

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Cost Decision

Date of Cost Decision – May 8, 2002

IN THE MATTER OF sections 91 and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an application for costs by Ducks Unlimited related to an appeal filed by Marc and Roch Bremont with respect to the decision by the Director, Northwest Boreal Region, Natural Resources Service, Alberta Environment, to refuse to issue an Approval under the *Water Act* authorizing an existing ditch at NW 27-079-21-W5M.

Cite as: Cost Decision re: *Ducks Unlimited*.

BEFORE:

Dr. M. Anne Naeth.

PARTIES:

Appellants: Messrs. Marc and Roch Bremont, represented by Mr. Keith Wilson.

Director: Mr. Nico Wyngaarden, Director, Northwest Boreal Region, Natural Resources Service, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

Intervenor: Ducks Unlimited, represented by Mr. Cyril Gurevitch, Burgess & Gurevitch.

EXECUTIVE SUMMARY

The Bremonts had applied to Alberta Environment under the *Water Act* for an Approval, authorizing an existing ditch that was used to deal with alleged flooding on their land that is adjacent to Lac Magliore, near Falher, Alberta. Alberta Environment declined to issue an Approval stating the ditch was having an adverse effect on the lake levels. The Environmental Appeal Board received an appeal from Marc and Roch Bremont stating that the weir structure constructed by Ducks Unlimited has caused flooding on their property, and as a result, the construction of a drainage ditch was needed. The Board undertook extensive mediation efforts, but eventually the matter was set for a hearing.

Five days prior to the hearing of this appeal, the Bremonts withdrew their appeal and advised that they would “seek remedies in another forum.” As a result of the withdrawal of the appeal, the hearing was cancelled and the Board issued a Discontinuance of Proceedings.

An application for costs was received from Ducks Unlimited, an intervenor, in the amount of \$743.72 for legal fees and air travel associated with the hearing that had been scheduled.

As the costs applied for did not relate directly to the matters contained in the Notice of Appeal nor to the preparation and presentation of the submission, the Board did not award costs to Ducks Unlimited.

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I. BACKGROUND

[1] Messrs. Marc and Roch Bremont applied to the Director, Northwest Boreal Region, Natural Resources Service, Alberta Environment (the "Director"), for an Approval under the *Water Act*, R.S.A. 2000, c. W-3,¹ to authorize an existing ditch used to deal with alleged flooding on their land at NW 27-079-21-W5M, adjacent to Lac Magliore, near Falher, Alberta. On May 5, 2000, the Director refused to issue an Approval, stating the ditch was having an adverse effect on the lake levels.

[2] The Environmental Appeal Board (the "Board") received a Notice of Appeal on May 19, 2000, from Messrs. Marc and Roch Bremont (the "Appellants") stating that the weir structure constructed by Ducks Unlimited had caused flooding on their property, and as a result, they constructed a drainage ditch. In their Notice of Appeal, the Appellants requested that the Board:

- “• grant the Bremonts an Approval for the ditch plug, or alternatively, rule that the ditch plug does not require an Approval;
- rule that Ducks Unlimited's licence is invalid and require Ducks Unlimited to render ineffective its weir structure located on Lac Magliore; and
- grant such further relief as the Board deems just and equitable.”

[3] In seeking the relief requested above, the Notice of Appeal identified seven grounds of appeal:

- “• The ditch plug was installed in accordance with a plan and at a location requested by Alberta Environment;
- Alberta Environment's denial of the Approval for the ditch plug could result in continued flooding of the NW 27, thereby preventing the Bremonts from farming these lands;
- Alberta Environment failed to provide adequate or proper reasons for the denial of the Approval;
- Alberta Environment failed to take into account relevant information regarding the ditch plug;

¹ As of January 1, 2002, the *Water Act*, S.A. 1996, c. W-3.5 has been replaced by the *Water Act*, R.S.A. 2000, c. W-3.

- The Ducks Unlimited weir structure located on the [*sic.*] Lac Magliore is illegal as Ducks Unlimited does not have a valid water license for the structure and the flooding it causes;
- The ditch plug does not require an Approval from Alberta Environment as it is exempt under Section 2(d) of Schedule 1 of Alberta Regulation 205/98 because the drainage ditch does not result in a change in the flow or volume of water on the adjacent parcel of land; and
- Further grounds as may be determined upon receipt of documentation from the Department of Alberta Environment regarding the refusal of this Approval.”

