
ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision: February 11, 2020

IN THE MATTER OF sections 122 and 123 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 98, 225, 228, and 232 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 for Appeal No. 16-0026, an appeal filed by 830614 Alberta Corporation for an order for a Road Use Agreement with the holders of DLO 990510, All Peace Asphalt Ltd. and the County of Grande Prairie No. 1.

Cite as: Costs Decision: *830614 Alberta Corporation v. All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (11 February 2020), Appeal No. 16-0026-CD (A.P.L.A.B.), 2020 ABPLAB 1.

BEFORE:

Ms. Marian Fluker, Panel Chair;
Ms. Anjum Mullick, Board Member; and
Dr. Brenda Ballachey, Board Member.

SUBMISSIONS BY:

Applicant: 830614 Alberta Corporation, represented by
Mr. Sigurd Delblanc, Bryan & Company LLP.

Respondents: All Peace Asphalt Ltd., represented by Mr.
Patrice Brideau, Stringam LLP; and County of
Grande Prairie No. 1, represented by Mr. Dale
Van Volkingburgh, Director of Public Works,
County of Grande Prairie No. 1.

EXECUTIVE SUMMARY

All Peace Asphalt Ltd. (All Peace) and the County of Grande Prairie No. 1 (the County) (collectively, the Respondents) are joint holders of a Department Licence of Occupation (the DLO). The DLO is used to access Surface Material Leases (SML) held individually by All Peace and the County.

830614 Alberta Corporation (the Applicant) is the holder of an SML adjacent to the County's SML. The Applicant was not able to reach an agreement with All Peace to use the DLO to access the Applicant's SML. The Applicant appealed to the Board requesting access to the DLO.

The Board provided its Report and Recommendations (the 2017 Report) to the Minister of Environment and Parks, who issued a Ministerial Order authorizing the Applicant to use the road on the Respondents' DLO. The Applicant subsequently requested the Board reconsider its 2017 Report. The Board agreed to reconsider the 2017 Report.

The Board held an oral hearing reconsidering the 2017 Report and recommended the Minister order the Respondents grant the Applicant access to the DLO according to the revised terms and conditions of a new Ministerial Order.

After the Minister issued the revised Road Use Order, All Peace and the Applicant filed claims for costs. The Board dismissed the Applicant's costs claim for being filed late. The Board considered All Peace's costs claim and determined All Peace had not met the criteria for a costs award. The Board dismissed All Peace's costs claim.

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I. INTRODUCTION

[1] This is the decision and reasons of the Public Lands Appeal Board (the “Board”) regarding the costs applications arising from a hearing held by the Board concerning an application filed by 830614 Alberta Corporation (the “Applicant”) for a reconsideration of the Board’s earlier Report and Recommendations in PLAB Appeal No. 16-0026 (the “2017 Report”).¹

II. BACKGROUND

[2] The Applicant is the holder of Surface Material Lease the Applicant’s SML (the “Applicant’s SML”), located on public lands south of the city of Grande Prairie, Alberta, in the Municipal District of Grande Prairie No. 1.

[3] All Peace Asphalt Ltd. (“All Peace”) is the holder of Surface Material Lease 950005 (the “All Peace SML”). The County of Grande Prairie No. 1 (the “County”) is the holder of Surface Material Lease 900016 (the “County SML”), which is adjacent to the south and east with the All Peace SML, and adjacent to the west with the Applicant’s SML. All Peace and the County (the “Respondents”) are joint holders of Department Licence of Occupation DLO 990510 (the “DLO”) and users of a road built on the DLO.

[4] The Applicant sought access to the road on the DLO to haul sand and gravel from the Applicant’s SML. The County and the Applicant agreed on terms of an access arrangement. Negotiations between the Applicant and All Peace were unsuccessful. On July 29, 2016, the Applicant filed a Notice of Appeal with the Board seeking an order from the Minister of Environment and Parks (the “Minister”), allowing access to the DLO.

[5] The Board held a written hearing on October 6, 2017 and provided 2017 Report to the Minister on November 3, 2017. The Minister accepted the 2017 Report and issued Ministerial Order 57/2017 (the “2017 Order”) on November 14, 2017.

[6] On December 21, 2017, the Board received a request from the Applicant to reconsider the 2017 Report. The Board received submissions from the Applicant and the

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 (ABPLAB).

