

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: April 23, 2021

CASE NO.: 20-050

PROCEEDING COMMENCED UNDER section 38 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28

Applicant:	See Appendix 1 – Applicant List
Instrument Holder:	Northern Disposal and Sanitation
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of leave to appeal:	Decision to issue an Environmental Compliance Approval under Part II.1 of the <i>Environmental Protection Act</i> for a hauled sewage site
Reference No.:	19-NOR-97288
Property Address/Description:	878 Highway 592
Municipality:	Township of Perry
Upper Tier:	District of Parry Sound
ERT Case No.:	20-050
ERT Case Name:	Beemer v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

Counsel+/Representative

Applicants
(as listed in Appendix 1)

Charles Kazaz

Director, Ministry of the
Environment, Conservation and
Parks

Sylvia Davis+

HEARD:
ADJUDICATOR:

By written submissions
Hugh S. Wilkins, Member

DECISION

[1] This Decision addresses a request for costs arising from applications for leave to appeal an approval under s. 38(1) of the *Environmental Bill of Rights, 1993*.

[2] On November 27, 2020, Environmental Compliance Approval No. 19-NOR-97288 (“Approval”) was issued by Angela Whiteley, Director (“Director”), Ministry of Environment, Conservation and Parks (“MECP”) to Northern Disposal and Sanitation. The Approval facilitates the construction of a hauled sewage disposal facility on the property located at 878 Highway 592 in Emsdale in the Township of Perry.

[3] On December 14, 2020, an application for leave to appeal the granting of the Approval was filed with the Tribunal by the individuals listed in Appendix 1 (“Applicants”) to this Order.

[4] On January 14, 2021, the Director revoked the Approval.

[5] On February 1, 2021, based on the Director’s revocation of the Approval, the Tribunal dismissed the Applicants’ applications for leave to appeal.

[6] On March 1, 2021, the Applicants filed a request for costs arising from their applications for leave to appeal the Approval.

[7] For the reasons set out below, the Tribunal orders that the request for costs is dismissed.

Relevant Legislation and Rules

[8] The relevant legislation and Rules applicable to the request for costs are the following:

Statutory Powers Procedure Act

17.1(1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party’s costs in a proceeding.

- (2) A tribunal shall not make an order to pay costs under this section unless,
- (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
 - (b) the tribunal has made rules under subsection (4).
- (3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4).
- (4) A tribunal may make rules with respect to,
- (a) the ordering of costs;
 - (b) the circumstances in which costs may be ordered; and
 - (c) the amount of costs or the manner in which the amount of costs is to be determined.

Tribunal's *Rules of Practice and Practice Directions* ("Rules")

COSTS

212. A costs award refers to the reimbursement of reasonable and eligible expenditures incurred by a Party for participation in a proceeding before the Tribunal. The objectives of the Tribunal's costs Rules are to: provide consistency and predictability in the awarding of costs by outlining relevant principles and evaluation criteria; to encourage responsible conduct in proceedings; and to discourage unreasonable conduct.

213. A wide authority to award costs applies to proceedings under the *Consolidated Hearings Act* and the *Environmental Assessment Act* and to proceedings under sections 20.15 and 36 of the *Environmental Protection Act* and section 74 of the *Ontario Water Resources Act*. A limited authority to award costs in situations of improper conduct applies to all proceedings before the Tribunal except Niagara Escarpment Plan amendment proceedings under the *Niagara Escarpment Planning and Development Act* and proceedings under the *Oak Ridges Moraine Conservation Act, 2001* and *Greenbelt Act, 2005*.

[...]

225. Under section 17.1 of the *Statutory Powers Procedure Act*, the Tribunal may only order costs to be paid if the conduct or course of conduct of a Party has been unreasonable, frivolous or vexatious or if a Party has acted in bad faith.

This power applies to all proceedings before the Tribunal except proceedings under the *Oak Ridges Moraine Conservation Act, 2001*, proceedings under the *Greenbelt Act, 2005* and Niagara Escarpment Plan amendment proceedings under the *Niagara Escarpment Planning and Development Act*, unless the Niagara Escarpment Plan amendment proceeding is brought under the *Consolidated Hearings Act*.

It is expected that this power will only be used in the rare case where a Party's conduct warrants such an award. In determining an award of costs under this Rule, the Tribunal may consider, among other things, the conduct of the requesting Party as well as whether the Party against whom a costs award is sought:

- (a) failed to attend a Hearing or to send a representative when properly given notice, without contacting the Case Coordinator;
- (b) failed to co-operate, changed a position without notice, or introduced an issue or evidence not previously mentioned;
- (c) failed to act in a timely manner;
- (d) failed to comply with the Tribunal's Rules or procedural orders;
- (e) caused unnecessary adjournments or delays or failed to prepare adequately for Hearings;
- (f) failed to present evidence, continued to deal with irrelevant issues, or asked questions or acted in a manner that the Tribunal determined to be improper;
- (g) failed to make reasonable efforts to combine submissions with Parties of similar interest;
- (h) acted disrespectfully or maligned the character of another Party; and,
- (i) knowingly presented false or misleading evidence.