[4] The Board received letters dated September 15, 2000, from the Director and September 22, 2000, from the Appellants regarding the involvement of Ducks Unlimited in this appeal. The Director contended that the Ducks Unlimited weir structure provides a positive benefit to the environment, and he would be hesitant to cancel the licence. The Appellants maintained that the structure has caused damage through flooding and infringed on their property rights. In response, the Board requested their comments on the participation of Ducks Unlimited and to again provide dates for a mediation meeting. The Director advised on September 29, 2000, that Ducks Unlimited would be interested in this matter, and he forwarded the information directly to them. The Director went on to say in his letter of October 5, 2000, that

“...with respect to Ducks Unlimited, while I feel that they may be interested in the issue before the Board, I note that Mr. Wilson has forwarded additional correspondence relating to a structure owned and operated by Ducks Unlimited that is also on this water body. That structure and the status of its approval under the *Water Act*, is an issue that is separate from the issue that is the subject of the appeal. In any participation by Ducks Unlimited, their role would be restricted to the issue at hand.”

[5] The Board received a letter dated November 24, 2000, from counsel for Ducks Unlimited outlining their understanding of their involvement in the appeal, and in response to this letter, the Appellants stated their concerns with various facts in a letter dated December 1, 2000.

[6] The Director advised on January 23, 2001, that he agrees to the participation of Ducks Unlimited as their participation would be “...beneficial as the overriding issue with respect to this appeal is the destruction of a wetland, that Ducks Unlimited have an interest, through their operation of the weir, in maintaining.” Ducks Unlimited responded on January 23,

2001, that they would be willing to participate in a mediation meeting as outlined in the Board's letter of January 15, 2001.

[7] In consultation with the Parties, the Board held a mediation meeting with respect to this appeal on April 10, 2001, in Falher, Alberta. Follow-up conference calls were held with the Director, the Appellants, Ducks Unlimited, Mr. Don Hayden, Mr. Paul Olivier and Mr. Hans Garde-Hansen. Messrs. Hayden, Olivier and Garde-Hansen had requested participation in the appeal early in the appeal process. As the mediation was unsuccessful, the Board proceeded to a hearing.

[8] In consultation with the Parties, the Board advised that a hearing would be held November 7, 2001, at the Board's office. A Notice of Hearing was published in the *Falher Smoky River Express* on September 19, 2001, advising of the details of the subject matter of the hearing, date, time, location, and requested any intervenor requests be received by October 1, 2001.

[9] On July 30, 2001, the Board requested that the Appellants and the Director identify the issues to be heard at the hearing of the appeal. Submissions were received, and the Board advised the Parties that the only issue to be heard at the hearing was "Whether the drainage ditch should be authorized under the *Water Act* or should it be closed and rendered ineffective?"² The Board also stated that it would not consider the validity or the effect of the Ducks Unlimited licence.

[10] The Board received intervenor requests early in the appeal process from Messrs. Garde-Hansen, Olivier, and Hayden. The participation of Ducks Unlimited was also reviewed early in the process as the relief sought by the Appellants included the issue of the Ducks Unlimited's licence for their weir on Lac Magliore. Throughout the history of this appeal, the Appellants have stated their relief directly related to the licencing of the Ducks Unlimited's weir. The Board concluded in its October 26, 2001 letter that intervenor status be granted to Mr. Paul Olivier, Mr. Hans Garde-Hansen, Mr. Don Hayden, and Ducks Unlimited.

² Letter from Board to the Parties, dated October 26, 2001.

[11] On October 30, 2001, the Board received requests from Ducks Unlimited and the Appellants for additional time to file their written submissions for the hearing. The Board agreed to extend the deadline from November 1, 2001, to November 2, 2001. In this letter, the Appellants requested the Board:

- “• direct the Director to immediately disclose all additional documents and records that were obtained or produced subsequent to September 2000;
- request the parties develop an agreed statement of facts and exhibit book; and
- develop an orderly and fair schedule for the filing of materials, submissions, and hearing of this matter.”

