ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 1, 2009

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

-and-

IN THE MATTER OF an appeal filed by Lee and Marilynn Fenske with respect to *Environmental Protection and Enhancement Act* Approval No. 20754-01-00 issued to the Beaver Regional Waste Management Services Commission by the Director, Central Region, Environmental Management, Alberta Environment.

Cite as: Costs Decision: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (01 May 2009), Appeal No. 07-128-CD (A.E.A.B.).

PANEL:	Dr. Alan J. Kennedy, Panel Chair, Dr. Steve E. Hrudey, Board Chair, and Dr. M. Anne Naeth, Board Member.
SUBMISSIONS BY:	
Appellants:	Mr. Lee and Ms. Marilynn Fenske, represented by Ms. Karin Buss and Ms. Eva Chipiuk, Ackroyd LLP.
Director:	Mr. Neil Hollands, Director, Central Region, Environmental Management, Alberta Environment, represented by Ms. Alison Peel, Alberta Justice.
Approval Holder:	Beaver Regional Waste Management Services Commission, represented by Ms. Cherisse Killick-Dzenick, Reynolds Mirth Richards & Farmer LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to the Beaver Regional Waste Management Services Commission (BRWMSC) authorizing the construction, operation, and reclamation of the Beaver Regional Class II landfill near Ryley, Alberta, where more than 10,000 tonnes per year of waste is disposed. The Approval is a renewal of an approval issued in 1998.

The Board received a Notice of Appeal from Mr. Lee and Ms. Marilynn Fenske, adjacent landowners to the landfill. The Board held the hearing on December 17 and 18, 2008, and the Fenskes and the BRWMSC reserved their right to apply for costs. Interim costs were awarded to the Fenskes to retain an expert for the hearing. The BRWMSC was ordered to pay $1,200.00 to the Fenskes towards the costs of retaining an expert.

The Fenskes requested costs for legal fees and disbursements ($47,561.58) and for their consultant ($8,764.76) for a total of $56,326.34. The Board found the expert provided limited assistance to the Board and awarded $1,068.97 for preparation time and travel expenses to attend the hearing. The Board awarded $3,877.95 for legal fees and disbursements because counsel kept the submissions focussed on the issues. The Board also determined the costs associated with the FOIP request, in the amount of $1,253.68, should be returned to the Fenskes. The Fenskes filed an amendment to their costs application for an invoice for $75.22 received from the BRWMSC for interest charges on the FOIP request. The Board allowed the amendment because the invoice was not available to the Fenskes at the time of the costs application, and the Board determined the interest costs to be part of the FOIP request and should be returned to the Fenskes. The total costs award was $6,275.82, less $1,200.00 for the interim costs paid and $1,328.90 for payment of the invoices regarding the FOIP request, leaving $3,746.92 payable by the BRWMSC.

The BRWMSC requested legal costs and costs for its experts for a total amount of $75,000.00. The BRWMSC also requested it be reimbursed for the interim costs paid to the Fenskes. The Board did not allow costs to the BRWMSC because reasonable costs associated with the appeal are a part of carrying out a regulated business. The Board credited the BRWMSC with the interim costs awarded in making its award of final costs to the Fenskes.

The Board did not find there were special circumstances that warranted costs being assessed against the Director. The BRWMSC was instructed to pay the final costs of $3,746.92 within 60 days of the costs decision being issued. The BRWMSC is also to provide the Board and the Fenskes with confirmation that the FOIP bill in the amount of $1,328.90 has been paid in full with the credit allowed by the Board.

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I. PROCEDURAL BACKGROUND

[1] On September 1, 2007, the Director, Central Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 20754-01-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to the Beaver Regional Waste Management Services Commission (the "Approval Holder" or "BRWMSC") authorizing the Beaver Regional Class II landfill (the "Landfill") near Ryley, Alberta, in Beaver County ("County"). The Landfill disposes of more than 10,000 tonnes of waste per year.

[2] On October 4, 2007, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Lee and Ms. Marilynn Fenske (the "Appellants") appealing the Approval. On October 5, 2007, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal.

[3] A preliminary motions hearing was held June 16, 2008.[1]

[4] On September 15, 2008, the Appellants submitted a request for interim costs. The Board awarded interim costs to the Appellants on October 30, 2008, in the amount of $1,200.00 for the purpose of retaining a technical witness.[2]

[5] The Hearing was held on December 17 and 18, 2008, in Edmonton. The Board provided its report and recommendations to the Minister on January 19, 2009, and the Minister accepted the Board's recommendations and issued Ministerial Order 03/2009 on January 21, 2009. A complete review of the procedural background can be found in the report and recommendations. [3]

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[1] See: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment* re: *Beaver Regional Waste Management Services Commission* (19 January 2009), Appeal No. 07-128-R (A.E.A.B.).

[2] See: Interim Costs: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment* re: *Beaver Regional Waste Management Services Commission* (30 October 2008), Appeal No. 07-128-IC (A.E.A.B.).

[3] See: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment* re: *Beaver Regional Waste Management Services Commission* (19 January 2009), Appeal No. 07-128-R (A.E.A.B.).

[6] At the end of the Hearing, the Appellants and the Approval Holder reserved their right to apply for costs. After the Minister issued his decision, the Board set a schedule to receive the costs submissions from the Parties. The Appellants and Approval Holder provided their costs applications on February 13, 2009, and the response submissions from the Parties were received on February 27, 2009. A request to amend their costs application was received by the Appellants on March 31, 2009, and response submissions on the amendment request were received from the other Parties on April 9, 2009.

II. APPLICATIONS and SUBMISSIONS

A. Appellants' Application

[7] The Appellants requested the Board direct their legal ($47,561.58) and expert ($8,764.76) costs, totaling $56,326.34, be paid by the Approval Holder. They explained the legal costs included legal fees, disbursements, and other charges. The expert costs consisted of fees and disbursements charged by SolAero Ltd. in connection with the consulting services provided by Dr. John Dennis.

