

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 4, 2012

IN THE MATTER OF sections 91, 92, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Mike Rudakewich with respect to *Water Act* Approval No. 00288056-00-00 issued to Clear Hills County by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Costs Decision: *Rudakewich v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Clear Hills County* (04 October 2012), Appeal No. 11-019-CD (A.E.A.B.).

BEFORE:

Ms. A.J. Fox, Panel Chair;
Dr. Alan J. Kennedy, Board Member; and
Mr. Jim Barlishen, Board Member.

SUBMISSIONS BY:

Appellant: Mr. Mike Rudakewich.

Approval Holder: Clear Hills County, represented by Mr. Kevin Henshaw, Genivar Inc.

Director: Mr. Gary Sasseville, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Jodie Hierlmeier, Alberta Justice.

Intervenor: Mr. Ed Mierzewski.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development issued an Approval under the *Water Act* to Clear Hills County to re-route the flow of Jack Creek by installing a culvert diagonally at a local road intersection and realigning the channel upstream and downstream of the culvert. The approved project replaces a culvert crossing and a bridge crossing of Jack Creek.

Mr. Mike Rudakewich appealed the decision to issue the Approval.

A hearing was held and the Board recommended and the Minister of Environment and Sustainable Resource Development ordered the Approval be amended. Mr. Ed Mierzewski participated at the hearing as an intervenor.

Mr. Mierzewski filed a costs application in relation to his participation at the hearing. He requested costs totalling \$916.20 for travel, per diem expenses, and accommodation.

After reviewing and assessing the submissions, the Board denied the costs application.

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I. INTRODUCTION

[1] Under the *Water Act*, R.S.A. 2000, c. W-3, an approval is required when an activity alters the flow, direction of flow, level of water, or changes the location of the water for certain purposes. Alberta Environment and Sustainable Resource Development¹ issued an Approval to Clear Hills County (the “Approval Holder”) for a channel realignment of a portion of Jack Creek. The realignment involves the replacement of a culvert and a bridge with one diagonal culvert under the road intersection and removal of Jack Creek from NE 20-84-4 W6M.

[2] The Environmental Appeals Board (the “Board”) held a hearing and, pursuant to section 99 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), the Board provided the Minister of Environment and Sustainable Resource Development (the “Minister”) with its report and recommendations. The Board recommended and the Minister of Environment and Sustainable Resource Development ordered the approval be amended to include an erosion control plan approved by the Director, additional monitoring, and an extension of the expiry date to June 30, 2017.

[3] After the Report and Recommendations and the Ministerial Order were provided to the hearing participants, the Board received a costs application from the intervenor. This is the Board’s decision on the costs application.

II. BACKGROUND

[4] On June 17, 2011, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued Approval No. 00288056-00-00 (the “Approval”) under the *Water Act* to the Approval Holder. The Approval allows the Approval Holder to re-route the flow of Jack Creek from SE 29-84-4-W6M to NW 21-84-4-W6M by installing a culvert diagonally under a local road intersection and realigning the channel upstream and downstream of the culvert so that the creek would no longer pass through NE 20-84-4 W6M.

¹ At the time the Approval was issued, the Department was named Alberta Environment. However, as of May 8, 2012, the Department was renamed Alberta Environment and Sustainable Resource Development.

[5] On August 2, 2011, the Board received a Notice of Appeal from Mr. Mike Rudakewich (the “Appellant”) appealing the Approval.

[6] On October 11, 2011, the Board wrote to the Appellant, Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal.

[7] In response to the Board’s Notice of Hearing published in the Peace Country Sun and Fairview Post, and posted in the Clear Hills County office and on the Government of Alberta and Board websites, the Board received an intervenor request from Mr. Ed Mierzewski (the “Intervenor”). On May 8, 2012, the Board notified the Parties and the Intervenor that his intervenor request was granted, because he is the owner of the parcel of land from which Jack Creek would be removed.

[8] The Board held the hearing in Peace River on May 29, 2012.

[9] The Board recommended the Approval be varied. The Minister accepted the recommendations and issued a Ministerial Order on August 7, 2012.² The Board provided a copy of the Report and Recommendations and the Ministerial Order to the Parties and Intervenor on August 9, 2012. The Board requested any party wanting to file a costs application to provide it to the Board by August 24, 2012.

[10] The Intervenor filed a costs application on August 11, 2012. Responses were received from the Approval Holder and Director on August 28 and 31, 2012, respectively.³

² See: *Rudakewich v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Clear Hills County* (27 June 2012), Appeal No. 11-019-R (A.E.A.B.).

³ The Board notes the Appellant provided comments on the costs application on September 12, 2012, which was after the deadline to receive submissions. Therefore, the Board did not consider his comments in making its decision.

III. SUBMISSIONS

A. Intervenor

[11] The Intervenor asked for costs totaling \$916.20, including \$689.00 for travel between Peace River and Edmonton, \$177.20 for per diem costs, and \$50.00 for private accommodation. He noted he did not claim costs for his preparation and attendance time.

B. Approval Holder

[12] The Approval Holder confirmed it was not seeking costs.

[13] The Approval Holder noted the Approval was upheld. The Approval Holder stated the information it presented was significant to the Board's final recommendations whereas the applicability of the Intervenor's presentation was less substantial and did not focus on the issue before the Board.

[14] The Approval Holder noted the costs claimed did not relate to the preparation for the hearing, only time spent at the hearing. The Approval Holder also noted that, at the hearing, the Intervenor did not indicate he intended to pursue his costs application.