[12] The Board advised the Appellants, in its October 30, 2001 letter, that it would “...take this request under advisement and advise of its decision shortly. However, until the Board makes a decision, the parties are encouraged to continue their preparations for the hearing.” The Board provided a response on October 31, 2001, advising that it had considered the letter, but the hearing would proceed on November 7, 2001.

[13] On November 2, 2001, the Board wrote to Mr. Wilson confirming his telephone conversation with Board staff wherein he advised that the Bremonts would be withdrawing their appeal and that a letter would be sent confirming the withdrawal. On November 2, 2001, the Bremonts advised in a letter that they would be withdrawing their appeal.³ On November 22, 2001, the Board issued a Discontinuance of Proceedings.⁴

[14] Ducks Unlimited asked the Board, on the same day the Board received the withdrawal notice from the Appellants, if the Board is prepared to order costs pertaining to the appeal. On November 6, 2001, the Board advised the Parties that it must receive a motion that clearly outlines the actual costs incurred including invoices, receipts, a breakdown of all costs,

³ In the Letter from the Appellants, dated November 2, 2001, it states:

“I have been instructed by my clients to withdraw their appeal. The Bremonts have also instructed me to advise the Board that while they had initially hoped that the Board would be able to deal with the broader issues underlying their dispute, it became clear that the Board would not be able to do so. This coupled with their concerns about the fairness of the proposed timelines, led to the Bremont’s decision to withdraw their appeal and seek remedies in another forum.

The Bremonts will continue to work toward a constructive resolution with the Department and Ducks Unlimited. However, in the event that this matter is not resolved, I have been instructed to commence a legal action against the Department and Ducks Unlimited.”

⁴ *Bremont v. Director, Northwest Boreal Region, Natural Resources Service, Alberta Environment* (November 22, 2001), E.A.B. Appeal No. 00-035-DOP.

why the funds were needed, whether the Board has jurisdiction, and whether it is appropriate to grant costs in these circumstances. Finally, the Board formulated a schedule to receive submissions.

II. APPLICATION FOR COSTS

[15] The Director responded to the Board's letter of November 6, 2001, advising that it "...does not seek costs from any participant, nor does the Director agree that any costs should be levied against it...."

[16] On November 9, 2001, the Board received a submission from Ducks Unlimited advising:

"In regards to costs incurred, please find enclosed the invoice for the writer's airline ticket acquired for the meeting that was to take place in Edmonton on November 7, 2001. Please note that out of the \$293.72, the amount of \$221.49 is non-refundable. We are only asking [f]or approximately \$450.00 for legal fees, representing two hours of discussion with our client, organizing travel arrangements and reviewing correspondence. (This is based on our hourly rate of \$225.00 per hour.)

As to the jurisdiction of the Board, I simply refer to Section 88 [now section 96] of the Environmental Protection and Enhancement Act which clearly gives the Board jurisdiction to deal with costs."

Included with their submission were receipts for air travel.

[17] The Appellants provided the Board with a submission on November 20, 2001, concluding that no costs should be awarded to Ducks Unlimited. The reasons cited were that the withdrawal of the appeal was timely, Ducks Unlimited is a large North American based institution, and Ducks Unlimited would have incurred significantly higher costs had the hearing continued.⁵

⁵ See Appellants' Submission, dated November 20, 2001.

III. DISCUSSION

A. Statutory Basis for Costs

[18] The legislative authority giving the Board jurisdiction to award costs is section 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the “Act”),⁶ which reads as follows:

“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.”

[19] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen’s Bench in *Cabre Exploration Ltd.*:⁷

“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.”⁸

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.]⁹

[20] The sections of the Environmental Appeal Board Regulation, A.R. 114/93, (the “Regulation”) concerning costs (except interim costs, which are not involved here) provide:

“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

(a) the matters contained in the notice of appeal, and

⁶ As of January 1, 2002, the *Environmental Protection and Enhancement Act*, S.A 1993, c. E-13.3 was replaced by the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.).

⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 23.

⁹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

(b) the preparation and presentation of the party's submission.

20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

- (a) whether there was a meeting under section 11 or 13(a);
- (b) whether interim costs were awarded;
- (c) whether an oral hearing was held in the course of the appeal;
- (d) whether the application for costs was filed with the appropriate information;
- (e) whether the party applying for costs required financial resources to make an adequate submission;
- (f) whether the submission of the party made a substantial contribution to the appeal;
- (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
- (h) any further criteria the Board considers appropriate.