[8] The Appellants stated the costs being claimed are directly related to the matters contained in the Notice of Appeal and the preparation of submissions and presentation at the Hearing. The Appellants submitted the Board should exercise its discretion and award the Appellants costs in the full amount claimed. They argued this would be consistent with and would further the goals set out in section 2 of EPEA, specifically sections 2(a), (d), (f), (g), and (i). [4]

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[4] Section 2 of EPEA provides:

"The purpose of this 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 actions;

[9] The Appellants stated they made a substantial contribution and had divided success in their appeal.

[10] The Appellants confirmed interim costs were awarded by the Board in the amount of $1,200.00, payable by the BRWMSC for the purpose of retaining Dr. John Dennis as a technical witness. They referred to the Board's interim costs decision where the Board accepted that the Appellants had limited alternate sources of funding available.[5]

[11] The Appellants stated they required financial resources to make an adequate submission, because they are in dire financial circumstances due to the bovine spongiform encephalopathy outbreak and the loss of their feed supply due to arson. The Appellants explained they are slowly rebuilding their herd. The Appellants argued the financial circumstances facing the agricultural industry that was recognized by the Board in previous decisions[6] should be considered by the Board as a factor that mitigates strongly in favour of granting final costs to the Appellants. The Appellants argued their written submissions and oral evidence would not have been as effective and useful if they had not retained expert and legal assistance.

[12] The Appellants noted the protection of groundwater is important to all Albertans. The Appellants stated their arguments at the Hearing regarding the protection of groundwater from the Approval Holder's operation supported section 2(d) of EPEA.

[13] The Appellants argued their participation in the appeal was important, and given that there was no other person to put forward the concerns identified, their participation was necessary to the hearing of the appeal.

[14] The Appellants submitted that given the complexity of the appeal, they required professional assistance to be able to participate in a meaningful way, and they should not be

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> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; …
>
> (i) the responsibility of polluters to pay for the costs of their actions…."

[5] See: Interim Costs: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (30 October 2008), Appeal No. 07-128-IC (A.E.A.B.) at paragraph 46.

[6] See: *Oxtoby et al.* v. *Director, Central Region, Regional Services, Alberta Environment*, re: *Capstone Energy* (29 December 2004), Appeal Nos. 03-118, 120, 121, and 123-IC (A.E.A.B.).

required to pay for the assistance themselves. They argued the polluter pays principle of section 2(i) of EPEA should be interpreted to mean the cost of funding participation of local residents. The Appellants argued the evidence shows the Approval Holder was not proactive in addressing the concerns of the Appellants.

[15] The Appellants noted that the costs claimed are a tax deductible business expense for the BRWMSC, but the Appellants do not receive any tax benefit for participating in the process.

[16] The Appellants argued the Board was persuaded by the Appellants' arguments with respect to a number of the preliminary motions raised, resulting in four issues being identified by the Board for the Hearing.

[17] The Appellants argued they made a substantial and useful contribution to the appeal. They noted the recommendations made by the Board regarding the issues of the abandoned wells, surface water regime, and special cells. The Appellants stated the Board was persuaded by the Appellants' argument regarding noise pollution, citing paragraph 185 of the Board's Report and Recommendations.[7] The Appellants stated their arguments regarding the operations of the Landfill persuaded the Board, because the Board confirmed the Director does have jurisdiction to consider operating hours and aesthetics. The Appellants argued their

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[7] See: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (19 January 2009), Appeal No. 07-128-R (A.E.A.B.). Paragraph 185 states:

> "The Board does not accept the argument that noise cannot be regulated by the Director. Noise is expressly included as a 'substance' under EPEA, and therefore the Director has the ability to regulate it if he chooses.[7] While the Director was unable to point to a written policy, the Board accepts the evidence that Alberta Environment does not regulate noise at any Class II landfills in Alberta, and that the regulation of noise has been left to the local municipalities. However, in accepting the Director's evidence, the Board is unclear if this decision is based on any qualitative evidence. None of the Parties, nor Dr. Dennis, was able to point the Board to any information on the level of noise that a landfill produces, although the Board expects that such information could be obtained. While the Board acknowledges that ERCB Directive No. 038 was developed for ERCB facilities, the Board believes the directive could be of some assistance to the Parties. In the absence of any other relevant information, ERCB Directive No. 038 is a relevant technical document as it presents useful information on noise impact assessment methodology that would be a useful starting point for a municipality, or any other agency, in addressing the regulation of noise." [Footnotes omitted.]

participation contributed to a better understanding of the Director's jurisdiction under EPEA to mitigate impacts related to noise, operating hours, and aesthetics.

[18] The Appellants explained that protecting the integrity of human health and well-being of society was one of the key issues of the appeal. The Appellants explained Dr. Dennis was retained as a human health risk expert, and he advised the Board that the precautionary approach to human health risks should apply in that a health impact should be assumed until a competent risk assessment demonstrates otherwise. The Appellants stated Dr. Dennis provided expert evidence directly related to section 2(a) of EPEA, and his presentation contributed to a better understanding of the issues before the Board.

[19] The Appellants stated the success or failure of an appellant plays a minor role in the Board's principles and practice on awarding costs. The Appellants argued that, even though the Board was not persuaded by Dr. Dennis' arguments, he contributed to the Hearing by presenting his expert opinion evidence on human health risk assessment, and he should be awarded costs for his contribution.

[20] The Appellants stated they were opposed to the renewal of the Approval so they requested the Board reverse the Director's decision until there were no outstanding technical, environmental, or health concerns. In the alternative, the Appellants requested the Approval be varied. The Appellants noted the Board recommended the Approval be varied by including conditions regarding abandoned wells, the water management system, water releases, and the amount of notice required to be given to the Director before starting construction of the Landfill cells. The Appellants noted the Minister accepted the recommendations. The Appellants argued their success on these issues formed important modifications to the Approval.

[21] The Appellants stated the expert costs were directly related to the matters contained in the Notice of Appeal and the preparation of Dr. Dennis' submission, presentation, and attendance at the Hearing. The Appellants stated the legal costs are reasonable and reflect only the actual expenditures incurred in the preparation of the submissions and the preparation and attendance at the preliminary motions hearing and the Hearing. The Appellants broke down the legal fees related to the various steps of the appeal proceedings: written preliminary motions submission ($11,320.00); written preliminary motions reply submission ($7,690.00); preparation

for and attendance at the preliminary motions hearing ($4,400.00); written submissions for the Hearing ($7,560.00); written reply submission for the Hearing ($1,260.00); and preparation for and attendance at the Hearing ($10,192.00).

