

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 14, 2011

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-

IN THE MATTER OF an appeal filed by Peter Kostawich with respect to *Environmental Protection and Enhancement Act* Reclamation Certificate No. 00254244-00-00 issued to Bonavista Petroleum Ltd. by the Director, Central Region, Environmental Management, Alberta Environment.

Cite as: Costs Decision: *Kostawich v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Bonavista Petroleum Ltd.* (14 February 2011), Appeal No. 09-030-CD (A.E.A.B.).

BEFORE:

Dr. Alan J. Kennedy, Panel Chair,
Mr. Jim Barlishen, Board Member, and
Mr. Eric O. McAvity, Q.C., Board Member.

SUBMISSIONS BY:

Appellant: Mr. Peter Kostawich.

Director: Mr. Darren Bourget, Director, Central Region,
Environmental Management, Alberta
Environment, represented by Ms. Aurelia
Nicholls, Alberta Justice.

Certificate Holder: Bonavista Petroleum Ltd., represented by Ms.
Patricia Quinton-Campbell, Burnet, Duckworth
& Palmer LLP.

EXECUTIVE SUMMARY

Alberta Environment issued a reclamation certificate to Bonavista Petroleum Ltd. for the Petrorep et al Provost 10-15-34-8 well located at NE 15-34-8-W4M near Consort, Alberta.

The landowner, Mr. Peter Kostawich, appealed the issuance of the Certificate on the grounds the topsoil depth and quality did not meet the required standards. Mr. Kostawich also argued the application for the certificate should have been treated as non-routine, because he had filed a complaint form with Alberta Environment. He asked that the certificate be cancelled. The Board held a hearing through written submissions.

Based on the evidence and data provided, the Board recommended the certificate be confirmed as issued and the Minister accepted the Board's recommendation.

Mr. Kostawich applied for costs totalling \$10,000.00. The hearing was through written submissions only, so there were no costs associated with attendance at a hearing. The document provided in support of the costs claim did not provide sufficient details to understand the validity of some costs, and some costs claimed were for the mediation meeting and, therefore, were not properly part of a costs claim. The Board could not award costs claimed by Mr. Kostawich for personally collecting and preparing the data, because the Board did not find the data collected were helpful in preparing its recommendations.

The Board denied the costs application in its entirety.

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I. BACKGROUND

[1] On October 20, 2009, the Director, Central Region, Environmental Management, Alberta Environment (the “Director”), issued Reclamation Certificate No. 00254244-00-00 (the “Certificate”) pursuant to the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to Bonavista Petroleum Ltd. (the “Certificate Holder”) for the Petrorep et al Provost 10-15-34-8 well located at NE 15-34-8-W4M near Consort, Alberta.

[2] On November 30, 2009, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Peter Kostawich (the “Appellant”)¹ appealing the Certificate. The Appellant provided additional information on December 14, 2009.

[3] A mediation meeting was held on June 2, 2010, at Veteran, Alberta. No resolution was reached.

[4] On June 3, 2010, the Board asked the Parties for available dates for a hearing. In response, the Appellant provided one date in June 2011. The Board requested the Appellant revisit his schedule. The Appellant responded that he would not be available until mid 2011. On July 2, 2010, the Board indicated to the Parties that, in balancing the interests of the Certificate Holder and Director to be heard in a timely manner, the Board was not willing to wait until June 2011 to hold the hearing. The Board stated the hearing would be held on September 15, 2010, and asked the Appellant whether he would like the hearing be held in person or in writing.

[5] On July 29, 2010, the Appellant notified the Board that he would proceed via a written hearing. The Certificate Holder and Director did not raise any concerns with proceeding via a written hearing.

[6] On December 17, 2010, the Board provided the Parties with a copy of its Report and Recommendations and the Minister’s Order confirming the Director’s decision to issue the Reclamation Certificate.²

¹ In this decision, the Appellant, Certificate Holder, and Director will be referred to collectively as the “Parties.”

² See: *Kostawich v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Bonavista Petroleum Ltd.* (10 December 2010), Appeal No. 09-030-R (A.E.A.B.).

[7] On December 29, 2010, the Board received a costs application from the Appellant. The Director and Certificate Holder provided their responses, respectively, on January 13 and 14, 2011.

II. SUBMISSIONS

1. Appellant

[8] The Appellant provided an invoice from Kovan Developments Ltd. for the following professional engineering services performed by the Appellant at a rate of \$200.00 per hour:

1.	Attend meeting (2 hours)	\$400.00
2.	Site visit (2 hours)	\$400.00
3.	Collect field data (20 hours)	\$4,000.00
4.	Assemble field data (20 hours)	\$4,000.00
5.	Assemble submission (6 hours)	\$1,200.00
	Total	\$10,000.00

[9] The Appellant noted the hourly rate includes all expenses such as travel time, mileage, accommodations, food, vehicle rental, office facilities, stationary, computer, and any other expenses required to perform the task.

