

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – December 21, 2004

**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** appeals filed by Ben Gadd with respect to *Water Act* Approval No. 00188589-00-00 and Amending Approval Nos. 11767-01-02 and 46972-00-01 issued under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Interim Costs Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (21 December 2004), Appeal Nos. 03-150, 03-151, and 03-152-ID3 (A.E.A.B.).



**BEFORE:**

Dr. Frederick Fisher, Q.C., Panel Chair,  
Mr. Ron V. Peiluck, Board Member, and  
Mr. Al Schulz, Board Member.

**SUBMISSIONS:**

**Appellant:** Mr. Ben Gadd, represented by Ms. Jennifer Klimek.

**Director:** Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Darrin Stepaniuk, Alberta Justice.

**Approval Holder:** Cardinal River Coals Ltd., represented by Mr. Dennis R. Thomas, Q.C. and Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

**Intervenors:** Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins, represented by Ms. Karin Buss, Ackroyd, Piasta, Roth & Day LLP.

## EXECUTIVE SUMMARY

Alberta Environment issued *Water Act* Approval No. 00188589-00-00 to Cardinal River Coals Ltd. for the construction, operation, and reclamation of a private haulroad located near Cadomin, Alberta. Alberta Environment issued Amending Approval Nos. 11767-01-02 and 46972-00-01 under the *Environmental Protection and Enhancement Act* for the opening up, construction, operation, and reclamation of the Cheviot Haul Road located near Cadomin, Alberta.

The Board received Notices of Appeal from Mr. Ben Gadd appealing the Approval and the Amending Approvals.

The Board determined Mr. Gadd was potentially affected by the construction of the haulroad and, therefore, was granted standing to present his appeal.

In response to the Board's notice of the hearing scheduled for September 27 and 28, 2004, the Board received a number of intervenor requests.

The Board granted full party status to Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins, who are all residents of Cadomin, Alberta. These Intervenors requested interim costs in order to retain an expert for the hearing.

The Board reviewed the submissions from the parties and denied the request for interim costs.

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## **I. BACKGROUND**

[1] On December 9, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00188589-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Cardinal River Coals Ltd. (the “Approval Holder”) for the construction, operation, and reclamation of a private haulroad located near Cadomin, Alberta.

[2] On December 19, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Ben Gadd (the “Appellant”) appealing the Approval.

[3] On December 29, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the “Parties”) 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 Parties to provide available dates for a mediation meeting or hearing.

[4] On December 5, 2003, the Director issued Amending Approvals No. 11767-01-02 and 46972-00-01 (the “Amending Approvals”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to the Approval Holder for the opening up, construction, operation, and reclamation of the Cheviot haul road located near Cadomin, Alberta. The Amending Approvals<sup>1</sup> allow for the construction of a haulroad between the Luscar Coal Mine and the Cheviot Coal Project mine site.

[5] On January 5, 2004, the Board received Notices of Appeal from the Appellant appealing the Amending Approvals.

[8] On January 5, 2004, the Board received a letter from the Director suggesting the appeals of the Approval and the Amending Approvals be combined and the Records for the appeals be sent at the same time.

[9] On January 6, 2004, the Board received a letter from the Approval Holder asking that the appeals be dealt with by the Board simultaneously and that the Director only produce

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<sup>1</sup> As the Approval and Amending Approvals were issued with respect to the same haulroad, the Board will

one set of documents relating to both the Approval and the Amending Approvals. It also requested that instead of scheduling a hearing or mediation meeting, a preliminary meeting should be scheduled first so that the following issues may be addressed:

- “(a) whether Mr. Gadd is ‘directly affected’ by the Approvals under appeal;
- (b) whether Mr. Gadd had the opportunity to participate in a hearing or review administered by the Energy Resources Conservation Board at which all of the pertinent matters were adequately dealt with;
- (c) whether the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* at which all of the pertinent matters were adequately dealt with; and
- (d) which matters raised by Mr. Gadd in the Notices of Appeal ought to be addressed during the EAB’s hearing of the appeal, if an appeal proceeds.”

[6] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. On January 13, 2004, the NRCB responded in the negative. On January 20, 2004, the Board received a letter from the AEUB advising that:

“...the Cardinal River Coals Ltd. (CRC) applied to the Alberta Energy and Utilities Board (Board/EUB) in August 2002, under the *Coal Conservation Act* for approval to develop a private haul road from the Cheviot Mine Site to the Coal Processing Plant located at the Luscar Mine Site. CRC applied to amend Permit 2000-37 to extend the Cheviot mine permit area so as to include the private haul road. Permit No. C2000-37 was issued to CRC with respect to the Cheviot mine following two joint EUB/Canadian Environmental Assessment Agency (CEAA) hearings in 1997 and 2000. The CRC also applied for an amendment of Permit No. C2000-2 with respect to those portions of the private haul road that would be located within the Luscar Mine site. Permit No. C2000-2 was issued to CRC for the operating of the Luscar Mine.

