ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 24, 2011

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 appeals filed by Kent and Ingrid Vipond, Bernie and Margie Brown, Robert and Lisa Cowling, Bruce and Marcia Jeffers, Ian and Corrinne Zeer, and Jesse, Sarah, and Harji Hari and Haralta Ranches with respect to *Environmental Protection and Enhancement Act* Approval No. 241939-00-00 issued to EcoAg Initiatives Inc. by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Costs Decision: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (24 October 2011), Appeal Nos. 09-006-009, 016 & 019-CD (A.E.A.B.).

PANEL:	Mr. Alex G. MacWilliam, Panel Chair; Mr. Jim Barlishen, Board Member; and Ms. A.J. Fox, Board Member.
SUBMISSIONS BY:	
Appellants:	Mr. Kent and Ms. Ingrid Vipond; Mr. Bernie and Ms. Margie Brown; Mr. Robert and Ms. Lisa Cowling and Mr. Bruce and Ms. Marcia Jeffers, represented by Ms. Teresa Meadows, Miller Thomson LLP; Mr. Ian and Ms. Corrinne Zeer; and Mr. Jesse, Ms. Sarah, and Mr. Harji Hari and Haralta Ranches.
Director:	Mr. Brock Rush, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham and Mr. Andrew Bachelder, Alberta Justice.
Approval Holder:	EcoAg Initiatives Inc., represented by Mr. Kelly Nicholson and Mr. Jase Cowan, Field LLP.
Intervenors:	Mr. Ian and Ms. Laurie Currie.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* to EcoAg Initiatives Inc. (EcoAg), authorizing the construction, operation, and reclamation of the High River Waste Management Facility (the Facility), located near High River, Alberta, for the collection and processing of waste to produce fuel (commonly referred to as biogas).

The Board received seven Notices of Appeal. The Board held a hearing on February 9 to 11, 2011, in Okotoks. At the hearing, Mr. and Ms. Cowling and Mr. and Ms. Jeffers (the Applicants) and EcoAg Initiatives reserved their right to apply for costs.

The Applicants requested costs totalling $60,314.11. This was based on their total costs of $79,689.11, less $3,375.00 for interim costs, and $16,000.00 provided by other appellants and community members.

After reviewing the costs request and the Applicants' participation in the hearing process, the Board awarded the Applicants $14,652.74 for legal services and disbursements and $4,750.29 for consultant fees and disbursements, for a final costs award of $19,403.03, payable by EcoAg. This amount took into consideration the $3,375.00 interim costs previously paid to the Applicants.

EcoAg applied for costs totalling $111,916.65, including $99,333.37 for legal fees and disbursements, and $12,583.28 for consultants' fees and disbursements. The Board did not award costs to EcoAg because EcoAg did not provide sufficient detail in support of its costs application, and the Board is of the opinion the costs incurred by EcoAg should be regarded as a cost of doing business.

The Board found no reason to assess costs against the Director since he did not act in bad faith, and the Board did not accept the Applicants' argument that special circumstances warranted an award of costs against the Director.

TABLE OF CONTENTS

I. BACKGROUND

[1] On June 23, 2009, the Director, Southern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 241939-00-00 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act"), to EcoAg Initiatives Inc. ("EcoAg" or the "Approval Holder") authorizing the construction, operation, and reclamation of the High River Waste Management Facility (the "Facility") located in the SE 16-19-1 W5M near High River, Alberta, for the collection and processing of waste to produce fuel, commonly referred to as biogas.

[2] Between July 22 and September 29, 2009, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Kent and Ms. Ingrid Vipond (the "Viponds") (09-006), Mr. Bernie and Ms. Margie Brown (the "Browns") (09-007), Mr. Robert and Ms. Lisa Cowling (the "Cowlings") (09-008), Mr. Bruce and Ms. Marcia Jeffers (the "Jeffers") (09-009),[1] Mr. Ian and Ms. Corrinne Zeer (the "Zeers") (09-016), and Mr. Jesse, Ms. Sarah, and Mr. Harji Hari and Haralta Ranches (the "Haris") (09-019) (collectively, the "Appellants").[2]

[3] A mediation meeting was held on October 30, 2009, in High River, Alberta. An additional mediation meeting was held on March 9, 2010, in Calgary. No resolution was reached, and the Board proceeded with the hearing process.

