

ALBERTA ENVIRONMENTAL APPEAL BOARD

Cost Decision

Date of Mediation Meeting/Settlement Conference: February 9, 2000

Date of Report and Recommendations: February 15, 2000

Ministerial Approval: February 29, 2000

Date of Cost Decision: November 6, 2000

IN THE MATTER OF sections 84 and 88 of the *Environmental Protection and Enhancement Act* S.A. 1992, c. E-13.3;

-and-

IN THE MATTER OF an application for costs related to an appeal filed by the Lower Mosquito Creek Water Users Association with respect to Approval 1006-01-00 issued to the Town of Nanton by the Director, Prairie Region, Alberta Environment.

Cite as: Cost Decision re: *Lower Mosquito Creek Water Users Association*.

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I. PROCEDURAL BACKGROUND

[1] Following a successful mediation meeting/settlement conference on February 9, 2000, the Environmental Appeal Board (the “Board”) issued a Report and Recommendations for Appeal 99-131-R, which received Ministerial approval on February 29, 2000. On March 1, 2000, the Board wrote to the parties providing them with a copy of the Report and Recommendations and the Minister’s decision. The Board then closed its file.

II. CLAIMS FOR COSTS

[2] On May 31, 2000, the Board received a letter from Mr. Michael J. Swanson, Beaumont Church, on behalf of Lower Mosquito Creek Water Users Association (the “Appellant”), requesting costs under section 88 of the *Environmental Protection and Enhancement Act, S.A. 1992, c.E-13.3* (the “Act”).

[3] Attached to Mr. Swanson’s letter dated May 31, 2000 was a statement in the amount of \$2,851.51. The statement detailed fees for services rendered, to Lower Mosquito Creek Water Users Association in the amount of \$2,500.00 with GST in the amount of \$175.00. The statement also detailed disbursements such as photocopies \$88.80, long distance calls \$54.77, postage \$8.40, courier fees, \$11.12, parking fees \$1.87 and GST \$11.55.

[4] Also attached to Mr. Swanson’s letter of May 31, 2000 was an interim statement dated August 27, 1999, in the amount of \$2,599.54 for services rendered with respect to the appeal of Lower Mosquito Creek Water Users Association; a submission from the Lower Mosquito Creek Water Users Association, detailing costs for the Association and time spent by the Directors, this being \$430.75 man hours @ \$20.00 per hour, for a total cost of \$8,615.00; a “conservative cost

estimate” of time, phone, mailing, copying and faxes spent by Mr. Gerald Lyon, of Lower Mosquito

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Creek Water Users Association, on research for mediation and hearing with respect to this appeal, a time estimate of 250 hours (no rate indicated), telephone and faxing charges of \$280.00 and copying charges and courier mailing expenses of \$264.00; and an additional cost submission which had been omitted on Mr. Lyons original submission for 6 hours at a cost of \$120.00, vehicle travel time for Mr. Lyons and associates of 600 kms at \$.25/km at a cost of \$150.00, hall rental for 12 meetings at a cost of \$180.00, and fax and phone calls at a cost of \$200.00.

[5] The Board acknowledged receipt of the request for costs by letter dated June 8, 2000. The Board then wrote to the parties on August 8, 2000, stating:

“Further to correspondence dated June 8, 2000, the Board acknowledges Mr. Michael Swanson’s cost application. In the letter, section 88 of the *Environmental Enhancement and Protection Act* is referenced which permits the Board to determine costs in any proceeding before it and to prescribe which parties are entitled to receive or pay costs.

In considering applications for final costs, the Board requires a motion that clearly outlines the actual costs incurred in the preparation of party’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 party 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.

Other considerations the Board may take into account when contemplating a cost application may include, but are not limited to:

- Did the party(ies) make a substantial contribution to the proceedings 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 a proceeding?
- Are the costs requested reasonable and reflect only the actual

expenditures incurred in the preparation of the submission?

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- Did the party indicate an intention to pursue a cost application prior to the conclusion of a proceeding (as required in s. 20 of the Environmental Appeal Board Regulation 114/93)?
- Did the parties act in good faith in all phases of the proceeding

By seeking the positions of all parties on the matter of costs, the Board is not opening the proceedings for any other purpose. It is not ruling at this time whether the request for costs is **timely or appropriate**. The Board will await the submissions from all parties on the above issues before making any such ruling.