[22] The Appellants submitted that they have satisfied the criteria applied by the Board when making an award of costs. The Appellants stated their submissions and involvement made a substantial contribution to the Hearing and the purpose and goals of EPEA. They stated they had considerable success in the appeal, and their presentations were articulate, focused, relevant, and advanced the public interest. They stated their presentations were made in a timely and efficient manner and did not unduly delay or prolong the hearing.

[23] The Appellants stated Dr. Dennis' rate of $150.00 per hour was reasonable for an expert with over 20 years of experience in human health risk assessment.

[24] The Appellants explained the effectiveness of their participation was due in part to the efforts of their legal counsel. They stated Ms. Buss was called to the Alberta Bar in 1993 and has been practicing environmental law since the mid 1990s. The Appellants explained Ms. Buss' hourly rate of $300.00 is reasonable for a lawyer who has been practicing for 15 years. The Appellants explained Mr. Nahirnik and Ms. Chipiuk drafted the submissions, responded to issues identified by the Board, and represented the Appellants on the second day of the Hearing, thereby reducing the total legal costs.

[25] The Appellants stated they acted in good faith throughout the appeal process.

[26] The Appellants requested an award of solicitor/client costs, including GST, for expert fees ($8,764.76) and legal fees ($47,561.58). After deducting the interim costs award of $1,200.00, the Appellants requested the Board order final costs in the sum of $55,126.34 to be paid by the BWRSMC.

B. Approval Holder's Application

[27] Regarding the interim costs award, the Approval Holder referred to the Board's Report and Recommendations in which the Board stated there was no evidentiary basis to make recommendations regarding litter, noise, odour, operating hours, and aesthetics. The Approval Holder noted the Board's statement that neither the Appellants nor Dr. Dennis presented any

quantitative evidence regarding noise levels at the Landfill or landfills in general. The Approval Holder quoted the Board from paragraph 192 of the Report and Recommendations in which the Board stated the "…evidence of Dr. Dennis did not provide any insights for the Board to consider bearing on the issues at the Hearing, and none of the information provided by Dr. Dennis forms the foundation for the Board's recommendations to the Minister."[8] The Approval Holder referred to the Board's comments that Dr. Dennis had no direct experience with landfills and was not qualified to practice medicine by diagnosing health outcomes of the Appellants. The Approval Holder noted the Board's statement that Dr. Dennis limited his preparation for the Hearing, and he did not review the application or any of the Approval Holder's data. The Approval Holder stated the literature review conducted by Dr. Dennis was inconclusive. The Approval Holder argued it was anticipated that Dr. Dennis would testify on the concerns relating to noise, litter, odour, operating hours, and aesthetics, but the Board found no evidence to make recommendations regarding these issues. The Approval Holder argued evidence on these issues was speculative.

[28] The Approval Holder argued that, based on the Report and Recommendations, this is an appropriate case for a re-determination of the interim costs awarded. The Approval Holder requested the return of the $1,200.00 paid for interim costs.

[29] The Approval Holder stated its legal costs, including disbursements and GST, totaled $82,067.88, and the costs for its expert witnesses were $19,698.80 for Entara Consulting Services Ltd. and $4,950.00 for EBA Engineering Consultants Ltd.

[30] The Approval Holder stated that, from the time it submitted its application and throughout the appeal, it has acted in accordance with the legislation, regulations, and standards. The Approval Holder stated it is committed to the goals of environmental legislation and regulation. It stated it has conducted its operations in a way that respects the principles of environmental protection as set out in EPEA. The Approval Holder submitted the Board should consider that the BRWMSC was created recognizing the needs of the public.

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[8] *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment* re: *Beaver Regional Waste Management Services Commission* (19 January 2009), Appeal No. 07-128-R (A.E.A.B.) at paragraph 192.

[31] The Approval Holder stated its expert witnesses brought all the issues before the Board and were instrumental in assisting the Board in formulating its recommendations. The Approval Holder argued the Appellants presented evidence that was speculative and offered little to vary from the BRWMSC's existing practice and policies.

[32] The Approval Holder stated the costs being claimed are directly related to the matters contained in the Notice of Appeal and the preparation and presentation of submissions at the preliminary motions hearing as well as the Hearing. The Approval Holder explained it was requesting $75,000.00 for final costs.

[33] The Approval Holder stated it had considerable success in the appeal with the recommendations reflecting practice and policies it already followed. The Approval Holder stated many of the costs incurred were the result of dealing with the issues on which the Board determined it had no basis to make any recommendations, including litter, noise, odour, operating hours, and aesthetics.

[34] The Approval Holder submitted this is an appropriate case in which costs should be awarded to the BRWMSC.

C. Appellants' Response Submission

[35] In their response submission, the Appellants asked that the Approval Holder's comments that it was created recognizing the needs of the public should not hinder a costs award for the Appellants. The Appellants stated that it is at the private expense of the Appellants, as adjacent landowners, that the BRWMSC is able to run a business that is satisfying the needs of the public. The Appellants argued the Approval Holder is a business, not a charitable venture created to address a greater public good.

[36] The Appellants submitted that by engaging in the appeal process, they acted pursuant to the purposes under EPEA, specifically with respect to environmental protection and effective mitigation measures. They argued the appeal gave the Director an opportunity to further and better discharge his obligations under the Approval and EPEA, and the BRWMSC had the opportunity to better manage its facilities and the needs of the public.

[37] The Appellants stated expert evidence was presented to the Board by the Appellants and the Approval Holder, and the appeal further enhanced the public interest. The Appellants argued imposing costs on the Appellants for acting in the public interest would be punitive.

[38] The Appellants argued the costs associated with an appeal are a part of doing business in Alberta. The Appellants stated that being liable for their own expert and legal costs will cause a serious financial burden. They argued this does not promote the purpose of EPEA of ensuring the shared responsibility of citizens to protect the environment and providing opportunities for citizens to do so, and it is not in the public interest. The Appellants argued the threat of a citizen having to subsidize an approval holder's business does not promote the purposes of EPEA, and it has a chilling effect and made the Appellants fearful of engaging in the process again.