[4] On September 23, 2010, the Board asked the Parties to provide submissions on the preliminary motions that had been raised.[3] Submissions were received from the Parties between October 12, 2010, and November 15, 2010. The Board notified the Parties of its

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[1] In this decision, the Jeffers and Cowlings will be referred to as the "Applicants" and will not be included in the definition of "Appellants." In this decision, the Applicants, Appellants, Approval Holder, and Director will be referred to, collectively, as the "Parties."

[2] The appeal of Mr. Wendel and Ms. Christy Wickenheiser was dismissed for failing to comply with the Board's request to submit a written submission in respect of the preliminary motions. See: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006-009, 016, 017, & 019-ID1 (A.E.A.B.).

[3] The preliminary issues were:

1. Did the Appellants file statements of concern with Alberta Environment?
2. Was adequate notice of the application given?
3. What documents should be disclosed and provided to the Appellants?
4. What issues are within the Board's jurisdiction and should be considered at the hearing, if one is held?

decision regarding the preliminary matters on November 25, 2010, and provided its reasons on January 6, 2011.[4]

[5] On December 6, 2010, the Board received a request from the Applicants and the Viponds to order the Approval Holder and Director to provide additional documents. The Board received responses from the Director and the Approval Holder on December 14 and 15, 2010, respectively. On January 4, 2011, the Board provided the Parties with its decision regarding the documents requested. The documents were provided on January 11, 2011.

[6] The Board accepted the intervenor application of Mr. Ian and Ms. Laurie Currie (the "Intervenors"). The Board provided the Parties and the Intervenors notice of its decision on January 12, 2011, and its reasons on January 26, 2011.[5]

[7] On January 14, 2011, the Board received an interim costs application from the Applicants. The Board received comments on the application from the other Parties between January 17 and 24, 2011. The Board provided its decision on the interim costs application on January 27, 2011, ordering the Approval Holder to pay interim costs totaling $3,375.00 to the Applicants. The Approval Holder paid the interim costs on February 2, 2011.[6]

[8] The Board held the Hearing on February 9 to 11, 2011, in Okotoks, Alberta. The Board provided the Parties with its Report and Recommendations and a copy of the Ministerial Order on March 23, 2011.[7]

[9] At the end of the Hearing, the Applicants and Approval Holder reserved their right to apply for costs.

[10] On May 20, 2011, the Board set the schedule to receive costs applications. The Board received costs applications from the Applicants and the Approval Holder on June 7, 2011. The Board received response comments from the Applicants, the Approval Holder, the Director, Mr. and Ms. Vipond, Ms. Brown, and Mr. Currie on June 21, 2011.

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[4] See: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006-009, 016, 017, & 019-ID1 (A.E.A.B.).

[5] See: Intervenor Decision: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (25 January 2011), Appeal Nos. 09-006-009, 016, & 019-ID3 (A.E.A.B.).

[6] Interim Costs: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (20 May 2011), Appeal Nos. 09-006-009, 016 & 019-IC (A.E.A.B.).

[7] See: *Viponds et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (11 March 2011), Appeal Nos. 09-006-009, 016 & 019-R (A.E.A.B.).

II. SUBMISSIONS

A. The Applicants

[11] The Applicants stated they have been actively engaged in the review and subsequent appeal of the Approval since November 2007, and have been represented by legal counsel, Ms. Teresa Meadows, since July 2009.

[12] The Applicants explained the Parties pursued mediation from October 2009 to August 2010, but the Applicants withdrew from the mediation process on August 11, 2010, because no progress was being made on the substantive issues. The Applicants noted that, between September and November 2010, the Parties made submissions regarding various preliminary matters. The Applicants stated that, after the issues for the Hearing were set, their counsel sought to identify and retain experts who could speak to the surface water and groundwater aspects of the Approval and the design, construction, operation, and reclamation of biogas plants in general.

[13] The Applicants stated they sent an e-mail on January 20, 2011, approximately two weeks before the Hearing, to the Appellants and to interested community members requesting assistance to offset the costs of their legal counsel and expert witnesses. Five individuals made payments to the Applicants totaling $16,000.00 to defray some of the costs associated with the appeals.

