ALBERTA
ENVIRONMENTAL APPEAL BOARD

Cost Decision

Date of Cost Decision: January 22, 2001

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 Legal Oil and Gas and Charles W. Forster with respect to the issuance of Environmental Protection Order 98-02 on February 17, 1998 by the Director, Land Reclamation Division, Alberta Environment.

Cite as: Cost Decision re: *Union Pacific Resources Inc.*

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I. BACKGROUND

[1] This decision concerns an application for costs submitted on behalf of Union Pacific Resources Inc. ("Union Pacific"). Union Pacific seeks costs against two parties: Legal Oil and Gas Ltd. ("Legal") and Mr. Charles W. Forster ("Forster"). Legal and Forster were appellants before the Environmental Appeal Board (the "Board') in EAB Appeal Number 98-007. That appeal challenged an Environmental Protection Order 98-02 issued by Mr. Larry Brocke, the Director, Land Reclamation Division, Alberta Environmental Protection (the "Director"). Some background information about this appeal is necessary to put this application in context.

[2] In summary, it is sufficient to say that an issue on the appeal was whether Legal and Forster were responsible for contamination on a well site they had taken over from another entity. At one point, Legal and Forster raised the suggestion that Union Pacific's predecessors may have been responsible for this contamination as a result of activities related to a neighbouring well. The Board arranged mediation proceedings. This mediation eventually resulted in a settlement between Legal and Forster on the one hand and the Director on the other. As a result of the settlement, Legal and Forster withdrew their appeal and the Board discontinued its proceedings on April 14, 2000.

[3] On April 26, 2000, Union Pacific wrote the following letter to the Board in response to the Board's notice of discontinuance.

> "Further to your letter dated April 14, 2000, please be advised that Union Pacific Resources Inc. ("UPRI") intends to make an application for costs pursuant to section 88 of the Environmental Protection and Enhancement Act. As will be outlined in more detail in UPRI's formal cost application, UPRI will be requesting that the Board direct the Appellants to reimburse UPRI for costs incurred in this matter. I will be meeting with my client this week, and I anticipate that UPRI's submissions will be provided to the Board by the end of this week or early next week."

[4] Union Pacific's next correspondence was a detailed claim for costs dated June 20, 2000. It sought an Order that Forster and Legal pay Union Pacific's total costs for its solicitors

in the amount of $13,307.32 and its expert consultants in the amount of $2,268.43. The solicitor's fee amount was subsequently corrected to read $13,999.51. These claims were supported by itemized invoices.

[5] Union Pacific advances no claim for costs against the Director. The Director, in turn, takes no position on the application for costs. The Director's only submission is that, as of 29 June 2000, he had not yet concluded who, in his opinion, was responsible for addressing the contamination on the north side of the well known as LSD 6/21.

[6] On August 21, 2000 Legal and Forster replied to the request for costs. It opposed the request on the merits. It also raised the objection that, since the Board's proceedings had been discontinued by the time of Union Pacific's application, the Board lacked jurisdiction to grant the request in any event. Its submission on this point provides:

> "Reference is made to the Discontinuance dated April 14, 2000. There are no longer any "proceedings" before the Board and therefore sec. 88 of the Environmental Protection and Enhancement Act ("the Act") cannot be engaged. Further, under sec. 20 of the Environmental Appeal Board Regulation (the "Regulation") an application for an award of costs is to be made at the conclusion of a hearing of the appeal at a time determined by the Board. No hearing was held because the Director and Legal and Forster were able to resolve the issues on appeal prior to a hearing, a result which had been encouraged throughout by the Board. Accordingly, no application for costs could be made under the Regulation. The Regulation appears to contemplate the awarding of costs related only to a hearing."

[7] The legislation relevant to a request for costs is section 88 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act") which reads as follows:

> "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."

[8] The Environmental Appeal Board Regulation, A.R. 114/93, (the "Regulation") provisions concerning costs (except interim costs, which are not involved here) 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 objection, 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.

(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) 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."

[9] On September 1, 2000 Union Pacific, by that point called Anadarko Canada Corporation ("Anadarko"), replied to Legal and Forster's submission. Its reply in respect to the jurisdictional issue read as follows:

"1. The Board has jurisdiction to award costs. Anadarko reserved its right to make an application for costs in its original submission. The Act is very clear that

> the Board has jurisdiction to award costs on a final basis concerning a proceeding before it and does not specify when the Board must make such a determination. Further, the Act does not make costs awards contingent on there being a hearing. The legislation refers to "proceedings" not to "hearings." As stated in Anadarko's cost claim application, Anadarko actively participated in several mediations and made substantial contributions to the appeal. Anadarko was clearly a party to a proceeding before the Board and therefore has a right to claim costs."