[39] The Appellants argued they claimed reasonable legal and expert costs that were the actual expenditures incurred in the preparation of the appeal. The Appellants noted the Approval Holder's expert fees were almost three times that claimed by the Appellants' expert, and legal costs claimed by the Appellants was roughly half of those incurred by the Approval Holder.

[40] The Appellants submitted that not all of the costs claimed by the Approval Holder were reasonable or directly related to the appeal and were part of running a business. The Appellants noted the Approval Holder's expert, Mr. Hugo, included an entry for "'Attendance at regular Board of Commissioners meeting to provide a briefing on appeal hearing proceedings and to provide advice on operational and administrative issues.'"[9] The Appellants questioned whether the entry was reasonable or directly related to the appeal or whether it was part of doing business. The Appellants also questioned the costs claimed by Mr. Hugo for updating his personal curriculum vitae.

[41] The Appellants questioned whether the Approval Holder requested payment for the same expense twice when Mr. Hugo entered time for responding to the Appellants'

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[9] Appellants' submission, dated February 27, 2009, at paragraph 15.

November 5, 2008 information request and legal counsel for the Approval Holder also claimed time for Mr. Hugo's assistance with the information request. The Appellants stated that most of the documents provided in the information request were meeting minutes, which according to the BRWMSC's website are available upon request. The Appellants questioned whether the Approval Holder was acting in a heavy handed way given the entries and the charges for obtaining information that should be public. The Appellants noted that costs are not awarded to penalize a party unless the party was acting in a vexatious manner. The Appellants submitted that the Approval Holder's behavior constitutes special circumstances to warrant an award for complete expert fees and solicitor/client costs.

[42] The Appellants noted that the Board has stated in previous decisions that the costs are more properly fixed on the proponent of the project, and the Appellants added that in this case, the Approval Holder should pay the costs because it is using a natural resource not just to meet local needs for waste disposal, but to generate a profit by soliciting waste from other jurisdictions.

[43] The Appellants argued that fixing costs on the Approval Holder is in keeping with the polluter pays principle. The Appellants referred to the decision *Canadian National Railway Company et al.* v. *A.B.C. Recycling Ltd.*, 2005 BCSC 1559, in which the Court found that making the responsible parties liable to indemnify costs in full accords with the polluter pays principle. The Appellants argued the principle of polluter pays is also in keeping with the reality that an approval holder pays for its legal and expert costs with after tax dollars because it is a business expense.

[44] The Appellants stated they have not achieved a personal gain by filing the appeal, but all Albertans have benefitted in further protecting the environment and the public interest. The Appellants stated they are not looking for a personal benefit, and they noted they have not claimed for their time in preparing for and attending at the Hearing.

[45] The Appellants argued the Approval Holder now has an Approval that further protects the environment and the public interest. The Appellants stated the Approval Holder requested the Appellants compensate the BWRMSC for assisting them to fulfill their mandate under EPEA and the public needs purpose for which it was created.

[46] The Appellants submitted that the Approval Holder's "…request to pay for their Appeal costs is not an effective means of repairing an already 'strained' relationship and would cause significant hardship to a family of modest means."[10]

[47] The Appellants requested final costs totaling $55,126.34 be paid by the Approval Holder.

D. Approval Holder's Response Submission

[48] The Approval Holder reiterated that the interim costs paid should be returned to the BRWMSC.

[49] The Approval Holder argued there should be no costs awarded to the Appellants, particularly no costs should be awarded for the presentation and appearance of Dr. Dennis.

[50] The Approval Holder submitted that no costs should be awarded to the Appellants because the contribution made by the Appellants to the Hearing was minimal, and much of the evidence presented by the Appellants and their expert was speculative and based on conjecture and objective impression. The Approval Holder argued the Appellants' evidence was not supported by scientific evidence. The Approval Holder noted Dr. Dennis did not review the Landfill, the application, or the reports forming part of the application. The Approval Holder stated a great deal of time was spent on written submissions and the oral presentations on matters of which no evidence was presented.

[51] The Approval Holder argued a lot of the information presented by the Appellants was not relevant or useful to the four issues identified by the Board, resulting in an ineffective and inefficient use of resources for the Parties and the Board.

[52] The Approval Holder stated it has consistently taken responsibility for incorporating the principles of environmental protection as set out in EPEA. It stated it has taken a proactive approach in ensuring there is compliance.

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[10] Appellants' submission, dated February 27, 2009, at paragraph 25.

[53] The Approval Holder submitted that awarding costs to the Appellants is not warranted, but if costs are awarded, they should be set off from the costs requested by the BRWMSC.

[54] The Approval Holder argued a great deal of the Appellants' evidence was not relevant. It stated the four issues before the Board, not the Notice of Appeal, is the relevant starting point in deciding whether a party made a substantial contribution to the appeal. The Approval Holder noted that the Board had no basis to make recommendations regarding noise, litter, odour, operating hours, or aesthetics. With respect to the issue of abandoned wells, the Approval Holder stated the Board recommended formalizing the operational practices of the BRWMSC regarding the locating of abandoned wells.[11] The Approval Holder stated it provided the Board with the necessary evidence to support the recommendation on abandoned wells.

[55] The Approval Holder stated the Board accepted the evidence of the BRWMSC on various issues regarding the surface water regime. The Approval Holder submitted that its

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[11] The recommendations made by the Board were:

"1. The Board recommends to the Minister that the Approval be amended to require the Approval Holder to develop a written protocol, to be reviewed and approved by the Director, as to how it will identify and properly reclaim any wells it encounters during construction of cells at the Landfill. The written protocol should address any type of well that could be encountered, including but not limited to monitoring wells, piezometers, and bore holes.

2. The Board recommends to the Minister that the Approval be amended to require the Approval Holder to develop additional information, to be available to the public, that clearly explains the water management system at the Landfill and assists in clearly identifying what features are part of the Off-site Water diversion, the Run-on water system, and the on-site Run-off water system on a map and on the ground at the Landfill.

