Court of King's Bench of Alberta

Citation: Bow Valley Engage Society v Alberta (*Environmental Protection and Enhancement Act*, Designated Director), 2025 ABKB 463

Date: 20250807
Dockets: 2401 04875, 2401 09956
Registry: Calgary

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Registry: Calgary

Between:

Bow Valley Engage Society

Applicant

- and –

Designated Director Under the *Environmental Protection and Enhancement Act*, and Three Sisters Mountain Village Properties Ltd.

Respondents

Docket: 2401 09956
Registry: Calgary

And Between:

Bearspaw First Nation, Chiniki First Nation and Goodstoney First Nation, collectively the Stoney Nakoda First Nations

Applicants

- and -

Designated Director Under the *Environmental Protection and Enhancement Act,* and Three Sisters Mountain Village Properties Ltd

Respondents

Reasons for Decision as to Costs
of the
Honourable Justice O. Ho

I. Introduction

[1] This costs decision arises from my decision reported at *Bow Valley Engage Society v Alberta (Environmental Protection and Enhancement Act, Designated Director)*, 2025 ABKB 158 (the "**Substantive Reasons**"). That single Reasons for Decision related to two applications for judicial review. This costs decision also relates to those two applications for judicial review.

[2] The applicant in one of the applications was Bow Valley Engage Society ("**BVES**"), and the applicants in the other application were Bearspaw First Nation, Chiniki First Nation, and Goodstoney First Nation, collectively the Stoney Nakoda First Nations ("**Stoney Nakoda**"). Both of BVES' and Stoney Nakoda's respective applications for judicial review were dismissed.

[3] I requested that all parties make costs submissions in writing, and that all submissions be submitted concurrently. Those were filed by the parties on May 8, 2025 and May 9, 2025.

II. Position of the Parties

[4] BVES and Stoney Nakoda request that no award of costs be made against them, or in the alternative that an award of costs be limited to Schedule C, Column 1.

[5] Stoney Nakoda acknowledges that Three Sisters Mountain Village Properties Ltd. ("**TSMVP**"), Thunderstone Quarries Canmore Ltd. ("**Thunderstone**") and the designated director under s 42 (the "**Designated Director**") of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("***EPEA***") were all successful parties and that they are presumptively entitled to costs. Stoney Nakoda however, argues that no costs or limited costs ought to be awarded on the basis that Stoney Nakoda advanced: 1) a clear matter of public interest; 2) novel points of law as it related to both the constitutionality of Rule 3.15 of the *Rules of Court*, and the ability of a First Nation to request an environmental impact assessment report (an "**EIA**") under *EPEA*; 3) an application for judicial review that represented test cases of these two novel points of law; and 4) an application, the consequences arising from which should not discourage First Nations from accessing the judicial system.

[6] BVES similarly argues that no costs or limited costs should be granted against it. BVES argues that Rule 10.33 allows me to consider a party's litigation conduct in the course of determining costs; in that regard, BVES points to the fact that BVES and Stoney Nakoda sought and received an expedited hearing from the Associate Chief Justice, did not seek a stay, cooperated in consolidating their two applications for judicial review and filed a joint brief in support of their applications and in response to Thunderstone's application to strike, all of which lead to significant efficiencies. BVES also cites reasons similar to Stoney Nakoda related to advancing a matter of public interest, bringing test cases as it related to the constitutionality of Rule 3.15 and the public's ability to request an EIA, and access to justice. BVES also argues that the Designated Director, in

her capacity as an administrative tribunal, ought not to be awarded costs (or pay costs for that matter).

[7] The Minister of Justice of Alberta (the "**Minister**") is not seeking costs, though it expressly reserved its right to seek costs at any subsequent proceedings or appeals related to the two within Actions.

[8] The Designated Director seeks Schedule C costs. The Designated Director argues that her role in this case was distinguishable from the traditional role of a quasi-judicial tribunal. In this case, she argues, she acted as an administrative decision maker, not a quasi-judicial tribunal. The Designated Director takes the position that she was not formally required to respond to the applicants' letter requests for an EIA since neither applicant had any rights at stake under *EPEA*. On that basis the Designated Director was not adjudicating any dispute, rather she was administering a statutory process when she responded to the applicants' letter requests. The Designated Director relies on *663073 Alberta Ltd. v Alberta (Treasury Board)*, 2021 ABCA 430 at paras 10-12 ("***663073 Alberta Ltd.***") as authority for such distinction and that costs awards, while not generally awarded to tribunals, may be awarded when an administrator is not adjudicating disputes between two parties. For those reasons, the Designated Director seeks a single award of costs against both applicants in accordance with Schedule C, Column 1, for Items 1(1) and 8(1), totalling $3,375.