[10] In their objection to the application, Legal and Forster raised a series of objections to the request for costs and to the quantum sought. Further, it asked for a hearing to deal with those objections should the Board decide it has jurisdiction. This decision deals solely with the jurisdictional issue.

II. ANALYSIS

[11] The Board's decision to discontinue its proceedings in this case on April 14, 2000 was a direct consequence of the decision by Legal and Forster to withdraw their appeal. The Board is not given discretion in the matter. Section 87(7) of the Act provides:

> "The Board shall discontinue its proceedings in respect of a notice of appeal if the notice of appeal is withdrawn."

Once an appellant has withdrawn their appeal, an intervenor to continue the proceedings themselves.[1]

[12] Section 18 of the Regulation describes what an award of costs can cover. That is

> "… 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." (emphasis added)

[13] The Regulation provides for applications for both interim and final costs. It provides, in each case, the points in the process when the applications can be made. In the case of interim costs this is defined by section 19(1):

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[1] *Chalifoux* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection re: Chem-Security*

> "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 has determined all parties to the appeal."

In the case of an application for an award of final costs, section 20(1) of the Regulation provides that "… it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board."

[14] These two sections read together show the Lieutenant Governor-in-Council has considered it necessary to place some restraints upon when each of these applications can be entertained. This casts a certain light on the wording of section 88 of the Act and section 18 of the Regulation. At the outset, costs cannot be ordered until after the parties are all determined. Where the award is for final costs the application shall be made at the conclusion of the hearing.

[15] This objection requires us to decide, in part, what the Lieutenant Governor-in-Council's intention was in adopting this temporal limitation on applications for costs. Do the words "shall be made at the conclusion of the hearing of the appeal"[2] mean "not until the hearing is over" or "not later than the conclusion of the hearing" or perhaps both. We find that the words "shall be made at the conclusion of the hearing" must at least be read in contrast to the rule of interim costs which, in part, may be made "at any time prior to the close of a hearing of the appeal."[3] Thus, cost awards are interim (and thus subject to redetermination under section 19(5) of the Regulation[4]), up until the end of the hearing. At that point, any award is final, but also subject to the different considerations set out in section 20(2) of the Regulation.

[16] It is of some significance that the considerations in 20(2) are retrospective in operation, whereas those in 19(3) are prospective.[5]

(Alberta) Ltd., EAB Appeal No. 95-25.

[2] Section 20(1) of the Regulation.

[3] Section 19(1) of the Regulation.

[4] Section 19(5) of the Regulation provides:

> "An award of interim costs is subject to redetermination in an award of final costs under section 20."

[5] Section 19(3) of the Regulation provides:

[17] Do the words in section 20(1) "shall be made at the conclusion of the hearing" also set a limit that excludes applications made beyond the conclusion of the hearing? The Board finds that while it does not do so directly, it does support the proposition that requests for costs must be made and determined while the Board's proceedings are extant. The Board's authority to award costs relates to proceedings that are before the Board. Section 88 provides the power to award costs for any "proceedings before it."

[18] Proceedings are before the Board from the time the appeal is filed right up until the final disposition of the matter and the exhaustion of the Board's jurisdiction. This will customarily occur either upon the Board's issuance of a discontinuance of appeal under section 87(7); a dismissal of appeal under section 87(5); the making of a decision under section 90; or the publication of notice of a Ministerial decision under section 92.[6] Once these steps are

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"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 interim costs;
(c) whether the party has demonstrated a need for 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 other criteria the Board considers appropriate."

[6] Section 87(5) of the Regulation provides:
"The Board
(a) may dismiss a notice of appeal if
(i) it consider the notice of appeal to be frivolous or vexatious or without merit,
(i.1) in the case of a notice of appeal submitted under section 84(1)(a)(iv) or (v), (g)(ii) or (j) the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
(i.2) for any other reason the Board considers that the notice of appeal is not properly before it,
(ii) the person who submitted the notice of appeal fails to comply with a written notice under section 85, or
(iii) the person who submitted the notice of appeal fails to provide security in accordance with an order under section 89(3)(b),
(b) shall dismiss a notice of appeal if in the Board's opinion
(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hears or reviews under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with, or

formerly taken, subject to the Board's authority to reconsider a matter under section 92.1, the Board's jurisdiction is exhausted and the principle of *functus officio* applies.[7]

[19] Obviously costs awards may depend in part upon the result not revealed until Board reasons or Ministerial decisions are issued. Section 20(1) provides the time for indicating an intention to seek costs and gives the Board the specific authority to determine the time for dealing with the question. This is an indication that the right to seek costs is not open-ended, in other words, to be invoked at any time the party seeking costs chooses.