3. The Board recommends to the Minister that the Approval be amended to require the Approval Holder to notify the Director and the Appellants of all stored water released from the Approval Holders' property, in the event that there could be a negative impact on the Appellants.

4. The Board recommends to the Minister that the Approval be amended to: require the Approval Holder to notify the Director any time it makes an application for an authorization required by another piece of legislation (federal, provincial, or municipal) to allow it to accept certain types of wastes; and allow the Director to extend the 14 day notice that needs to be given before the construction of a cell at the Landfill commences, where appropriate."

See: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment* re: *Beaver Regional Waste Management Services Commission* (19 January 2009), Appeal No. 07-128-R (A.E.A.B.) at paragraph 207.

evidence assisted the Board in developing the second recommendation, and the recommendation does not alter the surface water regime at the Landfill.

[56] The Approval Holder submitted that the fourth recommendation shows the Board accepted the view of the BRWMSC that special cells can be used to more effectively manage the waste being received by the Landfill.

[57] The Approval Holder stated the Board commented that the evidence presented on health impacts did not provide any insights. The Approval Holder argued that none of the information presented by the Appellants or Dr. Dennis formed a foundation for any of the Board's recommendations. Therefore, according to the Approval Holder, an award of costs to the Appellants is not supported. The Approval Holder added the Appellants did not demonstrate a need for costs, and no evidence was provided on the Appellants' financial position to support statements made in the Appellants' costs submission.

[58] The Approval Holder submitted the interim costs should be returned to the BRWMSC and no final costs should be awarded to the Appellants.

E. Director's Response Submission

[59] The Director noted the Appellants did not request costs from the Director, and the Approval Holder did not specify who should be liable for costs. The Director submitted that he should not be responsible for paying any of the costs claimed by the Appellants or the Approval Holder.

[60] The Director noted the Board and the Courts have developed principles for costs claims as they relate to the Director because of the unique role the Director holds in these matters as the statutory decision maker whose decision is being appealed. The Director explained his authority under EPEA is to consider the applications submitted by an applicant and decide whether to issue the environmental authorizations with certain terms and conditions. The Director stated that, given this statutory role, the Director is an automatic party to every appeal of the Director's decision. The Director stated the Board and the Courts have recognized this statutory role and considered it a vital factor in not ordering the Director pay costs as long as the Director is acting in good faith.

[61] The Director submitted that no award of costs should be made against him. He stated there was no finding of bad faith in the actions or interpretations taken by the Director in this case, and neither the Appellant nor the Approval Holder hinted at such an allegation. The Director submitted that there are no special circumstances that should result in costs being assessed against the Director in this case.

[62] The Director noted that in past decisions in which the Director's decision has been substantially varied or reversed, the Board did not consider that to be a special circumstance to assess costs against the Director. The Director submitted that the four recommendations put forward by the Board did not substantially vary or reverse the Director's decision.

[63] The Director submitted that the Board should not find any special circumstances to award costs against the statutory decision maker in this case.

III. LEGAL BASIS

A. Statutory Basis for Costs

[64] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA 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. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*:

> "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."[12]

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

[12] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

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.)[13]

[65] The sections of the *Environmental Appeal Board Regulation*,[14] (the "Regulation") concerning final costs 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
> (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.

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[13] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

[14] *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

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

[66] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the EPEA as found in section 2:

> "The purpose of this 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;
> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
> (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
> (i) the responsibility of polluters to pay for the costs of their actions;
> (j) the important role of comprehensive and responsive action in administering this Act."

[67] While all of these purposes are important, the Board believes the responsibility that sections 2(f) and (g) of EPEA place on all Albertans "…for the shared responsibility of all Alberta citizens…" and "…their role in providing advice…" is particularly instructive in making its costs decision.

[68] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply in the particular claim for

costs.[15] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[16] 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…,"[17] reinforcing the wide discretion given to the Board to award costs.

[69] The Board evaluates each costs application against the criteria in EPEA, 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."[18]

[70] 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.[19]

B. Courts vs. Administrative Tribunals

[71] In applying these costs provisions, there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings

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15 *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.)* (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.)).

16 *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

17 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

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

19 *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

or proceedings. As the public interest is part of all hearings before the Board, it 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 EPEA.

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

> "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."[20]

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[20] *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."

See also: *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.):

> "…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 tarrifs [*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

[73] EPEA and the Regulation give the Board 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 *Mizera*:

> "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) 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 spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[21]

[74] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[22] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.

IV. ANALYSIS

A. Appellants

1. Dr. John Dennis

[75] As the Board has stated in previous decisions, the starting point in considering any costs application is that the parties are responsible for the costs they incurred. Section 2 of EPEA states citizens of Alberta have a responsibility in protecting the environment, and

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> 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.'"

[21] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) ("*Mizera*"). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

[22] *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

participating in the approval and appeal processes is one way of fulfilling their obligations. The party making the costs application needs to show the Board there are sufficient reasons to depart from that starting point and award costs to that party.

[76] The Board has always held that awarded costs are intended to defray costs associated with preparing for a hearing in which the party has provided evidence and submissions that assisted the Board in drafting its recommendations. The Board must assess whether the costs claimed were required for the party to prepare and present its case at the Hearing. Costs are not awarded to provide a financial benefit to a party appearing before the Board, and costs are not awarded to penalize another party unless that party was acting in a vexatious manner.[23]

[77] The Appellants raised the Board's previous costs decision in *Capstone*.[24] In that decision, the Board recognized the difficulty farmers were having due to the BSE issue. Albeit some farmers are still recuperating from that issue, the *Capstone* decision was made in 2003, when the matter was at its peak. The Board did not accept that as a reason to award solicitor/client costs at that time, and it certainly cannot be used as a reason to award solicitor/client costs at this time.

[78] The Appellants in this case were concerned, among other issues, with the effects an expanding landfill will have on the air and groundwater resources in the area. They live across the road from the Landfill, and they raised legitimate concerns regarding the water flow from the site, abandoned wells, and special waste cells.

