

ALBERTA
ENVIRONMENTAL APPEAL BOARD

COST DECISION

Date of Hearing: October 7, 8 and 28, 1997
Date of Decision: December 22, 1997

IN THE MATTER OF Sections 84 and 88 of the Environmental Protection and Enhancement Act (S.A. 1992, c. E-13.3 as amended);

-and-

IN THE MATTER OF applications for costs related to an appeal filed by Nick Zon *et al.* with respect to Approval No. 10323-01-00 issued by Mr. David Spink, Director of Air and Water Approvals Division, Alberta Environmental Protection to TransAlta Utilities Corporation for the Wabamun thermal electric power plant.

Cite as: Cost Decision re: Zon *et al.*

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PANEL MEMBERSHIP

Dr. William A. Tilleman, Chair
Dr. Ted W. Best
Dr. Steve E. Hrudehy

HEARING APPEARANCES

Appellants

Mr. Nick Zon represented by Mr. A.O. Ackroyd, Q.C., Mr. Richard Secord; Dr. Balder Von Hohenbalken; Mr. Charles Spilsted; Mr. Stu Chase; Mr. Blair Carmichael; Mr. Dwayne Zon; Mr. Gary Gylytiuk; Ms. Gwen Bailey and the Summer Village of Point Alison, represented by Mr. K.F. Bailey; Ms. Donna Thomas and the Summer Village of Kapasiwin, represented by Mr. Dennis Thomas; Mr. James Paron, represented by Mr. Samuel Kravinchuk; and Mr. David Doull

Other Parties

Dr. E.A. Dale Allen

Mr. David Spink, Director, Air and Water Approvals Division, Mr. Ernie Hui, Mr. Clement Ng, Mr. Randy Dobko, Alberta Environmental Protection, represented by Mr. Stan Rutwind

Mr. Fred Lindsay, Mr. John Watt, Mr. Dwayne Dychkowski, Mr. Mike Leaist, TransAlta Utilities Corporation; and Dr. Stella Swanson and Mr. David Fernet of Golder Associates; represented by Mr. Steven Ferner

I. BACKGROUND

[1] The Environmental Appeal Board (Board) issued a Report and Recommendations regarding Appeal No.'s 97-005 - 97-015 on December 9, 1997. Following the hearing (on October 7, 8 and 28, 1997) the Board received two requests for costs, on November 27, 1997, and on December 9, 1997. Parties were offered the opportunity to comment on the appropriateness of these costs requests. The Board's letter stated:

"Enclosed for your information are letters dated November 27, 1997, from Mr. Richard Secord on behalf of Mr. Nick Zon and the Lake Wabamun Enhancement and Protection Association received by the Board which raise questions as to costs.

Section 20 of the Environmental Appeal Board Regulation 114/93 provides:

- 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.

Subsection 20(2) then sets out certain criteria for the Board to consider. Section 20(3) and (4) then provide:

- (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.

This regulation is based on section 88 of the *Environmental Protection and Enhancement Act* 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. The Board wishes to hear from the parties as to whether:

1. There are any other parties who are intending to seek costs.
2. As to the position of the parties on the enclosed requests for costs.

By seeking the party's positions on these matters, the Board is not opening the proceedings for any other purpose. It is not ruling at this time on whether this

request for costs is either timely or appropriate. The Board will await the submissions from the parties before making any such ruling. Any further requests for costs must be received by the Board by December 10, 1997. Any submissions as to the appropriateness of costs based on the enclosed applications or any that are forwarded by the December 10, 1997, deadline must be received by the Board by December 17, 1997.”

[2] The following is the Board’s decision on costs.

II. CLAIM FOR COSTS

[3] The Board received requests for costs from Mr. Nick Zon, Mr. James Paron and the Lake Wabamun Enhancement and Protection Association (LWEPA). The Director of Environmental Protection (Director) and the Approval Holder (TransAlta Utilities Corporation, hereinafter “TransAlta”) did not ask for costs. Their arguments will be considered later.

