

ALBERTA  
ENVIRONMENTAL APPEALS BOARD  
  
Decision

Date of Decision – February 13, 2007

**IN THE MATTER OF** sections 91 and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

**-and-**

**IN THE MATTER OF** an appeal filed by the Castle-Crown Wilderness Coalition with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 18777-01-01 issued to Castle Mountain Resort Inc. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Castle-Crown Wilderness Coalition v. Director, Southern Region, Regional Services, Alberta Environment re: Castle Mountain Resort Inc.* (13 February 2007), Appeal No. 03-144-CD (A.E.A.B.).

**BEFORE:**

Dr. Steve E. Hrudehy, Chair,  
Mr. Al Schulz, Board Member, and  
Dr. Alan J. Kennedy, Board Member.

**SUBMISSIONS:**

**Appellant:** Castle-Crown Wilderness Coalition,  
represented by Mr. Cameron D. McLennan,  
Huckvale Wilde Harvie MacLennan LLP.

**Director:** Mr. Dave McGee, Director, Southern Region,  
Regional Services, Alberta Environment,  
represented by Ms. Charlene Graham, Alberta  
Justice.

**Approval Holder:** Castle Mountain Resort Inc., represented by  
Mr. F. Murray Pritchard, Milne Pritchard Law  
Office.

## EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Castle Mountain Resort Inc. regarding the wastewater system for the Castle Mountain Resort. The Amending Approval does not change the physical outline, nature, or construction of the storage cell; it changes some of the operational parameters of the existing storage cell, essentially changing the limits of the wastewater system from a house based calculation to a volume based limit. The Environmental Appeals Board received a Notice of Appeal from the Castle-Crown Wilderness Coalition (“CCWC”).

The Board held a preliminary meeting to determine whether the CCWC was directly affected and the issues that should be heard at a hearing, should one be held. The Board determined the CCWC was not directly affected by the decision of Alberta Environment, and the appeal was dismissed. Therefore, the Board did not have to consider what issues should be heard at the hearing.

Castle Mountain Resort and the CCWC applied for costs. The Board asked the participants to respond to the question of whether the Board has jurisdiction to award costs in relation to a Preliminary Meeting based on sections 18, 19, and 20 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

After analyzing the wording of the legislation, the Board determined it could not award costs in this case. The CCWC was deemed not to be directly affected and the appeal was dismissed. Therefore, the CCWC did not meet the requirements as to who may file a costs application. Final costs can only be awarded after a hearing of the substantive matters in the appeal. Further, interim costs are prospective in nature as they may only be awarded to assist a party in the preparation and presentation of their case at the substantive hearing. No hearing was held, and therefore the Board could not award final or interim costs to either applicant. Finally, the Board also determined that costs will not be awarded against an appellant if he is seeking standing before the Board and is not successful, providing he is acting in good faith.

## TABLE OF CONTENTS

I.	BACKGROUND .....	1
II.	STATUTORY BASIS FOR COSTS .....	5
III.	SUBMISSIONS .....	10
A.	CCWC Costs Application .....	10
1.	Appellant .....	10
2.	Approval Holder .....	12
3.	Director.....	13
B.	Approval Holder Costs Application.....	14
1.	Approval Holder .....	14
2.	Appellant .....	15
3.	Director.....	17
IV.	DISCUSSION.....	17
V.	CONCLUSION.....	21

## **I. BACKGROUND**

[1] On September 30, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), issued Amending Approval No. 18777-01-01 (the “Amending Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA” or the “Act”) to Castle Mountain Resort Inc. (the “Approval Holder”) for the construction, operation, and reclamation of a wastewater system in Pincher Creek, Alberta.<sup>1</sup> The Amending Approval does not change the physical outline, nature, or construction of the storage cell; it changes some of the operational parameters of the existing storage cell, essentially changing the limits of the wastewater system from a house based calculation to a volume based limit.

[2] On November 14, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Castle-Crown Wilderness Coalition (the “Appellant” or “CCWC”) appealing the Amending Approval.

[3] On November 17, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal, and the Participants provide available dates for a mediation meeting or hearing. A copy of the Record was received and copies were provided to the Appellant and the Approval Holder.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (“NRCB”) and the Alberta Energy and Utilities Board (“AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative with respect to the Amending Approval.

[5] On November 19, 2003, the Director filed a motion with the Board regarding the directly affected status of the Appellant, and submitted the appeal should be dismissed pursuant

---

<sup>1</sup> The Amending Approval amended Approval No. 18777-01-00 (the “Approval”), which was issued to the Approval Holder on June 22, 1999.

to section 95(5)(ii) of EPEA.<sup>2</sup> On December 18, 2003, the Board wrote to the Participants to schedule a written submission process to deal with the directly affected motion.