[79] The Appellant retained the services of Dr. Dennis to provide evidence on the health impacts the Landfill has on the Appellants. As the Board stated in its interim costs decision, the Board can adjust any interim costs award in the final costs decision.

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[23] See: *Gadd* (2006), 19 C.E.L.R. (3d) 1 (Alta. Env. App. Bd.) at paragraph 83, (*sub nom.* Costs Decision: *Gadd* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Cardinal River Coals Ltd.* (16 December 2005), Appeal Nos. 03-150, 151 and 152-CD (A.E.A.B.); *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2004), 4 C.E.L.R. (3d) 238 (Alta. Env. App. Bd.) at paragraph 75, (*sub nom. Costs Decision: Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.).

[24] See: Costs Decision: *Mountain View Regional Water Services Commission et al.* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Capstone Energy Ltd.* (16 December 2005), Appeal Nos. 03-

[80] The evidence provided by Dr. Dennis at the Hearing was of limited value to the Board. Because the Board assesses whether the evidence was relevant to the issues before the Board and whether the evidence assisted the Board in preparing its recommendations, the Board cannot award full costs for Dr. Dennis.

[81] Dr. Dennis did, however, provide a summary of the literature he found regarding the effects of landfills on humans. Although the evidence provided by Dr. Dennis did not support the Appellants' case arguing that a full human health risk assessment was warranted in these circumstances, Dr. Dennis did bring forward some research documents which were relevant to the Board in considering what impacts on human health might arise from a municipal landfill. Of particular relevance were the articles "Waste management and public health: the state of the evidence"[25] and "Population Health and Waste Management."[26] These articles provided assurance for the Board that studies elsewhere of human populations living near municipal landfills had been unable to demonstrate human health impacts that could be attributed to contaminants arising from those landfills. In this regard, these articles were of some value to the Board.

[82] Dr. Dennis claimed 22.5 hours reviewing approximately 10 documents, including the two identified by the Board as being particularly relevant to the issues addressed at the Hearing. Because there was no further breakdown as to the time spent researching each of the documents, the Board will assume that an equal amount of time was spent reviewing each of the 10 articles. This would mean Dr. Dennis spent 2.25 hours reading each of the articles. Because the Board found only two of the articles listed as being particularly relevant, the Board will allow 4.5 hours for preparation time for the Hearing. Dr. Dennis charged $150.00 per hour, which the Board considers reasonable for Dr. Dennis' background. Therefore, the Board will allow $675.00 (4.5 hours x $150.00 per hour = $675.00) plus $33.75 for GST for Dr. Dennis' involvement at the Hearing.

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116 and 03-118-123-CD (A.E.A.B.) ("*Capstone*").

[25] G. Pheby et al., "Waste management and public health: the state of the evidence" (2003) 14:2 Management of Environmental Quality 191.

[26] Population Health and Waste Management: Scientific Data and Policy Options (2007), WHOLIS No. E91021.

[83] Dr. Dennis also charged $734.62 for travel expenses. These expenses included a trip to the Appellants' farm and expenses related to travel to the Hearing. Although the trip to the Appellants' farm seemed like a logical part of the preparation of Dr. Dennis' submission, he did not assist the Board by providing any analysis of the Appellants' circumstances going beyond what he could have achieved in a telephone conversation. The information could have, and was, presented by the Appellants themselves. Based on his investigation and questioning of the Appellants, Dr. Dennis could only conclude that the situation was stressful to the Appellants which in turn could impact the Appellants' health. This was an apparent conclusion that did not require much analysis of data. Again, the value of Dr. Dennis' evidence was bringing forward the research documents. Because he had to attend the Hearing to bring forward the research documents and summarize them, the Board will allow Dr. Dennis' travel expenses to the Hearing including airfare ($206.15) and hotel accommodations ($154.07), totaling $360.22.

[84] Because of the limited value of Dr. Dennis' submission, the Board will not grant any additional costs associated with his involvement in the appeal. Therefore, the total costs granted for Dr. Dennis' participation is $1,068.97.

2. Legal Counsel

[85] When assessing whether or not costs should be awarded, the Board looks at the level of helpfulness a party was to the Board in drafting the recommendations. The Appellants in this case were represented by legal counsel. The senior lawyer has considerable experience before tribunals, including this Board, and understands the principles of environmental law. It is apparent from the detailed billing provided that a number of lawyers worked on this file. The Board appreciates that day-to-day conduct of the file was delegated to junior lawyers in the firm to minimize costs.

[86] The Board is willing to consider some of the legal costs incurred by the Appellants. It was particularly helpful to have legal counsel represent the Appellants during the substantive Hearing. Counsel for the Appellants kept the evidence and submissions focused on the issues identified by the Board. Counsel assisted in ensuring the process was efficient and

asked relevant questions in cross examination. Their presence at the Hearing assisted the Board in getting efficiently at the facts relevant to the appeal.

[87] In assessing what costs can be considered, the Board generally does not accept any costs incurred after the date of the Hearing. In this case, one of the witnesses for the Approval Holder was required to complete an undertaking. It would appear those costs claimed by counsel for the Appellants after December 18, 2008, were in relation to the undertaking. Therefore, these costs will not be excluded in the Board's computations.

[88] In the Appellants' costs submission, the Appellants summarized the costs associated with the Hearing as: $7,560.00 for the written submission; $1,260.00 for the written reply submission; and $10,192.00 for preparation for and attendance at the Hearing. Therefore, the total legal costs for the Hearing was $19,012.00 plus $950.60 for GST.

[89] The Appellants had two counselors representing them at the Hearing.[27] In calculating legal costs, the Board uses the Government of Alberta rates for outside counsel. The Board considers the Government of Alberta rate as an appropriate tariff against which to judge the appropriateness of legal fees, but it is always cognizant that there may be circumstances in which it may not be appropriate.[28]

[90] Ms. Buss who was called to the Alberta Bar in 1993, charged $300.00 per hour. The government rate for a lawyer with 15 years of experience is $250.00 per hour. Ms. Buss charged for 19.6 hours for preparation for and attendance at the Hearing. Therefore, the starting point for Ms. Buss' legal fees is reduced to $4,900.00 plus $245.00 GST.

