
ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 28, 2018

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 Robert and Linda Morgan, Lawrence Rogoza, Patrick Timms, Audrey Laschuk, Bill Bogdan, Jason Senetza, and Randy and Diana Sawchuk with respect to the decision of the Director, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Approval No. 00378428-00-00 and *Water Act* Licence No. 00360885-00-00 to William and Audrey Trenchuk.

Cite as: Costs Decision: *Morgan et al. v. Director, Lower Athabasca Region, Alberta Environment and Parks, re: Trenchuk* (August 28, 2018), Appeal Nos. 16-010-023-CD (A.E.A.B.).

BEFORE:

Mr. Eric McAvity, Q.C., Panel Chair;
Dr. Nick Tywoniuk, Board Member; and
Dr. Brenda Ballachey, Board Member.

PARTIES:

Appellants:

Mr. Robert and Ms. Linda Morgan; Mr. Lawrence Rogoza; Mr. Patrick Timms; Ms. Audrey Laschuk; Mr. Bill Bogdan; Mr. Jason Senetza; and Mr. Randy and Ms. Diana Sawchuk.

Approval Holders:

Mr. William and Ms. Audrey Trenchuk, represented by Mr. Ron Kruhlak, Ms. Jessica Proudfoot, and Ms. Jessica Kruhlak, McLennan Ross LLP.

Director:

Mr. Michael Lapointe, Director, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Approval and Licence under the *Water Act* to Mr. William and Ms. Audrey Trenchuk for the construction of a dugout and the diversion of water from the dugout allowed under the Approval and from a previously approved, existing dugout.

Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk filed appeals with the Environmental Appeals Board (the Board) of AEP's decisions to issue the Approval and Licence.

The hearing of the appeals was held on June 16, 2017. The Board recommended the Approval be confirmed as issued and the Licence be varied. The Minister of Environment and Parks accepted the Board's recommendations.

After the Minister's decision was issued, Mr. Robert and Ms. Linda Morgan applied for final costs in the amount of \$690.80.

After reviewing the submissions provided, the Board determined no costs should be awarded since the costs did not relate to the preparation and presentation of submissions or evidence.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's reasons for its decision regarding the costs application filed in respect of appeals of Approval No. 00378428-00-00 (the "Approval") and Licence No. 00360885-00-00 (the "Licence") issued to Mr. William and Ms. Audrey Trenchuk (the "Approval Holders"). Alberta Environment and Parks ("AEP") issued the Approval and Licence to the Approval Holders under the *Water Act*, R.S.A. 2000, c. W-3.

[2] The Environmental Appeals Board (the "Board") held a hearing on June 16, 2017, in Edmonton. The Board recommended the Approval be confirmed as issued and the Licence varied. The Minister, Environment and Parks, issued an order on July 31, 2017, accepting the recommendations of the Board.

[3] Mr. Robert and Ms. Linda Morgan (the "Morgans") filed a costs application for the amount of \$690.80 for travel and accommodation costs.

[4] After reviewing the submissions, the Board determined it would not award costs to the Morgans.

II. BACKGROUND

[5] On July 11, 2016, the Director, Lower Athabasca Region, Alberta Environment and Parks (the "Director"), issued the Approval and Licence to the Approval Holders. The Approval allowed for the construction of a dugout at SW 22-59-16-W4M ("Dugout #2") in Smoky Lake County. The Licence allowed the Approval Holders to divert up to 18,100 cubic metres of water annually from a dugout located at SE 21-59-16-W4M ("Dugout #1") for the purpose of stock watering and miscellaneous farm use and an additional 10,860 cubic metres annually from Dugout #2 for the purpose of stock watering.

[6] On July 21, 22, and 25, 2016, the Board received Notices of Appeal from Mr. Robert and Ms. Linda Morgan, Mr. Lawrence Rogoza, Mr. Patrick Timms, Ms. Audrey Laschuk, Mr. Bill Bogdan, Mr. Jason Senetza, and Mr. Randy and Ms. Diana Sawchuk, (the “Appellants”) appealing the Approval and Licence.