[6] On January 8, 2004, the NRCB provided three documents related to the NRCB application by Vacation Alberta Corporation, a previous developer of the site.<sup>3</sup> The Board extended the submission deadlines to allow the Participants to review and incorporate anything from the NRCB documents that they believed may be relevant. The Board received submissions from the Participants between January 23, 2004, and February 20, 2004.

[7] On March 25, 2004, the Board wrote to the Participants informing them of its intent to hold an oral Preliminary Meeting in order to obtain further evidence from the individual members of the CCWC with respect to whether they personally are directly affected by the Amending Approval, how they will be harmed or impaired by the project, whether the project will harm the natural resources used by the Appellant and its members, or whether their use of the natural resources will be affected.

[8] In consultation with the Participants, the Board scheduled a Preliminary Meeting for June 7, 2004. On May 7, 2004, the Appellant advised the Board that the court decision regarding a related judicial review application was pending, and "...proceeding to a preliminary meeting before the judicial review decision is released would be inappropriate."

[9] On May 11, 2004, the Board wrote to the Participants requesting the Director and the Approval Holder provide comments with respect to the May 7, 2004 letter from the Appellant. On May 18, 2004, the Board notified the Participants that it would not grant the adjournment of the appeal on the basis of the judicial review, as the issue to be determined at the Preliminary Meeting was the directly affected status of the Appellant and this issue should not be affected by the outcome of the judicial review. However, the Board did grant the adjournment

---

<sup>2</sup> Section 95(5)(ii) of EPEA provides:

"The Board may dismiss a notice of appeal if ... (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation...."

<sup>3</sup> The three documents provided were: NRCB Pre-Hearing Conference Report (April 8, 1993); NRCB Report on Final Costs Awards (February 9, 1994); and NRCB Decision Report (December 1993). While these documents related to the development of the area in general, they did not specifically relate to the Amending Approval.

on the basis that the Appellant's counsel subsequently advised that he was no longer available on June 7, 2004.

[10] On July 2, 2004, the Board acknowledged a letter from the Appellant providing its list of witnesses, including Mr. James Tweedie, Mr. Gordon Petersen, Mr. Michael Taylor, Mr. Andrew Hurly, and Mr. John Hancock. On July 2, 2004, the Court of Queen's Bench released its decision regarding the judicial review filed by the CCWC.<sup>4</sup> On July 14, 2004, the Board wrote to the Participants requesting they provide their comments regarding the effect that Madame Justice Kenny's July 2, 2004 decision,<sup>5</sup> in relation to the judicial review filed by the CCWC, would have on the current appeal given the relief requested in the Appellant's Notice of Appeal was to "...withhold approval of amendment until after CCWC's motion of the judicial review of the Minister's decision not to order an E.I.A. has been resolved at Court of Queen's Bench." The Participants provided their submissions between July 16 and 21, 2004.

[11] On October 19, 2004, the Board acknowledged that the Approval Holder and the Appellant were in settlement discussions, and granted an abeyance to allow the discussions to continue. On January 18, 2005, the Approval Holder notified the Board that negotiations had broken down, and the Approval Holder requested the appeal be dismissed or, alternatively, set the matter down for a hearing.

[12] On February 10, 2005, the Board set the submission schedule for the Participants to respond to the following questions:

"1. Whether to dismiss the appeal for being moot, given the decision of Madame Justice Kenny in relation to the Judicial Review filed by the Appellant and given that the relief requested by the Appellant in their Notice of Appeal appears to have been met by the issuance of that decision?"

---

<sup>4</sup> See: *Castle-Crown Wilderness Coalition v. Jillian Flett, Director of Regulatory Assurance Division, Alberta Environment and Lorne Taylor, Minister of the Environment and Castle Mountain Resort Inc.* (2 July 2004) ABQB 515. In her decision, Madame Justice Kenny quashed the decision of the EIA Director not to order an EIA and returned the matter back to Alberta Environment. The Court of Appeal overturned Madame Justice Kenny's decision and determined that the EIA Director's determination that an EIA was not required was reasonable. See: *Jillian Flett, Director of Regulatory Assurance Division, Alberta Environment and Lorne Taylor, Minister of the Environment and Castle Mountain Resort Inc. v. Castle-Crown Wilderness Coalition* (9 September 2005) ABCA 283.

<sup>5</sup> See: *Castle-Crown Wilderness Coalition v. Jillian Flett, Director of Regulatory Assurance Division, Alberta Environment and Lorne Taylor, Minister of the Environment and Castle Mountain Resort Inc.* (2 July 2004) ABQB 515.

