

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 18, 2014

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 Joan Corbeil, Tania Demencuik, Terri Savitsky, and Paul Baumberg with respect to *Water Act* Approval No. 00349047-00-00 issued to the Municipal District of Bighorn by the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: Interim Costs: *Corbeil et al. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: Municipal District of Bighorn* (18 December 2014), Appeal Nos. 14-003-006-IC (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair.

SUBMISSIONS BY:

Appellants: Ms. Joan Corbeil; Ms. Tania Demencuik; Ms. Terri Savitsky; and Mr. Paul Baumberg, represented by Mr. Neil Patterson.

Approval Holder: Municipal District of Bighorn, represented by Mr. Derek King, Brownlee LLP.

Director: Mr. Brock Rush, Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an approval to the Municipal District of Bighorn (M.D. of Bighorn) under the *Water Act* for channel realignment, construction, and excavation of a new creek channel, filling in of the existing channel, creation of a berm, and installation of bank protection in Pigeon Creek.

Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg appealed the issuance of the approval.

Mr. Baumberg applied for interim costs totaling \$26,483.00 in order to retain a consultant to prepare a report and attend at the hearing. The Board requested, received, and reviewed the parties' submissions on the interim costs request and awarded costs of \$6,500.00, plus \$325.00 GST, to be paid by the M.D. of Bighorn. The Board considered that evidence by this consultant would be beneficial given the complex issues before the Board.*

* Mr. Baumberg withdrew his appeal by way of a letter dated November 7, 2014, and received by the Board on November 12, 2014. Therefore, on November 13, 2014, the Board wrote to the parties and advised that "... since Mr. Baumberg has withdrawn his appeal, it is no longer necessary for the M.D. of Bighorn to pay those costs to Mr. Baumberg."

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision on the interim costs application in relation to the appeals filed regarding the issuance of Approval No. 00349047-00-00 (the "Approval") to the Municipal District of Bighorn (the "Approval Holder" or "M.D. of Bighorn"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Approval to the M.D. of Bighorn under the *Water Act*, R.S.A. 2000, c. W-3, for flood mitigation works. The Approval applies to a site located in Pigeon Creek in the Hamlet of Dead Man's Flats in the M.D. of Bighorn. The work is in response to damage done during the 2013 floods. Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg (collectively, the "Appellants") appealed the issuance of the Approval and Ms. Savitsky requested a stay.

[2] The Environmental Appeals Board (the "Board") issued a stay until the Minister issues his decision following the hearing. The stay applied only to that portion of the project downstream of Station 1+060 and through Dead Man's Flats ("Phase 2").¹

[3] Mr. Baumberg filed an interim costs application in the amount of \$26,483.00 in order to retain a consultant. The Board received submissions from the other Appellants, the Approval Holder, and the Director (collectively, the "Parties") on the interim costs application.

[4] The Board determined that, given the complexity of the issues set for the hearing, it would be beneficial to have this consultant present his analysis of the potential environmental impacts of the proposed project and what steps can be taken to mitigate the impacts. The Board awarded interim costs of \$6,500.00 plus \$325.00 GST. Interim costs are to be paid by the M.D. of Bighorn as the proponent of the project.

¹ Although the Approval does not identify Phase 1 and Phase 2 of the proposed project, the Appellants' appeals and stay request relate to the lower part of the project downstream of Station 1+060, which they refer to as Phase 2. The Appellants refer to that portion of the project extending from the Thunderstone Quarry Waterfall to Station 1+060 as Phase 1. For clarity, the Board will use the terms "Phase 1" and "Phase 2" as defined by the Appellants.

II. BACKGROUND

[5] On May 12, 2014, the Director, South Saskatchewan Region, AESRD (the “Director”), issued the Approval to the Approval Holder authorizing the installation of bank protection (rip rap), channel re-alignment, construction or excavation of a new channel, the filling in of an existing channel, and the construction of berms affecting Pigeon Creek in SE 13-24-10-W5M, SW 18-24-09-W5M, and NW 07-24-09-W5M. The proposed project is related to flood recovery activities due to the 2013 floods.

[6] On May 19 and 20, 2014, the Board received Notices of Appeal from the Appellants appealing the Approval. Ms. Savitsky also requested a stay of Phase 2 of the project.

[7] On May 23, 2014, the Board wrote to the Parties acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals and stay request. The Board asked the Director to provide a copy of the documents upon which his decision was based (the “Record”). The Board also requested the Appellants to provide answers to the stay questions.²

[8] Between May 27 and 30, 2014, the Board received the Appellants’ responses to the stay questions.

[9] On May 30, 2014, the Board received a copy of the Record. The Board provided a copy of the Record to the Parties on June 4, 2014.

