



ALBERTA  
ENVIRONMENTAL APPEALS BOARD

2019 AEAB 8

April 4, 2019

**Via E-Mail**

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(Appellant)

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(Approval Holder)

Dear Ladies and Gentlemen:

**Re: Decision Letter: Lafarge Canada Inc./Water Act Approval No. 00255428-00-00**  
**Our File No.: EAB 15-021 (Public File)\***

This is the decision of Mr. Alex MacWilliam, Chair of the Environmental Appeals Board (the “Board”), with respect to an application by Mr. Lars Larsen (the “Appellant”) for interim costs in respect of an appeal of Approval No. 00255428-00-002 (the “Approval”) issued to Lafarge Canada Inc. (“Lafarge”) under the *Water Act*, R.S.A. 2000, c. W-5 by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the “Director”).

### Background

On August 14, 2015, the Director issued a *Water Act* Approval to Lafarge. The Approval allows Lafarge to construct an end pit lake and undertake river flood protection for its sand and gravel operations, near Fort Assiniboine, in Woodland County, adjacent to the Athabasca River.

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\* Cite as: Interim Costs Decision: *Larsen v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Lafarge Canada Inc.* (4 April 2019), Appeal No. 15-021-DL1 (A.E.A.B.), 2019 AEAB 8.

On August 28, 2015, the Appellant filed a Notice of Appeal with the Board. The Appellant expressed concern that no consideration had been given to proper flood protection measures and the potential impacts of the project on upstream residents.

On December 14, 2015, the Board held a mediation meeting in which Lafarge, the Appellant, and the Director (collectively, the "Parties") reached an interim resolution. On September 19, 2016, Lafarge requested the appeal proceed to a hearing.

On October 11, 2016, Lafarge and the Director raised a number of preliminary motions to be determined by the Board. Lafarge challenged the Appellant's standing arguing he is not directly affected. Lafarge and the Director also requested the Board set the issues to be considered at the hearing of the appeal. The Board requested and received submissions from the Parties regarding these motions. The Board released its decision on the motions on August 28, 2018.<sup>1</sup> The Board rejected the challenge to the Appellant's standing, finding he is directly affected by the Director's decision to issue the Approval and set the issues for the hearing. Based on the availability of the parties, an oral hearing, with written submissions, was scheduled for April 30, 2019.

On January 14, 2019, the Appellant made an application to the Board for an award of interim costs. The Board requested and received submissions from the Parties regarding the interim costs application. The Director took no position on the application for interim costs.

### **Submissions - Appellant**

The Appellant's interim cost application covers the period from December 28, 2018 to April 30, 2019. The Appellant submits the Board should grant interim costs in the amount of \$46,047.12. This amount is made up of \$18,249.00 for legal costs and \$27,798.12 for expert costs.

The Appellant stated the costs are directly related to the preparation and presentation of the Appellant's submissions for the hearing, including the anticipated amount of time required to prepare for and attend the hearing.

The Appellant submitted the appeal involves highly complex environmental issues, which are of high public interest, and he has taken on considerable responsibility in bringing these issues to the Board's attention. In doing so, the Appellant stated he will incur the cost of obtaining expert reports from: (1) Dr. Jon Fennell, a hydrologist and geochemist, and (2) Mr. Ray Makowecki, a biologist. The Appellant also states he will incur legal costs to prepare and present submissions to the Board.

The Appellant estimates he will incur costs for Dr. Fennell of \$10,500.00, calculated at \$350.00 per hour for 30 hours. Further, the Appellant estimates the costs he will incur for the services of Mr. Makowecki to be \$5,250.00, calculated at \$150.00 per hour for 35 hours. The Appellant stated these rates are reasonable and noted the Board found in *Vipond* that \$275.00 per hour was a reasonable rate for a senior geologist.<sup>2</sup>

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<sup>1</sup> See: *Larsen v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Lafarge Canada Inc.* (28 August 2018), Appeal No. 15-021-ID1 (A.E.A.B.).

<sup>2</sup> Interim Costs: *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (20 May 2011), Appeal Nos. 09-006-009, 016 & 017-IC (AEAB), at

The Appellant estimates the legal costs he has already incurred to be \$27,798.12 for the legal services of Ms. Ifeoma Okoye and Ms. Jessica L. Steingard of Ackroyd LLP.