2. Whether the Appellant should be permitted to amend the Notice of Appeal?"

[13] On February 11, 2005, the Appellant notified the Board that it objected to the submission process as outlined by the Board, specifically the requirement of the Appellant and its members to provide initial submissions and rebuttal submissions. The Board reviewed the Appellant's letter and, on March 11, 2005, notified the Participants that it would proceed in the manner detailed in its February 10, 2005 letter, and address the motions through written submissions. Submissions were received between March 24 and April 18, 2005.

[14] On August 31, 2005, the Board notified the Participants that the appeal was not moot as a result of the Court of Queen's Bench ruling, and the motion to dismiss the appeal was dismissed. The Board also denied the Appellant's application to amend its Notice of Appeal.<sup>6</sup> In the same letter, the Board requested the Participants provide submissions on the question of whether the Appellant has standing and what issues should be considered if a hearing was held. The Board informed the Participants that it would schedule an oral Preliminary Meeting to address these issues. The submissions were received between September 30 and October 31, 2005.

[15] On September 12, 2005, the Approval Holder notified the Board that the Court of Appeal had overturned the Queen's Bench decision and decided in favour of Castle Mountain Resort Inc. On October 4, 2005, the Board notified the Participants that the Preliminary Meeting would be held on November 29, 2005.

[16] On November 25, 2005, the Board requested the following witnesses attend at the Preliminary Meeting on behalf of the Appellant: Mr. Michael Lynch; Ms. Nancy Purdy; Mr. John Hancock; Mr. Gordon Petersen; Mr. James Tweedie; Mr. Clifford Wallis; and Mr. Andrew Hurly. The Preliminary Meeting was held on November 29, 2005, in Lethbridge, Alberta.

[17] On August 8, 2006, the Board released its decision, finding the CCWC was not directly affected and, therefore, dismissed the appeal.<sup>7</sup>

---

<sup>6</sup> See: *Castle-Crown Wilderness Coalition v. Director, Southern Region, Regional Services, Alberta Environment re: Castle Mountain Resort Inc.* (8 August 2006), Appeal No. 03-144-D1 (A.E.A.B.).

<sup>7</sup> See: *Castle-Crown Wilderness Coalition v. Director, Southern Region, Regional Services, Alberta Environment re: Castle Mountain Resort Inc.* (8 August 2006), Appeal No. 03-144-D2 (A.E.A.B.).

[18] On August 10, 2006, the Board wrote to the Participants, noting the Appellant and Approval Holder reserved their right to apply for costs at the Preliminary Meeting. The Board set the schedule to receive written submissions from the Participants and asked the Participants to address the following:

1. Does the Board have jurisdiction to award costs in relation to a Preliminary Meeting based on the Board's Regulation? Refer to sections 18, 19 and 20 that relate to costs.
2. In considering applications for costs, the Board requires a motion that clearly outlines the actual costs incurred in the preparation of the participant's submission. Where possible, invoices, receipts and other necessary documentation should be attached. A detailed breakdown of all costs should be provided. In addition, the participant should indicate the reasons why the funds are needed to meet their financial obligations and if attempts were made to seek other sources of funding.
3. Other considerations the Board may take into account when contemplating a cost application include, but are not limited to:
  - Did the participants make a substantial contribution to the Preliminary Meeting and focus on matters contained within the Notice of Appeal?
  - Were the presentations made in a timely and efficient manner so as not to unduly delay and prolong the Preliminary Meeting?
  - Are the costs requested reasonable and reflect only the actual expenditures incurred in the preparation of the submission?
  - Did the participants indicate an intention to pursue a cost application prior to the conclusion of the Preliminary Meeting?
  - Did the participants act in good faith in all phases of the proceeding?

[19] The Board received costs applications on behalf of the Appellant and the Approval Holder and submissions were received from the Participants between August 22 and September 8, 2006.

## **II. STATUTORY BASIS FOR COSTS**

[20] 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>8</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>9</sup>

[21] The sections of the *Environmental Appeal Board Regulation*,<sup>10</sup> (the “Regulation”) concerning costs 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.

19(1) An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board had determined all parties to the appeal.

(2) An application for an award of interim costs shall contain sufficient information to demonstrate to the Board that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission,

(3) In deciding whether to grant an interim award of costs in whole or in part, the Board may consider the following:

- (a) whether the submission of the party will contribute to the meeting or hearing of the appeal;
- (b) whether the party has a clear proposal for the interim costs;

---

<sup>8</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

<sup>9</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

<sup>10</sup> *Environmental Appeal Board Regulation*, A.R. 114/93.

- (c) whether the party has demonstrated a need for the interim costs;
  - (d) whether the party has made an adequate attempt to use other funding sources;
  - (e) whether the party has attempted to consolidate common issues or resources with other parties;
  - (f) any further criteria the Board considers appropriate.
- (4) In an award of interim costs the Board may order the costs to be paid by either or both of
- (a) any other party to the appeal that the Board may direct;
  - (b) the Board.
- (5) An award of interim costs is subject to redetermination in an award of final costs under section 20.
- 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.”