[9] TSMVP seeks costs in both judicial review applications; one costs award against BVES and a separate costs award against Stoney Nakoda. TSMVP also seeks costs in relation to its written costs submission for costs. TSMVP argues that the matter being litigated was important to not only to the parties but also the community in general, and that the impact on the judicial review applications could have had a significant impact on TSMVP in particular since it had already spent $11 million in relation to the development of the area structure plans. TSMVP argues that these applications were complex and included a Certified Record of over 3,500 pages, and relies on the cases of *Northland Material Handling Inc. v. Parkland (County)*, 2012 ABQB 586, at para 32, *Gendre v Fort Macleod (Town)*, 2016 ABQB 111, and *Lehodey v Calgary (City)*, 2025 ABKB 76 as authorities supporting that not only is Column 3 the appropriate column upon which to calculate costs, but that a further 3x multiplier of Column 3 be used. TSMVP further requests that a second counsel fee of 50% be granted, and that a 31% inflationary adjustment to the dollar amounts set out in Schedule C also be applied. In total, TSMVP seeks costs awards, including disbursements and GST, in the amounts of $72,987.58 against BVES, and $42,971.63 against Stoney Nakoda.

[10] Thunderstone similarly seeks one set of Schedule C costs against BVES and a separate set of Schedule C costs against Stoney Nakoda. Thunderstone argues that Column 5 is appropriate, but that in the alternative that costs be awarded on Column 3. Thunderstone further suggests that if I elect to grant costs on Column 3, a further 3x multiplier is appropriate. Thunderstone also seeks a second counsel fee of 50% and also a 25% inflationary adjustment. In total, and as concluded by Thunderstone in para 12 of its written submissions, Thunderstone seeks a costs award, including disbursements and GST, in the amounts of $26,202.75 as against each of BVES and Stoney Nakoda, or in the alternative amounts of $13,651.75 as against each of BVES and Stoney Nakoda.

III. Discussion

[11] It is trite law that when considering an award of costs Courts are required to take into consideration the factors set out in Rule 10.33(1), including the result of the action or degree of success of each party, the amount claimed and the amount recovered, the importance of the issues, the complexity of the action, and any other matter related to the question of reasonable and proper costs that the Court considers appropriate. In addition to these factors Rule 10.33(2) requires the Court to consider the conduct of the parties, including whether any party's conduct unnecessarily delayed or lengthened the action, whether any party took unnecessary steps or contravened the *Rules of Court* or a court order or otherwise engaged in misconduct.

[12] There is no dispute that there were two separate judicial review applications, one commenced by each of BVES and Stoney Nakoda. However, the issues raised in each judicial review application were largely the same, and the two applications were heard concurrently on a single day. The fact that the two applicants also produced a joint brief not only in support of their respective judicial review applications, but also a joint brief in response to Thunderstone's application to strike (also heard on that same single day) also resulted in significant efficiencies. As a result, while I conclude that an award of costs is appropriate, I am cognizant that there were significant efficiencies resulting from overlap of the proceedings.

[13] I agree with TSMVP and Thunderstone, and with the alternative arguments of BVES and Stoney Nakoda that costs are to be awarded according to Schedule C. However, even when relying on Schedule C, the Court must still satisfy itself that a costs award calculated in accordance with Schedule C are still reasonable and proper: *McAllister v Calgary (City)*, 2021 ABCA 25 at para 25 ("***McAllister***").

[14] BVES and Stoney Nakoda argue that because of the public interest nature of the judicial reviews, a costs award, if any, ought to be minimized. In the Substantive Reasons, I concluded that Thunderstone was directly affected, and in so doing distinguished Thunderstone's interests from those interests of the many individuals who wrote to the Designated Director or made verbal submissions at a public hearing. For similar reasons, I do not come to the conclusion that this judicial review was public interest litigation as discussed in the case of *Coalition for Justice and Human Rights Ltd v Edmonton (City)*, 2024 ABKB 148 ("***Coalition for Justice***"). As the Court noted at paras 32 -34 of *Coalition for Justice*, and quoting *Klassen v Canadian National Railway Company*, 2023 ABCA 233 at para 6, even if a proceeding brings significant attention to a public issue "the pursuit of actions that do not disclose a cause of action is destined to consume individual and court resources without achieving any economy or efficiency". In other words, despite the issues raised by BVES and Stoney Nakoda, there was never any possibility that the general public could have ever received the benefit from the remedy sought by the applicants in these Actions.