The Appellant submits his participation in the appeal, aided by his legal representatives and his experts will assist the Board in addressing the issues set by the Board, and the payment of interim costs will assist in covering costs associated with his participation in the hearing.

The Appellant states he has no other sources of funding available to him.

The Appellant submits the Government of Alberta tariff rate (the "Tariff") for legal costs is not appropriate for awarding interim costs in this appeal and states the Board should use the rates set by the Alberta Utilities Commission ("AUC").<sup>3</sup>

The Appellant states Lafarge, as the approval holder, should pay the interim costs.

### **Submissions - Lafarge**

Lafarge submits the Appellant has not provided evidence to support the claim that the issues before the Board in this appeal are of high public interest and, therefore, the Board should not consider this in its deliberations.

Lafarge notes the Appellant devoted much of his application to discussing how much time and money had already been spent in the initial stages of the appeal, and 50 hours is estimated to be required by two lawyers to prepare for the hearing. Lafarge submits less time is needed to prepare for the hearing given the work already completed by legal counsel on the preliminary matters. Lafarge states the Board should not award costs for what is likely to be duplicative work.

Lafarge says the Board should not award costs to the Appellant for travel, meals, accommodation, disbursements, and parking.

Lafarge submits the Appellant did not provide any information regarding his ability to pay to participate in the hearing. Also, he did not indicate whether anyone else is assisting with the legal and expert costs, and whether any of the costs have already been paid. Lafarge argues that if these costs have not yet been paid, then the Appellant has not incurred these costs.

Lafarge states it would not be appropriate to use the AUC rates to calculate costs of legal counsel as the appeal is not overly complex, the Board has already stated it prefers the rates for outside counsel set by the Tariff, and the Board considers more factors than the AUC does in determining interim costs. Lafarge submits the Appellant's claim for interim legal costs can be reduced to \$34,500.00 by using the Tariff, instead of AUC rates, and eliminating disbursements and travel costs. Lafarge states interim costs should be reduced to 25 percent of that amount due to deficiencies in the Appellant's application.

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paragraph 48.

<sup>3</sup> Alberta Utilities Commission, AUC Rule 009. See: [www.auc.ab.ca/Shared%Documents/Rules/Rule0009.pdf](http://www.auc.ab.ca/Shared%Documents/Rules/Rule0009.pdf).

Lafarge submits if the Board finds it is appropriate to award interim costs to the Appellant, then the amount should be \$8,625.00.

### Analysis

The legislative authority giving the Board jurisdiction to award costs is found in section 96 of the *Environmental Protection and Enhancement Act* ("EPEA"), R.S.A. 2000, c. E-12, 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."

Mr. Justice Fraser of the Court of Queen's Bench in *Cabre Exploration Ltd.*, stated:<sup>4</sup>

"Under s. 88 [(now section 96)] of the [EPEA], 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.... 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 [EPEA] 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....'"

Mr. Justice Fraser's comments, although referring to final costs, are equally applicable to interim costs.

The requirements for applying for interim costs are found in sections 18 and 19 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"). 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,

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<sup>4</sup> *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.”

As the starting point, the Board generally accepts that costs incurred in an appeal are the responsibility of the individual parties. This is because there is an obligation for members of the public to accept some responsibility for bringing environmental issues to the forefront. This applies to interim costs as well as final costs.

The Board looks at interim costs as costs related to work to be done – prospectively - in preparation for and attendance at the hearing. Interim costs do not include costs arising from work already completed. This does not preclude the parties from choosing to claim such costs as part of a final costs application.

To determine whether interim costs should be awarded, the Board looks at whether the party applying for the award of costs 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 and the amount of such interim costs, if awarded.

The purpose of the hearing is to ensure the Board hears the best evidence on the issues, to assist the Board in providing the best recommendations possible to the Minister. In this appeal, the protection of the quality of surface water and groundwater, and the protection of the aquatic environment are important issues. The Board considers it important to hear from experts in the field to obtain a full picture of the concerns and the mitigative measures being taken. In the Board’s view, subject to the experts focusing on the issues set by the Board, the Board accepts the Appellant has presented an appropriate plan. Further, the Board recognizes the value of legal counsel in assisting parties to prepare for a hearing. Therefore, the Board will award interim costs to the Appellant for legal and expert costs, related to the preparation of expert reports, as well as for preparation and attendance at the hearing.