[10] On June 9, 2014, the Board notified the Parties that a temporary stay of Phase 2 of the project was granted pending completion of the submission process and the Board’s final

² The Appellants were asked to answer the following questions:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board, than the Municipal District of Bighorn No. 8 would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?
5. Are the Appellants directly affected by AESRD’s decision to issue Approval No. 00349047-00-00 to the Municipal District of Bighorn No. 8?

decision of the stay. The Board asked the Director and Approval Holder to provide response submissions on the stay questions.

[11] On June 11, 2014, the Board notified the Parties that, based on the available dates provided by the Parties, the mediation meeting was scheduled for July 21, 2014.

[12] The Board received response submissions on the issue of the stay from the Director and Approval Holder on June 19 and 23, 2014, respectively. Mr. Baumberg, Ms. Savitsky, and Ms. Corbeil provided final responses on June 30, July 2, and July 8, 2014, respectively. Ms. Demencuik did not provide a final response.

[13] On July 10, 2014, the Board notified the Parties that it was putting the stay decision on hold pending the mediation meeting.

[14] The mediation meeting was held on July 21, 2014, in Cochrane. The appeals were not resolved, and the Board proceeded to determine whether the stay should remain in place until the hearing was held and the Minister makes his decision following the hearing.

[15] On August 12, 2014, the Board requested the Approval Holder advise the Board whether the Approval Holder wanted to proceed with construction under the Approval or leave the temporary stay in place.

[16] On August 19, 2014, the Approval Holder notified the Board that it would like to proceed with construction of the proposed project.

[17] On August 25, 2014, the Board notified the Parties that the stay was to remain in place. Reasons were provided to the Parties on October 20, 2014.

[18] On August 12, 2014, the Board asked the Parties to provide any preliminary motions they wanted the Board to decide and specify the issues included in the Appellants' Notices of Appeal that should be heard by the Board.

[19] On August 20, 2014, Mr. Baumberg submitted a motion asking the Board to reverse the decision to issue the Approval because the application for the Approval contained an error that voided the application.

[20] On August 21, 2014, the Board acknowledged Mr. Baumberg's motion and noted that, without the Board making a decision, it appeared the application requested a remedy that can only be granted following a full hearing of the appeals. The Board requested the Parties provide comments on Mr. Baumberg's motion. On August 25, 2014, Mr. Baumberg provided an amended motion, and a further amendment was received on September 10, 2014.

[21] Between August 31, 2014, and October 10, 2014, the Board received the Parties' comments on the issues for the hearing and Mr. Baumberg's motion.

[22] On October 17, 2014, the Board notified the Parties of the issues for the hearing. The issues for the hearing are:

1. Did the Director properly exercise his discretion regarding the size and scope of the proposed project when issuing the Approval?
2. Are the design requirements of the proposed project, including size and scope, as specified in the Approval adequate to protect the environment and ensure public safety?
3. If the Director's decision to issue the Approval was based on an invalid document, would the Approval be valid?

Mr. Baumberg's motion to summarily reverse the Approval was dismissed, as the Board does not have the jurisdiction to reverse an Approval based on a preliminary motion.³

[23] On November 3, 2014, Mr. Baumberg submitted a request for interim costs. The Board received response submissions from the other Appellants, the Approval Holder, and the Director on November 6 and 7, 2014.

[24] On November 10, 2014, the Board notified the Parties that interim costs would be awarded and were payable by the M.D. of Bighorn. These are the Board's reasons.

³ Issues Decision: *Corbeil et al. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn* (25 November 2014), Appeal Nos. 14-003-006-ID2 (A.E.A.B.).

III. SUBMISSIONS

A. Appellants

[25] Mr. Baumberg requested interim costs of \$26,483.00, plus applicable taxes to retain a consultant to prepare a report in response to the identified issues and attend at the hearing.

[26] Mr. Baumberg believed it was important to get some expertise in the hearing to discuss alternatives to the proposed project. He attached a letter from a consultant indicating the scope of work that would be undertaken, including the preparation of a report and providing evidence at the hearing, for a cost of \$26,483.00 plus applicable taxes. Mr. Baumberg explained the consultant he intended to retain was familiar with the 2013 flood event and the debris floods and flooding that resulted in the Bow Valley Corridor.

[27] Mr. Baumberg stated he did not have the funds the Director or the Approval Holder have.

[28] Mr. Baumberg submitted the evidence provided by the consultant would be relevant to the hearing and would give the Board other alternatives that would be less invasive than the proposed project.