[4] The summary of the final cost application is:

The Appellant, Nick Zon:	
Richard Secord (legal fees, disbursements, other charges)	\$22,806.59
Dr. Dale Allen	\$ 642.00
TOTAL	\$23,448.59

The Appellant, James Paron:	
Samuel Kravinchuk (legal fees, disbursements, other charges)	\$16,261.23
TOTAL	\$16,261.23

LWEPA	
Richard Secord (legal fees, disbursements, other charges)	\$ 1,893.71
Edward Hanna	\$ 2,473.38
TOTAL	\$ 4,367.09

GRAND TOTAL APPLICATION	<u>\$44,076.91</u>
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III. SUMMARY OF ARGUMENTS REGARDING COSTS

A. The Department

[5] The Department submitted:

“The position of the Director with respect to the several applications for costs is that:

- a) these applications for costs are premature;
- b) the test for costs is set out in s.20 of the Regulations and as amplified by the Board in Costs Decision re: Bernice Kozdrowski; and
- c) if costs are awarded, such costs should be awarded against the Approval Holder or the Board and not the Director.”¹

[6] With regard to the timeliness of costs applications, the Department stated:

“The issue of costs should be addressed, if at all, after the issuance of the Board’s decision on the merits, when the parties can address more cogently the criteria listed under s.20 of the Regulation.”

B. The Approval Holder: TransAlta Utilities Corporation (TransAlta)

[7] The Approval Holder submits that the Lake Wabamun Environmental Protection Association, Mr. Zon and Mr. Paron should not be awarded costs. The Approval Holder argues that unlike in *Cost Decision re: Bernice Kozdrowski*², none of the claimants for costs in the current appeal have provided evidence to indicate that they required financial assistance to make an adequate

¹ Letter to Board from Department dated December 17, 1997, at pg. 3. [hereinafter Department’s letter].

² *Cost Decision re: Bernice Kozdrowski*, EAB No. 96-059, July 7, 1997. [hereinafter *Kozdrowski*].

submission.³ The approval holder also argues that the submissions of the LWEPA, Mr. Zon, and Mr. Paron did not make a substantial contribution to the appeal, as required pursuant to section 20(f) of the Regulation and as spoken to by the Board in *Kozdrowski*.⁴ The Approval Holder also submits that the costs claimed by these parties were not directly related to the matters contained in the notice of objection and the preparation and presentation of the parties' submissions. By way of summary, the Approval Holder submitted:

“Based on the submissions of Mr. Zon and Mr. Paron, and based on the statements and submissions made by the “appellant panel” throughout the hearing (in opening, direct, cross and closing), it is clear that the lake level was the major issue of concern for the appellants. The lake level issue, as it relates to the operation of the Wabamun plant has been previously dealt with in approval 18528-00-00, and approval separate and apart from the Wabamun approval. The lake level as it relates to the weir is irrelevant to the Wabamun approval.

...

...The approval holder submits that the Director balanced and addressed the concerns raised by the appellants, and the approval holder, when he issued the approval. The appellants did not provide information that would not otherwise be available to the Board. There were no new issues raised in this hearing which were passed over, missed or ignored by the approval holder.”⁵

IV. CONSIDERATIONS OF THE BOARD

A. Statutory Matters

[8] In considering the decision to award final costs, whether in whole or in part, it is important, as always, to consider the purposes of the *Environmental Protection and Enhancement*

³ Letter to the Board from Mr. Steven Ferner, on behalf of TransAlta, dated December 16, 1997. [hereinafter TransAlta Letter]

⁴ *Kozdrowski*, *supra* note 2 at 12.

⁵ TransAlta Letter, *supra* note 3 at 5.

*Act*⁶ (Act) that provides the Board with its jurisdiction:

- 2 The purpose of this 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;
 - ...
 - (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
 - ... [and]
 - (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; (Emphasis added.)
 - ...