Respondents (collectively, the “Parties”) on the question of whether the Board should reconsider the 2017 Report. On July 4, 2018, the Board determined there were sufficient reasons to justify a reconsideration of the 2017 Report.²

[7] The Board held an oral hearing on March 5, 2019, in Edmonton, with written closing submissions provided by the Parties between March 15, 2019 and April 4, 2019. In its closing submission, All Peace reserved its right to apply for costs. The Applicant and the County did not reserve the right to apply for costs. After the oral hearing, the Board requested written submissions regarding some follow-up questions. The Board received the written submissions and closed the hearing on May 16, 2019.

[8] Following the hearing, the Board recommended the Applicant be allowed access to the DLO on certain terms and conditions. The Minister accepted the Board’s Report and Recommendations and issued Ministerial Order 29/2019 on June 20, 2019.³

[9] On June 27, 2019, the Board advised the Parties that All Peace’s application for costs was due by July 11, 2019, with responses from the Applicant and the County due by July 25, 2019.

[10] On July 11, 2019, All Peace filed a costs application for \$13,849.31 for “personal costs” and \$36,328.40 for legal costs.

[11] On July 11, 2019, the Board acknowledged receipt of All Peace’s costs application, and reminded the Applicant and the County their response submissions were due by July 25, 2019. On July 25, 2019, the Board asked the Applicant and the County if they would be responding to All Peace’s costs application. On July 26, 2019, the Board again asked the Applicant and County if they would be providing response submissions. The County responded on the same day and advised the Board it would not be submitting a costs application.

[12] On July 29, 2019, the Applicant’s legal counsel advised the Board they had only recently been able to contact their client to receive instructions and would be providing submissions the next day.

² See: 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.), 2018 ABPLAB 19.

³ *830614 Alberta Corporation v. All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (14 June 2019), Appeal No. 16-0026-R2 (A.P.L.A.B.), 2019 ABPLAB 12.

[13] On July 29, 2019, All Peace wrote the Board opposing any extension for the Applicant to file a response submission.

[14] On July 30, 2019, the Applicant filed a response submission and costs application for \$26,185.73 for legal costs.

[15] On August 2, 2019, the Board dismissed the Applicant's costs application for being filed after the deadline specified by the Board. The Board noted All Peace expressed concerns regarding the late filing of the Applicant's response submission. The Board stated it would address the concerns in its final decision on costs.

[16] The following is the Board's consideration of All Peace's costs application.

III. SUBMISSIONS

A. All Peace

[17] All Peace submitted it acted reasonably in the hearing and contributed to a better understanding of the issues before the Board. All Peace stated its evidence was not unduly repetitive and was relevant to the issues.

[18] All Peace said the hearing required significant preparation, which included additional submissions requested by the Board.

[19] All Peace submitted its expenses to prepare for and attend the hearing included:

- (a) \$949.31 in travel expenses; and
- (b) \$12,900.00 for 86 hours for two professional engineers at an hourly rate of \$150.00.

The total personal costs claimed by All Peace was \$13,849.31.

[20] All Peace also claimed legal costs of \$36,328.40. Legal services claimed included:

- (a) reviewing materials;
- (b) preparing and filing written submissions;
- (c) attending the hearing;
- (d) presenting direct evidence;
- (e) cross-examination of witnesses adverse in interest; and
- (f) delivery of oral argument.

[21] All Peace stated the experience of legal counsel, the complexity of the issues, and the extensive submissions required, warranted the legal costs.

[22] All Peace submitted its legal counsel acted responsibly and cooperatively in the hearing, contributed to a better understanding of the issues before the Board, and assisted the Board in keeping to the schedule.

[23] All Peace said it refrained from entering its SML until the Board said it could, and it complied with the terms of the 2017 Order. All Peace submitted the Applicant did not comply with the 2017 Order.

B. Applicant

[24] On July 30, 2019, the Applicant filed a costs application with the Board seeking \$26,185.73 for legal costs. The Applicant submitted it was entitled to costs as it was the successful party in the appeal. The Applicant stated its costs application and response submission were late due to difficulties in communication between the Applicant and its legal counsel.