[91] Ms. Chipiuk was called to the bar in 2008, so the government rate for lawyers with one year experience is $95.00 per hour. She claimed 93.8 hours for preparation for and attendance at the Hearing. Therefore, her legal costs associated with the Hearing are $8,911.00.

[92] In reviewing the costs, the Board notes Ms. Chipiuk claimed 0.9 hours for researching articles published by one of the panel members. The Board will not include this time

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[27] The Board notes Mr. Nahirnik did not work on the submissions for the Hearing, so his costs will not be included in the costs analysis.

[28] See: Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098, and 101-CD (A.E.A.B.) at paragraph 42 and associated footnotes.

(0.9 hours) into its calculations, so the starting point for the costs claim is $14,411.78. In this case, legal counsel was of assistance to the proceedings so the Board is willing to award some of the costs. Because counsel did an adequate job of focusing the presentations to the issues, the Board will award 25 percent of the legal costs, totaling $3,431.38 plus $171.57 GST, totaling $3,602.95.

[93] The Board will allow some of the disbursement costs.[29] It is unclear from the statements provided the amount of the disbursements that are directly related to the Hearing. Because counsel's fees for the Hearing were approximately 45 percent of the total fees claimed, the Board will accept 45 percent of the reasonable disbursement costs. The Board does not award costs associated with researching documents through Westlaw or Quicklaw or conducting article searches, because these documents could, in most cases, be found in the firm libraries or legal libraries at no cost. The Board will generally not allow costs for in-house photocopying or printer copies, scanning, or production of CDs. These in-house costs are normally calculated into the fees charged as part of the overhead. If these costs were outsourced, the Board may consider the costs if receipts are provided. The Board will not consider paying for items such as index tabs. Without documentation or an explanation of costs, such as bus tickets and parking, the Board does not know how it is associated with the Hearing. Therefore, the starting point for the disbursements allowed is faxing charges ($382.00), courier charges ($42.92), long distance charges ($68.26), postage ($62.15), and area photographs ($12.00) for a total of $567.33. The area photographs were used at the Hearing, so the Board will allow the full amount for these photographs. The remainder of the disbursement charges will be reduced because it is uncertain whether the charges relate to the preliminary motions or the Hearing. Therefore, the costs

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[29] The Appellants' counsel claimed the following disbursement costs totaling $1,680.76 plus $84.04 for GST:

Westlaw-Carswell	$52.50	Couriers	$42.92
Photocopies	$837.15	Long Distance	$68.26
Production of CDs	$1.88	Postage	$62.15
Scanning	$24.80	Bus tickets	$3.96
Fax	$382.00	Parking	$1.89
Printer Copies	$164.10	Area Photos	$12.00
Corporate on-line searches	$3.00	Index Tabs	$18.95
Article Search	$5.20		

allowed for disbursements will be $12.00 for the photographs plus $249.90 for the other allowable disbursements for a total of $261.90.

3. Other Costs

[94] In reviewing the costs claimed by the Appellants, the Board notes the Appellants were required to pay $1,253.68 to file a request for documents under the Freedom of Information and Protection of Privacy ("FOIP") legislation. If the Appellants had made a document production request, the Board would have considered the request and if the Board considered the documents relevant to the appeal, it may have ordered the production of the documents from the Approval Holder without costs. Most of the documents requested related to minutes of meetings held by the BRWMSC, and on its website, the BRWMSC states that this information is available on request. It does not seem appropriate that, just because the Appellants had filed an appeal, that these documents should come with a price. During an appeal process, the Board expects the parties to be co-operative in providing documentation relevant to the appeal to the Board and the other parties. Therefore, the Appellants will be awarded costs, totaling $1,253.68 to reimburse the Appellants for having to pay for documents that are supposed to be available by request.

4. Who Should Bear the Costs?

[95] Although the legislation does not prevent the Board from awarding costs against the Director, the Board has stated in previous cases, and the Courts have concurred,[30] that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

[96] In this case, the Director's decision was not overturned by the Board but was varied. Even if the decision had been reversed, special circumstances are required for costs to be awarded against the Director. The Court, in the decision of *Cabre*, considered the issue of the Board not awarding costs against the Director. In his reasons, Justice Fraser stated:

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[30] See: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

> "I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board's decision, that the Department should be treated differently from other parties to an appeal.
>
> The Board states in its written submission for this application:
>
> > 'There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.'
>
> In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise."[31]

[97] There are no special circumstances to warrant awarding costs against the Director. When the Board refers to special circumstances, the Board determines whether the Director acted in good faith within his jurisdiction. The Director issued the Approval to the BRWMSC, renewing a pre-existing approval. The Director included additional conditions into the Amending Approval in response to the application filed by the BRWMSC. The Director was acting within his jurisdiction under EPEA. Neither the Appellants nor the Approval Holder argued the Director was not acting in good faith in issuing the Approval. The Director also believes he was acting in good faith throughout the process. Therefore, costs will not be awarded against the Director in these circumstances.

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[31] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board*) (9 April 2001) Action No. 0001-11527 (Alta. Q.B.) at paragraphs 33 to 35.

[98] In previous costs decisions where costs have been awarded against the project proponent, the Board has described the role of project proponents as being "…responsible for incorporating the principles of environmental protection set out in the Act [EPEA] into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties…."[32] As the Board has stated before, "…these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the projects financing, than upon the public at large as would be the case if they were to be assessed against the Department."[33]

[99] The Approval Holder in this case is enlarging an existing landfill. It receives the benefits of operating such a facility. Although the Board recognizes the public benefit provided by the Landfill, it is operated for profit. The Approval Holder was aware that building such a facility in a populated area could raise concerns and the possibility of appeals.

[100] The Board considers the costs awarded in this appeal a cost of doing business for the Approval Holder. Therefore, in the circumstances of this appeal, costs in the amount of $6,200.60, less the $1,200.00 interim costs paid previously for a total of $5,000.60, will be ordered payable by the Approval Holder.

