 40 years ago.

(c) Rendering the ditch inoperable during winter would cost money without benefit. The water will drain in the same direction in any event.

(d) No prejudice or environmental harm will be suffered by maintaining the status quo until the appeal is heard.

II. THE BOARD'S PRELIMINARY PROCEEDINGS

[8] Mr. Monner wrote to the Board on December 1, 1999 asking to be apprised of developments in this appeal and stated "… the drainage ditches in question have resulted in the loss of productivity on part of my land, increased operating costs have created the development of salinity as well as interfering with the ability of me to access parts of my property." He was thereafter kept apprised of the Board's proceedings and copied with all correspondence.

[9] On December 20, 1999, the Director advised the Board that it did not object to a stay, saying in part:

> "In the Department's opinion, there is little risk of any damage or environmental effects from the ditch during the winter months, prior to spring run-off."

[10] In contrast, in his December 20, 1999 letter, Mr. Monner objected to the stay saying, in part:

> "Depending upon the time of spring thaw, the water may once again be flowing through these ditches anytime from early March through April, May.
>
> The loss of use of a significant amount of land by the increased water flow is but one cost to our farm, however the long term deterioration of the soil as a result of this extra water will be with us for many years.

> The ramifications of not having this unauthorized drainage project terminated in the very near future are more profound than Mr. Harvie and his clients may be awarded."

[11] The Colony pressed again for a stay before the December 31, 1999 deadline provided for in the Enforcement Order.

[12] On December 22, 1999 the Board granted a temporary stay but only until January 7, 2000 at which time it would hold a hearing to consider:

> (a) an extension to the stay for all, or a portion of, the remainder of the appeal, and
>
> (b) a schedule for disposal of the appeal as quickly as possible.

[13] On January 7, 2000 the Board granted the requested stay as there was the consent of all parties. The stay would expire on March 1, 2000. At the same time, the Board scheduled a mediation/settlement conference for January 11, 2000 - facilitated by a different Board member. In the event no settlement was achieved, a hearing was to occur on January 27, 2000 with submissions to be provided by January 24, 2000.

[14] The mediation/settlement conference took place on January 11, 2000 with Mr. Monner participating. At the conclusion the parties were advised to provide a status report by January 18, 2000. On January 17, 2000 legal counsel for the Colony advised the Board that his client intended to block the ditch that was the subject of the Enforcement Order the next week, frost levels permitting. The letter on behalf of the Colony said, in part:

> "It is our understanding that once these actions have been completed the Enforcement Order will have been complied with and we respectfully request that the Enforcement Order be formally cancelled. Once the Enforcement Order has been cancelled there will be no need for the Appeal before the Environmental Appeal Board and at that time the Brethren will withdraw the Notice of Appeal.
>
> It is the Brethren's intention to apply for an approval under the *Water Act* for the ditch so that they may unblock it and water may again flow toward Indian Lake. It is our understanding that the Brethren will not unblock the ditch until it has the approval.

> It is our understanding an application for the approval will be filed within the next week."

[15] Legal counsel for the Director wrote to the Colony on the same day and confirmed this understanding.

[16] Mr. Monner also replied to the Colony on January 17, 2000, expressing concern that "… if your clients do not fill the ditch within the next week and/or there is need for an enforcement order once again these delays will compromise our property in regards to spring run-off." His letter continued:

> "We believe that a Hearing is vital so that all of the implications of the extensive network of unlicenced ditches on New Dale land and on adjacent landowners properties will indeed be duly aired.
>
> …
>
> Now is the time for the scheduled E.A.B. Hearing to proceed so everyone may full [sic] appreciate the significance of the New Dale Colony's unlicenced drainage network."

[17] What is significant in these comments is that Mr. Monner seems to view the pending hearing as an opportunity to air much wider concerns than were dealt with in the Enforcement Order, which was the only subject matter of the appeal, an appeal brought not by Mr. Monner but the by Colony.

[18] On January 18, 2000, the Colony withdrew their appeal; this was their right. The Act does not give intervenors rights to object to such a withdrawal.[3] Accordingly, on January 24, 2000, the Board issued it Discontinuance of Proceedings.

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[3] See *Chalifoux* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection re: Chem-Security (Alberta) Ltd.*, EAB Appeal No. 95-025.