C. County of Grande Prairie

[25] The County declined to make a costs submission, stating:

“The county will be sharing in the cost with all parties for the road authority agreement as part of the ministerial order.”⁴

IV. THE LEGAL BASIS FOR COSTS

[26] The Board’s authority to award costs is found in section 123(11) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “PLA”), which provides:

“The appeal body [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.”

This section gives the Board broad discretion in awarding costs.

[27] Mr. Justice Fraser of the Court of Queen’s Bench, in *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*,⁵ commented on the authority of the Environmental

⁴ Email from Mr. Dale Van Volkingburgh, Director of Public Works, County of Grande Prairie, July 26, 2019.

⁵ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293 (CanLII).

Appeals Board to grant costs under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”). Justice Fraser referred to what is now section 96 of EPEA,⁶ which is very similar to section 123(11) of the PLA:

“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.”⁷

[28] 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....’” (Emphasis in the original.)⁸

[29] The factors to be considered by the Board in determining whether to award costs are set out in section 232(4) of the *Public Lands Administration Regulation* (“PLAR”) as follows:

“In deciding whether to award costs, the amount of any costs and the party by whom costs are to be paid, the panel may consider

- (a) the extent, if any, to which the appeal succeeded,
- (b) the value of the statutory interest, right or privilege at issue in the appeal,
- (c) the importance of the issues,
- (d) the complexity of the appeal,
- (e) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding,
- (f) a party’s denial of or refusal to admit anything that should have been admitted,
- (g) whether any step or stage in the proceedings was
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution,
- (h) whether a party commenced separate proceedings in a court or a tribunal under another enactment respecting matters that should have been dealt with in one proceeding, and

⁶ Section 96 of EPEA 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.”

⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293 (CanLII), at paragraph 23.

⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293 (CanLII), at paragraphs 31 and 32.

- (i) any other matter the panel considers relevant to the question of costs.”

[30] As part of its determination of a costs application, the Board considers the following to be matters “relevant to the question of costs” as per section 232(4)(i):

- (a) whether the parties presented valuable evidence, arguments, witnesses or experts, that substantially contributed to the hearing on issues directly related to the matters contained in the Notice of Appeal;
- (b) whether the party’s overall participation in the appeal process assisted the Board in providing the best recommendations possible to the Minister; and
- (c) whether the awarding of costs would be consistent with the purposes of the PLA and PLAR, which AEP describes in the document *History of Public Lands in Alberta*, as “the governing legislation for public land in Alberta” allowing “government to ensure the activities happening on public land are sustainable.”⁹

[31] The Board has the discretion to determine which of the criteria listed in section 232(4) of PLAR are relevant to a particular costs application. The Board will assess the relative weight to be given to each criterion, depending on the specific circumstances of each appeal.

[32] The Board will consider awarding costs when the amounts claimed are directly and primarily related to the preparation and presentation of the party’s submission. A costs application must contain a thorough breakdown of the amount claimed. Where relevant, this may include the number of hours spent in preparation and presentation of the party’s submission and the hourly rate of any legal representation or expert witnesses involved. A costs application must also include copies of receipts for other expenses. The Board is disinclined to award costs related to travel and accommodation or disbursements. Depending on the circumstances, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses or lost time from work.

⁹ See *History of Public Lands in Alberta*, Government of Alberta, 2017, at page 2:

“The *Public Lands Act* is the governing legislation for public land in Alberta. The associated Public Lands Administration Regulation (PLAR) allows government to better manage our increasingly busy landscape to ensure the activities happening on public land are sustainable.... The Government of Alberta is responsible for managing public land for the benefit of all Albertans, both now and in the future. Public land management focuses on establishing and sustaining an optimum balance of use, conservation and development of resources, in harmony with the values and needs of Albertans. This stewardship responsibility requires public land managers to ensure that the quantity and quality of public land resources are maintained or enhanced.... Administration and management of public lands involve determining the best and most appropriate use for the land, using the most appropriate instrument for authorizing land use and ensuring that the land is used in a proper manner.”

[33] Section 232(5) of PLAR grants the Board the discretion to determine how to allocate the costs. It reads:

“In awarding costs, the panel may

- (a) award all, part, or none of the costs to a party, or
- (b) award costs to a party respecting a particular matter or part of an appeal while refusing to award costs to that party, or awarding costs to another party, respecting another matter or part of the appeal,

and may direct whether or not any costs are to be set off against other amounts owing by or to a party.”