2. Certificate Holder

[10] The Certificate Holder noted the Appellant's cost request identified two hours for "Attend Meeting" but he did not identify the meeting, the date of the meeting, the actual length of time of the meeting, or any other details related to the meeting. The Certificate Holder submitted that without details, no costs should be awarded for attendance at a meeting. The Certificate Holder argued the Appellant's attendance at the mediation meeting did not substantially contribute to the Hearing since the Appellant chose not to withdraw his appeal after the Director conducted a site visit during the mediation and found the site met the applicable reclamation criteria.

[11] The Certificate Holder noted that the Hearing was conducted by a written process.

[12] The Certificate Holder argued the Appellant has the onus to provide sufficient detail, justification, and backup documentation to support the costs claim and to justify any departure from the general rule that costs are the responsibility of the individual parties. The Certificate Holder stated the Appellant did not meet this onus.

[13] The Certificate Holder stated the Appellant provided only an invoice from a previously unidentified company which distributed the costs claim among six general headings without providing any dates, times, or any other details. The Certificate Holder said the costs relate entirely to time spent by the Appellant and not to costs incurred by him for expert reports or evidence. The Certificate Holder stated the Appellant did not provide any justification for the \$200.00 per hour rate. The Certificate Holder submitted that costs are intended to offset some portion of actual costs expended, not to financially benefit any party.

[14] The Certificate Holder said there was no evidence the rate of \$200.00 per hour related to lost time from work. The Certificate Holder stated the Appellant included other expenses in the \$200.00 per hour rate, such as travel, accommodations, and office supplies, but there was no evidence these expenses related directly and solely to the preparation and presentation of the Appellant's submission. The Certificate Holder noted there were no time sheets, mileage records, receipts, or any documentation to support the claim. The Certificate Holder argued it should not be required to pay costs on the basis of vague and unsupported statements.

[15] The Certificate Holder argued that, even if the hours claimed by the Appellant were substantiated, to allow the Appellant to be paid at a rate of \$200.00 per hour would encourage abuse of the appeal process because it would signify to appellants that pursuing appeals could provide lucrative compensation for their time.

[16] The Certificate Holder stated there was no evidence or submission that the Appellant required financial resources to make an adequate submission.

[17] The Certificate Holder submitted the Appellant did not make a substantial contribution to the appeal for the following reasons:

1. The Appellant primarily complained about the procedure under which the Certificate was granted, the reclamation criteria, and Alberta Environment's use of the criteria.

2. The Appellant provided unsupported calculations regarding loss of productivity.
3. Only a small portion of the Appellant's submission and most of the rebuttal submission related to topsoil measurements.
4. The Appellant's sampling was not conducted in accordance with prescribed sampling procedures and his sampling sites were not chosen in an unbiased manner.
5. The Board did not rely on the Appellant's data.
6. The Appellant did not provide any evidence in his Hearing submission to show the site was not at an acceptable production level.
7. The Appellant failed in the Hearing to prove the site was not properly reclaimed.
8. It is clear from the Report and Recommendations that none of the submissions of the Appellant made a substantial contribution to the appeal.

[18] The Certificate Holder argued that, without any details, the Board cannot determine if the costs claimed were directly related to the matters contained in the Notice of Appeal and the preparation and presentation of the Appellant's submission.

[19] The Certificate Holder submitted this case is closer to a private dispute rather than a public interest dispute, and the fact the Appellant was unsuccessful in his appeal should be a factor taken into consideration in determining that each Party is responsible for its own costs.

[20] The Certificate Holder submitted the Board should deny the costs request, because the Appellant failed to provide sufficient information or justification in support of the costs claimed.

3. Director

[21] The Director referred to his submission for the substantive Hearing in which he discussed the Appellant's costs claim.³

³ See: *Kostawich v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Bonavista Petroleum Ltd.* (10 December 2010), Appeal No. 09-030-R (A.E.A.B.) at paragraphs 64 and 65:

"The Director noted the Appellant did not itemize the costs claimed for preparation for the hearing and no details were provided to demonstrate how the lump sum of \$10,000.00 was reached. The Director argued that, since no details were provided, it is inappropriate for the Board to award costs to the Appellant. The Director submitted the results provided by the Appellant were of little assistance because the Appellant did not follow the published requirements for testing of a

[22] The Director noted the invoice provided by the Appellant related to work the Appellant conducted on his own behalf. The Director stated the Appellant did not incur expenses associated with retaining experts so he did not require financial resources to make an adequate submission. The Director submitted the Appellant's results were of little assistance and did not make a substantial contribution to the appeal because the Appellant failed to follow Alberta Environment's policy regarding the testing of wellsites.