[22] Section 33 of the Board's Rules of Practice states:

“Any Party to a proceeding before the Board may make an application in writing

to the Board for an award of costs on an interim or final basis. A Party may make an application for all costs that are reasonable and are directly and primarily related to the preparation and presentation of the Party's submission in relation to the matters contained in the Notice of Appeal.

An application for an award of interim costs can be made by a Party at any time prior to the close of a hearing of the appeal but after the Board has determined all Parties to the appeal.

An application for interim costs shall contain sufficient information to demonstrate to the Board that interim costs are necessary in order to assist the Party in effectively preparing its submission with respect to a proceeding."

[23] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the Act. The purpose of EPEA is found in section 2 which provides:

"The purpose of the Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; ...
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsive action in administering this Act."

[24] While all of these purposes are important, the Board believes the shared responsibility that section 2(f) of EPEA places on all Albertans "...for ensuring the protection, enhancement and wise use of the environment through individual actions..." is particularly instructive in making its costs decision.

[25] The Board has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply in the particular claim for costs.<sup>11</sup> The Board also determines the relative weight to be given to each criterion, depending on the specific circumstances of each appeal.<sup>12</sup> In *Cabre*, Mr. Justice Fraser noted that section "...20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs..." and concluded "...that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."<sup>13</sup>

[26] As stated in previous appeals, the Board evaluates each costs application against the criteria in EPEA and the Regulation. As stated by the Board in *Cabre* costs decision:

"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.

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>14</sup>

---

<sup>11</sup> *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.*) (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.).

<sup>12</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>13</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

<sup>14</sup> *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.) ("*Cabre*").

[27] Under section 18(2) of the Regulation, costs awarded by the Board must be “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.” These elements are not discretionary.<sup>15</sup>

### **III. SUBMISSIONS**

#### **A. CCWC Costs Application**

##### **1. Appellant**

[28] The Appellant argued there is no differentiation in section 18 of the Regulation to a preliminary meeting as compared with any other proceeding before the Board. The Appellant explained it provided submissions to the Board as requested with respect to whether it was directly affected and whether the Notice of Appeal should be allowed to be amended. The Appellant submitted there is nothing in the Regulation that would limit the jurisdiction of the Board in awarding costs in relation to any proceeding before the Board, including a preliminary meeting.

[29] The Appellant submitted that all of the costs incurred leading up to and including the preliminary meeting should be paid by the Board.

[30] The Appellant explained it made significant effort to raise funds from its membership for the appeal and have relied on those funds to pay expenses incurred. According to the Appellant, it arranged to have legal services at a reduced hourly rate and to have the accounts reduced.

[31] The Appellant stated the costs reflect the public interest in having an objective review of environmental decision making and its efforts to maintain and promote the well being of the Castle-Crown Wilderness area.

[32] The Appellant acknowledged it is solely the Board’s discretion to award costs and the legislation does not limit the factors that can be considered by the Board in awarding costs. The Appellant also acknowledged the obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront, and this was recognized by the

---

<sup>15</sup> *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

Appellant's Executive Director and Conservation Director filing the Statement of Concern with the Director and the Notice of Appeal with Board.

[33] The Appellant explained it was talking with the Director and Approval Holder prior to the Director's decision to issue the Amending Approval. It stated it acted in good faith in submitting its Statement of Concern, Notice of Appeal, and subsequent submissions requested by the Board on its directly affected status and the amendment to the Notice of Appeal.

[34] The Appellant stated the Participants attempted to resolve the matter themselves without further involvement of the Board or costs to the Participants. The Appellant submitted it made a substantial contribution to the appeal and tried to provide its concerns in a cogent and material fashion.

[35] According to the Appellant, its submission for costs directly related to the matters in the Notice of Appeal and

“...reflect the costs arising from responding to the specific requests by the EAB for submissions from the Society relative to its status as a person who is directly affected and as one who is seeking an amendment to their Notice of Appeal. At no time was the Appellant's submission specious, nor did they attempt to address issues other than those identified by the Board....”<sup>16</sup>

[36] The Appellant explained the costs claimed were related to the preparation and presentation of the issues in the appeal, and legal counsel was retained after the Notice of Appeal and initial submission were provided to the Board. According to the Appellant, in order to reduce the costs to the CCWC, its legal costs were reduced by the hourly rate charged and by its counsel making additional reductions. The Appellant submitted it “...acted prudently and reasonably in securing legal assistance and only when it felt it was necessary....”<sup>17</sup>

[37] The Appellant submitted it acted reasonably in advocating why it should have been regarded as a person directly affected by the Director's decision.

