Appeal No. 97-032

ALBERTA ENVIRONMENTAL APPEAL BOARD

COST DECISION

Date of Decision: February 5, 1998

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

- and-

IN THE MATTER OF appeals filed by Fay Ash with respect to Approval No.'s 18445-01 issued to the City of Calgary, Calgary Parks and Recreation and 47150 issued to the City of Calgary, Golf Course Operations # 136 by the Director, Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection.

Cite as: Cost Decision re: The City of Calgary (Fay Ash)

PANEL MEMBERSHIP

Dr. William A. Tilleman, Chair
Dr. Ted W. Best
Mr. Ron V. Peiluck

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I. BACKGROUND

[1] In its January 23, 1998 letter, the Environmental Appeal Board (the Board) denied the latest request by Appellant Fay Ash for interim costs. This decision provides the Board's reasons for that denial and is intended to clarify the Board's expectations regarding the adequacy of future applications for interim costs.

[2] These consolidated appeals concern two Approvals, issued by the Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Services, of the City of Calgary's application to use pesticides within thirty horizontal meters of an "open body of water." The Board held a preliminary meeting on October 23, 1997 and, in a November 13, 1997 decision, found that Appellant Fay Ash, one of the two original Appellants, could proceed with the appeal on the issue of the surface water quality effects of the Director's Approvals.

[3] The oral hearing was scheduled for January 26, 1998, but was subsequently rescheduled for February 19, 1998. On November 21, 1997, Appellant Fay Ash wrote to the Board requesting "adequate funding" for various purposes, including "legal representation" and "to call witnesses." Ms. Ash also requested an "assurance" that the Board would not assess costs against her. In its November 25, 1997 letter, the Board declined to provide the requested "assurance" and denied Ms. Ash's request for costs "[a]t this time." The Board stated that Ms. Ash could make another application for interim costs at the hearing, but the Board advised Ms. Ash that, in making that application, she should be "prepared to fully address this issue of costs as outlined in" item 33 of the Board's Rules of Practice and section 19 of the regulations governing Board proceedings.

[4] In a letter dated December 21, 1997, Ms. Ash made a second request for interim funding "to ensure that a well-coordinated and proper appeal is conducted." Ms. Ash indicated that the funding would be used for several purposes, including "hiring legal counsel" and "the procurement of expert witnesses as needed, and to facilitate and coordinate testimony." Ms. Ash provided an "estimate" of $10,000 for costs, but noted that those costs "may increase."

[5] The Board again denied this request in a letter dated December 23, 1997, but "invite[d] all parties to apply for costs at the end of the hearing."

[6] Ms. Ash filed a third request for interim costs in a letter dated January 13, 1998, written by her counsel Mr. O'Ferrall. In that letter, Ms. Ash "accept[ed]" the Board's prior cost decisions with respect to "legal costs." But Ms. Ash sought $5,000 in interim costs to pay a pesticide consultant, Mr. J. Wallace Hamm, to "research and prepare a report on the characteristics and behavior of the subject chemicals." Ms. Ash noted that this amount would not cover the cost of Mr. Hamm's "attending and testifying" at the oral hearing, which additional cost she would be "prepared to address . . . at a later date."

[7] In its January 16, 1998 letter, the Director urged the Board to deny Ms. Ash's third interim funding request on the ground that the criteria for interim funding in section 19 of the regulations governing Board proceedings "have not been met." In a January 19, 1998 letter, the City of Calgary took a similar position, arguing that Ms. Ash's request was not "reasonable or appropriate in the circumstances," because it did not show why Ms. Ash was unable to provide the required funding and did not "appear to satisfy" the regulatory criteria for interim costs, and because it "repeat[ed] an earlier request for interim costs which the Board denied." (The "cc" list on the City's letter does not include the Appellant or her counsel.)

[8] In a January 20, 1998 letter, responding to the Director's objection, Mr. O'Ferrall "question[ed]" the Director's "interest" in the Appellant's cost application and also "question[ed]" which of the regulatory criteria for awarding interim costs she had "not met." Mr. O'Ferrall explained his position on page 2 of that letter as follows:

> Clearly Mr. Hamm's evidence will be of assistance to the Board. I daresay he knows more about pesticides than the approval-holder does. What we seek is to have Mr. Hamm provide the Board with evidence with respect to the effects of the approved pesticides, their persistence, and under what conditions, if any, they can be used. Clearly, Fay Ash does not have the resources to independently retain Mr. Hamm.

The[re] are no other funding resources available.

[9] The Board decided to deny Ms. Ash's third request for interim funding. In order to provide Ms. Ash with notice of this decision as quickly as possible, the Board stated its denial in a letter dated January 23, 1998, but indicated that it would subsequently provide the reasons for the decision and a "clarification of the Board's expectations for any future requests for interim costs...".