5. Summary

[101] The total costs award for the Appellants is $6,200.60, including $1,068.97 for expert costs, $3,602.95 for legal fees plus $275.00 for disbursements, and $1,253.68 for FOIP costs. The interim costs award of $1,200.00 is credited to the Approval Holder leaving an outstanding costs award of $5,000.60. The FOIP costs are to be credited to the Appellants' bill owing to the BRWMSC. Therefore, the outstanding amount owing directly to the Appellants is $3,746.92.

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[32] See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B). In *Cabre*, the Board stated that where Alberta Environment has carried out its mandate and has been found, on appeal, to be in error, then in the absence of *special circumstances*, it should not attract an award of costs. The Court of Queen's Bench upheld the Board's decision: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.)

[33] Re: *Mizeras* (2000), 32 C.E.L.R. (N.S.) 33 (Alta. Env. App. Bd.), (*sub nom.* Cost Decision re: *Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 33.

B. Approval Holder

[102] The Approval Holder asked for costs totaling $75,000.00 and the return of interim costs of $1,200.00 paid to the Appellants to retain an expert.

[103] The Approval Holder explained it spent approximately $106,716.68 to participate in this appeal, but it requested only $75,000.00 be awarded as costs.

[104] The Board has taken the position that the proponent of a project accepts that an appeal of an approval is a possibility and is considered a part of the application and approval process. Essentially, reasonable costs are a cost of carrying out a regulated business.

[105] Although any party to an appeal has the right to ask for costs, the Approval Holder in this appeal has been before the Board previously and knows the general starting point is that, if costs are awarded, they are often borne by the proponents. The Approval Holder's request to reassess the interim costs was expected, and in this case, has worked to the Approval Holder's advantage.

[106] The Board acknowledges the evidence provided by the Approval Holder did assist the Board in making its recommendations. The recommendations made by the Board and accepted by the Minister provides the Approval Holder with a clearer Approval, making it easier for the Approval Holder, as well as the Director and Appellants, to determine if the Approval Holder is complying with all of the conditions in the Approval. In this case, the Board will not award costs to the Approval Holder.

[107] Regarding the request for interim costs to be returned, the Board has adjusted the costs award to the Appellants for retaining Dr. Dennis. This is reflected in the final costs award to the Appellants as discussed above. The interim costs awarded amounted to $1,200.00, but the value of Dr. Dennis' participation in the Hearing process to the Board was limited to $1,068.97. Therefore, the Approval Holder will be credited $131.03 for the difference. Therefore, the total costs award to the Appellants, payable by the Approval Holder is $5,000.60.

V. INTEREST COSTS

[108] While the Board was completing its decision regarding the costs applications, the Appellants notified the Board on March 31, 2009, that they had received an invoice for $75.22 from the Approval Holder for interest charges relating to the outstanding balance due for the document request filed through the FOIP process. They requested the opportunity to amend their costs application to include the invoice.

[109] The Board asked the Approval Holder and the Director to respond to the Appellants' request. The Director confirmed its position set out in his response submission, and added the amendment application was filed well past the time set for submissions by the Board. The Approval Holder explained the request for documents was not made by the Board, so the BRWMSC took the request was outside the appeals process and applied the same principles for charging for a request under FOIP. The Approval Holder explained interest was charged at the rate of 2% per month, and the charges were approved by the board of the BRWMSC. The Approval Holder argued it is not unusual or unreasonable for interest to be charged on overdue accounts. The Approval Holder argued the Board should not accept the amendment to the costs application, and if the Board accepts the amendment, the additional costs should not be awarded to the Appellants.

[110] In order to consider whether the Board should consider awarding costs associated with the interest charges, it must first determine whether it should accept the amendment request. The deadline for receiving costs applications was February 13, 2009, with response submissions due on February 27, 2009. The amendment was received over one month past these dates. In order for the Board to allow late filed submissions, the party must be able to demonstrate circumstances exist that warrant the extension. In this case, the Appellants had not yet received the invoice for the interest by the deadline for the costs submission. The invoice was not received until March 23, 2009. There was nothing on the original invoice to indicate that interest would be charged. At the time of the costs submission, the Appellants could not have known there would be interest charged or if so, the amount of the interest due. The amendment was not a result of overlooking costs already in the Appellants' possession. Therefore, the Board

considers it reasonable in these circumstances to allow the amendment to the Appellants' costs application.

[111] The Board has allowed the Appellants' costs associated with retrieval of the documents from the Approval Holder, totaling $1,253.68. The interest charges are a result of the Appellants having to use FOIP as a means of receiving documents from the Approval Holder that should have been easily obtained. The BRWMSC is not required to use FOIP in order to provide documents to the public. In this case, the Appellants are the ones who are most affected by the operations of the Landfill; they are not just any member of the general public. Therefore, the Appellants will be awarded costs, totaling $75.22 to reimburse the Appellants for having to pay for the interest charges associated with the request for documents that are supposed to be available by request.

[112] The Board will include the interest charges to the total costs award for the Appellants. Therefore, the total costs associated with the FOIP request is $1,328.90. Because this amount would be paid back to the BRWMSC for the invoices, the Board will credit the total amount payable by the Approval Holder for this amount. The BRWMSC is to provide the Board and the Fenskes with confirmation that the FOIP bill in the amount of $1,328.90 has been paid in full with the credit allowed by the Board.

VI. DECISION

[113] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Appellants totaling $6,275.82, less the $1,200.00 interim costs paid previously and less the $1,328.90 for payment of the invoices regarding the FOIP request, leaving $3,746.92 payable by the Beaver Regional Waste Management Services Commission.

[114] The Board orders that these costs be paid within 60 days of issuance of this decision. Payment is to be made to the Appellants' counsel, Ms. Karin Buss, in trust. The BRWMSC is requested to provide confirmation to the Board that payment has been made. The

BRWMSC is also to provide the Board and the Fenskes with confirmation that the FOIP bill in the amount of $1,328.90 has been paid in full with the credit allowed by the Board.

Dated on May 1, 2009, at Edmonton, Alberta.

"*original signed by*"

Dr. Alan J. Kennedy
Panel Chair and Board Member

"*original signed by*"

Dr. Steve E. Hrudey, FRSC, PEng
Board Chair

"*original signed by*"

Dr. M. Anne Naeth
Board Member