The Board has considered the cost of the preparation and attendance of the experts at the hearing. In this case, the Board accepts 10 hours of hearing preparation time for each of the experts, which is one hour of preparation time for each hour of hearing time. In the *Vipond* case, the Board considered how to determine the appropriate rate for expert witnesses.<sup>5</sup> The Board held:

“In order to find a reasonable rate, the Board used the following formula to determine the appropriate cost for consultants:  $((\text{salary} + \text{overhead}) \times \text{profit}) / \text{billable hours worked per year}$ . (This formula is used by the United States State Department. See: [www.state.gov/documents/organization/75157.doc](http://www.state.gov/documents/organization/75157.doc).) To determine annual salary, the Board referred to the Association of Professional Engineers, Geologists and Geophysicists of Alberta document, 2010 Value of Professional Services. Given Mr. Clissold’s experience, the Board used the top level salary mean for geologists, which is \$206,147.00 per annum. It is common practice to use the annual salary as the amount required to cover overhead. In addition, the Board allowed for a profit of 20 percent, which is represented by 1.2 in the formula. The Board expects that a person with Mr. Clissold’s years of experience would be entitled to 4 weeks of holidays per year. Based on 48 weeks per year and 37.5 billable hours per week (7.5 hours x 5 days), the total billable hours per year would be 1800 hours. When these values are placed in the equation,  $((206,147 + 206,147) \times 1.2) / 1800$ , the hourly rate would be \$274.86. For the Board’s purposes, it will use \$275.00 per hour.”

The Board notes the Consulting Engineers of Alberta<sup>6</sup> provide a Consulting Engineers Rate Guideline (the “Guideline”).<sup>7</sup> The Board believes it is appropriate to use the 2019 version of this Guideline, which is calculated following the same principles the Board used in *Vipond*.

For Dr. Fennell, the Appellant claimed the following eligible costs at \$350.00 per hour:

- 32 hours for preparing the expert report;
- 16 hours for preparing for the hearing (reduced by the Board to 10 hours); and
- 10 hours for attendance at the hearing.

The Board considered Dr. Fennell’s resume and report, both provided by the Appellant, and concludes, for this appeal, Dr. Fennell can be classified as a Senior Specialist Engineer, according to the Consulting Engineers of Alberta. The Guideline sets the Industry Standard Hourly Rate for a Senior Specialist Engineer at \$305.00 per hour. Using the Guideline rate of \$305.00 per hour to calculate interim costs related to Dr. Fennell’s work on the report and his preparation and attendance at the hearing, this amounts to \$15,860.00 for 52 hours. (32 hours + 10 hours + 10 hours = 52 hours x \$305.00/hour = \$15,860.00.)

<sup>5</sup> Interim Costs: *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (20 May 2011), Appeal Nos. 09-006-009, 016 & 019-IC (A.E.A.B.).

<sup>6</sup> See: [www.cea.ca/index.html](http://www.cea.ca/index.html).

<sup>7</sup> See: [www.cea.ca/files/Rate\\_guide/Rate%20Guide%20--%202019.pdf](http://www.cea.ca/files/Rate_guide/Rate%20Guide%20--%202019.pdf).

The Appellant claimed the following eligible costs related to Mr. Makowecki at \$150.00 per hour:

- 20 hours for preparing the expert report and preparing for the hearing; and
- 10 hours for attending the hearing.

The Board considered Mr. Makowecki's resume and report, both provided by the Appellant, and concludes Mr. Makowecki's hourly rate of \$150.00 per hour is reasonable given his extensive experience and expertise in aquatic-related environmental matters. Using this rate, the Appellant's costs for Mr. Makowecki amounts to \$4,500.00 for 30 hours. (20 hours + 10 hours = 30 hours x \$150.00/hour = \$4,500.00.)

The Board does not generally award costs for disbursements or meals, and will not depart from that practice in this case. However, this depends on the complexity of the issues before the Board and the availability of witnesses, neither of which is discussed by the Appellants. Therefore, the Board concludes it is not appropriate to consider such costs in this case.

The Appellant requested interim costs in the amount of \$18,249.00 for legal services.