[34] The Board notes section 232(3) of PLAR prohibits any costs award against “the Crown, a Minister, a director, an officer or any employee or official of the Government of Alberta.”¹⁰

[35] The Board generally accepts the starting point for costs incurred in an appeal is that costs are the responsibility of the individual parties.

V. ANALYSIS

A. Applicant’s Costs Application and Response Submission

[36] In the Board’s March 7, 2019 letter to the Parties, the Board requested any reservation of the right to apply for costs be included in the written closing submissions, which were due between March 15, 2019 and April 4, 2019. The Board wrote:

“If Mr. Delblanc, Mr. Brideau or Mr. Van Volkingburgh will be reserving their right to make an application for costs, they should indicate so in their closing comments. It should be noted, that under section 232(3) of the Regulation, no direction for costs may be made against the Crown, the Minister of Environment and Parks, the Director, or any employee or official of the Government of Alberta. By requesting the parties state their intentions, the Board is not implying that costs will be awarded. The Board will establish a submission process to address any cost applications after the Minister has issued the Report and Recommendations and Ministerial Order in this matter.” (Emphasis added.)

¹⁰ Section 232(3) provides: “No direction for the payment of costs may be made against the Crown, a Minister, a director, an officer or any employee or official of the Government of Alberta.”

[37] On March 25, 2019, All Peace, in its closing submission, stated, “[a]s for costs, APA [All Peace] wishes to reserve its submissions regarding same until this Board issues its recommendation.”¹¹

[38] The Applicant’s final closing submission was received on April 4, 2019. The Applicant did not reserve the right to apply for costs in its closing submissions.

[39] The Board provided the Applicant with All Peace’s costs application on July 11, 2019, and advised the Applicant a response submission was due July 25, 2019. On July 25, 2019, and again on July 26, 2019, the Board wrote to the Applicant and asked if it would be replying to All Peace’s costs application. The Board received a response from the Applicant’s legal counsel on July 29, 2019, advising they had not been able to contact their client until that day and would be providing submissions the following day.

[40] All Peace sent a letter to the Board on July 29, 2019, objecting to any extension of the Applicant’s time to file submissions. All Peace stated the Applicant was advised on June 27, 2019,¹² that a response submission was due by July 25, 2019.

[41] On July 30, 2019, the Applicant provided its response submission and an application for costs. The Applicant’s legal counsel apologized and stated the reason for the lateness was difficulty communicating with the Applicant.

[42] The Board understands communication issues may arise between legal counsel and a client. However, the Board notes the Applicant was informed on March, 7, 2019, that it needed to reserve its right to apply for costs at the conclusion of the hearing. The Applicant did not reserve its right to apply for costs, but sent in a costs application on July 30, 2019.

[43] As the Applicant did not reserve its right to apply for costs in its closing submissions, the Board dismisses the Applicant’s costs application.

[44] The Board notes it informed the Applicant on July 11, 2019, that a response to All Peace’s costs application would be due July 25, 2019. The Board considers 14 days sufficient time to prepare a written response submission. The Applicant did not request an extension to file the submission, and the Board did not grant an extension. As a result, the Board will not

¹¹ All Peace’s Closing Response, March 25, 2019, at paragraph 29.

¹² All Peace is incorrect that the date the Applicant was informed was June 27, 2019. The correct date is July 11, 2019.

consider the Applicant's response submission as it was five days late. The Board notes that even if it had considered the Applicant's response submission, it would not have changed the Board's decision whether costs should be awarded to All Peace.

B. All Peace's Costs Application

[45] The issue before the Board is whether to award costs to All Peace.

[46] The Board has the authority to award final costs after the completion of the hearing, when the Board considers it appropriate, based on the evidence and arguments presented at the hearing and the factors and principles outlined above.

[47] The Board does not award costs to provide a financial benefit to a party, and costs are not assessed against a party as a penalty unless that party acted in a vexatious manner during the appeal process.

[48] Not every criterion in section 232(4) of PLAR is relevant to every costs application. The Board reviewed each of the criteria and considered the most relevant, taking into account the facts of the appeal.