[14] The Applicants noted that, on January 25, 2011, the Director filed his written submission, which included a document proposing 28 modifications to clarify the Approval. The Applicants stated that, prior to receiving the Director's submission, they had no notice that any such amendments to the Approval were being contemplated and would be forthcoming.

[15] The Applicants acknowledged they were awarded interim costs of $3,375.00 to be paid by the Approval Holder. The Applicants stated the interim costs consisted of $3,000.00 for legal representation and $1,375.00 for the preparation of a report by Mr. Roger Clissold, but the amount was reduced by $1,000.00 because the Board indicated the Applicants had not, at that time, provided satisfactory evidence the Applicants had sought contributions from the community and Appellants. The Applicants confirmed the Approval Holder provided the interim costs award as required.

[16] The Applicants stated their legal counsel attended the Hearing from February 9 to 11, 2011, and the Applicants presented their own evidence and the evidence of Mr. Bernie and Ms. Margie Brown, who were unable to attend the Hearing. Dr. J. Patrick Hettiaratchi attended the Hearing on February 9, 2011, to present evidence and be cross-examined regarding the design, construction, operation, and reclamation of the Facility and proposed methods of operating the Facility. Mr. Roger Clissold attended the Hearing on February 9 and 10, 2011, to present evidence, be cross-examined, and assist legal counsel with the preparation of questions for cross-examination with respect to hydrogeological conditions at the site, potential groundwater contamination issues, and the proposed amendments to the groundwater monitoring program.

[17] The Applicants stated their total costs incurred as a result of their involvement in the appeals was $79,689.11,[8] but with the $16,000.00 contribution from community members and the Appellants and the interim costs award of $3,375.00, the Applicants have been personally responsible to contribute $60,314.11 for out-of-pocket expenses.

[18] The Applicants stated they have experienced considerable financial and emotional stress due to the burden of carrying the costs to date and the considerable time committed to advancing the appeals.

[19] The Applicants stated that in 2010, their sources of income, specifically farming and a consulting practice, were severely limited, and bearing the burden of the additional costs associated with the appeals has caused, and is causing, financial hardship.

[20] The Applicants acknowledged the Board's starting point is that costs incurred with respect to an appeal are the responsibility of the individual parties, but they argued this was an exceptional case where the Applicants furthered the participation of community members and the Appellants through their commitment and full participation in the approval and regulatory process. The Applicants noted they have incurred costs of more than $60,000.00 as a result of appealing the Approval.

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[8] The Board notes in the Tab 1 of the Applicants' submission, when the individual costs in the "Summary of Out of Pocket Costs Incurred In The Appeal" are added, there is a $0.05 discrepancy in the total amount of the costs. As the exact costs in this case does not alter the costs award, the Board will not vary the amount used in the calculations.

[21] The Applicants stated they also contributed two to three days a week of uncompensated time over a period of several months to: provide information and direction to community members and the Appellants; obtain information from relevant regulatory agencies including Alberta Environment; review documents; provide reasoned, constructive, and appropriate comments whenever regulators or the Approval Holder provided such opportunities; attend scheduled meetings; and consult with legal counsel and experts.

[22] The Applicants stated that, in an effort to be effective and efficient, they worked to co-ordinate and co-operate with the Appellants involved in the mediation and Hearing by retaining experts, leading evidence, and providing access to their legal counsel, thereby supporting the interests of all the Appellants and the community surrounding the Facility.

[23] The Applicants submitted that an award of costs to them supports the purposes of EPEA as stated in section 2 of the Act.

[24] The Applicants submitted there were significant flaws in the Notice of Application and, as a result, many of the citizens who were directly affected by the Facility were not engaged in the process before the Director issued the Approval. The Applicants stated they would have preferred the concerns of adjacent landowners to be canvassed and considered prior to the Approval being granted, but the flaws in the Notice of Application meant the Applicants were the only ones who met the requirements for standing and, as of right, to formally participate in the appeal process. The Applicants stated this resulted in them bearing a disproportionate burden at the outset of the appeal, because the Appellants were uncertain as to whether they would be granted standing at the Hearing. The Applicants stated it was not until the Board accepted the Appellants that the Applicants knew they would not be the only landowners with standing to carry the appeal forward. The Applicants explained they prepared for the Hearing on the basis they would be the only parties to bring forward the concerns of the community and adjacent landowners.

