ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – July 4, 2018

IN THE MATTER OF sections 121, 124, and 125 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 98, 211, 213, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an application filed by 830614 Alberta Corporation, for the Public Lands Appeal Board to reconsider its Report and Recommendations regarding an order for a Road Use Agreement with the holders of DLO 990510, All Peace Asphalt Ltd., and the County of Grande Prairie #1.

Cite as: Reconsideration Decision: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and County of Grande Prairie No. 1* (4 July 2018), Appeal No. 16-0026-RD (A.P.L.A.B.).

BEFORE: Mr. Eric McAvity, Q.C., Panel Chair;
Ms. Marian Fluker, Acting Board Chair; and
Dr. Brenda Ballachey, Panel Member.

SUBMISSIONS BY:

Applicant: 830614 Alberta Corporation, represented by Frontier Resource Services Ltd.; and Mr. Sigurd Delblanc, Bryan & Company LLP.

Respondents: All Peace Asphalt Ltd.; and County of Grande Prairie No. 1.

EXECUTIVE SUMMARY

830614 Alberta Corporation (the Applicant) submitted a Notice of Appeal to the Public Lands Appeal Board (the Board) seeking an order to use the road located on a Department Licence of Occupation (the DLO) held by All Peace Asphalt Ltd. and the County of Grande Prairie No. 1 (collectively, the Respondents). The Board held a written hearing and made its Report and Recommendations (the Report) to the Minister. The Minister accepted the Board's recommendations.

The Applicant subsequently applied to the Board for a reconsideration of the Report, introducing new facts it claimed were not reasonably available at the time of the hearing, and alleging the Board had made a material error that could reasonably change the outcome of the Board's decision. The Board requested and received written submissions from the Applicant and Respondents.

The Board found the Applicant presented new facts that were not reasonably available at the time of the hearing and which were significant enough to potentially have a bearing on the outcome of the Board's decision. The Board also found the Report may have included a material error, which could have unfairly prejudiced the Applicant.

As a result of its findings, the Board will undertake a reconsideration and will hold a new hearing.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") on the application by 830614 Alberta Corporation (the "Applicant"), for the Board to reconsider and vary its Report and Recommendations (the "Report") to the Minister of Alberta Environment and Parks (the "Minister") in Appeal No. 16-0026.[1]

II. BACKGROUND

[2] The Board received a Notice of Appeal from the Applicant on July 28, 2016, requesting an order allowing it to use the road built on Department Licence of Occupation 990510 (the "DLO") held by All Peace Asphalt Ltd. ("All Peace") and the County of Grande Prairie No. 1 (the "County") (collectively, the "Respondents"). The Board held a written hearing October 6, 2017, and issued its Report November 3, 2017.

[3] The Report recommended the Applicant pay the Respondents annual compensation calculated as follows:

(a) $1,000.00, representing a $500.00 per kilometre Access Fee;

(b) one-third of the actual maintenance costs for the DLO;

(c) $1,500.00 Gates Fee; and

(d) $1.00 per cubic yard fee for all materials hauled by the Applicant on the DLO.[2]

[4] The Minister accepted the Board's Report and issued Ministerial Order 57/2017 on November 14, 2017.

[5] On December 21, 2017, the Board received a request from the Applicant to reconsider the Report. The Board received submissions from the Applicant and the Respondents (collectively, the "Parties") on the question of whether the Board should reconsider its Report.

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1 See: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (3 November 2017), Appeal No. 16-0026 (APLAB).

2 See: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (3 November 2017), Appeal No. 16-0026 (APLAB), at pages 13-15.

III. RECONSIDERATION PROCEDURE

[6] The authority to reconsider a report made by the Board is found in section 125 of the *Public Lands Act* (the "Act"),[3] which states: "The appeal body may reconsider, vary or revoke any report made by it."

[7] Under the authority of section 123(9) of the Act, the Board has developed rules and procedures for dealing with reconsideration requests. These rules and procedures are found in the Board's Interim Appeals Procedure Rules for Complex Appeals. The relevant rules are 26.5 and 26.6.

[8] Rule 26.5 states:

> "The Board will not exercise its powers under section 125 of the Public Lands Act in the absence of the following:
>
> (a) New facts, evidence or case-law that was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
>
> (b) A procedural defect during the hearing which prejudiced one or both of the parties,
>
> (c) Material errors that could reasonably change the outcome of the decision, or
>
> (d) Any other circumstance the Board considers reasonable and substantive."

[9] Rule 26.6 states:

> "The following are not sufficient grounds for a review:
>
> (a) disagreement with a decision;
>
> (b) failure to provide related case authority; or
>
> (c) present available evidence."

IV. ISSUE

[10] The Board received submissions from the Parties on the following issue:

> Does the reconsideration request meet the requirements of Rule 26.5, and should the Board reconsider?

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3 *Public Lands Act*, R.S.A. 2000, c. P-40.

V. SUBMISSIONS

A. Applicant

[11] The Applicant submitted the Board did not have sufficient information to consider the implications of its decision and therefore erred in determining the compensation to be paid to All Peace.

[12] The Applicant argued the Board made a material error in its recommendation that compensation be awarded retroactively to "the date the applicant first had access to the DLO and the SML's." The Applicant submitted this error would result in the Applicant compensating All Peace for a period where the Applicant used the DLO, but All Peace was not the licence holder.