[7] On July 26, 2016, the Board wrote to the Appellants, Approval Holders, and Director (collectively, the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holders and Director of the appeals.

[8] A mediation meeting was held on November 15, 2016, in Smoky Lake, Alberta. No resolution was reached.

[9] On June 16, 2017, the Board held a hearing in Edmonton, Alberta, and heard evidence and submissions on the following issues:

1. Were the Approval and Licence properly issued ensuring no impact to the water supplies of the Appellants? This issue includes consideration of:
 - a. whether the Licence Holder needed the water included in the Licence for their operation;
 - b. the amount of water available in the basin for the Licence Holder’s operation and other water users;
 - c. whether the applications were complete (i.e. whether sufficient technical information was provided).
2. Are the terms and conditions of the Licence and Approval sufficient to protect local water supplies and the local environment?

[10] At the hearing, only the Morgans reserved their right to file a costs application.

[11] Following the hearing, on July 14, 2017, the Board issued its Report and Recommendations to the Minister, Environment and Parks, recommending the Approval be confirmed and the Licence be varied. On July 31, 2017, the Minister, Environment and Parks, issued an order accepting the recommendations of the Board to confirm the Approval as issued and to vary the Licence.

[12] On August 11, 2017, the Board set the schedule to receive submissions regarding the costs application.

[13] On August 17, 2017, the Morgans submitted their costs application.

[14] On September 1, 2017, Ms. Laschuk responded to the Morgans' costs application. Ms. Laschuk stated all the Appellants should receive costs and requested she be reimbursed for her costs.

[15] On September 5, 2017, the Board dismissed Ms. Laschuk's request for costs as she did not reserve her right at the hearing to file a costs application and did not file the costs application by the August 25, 2017 deadline set by the Board.

[16] On September 6, 2017, the Approval Holders submitted their response to the Morgans' costs application.

[17] On September 8, 2017, the Director submitted his response to the Morgans' costs application.

III. SUBMISSIONS

A. Robert and Linda Morgan

[18] The Morgans submitted a costs application which included costs for:

- travel to and from their residence in Brule, Alberta to Edmonton, Alberta on June 14, 2017 (\$157.50);
- travel from Edmonton to Smoky Lake and return to Edmonton on June 15, 2017, to meet with co-appellants to prepare for the hearing (\$115.00);
- travel from Edmonton to Brule on June 16, 2017 (\$157.50); and
- accommodation in Edmonton on June 14 and 15, 2017 (\$260.80).

B. Approval Holders

[19] The Approval Holders stated the Morgans did not attend the meditation and did not present any valuable evidence or arguments at the hearing. The Approval Holders stated it was not their responsibility the Morgans did not live in the Smoky Lake area.

C. Director

[20] The Director took no position with respect to the costs claimed by the Morgans.

IV. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[21] The legislative authority giving the Board jurisdiction to award costs is section 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the “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 the *Cabre* case:

“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.”¹

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.)²

¹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

² *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

[22] The sections of the *Environmental Appeal Board Regulation*,³ (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.
- (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.”

³ *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

[23] 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 2.⁴

[24] However, as the Board has stated in other decisions, it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.⁵ The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.⁶ 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."⁷

⁴ 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; ...
- (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."

⁵ *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.).

⁶ *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.).

⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

[25] He also noted that:

“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.”⁸

[26] 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.⁹

B. Courts vs. Administrative Tribunals

[27] In applying the costs provisions referred to above, 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 a factor in all proceedings before the Board, it must be taken into consideration when making the Board makes its final decision or recommendation. The Board's role is not simply to determine a dispute between parties. Therefore, the Board is not bound to apply 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 purposes identified in section 2 of EPEA.