[29] Ms. Savitsky supported Mr. Baumberg's request for interim costs. She explained that Mr. Baumberg is the only Appellant who has the financial resources to obtain professional assistance. Ms. Savitsky believed that, given the complexity of the appeals, it is necessary to have an alternative opinion and solution presented that would result in a smaller environmental footprint with the same level of public safety. Ms. Savitsky stated that, since there were no public meetings or opportunities for the public to bring forward their concerns prior to the Approval being issued, providing interim costs to Mr. Baumberg would be a fair alternative. Ms. Savitsky said the appeal process has been stressful to the Appellants, but filing the appeals was the only way to voice their concerns. Ms. Savitsky said she would appreciate any financial support that can assist in determining a fair, environmentally sound solution to the appeals.

[30] Ms. Demencuik supported the interim costs application filed by Mr. Baumberg and his efforts to find a solution. Ms. Demencuik said she cannot financially support Mr. Baumberg's efforts at this time, so any financial assistance that could be provided to Mr. Baumberg would be appreciated.

[31] Ms. Corbeil said she can only provide moral support to Mr. Baumberg and Ms. Savitsky, and she was not making any commitment to assist with the consultant's fees or legal costs.

B. Approval Holder

[32] The Approval Holder argued the costs application was deficient and did not justify an award of interim costs.

[33] The Approval Holder submitted the application for interim costs should be denied, because Mr. Baumberg did not demonstrate a need for interim costs and his application for costs provided only the minimum requirements to establish grounds for the granting of interim costs. The Approval Holder stated that, if costs are awarded, they should be limited to 25 percent of the costs sought by Mr. Baumberg.

[34] The Approval Holder submitted the following regarding the interim costs application provided by Mr. Baumberg:

1. The application relates to providing an expert report and evidence that will not contribute to the hearing. A significant portion of the proposed work is intended to address questions that are outside of the issues for the hearing. The questions of necessity of the proposed project and the availability of alternative designs or solutions are not before the Board. To the extent the interim costs relate to irrelevant matters, they should be denied.
2. Mr. Baumberg did not demonstrate a financial need for interim costs or provide evidence that he made an attempt to use other funding sources. The onus is on the Appellant to demonstrate a need for the costs, but Mr. Baumberg did not provide any financial information to support his need for interim funding, and he did not demonstrate that he attempted to secure funding from other sources, including the other Appellants. Mr. Baumberg admitted he makes a good living and he did not argue that he is incapable of securing alternative funding sources if necessary. The

requirement to demonstrate need does not mean a comparison of the relative financial capacity of the applicant and respondents, but it is a test based on necessity. Mr. Baumberg did not demonstrate necessity.

3. The proposed consultant's costs are reasonable if they are distributed among the four Appellants. If the consultant's evidence is beneficial to Mr. Baumberg's case, then it would also be beneficial to the other Appellants. If the proposed costs are divided equally among the Appellants, it would amount to approximately \$6,600.00 each. If the individual costs of an expert are reasonable, the Board may decline to order costs.
4. There is no clear proposal for the interim costs. The proposal does not include a breakdown of the anticipated costs, so it is unclear what contribution each member of the consultant's team will make or the number of hours each member will provide to the preparation of the report and the evidence. It is unclear if the total cost includes disbursements or other costs unrelated to the issues.

[35] The Approval Holder submitted that, if interim costs are awarded, it should only be ordered to pay a portion of the costs that will be incurred. The Approval Holder submitted that 25 percent of the anticipated costs, which would be approximately \$6,500.00 plus GST, is reasonable and consistent with other interim costs decisions made by the Board.

C. Director

[36] The Director submitted costs should not be assessed against the Director given his role in the appeals as the statutory decision-maker who is an automatic party to every appeal filed. The Director noted the Board and Alberta courts have recognized the Director's role in other costs decisions, which has been an important factor in not ordering the Director pay costs as long as he acted in good faith.

IV. Analysis

A. Legal Basis

[37] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which states:

“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.”

[38] 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.*:⁴

“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.”

[39] 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....’”

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

[41] Sections 18 and 19 of the Regulation 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,

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

- (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
 - (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.”

[42] 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.”

[43] The Board has generally accepted, as the starting point, that costs incurred in an appeal are the responsibility of the individual parties. There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront. This applies to interim costs as well as final costs.

B. Application

[44] The Board has generally viewed interim costs as those costs associated with work that has to be done in preparation for and attendance at the hearing.

[45] To determine whether interim costs should be awarded, the Board looks at whether the party applying has a specific plan to show where the anticipated costs will be incurred. Including more specifics in the plan will enable the Board to determine whether interim costs are warranted or the amount of any interim costs if awarded.