III. THE APPLICATION FOR COSTS

A. Mr. Monner's Claim for Out-of-Pocket Expenses

[19] Eight weeks later, on March 14, 2000, Mr. Monner wrote to the Board requesting total costs in the amount of $2831.80, saying, in part:

> "I wish to submit some out of pocket expenses that I incurred in regards to the above. I had hired a consulting firm to confirm my observations that there were indeed additional lands drained through our property. These were not identified in Alberta Environment's submission."

[20] Included with the letter were: (a) a receipt for Air Photos in the sum of $243.96, (b) a receipt for Maps in the sum of $22.42, and (c) an invoice for $2,565.42 for field work and the preparation of a report. The invoice, from Matrix Solutions Inc., refers to the period between January 1, 2000 to February 29, 2000. The Board notes that Mr. Monner's claim extends beyond the date that the Discontinuance of Proceedings was issued (January 24, 2000). It is unclear whether the report was completed. Mr. Monner's letter also contains a reference to travel to Calgary, although no further information regarding this was provided.[4]

[21] On August 23, 2000, the Board wrote to Mr. Monner outlining a number of factors that the Board takes into consideration when contemplating a costs award and asked Mr. Monner to provide any additional submissions or information that he would like the Board to consider in making its costs decision.[5]

[22] On August 28, 2000 Mr. Monner responded to the Board's letter providing his arguments as to why he should be awarded costs.[6]

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[4] No arguments were included in this letter to support the claim for costs.

[5] The August 23, 2000 letter from the Board was incorrectly dated March 20, 2000.

[6] In summary, in his letter of August 28, 2000, Mr. Monner advised:

1. He is of the view that he is victim of the unlicensed activity being carried out by the Colony, and states that "if a victim feels that in order for his/her interests to be fully laid out before an Environmental Appeal Board, there should be some effort made to ensure that the playing field is reasonably level."
2. There is an "economic benefit" being realized by the Colony as a result of the drainage works.
3. That legal counsel for the Colony, and the employees of Alberta Environment and Alberta Justice receive compensation for their efforts.

B. The Board's Authority to Award Costs

[23] The Board's power to order costs comes from section 88 of the Act. This section provides:

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

[24] The Environmental Appeal Board Regulation, A.R. 114/93 (the "Regulation") states:

> **"**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 within 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 order the following:
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> (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

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4. He was "brought into this process by the unauthorized" works of the Colony.
5. He has lost "crop income" as a result of the works for the last three years and expects to continue to lose income as a result of these works.
6. He was advised by "a senior Alberta Environment employee" to hire an engineer to identify additional lands that were being drained by the works that Alberta Environment did not know about. The report confirmed that an additional 600 acres were being drained and indicated that it was likely that more lands were being drained.
7. He felt that he "was in no way a match for Mr. Harvee's [sic] (the Brethren's lawyer) expertise."
8. He participated fully and timely in the Board's process. During the mediation efforts he offered alternatives.
9. He discussed with Board staff whether there "was any process available to help cover costs."
10. He felt "quite confident that if no lawyers were present to represent the Brethren's views, I could adequately represent our concerns."

appeal;
(d) whether the application for costs was filed with the appropriate information;
(e) whether the party applying for costs required the 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."

[25] Section 18(2) of the Regulation requires that any costs award be "… directly and primarily related to … (a) the matters contained in the notice of appeal, and the (b) preparation and presentation of the party's submission." These criteria, that the costs be directly related to matter within the notice of appeal and the preparation and presentation of the party's submission, are also listed as factors for consideration in section 20 of the Regulation. What is important to note is that these factors are not merely discretionary since section 18(2) makes them a precondition to the Board's authority to award costs.

C. Analysis

[26] In this case, it is the Colony who launched the appeal against an Enforcement Order issued to them. Mr. Monner intervened in an attempt to uphold the Enforcement Order. Yet, Mr. Monner's submissions make it clear that he views his concerns about drainage from the Colony in a broader perspective. For example in Mr. Monner's initial complaint to Alberta Environment, he advises:

> "… that the additional discharge from the Colony's unauthorized drainage work has raised the level on Indian Lake in NE 15-20-21-4 higher than it normally would be and also contributed to the flooding over at the Secondary Hwy. 842 crossing this past spring. The Monner's were trying to reclaim some of the normally dry lake bed in NE 15-20-21-4 for hay cropping, but it was extensively flooded this year."[7]

[7] Environment Documents: #1 – Water Management Division, Prairie Region, Inspection Report, dated April 29, 1998.