[38] The Appellant claimed legal costs of \$19,373.10, including \$17,080 for lawyer fees, \$1,036.61 for disbursements and other charges, and \$1,256.49 for GST. In addition, the Appellant claimed costs totaling \$8,716.33 for its Executive Director, Ms. Judy Huntley,

---

<sup>16</sup> Appellant's submission, dated August 24, 2006, at paragraph 25.

<sup>17</sup> Appellant's submission, dated August 24, 2006, at paragraph 26.

(\$508.10); Conservation Director, Mr. James Tweedie, (\$4,911.60); Contractor, Mr. Mike Taylor, (\$2,712.78), and for two of its members to attend the Preliminary Meeting (Mr. Andy Hurly - \$386.05 and Mr. Cliff Wallis - \$197.80). Two other attendees, Mr. Gordon Petersen and Mr. Mike Lynch, did not charge expenses. Therefore, the total costs claimed by the Appellant were \$28,089.43.

2. Approval Holder

[39] The Approval Holder argued the Appellant's request for costs should be denied.

[40] The Approval Holder acknowledged that the Appellant provided significant materials and expended substantial effort in regards to the appeal. The Approval Holder submitted the issues raised in the appeal and the Appellant's claim for standing were not directly related to the issues before the Board but were related to the Appellant's concern about the expansion of the resort facility in the Westcastle Valley. The Approval Holder argued that raising issues such as traffic volume, increase in skier visits, and the number of housing units significantly added to the complexity of the issues before the Board.

[41] The Approval Holder argued the Appellant failed to consider that the Board must consider not only the protection, enhancement, and wise use of the environment, but also the need for economic growth, the opportunities for citizens to provide advice on decisions affecting the environment, and the important role of comprehensive and responsive action in administering EPEA.

[42] The Approval Holder stated the appeal of the Amending Approval caused significant delay and costs to the approval process, and having the ability to cause such a delay must have responsibility associated with it. The Approval Holder explained this responsibility includes an obligation to comply with the legislation and to be familiar with the Board's interpretation and application of those requirements. The Approval Holder submitted the Board and the Courts have clarified through their decisions the interpretation of the directly affected test to get standing before the Board.

[43] The Approval Holder stated the Board's determination that the Appellant was not directly affected which was consistent with previous decisions. The Approval Holder argued

that "...the Appellant's claim for standing was not based upon any uncertainty relating to the interpretation and application of previous decisions, but was an attempt to have the Board waiver from its previously stated positions."<sup>18</sup>

[44] The Approval Holder submitted the Appellant's request for costs "...should be denied on the basis that it has not complied with its responsibility to recognize and comply with the provisions of the Act and to familiarize itself with previous Board and Court decisions on the issue of standing."<sup>19</sup>

3. Director

[45] The Director explained the statutory authority for the Board to award costs is clearly set out in EPEA, the Regulation, and the Board's Rules of Practice.

[46] The Director stated he should not be responsible for paying any of the costs claimed, and the Appellant did not seek costs to be paid by the Director.

[47] The Director referred to the Board's decision where the Board noted the Director took additional steps to include the Appellant in the decision making process, and the Appellant was provided the opportunity to be involved in the review of the application.

[48] The Director explained the Board and the Courts have developed principles for costs claims related to the Director, recognizing the unique role of the Director in these matters as the statutory decision maker whose decision is being appealed. The Director stated the Board and Courts have considered his statutory role to be a vital factor in not ordering the Director pay costs, as long as the Director is acting in good faith.

[49] The Director submitted that no award of costs against the Director should be made, as he acted in good faith and no special circumstances exist that should result in costs being assessed as against the Director.

---

<sup>18</sup> Approval Holder's submission, dated September 5, 2006, at paragraph 10.

<sup>19</sup> Approval Holder's submission, dated September 5, 2006, at paragraph 11.

## **B. Approval Holder Costs Application**

### 1. Approval Holder

[50] The Approval Holder applied for costs totaling \$24,386.90 which included: \$21,868.80 for legal fees; \$928 for disbursements and other charges; and \$1590.15 for GST. The Approval Holder requested all legal costs incurred be paid by the Appellant.

[51] The Approval Holder stated section 18 of the Regulation allows a party to apply for costs at an interim stage for costs related to the matters in the Notice of Appeal and which relate to the preparation and presentation of the party's submission. The Approval Holder submitted that costs incurred in preparing arguments, affidavits, and submissions associated with the issue of standing are contemplated in section 18.