The Appellant argues the Tariff used by the Board for calculating legal costs is insufficient and recommends the Board apply the Alberta Utilities Commission ("AUC") rates.<sup>8</sup> The Appellant did not explain why this appeal was different from other appeals where the Board has awarded interim costs based on the Tariff. Further, the Appellant did not explain why the AUC rate was preferred in comparison to other possible rates, such as the Rules of Court or the Alberta Energy Regulator. Therefore, the Board considers the Tariff is appropriate for this appeal.

The Appellant expects that Ms. Okoye will spend 30 hours preparing for the hearing, plus 10 hours attending the hearing for a total of 40 hours. Ms. Steingard is expected to spend 20 hours preparing for the hearing, and 10 hours attending the hearing, for a total of 30 hours. Using the Tariff rate, the legal cost for Ms. Okoye, who has 6 years at the Alberta Bar, is \$160.00 per hour, for a total of \$6,400.00. (30 hours + 10 hours = 40 hours x \$160.00/hour = \$6,400.00.) Ms. Steingard has 2 years at the Alberta Bar, which results in a Tariff rate of \$110.00 per hour for a total of \$3,300.00. (20 hours + 10 hours = 30 hours x \$110.00/hour = \$3,300.00) The legal fees submitted by the Appellant included \$100 for photocopying, printing, and scanning and \$80.00 for meals. As already mentioned, the Board does not generally award costs for disbursements or meals, and will not depart from that practice in this case. The total eligible legal fees the Board will consider for interim costs is \$9,700.00. (\$6,400.00 + \$3,300.00 = \$9,700.00.)

The Appellant's total interim costs considered by the Board is \$20,360.00 for the experts (\$15,860.00 + \$4,500.00 = \$20,360.00) and \$9,700.00 for legal fees (\$6,400.00 + \$3,300.00 = \$9,700.00). To these amounts the Board adds GST at 5 percent, which is \$1,503.00, for a total of \$31,563.00 (\$20,360.00 + \$9,700.00 = \$30,060.00 x 1.05 = \$31,563.00). This is the total amount of interim costs the Board will consider.

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<sup>8</sup> The AUC awards costs based on a "scale of costs" found in Appendix A of the Alberta Utilities Commission Rules 009 and 022. The AUC uses the following maximum hourly rates for legal fees: Articling students \$140 per hour, 1 to 4 years at the bar \$240 per hour, 5 to 7 years at the bar \$280 per hour, 8 to 12 years at the bar \$320 per hour, and more than 12 years at the bar \$350 per hour.

The Board recognizes 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 Appellant's experts and legal counsel will provide to the Board in making its recommendations, the Board will award 25 percent of the eligible interim costs to the Appellant. This is based on the starting point for final costs, which is usually 50 percent and, therefore, the Board will award half of its starting point for interim costs. Twenty-five percent of \$31,563.00 is **\$7,890.75, which is the total amount the Board awards to the Appellant for interim costs.**

The Appellant and Lafarge acknowledged costs should not be awarded against the Director, provided the Director acted in good faith when he made the decision to issue the Approval to Lafarge. The Board does not find circumstances exist to award interim costs against the Director. Therefore the Board awards the interim costs against Lafarge, and **the Board directs Lafarge to forward payment to counsel for the Appellant, in trust, for interim costs of \$7,890.75, by April 17, 2019.** The Board notes the interim costs award can be varied when the Board considers final costs; meaning the Board may, where circumstances warrant, require the Appellant to repay all or part of the interim costs awarded to Lafarge. In its consideration of final costs, the Board may also award additional costs. By indicating these possibilities, the Board is not suggesting what course of action it will take if final costs are requested by any party.

Please do not hesitate to contact the Board if you have any questions. The Board can be reached toll-free by first dialling 310-0000 followed by 780-427-6569 for Valerie Myrmo, Registrar of Appeals, 780-427-7002 for Denise Black, Board Secretary, or 780-427-4179 for Gilbert Van Nes, General Counsel and Settlement Officer. The Board can also be contacted via e-mail at [valerie.myrmo@gov.ab.ca](mailto:valerie.myrmo@gov.ab.ca), [denise.black@gov.ab.ca](mailto:denise.black@gov.ab.ca), or [gilbert.vannes@gov.ab.ca](mailto:gilbert.vannes@gov.ab.ca).

Yours truly,



Gilbert Van Nes  
General Counsel and  
Settlement Officer

The information requested is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.