[9] Thus, one of the key purposes of the Act is to ensure that the integrity of ecosystems and human health are protected. The mechanism with which to do so, at least at the appeal level, is found in section 84. This section provides appellants with procedural details of the appeal process. The portions of section 84 relevant to the facts of this costs decision are:

- 84 (1) A notice of objection may be submitted to the Board by the following persons in the following circumstances:
- (a) where the Director
 - (i) issues an approval, ...
- a notice of objection may be submitted
- (iv) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's

⁶ S.A. 1992, c. E-13.3 (as amended).

decision,

[10] Related provisions are included in the Act to address issues of awarding and distributing costs. Section 88 of the Act raises these issues in connection with Board proceedings:

88 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.

[11] Sections 18, 19 and 20 of the Environmental Appeal Board Regulation more specifically govern the award of costs. Section 18 provides that:

- 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 objection, and
 - (b) the preparation and presentation of the party's submission.

[12] Section 19 applies to interim costs and, since the Board has decided against the award of interim costs, in this case, it need not be considered here. Section 20 provides for the matters to be considered by the Board when awarding final costs. The relevant portions of section 20 read:

- 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:
- ...
- (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 objection 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. ...

[13] Section 20(2)(h) is particularly relevant to cases where parties are vindicating elements of policy that our legislators have deemed important enough to protect. Anand and Scott have stated:

Where a board is given a broad residual authority to do what it considers necessary to carry into effect the intent of the legislature, it can be argued that it should ensure that there is a balanced representation of views at its public hearings by funding groups which could not otherwise participate in an effective manner.⁷

[14] At this point the Board notes that the legislature has left a discretion to use any of the above factors; not all of the criteria need to be met in order to be successful in a claim for costs.

⁷ R. Anand & I.G. Scott, Q.C. "Financing Public Participation in Environmental Decision Making" (1982) 60 Can. Bar. Rev. 81 at 104, cited from Regulated Industries Program, Consumers' Association of Canada, Costs Awards in Regulatory Proceedings: A Manual for Public Participants (1979) at 20.

B. Judicial v. Quasi-Judicial Forum

[15] In *Cost Decision re: Bernice Kozdrowski*⁸, the Board stated that “when considering the issue of whether or not to award final costs, it is important at the outset to clarify the distinction between the awarding of costs in civil litigation fora as opposed to quasi-judicial hearings.”⁹ The

⁸ *Kozdrowski*, supra note 2, at 7.

⁹ *Ibid.* The Board stated: “This distinction has been addressed by R. Macaulay, Q.C., who states that:

The public interest is an unseen but vital party in virtually all agency deliberations. The public interest may be explicitly set out in the mandating legislation or alternatively implied by it.

Elsewhere [in his book, 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, a 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 represented before it. (Emphasis added.) [R. Macaulay Q.C., *Practice and Procedure Before Administrative Tribunals* (Scarborough: Carswell, 1988) at 8-1.]

Conversely, according to Macaulay, Boards can also rule “in favour” of all parties appearing before it if the public interest in a particular case supports such a determination. Thus, when considering the issue of whether or not this Board should grant final costs, in whole or in part, the outcome of the hearing (in this case, whether or not LES was granted or denied the Approval) should be relevant to an assessment for or against a costs ruling, but only in part. Administrative proceedings are different from judicial proceedings and the Board finds that environmental hearings, such as this case, are technically complex, value based (almost always requiring a combination of persons to speak of values); and they require experts to speak of biophysical issues, and legal counsel to advise on procedural matters. A request for costs may conceivably address compensation in all three areas.

Administrative hearings are different than court hearings. The focus in administrative hearings is on the public interest, not a *lis* between parties. And according to Professor Evans, “[t]he nature of regulatory proceedings is not compatible with the general rule applied in civil litigation that costs follow the event...”. As Justice Urie of the Federal Court of Appeal 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*

(continued...)