II. REASONS FOR THE BOARD'S DENIAL OF INTERIM COSTS

A. The Appellant's Burden of Proving that She is Entitled to Costs

[10] Sections 18(1) & (2) of AR 114/93, the regulations governing the Board's proceedings, authorize any party to apply for an award of either interim or final costs, if the costs are "reasonable" and "directly and primarily related" both to the "matters" addressed in the notice of objection[1] and to the "preparation and presentation" of the party's submission. Section 18 states:

> 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
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> (a) the matters contained in the notice of objection, and
> (b) the preparation and presentation of the party's submission.

Section 19 deals with interim costs:

> 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 has determined all parties to the appeal.

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[1] Where, as here, the Board has decided to consider only a sub-set of the matters referenced in the notice of objection, the application for costs must show that the costs are "directly and primarily" related to that subset.

(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.

(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.

[11] Section 19(2) of the regulations rephrases the latter requirement specifically in the context of interim cost applications, by providing that such applications "shall contain sufficient information to demonstrate . . . that the interim costs are necessary in order to assist the party in effectively preparing and presenting its submission." The "directly and primarily" related standard in section 18(1) for both interim and final cost applications seems to be subsumed by the "necessary" standard in section 19(2) for interim cost applications, because it is hard to imagine how costs could be "necessary" for preparing and presenting a submission if they were not "directly and primarily"

related to the content of the submission.[2]

[12] In sum, the Board will consider granting an award of interim costs only if the applicant demonstrates that the costs are "reasonable" and "necessary" for the preparation and presentation of the applicant's case.[3] There are several aspects of this standard which deserve further explanation, regarding *who* bears the burden of proof and *what* must be proven.

[13] The standards recited above make it clear that the applicant bears the burden of proving that an award of costs is both "reasonable" and "necessary". For this burden to be a meaningful one, the applicant cannot carry it simply by making a request for costs which contains conclusory statements about its "reasonableness" and "necessity." Admissible evidence (e.g. documents, revealing of witnesses, sworn affidavits) must be provided to demonstrate all relevant facts, except those the applicant specifically identifies as being facts of which the Board could take "judicial notice".

[14] The "reasonable" and "necessary" standards together define generally *what* the applicant must prove. The two standards overlap as they relate to how the applicant can prove its underlying case on the merits, although the "necessary" standard seems to be more stringent than the "reasonable" test. In order to satisfy its burden of proving[4] why the costs sought are "necessary", the applicant must provide at least a general outline of its merits case, then describe how the costs sought will enable the applicant to prove that case, and why the applicant is unable to fill that role

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2 The converse is not always true, however, that costs which are "directly and primarily" related to a submission are also "necessary" for the submission.

3 For purposes of this decision, all references to the "necessary" test will include the "directly and primarily related" test.

4 Note that the standard of certainty for disputed facts related to the cost application is preponderance of the evidence.

through reliance on the resources of the other participants in the appeal or through other means.[5] Conclusory assertions of necessity simply will not suffice.

[15] The Board recognizes that proving the absence of other means than a costs award is difficult, because it is proof of a negative proposition. But the Board will not ignore this element altogether. At a minimum, the applicant must show through competent evidence (*i.e.* not conclusory, un-sworn statements made by representatives of the applicant) that she has made reasonable efforts both to identify other means and to make use of them.

[16] Two other factors are implicit in the "reasonable" test. One is that the services or materials for which costs are sought are consistent with the prevailing market rate for those services or materials. The second factor is that the amount of costs sought is actually capable of enabling the applicant to accomplish the tasks for which the costs are sought. If the amount requested is not sufficient, then the applicant must address whether it has additional funding sources or a reasonable plan for obtaining those additional sources or whether the applicant will need to make an additional application for interim costs. The Board wants to be sure that it is not put in a situation where it feels compelled to keep granting unexpected cost applications in order to ensure that its previous cost awards result in completed work.

[17] A simple budget would be very helpful and indeed necessary to demonstrate how the costs sought are likely to serve the desired role if the costs are awarded.

[18] Section 19(3) of the regulations governing the Board's cost awards expressly addresses several of the factual elements discussed above, by providing that the Board "may"

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5 In another appeal, the Board indicated its general practice not to award costs "primarily on the theory that all parties to the appeal should pool resources, donate time and expenses, and consider hiring and sharing experts." *Re: Kozdrowski* (1997), 23 C.E.L.R. (N.S.) 284.

consider several factors in deciding whether to award interim costs.[6]

[19] The regulations do not explicitly require applications for interim costs to address all the factors on this list.[7] But the Board cautions that an applicant's failure to address these factors, as embellished by the discussion above, is at the applicant's risk. As a practical matter, interim cost applicants who do not affirmatively address all factors are less likely to satisfy their mandatory burden of proving that the costs sought are "reasonable" and "necessary" than applicants who cover all the cost bases listed above.

