



# Environmental Appeal Board

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## APPEAL. 2003-WAT-008(a)

In the matter of an appeal under section 40 of the *Water Act*, R.S.B.C. 1996, c. 483.

<b>BETWEEN:</b>	James B. Cooperman	<b>APPELLANT</b>
<b>AND:</b>	Assistant Regional Water Manager	<b>RESPONDENT</b>
<b>AND:</b>	Larry Lutjen et al.	<b>APPLICANTS</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
<b>DATE:</b>	Conducted by written submissions concluding on June 27, 2003	
<b>APPEARING:</b>	For the Appellant: James B. Cooperman For the Respondent: Don I. McKee For the Applicant: Larry Lutjen	

## APPLICATION FOR COSTS

By letter dated May 26, 2003, Larry Lutjen et al., applied to the Board for an award of costs associated with the appeal filed by the Appellant, James Cooperman.

The application for costs has been conducted by way of written submissions.

## BACKGROUND

The application for costs is in relation to an appeal by Mr. Cooperman against Permit No. 24402 to occupy Crown Land (the "Permit") and Conditional Water Licence No. 117970 (the "Licence") issued on February 3, 2003, to Larry Lutjen et al. The Permit and Licence were issued by Don McKee, Assistant Regional Water Manager of the Southern Service Region – Kamloops Service Centre, Land and Water British Columbia Inc., (the "Assistant Manager"). They were issued in substitution of the Applicants' prior licence and permit.

The Licence and Permit authorize the use and storage of water for Block A<sup>1</sup> of the North West ¼ and Block A of the North East ¼, Section 21, Township 22, Range 11,

<sup>1</sup> A number of people own Block A and are sometimes referred to by the parties as the Block A owners. Lutjen et al. appears to be a group made up of some but not all of the owners of Block A.

West of the 6<sup>th</sup> Meridian, Kamloops Division Yale District. Specifically, they authorize a diversion structure, a ditch, two ponds, a dugout, and pipes to divert water from Freeman Brook into two reservoirs.

On March 5, 2003, Mr. Cooperman appealed the decision to issue the Licence and Permit on the ground that "this decision does not adequately consider the need to maintain adequate water flows in the south fork of Freeman Brook during the spring freshet." He further states:

While I appreciate the effort that Land and Water BC is making to see that the unauthorized structures (two dams) are removed because of safety issues, there is also a need for a directive that ensures that both this deconstruction and subsequent new construction of water works will ensure that the spring freshet in Freeman Brook will continue to flow. This spring freshet is needed to ensure that the other water licensees on Freeman Brook receive adequate water and to ensure that the water table needed for our wells is recharged each year.

By letter dated March 6, 2003, the Board advised Mr. Cooperman that his appeal, as filed, was deficient. On March 12, 2003, the Board received a corrected notice of appeal. In that letter, Mr. Cooperman provided specifics about the remedy he sought from the Board:

The remedy for this appeal would be a letter that provides directions to Lutjen et al. to ensure that the deconstruction and new construction of water structures in the Freeman Brook watershed are done in such a way that the flow of water in the south fork of Freeman Brook is maintained to the level that the spring freshet flows above ground to Shuswap Lake.

The Licensee and Permit Holder, Larry Lutjen et al., were given full party status in the appeal.

By letter dated March 17, 2003, the Board scheduled a hearing for June 17-18, 2003. It also advised the parties of the schedule for submissions of their respective Statement of Points prior to the hearing.

At some point after the appeal was filed, Mr. Cooperman and a representative of Land and Water British Columbia Inc. ("LWBC"), began discussing ways to resolve Mr. Cooperman's concerns. From the correspondence copied to the Board, it appears that Mr. Cooperman sought approval from LWBC on May 14, 2003, to alter Larry Lutjen et al.'s works by excavating a channel between the ponds, and installing a siphon at the outlet of the southern pond.

