
ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision: July 3, 2019

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 appeal filed by Tim Kalinski with respect to the deemed rejection by the Director, Provincial Approvals Section, Alberta Environment and Parks, of an application for access to Department Licence of Occupation DLO 111469, held by Alvin Bancarz.

Cite as: Costs Decision: *Kalinski v. Director, Provincial Approvals Section, Alberta Environment and Parks*, re: *Bancarz* (3 July 2019), Appeal No. 17-0028-CD (A.P.L.A.B.), 2019 APLAB 14.

BEFORE:

Ms. Marian Fluker, Panel Chair;
Ms. Meg Barker, Board Member; and
Ms. Anjum Mullick, Board Member.

SUBMISSIONS BY:

Applicant: Mr. Tim Kalinski, represented by Mr. Thomas Owen, Owen Law.

Respondent: Mr. Alvin Bancarz, represented by Mr. Brent Mielke, MLT Aikins LLP.

EXECUTIVE SUMMARY

Mr. Tim Kalinski sought access along a portion of a Department Licence of Occupation (DLO) held by Mr. Alvin Bancarz. When Mr. Kalinski and Mr. Bancarz (the Parties) could not agree on terms of access, Mr. Kalinski filed a Notice of Appeal with the Public Lands Appeal Board (the Board) to gain access to the DLO.

The Board held a hearing on November 20, 2018. The Board recommended the Minister of Environment and Parks (the Minister), order Mr. Kalinski be allowed access to the DLO on certain terms and conditions. The Minister accepted the Board's recommendations.

After the Minister's decision was released, Mr. Bancarz applied to the Board for costs in the amount of \$20,892.79, for legal fees and disbursements. Mr. Kalinski also filed an application for costs for legal fees and disbursements in the amount of \$27,350.58.

The Board considered the costs applications from the Parties and determined both Parties had been partially successful in the appeal and had equally presented evidence and contributed arguments that assisted the Board in making its recommendations to the Minister. Therefore, no costs were awarded to either of the Parties.

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I. INTRODUCTION

[1] This is the Public Lands Appeal Board's (the "Board") decision and reasons for its decision regarding the costs applications arising from a hearing held by the Board of an appeal filed by Mr. Tim Kalinski (the "Applicant") for access to Department Licence of Occupation ("DLO") 111469 (the "Bancarz DLO") held by Mr. Alvin Bancarz (the "Respondent").

[2] The Board held an oral hearing on November 20, 2018, in Edmonton. Following the hearing, the Board recommended the Applicant be allowed access to the Bancarz DLO on certain terms and conditions. Ministerial Order 06/2019 (the "Road Use Order"),¹ accepting the recommendations of the Board, was issued on January 16, 2019, by the Minister of Environment and Parks (the "Minister").

[3] Following the issuance of the Road Use Order, the Applicant filed a costs application for \$27,350.58 for legal fees and disbursements. The Respondent also filed a costs application for \$20,892.79 for legal fees and disbursements.

[4] After reviewing the submissions, the Board determined it would not award costs to either the Applicant or the Respondent.

II. BACKGROUND

[5] The Applicant is the holder of surface materials lease ("SML") 130017 (the "Kalinski SML"), located on public lands northwest of Calling Lake, in the Municipal District of Opportunity No. 17, Alberta. The Kalinski SML was granted to allow the Applicant to extract surface materials such as sand and gravel.

[6] The Applicant also holds DLO 130613 (the "Kalinski DLO"), on which he has built a road to access the Kalinski SML.

[7] The Kalinski DLO runs from the Kalinski SML to the Bancarz DLO. The Bancarz

¹ See: *Tim Kalinski v. Director, Provincial Approvals Section, Alberta Environment and Parks, re: Alvin Bancarz* (20 December 2018), Appeal No. 17-0028-R (A.P.L.A.B.), 2018 APLAB 38.

DLO extends from SML 110036 (the “Bancarz SML”), held by the Respondent, to Highway 813.²

[8] To haul sand and gravel from the Kalinski SML along the Kalinski DLO to Highway 813, the Applicant must use approximately 2.1 km of the road built on the Bancarz DLO (the “Road”).

[9] The Applicant and the Respondent (collectively, the “Parties”) were unable to reach an agreement for the Applicant’s use of the Road.