(3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of

- (a) any other party to the appeal that the Board may direct;
- (b) the Board.

(4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[21] When applying these criteria to the specific facts of the appeal, the Board must also remain cognizant of the purpose of the Act as stated in section 2:

"The purpose of the Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well being of society;...
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;...
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual action;

- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...”

While all of these purposes are important, the Board is of the view that the shared responsibility that section 2(f) of the Act places on all Albertans “...for ensuring the protection, enhancement and wise use of the environment through individual action...” is particularly instructive in making its costs decision.

[22] However, the Board has stated in other decisions that it has the discretion to decide which of the criteria listed in the Act and the Regulations should apply in the particular claim for costs.¹⁰ The Board also determines the relevant weight to be given to each of the criteria, depending on the specific circumstances of each appeal.¹¹ In *Cabre*, Mr. Justice Fraser noted that section “...20(2) of the Regulation sets out several factors that the Board ‘may’ consider in deciding whether to award costs...” and concluded “...that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal.”¹²

[23] As stated in previous appeals, the Board evaluates each costs application against the criteria in the Act and the Regulation and the following:

“To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:

- (a) substantially contributed to the hearing;
- (b) directly related to the matters contained in the Notice of Appeal; and
- (c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board’s hearing.”¹³

¹⁰ Cost Decision *re: Zon et al.* (December 22, 1997), E.A.B. Appeal No. 97-005-97-015.

¹¹ Costs Decision: *Paron et al.* (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD.

¹² *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

¹³ Cost Decision *re: Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraph 9.

[24] Under section 18(2) of the Regulation, costs awarded by the Board must be “directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party’s submission.” These elements are not discretionary.¹⁴

B. Courts vs. Administrative Tribunals

[25] In applying these costs provisions, it is important to remember that there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings or proceedings. As the public interest is part of all hearings before the Board, the Board must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply making a determination of a dispute between parties. Therefore, the Board is not bound by the “loser pays” principle used in civil litigation. The Board will determine whether an award of costs is appropriate considering the public interest generally and the overall purpose as defined in section 2 of the Act.

[26] The distinction between the costs awarded in judicial and quasi-judicial settings was stated in *Bell Canada v. C.R.T.C.*:¹⁵

“The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.”¹⁶

¹⁴ Cost Decision re: *Monner* (October 26, 2000), E.A.B. Appeal No. 99-166-CD at paragraph 25.

¹⁵ *Bell Canada v. C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.).

¹⁶ *Bell Canada v. C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to

“...express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it.”

[27] The effect of this public interest requirement was also discussed by Mr. Justice Fraser in *Cabre*:

“...administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green, supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:

In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tariffs [*sic.*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.”¹⁷

[28] The Act and the Regulation give the Board the authority to award costs if it determines the situation warrants it, and the Board is not bound by the loser-pays principle. As stated in *Mizeras*:¹⁸

“Section 88 [now section 96] of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese* [*Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992), 5 Alta. L.R. (3d) 40 [1993] W.W.R. 450 (Alta.Q.B.)]. The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay

¹⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 32.

¹⁸ Cost Decision *re: Mizeras, Glombick, Fenske, et al.* (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C.

spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed.”¹⁹

[29] The Board has generally accepted the starting point that the costs incurred with respect to the appeal are the responsibility of the individual parties.²⁰ There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.²¹

C. Application

[30] With this starting point in mind, the Board has assessed the request for costs through an analysis of the factors listed above. As indicated earlier, under section 18(2) of the Regulation, costs awarded by the Board must be “...directly and primarily related to (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission.” These elements are binding.²²

[31] The facts are that a mediation meeting was held, no interim costs were requested or awarded, and an oral hearing was not held as the appeal had been withdrawn. The application for costs was filed with the appropriate receipts, in the appropriate time period, and costs were directly related to the appeal. However, there was little justification included in the costs claim. The contribution of Ducks Unlimited to the appeal cannot be considered because the merits of the appeal were not adjudicated as the hearing was cancelled.

[32] One of the factors the Board considers is whether the party applying for costs required financial resources to make an adequate presentation. Since the costs request was for legal fees and airfare, the Board believes that this is not the case. The legal fees were mainly for

¹⁹ Cost Decision re: *Mizeras, Glombick, Fenske, et al.* (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C at paragraph 9; Cost Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraph 6.

