

DECISION NO. 2007-EMA-004(b)

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Chief Wayne Christian, on behalf of the Splatsin First Nation	APPELLANT
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
AND:	Monty Lee Andrew Willis	APPLICANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 9, 2007	
APPEARING:	For the Appellant: Jennifer Spencer, Counsel For the Respondent: Dennis Doyle, Counsel For the Applicant: Steven Dvorak, Counsel	

APPLICATION FOR COSTS

By letter dated September 18, 2007, Mr. Willis applied to the Board to order the Appellant, the Splatsin First Nation (the "Splatsin"), to pay Mr. Willis' costs in relation to the Splatsin's appeal.

The application for costs was conducted by way of written submissions.

BACKGROUND

The application for costs is in relation to an appeal brought by the Splatsin against a letter issued on April 18, 2007, by Mike J. Reiner on behalf of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment, to Mr. Willis. The letter acknowledges receipt of a completed registration form for discharge to surface water from a sewage treatment plant located on land adjacent to the Shuswap River, pursuant to the *Municipal Sewage Regulation*, B.C. Reg. 129/99 (the "*Regulation*"). The letter states that the registration is effective on November 22, 2006, and the letter sets out a number of requirements that the Director imposed regarding the discharge.

The Splatsin appealed the letter on May 17, 2007, on the basis that the Province had breached its duty to consult the Splatsin with respect to their aboriginal rights

and interests before authorizing the discharge. The Splatsin also appealed the terms and conditions of the registration on the basis that they are inadequate to protect the river system and do not adequately mitigate the negative effects of the discharge on the Splatsin's aboriginal rights. It asked the Board to set aside the registration and all of the conditions associated with it due to a lack of consultation with First Nations.

The Splatsin's appeal was joined with an appeal by Peter Kruyk and Carolyn A. Baird against the registration (Appeal No. 2007-EMA-005). The Board advised the Splatsin that it had jurisdiction to hear an appeal against the additional requirements that were imposed by the Director in the letter, but that it was unclear whether the registration itself was an appealable decision under section 99 of the *Environmental Management Act*. The Board sought and obtained written submissions from all parties on this threshold jurisdictional issue.

In a decision issued on August 22, 2007, the Board concluded that it had jurisdiction to hear part but not all of the Splatsin's appeal, holding that it had no jurisdiction over the registration or the lack of consultation over the registration. The Board found, however, that it had jurisdiction over the appeals to the extent that they pertain to the additional requirements imposed on the registration and the lack of consultation in respect of those requirements (Decisions No. 2007-EMA-004(a)).

The Board then invited the Appellant to consider whether it wished to continue with the appeal in respect of the issues pertaining to the additional requirements alone. The Splatsin withdrew their appeal by letter dated September 12, 2007. The Board accepted the withdrawal and made no award as to costs.

By letter dated September 18, 2007, Mr. Willis requested an order of costs against the Splatsin, on the grounds that the Splatsin's appeal was frivolous or vexatious.

ISSUES

The sole issue to be determined is whether the Panel should award costs to Mr. Willis 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;

...

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 Mr. Willis in relation to this appeal.

The parties' submissions

Mr. Willis argues that he should receive an order for costs because there are special circumstances that warrant such an order. Mr. Willis argues, more specifically, that the appeal was brought for frivolous or vexatious purposes. His argument is as follows:

- The Splatsin's ostensible purpose in filing the appeal was to seek the imposition of more stringent environmental standards upon the registration granted to Mr. Willis.
- Pursuant to the Board's preliminary ruling on jurisdiction, the issue of whether the additional requirements were sufficiently stringent remained extant.
- The Splatsin have offered no explanation for their summary withdrawal of the appeal.
- In abandoning the appeal, the Splatsin have demonstrated that their true objective was not, in fact, to secure more stringent environmental standards.
- These circumstances support a finding that the appeal was brought for frivolous or vexatious purposes.

In reply, the Splatsin submit that Mr. Willis' position is based on a misunderstanding of the grounds of its appeal. The Splatsin draw attention to the fact that its appeal challenged the registration itself and the adequacy of the terms and conditions. Both grounds of appeal were raised in the context of the failure of the Director to consult and accommodate the Splatsin about the infringement of their aboriginal rights and title.

The Splatsin note that the Board's policy is to award costs only in “special circumstances”, such as where an appeal is frivolous and vexatious. The Splatsin argue that the appeal raised substantive and serious issues relating both to the Registration itself, and to the Board's jurisdiction. Moreover, the Splatsin submit

that the appeal was conducted in good faith, and the reason it was withdrawn was the Board's unfavourable decision regarding the jurisdictional question.

In sum, the Splatsin submit that, as their appeal raised substantive issues, it was neither frivolous, nor vexatious, and there are no special circumstances that would warrant a costs order against them.

The Respondent took no position, and made no submissions, regarding the costs application.

The Panel's findings

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

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.

This Panel adopts these definitions.

Given that the appeal did not proceed to a hearing, the Panel is not in a position to assess its merits. However, based on the Notice of Appeal and correspondence provided by the Splatsin, the Panel is satisfied that the appeal was neither frivolous, nor vexatious.

The Panel agrees with the Splatsin that the appeal raised serious questions, including whether the Province had a duty to consult with the Splatsin on this matter and, if so, whether the consultation was adequate, and, also, whether the additional requirements imposed on the registration were adequate.

In its submissions on jurisdiction, the Splatsin provided an affidavit of Chief Wayne Christian, sworn June 4, 2007, in which the Chief set out the Splatsin's concerns about the discharge of sewage authorized by the registration. The Panel finds that the Splatsin had genuine concerns relating to human health, water quality, and the

effects of sewage discharge on fish and fish habitat. Those concerns were expressed in relation to the Splatins people, their use of fish and the broader environment, as well as the Splatins' aboriginal title and rights within the area affected by the discharge. Those are substantive issues that were raised in good faith and had at least some basis in fact. Further, there is no evidence of malice or that the appeal was intended to harass.

The appeal raised a threshold jurisdictional question, which required a preliminary determination by the Board. That jurisdictional question resulted in a finding that the Splatins could not pursue, in its appeal, all of the issues that it had intended to pursue. The Board wrote to the Appellant to ask them to confirm whether it wished to proceed to a hearing on the merits of the appeals. Although the Splatins' appeal still raised arguable issues, it chose to withdraw its appeal shortly thereafter. This resulted in a substantial saving in time and expense to all parties, as aboriginal rights and title cases can be extremely long and costly.

In sum, the Panel finds that the appeal was neither frivolous, nor vexatious, and that there are no special circumstances in this case that merit an award of costs to Mr. Willis.

DECISION

For all of the reasons set out above, Mr. Willis' application for costs is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

October 17, 2007