On May 16, 2003, Mr. Cooperman began the installation of these proposed works, thus creating a greater flow of water to lower Freeman Brook.

In a letter to the Board dated May 21, 2003, Mr. Cooperman stated that he had given LWBC his application for a water licence and permit for the works he installed on May 16, and that he was told it was likely his licence would be "issued within a week or two." He further stated that once the new licence was issued, he would

withdraw his appeal. In the same letter, he also asked for an extension of two weeks to submit his Statement of Points, which was due on May 28, 2003.

By letter dated May 22, 2003, the Board refused the request for an extension stating, "such an extension would be prejudicial to the other parties" because it would provide "limited time to file their Statement of Points in the event that the hearing proceeds as scheduled."

By letter to the Board, dated May 26, 2003, Larry Lutjen et al. requested an award of costs related to the appeal, regardless of whether the appeal was withdrawn. They also made detailed submissions on why costs should be awarded to them.

On May 27, 2003, Mr. Cooperman notified the Board that he was withdrawing his appeal. The Board accepted the withdrawal and cancelled the scheduled hearing. On the same day, the Board offered Mr. Cooperman and the Assistant Manager the opportunity to respond in writing to the costs application.

The application for costs does not clearly indicate from whom Larry Lutjen et al. are seeking costs. The majority of Larry Lutjen et al.'s submissions pertain to the conduct of Mr. Cooperman, and it appears they are seeking costs from him. However, this has not been explicitly stated. Accordingly, the Board has considered whether costs should be ordered against Mr. Cooperman, the Assistant Manager, or both.

Mr. Cooperman and the Assistant Manager argue that the application of costs should be denied.

## **ISSUES**

The sole issue to be determined is whether the Panel should award costs to Larry Lutjen et al. in relation to this appeal.

## **LEGISLATION AND POLICY**

The Board has the authority to award costs pursuant to section 11(14.2) of the *Environment Management Act*, which provides:

**11 (14.2)** In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

...

The Board has adopted a general policy to award costs in "special circumstances." These circumstances are outlined in the Environmental Appeal Board Procedure Manual on page 44, and include:

- a. where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

- b. where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;
- c. where a party, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing;"
- d. where a party unreasonably delays the proceeding;
- e. where a party's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; and
- f. where a party has continued to deal with issues, which the Board has advised are irrelevant.

A Panel of the Board is not bound to order costs when one of the above-mentioned examples occurs. Furthermore, the list is not exhaustive and the Panel can order costs for circumstances beyond those described above.

## **DISCUSSION AND ANALYSIS**

### **Whether the Panel should award costs to Larry Lutjen et al. in relation to this appeal.**

Larry Lutjen et al. argue that they should receive an order for costs on the grounds that:

- Mr. Cooperman never had clear authorization to build any works to divert water and thus the new works were illegal and should have been removed;
- no south fork of Freeman Brook exists currently or existed in the past, and there was never any historical flow of water to lower Freeman Brook;
- Mr. Cooperman failed to file the appeal within the statutory time limit as his corrected appeal notice was not received until March 12, 2003, and thus Mr. Cooperman failed to act in a timely fashion;
- Mr. Cooperman asked for a two-week extension for his Statement of Points, and this is both an unreasonable delay of the proceedings, and also demonstrates the failure of Mr. Cooperman to act in a timely fashion. This in turn prejudiced the other parties' ability to submit their Statement of Points prior to the hearing;
- in the same letter in which he asked for the two week extension, Mr. Cooperman made it clear that he would drop the appeal should his water licence be granted, and this demonstrates that Mr. Cooperman was "stalling for time" in order to get the licence and knowingly costing people unnecessary time and money;
- the fact that Mr. Cooperman has withdrawn the appeal, without first getting his water licence, shows that Mr. Cooperman knew the appeal was unacceptable;
- the appeal has been characterized by the Assistant Manager as being about the ditch and pipeline, yet Mr. Cooperman failed to appeal the part of the permit that dealt with these works, namely section (b) of the Permit;

- Mr. Cooperman and the Assistant Manager are wrong in alleging that Larry Lutjen was not the representative of the waterworks owners, and they are also wrong in their submissions by calling the waterwork owners the same group of people as the Block A owners;
- Mr. Cooperman and the Assistant Manager are incorrect in their allegations that there is or was dissension among the waterworks owners;
- Mr. Cooperman is wrong in arguing that Larry Lutjen et al. should not be involved in the appeal because their water rights are unaffected by either his appeal or his works; and
- the appeal is improper, frivolous, and vexatious.