[52] The Approval Holder submitted that prior to the close of the Preliminary Meeting on standing, it reserved its right to speak to costs in contemplation of section 19(1). The Approval Holder argued "...the restrictions contained in Rule 19(1) relate only to the timing of the application and do not prevent costs being awarded for steps taken by either party which were necessary for the submissions and which occurred prior to the determination of the actual parties to the appeal."<sup>20</sup>

[53] The Approval Holder stated the legal costs associated with the appeal are a significant cost associated with its recreational development. The Approval Holder explained the smaller resort it proposed could be developed with reduced cumulative environmental impacts, but it was contingent on reduced legal, consultant, and regulatory costs associated with a lower impact resort. The Approval Holder stated it "...continues to incur substantial costs associated with the Appellant's ongoing challenges to government and regulatory approvals."<sup>21</sup>

[54] The Approval Holder stated the legal costs associated with the appeal are a small portion of the overall impact of the appeal. It explained the appeal has taken 40 months from the date of the original application to the date the Board rendered its decision, and hundreds of hours have been used to address the various issues associated with the application and the appeal. The

---

<sup>20</sup> Approval Holder's submission, dated August 22, 2006.

<sup>21</sup> Approval Holder's submission, dated August 22, 2006.

Approval Holder stated the significant delays in the development adversely affect the financial viability of the resort and its ability to compete in the snow sport business.

[55] The Approval Holder stated it is a private corporation operating pursuant to the *Business Corporations Act*, R.S.A. 2000, c. B-9, and does not have access to government or other public funding.

[56] The Approval Holder stated its participation in the appeal and Preliminary Meeting was necessary given the specific issues raised. The Approval Holder argued the Appellant's submission required the Approval Holder to provide "...significant information and argument relating to the overall impact of its resort development and not simply the impact of the regulatory changes to its waste water approval." The Approval Holder stated the Director may not have known the information.

[57] The Approval Holder explained a substantial portion of the legal costs associated with the application related to: the Appellant endeavouring to link the appeal with the Judicial Review of the Director's decision not to require an environmental impact assessment; drafting of the initial response to the Notice of Appeal and Appellant's subsequent request to amend the Notice of Appeal; and the Appellant's request for extensions of time. The Approval Holder noted it tried to comply with the deadlines and procedures set by the Board, and the Approval Holder cooperated with the Appellant in an attempt to settle the dispute.

[58] The Approval Holder argued that a party who is not directly affected and who causes costs and delays should be subject to the Board's discretion to award all reasonable costs incurred. The Approval Holder stated the Appellant did not recognize the Board's guidelines as set forth in previous decisions of the Board, and that "...based upon those Board guidelines, the Appellant in this case clearly did not have standing but was endeavouring to have the Board vary its interpretation of the EPEA and broaden the interpretation of 'directly affected.'"<sup>22</sup>

## 2. Appellant

[59] The Appellant argued it should not be responsible for any of the costs claimed by the Approval Holder. It argued it would be inappropriate for the CCWC to be punished for

---

<sup>22</sup> Approval Holder's submission, dated August 22, 2006.

responding to the process determined by the Board. It stated its submissions after the Notice of Appeal was filed were in response to the Board's request for individual submissions or in response to the submissions of the other Participants. The Appellant stated it did not seek to lengthen the time of the review of the matter and worked diligently with the Director and in settlement discussions with the Approval Holder.

[60] The Appellant argued it would be inconsistent with the review process contemplated by EPEA to punish a party for making a good faith request of the Board to review a decision, and it would be inconsistent with the public interest to punish an appellant with costs where the appellant is engaged in the process, is fulfilling its mandate, and has a legal status acknowledged by others, including the Director. The Appellant submitted that the Board's determination that the CCWC was not directly affected should not be the basis for determining a costs award against the Appellant. The Appellant stated that, as the steward and primary stakeholder in the area, it reasonably concluded that it was directly affected and advanced the appeal in good faith. The Appellant explained the appeal was appropriate, and it was a relevant matter for the Board to consider in respect of preventing and mitigating environmental impacts of the development.

[61] The Appellant stated it was forthright, candid, and responsive to the requests of the Board and the other Participants, and therefore, the CCWC should not have to bear the costs of the Approval Holder. The Appellant argued its submissions were not that of a "mere busybody," but they "...were genuine, directly on point and clearly sought to establish its position for the Board to review and consider..."<sup>23</sup>

[62] The Appellant opposed the Approval Holder's application to have the CCWC bear any portion of the costs incurred by the Approval Holder. The Appellant argued that in its costs submission, and "...as confirmed by the submission of the Director, as a starting point, costs are the responsibility of the individual parties and the Respondent, in not seeking costs from the Board should bear its own costs."<sup>24</sup>

---

<sup>23</sup> Appellant's submission, dated September 7, 2006, at paragraph 20.

<sup>24</sup> Appellant's submission, dated September 7, 2006, at paragraph 22.

3. Director

[63] The Director stated he should not be responsible for paying any of the costs claimed, and the Approval Holder did not seek costs to be paid by the Director.