[15] The Approval Holder requested the Board deny the costs application.

C. Director

[16] The Director noted the legislation makes the Director an automatic party to every appeal of his decisions, thereby placing him in a unique role that has been recognized by the Board and the Courts. The Director submitted no award of costs should be made against him, because there were no findings of bad faith in his actions or interpretations. The Director noted the Approval was substantially upheld, although varied by the Minister to impose further conditions on the Approval Holder. The Director stated there are no special circumstances that exist that should result in costs being assessed against him.

IV. ANALYSIS

A. Statutory Basis for Costs

[17] 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.”⁴

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.)⁵

[18] The sections of the *Environmental Appeal Board Regulation*,⁶ (the “Regulation”) concerning final 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.

...

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.

⁴ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

⁵ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

⁶ *Environmental Appeal Board Regulation*, A.R. 114/93.

(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.”

[19] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of EPEA as stated in section 2.⁷

⁷ Section 2 of EPEA 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;
- (e) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (f) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...

[20] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.⁸ The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.⁹ 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."¹⁰

[21] As stated in previous appeals, the Board evaluates each costs application against the criteria in EPEA and the Regulation and the following:

"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."¹¹

[22] 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.¹²

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- (h) the responsibility of polluters to pay for the costs of their actions;
 - (i) the important role of comprehensive and responsive action in administering this Act."

⁸ *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.).

⁹ *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.).

¹⁰ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

¹¹ *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

¹² *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub*

B. Courts vs. Administrative Tribunals

[23] In applying these costs provisions, it is important to remember there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings or proceedings. As the public interest is part of all hearings before the Board, it must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply making a determination of a dispute between parties. Therefore, the Board is not bound by the “loser-pays” principle used in civil litigation. The Board will determine whether an award of costs is appropriate considering the public interest generally and the overall purposes listed in section 2 of EPEA.

C. Application

[24] The Board has generally accepted the starting point is that costs incurred in an appeal are the responsibility of the individual parties.¹³ There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.¹⁴ This applies to appellants and intervenors.

[25] Although the Approval Holder noted the Intervenor did not reserve his right to apply for costs at the hearing, he had reserved his right to apply for costs in his written submission. Although the Board would prefer confirmation at the hearing of the participant’s intent to seek costs, having reserved his right in his written submission was sufficient for the Board to consider his application for costs.

[26] The Intervenor asked for costs totaling \$916.20. As the Board has stated in past decisions, the Board requires documentation to support costs claims. He did not provide any invoices or receipts, just a request for travel expenses, per diem costs, and private

nom. Cost Decision re: Monner) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

¹³ *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.).

¹⁴ Section 2 of EPEA states:

“(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ... (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions....”

accommodation. It is not enough to ask for costs without detailed documentation to show how and when the expenses were incurred or substantiation for the costs claimed. Although a receipt for private accommodation would not be required, costs are not to be used by a claimant to profit financially from the appeal process. There was also no explanation of what was included in the per diem claimed. However, the Intervenor indicated he based the per diem rate on the National Joint Council rates. According to the National Joint Council website, the per diem rate includes meals and an incidental allowance.¹⁵

[27] However, when reviewing the National Joint Council website for mileage rates, the rate allowed on April 1, 2012, was \$0.495 per kilometre, not \$0.53 per kilometre which the Intervenor claimed.¹⁶ The provincial government rate in May 2012 was \$0.505 per kilometre. The Intervenor gave no indication of how he determined \$0.53 per kilometre was the appropriate rate. In addition, the Intervenor claimed 1300 kilometres for a round trip between Edmonton and Peace River. When looking at the Alberta Motor Association 2012 Road Map, the distance between Edmonton and Peace River is listed as 484 kilometres, so a round trip would be approximately 968 kilometres.

[28] The Board's starting point is that parties bear the costs of bringing environmental issues to the forefront. Section 18 of the Regulation states a "party" to an appeal can apply for costs. The Board can use its discretion and award costs to intervenors depending on the level of participation they had in the hearing and the level of assistance their evidence provided to the Board. In this case it is the Intervenor who is applying for costs, not one of the Parties. The Intervenor provided a written submission and was allowed to provide a brief oral submission at the hearing. He was subject to cross-examination by the Director and Approval Holder and questioning by the Board. However, the Intervenor did not participate further in the hearing process.

[29] The Intervenor did not retain legal counsel or an expert to assist in the preparation of his submissions. Although the Board believed the Intervenor was genuinely concerned about the issues before the Board, the Intervenor's submissions were of limited assistance to the Board in making its recommendations, because his evidence was similar to the Appellant's evidence.

¹⁵ See: www.njc-cnm.gc.ca/directive/index.php?lang=eng&svid=98-7.

[30] Costs are awarded to recognize the assistance a party has provided the Board in making its recommendations. The costs claimed must also be directly and primarily related to the matters in the notice of appeal and the preparation and presentation of the party's submission.

[31] As the Intervenor's participation at the hearing did not make a substantial contribution to the Board's deliberation of its recommendations, the Board denies the costs application in its entirety.

V. DECISION

[32] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board denies the costs application filed by the Intervenor, Mr. Ed Mierzewski.

Dated on October 4, 2012, at Edmonton, Alberta.

“original signed by”

A.J. Fox
Panel Chair

“original signed by”

Alan J. Kennedy
Board Member

“original signed by”

Jim Barlishen
Board Member