

The Price of Environmental Review Tribunal Cost Awards

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The Environmental Review Tribunal (“ERT”) has awarded costs in rare circumstances, only when a party’s conduct has been exceptionally egregious. However, the recent decision in *CNH Canada Ltd v Chesterman Farm Equipment Ltd* (“*CNH*”)¹ could significantly alter the ERT’s practice. Costs awards could become more frequent.

Impact of *CNH* on ERT Cost Awards

In *CNH*, the Ontario Court of Appeal (“ONCA”) found that the appellant manufacturer behaved unreasonably. It changed its theory of the case partway through the ERT proceeding. And it did not raise the issue of retroactive versus retrospective application of the *Dealership Agreements Regulation* earlier.² Accordingly, the ONCA upheld the ERT’s decision to award the respondent manufacturer \$376,338.05 in partial indemnity costs.

Notably, the ONCA held that when awarding costs, the ERT is not restricted to considering a party’s unreasonable conduct within the hearing itself. *CNH* recognizes that the ERT can now consider a parties’ conduct outside of the ERT hearing.³

CNH diverges significantly from earlier cases, where the ERT limited its consideration of costs awards to parties’ conduct during the hearing. The ONCA found that neither the *Statutory Powers Procedure Act* (“*SPPA*”)⁴ nor the The Rules of Practice and Practice Directions of the ERT⁵ require such a narrow reading of the ERT’s power.

ERT’s Legal Framework for Costs Awards

SPPA, s. 17.1 limits the discretion of the ERT to award costs. *SPPA*, section 17.1(2) states:⁶

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).

¹ *CNH Canada Ltd v Chesterman Farm Equipment Ltd*, 2018 ONCA 637, 295 ACWS (3d) 286 [*CNH*].

² *Ibid* at para 77.

³ *Ibid* at paras 86-87.

⁴ RSO 1990, c S 22 [*SPPA*].

⁵ *Rules of Practice and Practice Directions of the Environmental Review Tribunal*. Environment and Lands Tribunals Ontario, (2016) [ERT Rules].

⁶ *SPPA*, s 17.1(2).

ERT Rule 212 says the cost rules are meant “...to encourage responsible conduct in proceedings; and to discourage unreasonable conduct.”⁷

ERT Rule 225 adopts *SPPA*, s. 17.1, and states that the ERT shall only award costs if a party’s conduct is “unreasonable, frivolous or vexatious or if a party acted in bad faith.”⁸ ERT Rule 225 provides a non-binding and non-exhaustive list of conduct that the ERT can consider when making a costs award. Conduct enumerated in Rule 225 includes a party’s failure to attend a hearing, to co-operate, or to act in a timely manner among other considerations.⁹

One Example of an ERT Costs Decision Prior to *CNH*

In 2017, Willms & Shier Environmental Lawyers LLP acted as legal counsel to the Regional Municipality of Peel (“Peel”) on a costs application before the ERT.¹⁰ The ERT dismissed Peel’s costs application against the Director, Ministry of the Environment and Climate Change, even though Peel was successful on its motion to revoke a Director’s Order.

The ERT relied on Rule 217 and *SPPA*, s. 17.1, and found that the Director did not behave in a manner that was unreasonable, frivolous, vexatious, or in bad faith.¹¹

Peel argued that the Director acted unreasonably, when the Director opposed Peel’s motion to revoke the Director’s Order, despite Peel being unaware of, or having any role in, the illegal waste ash deposits at a church site.¹² Peel argued that the Director was unreasonable for trying to fix financial responsibility for waste ash removal onto Peel, despite having knowledge of the true identities of the parties responsible.¹³

Peel argued that the Director also behaved unreasonably by failing to act in a timely manner to order the parties actually responsible to remove the waste.

The ERT said that the appropriate question in the costs application was whether Peel established that the Director’s conduct was unreasonable during the appeal hearing.¹⁴ The ERT held that Peel’s grounds for the costs application related more to the Director’s decision to issue the order in the first place, conduct outside of the appeal hearing. The ERT found that during the hearing, the Director’s conduct did not cause delay, nor was it uncooperative or improper.¹⁵

⁷ ERT Rules, Rule 212.

⁸ ERT Rules, 225.

⁹ *Ibid.*

¹⁰ *Keswick Presbyterian Church v Ontario (Environment and Climate Change)*, 2017 CarswellOnt 779, 6 CELR (4th) 157 [*Keswick*].

¹¹ *Ibid* at para 8.

¹² *Ibid* at para 12.

¹³ *Ibid.*

¹⁴ *Ibid* at para 26.

¹⁵ *Ibid* at paras 17, 27-28.

Going Forward

Now that the ONCA has opened the door for Tribunals to consider conduct outside of the actual hearing itself, perhaps the ERT will look more favourably on costs applications like Peel's.

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