[64] The Director explained the Board and the Courts have developed principles for costs claims related to the Director, recognizing the unique role of the Director in these matters as the statutory decision maker whose decision is being appealed. The Director stated the Board and Courts have considered his statutory role to be a vital factor in not ordering the Director pay costs, as long as the Director is acting in good faith.

[65] The Director submitted that no award of costs against the Director should be made, as he acted in good faith and no special circumstances exist that should result in costs being assessed as against the Director.

#### **IV. Discussion**

[66] The Board is bound by the legislation under which it operates. When considering an application for costs, the Board must follow section 96 of EPEA and sections 18, 19, and 20 of the Regulation.

[67] The Board asked the Participants in this appeal to answer the question whether the Board has jurisdiction to award costs when only a Preliminary Meeting was held and the Appellant was found not to be directly affected. With respect, none of the Participants provided any in-depth arguments to support the granting of costs in these specific circumstances. The arguments relied primarily on the apparent discretion available to the Board, but did not deal with the legislative barriers in the Regulation to awarding costs in a case where no valid appeal proceeds. The Board agrees costs can be granted as interim costs or final costs when a hearing of the substantive issues is ultimately held, but in this case, a substantive hearing was not held because the Appellant was not directly affected and, therefore, the Board loses jurisdiction to proceed further with the appeal.

[68] Section 96 of EPEA 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 is broadly interpreted to

allow the Board great latitude when considering costs. However, the Regulation states specific conditions must be met before costs can be awarded.

[69] Section 18 of the Regulation again gives the Board broad jurisdiction to award interim or final costs when the costs are reasonable and are directly and primarily related to the matters contained in the Notice of Appeal and to the preparation and presentation of the party's submissions. Section 19 then goes on to explain interim costs and section 20 outlines the considerations for final costs.

[70] In the application before us, the Preliminary Meeting was the only proceeding held by the Board. It was held to determine whether the Appellant was directly affected and, by doing so, determine whether the Board had a valid appeal before it. Without a valid appeal, the Board does not have jurisdiction to hold a substantive hearing.

[71] Section 1(f) of the Regulation defines the term "party" as follows:

- “(i) the person who files a notice of appeal that results in an appeal,
- (ii) the person whose decision is the subject of the notice of appeal,
- (ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the *Water Act*, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and
- (iii) any other person the Board decides should be a party to the appeal.”

[72] Section 19 requires that all "parties to an appeal" be determined before an application for interim costs is made. This suggests that the person must be an actual party before costs can be considered. Based on the definition found in section 1(f)(ii.1) of the Regulation, the Approval Holder is a party to the proceeding and therefore satisfies the first requirement of section 19(1) that only a party can apply for costs. The Appellant was found not to be directly affected, and although it was an active participant to the proceedings, it was not a party for the purpose of section 19.

[73] In this case, the Appellant filed a Notice of Appeal but was found not to be directly affected. As soon as the Board made the determination of standing and found the Appellant not directly affected, there was no longer a valid appeal before it. Simply filing a

Notice of Appeal does not make the appeal valid, because the Board must have jurisdiction according to the requirements stipulated in the legislation. Therefore, even though the first part of section 1(f)(i) has been satisfied, the second part, "...that results in an appeal," has not been met.

[74] Section 19 requires interim costs only be applied for by a party to an appeal, and because the Appellant does not meet the definition of a party, the Board cannot accept the Appellant's costs application under section 19 of the Regulation.

[75] Section 19 of the Regulation clearly states that an application for interim costs can be done any time before the close of the hearing but after all of the parties have been determined. Interim costs are prospective in nature, as section 19(2) requires an applicant to demonstrate that costs are needed to assist in preparing and presenting the party's submission. Section 19(3)(a) refers to whether the submission *will* contribute to the meeting or hearing of the appeal. This suggests interim costs apply only to costs a party will have to pay in order to bring the best possible evidence to the Board in the substantive hearing. The costs applied for in this case are for costs incurred by the Appellant and Approval Holder in preparing arguments for the Preliminary Meeting. The costs claimed are not prospective in nature and do not apply to the preparation for a hearing on the substantive issues. Therefore, section 19, relating to the issuance of interim costs, does not apply in this case.

[76] The Board's hearing process can involve a preliminary meeting as well as a substantive hearing. At a preliminary meeting, participants provide arguments on matters such as jurisdiction and issues to be heard at a hearing, should one be held. Without jurisdiction, the Board cannot proceed to a hearing of the substantive matters, or in other words, the issues identified in the Notice of Appeal. There are occasions when a Preliminary Meeting or a substantive hearing is adjourned to allow a participant or party to collect further information that the Board needs to make the best possible decision or recommendation. By allowing a party the ability to ask for interim costs at any time up until the close of the hearing allows a party to apply for costs, if necessary, to gather the rest of the information. Ordinarily, interim costs would apply only up until the start of the substantive hearing.