²⁰ Costs Decision: *Paron et al.* (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD.

²⁰ Section 2 of the Act provides:

“The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ...

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions....”

²² Costs Decision: *Paron et al.* (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD; Cost Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C.

“...two hours of discussion with our client, organizing travel arrangements and reviewing correspondence....” This constitutes general work involved in any case and is not specific to preparation for an adequate presentation for this appeal. The airfare is a small cost that Ducks Unlimited should easily and rightly pay as a party to an appeal.

[33] A large portion of the claim (\$450) is based on a solicitor-client account for services. No justification is given for this request. The Board has clearly set out its approach to costs in regard to solicitor fees in two recent decisions and believes that these reasons are pertinent to this decision as well.

[34] In *Mizera*, the Board stated:

“In court proceedings, it is only in exceptional circumstances that the courts award costs on a solicitor and client basis. Rather, the norm is for the courts to base costs, in so far as they relate to the costs of advocacy, upon a scale related to the size and nature of the dispute and the amount of trial and preparatory time customarily involved in matters of that type. In Alberta, this approach is embodied in the Schedules to the Rules of Court. Such amounts are, at all times, subject to the overriding discretion of the court. They are not intended to compensate for the full costs of advocacy, even in the court system where a ‘loser pays’ approach is the norm.

In exercising its costs jurisdiction, this Board believes it is not appropriate (except perhaps in exceptional cases) to base its awards on a solicitor and client costs approach. It is up to each party to decide for themselves the level and the nature of representation they wish to engage. Similarly, it is up to each party to decide to what extent they wish their advocates to be involved in their pre-hearing preparation. The Board does not intend, through the exercise of its costs jurisdiction, to become involved in such decisions, yet this would be inevitable if, in deciding costs, the starting point was the actual account charged by the lawyer or advisor in question. Rather, the Board intends to follow the court’s approach of basing any costs awards on a reasonable allowance for hearing and preparation time, suitably modified to reflect the administrative and regulatory environment and the other criteria that apply before the Board.”²³

[35] The Board, if it does award legal costs, will generally base the costs award on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board determines to be relevant in the specific case. As stated in *Paron*:

²³ Cost Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C at paragraphs 10-11; Cost Decision re: *Mizeras, Glombick, Fenske, et al.* (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C at paragraphs 17-18.

“In the case before the Board, virtually all of the costs are legal fees. For this category of expense, except in exceptional cases, the Board has not previously assessed costs awards on a full solicitor and client basis. (Cost Decision re: *Cabre Exploration Ltd.*, E.A.B. Appeal No. 98-251-C). Where the Board awards legal costs, the Board will generally base the costs awards on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board applies under the Act and the Regulation for that case.”²⁴

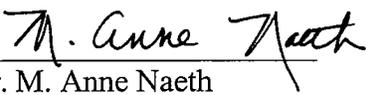
[36] In an appeal, the burden of proof rests with the appellant to demonstrate that the Director acted inappropriately. The Director must demonstrate that the order was valid and proper. Thus, in this appeal, Ducks Unlimited has no specific onus placed upon it. The Board acknowledges that the participation of Ducks Unlimited was welcome in the proceedings and that it presented another important perspective that assisted the Board in making informed decisions. However, the hearing could have proceeded without the participation of Ducks Unlimited.²⁵

[37] This is clearly not a case where Alberta Environment or the public at large should be liable for costs. It would be inappropriate to assign costs to any of the parties who participated in the mediation meeting and certainly inappropriate to assign them to the Bremonts who withdrew their appeal. Ducks Unlimited wanted to be part of the appeal, participated in the mediation and, had this matter gone to a hearing, would have been helpful in establishing a foundation for costs.

IV. DECISION

[38] For the foregoing reasons, and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, Ducks Unlimited’s request for costs is dismissed.

Dated on May 8, 2002, at Edmonton, Alberta.



Dr. M. Anne Naeth

²⁴ Costs Decision: *Paron et al.* (February 8, 2002), E.A.B. Appeal No. 01-002, 01-003 and 01-005-CD at paragraph 44.

²⁵ Cost Decision re: *Monner* (October 26, 2000), E.A.B. Appeal No. 99-166-CD.