[49] All Peace claimed \$13,849.31 in personal costs, which was broken down as \$949.31 in travel expenses and \$12,900.00 for 86 hours for two professional engineers at an hourly rate of \$150.00. All Peace also claimed \$36,328.40 for legal costs.

[50] The Board found the participation of the County to be most helpful in determining the history of the lease and the current situation. Unfortunately, the Board found both the Applicant and All Peace to be less helpful. The Board, in its July 4, 2018 Reconsideration Decision, wrote:

“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.”¹³

¹³ 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.), 2018 ABPLAB 9, at paragraph 24.

[51] A reconsideration of the Board's decision might not have been necessary if the Applicant and All Peace had been more cooperative and forthcoming with information in the October 2017 hearing. While the Applicant and All Peace were more helpful in the reconsideration hearing, the Board found they were more concerned about gaining a competitive advantage than working with the Board to resolve the appeal.

[52] When the Board attempted to set a hearing date, All Peace appeared to be less than fully cooperative. The Board provided the parties with several opportunities between July and October 2018 to provide their schedules for a mutually acceptable hearing date. The Board was unable to find a common date and wrote the Parties again on October 22, 2018, requesting available dates between March 4 and 8, 2019. The Board did not receive a response from All Peace, and on November 26, 2018, the Board set the hearing date for March 5, 2019.

[53] At the hearing the Board found the submissions and evidence of the Applicant and All Peace to be of comparable value. All Peace stated its evidence was not unduly repetitive and was relevant to the issues. The Board would expect this from any party as a minimum standard. It is not sufficient reason alone to award costs.

[54] All Peace stated the legal costs were justified due to the appeal's complexity and the "extensive" submissions required by the Board. The Board has heard other road use appeals and did not find this appeal to be unduly complex. How extensive the submissions are is solely the discretion of the parties. The appeal could have been less onerous if the Parties had been more willing to provide the information necessary for the Board to make the best possible recommendations.

[55] The Board is not inclined to award personal costs. The Board considers travel expenses to be the cost of participating in the appeal process and, therefore, will not award costs for the witnesses appearing on behalf of All Peace at the hearing.

[56] All Peace claimed its representatives were entitled to costs of \$12,900.00 as professional engineers for attending and preparing for the hearing. The Board notes All Peace did not claim in its submissions or evidence that its representatives were engineers. All Peace cannot now in its costs application expect its witnesses to be recognized and reimbursed as engineers. All Peace did not provide the Board with professionally certified engineering reports or opinions. The Board will not award any of All Peace's claim for personal costs.

[57] Although under section 232(4)(a) of PLAR the Board may consider who was the successful party in an appeal, in most appeals, such as this one, no party is completely successful. All Peace did not want the Applicant to have any access to the DLO, but if there was access, then All Peace specified the compensation it sought. The Board's recommendations, as accepted by the Minister, provided access to the DLO and compensation at a lesser rate than sought by All Peace. All Peace cannot claim it achieved higher success than the Applicant.

[58] All Peace submitted its legal counsel acted responsibly, cooperatively, kept on schedule, and contributed to a better understanding of the issues before the Board. The Board would expect no less from competent legal counsel and was grateful for both All Peace's and the Applicant's legal representatives. By ensuring their clients remained focused on the issues, legal counsel for both All Peace and the Applicant assisted the Board in the hearing process. The Board found the contributions of legal counsel for All Peace and the Applicant to be of comparable value. Therefore, the Board will not award legal costs to All Peace.

VI. DECISION

[59] For the preceding reasons and under section 232 of PLAR, the Board finds it would not be appropriate to award costs to All Peace.

[60] The Board notes that even if it had considered the Applicant's costs application and response submission, which was received late, the Board's decision would not have changed. The Board found the Parties' participation and contribution to the hearing were of no greater value than any other party to the hearing, and the reconsideration was a result of the Parties being less than forthcoming in the first hearing.

[61] The Board could not consider the Applicant's costs application as the Applicant did not reserve its right to ask for costs.

[62] The Board denies the costs application of All Peace.

Dated on February 11, 2020, at Edmonton, Alberta.

“original signed by”

Marian Fluker
Panel Chair

“original signed by”

Anjum Mullick
Board Member

“original signed by”

Brenda Ballachey
Board Member