

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – November 24, 2015

**IN THE MATTER OF** sections 91, 92, 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** an appeal filed by Hendrik and Gerritje Krijger with respect to *Water Act* Enforcement Order No. WA-EO-2014/01-RDNSR issued to Hendrik and Gerritje Krijger by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: Costs Decision: *Krijger v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development* (24 November 2015), Appeal No. 13-026-CD (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Panel Chair;  
Mr. Jim Barlishen, Board Member; and  
Ms. A.J. Fox, Board Member.

**SUBMISSIONS BY:**

**Appellants:** Mr. Hendrik and Ms. Gerritje Krijger represented, by Mr. Keith Wilson, Wilson Law Office.

**Director:** Mr. Michael Aiton, Regional Compliance Manager, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Ms. Vivienne Ball and Ms. Erika Gerlock, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD)\* issued an Enforcement Order to Mr. Hendrik and Ms. Gerritje Krijger under the *Water Act* for conducting activities without an approval. AESRD alleged the Krijgers were draining a lake by deepening an existing trench that was initially constructed in the 1960s. AESRD also alleged the Krijgers dug a second trench to drain a wetland on their property.

The Krijgers appealed the issuance of the Enforcement Order.

The Board held a hearing on January 29, 2015, to hear and consider submissions on two issues. At the hearing the Krijgers reserved their right to file a costs application.

Based on the Board's recommendations, the Minister ordered the Enforcement Order be varied.

After the Ministerial Order was issued, the Krijgers submitted a costs application totaling \$53,118.46, including GST, for legal costs they incurred for their legal counsel's preparation and attendance at the hearing.

The Board did not award any costs to the Krijgers. The Board found no exceptional circumstances existed in this case to warrant costs against the Director. Although the Board found the Director's approach in issuing the Order was demanding, this did not demonstrate the Director was acting in bad faith or beyond his legislated mandate.

\* AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding this appeal while the Department was called AESRD.



## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	1
III.	SUBMISSIONS .....	2
	A.    Appellants .....	2
	B.    Director .....	3
IV.	LEGAL BASIS FOR COSTS .....	5
V.	DISCUSSION .....	7
VI.	DECISION .....	9

## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's decision regarding the costs application filed by Mr. Hendrik and Ms. Gerritje Krijger (the "Appellants"). The application is in relation to the appeal filed regarding Enforcement Order No. WA-EO-2014/01-RDNSR (the "Order") issued to the Appellants. Alberta Environment and Sustainable Resource Development ("AESRD")<sup>1</sup> issued the Order to the Appellants under the *Water Act*, R.S.A. 2000, c. W-3, for carrying out activities without an approval. AESRD alleged the Krijgers were draining a lake by deepening a trench that was constructed in the 1960s ("Trench 1"). AESRD also alleged the Krijgers dug a second trench ("Trench 2") to drain a wetland on their property (the "Wetland").

[2] The Board held a hearing and, based on the submissions, the Board recommended the Order be varied. The Minister issued a Ministerial Order on August 26, 2015, varying the Order.<sup>2</sup>

[3] The Appellants submitted an application for legal costs incurred for their legal counsel's preparation and attendance at the hearing. They claimed costs for \$50,589.00 plus \$2,529.46 GST, for a total of \$53,118.46. Such costs were claimed against AESRD.

[4] The Board denied the costs application, because the evidence did not demonstrate that AESRD acted in bad faith or outside its jurisdiction in issuing the Order.

## **II. BACKGROUND**

[5] On February 18, 2014, the Director, Red Deer-South Saskatchewan Region, Alberta Environment and Sustainable Resource Development (the "Director"), issued the Order to the Appellants regarding unauthorized works, including an excavated area and trenches, at SE 30-42-24-W4M (the "Site" or "SE 30") near Ponoka, Alberta. The unauthorized works allowed water to drain from a water body and flow to the west onto neighbouring lands.

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<sup>1</sup> AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding this appeal while the Department was called AESRD.

<sup>2</sup> See: *Krijger v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, (27 February 2015), Appeal No. 13-026-R (A.E.A.B.).

[6] On February 28, 2014, the Board received a Notice of Appeal from the Appellants appealing the Order.

[7] On March 3, 2014, the Board wrote to the Appellants and Director (collectively, the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal.