[25] The Applicants stated they had to:

1. personally retain their own legal counsel, as the interests of the landowners were not identical;
2. identify and retain relevant experts necessary to discharge the Applicants' burden of proof;

3. provide written submissions to address all preliminary matters, including supporting the standing of the Appellants; and
4. review all documentation to identify gaps that needed to be filled to prepare for the Hearing.

[26] The Applicants stated they had to bear a disproportionate burden as they were responsible for making submissions for those who were directly affected but had not been appropriately engaged at the earliest possible stages of the process. The Applicants stated they worked countless hours to ensure community members that were not adequately consulted in the approval process prior to the Approval being issued were able to participate and express their concerns. The Applicants stated they: (1) provided the community with information regarding the approval process, the status of the appeals, and mechanisms to become involved; (2) prepared and presented at community meetings; (3) circulated petitions and sign-up sheets for people wanting to be kept informed; and (4) spent time making inquiries of regulatory agencies, academics, and individuals who might be able to provide information and background relevant to the appeals.

[27] The Applicants stated they did not seek out this role, but it resulted from the initial flawed notification made by the Director. The Applicants argued it would be unfair for them to continue to bear this burden without some support from the other Parties to the process.

[28] The Applicants stated that, from October 2009 to August 2010, the Parties pursued the option of mediating the appeals. The Applicants stated they worked diligently to respond to all requests of the Board and other Parties to move the matter forward expeditiously. The Applicants stated they met all deadlines imposed by the Board, responded to all information requests, and provided review comments as requested by the Parties. The Applicants stated they did not cause any of the circumstances or delays in the mediation process that resulted in the matter becoming unusually protracted. The Applicants stated they tried throughout to move the mediation forward with as little cost and delay as possible and should not be solely responsible for the costs associated with the fact that significant delays and multiple revised timelines caused by the Approval Holder extended the process to 10 months and necessitated the significant involvement of the Applicants' legal counsel.

[29] The Applicants acknowledged the Board generally does not award costs with respect to the mediation process. The Applicants stated they worked for more than 10 months

with the Appellants in an attempt to broker solutions to the impasse. The Applicants submitted it is appropriate for the Board to consider awarding at least some costs since the mediation led to the formulation of the issues for the Hearing.

[30] The Applicants noted the Board deducted $1,000.00 from the interim costs award because, at the time the interim costs application was submitted, there was no evidence provided to show the Applicants had requested financial support from the Appellants or community members. The Applicants explained they had just made such a request but had not, at the time of the interim costs application, received any responses. The Applicants stated some of the Appellants and a few other community members subsequently provided $16,000.00 toward the Applicants' costs. The Applicants submitted the rationale for deducting the $1,000.00 no longer applies and, therefore, the full amount of the costs award should be restored to reflect that support was sought and obtained. The Applicants stated that, even with the support of others, the Applicants are still responsible for over $60,000.00 of out-of-pocket costs for the appeals.

[31] The Applicants explained they ensured all the Appellants were informed and advised of the nature and extent of the technical evidence that was to be provided at the Hearing by the experts retained by the Applicants. The Applicants stated that, throughout the Hearing, their legal counsel worked with the Appellants to ensure the Appellants' oral submissions and cross-examination addressed the issues, were not repetitive, and were focused on the issues established by the Board.

[32] The Applicants stated the written and oral evidence of Dr. J. Patrick Hettiaratchi contributed to the Hearing by:

1. explaining the differences between the operation of the Facility as originally proposed under the application and that subsequently proposed by the Approval Holder, and establishing that much remains unknown about the effectiveness and impacts associated with emerging psychrophilic processes;
2. identifying the critical role of operating and maintenance practices required for the biofilters associated with these types of facilities to operate effectively;
3. identifying the potential emergency situations and associated impacts that could result at this type of facility;
4. emphasizing the importance of proper design, installation, and maintenance of the clay liner system for the retention pond; and

5. identifying best management practices in terms of air filtration, retention pond construction, and operating processes at facilities of this type.