[10] On January 2, 2018, the Applicant submitted a letter to the Director, Provincial Approvals Section, Alberta Environment and Parks (the “Director”), requesting the Director make a decision regarding the Applicant’s request to access the Road. The Director did not make a decision within the prescribed 30-day period, resulting in a deemed rejection under section 15(1) of *Public Lands Administration Regulation*, AR 187/2011 (“PLAR”).³ This deemed rejection is appealable to the Board under section 211(e) of PLAR.⁴

[11] On February 8, 2018, the Applicant filed a Notice of Appeal with the Board for a road use order under section 98 of PLAR.⁵ The Respondent was notified of the appeal, and on April 23, 2018, he advised the Board he wanted to participate in the appeal. A mediation meeting was held, but no agreement was reached between the Parties. An oral hearing was held November 20, 2018, in Edmonton. Written submissions were filed with the Board by the Parties before the hearing.

² The Bancarz DLO is located on 13-19-76-22 W4M to 15-22-76-23 W4M.

³ Section 15(1) of PLAR provides:

“Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.”

⁴ Section 211(e) of PLAR states:

“The following decisions are prescribed as decisions from which an appeal is available: ... (e) a deemed rejection under section 15(1)....”

⁵ Section 98 of PLAR provides:

“A commercial user that requires use of a road in a licensed area for the purposes of the commercial user’s commercial or business undertaking may use the road only

(a) by agreement with the holder of the licence, whether reached in mediation under Part 10 or otherwise, or

(b) in the absence of an agreement with the holder of the licence, in accordance with an order under section 124(3) of the Act on an appeal under Part 10.”

[12] Following the hearing, the Board submitted its Report and Recommendations to the Minister, recommending the Applicant be allowed access to the Road on certain terms and conditions. The Minister issued the Road Use Order, by way of a Ministerial Order, on January 16, 2019, accepting the recommendations of the Board.

[13] On February 1, 2019, the Respondent filed a costs application with the Board, as did the Applicant on February 6, 2019. The Board received responses to the costs applications from the Applicant on February 13, 2019, and from the Respondent on February 15, 2019.

III. SUBMISSIONS

A. Applicant's Costs Submission

[14] The Applicant requested the Board award him costs of \$27,350.58 for legal fees and disbursements he incurred in respect of the appeal.

[15] The Applicant submitted he had succeeded in four main issues in the appeal: access; term; compensation; and terms of use.

[16] The Applicant stated the Respondent opposed allowing the Applicant any access to the Road and, alternatively, opposed access during the winter. The Applicant noted the Road Use Order granted him year-round access to the Road.

[17] The Applicant said the Road Use Order granted a multi-year term, which he had argued for, whereas the Respondent sought a one-year term with the Respondent deciding if it could be renewed.

[18] The Applicant noted the Road Use Order required him to pay \$130,000.00 to compensate the Respondent for construction costs, which was less than the \$300,000.00 sought by the Respondent.

[19] The Applicant said the Respondent was not successful in obtaining \$1.50 per tonne of gravel hauled by the Applicant on the Road as compensation for road maintenance. The Applicant stated the Road Use Order determined the amount owed for road maintenance would be based on the percentage each party used the Road and the actual cost of maintenance each month,

which the Applicant submitted was more in line with his argument that he should be responsible for half the actual maintenance costs.

[20] The Applicant argued he was partially successful regarding security costs – costs to ensure the gates on the Road were closed - as the Road Use Order specified an annual fee of \$2,160.00, but did not accept the \$100 per day fee sought by the Respondent.

[21] The Applicant stated he was successful in opposing the Respondent's request for an interference fee, which was not included in the Road Use Order.

[22] The Applicant submitted the value of the interests at issue was hundreds of thousands of dollars.

[23] The Applicant stated the issues in the appeal were numerous, complex, and serious, as the Respondent firmly opposed granting the Applicant any access to the Road.

[24] The Applicant submitted the Respondent did not allege any misconduct by the Applicant during the appeal proceedings, and allegations of inappropriate behaviour before the appeal are not within the Board's jurisdiction to consider.

B. Respondent's Response

[25] The Respondent submitted his opposition to granting the Applicant access to the Road was based on the Applicant's behaviour and the likely impact of this behaviour on the use of the Road. The Respondent stated despite his disagreement with the Applicant using the Road, he still put forward constructive suggestions which were incorporated into the Road Use Order.

[26] The Respondent noted the Applicant did not succeed in obtaining the term he sought.

