

ALBERTA
ENVIRONMENTAL APPEAL BOARD
COST DECISION

Date of Decision: June 18, 1998

IN THE MATTER OF Sections 84 and 88 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and -

IN THE MATTER OF an appeal filed by Mr. Richard Stelter with respect to Approval No. 1069-01-00 issued to GMB Property Rentals Ltd. by the Director of Air and Water Approvals Division, Alberta Environmental Protection.

Cite as: Cost Decision *re: GMB Property Rentals Ltd. (Richard Stelter)*

PANEL MEMBERSHIP

Dr. Steve E. Hrudehy, Panel Chair

Dr. John P. Ogilvie

Mr. Ron V. Peiluck

APPEARANCES

Appellant: Ms. Karin Buss, counsel, Ackroyd, Piasta, Roth & Day, representing Mr. Richard Stelter

Other Parties: Ms. Maureen Harquail, counsel, Alberta Justice, representing the Director of Air and Water Approvals Division, Alberta Environmental Protection; and Mr. Larry Williams, Alberta Environmental Protection

Mr. Andrew Hudson, counsel, Emery Jamieson, representing Mr. Garry Bogart of GMB Property Rentals Ltd.

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BACKGROUND

[1] On December 4, 1997, Mr. Richard Stelter, (the Appellant) filed a Notice of Appeal with the Environmental Appeal Board (the Board) with respect to Approval No. 1069-01-00 (the Approval) issued to GMB Property Rentals Ltd. (GMB) by Mr. David Spink, (the Director) Air and Water Approvals Division, Alberta Environmental Protection on November 21, 1997. This Approval, effective until November 1, 2007, is for the operation of a Class I wastewater treatment plant (wastewater stabilization ponds) in the Edson area.

[2] The Board held a hearing on April 23, 1998, in which the Appellant at the conclusion of the hearing applied for costs and a Stay of the decision of the Director.¹

CLAIM FOR COSTS

[3] The following is a summary of the statement of costs submitted by counsel for the Appellant:

1.	Legal Costs (including G.S.T.)		
a.	Legal fees for preparing and conducting appeal	5,007.60	
b.	Other charges		213.63
c.	Disbursements	95.50	
d.	Expert Report re: surface quality water guidelines	361.12	
		TOTAL	\$5,677.85
2.	Mr. and Mrs. Stelters' pocket expenses		
a.	Travel to and from Edson (400 km x \$0.35)	140.00	
b.	Meals to attend hearing	60.00	
c.	Long distance telephone	30.00	
d.	Cost of making and copying videotape	25.00	

¹ *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection Stay decision re: GMB Property Rentals Ltd.*, EAB97-051, May 14, 1998.

e.	Cost of aerial photographs	40.00
	TOTAL	\$295.00
	GRAND TOTAL APPLICATION	\$5,972.85

SUMMARY OF ARGUMENTS REGARDING COSTS

A. The Appellant

[4] In making the application for costs, Ms. Buss argued that the Director had committed a flagrant violation of Mr. Stelter's rights in issuing the Approval. Accordingly, because the Director was at fault, costs should be assigned against the Department.

B. The Director

[5] In reply, counsel for the Director argued that the criteria for awarding costs are outlined in Section 20(2) of the *Environmental Appeal Board Regulation*² and that any costs which have been incurred are costs which should be borne by the respective parties.

[6] In an April 24, 1998 letter, counsel for the Director advised of the following:

"The Director strongly objects to Counsel for the Appellant applying for costs and seeking a stay without notice to either the parties or the Board. Without notice, counsel for the Director had no opportunity to either consider the position or to seek instructions from the Director on these two significant matters.

The Director respectfully requests the Board to adjourn any decision with respect to costs. The basis for this is:

· notice of application for costs was not provided by counsel for the appellants and the Director has not considered or provided any instructions to counsel;

² AR 114/93.

- decision as to costs should be addressed only once a decision by the Board has been made. A key consideration in submissions is the value of counsel's representations to the Board. Without knowing the Board's decision, it is premature to comment on the utility of the arguments advanced.
- counsel for the appellant can then, with notice, make a proper application for costs which the Board and the other parties may properly respond to."

[7] In an April 27, 1998 letter, Ms. Karin Buss, counsel for the Appellant responded to the Director's objection as follows:

"With respect to Ms. Harquail, I am sure she will agree, upon reflection, that there is no basis for the Director to raise these objections for several reasons, the primary one being that no objection was made on behalf of the Director at the hearing to the matters raised in her letter and, in fact, counsel for the Director made representations at the hearing both with respect to the stay application and with respect to costs. It is a well established rule of practice that one cannot later object to a procedure in which one participated without objection.