[46] In this case, Mr. Baumberg included a letter from the consultant that outlined the proposed course of action to address the identified issues. The interim costs request did not provide specific details, such as an estimate of the hours that will be needed to complete the work. However, there was sufficient detail to explain who would be conducting the work, that a report would be provided, and the consultant would be available for the hearing. It is common practice for the lead consultant to be assisted by other members of their team, who, if they are junior members of the team, will help to reduce costs for their client. There was a breakdown of the members of the consultant's team who would be working on the file, including hourly rates for the individual members, an overview of what part of the review each member would undertake, and a curriculum vitae for each of the team members. Based on the information provided, the hourly rates for the consultant and his team members appeared to be reasonable. After the hearing is held, the Board will complete a more thorough analysis of the costs application, if final costs applications are filed, to assess whether the actual hours claimed and hourly rates are reasonable given the issues and the assistance the evidence presented was to the Board's preparation of its recommendations to the Minister. Significantly more details would be required in any final costs application filed.

[47] The Board awards interim costs on the basis of whether the anticipated evidence and arguments will assist the Board in preparing its recommendations. When an interim costs application is assessed, the Board does not know the level of assistance consultants will provide at the hearing. However, in reviewing the Director's record and given the issues for the hearing, the Board believes it would be beneficial for Mr. Baumberg to retain a consultant to provide

another opinion on the environmental and safety impacts of the proposed project and what measures can be taken to mitigate any impacts.

[48] It is unclear if Mr. Baumberg has attempted to secure funding from other sources, including the other Appellants. It appears some of the Appellants may not be willing to contribute to the costs for the consultant. Given the Board considers it an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront, the other Appellants may want to consider sharing the costs for the consultant.

[49] The Board has recognized the importance of individuals bringing forward environmental issues before the Board. However, the Board also considers it important for parties appearing before the Board to be responsible for costs incurred in the process. Therefore, the Board generally does not award full costs claimed, particularly for interim costs. As the Board does not know at this stage of the process how much assistance the consultant will provide to the Board in making its recommendations, the Board will award approximately 25 percent of the relevant costs in the costs application for the consultant, thereby awarding costs of \$6,500.00, plus GST.

[50] Although the consultant has advised Mr. Baumberg he requires a 30 percent up front retainer, the Board considers the awarding of interim costs in the range of 25 percent is reasonable, given the Board's starting point that individuals appearing before the Board should bear the costs.

[51] Therefore, the Board awards interim costs of \$6,500.00, plus \$325.00 GST, for a total of \$6,825.00.

C. Who Should Bear the Costs?

[52] In previous costs decisions against a project's proponent, the Board has described the role of project proponents as being "...responsible for incorporating the principles of environmental protection set out in the Act into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties..."⁵ As the Board has stated

⁵ See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B). In

before, "...these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources, and responsible for the project's financing, than upon the public at large as would be the case if they were to be assessed against the Department."⁶

[53] Although the legislation does not prevent the Board from awarding costs against the Director, the Board has stated in previous cases, and the courts have concurred,⁷ that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith. At this stage of the process, there is no indication or evidence the Director's decision was made in bad faith.

[54] The Board considers it appropriate in this case that the Approval Holder bears the responsibility of paying interim costs associated with these appeals. The Approval Holder knows that, under the regulatory scheme, there is a risk an appeal will be filed when an application is submitted for an approval.

D. Final Costs

[55] Each party to this appeal can make an application for final costs. If they choose to do so, they must advise the Board in their written submissions for the hearing and prior to the close of the hearing. The applicants are free to submit a final costs submission and request the Board consider any additional costs incurred. However, Mr. Baumberg must remain aware of section 19(5) of the Regulation, which provides:

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

Cabre, the Board stated that where Alberta Environment has carried out its mandate and has been found, on appeal, to be in error, then in the absence of *special circumstances*, it should not attract an award of costs. The Court of Queen's Bench upheld the Board's decision: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.)

⁶ Re: *Mizeras* (2000), 32 C.E.L.R. (N.S.) 33 (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.) at paragraph 33.

⁷ See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

V. DECISION

[56] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards interim costs to Mr. Baumberg in the amount of \$6,500.00, plus \$325.00 GST, for a total of \$6,825.00. The Board orders that, on or before November 17, 2014, the M.D. of Bighorn shall pay the amount of \$6,825.00 to Mr. Baumberg for the purpose of retaining a consultant as identified in his submission. The M.D. of Bighorn shall provide the Board with written confirmation of this payment.⁸

Dated on December 18, 2014, at Edmonton, Alberta.

“original signed by”
Alex MacWilliam
Panel Chair

⁸ Mr. Baumberg withdrew his appeal by way of a letter dated November 7, 2014, and received by the Board on November 12, 2014. Therefore, on November 13, 2014, the Board wrote to the parties and advised that “... since Mr. Baumberg has withdrawn his appeal, it is no longer necessary for the M.D. of Bighorn to pay those costs to Mr. Baumberg.”