[27] The Respondent pointed out maintenance costs are unknown and could end up being close to his proposal of \$1.50 per tonne of gravel hauled on the Road.

[28] The Respondent noted the Board did not state an interference fee was inappropriate, but rather the Board said an interference fee was perhaps premature and speculative due to the status of the application for SML 140062, and interference could be avoided through communication.

[29] The Respondent submitted the circumstances favoured a costs award in his favour.

C. Respondent's Costs Submission

[30] The Respondent requested the Board award him costs of \$20,892.79 for legal fees and disbursements related to the appeal.

[31] The Respondent submitted the appeal proceedings were initiated by the Applicant and were unrelated to the Respondent's business and use of the Road, which the Respondent had constructed at his own risk and expense.

[32] The Respondent stated the Applicant had misled him into granting initial access to the Road by promising the Respondent would be the operator of the Kalinski SML on behalf of the Applicant. The Respondent submitted the Applicant did not seek approval for the location of the Kalinski DLO and its intersection with the Bancarz DLO.

[33] The Respondent said the Applicant and his workers used the Road without the Respondent's consent and refused to accept responsibility for the damage they caused.

[34] The Respondent submitted the Applicant's behaviour eroded any trust between them. The Respondent described the Applicant's approach to the use of the Road as "unilateral and high-handed." The Respondent said the conflict between the Parties could have been avoided had the Applicant (1) been more conciliatory and recognized he was imposing upon the Respondent, (2) been true to his word and made the Respondent the operator of the Kalinski SML as promised, (3) required his workers to obtain consent to use the Bancarz DLO, and (4) repaired the damage to the Road.

[35] The Respondent noted the Board, in its decision, said it was unacceptable for the Applicant to build the Kalinski DLO without first securing written permission from the Respondent to use the Bancarz DLO.

[36] The Respondent stated he should not be punished by having to incur costs related to a hearing which was required because of the Applicant's improper approach to obtaining permission to use the Road. The Respondent believed a costs decision in his favour would both assist him with covering unnecessary expenses as a result of the appeal and discourage

inappropriate behaviour by the Applicant or others in the future.

[37] The Respondent submitted the Road Use Order accepted many of his suggestions for conditions. For example, the Respondent said he had argued the Applicant should contribute to the construction cost of the Road, and the Road Use Order reflected this by requiring the Applicant to pay \$130,000.00 to the Respondent for that purpose.

[38] The Respondent stated the Road Use Order included other suggestions brought forward by him, such as conducting a baseline review of the Road, consideration of safety concerns, implementation of use restrictions, and insurance requirements.

[39] The Respondent submitted a costs decision in his favour would be reasonable and proper.

D. Applicant's Response

[40] The Applicant submitted the Board did not have jurisdiction under section 232(4) of PLAR⁶ to consider the Respondent's allegation the Applicant acted improperly before the

⁶ Section 232(4) of PLAR reads:

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

appeal was filed.

[41] Alternatively, the Applicant stated if the Board found it did have jurisdiction to consider the allegation, the Board should take note the Respondent did not appeal the issuance of the Kalinski DLO by Alberta Environment and Parks (“AEP”).

[42] The Applicant submitted the Respondent opposed the Applicant’s use of the Road because the Applicant would be in direct competition with the Respondent in the sand and gravel industry.

[43] The Applicant stated the Board, in its Report and Recommendations, found it was reasonable for him to use the Road rather than build another road on public land.

[44] The Applicant submitted there was no evidence to support the Respondent’s claim the dispute may have been resolved earlier if the Applicant had been more conciliatory to the Respondent. The Applicant noted mediation between the Parties was attempted but did not result in an agreement.

[45] The Applicant stated there was never a contract between the Parties that provided for the Respondent to be the operator of the Kalinski SML.

IV. THE LEGAL BASIS OF COSTS

[46] 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 [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.

[47] Mr. Justice Fraser of the Court of Queen’s Bench, in *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*,⁷ commented on the authority of the Environmental Appeals Board to grant costs under the *Environmental Protection and Enhancement Act*, R.S.A.

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

2000, c. E-12 (“EPEA”). Justice Fraser referred to what is now section 96 of EPEA,⁸ 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.”⁹

[48] 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.)¹⁰

[49] The factors to be considered by the Board in determining whether to award costs are set out in section 232(4) of 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

⁸ 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.”

⁹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293 (CanLII), at paragraph 23.

¹⁰ *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.”