With respect to the notice issue, the parties were advised during the appellant's opening statement of the application for a stay and given the explicit provision for a stay in EPEA, it should not take anyone by surprise that such an application would be made. It is also not unexpected that a costs application was made at the end of hearing, section 20 of the *Environmental Appeal Board Regulations* specifically states that an application for final costs shall be made at the conclusion of the hearing. Again, procedures set out in the Regulations should not take anyone by surprise. We note that at no time during the hearing did counsel for the Director request from the Board additional time to seek instructions prior to making her representations."

C. The Approval Holder

[8] Mr. Hudson, counsel for the Approval Holder made no application for costs.

CONSIDERATIONS OF THE BOARD

[9] Sections 18(1) & (2) of AR 114/93, the regulations governing the Board's proceedings, authorize any party to apply for an award of either interim or final costs, if the costs are "reasonable" and "directly and primarily related" both to the "matters" addressed in the notice of objection³ and to the "preparation and presentation" of the party's submission. Section 18 states:

- 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 objection, and
 - (b) the preparation and presentation of the party's submission.

[10] Section 20 of the *Environmental Appeal Board Regulation*⁴ provides for the matters to be considered by the Board when awarding final costs. The relevant portions of Section 20 read:

- 20(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 objection and the preparation and presentation of the party's submission;
 - (h) any further criteria the Board considers appropriate.

³ Where, as here, the Board has decided to consider only a sub-set of the matters referenced in the notice of objection, the application for costs must show that the costs are "directly and primarily" related to that subset.

⁴ *Supra*, note 2.

[11] The standards recited above make it clear that the applicant bears the burden of proving that an award of costs is both "reasonable" and "necessary". In a previous Cost Decision⁵ the Board stated: "For this burden to be a meaningful one, the applicant cannot carry it simply by making a request for costs which contains conclusory statements about its 'reasonableness' and 'necessity.' Admissible evidence (e.g. documents, revealing of witnesses, sworn affidavits) must be provided to demonstrate all relevant facts, except those the applicant specifically identifies as being facts of which the Board could take 'judicial notice'."

[12] In another Cost Decision⁶ the Board stated "When considering the issue of whether or not to award final costs, it is important at the outset to clarify the distinction between the awarding of costs in civil litigation fora as opposed to quasi-judicial hearings." The Board also noted⁷ that: "Since hearings before the Board do not produce judicial winners and losers, the Board does not expect to be bound by the general principle that the 'loser pays'..."

ANALYSIS

[13] The Board did not find that the Director, or his representatives, committed a violation of Mr. Stelter's rights in issuing the Approval. Instead, the Board found the participation of the Director's representative, Mr. Larry Williams, to be totally honest and forthright. The Board did agree with the Appellant that the purposes of the Act could be served just as well by avoiding a discharge of treated sewage effluent across Mr. Stelter's land and that the public interest would be better served by avoiding the possibility of harmful effects on fish at the outlet of the unnamed creek into the McLeod River. The Board also noted that some of the alleged actions of departmental Water Resources' personnel appeared disrespectful of Mr. Stelter's property rights, but, again, the Board did not find that issuing the Approval (that was under the Board's jurisdiction) was a violation of Mr. Stelter's rights.

[14] Mr. Stelter's case was primarily based upon how his rights and interests were adversely affected by the Director's

⁵ *Cost Decision re: The City of Calgary (Fay Ash)*, EAB No. 97-032, February 5, 1998.

⁶ *Cost Decision re: Bernice Kozdrowski*, EAB No. 96-059, July 7, 1997.

⁷ *Ibid.*

decision. The Board's decision, in the public interest of seeing the purposes of the Act served, also benefits Mr. Stelter's personal interests. The Board was not presented with evidence that Mr. Stelter's participation in this Appeal to represent his personal interests constituted an unreasonable financial burden upon him.

CONCLUSION

[15] The Board's decisions on the merits do not create judicial "winners and losers" and the Board is not constrained to award costs on that basis. The Appellant acted in his best interests and achieved a ruling on the merits which served his interests while serving the public interest. The Board does not find any basis for punishing the Director, as requested by the Appellant.

[16] For the reasons stated, the Board will not award costs.

Dated on June 18, 1998, at Edmonton, Alberta.

"Original signed by"

Dr. Steve E. Hrudey, Panel Chair

"Original signed by"

Dr. John P. Ogilvie

"Original signed by"

Mr. Ron V. Peiluck