[33] The Applicants submitted the importance of this evidence was reflected in the Board's recommendations: (1) to remove the ability of the Director to authorize changes to the process by way of a Director's amendment, as the environmental impacts of a psychrophilic process are unknown and should be subject to the scrutiny of an approval amendment; (2) that a compliance audit be conducted to ensure the biofilter and pond design, construction, and maintenance are in compliance with the Approval; and (3) the Approval Holder must develop, submit, and implement an Emergency Response Plan.

[34] The Applicants stated their groundwater expert, Mr. Roger Clissold, put forward the following:

1. the Facility is located in an area where groundwater impacts have been identified;
2. there is some indication that fracture permeability exists, which creates greater potential for contamination at the site and calls for greater caution and a higher level of protection than would normally be needed;
3. the full extent of the existing impacts has not been determined; and
4. to protect the groundwater in the area, a more complete groundwater baseline needs to be established in advance of the Facility becoming operational.

[35] The Applicants submitted that, although surface and groundwater were only 2 of the 13 issues at the Hearing, concerns over groundwater contamination and the amendments to the Approval to manage it were central issues prior to and at the Hearing, and occupied greater time and focus than several of the other issues put forward. The Applicants argued the rationale for some of the amendments recommended by the Director was based on an underlying concern about groundwater conditions at the site as first put forward by Mr. Clissold.

[36] The Applicants noted the Board's recommendation that a Groundwater Monitoring Program for the Facility be submitted and approved by the Director prior to operations commencing reflects the recommendation by Mr. Clissold that baseline conditions be established prior to the Facility becoming operational.

[37] The Applicants submitted that, in addition to the contributions of their experts, the Applicants:

1. participated in providing written submissions, evidence, and cross-examination of the other Parties, which assisted in identifying key differences between the Approval application and the subsequent development and proposed operation of the Facility;
2. gathered and provided to the Board a list of other community members who had concerns and had not been engaged in the approval process but who may have had an interest in intervening in the matter;
3. identified outstanding compliance issues under the current approval; and
4. identified flaws with the Facility Plant Odour Response requirements under the Approval.

[38] The Applicants submitted their contribution to the Hearing underlies certain aspects of the Board's Report and Recommendations including:

1. amending the conditions of the odour section of the Approval;
2. requiring the Director provide direct notice of amendments or renewals of the Approval to all residents within a three kilometre radius of the Facility;
3. requiring the development and implementation of an Emergency Response Plan that meets the Director's approval, and providing copies to residents within a three kilometre radius; and
4. recommending the Director exercise his discretion to cancel the registration for the non-feedlot composting operation at Tongue Creek within 18 months of the Minister's decision.

[39] The Applicants broke down their costs as follows:

1. Legal Fees:

    (a) $4,196.81 for legal fees, costs, and GST associated with filing the appeals;

    (b) $20,482.38 for legal fees, costs, and GST associated with the protracted mediation process;

    (c) $15,249.72 for legal fees, costs, and GST associated with preparing and submitting written materials on preliminary motions, identifying and consulting with experts and preparing written materials for the Hearing;

    (d) $15,565.21 for legal fees, costs, and GST associated with preparation for and attendance at the Hearing on February 9 to 11, 2011.

2. Mr. Clissold and Hydrogeological Consultants Ltd.:

(a) $13,954.61 for professional fees, costs, and GST associated with preparation of the report, presentation materials, and meeting with legal counsel to prepare for the Hearing; and

(b) $7,840.40 for professional fees, costs, and GST associated with attendance at the Hearing on February 9 and 10, 2011.

3. Dr. Hettiaratchi, Professor of Environmental Engineering, University of Calgary:

(a) $1,500.00 for professional fees, costs, and GST associated with preparation of the Facility review report and telephone contact with legal counsel to prepare for the Hearing; and

(b) $900.00 for professional fees, costs, and GST associated with attendance at the Hearing on February 9, 2011.

[40] The Applicants noted their counsel, Ms. Meadows, was called to the Alberta Bar in 1993, and although her hourly rate is $425.00 per hour, her rate for these appeals was reduced to $385.00 per hour, and travel and accommodation costs were waived reflecting that she could have been deployed from her firm's Calgary office.