[15] I agree that BVES' and Stoney Nakoda's argument about the constitutionality of Rule 3.15 was a novel point of law, however, I do not agree that this was a test case to determine the constitutionality of Rule 3.15; insufficient baseline facts were present for me to even decide that issue. For this to have been a test case on the constitutionality of Rule 3.15, the applicants would have had to first establish that there were other "directly affected" individuals who could not be identified. However, this minimum evidence was not established.

[16] I also disagree that this was a test case to determine whether members of the public and/or First Nations could request an EIA; while I was asked to make such a ruling as it related to BVES and Stoney Nakoda, my conclusion was based on the interpretation of whether *EPEA* gave BVES and Stoney Nakoda standing to make the requests set out in their letter requests. My conclusion was that neither I or the Designated Director had the authority to initiate an EIA as was being requested by the applicants. For this to have been a test case about whether members of the public and/or First Nations could request an EIA would have required there to be at least some possibility that the statute would allow for such request to be fulfilled. An argument advanced by an applicant cannot be said to be a test case if the argument being advanced has no chance of success.

[17] In the present case, the circumstances are that BVES and Stoney Nakoda each brought unsuccessful applications for judicial review. An award of costs against them does not adversely affect access to justice; that is to say, neither First Nations or members of the public are being discouraged to bring litigation beyond the ordinary impact arising from an adverse costs award being made against an unsuccessful litigant.

[18] In *Northern Air Charter (P.R.) Inc. v Alberta Health Services and Can-West Corporate Air Charters Ltd.*, 2024 ABKB 574 at paras 21-22 ("***Northern Air Charter***") the Court noted that where a claim seeks relief for something other than a monetary award, costs are assessed on Column 1 of Schedule C, but went on to recognize that accounting for some complexity in the litigation by assessing costs on Column 5 rather than Column 1 was appropriate.

[19] In the case of Thunderstone, having regard for the significant overlap in the two judicial review applications, but balanced against some complexity to these applications, I grant Thunderstone costs on Column 5, but without any multiplier, as against each of BVES and Stoney Nakoda. Notwithstanding that Thunderstone had second counsel at the applications, I am not prepared to grant a second counsel fee on the basis that an appropriate balance has already been reached regarding complexity and assessment on Column 5, and on the basis that the hearing was limited to one day, and that all counsel had helpfully pre-discussed, and self-imposed, limitations on the amount of time each would be able to make oral submissions in order that the one-day hearing was completed on time. Thunderstone has requested a 25% inflationary adjustment, and having regard for the timing of the last updates to Schedule C and *McAllister*, I grant the 25% inflationary adjustment as requested. Thunderstone may also have the disbursements as it has requested together with GST. In other words, Thunderstone is awarded costs as against each of BVES and Stoney Nakoda, each in the amount as set out by Thunderstone in Schedule B of its written submissions, except for the second counsel fee. Corresponding adjustments to the "Other Charges" and the GST currently appearing in Thunderstone's Schedule B will have to be made in light of my not granting the second counsel fee.

[20] In the case of TSMVP, I similarly balance the various factors including the overlap in proceedings, the complexity of the judicial reviews, and my conclusions that these were not matters of public interest or test cases. I note however, that unlike the case with Thunderstone, the steps that TSMVP took in each of the two judicial review applications were not the same (i.e. TSMVP took more steps responding to BVES' judicial review application than it did in responding to Stoney Nakoda's judicial review application). To account for the fact that some, but not all of the steps taken in those two actions overlapped, I grant costs to TSMVP in each of the two judicial review applications for the steps and disbursements as set out in the Bills of Costs attached to TSMVP's written submissions, but not on a 3x multiplier of Column 3, rather only on Column 5

(with no multiplier). Further, I do not grant the second counsel fee. For clarity, the steps set out by TSMVP in its Bills of Costs are to be recalculated and assessed on Column 5 with no multiplier. I grant a 25% inflationary adjustment (not a 31% inflationary adjustment). As is the case for Thunderstone, TSMVP will also have to make corresponding adjustments to the GST calculable. I do not grant costs for the preparation for the written submission on costs.