Board found its statutory authority to award costs in the administrative sense, rather than in a civil litigation context, and the authority was clear and unambiguous.¹⁰ The Board also found that section 88 of the Act, and the Regulation, allow the Board the ability to grant costs in a variety of situations that may exceed the common law restrictions imposed the courts.¹¹

C. Nature of the Evidence

[16] The substantive issues raised by the Appellants in this appeal were primarily related

⁹(...continued)

interpretation of the word which must necessarily be given in proceedings before regulatory tribunals. (Emphasis added.) [34 C.P.C. 121, 147 D.L.R. (3d) 37, 72 C.P.R. (2d) 162, [1984] 1 F.C. 79, 48 N.R. 197 (Fed. C.A.), affirmed (*sub nom. Bell Canada v. Consumers' Assn. Of Can.*), [1986] 1 S.C.R. 190, 17 Admin. L.R. 205, 9 C.P.R. (3d) 145, 65 N.R., 26 D.L.R. (4th) 57 at 147 D.L.R. pp. 39]

¹⁰ *Ibid.* at 9. The Board stated: "Through the wording of section 88, the Alberta Legislature granted the Board cost awarding powers for any "proceedings". "Proceeding" is defined by Black's Law Dictionary as:

... the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. [*The term*] also refers to administrative proceedings before agencies, tribunals, bureaus, or the like. (Emphasis added.)" [H.C. Black et al., *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 1204.]

¹¹ *Ibid.* The Board stated: "Since hearings before the Board do not produce judicial winners and losers, the Board does not expect to be bound by the general principle that the "loser pays", as outlined in *Reese*. Even if the Board was subject to the principle that the winner is entitled to costs, the results in the LES case do not suggest that the Appellants were in result the "losers" and LES the "winners". The original Approval, after all, has been varied, following essentially a *de novo* hearing, not a record review. The Board wishes to stress that deciding "who won" is less important than assessing and balancing the contribution of the parties so that the evidence and arguments presented to the Board are not skewed. Our preference is to have articulate, succinct, presentations by both expert and lay spokespersons to appear before the Board and advance the public interest for both environmental protection and economic growth in reference to the decision appealed."

to the impact of TransAlta's Wabamun power plant's thermal input on aquatic weeds in Lake Wabamun and the lake level. The Appellants also raised issues related to TransAlta's impact on air quality, and in particular, to the deposition of a "black soot" substance on Mr. Nick Zon's property, winter ice and water quality (with respect to chemistry and effects on fish) in Lake Wabamun. Mr. Richard Secord, on behalf of Mr. Nick Zon, also questioned the adequacy of the approval process undertaken by the Department, and raised the issue of whether emission charges would be an appropriate regulatory tool to use in TransAlta's Approval.

[17] During the course of the hearing, evidence was presented by all parties that dealt with the impact of TransAlta's thermal input on lake level, aquatic weed distribution and biomass, lake temperature, water chemistry, effects on fish, and winter ice. Some of this evidence, particularly that related to the interplay between thermal input, aquatic weeds, and lake level was drawn from studies conducted 20 years ago, contained incomplete data sets, and could not be relied upon with confidence. The Appellants formed a panel for the purposes of presenting their submissions at the hearing, prepared written submissions, and presented evidence in the form of photographs and graphs to illustrate their concerns regarding increased weediness and decreasing lake levels associated in part from a breach in the weir, and in part from TransAlta's impacts on the lake. The Approval holder, TransAlta, presented a panel at the hearing, led evidence in the form of a risk assessment report prepared by Golder Associates Limited,¹² and presented two individuals from Golder to explain and answer questions about the report. The Department presented written, and oral evidence to the Board to explain the basis of its decision to grant TransAlta's Approval, the terms of the Approval, and to answer questions regarding the Approval. Significantly, the Director whose decision was appealed appeared at the oral hearing and answered questions and objections without complaint.

¹² This report was submitted by TransAlta to the Department as part of its application for Approval renewal: Golder and Associates Limited, "Report on a Synthesis of Historical Information on the Effects of the TransAlta Utilities Wabamun Lake Power Plant Using a Risk Assessment Approach", dated March 1997.