The Board wishes to hear from the parties as to whether there are further applications for costs associated with the above noted proceeding...”

[6] On August 31, 2000, Mr. Swanson replied to the Board’s letter of August 8, 2000. Mr. Swanson’s letter stated:

“The Association and its members have funded the cost of these proceedings from their own resources. No attempt has been made to seek other sources of funding nor are they aware of other sources. The Association is strongly of the view that it has made a valuable contribution to the benefit of the local community and beyond through its participation in these proceedings.”

Mr. Swanson went on to respond to further questions raised in the Board’s letter of August 8, 2000. Mr. Swanson submitted that:

“The Association commenced the appeal and made and made a substantial contribution to the proceedings and to their ultimate resolution...The proceedings were not unduly delayed or prolonged. Any delay was typically consented to and in most cases resulted from consulting third party experts. None of the parties have indicated that prejudice resulted from any delay...The costs have been itemized by the Association and submitted as part of the application. These costs are reasonable and reflect actual expenditures for time and effort on the part of the Association and some of its members...Interim and final costs were requested in the Notice of Appeal...All parties to the proceedings acted in the good faith throughout...”

Mr. Swanson conveyed the Association's view that its application was both timely and appropriate in all of the circumstances.

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[7] On September 22, 2000, the Board received a response submission from the Director advising that he had no position on the application for costs, as the Association was not applying for costs to be paid by Alberta Environment.

[8] On September 22, 2000, the Board also received a response submission from counsel for the Town of Nanton, requesting that the Association's claim for costs be denied. Counsel for the Town claimed that any costs should not be awarded against the Town as the dispute was focussed on the adequacy of Alberta Environment's wastewater regulations. Counsel for the Town submitted that the Town acted in the furtherance of the public interest and that each party should bear their own respective costs, and that the Association had not discharged its burden of demonstrating that it required financial resources to make an adequate submission.

[9] Mr. Swanson did not submit a response to submissions from the Town of Nanton and the Director.

III. ANALYSIS

[10] The Board's power to order costs comes from section 88 of the Act. This section provides:

"The Board may award costs of and incidental to any proceeding before it on a final or interim basis and may, in accordance with the regulations, direct by whom any costs are to be paid."

[11] The Environmental Appeal Board Regulation, A.R. 114/93 (the "Regulation") 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.

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(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 within the notice of appeal, and
- (b) the preparation and presentation of the party's submission”

[12] Section 20(1) of the Environmental Appeal Board Regulation, A.R. 114/93 (the “Regulation”) provides that a costs application must be made at the conclusion of a hearing.

[13] Pursuant to this jurisdiction, the Board dismisses the request for costs for reasons that follow. First the Board is concerned with the concept of awarding costs after the conclusion of a mediation. Lower Mosquito Creek Water Users Association were notified and participated in the Board's mediation meeting/settlement conference. That mediation meeting/settlement conference resulted in a satisfactory resolution to the Notice of Appeal. Again, significantly, the filing of the costs claim occurred two months after the Board had closed this file.

[14] Second, and even assuming that (1) the filing of cost application was timely, and (2) the Appellant lacked the financial resources to make their submission, the Board is not convinced that on the facts of this case for the purpose of awarding costs, the farmers and ranchers of Nanton represent the public's interest in this appeal in a way that is different from the citizens of Nanton, or the taxpayers of Alberta, both of whom pay directly or indirectly for the municipal treatment systems. Both the Appellants and the Town include citizens representing (or arguing against) other citizens; both groups are extremely important in the overall decision making process relative to the Town of Nanton, its water, and surrounding environment. The Board is convinced that both rural and “urban” interests acted in good faith, making a significant contribution to the mediation proceedings and to its ultimate resolution. The mediated settlement contributed to a better environment, to the credit of all parties, and even if the Board's file was not closed it would be inappropriate to shift costs from the Appellant to the public purse whether that be municipal or

provincial.

VI. CONCLUSION

[15] Further to the foregoing reasons, and pursuant to section 88 of the Act, the Lower Mosquito Creek Water Users Association's request for costs is dismissed.

Dated on November 6, 2000, at Edmonton, Alberta.

Dr. William A. Tilleman