[27] His correspondence with the Board also suggests his overall concern is the network of drainage ditches. In his January 17, 2000 letter to the Board, Mr. Monner stated:

> "We believe that a Hearing is vital so that all of the implications of the extensive network of unlicenced ditches on New Dale land and on adjacent landowners properties will indeed be duly aired.
>
> …
>
> Now is the time for the scheduled E.A.B. Hearing to proceed so everyone may full [sic] appreciate the significance of the New Dale Colony's unlicenced drainage network."

[28] It is important to note that was Mr. Monner's position was taken *after* the Colony agreed to comply with the Enforcement Order, effectively settling the appeal. The Board has no doubt that Mr. Monner's concerns are genuinely felt and important to have aired from his perspective. However, it is clear from the January 17, 2000 letter and Mr. Monner's letter of August 28, 2000 (see Footnote 5.) that he repeatedly focuses on broader drainage issues in the area.

[29] The Board finds that the expenses Mr. Monner seeks to recover are not "… directly and primarily related to the matters contained …" in the Notice of Appeal. For that reason alone, the request for costs must fail. The Colony's appeal relates solely to the matter of the propriety of the Enforcement Order, and that order was satisfied by the actions of the colony. Even if Mr. Monner's view had prevailed before the Board, the only result would have been to dismiss the appeal following a hearing, and confirm the Enforcement Order.

[30] There are three additional reasons that would also lead the Board to deny costs in this situation. The first is that Mr. Monner was notified of and participated in the Board's mediation/settlement conference. That conference resulted in a satisfactory resolution to the Notice of Appeal and compliance with the Enforcement Order prior to the Board proceedings. At that point the Board had not even reached the stage of addressing the question of Mr. Monner's status as a party or intervenor or, more importantly, deciding pursuant to section 87(2) of the Act what matter should be dealt with on the appeal. As we now know, Mr. Monner took it upon himself to commission a costly report in the face of a pending settlement conference and before the issues to be dealt with were identified by the Board and clarified by agreement. Not

only that, but the filing of the costs claim occurred after the Board had discontinued its proceedings. Section 20(1) of the Regulation, as set out above in paragraph 24, provides that a costs application must be made at the conclusion of the hearing.

[31] Secondly, this is clearly not a case where Alberta Environment or the public at large should be liable for costs.[8] In the Board's view it would be inappropriate to fix the Colony with these costs incurred in anticipation of a hearing given their participation in the pre-hearing settlement process, their resulting compliance with the Enforcement Order, and the withdrawal of their appeal.

[32] With respect, while the presentation of Mr. Monner's interests in this matter are of assistance to the Board, this appeal could have proceeded without Mr. Monner's participation. In an appeal of an Enforcement Order, the first onus is on the Director to demonstrate that the order is valid and proper. The onus then shifts to the Appellant whose burden it is to demonstrate that the order is invalid or improper. In such a context, Mr. Monner has no onus placed upon him. The Board appreciates Mr. Monner's desire to participate in this process and protect his interests. In fact, the Board generally encourages affected landowners to participate in our process. However, the Board questions whether the Colony, Alberta Environment, or the public as a whole should pay a costs award to support this participation.

[33] Finally, the Board would also deny costs based on its view of the overall balance of interests. The Colony sought a temporary stay of the Enforcement Order pending the appeal. This was in November when, by everyone's account, freezing conditions would last until March. Only Mr. Monner opposed a temporary stay during the period. It was only following the January 7, 2000 hearing where the parties consented, that the Board granted a stay until March 1, 2000.

[34] This put the principal parties to the appeal to additional expense. It should be noted that the Director, as is his usual practice in these circumstances, had consented to the Colony's request for a temporary stay. On that aspect of the appeal, Mr. Monner was unsuccessful. His position opposing the stay was directly related to his view that matters were

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[8] See the discussion of these principles in the *Costs Decision Re: Mizeras, Glombeck, Fenske et al*. EAB Appeal No. 98-231, 232 and 233 C.

being delayed unduly and his fear that matters would stall. Those fears, which also lead to the early commission of the report concerning his broader concerns, proved unfounded. Given all of these circumstances, a costs award against the Colony would be inappropriate.

IV. CONCLUSION

[35] For the foregoing reasons, and pursuant to section 88 of the Act, Mr. Monner's request for costs is dismissed.

Dated on October 17, 2000 at Edmonton, Alberta.

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Dr. William A. Tilleman