D. Relevancy, Materiality and Purposes of the Act

[18] Before costs can be awarded, section 20(2)(f) of the Regulation requires that experts make a "substantial contribution" to a hearing and this calls into question the effect of their presentation on section 2 of the Act. As in *Kozdrowski*, almost all presenters in this case made an equal "contribution". But, as the Board stated in *Kozdrowski*:¹³

"something more is required if all parties, witnesses and "experts" that are called upon to participate in a hearing are reimbursed, regardless of the quality of their evidence and its effect on furthering legislative intent. The Board cannot, and will not, reimburse costs for irrelevant evidence. And even if relevant, the evidence must, in our opinion:

- (a) substantially contribute to the hearing;
- (b) directly relate to the matters contained in the notice of appeal; and
- (c) make a significant and noteworthy contribution to the goals of the Act.

Fiscal constraints on all parties require that appeals be resolved in an efficient and effective manner,¹⁴ and one that is fair. For awarding costs, the Board intends to exercise restraint and caution, while at the same time attempt to give effect to the statutory provisions (section 88) providing for cost claims, so that this provision is not an empty gesture to parties that otherwise meet the requirements for financial assistance."

V. ANALYSIS

[19] The Board is not convinced by the Appellants, through their submissions and as required under section 20(2)(e) of the Regulation, that the Appellants required financial assistance to make an *adequate* submission. The Board finds that most of the Appellants made a substantial

¹³ *Kozdrowski*, *supra* note 2 at 12.

¹⁴ See J.M. Evans et al., *Administrative Law: Cases, Text, and Materials* (Toronto: Emond Montgomery Publications Ltd., 1995) at 18-19.

contribution to this appeal, as required by section 20(2)(f) of the Regulation. However, the Board finds that all parties made an equally substantial contribution to this appeal. As the Board stated in *Kozdrowski*, “the success of a claim for costs will depend on the extent to which the Appellant raises significant issues in the public interest that no one else raises and that are tied to goals promoted in section 2 of the Act”¹⁵ In this regard and in this case, the Board finds that all parties to the appeal made an equal and substantial contribution to the hearing. In fact, regarding the issue of public safety, the Board relied more upon the evidence of TransAlta (who elevated the issue of the drownings) and the Department (who agreed with the public safety provision), than the Appellants.

VI. CONCLUSION

[20] As the Board stated in *Kozdrowski*:¹⁶

“Section 88 of the Act, read carefully, allows for a reward of costs without regard for success on the merits. The Board believes that a paramount consideration in ordering costs is whether a party has served the public interest by furthering the goals of the Act and assisting the Board in the interpretation of the Act and Regulation.”

[21] However, in this case and in this regard, the Board finds that all parties contributed to the public interest equally to serving the public interest by furthering the goals of the Act and assisting the Board in the interpretation of the Act and Regulation.

[22] Unlike the *Kozdrowski* case, the Department’s witnesses in this appeal contributed significantly, and represented the public interest on many issues. The Department’s witnesses led evidence regarding, among others: the public interest in investigating alternative control methods for dealing with TransAlta’s thermal input; specific written suggestions for clauses to improve the terms of the Approval in light of the new information gained since issuing the Approval; and, public interest concerns related to the interrelationship between weed control methods and extent and

¹⁵ *Kozdrowski*, *supra* note 2 at 15.

¹⁶ *Ibid.* at 16.

maintenance of fish habitat. The Board is impressed with the evidence of the Director.

[23] The Approval Holder, TransAlta, also contributed significantly and represented the public interest on many issues. TransAlta's witnesses led evidence regarding, among others: safety issues related to winter ice and open water; the desire to ensure the thermal input control option chosen is in the public interest; the issues of weed control, fish habitat and recreational aesthetics; and, TransAlta's current initiative to replace evaporative losses caused by its activities.

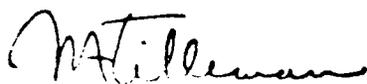
[24] For the reasons stated above, the Board will not award costs.

VII. SUMMARY OF COSTS ALLOWED

[25] The Board awards no costs.

[26] So ordered.

Dated on December 22, 1997, at Edmonton, Alberta.



Dr. William A. Tilleman, Chair



Dr. Ted W. Best



Dr. Steve E. Hruday