⁸ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

⁹ *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

[28] The distinction between the costs awarded in judicial and quasi-judicial settings was stated by the Federal Court of Appeal in *Bell Canada v. C.R.T.C.*:

“The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.”¹⁰

[29] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it, and the Board is not bound by the loser-pays principle. As stated in *Mizera*:

“Section 88 [now section 96] of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the

¹⁰ *Bell Canada v. C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to

“...express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it.”

See also: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.):

“...administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green, supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:

‘In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tariffs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.’”

common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta. L.R. (3d) 40, [1993] W.W.R. 450 (Alta. Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed.”¹¹

[30] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.¹² There is an obligation for members of the public to accept some responsibility of bringing environmental issues to the forefront.

V. Analysis

[31] The issue before the Board is whether costs should be awarded to the Morgans.

[32] The Board has the authority to award interim costs or final costs. Final costs are awarded after the completion of the hearing and are awarded in recognition of the assistance provided by the parties at the hearing in order to allow the Board to prepare its recommendations. Costs are awarded when the Board considers it appropriate and based on the evidence and arguments presented at the hearing.

[33] The Board has consistently applied the principle that the starting point in a costs application is that all parties are responsible for their own costs.¹³ Section 2 of the *Water Act*¹⁴

¹¹ *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) (“*Mizera*”). See: *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

¹² *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.).

¹³ *Costs Decision: Paron et al.* (February 8, 2002), E.A.B. Appeal Nos. 01-001, 01-003, and 01-005-CD, at paragraph 38.

¹⁴ Section 2(d) of the *Water Act* provides:

“The purpose of the Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ...

(d) the shared responsibility of all residents of Alberta for the conservation and wise

states citizens of Alberta have a responsibility in becoming involved in water matters, and participation in the appeal process is one way of fulfilling this responsibility. Given the “shared responsibility” of all citizens, the Board starts from the viewpoint that appellants should expect to bear their own costs, unless they can convince the Board there is sufficient reason to award costs to them.

[34] The Board has always held that an award of costs is intended to defray a party's expenses associated with preparing for a hearing in which the party has provided evidence and submissions that assisted the Board in reaching its decision and making its recommendations. The Board must look at whether the costs claimed were required for the party to prepare and present its case at the hearing. Costs are not awarded to provide a financial benefit to a party appearing before the Board, and costs are not awarded to penalize another party unless that party was acting in a vexatious manner.¹⁵

[35] The Board generally does not award costs related to travel and accommodation, and in this case, the Morgans asked for such costs because they live in Brule and not in the Smoky Lake region where the lands at issue are located. The Approval Holder should not be responsible for costs based solely on where the Morgans live.

[36] The Morgans provided a breakdown of their expenses and a receipt for their hotel, which the Board requires when assessing whether costs should be awarded. However, the costs claimed do not relate to the preparation and presentation of submissions or evidence to the Board.

[37] In the Board's view, the Morgans have not presented sufficient reasons why the Board should be moved from its starting point that parties should bear their own costs.

use of water and their role in providing advice with respect to water management planning and decision-making....”

¹⁵ See: *Gadd* (2006), 19 C.E.L.R. (3d) 1 (Alta. Env. App. Bd.) at paragraph 83, (*sub nom.* Costs Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (16 December 2005), Appeal Nos. 03-150, 151 and 152-CD (A.E.A.B.); *Imperial Oil Ltd. v. Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2004), 4 C.E.L.R. (3d) 238 (Alta. Env. App. Bd.) at paragraph 75, (*sub nom.* Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.).

[38] Therefore, the Board will not award costs to the Morgans.

VI. DECISION

[39] The Board denies the Morgans' costs applications.

Dated on August 28, 2018, at Edmonton, Alberta.

"original signed by"
Eric McAvity, Q.C.
Panel Chair

"original signed by"
Nick Tywoniuk
Board Member

"original signed by"
Brenda Ballachey
Board Member