[77] At the close of a substantive hearing, the Board will ask the parties if they intend to reserve their right to apply for costs. If the party asks for costs, they can apply for all reasonable costs associated with the appeal process from the time the Notice of Appeal was filed, including any preliminary meeting costs, if one was held.

[78] Section 20 refers to an application for final costs at the close of a hearing of the appeal. The “hearing” referred to in section 20 would be a hearing of the substantive matters of a valid appeal, not a preliminary meeting to determine preliminary motions. This coincides with the Board’s interpretation of section 1(f)(i), in which a Notice of Appeal becomes a valid appeal when the Board has jurisdiction. Under section 20 of the Regulation, the Board can award final costs after the close of a hearing on the substantive issues and after the Report and Recommendations is received from the Minister or the Decision is issued by the Board.

[79] No substantive hearing was held in this appeal, therefore no costs were incurred by the Appellant or the Approval Holder for the preparation and presentation of arguments regarding the matters in the Notice of Appeal. This does not suggest that the expenses incurred by the Participants to present arguments with respect to the issue of standing were not real costs to the Participants, but these costs cannot be considered final costs as contemplated in section 20. Section 20(2)(g) requires costs be associated with the matters contained in the Notice of Appeal. Preliminary matters, such as standing, are not matters contained in the Notice of Appeal. Based on this reading of this section, the Board cannot award costs when only the preliminary matters, such as standing, are determined without ever hearing arguments on the substantive issues identified in the Notice of Appeal.

[80] Section 18 also requires that any costs applied for be related to the matters contained in the Notice of Appeal. Based on the simple reading of this section, the Board cannot award costs unless the costs are associated with the substantive issues of an appeal. Therefore, the costs applications of the Appellant and the Approval Holder do not meet the prerequisites, as defined in sections 18, 19, and 20, for either interim or final costs.

[81] In the Approval Holder’s submission, reference was made to the length of time required to hear the preliminary matter. The Board notes some of the time delay resulted from the Participants pursuing matters within the court system. The Participants requested an

abeyance of the Board's process until the matter was determined by the courts, and the Board granted the abeyance. Time and costs associated with appearing before the courts cannot be considered in a costs application to this Board.

[82] In a previous decision of the Board, *Paron et al.*,<sup>25</sup> the Board awarded a group, Lake Wabamun Enhancement and Protection Association ("LWEPA") costs associated with a preliminary meeting. In that case the Board found the LWEPA legal counsel of particular assistance during the preliminary meeting. However, a hearing of the substantive matters of a valid appeal took place after the preliminary meeting at which LWEPA participated. It was not until after the hearing of the substantive matters was held that an application for final costs was made.

[83] Often the matter heard at a preliminary meeting is whether the appellant is directly affected by the Director's decision. By not granting costs associated with a preliminary meeting, appellants do not have to fear that costs will be awarded against them for filing a Notice of Appeal. Although appellants may not get costs, they will also not be subject to costs, unless the appeal is frivolous or vexatious. By the appellant absorbing its own costs associated with a preliminary meeting, the appellant is also supporting the intentions of EPEA that requires Alberta citizens to take an active role in the protection of the environment. Appellants who are found directly affected and that proceed to a hearing of the substantive matters are free to apply for costs at the end of the hearing and include costs associated with the preliminary meeting as well as the hearing of the valid appeal.

## **V. CONCLUSION**

[84] The Board realizes it asked the Participants if they wanted to reserve their right to apply for costs at the end of the Preliminary Meeting. At the time, the Board had heard the Participants but had not yet made a determination on whether the Appellant was directly affected. Because the Appellant and the Approval Holder in this appeal applied for costs, the Board requested the Participants provide their arguments as to whether or not the Board has the ability to award costs after a Preliminary Meeting. However, with respect, the Participants did

---

<sup>25</sup> Costs Decision: *Paron et al.* (8 February 2002) Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

not provide arguments which demonstrated to the Board that it has the ability to award costs when the appeal is dismissed after a Preliminary Meeting. Therefore, the Board must deny the application for costs made by the Appellant and the Approval Holder.

[85] Based on the wording of sections 18, 19, and 20 of the Environmental Appeal Board Regulation and the arguments provided by the Participants, the Board will not award costs to either the Castle-Crown Wilderness Coalition or to Castle Mountain Resorts.

Dated on February 13, 2007, at Edmonton, Alberta.

*“original signed by”*

---

Dr. Steve E. Hrudey, FRSC, PEng  
Chair

*“original signed by”*

---

Mr. Al Schulz, PEng  
Board Member

*“original signed by”*

---

Dr. Alan J. Kennedy  
Board Member