Mr. Cooperman made submissions in response to several of the above grounds. He states that his appeal was not frivolous. He submits that proof that the appeal was not frivolous can be found in the fact that the appeal acted as a "catalyst" in the resolution of his concerns – and prompted LWBC staff to deal with his concerns in "an effective and fair manner."

Mr. Cooperman further submits that there is historical spring freshet flow in the south fork of Freeman Brook, that his works will have no impact on Larry Lutjen et al.'s water rights, and that Larry Lutjen acted unilaterally and was not the representative of the Block A water licence holders. His argument appears to be that Larry Lutjen et al. chose to become a party and incur costs, and that there was no reason to become a party since the rights of Larry Lutjen et al. remained intact at all times. For all of these reasons, Mr. Cooperman submits that there is no basis for an order of costs against him.

The Assistant Manager states that Mr. Cooperman's appeal related to conditions set out in the Licence, and that it was about the plans to fill in a ditch. The Assistant Manager also states that there is disagreement amongst the Block A owners, and that LWBC's requests for a final proposal or plans from the Block A owners has gone unanswered. He argues that Mr. Cooperman should not be required to pay costs because "many of the issues are beyond his control."

As noted above, Larry Lutjen et al. have made a variety of allegations in support of an award of costs in this case. The Panel will address his concerns in no particular order.

The Panel finds that Mr. Cooperman filed his appeal within the prescribed time set out in section 40 of the *Water Act*. When a notice of appeal is deficient, as occurred in this case, the Board establishes deadlines for an appellant to correct any deficiencies. This is specifically authorized by section 3 of the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82. The Panel finds that Mr. Cooperman filed his appeal in a timely manner, and met any deadlines for correcting deficiencies.

Larry Lutjen et al. also argue that Mr. Cooperman's appeal was frivolous and vexatious.

In a previous Board decision, *Klassen v. Environmental Health Officer* (Appeal No. 98-HEA-08(a), August 31, 1998, page 6) (unreported) the Board considered the meaning of frivolous and vexatious:

The Board has considered the meaning of the words "frivolous" and "vexatious," as defined in various dictionaries.

*Webster's Collegiate Dictionary*, 10th ed., defines the terms as follows:

*Frivolous*. of little weight or importance; having no sound basis (as in fact or law); lacking in seriousness

*Vexatious*. causing vexation; intended to harass

*Black's Law Dictionary*, 6th ed., offers these definitions:

*Frivolous appeal*. One in which no justiciable question has been presented and appeal is readily recognisable as devoid of merit in that there is little prospect that it can ever succeed.

*Vexatious proceeding*. Proceeding instituted maliciously and without probable cause.

To summarize, an appeal might be said to be "frivolous" if there is no justiciable question, little prospect that it can ever succeed and it is lacking in substance or seriousness; and "vexatious" if it is instituted maliciously or based on improper motives, intended to harass or annoy.

The Panel adopts these definitions.

Given that Mr. Cooperman's appeal did not proceed to a hearing, the Panel is not in a position to assess the merits of the appeal. However, based on the Notice of Appeal and correspondence provided by Mr. Cooperman, the Panel is satisfied that his appeal was not frivolous, or vexatious.