[20] Three additional comments are warranted on the manner in which applications for interim costs are filed. One is that the application for costs should be clearly marked as such and clearly distinguished from other written submissions. An application which is buried in an informal letter which addresses numerous subjects not only makes it hard for the Board to identify but also suggests that the applicant does not consider it an important request.

[21] The second comment is that interim cost applications should be submitted as early as possible in the appeal proceeding unless the applicant has a good reason for filing an application at a later stage.[8] This practice facilitates efforts to plan the proceedings, by giving the prospective

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6 These factors again are:

(a) whether the submission of the party [making the cost application] 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; [and]
(f) any further criteria the Board considers appropriate.

7 *Re: Kozdrowski* (1997), 23 C.E.L.R. (N.S.) 269, 275-276.

8 The Board will be lenient with this requirement if the applicant can show that the delay in filing her application resulted from reasonable efforts to accomplish the desired tasks by obtaining alternate funding or other assistance before seeking an award of costs from the Board.

applicant a clearer sense of how it will prepare for and present its positions on the merits. From the applicant's strategic perspective, last-minute applications are simply less likely to impress the Board as being "necessary" because they give the impression that they were conceived as an after-thought.

[22] Finally, an application for interim costs should include a recommendation with accompanying explanation on whether the Board should award the costs from public funds or direct another party or parties to bear the costs. This recommendation is technically not part of the applicant's burden of proof, but may help demonstrate the fairness of the applicant's request.

B. Has Appellant Fay Ash Satisfied Her Burden of Proof?

[23] The Appellant's latest "application" for an award of interim costs is found in the January 13, 1998 letter from her counsel Mr. O'Ferrall as supplemented by Mr. O'Ferrall's January 20, 1998 letter, referenced in section I above. These letters fail to satisfy Ms. Ash's burden of proving that she is entitled to costs because, as explained below, they contain only a cursory statement of need and fail to address many of the factors discussed above.

[24] For starters, the Appellant's letters do not indicate with sufficient certainty the amount of costs that are sought, although it appears to be $5,000, which the Appellant states is the amount which an expert will "probably . . . [charge] no more than" to prepare a "report" on the "characteristics and behavior" of the "subject chemicals." Without specifically referencing the "reasonable" and "necessary" tests discussed in section A above, the Appellant's first letter makes the conclusory assertion that this expert's report is "required" for Ms. Ash to "properly" present her Appeal.

[25] The Board could speculate from the Appellant's January 13 and 20, 1998 letters and various other filings as to why Mr. Hamm's report is "required" or, in the precise legal terms why it is "reasonable" and "necessary". But that is not the Board's job. The burden is on the Appellant to make that showing; as noted in section I above, that burden cannot be satisfied with mere

conclusory assertions of need.

[26] In satisfying that burden, the Appellant should indicate precisely what aspects of the water quality issue Mr. Hamm's report and accompanying testimony will address. The Appellant should also indicate how Mr. Hamm's report and testimony fits in with the remainder of the Appellant's presentation. Similarly, the Appellant should explain how her overall presentation, including her proposed use of Mr. Hamm's report and testimony, is being coordinated with that of the Bow River Basin Water Council or other like-minded intervenors in order to minimize duplication and maximize use of the participants' available "in-house" resources. Which of the subjects addressed in the Appellant's written submission and the other participants' supporting submissions will Mr. Hamm address and why is his report and testimony necessary to supplement those written presentations?

[27] Mr. Hamm's specific role is not readily inferable to the Board notwithstanding the Alberta court decision[9] and curriculum vitae which accompany the Appellant's application for interim costs. The court decision (page 10) refers to Mr. Hamm's testimony regarding the effects of herbicides on the crops on which they are sprayed. This does not demonstrate Mr. Hamm's expertise with respect to potential surface water quality effects from the application of the specific pesticides challenged in the appeal before this Board. The one paragraph description of Mr. Hamm's "expertise" on his company's CV similarly makes no specific reference to water quality expertise. Mr. Hamm's personal CV refers to his background in "soil science", but it is unclear whether this field includes the surface water quality effects of pesticide "migration" through soils, let alone the water quality effects which may result from migration of pesticides to surface waters from pathways other than soil.

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9 *Lambertus Van Oirschot v. Dow Chemical Canada Inc.*, Reasons for Judgment of the Honourable Mr. Justice MacLean, Alta. Q.B., June 2, 1993 [1993] A.J. No. 480; appeal dismissed June 27, 1995 [1995] A.J. No. 611.