[23] The Director stated the invoice does not contain sufficient detail to indicate the actual work conducted or the length of time it took to complete each task; the invoice contained general headings. The Director argued there is no way to gauge whether the costs claimed are reasonable or proportionate to the work completed. The Director submitted the costs claim runs contrary to an individual's personal responsibility to bring environmental issues forward.

[24] The Director argued the Appellant did not demonstrate special or exceptional circumstances that would warrant an award of costs against the Director. He stated he investigated the Appellant's complaint when he received it, and he acted in good faith when he upheld the decision to issue the Certificate.

III. LEGAL BASIS

A. Statutory Basis for Costs

[25] The legislative authority giving the Board jurisdiction to award costs is section 96 of 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 *Cabre*:

wellsite. The Director submitted the costs claimed by the Appellant for the loss of productivity of the land are compensatory costs and are not costs of, or incidental to, the appeal.

The Director submitted that each of the Parties should be responsible for their own costs and no award of costs should be made against the Director. He stated he acted in good faith in considering the application and issuing the Certificate, and no special circumstances were demonstrated to warrant an order of costs against the Director."

“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.”⁴

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.)⁵

[26] The sections of the *Environmental Appeal Board Regulation*,⁶ (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;

⁴ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

⁵ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

⁶ *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

- (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.”

[27] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of EPEA as found in section 2. While all of these purposes are important, the Board believes the responsibility that sections 2(f) and (g) of EPEA place on all Albertans is particularly instructive in making its costs decision.⁷

[28] The Board evaluates each costs application against the criteria in EPEA, the Regulation, and the following:

“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

⁷ Sections 2(f) and (g) of EPEA states:

“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;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment....”

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

[29] 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

[30] In applying these costs provisions, 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 part of all hearings before the Board, it must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply making a determination of a dispute between parties. Therefore, the Board is not bound by 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 overall purpose as defined in section 2 of EPEA.

[31] The distinction between the costs awarded in judicial and quasi-judicial settings was stated 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

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.).

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*

[32] 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 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

[33] 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 each member of the public to accept some responsibility of bringing environmental issues to the forefront.

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.’”

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.).

IV. ANALYSIS

[34] The Appellant asked for costs totaling \$10,000. He did not provide any invoices or receipts, just a list of hours spent conducting the work. As the Board has stated in past decisions, the Board requires documentation to support costs claims. The Appellant provided an invoice for what appears to be his own company for work he performed as part of the appeal process. It is not enough to ask for costs without detailed documentation to show how and when the expenses were incurred. Costs are not to be used by a claimant to profit financially from the appeal process.

[35] The Board's starting point is that parties bear the costs of bringing environmental issues to the forefront. The Appellant is asking for costs for work that he completed; he did not retain legal counsel or an expert to assist in the preparation of his submissions. He had no additional costs, such as travel, meals, or lost wages for attending a hearing even though he claimed these expenses were included as part of the \$200.00 per hour rate.

[36] The Appellant claimed two hours for attending a meeting and two hours for a site visit. The Hearing was held through written submissions, so the Board assumes the Appellant is referring to the mediation meeting and the site visit conducted as part of the mediation meeting. As stated in clause 8 of the Participants' Agreement to Mediate, which the Appellant would have signed as part of the mediation meeting, the participants of a mediation cannot claim costs associated with the mediation unless it is part of the mediated agreement.¹³ In this case, no agreement was reached and no agreement to cover these costs was made between the Parties.

[37] Costs are awarded to recognize the assistance a party has provided the Board in making its recommendations. As stated in the Board's Report and Recommendations, the Board did not find the Appellant followed the specified procedures to collect the data in an unbiased

¹³ Clause 8 of the Participants' Agreement to Mediate states:

"The Participants acknowledge that the EAB does not generally award costs relating to the preparation for or attendance at a mediation. The Participants agree they shall not submit a request to the EAB for costs respecting the mediation after the conclusion of the mediation. This does not preclude costs between the Participants being addressed in an agreement between the Participants."

manner, so the data were of limited value to the Board.¹⁴ The Appellant did not make a substantial contribution to the Board's deliberation of its recommendations.

[38] Therefore, the Board denies the costs application in its entirety.

V. DECISION

[39] Based on the above, the Board denies the costs application filed by the Appellant.

Dated on February 14, 2011, at Edmonton, Alberta.

"original signed by"

Dr. Alan J. Kennedy
Panel Chair

"original signed by"

Mr. Jim Barlishen
Board Member

"original signed by"

Mr. Eric O. McAvity, Q.C.
Board Member

¹⁴ See: *Kostawich v. Director, Central Region, Environmental Management, Alberta Environment*, re: *Bonavista Petroleum Ltd.* (10 December 2010), Appeal No. 09-030-R (A.E.A.B.) paragraph 82:

"The Appellant's data were not collected in accordance with the Application Guidelines, thereby making the data less reliable."