[8] On April 4, 2014, the Board notified the Parties that, based on the available dates provided, a mediation meeting would be held on May 9, 2014. On April 11, 2014, the Appellants requested the mediation be re-scheduled. The Board notified the Parties on April 17, 2014, that the mediation meeting would be held on June 13, 2014.

[9] The mediation meeting was held on June 13, 2014, in Edmonton. A further mediation meeting was held on October 10, 2014. The appeal was not resolved through mediation.

[10] On December 18, 2014, the Board notified the Parties the issues for the hearing would be:

1. Was the Enforcement Order properly issued?
2. Are the conditions in the Enforcement Order reasonable?

[11] The Board held the hearing on January 29, 2015, in Edmonton.

[12] On August 31, 2015, the Board provided its Report and Recommendations, dated February 27, 2015, and the Minister’s Order to the Parties.

[13] On September 15, 2015, the Appellants submitted their costs application.

[14] On September 29, 2015, the Director provided his response submission.

### **III. Submissions**

#### **A. Appellants**

[15] The Appellants recognized the only other party to the appeal was the Director, and they were aware the Board requires special circumstances in order to award costs against the Director.

[16] The Appellants submitted this is a proper case to award costs against the Director.

[17] The Appellants stated they made a substantial contribution to the hearing and the issues, and their presentations were timely, efficient, and did not prolong the hearing.

[18] The Appellants provided a breakdown of the legal costs they incurred related to the hearing. They said they incurred other legal costs related to participation in the mediation, filing of the appeal, and compliance with the Order. The Appellants noted that disbursements were waived by their legal counsel.

[19] The Appellants said the Director was seeking to implement a fundamental and dramatic change to government policy through an enforcement order. The Appellants stated they incurred costs exposing this and explaining why it was an inappropriate way for AESRD to seek change to a policy adversely affecting almost all rural Alberta landowners, specifically holding current landowners responsible for unapproved works undertaken by previous landowners.

[20] The Appellants noted the unusual difficulties they had obtaining the co-operation of the Director on procedural matters, including scheduling, document disclosure, obtaining the supplemental Record, and related matters.

[21] The Appellants stated they acted in good faith throughout the proceedings, including the Board's requests for several mediation meetings and with respect to the hearing.

[22] The Appellants asked for legal costs of \$50,589.00 plus \$2,529.46 GST, for a total of \$53,118.46.

**B. Director**

[23] The Director stated that no award of costs should be made against him, because there were no special circumstances that warranted such an award.



[24] The Director stated there was no evidence before the Board that he acted in bad faith or the issuance of the Order to the Appellants was made in bad faith. The Director said the evidence before the Board was that he acted at all times in good faith and within his statutory authority.

[25] The Director stated the Board, in determining whether to award costs, must consider the purposes of the *Water Act*.<sup>3</sup>

[26] The Director noted the Order was substantially upheld, and the Board found it was properly issued. The Director stated that, even though some of the terms of the Order were varied, the ultimate objective of the Order (to restore the storage capacity of Lake No. 21) was maintained and was consistent with the purposes of the *Water Act*.

[27] The Director stated that, even if his decision had been reversed, special circumstances are required for costs to be awarded against the Director.

[28] The Director noted the *Water Act* allows the Director to issue an enforcement order to any person who, in the Director's opinion, contravened the Act. It does not require the Director to issue an order to all persons who may have contravened the Act.

[29] The Director stated there has been no fundamental or dramatic change from AESRD's policy and practice of issuing enforcement orders to bring persons into compliance

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<sup>3</sup> Section 2 of the *Water Act* states:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

with the *Water Act*. The Director noted that, under the *Water Act*, persons are prohibited from draining waterbodies and altering the flow or level of water, or from changing the location of water unless they apply for and receive approval from AESRD.

[30] The Director stated the Board's comments in its Report and Recommendations regarding holding current landowners liable for activities of past landowners were *obiter* (i.e. not essential to the Board's decision) since the Board held it did not have to decide this point in order to determine the issues it set for the hearing.

[31] The Director disagreed with the Appellants' statement that they encountered unusual difficulties as it related to procedural matters, and the alleged difficulties did not support the Appellants' allegations that special circumstances existed.