[28] The Board wants to make it clear that this discussion is not intended as a final determination that Mr. Hamm in fact lacks expertise on the relevant water quality issue or otherwise lacks competence or credibility. Quite the opposite. Mr. Hamm may well prove to be an important witness or, in the words of assurance from Mr. O'Ferrall, Mr. Hamm may have general knowledge of pesticides which "goes way beyond that possessed by those in Health Canada . . . and indeed, in some instances, even beyond that possessed by the [pesticide] formulators. . . .". The Board's point here is simply that Mr. Hamm's precise role and expertise have not been sufficiently shown in the Appellant's cost application to warrant an award of public money in advance of the hearing (whether it comes from the Province's or the City's accounts) to pay for Mr. Hamm's services.

[29] Besides failing to show why Mr. Hamm's services are "necessary," the Appellant has failed to address in more than conclusory fashion the elements of the "reasonable" standard discussed in the previous section of this decision. Is $5,000 a reasonable rate for the product which Mr. Hamm is expected to produce? If that amount will only buy Mr. Hamm's report, is there a risk that Mr. Hamm will be unavailable for direct testimony or cross-examination unless additional costs are awarded? What efforts has the Appellant made to secure partial or complete funding from other potential sources, including seeking contributions from the other "environmental" participants?

[30] Additionally, the Board expects a greater showing of the Appellant's own lack of resources; a conclusory statement from her, in our opinion, does not meet the requirement of section 19(3)(c). Without getting into minute details of personal financial history, we do believe her need for costs be elaborated and properly captured in a letter, or preferably, a sworn statement from the Appellant.

[31] Finally, the Board notes that the Appellant's latest request for interim costs came on the heels of the Board's previous denial of the Appellant's two prior requests and, thus, bore the extra burden of overcoming the Board's prior decisions. Given those denials, and the Board's most recent denial, the Appellant must provide considerably more justification for the Board to consider any future interim cost application. This burden is underscored by the imminence of the oral hearing in

this appeal; the Board is reluctant to grant applications for funding which are made on the eve of a hearing because they have the air of a *fait accompli.*

III. CONCLUSION

[32] The Board has previously expressed its objective of promoting "articulate, succinct, presentations by both expert and lay spokespersons" before the Board and of "advanc[ing] the public interest for both environmental protection and economic growth. . . ."[10] The Board has also recognized that participation in its proceedings by members of the public or non-governmental public interest groups will help the Board promote those objectives, and that cost awards can be used to enable those individuals and groups to participate.[11]

[33] The Board's explanation of the Appellant's failure to satisfy her burden of proof in this decision is not intended to negate or diminish those important principles. It is simply intended to show that applicants for interim costs cannot obtain them merely upon request; they must provide sound reasons for the expenditure of the public's money or another party's money on their behalf -- especially in advance of a hearing.

[34] The Board also stresses that this decision is not intended to impose an appeal's worth of effort on interim costs applicants just to prove the "reasonableness" and "necessity" of their applications. That kind of burden would frustrate, rather than promote, the public interest objectives stated above. Nevertheless, the Board will not award interim costs for a witness based upon conclusory, un-sworn statements and indeterminate background documents, neither of which indicate the witness' expertise on the precise issues raised in the appeal and the precise role the

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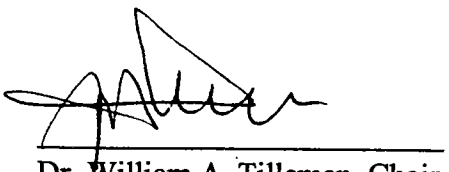
[10] *Re: Kozdrowski* (1997), 23 C.E.L.R. (N.S.) 269, 278.

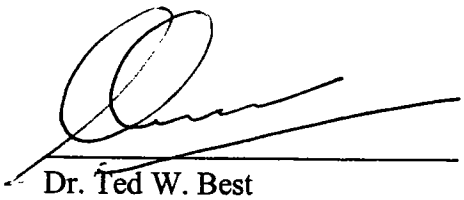
[11] *Ibid.* at 281-283.

witness will play and the relevance or significance of this information to the overall presentation of the Appellant. The Board expects that, rather than imposing an unreasonable burden on the Appellant, these standards of proof could actually facilitate the Appellant's preparation of her own presentation on the merits.

Dated on February 5, 1998, at Edmonton, Alberta.



Dr. William A. Tilleman, Chair



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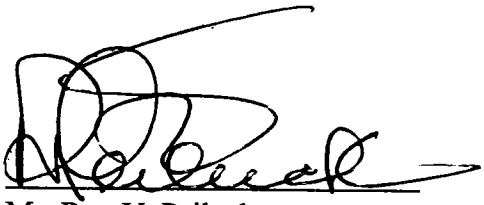

Mr. Ron V. Peiluck