[50] 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.”¹¹

[51] 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 each criterion, depending on the specific circumstances of each appeal.

[52] 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 for the hearing. A costs application must contain a thorough breakdown of the amount claimed including, if relevant, 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. Copies of receipts for other expenses must also be included in a costs application. In most cases, the Board will not award costs related to travel and accommodation or disbursements. Depending on the circumstances, the Board may

¹¹ 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.”

award costs for reasonable and relevant expenses such as out-of-pocket expenses or lost time from work.

[53] 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.”

[54] 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.”¹²

[55] The Board generally accepts as a starting point that costs incurred in an appeal are the responsibility of the individual parties.

V. ANALYSIS

[56] The issue before the Board is whether costs should be awarded to the Applicant and the Respondent.

[57] 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.

[58] Costs are not awarded 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.

[59] Not every criterion in section 232(4) of PLAR is relevant to every costs application.

¹² 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.”

The Board reviewed each of the criteria and considered the most relevant, taking into account the facts of the appeal.

A. Applicant

[60] The Applicant applied for costs of \$27,350.58, including legal fees determined on a solicitor and client basis. The Applicant included an itemized list of disbursements it sought to recover and a description of how each amount was calculated.

[61] The Applicant's costs submission addressed the factors listed in section 232(4) of PLAR.

[62] The Applicant stated he was successful in the appeal. The Applicant argued many of his proposals for terms and conditions for a road use order were included by the Board in its Report and Recommendations to the Minister. The Applicant submitted he was successful in the following areas:

- (a) access to the Road;
- (b) length of the term of the Road Use Order;
- (c) compensation to be paid to the Respondent; and
- (d) the terms of use of the Road.

[63] The Board finds the Applicant presented valuable evidence and arguments that substantially contributed to the hearing on the issues, and his overall participation was helpful to the Board in providing the best recommendations possible to the Minister. The Board finds the Applicant succeeded on some issues in the appeal and failed on others.

[64] However, the Applicant has not presented sufficient reasons why the Board should move from its starting point that parties should bear their own costs in the appeal process.

[65] Therefore, the Board will not award costs to the Applicant.

B. Respondent

[66] The Respondent's costs application included seven invoices for legal fees and disbursements, totalling \$20,892.79.

[67] The Respondent submitted many of the terms and conditions he proposed at the hearing were incorporated into the Road Use Order, including:

- (a) requiring the Applicant to contribute to the cost of the Road's construction;
- (b) conducting a baseline review of the Road;
- (c) consideration of safety concerns;
- (d) restrictions on the use of the Road; and
- (e) the amount and type of insurance required by the Applicant.

The Board finds the Respondent was successful, or partially successful, in these issues.

[68] Most of the Respondent's costs submission dealt with the Applicant's alleged behaviour leading up to the appeal. The Respondent stated the Applicant misled him and had not kept his word in negotiations before the appeal was filed. The Respondent argued an order of costs in favour of the Respondent would discourage inappropriate behaviour by the Applicant, or other parties, in the future.

[69] Under sections 232(4)(e) and (g), the Board may consider whether the conduct of a party tended to shorten or to unnecessarily lengthen the proceeding and whether any stage or step in the appeal proceedings was improper, vexatious, or unnecessary. The Board finds no evidence the conduct of either party tended to unnecessarily lengthen the proceeding, and the actions of the Applicant during the appeal process did not lead to any stage or step that was improper, vexatious, or unnecessary.

[70] The Board finds the Respondent presented evidence and arguments that were valuable and contributed to the hearing on the issues, and his overall participation was helpful to the Board in providing the best recommendations possible to the Minister. The Board finds the Respondent succeeded on some issues in the appeal and failed on others.

[71] In the Board's view, the Respondent has not presented sufficient reasons why the Board should move from its starting point that parties should bear their own costs in the appeal process.

[72] Therefore, the Board will not award costs to the Respondent.

VI. DECISION

[73] The Board finds as both the Applicant and the Respondent succeeded on some issues in the appeal and failed on others, success was equally divided. Accordingly, the Board finds it would not be appropriate to award costs to either the Applicant or the Respondent.

[74] Therefore, the Board denies the costs applications of the Applicant and the Respondent. No costs are awarded to either party.

Dated on July 3, 2019, at Edmonton, Alberta.

"original signed by"

Marian Fluker
Panel Chair

"original signed by"

Meg Barker
Board Member

"original signed by"

Anjum Mullick
Board Member