#### **IV. LEGAL BASIS FOR COSTS**

[32] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which provides: "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." This section gives the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*:

"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."<sup>4</sup>

Further, Mr. Justice Fraser stated:

"I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs ... and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid....'" (Emphasis in the original.)<sup>5</sup>

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<sup>4</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

<sup>5</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

[33] Sections 18 and 20 of the *Environmental Appeal Board Regulation*,<sup>6</sup> (the “Regulation”) provide the criteria for determining if costs should be awarded.<sup>7</sup>

[34] As stated in previous appeals, the Board evaluates each costs application against the criteria in the *Water Act* 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;
- (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.

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<sup>6</sup> *Environmental Appeal Board Regulation*, A.R. 114/93.

<sup>7</sup> Sections 18 and 20 of the Regulation provide:

- “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.
- (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.”

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."<sup>8</sup>

[35] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it. As stated in *Mizera*:

“Section 88 (now section 96) of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta. L.R. (3d) 40, [1993] W.W.R. 450 (Alta.Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed.”<sup>9</sup>

## V. DISCUSSION

[36] The Board has generally accepted, as a starting point, that costs incurred in an appeal are the responsibility of the individual parties.<sup>10</sup> There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.<sup>11</sup>

[37] In this case, the Appellants are seeking costs against the Director, the only other Party to this appeal.

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<sup>8</sup> Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

<sup>9</sup> *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

<sup>10</sup> *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

<sup>11</sup> Section 2 of EPEA states:

“(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ... (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions....”

[38] Although the legislation does not prevent the Board from awarding costs against the Director, the Board has stated in previous cases, and the Courts have concurred,<sup>12</sup> that costs should not be awarded against the Director providing his actions in carrying out his statutory duties were done in good faith.

[39] In this case, the Director's decision was not overturned but was varied. Even if the decision had been reversed, special circumstances are required for costs to be awarded against the Director. The Court of Queen's Bench in the *Cabre* decision, considered this issue:

“I find that it is not patently unreasonable for the Board to place the Department 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 immunity and based on the other factors mentioned in the Board's decision, that the Department 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.’

In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise.”<sup>13</sup>

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<sup>12</sup> See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

<sup>13</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001) Action No. 0001-11527 (Alta. Q.B.) at paragraphs 33 to 35.

[40] There was no indication the Director acted in bad faith in issuing the Order. Therefore, the Board does not believe the Director should pay the Appellants' costs.

[41] Through their appeal, the Appellants raised the issue regarding holding current landowners responsible for the alteration of water flows by prior owners. In this case, the Director was expecting the Appellants to undo the effects of a trench that had been dug by others and had been in existence for 50 years. Although this was an important issue, the issuance of the Order was within the Director's jurisdiction. There was no indication the Director acted outside his jurisdiction.

[42] Although the Appellants raised concerns with the approach taken by the Director prior to issuing the Order and in issuing the Order, there was no indication the Director acted in bad faith. The Board does not award costs for punitive reasons. Even though the Board found the terms of the Order were unfairly onerous on the Appellants in that it required the Appellants to take full responsibility for remediating a trench that had been in existence for 50 years, the Board did not find this was evidence of bad faith on the part of the Director. The *Water Act* does not specify how an Order should be written nor the conditions it should include. In this case, the Board found the Order needed to be clearer and more direct in describing what the Appellants were expected to do. Additionally, the Order should not have created what was in essence a two-pronged process by ordering the Appellants to construct a temporary control structure and prepare a remedial plan to help determine the permanent control structure. Instead, the Director should have either selected a conservative spill elevation or have the surveys completed and then design the control structure to achieve the final spill elevation. Even though the conditions in the Order were onerous, the Director did not violate the *Water Act* and his decision to issue the Order with the specific conditions was within his jurisdiction.

[43] Although the Board saw some merit in the Appellants' arguments that costs should be awarded in this case, there was no evidence the Director acted outside his jurisdiction in issuing the Order or wording the Order in the manner he did.

## **VI. DECISION**

[44] For the foregoing reasons, the Board denies the Appellants' costs application.

Dated on November 24, 2015, at Edmonton, Alberta.

“original signed by”  
Alex MacWilliam  
Panel Chair

“original signed by”  
Jim Barlishen  
Board Member

“original signed by”  
A.J. Fox  
Board Member