[13] The Applicant stated the Board's recommendation in its Report of a one dollar per cubic yard fee for all materials hauled by the Applicant on the DLO creates a business opportunity for All Peace as the amount the Applicant would pay to All Peace substantially exceeds All Peace's initial investment of $75,000.00 for a 1.14 kilometre of road. The Applicant submitted the estimated volume of gravel remaining in the Applicant's SML is 3,264,000 tons, which could result in the Applicant paying All Peace $3.2 million in compensation.

[14] The Applicant submitted the one dollar per cubic yard fee recommended by the Board is based on speculative cases and misrepresentation. The Applicant submitted, as an example, the fees in the Wapiti Mainline case were misrepresented to the Board, and the actual agreement showed a flat fee of $1260.50 per kilometre for a 5.95 kilometre road for a total of $7,500.00.

[15] The Applicant stated under the terms recommended in the Report, the Applicant will have to continue to pay to use the DLO until All Peace or the Applicant has no more gravel in their respective SMLs. The Applicant argued these terms create a situation where there is no incentive for All Peace to extract any gravel from its SML.

[16] The Applicant submitted All Peace's submission argued use of the DLO by the Applicant would result in an increased cost in the cycle time of the truck haul of $1.93 to $3.86 per ton based on 15 minute and 30 minute increases in cycle time; however, the Applicant alleged All Peace provided no background information to justify the amounts.

[17] The Applicant argued, in a worst-case scenario where simultaneous calls cannot be avoided, the cost to the cycle time of the truck haul would be $0.75 per ton. The Applicant suggested proper communication regarding the scheduling of truck traffic between the DLO users would avoid simultaneous calls and result in lower costs. The Applicant noted the County identified the increased cost to the cycle time of the truck haul to be $0.25 per ton.

[18] The Applicant submitted the Board erred in the following manner:

(a) the volume of gravel the Applicant would be compensating All Peace for was not considered;

(b) the decision may set a precedent for the industry;

(c) the commercial realities of the recommendations were not considered;

(d) evidence the Applicant had entered into a road use agreement with the County, another DLO holder, was not considered; and

(e) reasons were not provided as to why the Board recommended compensation based on the Applicant's hauling volumes.

[19] The Applicant submitted the Board's Report is contrary to the purpose of the Act, the purpose of granting DLO's, and to public policy, and the Board does not have jurisdiction to go beyond, or make a decision contrary to, the legislative intent of the Act.

B. All Peace

[20] All Peace argued the Applicant submitted additional information it should have included in its submission for the hearing, and the only reason the Applicant is submitting this information now is the Applicant disagrees with the Minister's decision.

[21] All Peace stated the Applicant chose to not follow the appeal process and submit information by the dates requested and, therefore, the Board should ignore any additional information or arguments by the Applicant.

[22] All Peace submitted the Applicant is misconstruing conversion factors between cubic yards and tons to favour their argument.

C. County of Grande Prairie

[23] The County submitted if the road use fee schedules cost exceed the cost to build an alternative access for one party, public land will be affected.

VI. ANALYSIS

[24] The Board's mandate is to provide the best possible recommendations to the Minister to assist her in making her decision. In order to do so, the Board requires the parties to an appeal to be open in bringing forth information. In this appeal, it seemed the Parties were reluctant to provide information they considered could be used against them in a competitive industry, or the Parties did not have information available when requested by the Board.

[25] As explained above, in order to successfully apply for a reconsideration, the Applicant must demonstrate that one of the following exists:

(a) new facts, evidence, or case-law that was not reasonably available at the time of the hearing. The new facts, evidence, or case-law must be significant enough to have a bearing on the outcome of the decision;

(b) a procedural defect during the hearing, which prejudiced one or both of the parties;

(c) material errors that could reasonably change the outcome of the decision; or

(d) any other circumstance the Board considers reasonable and substantive.

[26] After reviewing the submissions from the Parties, the Board found the Applicant provided new information regarding the volume of gravel, which may have not been readily available at the time of the hearing. Such information could change the result of the Board's findings and its Report to the Minister.

[27] The Applicant raised the issue of retroactivity, alleging the Board made a material error in the wording of the Report, Appendix B, paragraph 7, which states:

> "All of the Fees described in paragraph 3 are to be calculated from the date the Company first accessed the DLO. Any Fees that have become payable prior to the date of this Order are due within 60 days of the date of this Order." (Emphasis added.)

The Applicant submitted the wording of paragraph 7 may establish the date from which the Applicant must pay fees for use of the DLO as being before the Respondents were assigned the DLO. As such, this could be viewed as a material error and supports the Applicant's request for a reconsideration of the Report.

[28] Therefore, the Board will undertake a reconsideration of the Report and will hear arguments from the Parties. However, to ensure the Board hears all of the arguments of the Parties the Board would like to hold an oral hearing. The Parties will be given the opportunity to provide full and complete evidence as to what terms and conditions should be included in the road use agreement. The evidence needs to be substantiated with reasonable explanations and documents to support the arguments presented.

VII. CONCLUSION

[29] Pursuant to Rule 26.5 of the Board's Interim Appeal Rules and Procedures for Complex Appeals, the Board will undertake a reconsideration of its Report as there are new facts and a possible material error during the hearing that could reasonably change the outcome of the decision.

Dated on July 4, 2018, at Edmonton, Alberta.

"*original signed by*"
Eric McAvity, Q.C.
Panel Chair

"*original signed by*"
Marian Fluker
Acting Board Chair

"*original signed by*"
Dr. Brenda Ballachey
Panel Member