The Panel finds that Mr. Cooperman had concerns about the decision to issue Larry Lutjen et al. the Licence and Permit, and appealed that decision to the Board, as he was entitled to do under the *Water Act*. He expressed concerns about the effect of the works on the flow of water to lower Freeman Brook. The Panel notes that in a June 3, 2003 letter, the Assistant Manager states that a portion of Larry Lutjen et al.'s works were preventing water from going down lower Freeman Brook. The Panel finds that Mr. Cooperman had concerns about the Licence and Permit that had some basis in fact. Further, based on the documents before the Panel, there is no evidence of malice or that the appeal was intended to harass.

The Panel also notes that Mr. Cooperman was also clear that he would withdraw the appeal when it became apparent that a licence for his works would be forthcoming. Mr. Cooperman gave advance notice of his plans and later followed through with them. These actions cannot be construed as evidence that Mr. Cooperman believed his appeal to be without merit. Rather, as stated by Mr. Cooperman, it is evident that the concerns, which led to his appeal, were being resolved without the need for a hearing.

It should be noted that, as a matter of practice, the Board encourages parties to seek resolution of the issues under appeal prior to an appeal hearing. Mr. Cooperman and the Assistant Manager did so in this case. A resolution was reached before the commencement of the hearing, thus saving all parties, including Larry Lutjen et al., the time and expense of a formal hearing. Furthermore, the Panel finds that there is no bad faith in pursuing an appeal while at the same time working towards a resolution of the matter. An appeal simply preserves a party's rights should settlement not occur.

The Panel also rejects the concept that Mr. Cooperman was "stalling." The entire process from the filing of the Notice of Appeal to Mr. Cooperman's withdrawal took less than three months. Larry Lutjen et al. are correct in saying that Mr. Cooperman did not have his water licence at the time that he withdrew his appeal, but if Mr. Cooperman's intentions had been to stall for time, he could have continued the appeal process until a licence was issued. Instead, as soon as Mr. Cooperman was satisfied that his concerns were being addressed, he withdrew his appeal. The Panel notes that his appeal was withdrawn before his Statement of Points was due, thus saving all involved in the appeal additional time and expense.

As for Mr. Cooperman's request for an extension, the Board denied that request on the grounds that it "would be prejudicial to the other parties." Had the extension been granted, the Board's policy is to grant the extension to all the parties, so that no party is treated unfairly. The Panel finds that the request for an extension did not prejudice Larry Lutjen et al., nor did it cause any delay.

Larry Lutjen et al. also raised concerns regarding the framing of the appeal. They submit that the Respondent contends that the appeal was about a ditch. If that is true, they question why Mr. Cooperman did not appeal that part of the Permit that authorized the ditch.

The Panel agrees that the Assistant Manager characterized the appeal in this manner. However, Mr. Cooperman consistently maintained in his documents that his concern was with any destruction and reconstruction of the works in question, and with ensuring that any actions authorized by the Permit and Licence would not undermine the amount of water reaching Freeman Brook. Regardless, nothing turns on this point, as Larry Lutjen et al. were not prejudiced by any uncertainty in the way that the appeal was characterized.

Larry Lutjen et al. also raised issues relating to the historical flow of Freeman Brook, and the waterworks overall. However, the Panel is not in a position to make any findings on these matters. Finally, Larry Lutjen et al. have concerns about the lack of enforcement action by LWBC regarding Mr. Cooperman's changes to their works. These activities are beyond the scope of this appeal and the application, and, accordingly, cannot be considered in a costs application.

In all of the circumstances, the Panel finds that there are no special circumstances that merit an award of costs to Larry Lutjen et al. The Panel finds that the appeal was neither late, nor improperly drafted, there were no unreasonable delays or failures to act in a timely fashion, and the appeal was not frivolous and vexatious.

**DECISION**

In making this decision the Panel has considered all of the evidence, documents and arguments before it, whether or not they have been specifically reiterated here.

For the reasons stated above, the Panel finds that no special circumstances exist that warrant an order for costs.

The application is dismissed.

Alan Andison, Chair  
Environmental Appeal Board

August 1, 2003