[21] The Minister has not sought costs, and as a result I do not make an award of costs payable to the Minister. I am not making any ruling regarding the Minster's entitlement to costs in relation to subsequent proceedings in either of these Actions, or in the appeals of the two within Actions.

[22] The Designated Director has sought costs for Items 1(1) and 8(1) on Column 1 of Schedule C. I agree that in this case, given that the Designated Director did not have a statutory obligation to make a decision in response to BVES' and Stoney Nakoda's letters, the Designated Director was acting more as an administrative body, and not as a quasi-judicial tribunal. In light of the reasons set out in *663073 Alberta Ltd.*, I am prepared to grant the Designated Director the Schedule C, Column 1 costs it seeks in relation to both Items 1(1) and 8(1).

[23] There is some question about whether the Designated Director is entitled to costs for Item 1(1) since the Designated Director did not file a document in direct response to the Originating Applications. Given that Item 1(1) specifically includes language that refers not only to "commencement documents", but also refers to "affidavits, pleadings and related documents and amendments" [emphasis added], I am prepared to grant the $1,350 costs for preparing the Certified Record sought by the Designated Director.

[24] Further, even if I am wrong that the wording in Item 1(1) was not intended to include the preparation of Certified Records, a Respondent might argue that it is entitled to costs for the preparation of a Certified Record in accordance with Item 3(1) which expressly relates to disclosure of records: *Northern Air Charter*, at paras 23 and 27.

[25] The Court in *Kissel v. Rocky View (County)*, 2020 ABQB 570 considered whether costs ought to be awarded to a party for the review of a Certified Record under Item 3(2). The Court considered whether Item 3(2) included the review of a Certified Record given that Item 3(2) fell under the heading "Disclosure under Part 5" while preparation of a Certified Record was an obligation imposed by Rule 3.19, and not Part 5 of the *Rules of Court*. At para 48, the Court declined to decide that specific issue saying instead that "*the Court can make a similar allowance under the Court's general costs discretion for preparation or review of the certified record to ensure that the award is appropriate*". For those same reasons, whether under Item 1(1), or Item 3(1) or by the Court's general costs discretion, I am prepared to award costs to the Designated Director for the preparation of the Certified Records in the amount of $1,350. This amount is commensurate with the Certified Records filed in this case which was comprised of 34 tabs and 3,587 pages.

[26] The total costs awarded to the Designated Director is $3,375 as against both BVES and Stoney Nakoda jointly.

IV. Conclusion

[27] I award costs to TSMVP payable by BVES in the judicial review application commenced by BVES, and payable by Stoney Nakoda in the judicial review application it commenced by

Stoney Nakoda. Costs are payable in accordance with the Bills of Costs attached to TSMVP's written submissions, but on Column 5 and not on a 3x multiplier of Column 3. Further, I do not grant the second counsel fee, but I do grant a 25% inflationary adjustment on the fees portion of the costs award.

[28] Thunderstone is awarded costs as against each of BVES and Stoney Nakoda on Schedule C, Column 5. Costs are payable in accordance with the Bills of Costs appearing at Schedule B of Thunderstone's written submissions. However, I do not grant the second counsel fee, but I do grant a 25% inflationary adjustment on the fees portion of the costs award.

[29] The Designated Director is awarded costs of $3,375 as against both BVES and Stoney Nakoda jointly.

[30] The Minister is not awarded any costs of the judicial reviews.

Heard by way of written submissions dated May 8, 2025, and May 9, 2025.
Dated at the City of Calgary, Alberta this 7th day of August, 2025.

O. Ho
J.C.K.B.A.

Appearances:

Richard Harrison, Wilson Laycraft
for the Applicant, Bow Valley Engage Society

Brooke Barrett, Rae & Company
for the Applicants, Bearspaw First Nation, Chiniki First Nation, and Goodstoney First Nation

Gwendolyn Stewart-Palmer, KC, Kathleen Elhatton-Lake, Shores Jardine LLP
for the Respondent, Three Sisters Mountain Village Properties Ltd.

Andrea Simmonds, Alberta Justice
for the Respondent, the Designated Director under the *Environmental Protection and Enhancement Act*

David Wachowich, K.C., and Samatha Stokes , Rose LLP
for the Applicant, Thunderstone Quarries Canmore Ltd.

Dalal Jergeas-Legate, and Jennifer Keliher, Alberta Justice, Constitutional and Aboriginal Law
for the Intervenor, The Minister of Justice of Alberta