226. The Tribunal is not bound to order costs when any of the instances listed in Rule 225 occurs nor does the Tribunal have to find that one of the instances occurred in order to conclude that the conduct of a Party has been unreasonable, frivolous or vexatious or that a Party has acted in bad faith. The Tribunal will also consider whether the issues respecting the conduct of such a Party can be addressed by a denial or reduction of costs in its favour rather than a costs award against it.

Issue

[9] The issue is whether the Director should be ordered to pay costs to the Applicants in relation to the applications for leave to appeal the Approval.

Discussion

[10] The Applicants make the following submissions as their bases for the request for costs:

- a) the Applicants notified the MECP of issues with the Approval well in advance of filing the application for leave to appeal and made attempts to resolve the issues with the MECP;

- b) the MECP refused to revoke the Approval, leaving the Applicants no choice but to retain counsel and prepare an application for leave to appeal;
- c) following receipt of the application, the MECP revoked the Approval and thereby acknowledged that the Approval never should have been issued;
- d) the MECP had in its possession all of the facts necessary to arrive at the conclusion that the Approval never should have been granted. The MECP's reasons for revocation are based on facts that were specifically brought to the attention of the MECP by some of the Applicants prior to filing the applications for leave to appeal;
- e) the MECP acted unreasonably and in contravention of regulations that it is charged with upholding and refused to consider the Applicants' submissions prior to the filing of their applications for leave to appeal. As a result, the Applicants incurred out-of-pocket expenses to prepare the applications for leave to appeal, which would not have been required if the Director had acted reasonably and revoked the Approval prior to the filing the applications; and,
- f) the Director was aware of the facts that led to the revocation in advance of the applications for leave to appeal and nevertheless, decided to maintain the decision granting the Approval.

The Applicants elaborate that the Director's actions were unreasonable for a variety reasons, including: (a) the Director posted inaccurate information on the Ontario Environmental Registry regarding the proposed project and Approval; (b) the Director granted the application for the Approval even though it did not comply with the applicable regulations; (c) the Director granted the Approval although it did not comply with applicable setback requirements; and (d) the Director did not consider the impacts on nearby wells and water supplies. They submit that "[t]he Ministry's failure to comply with its own legislation and policies and to address the concerns resulted in the Appeal

and the costs incurred by the Applicants. Had the Ministry acted appropriately and in a manner that was reasonable, the proceeding would have been avoided.”

[11] The Director submits that the Tribunal does not have the authority to grant the Applicants’ request for costs because costs cannot be awarded for events that happened before the commencement of a Tribunal proceeding. The Director submits that, in the present case, the Director’s alleged improper conduct occurred before the Applicants filed their application for leave to appeal. Referring to *Chesterman Farm Equipment Inc. v. CNH Canada Ltd.*, 2016 ONSC 698 (Div. Ct.) (“*Chesterman*”), at para. 20, the Director submits that s. 17.1(2) of the *Statutory Powers Procedures Act* does not provide authority to the Tribunal to order costs for alleged conduct that occurred prior to the commencement of proceedings. Similarly, the Director refers to *Wiggins v. Ontario (Ministry of Environment and Climate Change)*, 2018 CanLII 8110 (ON ERT) (“*Wiggins*”), at para. 28, where the Tribunal found that Rules 212 and 225 of the Tribunal’s Rules do not permit costs awards regarding conduct that happened prior to a proceeding.

[12] The Director filed an affidavit sworn by Jean Guindon, dated March 12, 2021. Mr. Guindon is the District Manager for the MECP’s Timmins District where he is responsible for the MECP’s Environmental Compliance and Drinking Water programmes. He provided evidence on when and why the Approval was revoked. He stated that on December 7, 2020, the MECP received expert hydrogeology evidence from the Applicants questioning the viability of the Approval. He stated that the MECP had the evidence peer reviewed, considered its implications, and then, based on this evidence and peer review, it revoked the Approval on January 14, 2021.

Analysis and Findings

[13] The *Statutory Powers Procedures Act* states that a tribunal may order that a party reimburse another party to pay its costs. Section 17.1(1) states in part:

... a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party’s costs in a proceeding.

Applying this section, the Divisional Court in *Chesterman* emphasized that costs are to address a party's conduct in a proceeding itself and not to address conduct relating to the subject matter of the dispute outside of the proceeding. The Divisional Court stated at paras. 184 and 186 (emphasis added):

Ordinarily, **courts will only impose extreme costs sanctions based on the conduct of the party in the litigation.** A similar interpretation applies to the type of conduct that will attract a costs award under s. 17.1 of the SPPA and, indeed, under the Tribunal's own Rules.

[...]

Conduct that relates to the subject matter of the proceeding [...] is not a basis for an award of costs under the Tribunal's Rules or s. 17.1 of the SPPA.