A number of objections were received to CRC’s application to develop a haulroad, including an objection from Mr. Ben Gadd. Following a review of submissions, the Board dismissed all the objections on the basis that the objectors did not have standing, pursuant to s. 26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the Board issued Permit No. C2003-4 on April 9, 2003. Permit No.C2003-4 rescinded Permit No. C2000-37 in order for the inclusion of a private haul road to the existing coal processing plant located at the Luscar Mine Site.”

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refer to the Approval and Amending Approvals collectively as the “Approvals.”

The AEUB provided a copy of permit No. C2003-4 and AEUB Decisions 97-088 and 2002-59, which were the two decisions of the joint review panel with regard to the Cheviot Coal Project.

[7] On January 22, 2004, the Board informed the Parties that it had decided to schedule a Preliminary Meeting to deal with the preliminary motions raised in the Approval Holder's January 6, 2004 letter.

[8] On February 20, 2004, the Board received a copy of the Record from the Director, and on February 26, 2004, copies were forwarded to the Appellant and the Approval Holder.

[9] On April 22, 2004, the Appellant notified the Board and the other Parties that he intended to appear before the Board to provide evidence at the Preliminary Meeting. The Board allowed his request. However, on April 23, 2004, the Approval Holder stated his objection to allowing the Appellant to give oral evidence. The Board notified the Parties that any objections or concerns could be raised at the beginning of the Preliminary Meeting.

[10] The Preliminary Meeting was held on April 26, 2004.

[11] The Board notified the Parties on May 26, 2004, that it had decided to grant the Appellant standing in these appeals.

[12] On June 14, 2004, the Board received submissions from the Parties regarding the issues that should be heard at the Hearing.

[13] On July 26, 2004, the Board notified the Parties of the issues that would be heard at the Hearing.<sup>2</sup>

[14] On August 9, 2004, the Board sent the Parties the schedule for providing submissions in preparation of the Hearing set for September 27 and 28, 2004.

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<sup>2</sup> The Board determined the issues that will be considered at the Hearing are:

1. What effect will the new design of the haul road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the haul road have on public access to the wilderness areas and tourist sites on either side of the haul road?
3. What effect will the new design of the haul road have on the local watershed?
4. What effect will the new design of the haul road have on the noise and dust coming from the haul road?
5. What is the legal status of the approval given that "pre-development activities" under the previous approval were to be commenced by December 31, 2001 unless amended?



[15] In response to the Board's notice of the Hearing, the Board received a number of intervenor requests.

[16] On September 1, 2004, the Board offered the Parties an opportunity to comment on the intervenor requests. The Board received the Parties' comments on September 7, 2004.

[17] On September 1, 2004, the Board received a request from the Approval Holder to stay the Board's process until such time as the application commenced in the Federal Court of Canada is adjudicated upon. According to the Approval Holder, the Board could lose jurisdiction if the Federal Court determines an environmental assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, is required. Also, the Approval Holder stated it may be prejudiced if the Board's proceedings are not stayed as information obtained in the Hearing may be detrimental to the Approval Holder's position in respect to the Federal Court application. The Board received comments regarding the stay request from the Appellant and the Director on September 3, 2004. On September 9, 2004, the Board notified the Parties it was denying the Approval Holder's request for a stay of the proceedings.

[18] On September 9, 2004, the Board notified the Parties that Mr. Allan Dane, Ms. Barb Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins (collectively, the "Cadomin Residents") would be granted full party status. Trout Unlimited, Yellowhead County, Alberta Fish and Game Association, United Mine Workers of America, the Town of Hinton, West Yellowhead Community Futures Development Corporation, and the Alberta Council for Sustainable Communities and the Environment would have limited intervenor status. The intervenor request of Mr. Tom Stang was denied.

[19] In their August 20, 2004 intervenor request, the Cadomin Residents also requested interim costs. The Board received comments from the other Parties regarding the interim costs request.

[20] On September 9, 2004, the Board notified the Parties and the Cadomin Residents that the request for interim costs was denied.

[21] The following are the Board's reasons.

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## **II. SUBMISSIONS**

### **A. Intervenors**

[22] The Cadomin Residents requested interim costs for the amount of \$2500.00. They stated they wished to retain the services of an expert to present evidence on the likely noise impacts of the haul road.

[23] The Cadomin Residents provided a curriculum vitae of the expert they intended to retain, Dr. Gary Faulkner from the University of Alberta, and stated it would cost approximately \$2500.00 for his time and expertise. They stated that without these costs being covered, they would be unable to retain the expert.