[20] In this case, Union Pacific made a written submission to the Board on April 13, 2000. That submission closed with the following paragraph:

> "VI Costs
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> 29 UPRI makes no submission concerning costs, but reserves the right to make such submissions upon a decision being issued by the Board."

At this point, it was clear from the correspondence circulated to the hearing participants that settlement efforts were still underway presumably with a view to avoiding the necessity of the pending hearing.

(ii) the Government has participate in a public review under the Canadian *Environmental Assessment Act* (Canada) in respect of all of the matters included in the notice of appeal."

Section 90(1) of the Regulation provides:

"In the case of a notice of appeal submitted under section 84(1)(k) or (l) of this Act or a notice of appeal submitted under section 115(1)(j), (l) or (q) of the *Water Act*, the Board shall, within 30 days after the completion of the hearing of the appeal, make a written decision on the matter."

Section 92(1) of the Regulation provides:

"On receiving the report of the Board the Minister may, by order,

(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,

(b) make any direction that the Minister considers appropriate as to the forfeiture or return of any security provided under section 89(3)(b), and

(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision."

[7] Section 92.1 of the Regulation provides:

"Subject to the principles of natural justice, the Board may reconsider, vary or revoke any

[21] The proceedings held up to that point are outlined in the Board's Discontinuance of Proceedings dated April 14, 2000 and do not need to be repeated here. It was anticipated at the time of Union Pacific's April 13 letter that a hearing would be held on April 17 and 18, 2000 and that a decision would be rendered thereafter based on submissions at that hearing. That hearing was rendered unnecessary and in fact beyond the Board's jurisdiction to hold due to section 87(7) once Legal and Forster discontinued their appeal due to their settlement with the Director on August 14.

[22] The next the Board heard from Union Pacific on the costs issued was its letter of April 26, 2000 set out in paragraph 3 above. At this point, the Board's proceedings were formally concluded. However, given the very short period from the letter of abandonment and the formal Discontinuance of Proceedings the Board might well have considered exercising its powers under section 92.1 to reopen the matter to assess a costs request. However, nothing further prompted the Board to act until almost two months later when Union Pacific finally made its formal request.

[23] The Board's finding is that this formal request, coming after the Board's proceedings were formally discontinued, was *prima facie* outside the Board's jurisdiction under section 88 to award costs in respect to any proceeding "before it." Despite Union Pacific's intimations on April 14th and again on April 28th that it could be expected to ask for costs, no formal request was made until over two months after the hearings were discontinued. In these circumstances the Board is not persuaded to exercise its powers under section 92.1. It therefore finds the application is untimely and must be rejected.

[24] While it was unnecessary to decide any further issues, given this conclusion the Board notes two matters with respect to the application itself. First, the claim submitted is based in large part on a solicitor-client account for services. No specific justification is given for that request. The Board has set out its approach to costs in regard to solicitor fees in two recent

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decision, order, direction, report, recommendation or ruling made by it."

decisions.[8]

[25] Second, the Board wishes to express concern that, where a substantial claim for costs is in the contemplation of a participant and mediation or settlement efforts are going on, it is appropriate that such claims be disclosed and put immediately onto the table as part of the mediation process. It is the objective of such efforts to settle all the issues in dispute. If substantial costs claims can surface after the mediation or settlement process, particularly from third parties, it will make parties more reluctant to achieve settlements this way and thus increase the overall costs of proceedings before the Board. As the Board has indicated in several prior decisions, costs before the Board do not follow the Court's approach of a prima facie entitlement to costs upon winning an application. Rather the Board exercises its costs jurisdiction considering the Act's overall objectives.

III. CONCLUSION

[26] For the foregoing reasons, and pursuant to section 88 of the Act, Union Pacific's request for costs is dismissed.

Dated on January 22, 2001 at Edmonton, Alberta.

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Dr. William A. Tilleman

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[8] *Mizera et al*. v. *Director, Northeast Boreal and Parklands Region*, EAB Appeal No. 98-231, 98-232, and 98-233C.

Cabre Exploration Ltd. v. *Conservation and Reclamation Officer, Alberta Environmental Protection*, EAB Appeal No. 98-251C.