[14] Based on the powers conferred on it under s. 17(1) of the *Statutory Power Procedure Act*, the Tribunal has made Rules regarding the awarding of costs. Rules 212 and 225 of the Tribunal's Rules address the conduct regarding which costs may be ordered. The relevant parts of these Rule state (emphasis added):

212. A costs award refers to the reimbursement of reasonable and eligible expenditures **incurred by a Party for participation in a proceeding before the Tribunal. The objectives of the Tribunal's costs Rules are to:** provide consistency and predictability in the awarding of costs by outlining relevant principles and evaluation criteria; **to encourage responsible conduct in proceedings; and to discourage unreasonable conduct.**

[...]

225. Under section 17.1 of the *Statutory Powers Procedure Act*, the Tribunal may only order costs to be paid if the conduct or course of conduct of a Party has been unreasonable, frivolous or vexatious or if a Party has acted in bad faith.

This power applies to all proceedings before the Tribunal except proceedings under the *Oak Ridges Moraine Conservation Act, 2001*, proceedings under the *Greenbelt Act, 2005* and Niagara Escarpment Plan amendment proceedings under the *Niagara Escarpment Planning and Development Act*, unless the Niagara Escarpment Plan amendment proceeding is brought under the *Consolidated Hearings Act*. [...]

[15] In *Wiggins*, at para. 28, the Tribunal applied Rules 212 and 225 when addressing a situation where costs were requested regarding conduct that occurred prior to the commencement of the proceeding. The Tribunal found (emphasis added):

Rule 212 states that an award of costs “refers to the reimbursement of reasonable and eligible expenditures incurred by a Party for participation in a proceeding before the Tribunal”. Rule 225 uses similar words. It states that the costs rules apply to “proceedings before the Tribunal”. Expenditures incurred due to conduct which has occurred prior to a proceeding are not eligible for an award of costs. It is a party's actions during the course of a proceeding that may be the subject of a costs award (see *Concerned Citizens Committee of Tyendinaga and Environs (CCCTE) v. Director, MOECC*, [2017] O.E.R.T.D. No. 35, (“CCCTE”), at paras. 104-105; and also *Chesterman Farm Equipment Inc. v. CNH Canada Ltd.*, 2016 ONSC 698 at para. 186). In *Dixon v. Director (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 33, at para. 113, the Tribunal found that its jurisdiction on renewable energy approval appeals “is triggered by a request for a hearing under EPA, s. 142.1”. **The Tribunal finds that in this case the Applicants' costs incurred prior to the Appellants' requests for a hearing, including those due to alleged improper conduct related to the terms and conditions of the [Approval], its issuance, and protection of human health and the environment, are not eligible for an award of costs.**

[16] The intent of the Tribunal’s Rules on costs are to encourage responsible conduct and discourage unreasonable conduct in proceedings before it. The Tribunal has no means to properly control conduct that occurred prior to the commencement of a proceeding and does not have the authority under the *Statutory Powers Procedure Act* or the Tribunal’s Rules to award costs for such conduct. The Applicants submit that had the Director acted appropriately, the proceeding would have been avoided. As all of the Director’s alleged improper conduct occurred prior to filing of the application for leave to appeal, the Tribunal finds that it does not have the authority to award costs for that conduct in the present circumstances.

[17] Regarding the Director’s conduct between the time of the filing of the applications for leave to appeal and the revocation of the Approval, the Tribunal notes the finding in *Wiggins* that a Party’s change in position may not necessarily signify unreasonable conduct. It stated at para. 32:

... A party should not steadfastly adhere to an unsupportable position once evidence arises that undermines that position out of fear that changing a position will necessarily lead to a costs award against it. A party is clearly entitled to re-evaluate its position in an appeal proceeding as the evidence unfolds. Therefore, the Tribunal finds that the Director acted responsibly in changing its position during the course of the proceeding based on the evidence that came to light. Accordingly, the Tribunal finds that the Appellants have not established that this conduct is unreasonable.

[18] In the present case, the MECP received expert hydrogeology evidence questioning the viability of the Approval on December 7, 2020, the proceeding was commenced on December 14, 2020, the MECP had the evidence peer reviewed, and, based on the peer reviewer's comments, the Approval was revoked on January 14, 2021. The Tribunal finds that the Director acted in a reasonable, genuine, and timely manner upon receiving and considering this evidence and then by revoking the Approval.

ORDER

[19] The Tribunal dismisses the application for costs brought by the Applicants.

[20] No costs are awarded in this proceeding.

Application for Costs Dismissed

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

If there is an attachment referred to in this document,
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Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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Appendix 1**Applicant List**

Applicant Name	File No.
Kim Beemer	20-050
Christine Bice	20-051
Raymond Denney	20-052
Wilma Denney	20-053
John Glaves	20-054
Valerie Glaves	20-055
Adam Grin	20-056
Charles Kazaz	20-057
Dan Larade	20-058
Dawn Mashinter	20-059
Evan Mashinter	20-060
Wayne Mashinter	20-061
Evelyn Winter	20-062
Ulrich Winter	20-063
Algonquin Woods	20-064
Booker's Clear Lake Cottages	20-065
Clear Lake Property Owners Association	20-066
Winning Techniques Incorporated	20-067