[24] The Cadomin Residents explained most them are retired and living on fixed incomes and modest means. They stated they would not be retaining counsel to represent them at the hearing.

[25] They stated they wished to provide the Board with useful, focussed evidence and to do so, they require the assistance of an expert.<sup>3</sup>

### **B. Appellant**

[26] The Appellant made no submissions regarding the request for interim costs by the Cadomin Residents.

### **C. Approval Holder**

[27] The Approval Holder opposed the request for interim costs. It argued the Cadomin Residents requested the same rights as the Appellant, "...but have not complied with s. 91 of EPEA and specifically with the procedural requirements and time provisions contained therein."<sup>4</sup> It argued this alone was a basis for denying interim costs.

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<sup>3</sup> See: Cadomin Residents' submission, dated August 20, 2004.

<sup>4</sup> Approval Holder's submission, dated September 7, 2004.

[28] The Approval Holder stated the Cadomin Residents did not provide any evidence as to whether other funding sources were sought, and they did not explain why the Appellant would not adequately address their interests.

**D. Director**

[29] The Director stated he did "...not believe that costs should either be awarded to or against the Provincial government as a result of its participation in proceedings before the Environmental Appeals Board."

**III. ANALYSIS**

**A. Legislation**

[30] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA 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."

[31] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre Exploration Ltd.*:<sup>5</sup>

"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>6</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

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<sup>5</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

<sup>6</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 (Alta. Q.B.) at paragraph 23.

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>7</sup>

Although Mr. Justice Fraser’s comments were in relation to final costs, the principles are equally relevant to interim costs applications.

[32] Sections 18 and 19 of the *Environmental Appeal Board Regulation*, A.R. 114/93, (the “Regulations”) specify the requirements of applying for interim costs. These sections state:

“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 preparations 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;
  - (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

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<sup>7</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 (Alta. Q.B.) at paragraph 31.

- (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.”

[33] 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 matters contained in the notice of appeal in the preparation and presentation of the party’s submission.

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 at a hearing or mediation meeting.”

[34] The Board has generally accepted that the starting point is that costs incurred with respect to the appeal are the responsibility of the individual parties.<sup>8</sup> We believe there is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.

## **B. Discussion**

[35] Section 18 of the Regulations clearly states that only a “party” to an appeal can request interim costs. The Board granted the Cadomin Residents full party status, and they are, therefore, entitled to submit a request for interim costs.

[36] The Board appreciates the Cadomin Residents may be on a limited income, and they are attempting to minimize expenses by choosing not to be represented by a lawyer at the Hearing. However, no information was provided to indicate whether these individuals are

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

actually economically disadvantaged or how many are on a limited income. The Board needs further information on the individual members to assess whether their request is reasonable under the existing circumstances. Without this type of additional information, the Board cannot justify the granting of interim costs.

[37] The Cadomin Residents have approached the appeal process in a very logical and responsible manner, as they have combined their efforts to bring their issues to the Board. This will reduce the possibility of any redundancy and will help in ensuring the appeal process is efficient.

[38] The expenses claimed by the Cadomin Residents, \$2500.00, is not unreasonable. If the expenses are to be divided evenly between the seven Cadomin Residents, the cost for each of these Intervenors to bring their issues to the Board is approximately \$350.00. As stated previously, the Board is of the view that parties that appear before it are responsible for the costs associated with bringing their issues to the forefront.

[39] Section of EPEA Section 2(f) of EPEA provides:

“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....”

Similar provisions are included in section 2(d) of the *Water Act*:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing: ...

the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making....”

[40] Both of these Acts recognize the importance of all Alberta citizens to share the responsibility of environmental protection. The cost for each of the Cadomin Residents to present their evidence is part of the responsibility referred to in section 2 of EPEA and the *Water Act*. When compared to the importance of having the Board hear their evidence on the matter of noise impacts, \$350.00 for each of the Cadomin Residents is minimal.

[41] Therefore, the Board denies the request for interim funding. The Cadomin Residents are free to submit a final costs submission at the close of the Hearing and request the Board consider the costs incurred, legal and otherwise. The Board will reassess their request on the basis of the criteria listed in sections 18 and 20 of the Regulation.

#### **IV. CONCLUSION**

[42] Based on the above and sections 18 and 19 of the *Environmental Appeal Board Regulation*, the Board denies the Cadomin Residents' request for interim funding.

Dated on December 21, 2004, at Edmonton, Alberta.

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Dr. Frederick Fisher, Q.C.  
Chair

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Mr. Ron V. Peiluck  
Board Member

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Mr. Al Schulz  
Board Member