[41] The Applicants stated both of their experts are senior professionals in their fields, and their hourly rates reflect this expertise and experience.

[42] The Applicants stated the experts retained, the evidence offered by the Applicants, and the submissions provided by their legal counsel and experts were all directly related to the issues.

[43] The Applicants stated they did not claim compensation for the significant amount of time they devoted to advancing the appeals on behalf of all community members affected by the Facility. The Applicants stated they were willing to devote the time to ensure the community's voice was heard and to fulfill the objective of protecting the environmental condition of the community where they live, farm, and raise their families. The Applicants asked the Board to consider this significant commitment and contribution when considering the Applicants' request for reimbursement of out-of-pocket expenses.

[44] The Applicants stated that, in 2010, their financial resources from their consulting practice and farming operations were severely limited as a result of the recession, and the Applicants do not have the resources to shoulder the burden of the significant out-of-pocket expenses of the appeals alone.

[45] The Applicants requested costs from the Approval Holder and submitted the Board consider awarding costs against the Director as well. The Applicants noted the Board generally does not award costs against the Director given the Director's position in the appeal process. The Applicants stated they were not suggesting the Director acted in bad faith, but submitted the following circumstances justify the Director bearing some responsibility for the Applicants' costs in bringing these appeals forward:

1. his reliance on inadequate notice of the application resulted in a lack of community consultation at the earliest possible stage in the approval process contrary to the requirements of the legislation, which resulted in the Applicants shouldering a significant burden in terms of bringing the appeals forward on behalf of the community members who had not been properly engaged;
2. his failed attempt to cure the inadequate notice when it was brought to his attention there were problems contacting adjacent landowners directly;
3. despite being notified by the Applicants that an incorrect land description was contained in the application prior to the Approval being granted, the error persisted and carried through into the Approval, creating further confusion and uncertainty for community members who may have been interested in participating, and again imposing a further duty on the Applicants to get the word out to community members; and
4. from the time the Notices of Appeal were filed, through the mediation process, and until the submissions for the Hearing were filed two weeks prior to the Hearing, the Applicants had no idea of the significant amendments being considered by the Director. The amendments were received after the experts filed their reports, so the Applicants did not have sufficient time for their experts to consider the sufficiency and effect of the proposed amendments on the overall Approval and to file supplementary information. They also did not have time to obtain confirmation from the Approval Holder as to whether it had been involved in the development of the proposed amendments or were willing to accede to the amendments as proposed. Had the Applicants been aware of the proposed amendments, it may have been possible to reduce the costs of the Hearing by further streamlining evidence and limiting the scope of the issues. Although the Director characterized the proposed amendments as mere clarifications, the Applicants considered the changes substantial and noted they were proposed at a late stage in the process.

[46] The Applicants noted the Director stated in cross-examination there were many things he would have done differently for this Approval had the full extent of community concern and existing environmental impact been understood at the time the Approval was granted. The Applicants argued that, without their appeals and their persistence in pursuing the appeals, the changes to improve Alberta Environment's future processes and amendments to the

Approval to ensure better environmental protection would not have taken place. The Applicants submitted they should not bear the full costs of furthering a Hearing caused in part by the failures of the Director listed above.

[47] The Applicants requested the Board grant final costs in the entire amount of $60,314.11 given that: (1) this was an exceptional case where the Applicants' participation was the central driving force in facilitating public and community interest in environmental protection; (2) the appeals raised the identification and mitigation of the effects of the development; and (3) the Applicants incurred significant costs, both financial and personal, to further the public interest. The Applicants requested the Board make a determination that special circumstances existed that justify the Board making at least a partial award of costs against the Director as well as the Approval Holder.

B. Approval Holder

[48] The Approval Holder stated it incurred significant expenses preparing for and engaging in the Hearing process including:

1. legal fees, totaling $99,333.37, for touring the site, preparation of materials to submit to the Board, representation at the Hearing, review of evidence and legislation, and drafting briefs for the Board;

2. $11,423.03 for the retention of DGH Engineering to review expert evidence from the Applicants, tour and examine the site, draft an expert report, and assist the Board with expert evidence concerning the construction, operation, and environmental effect of nutrient management projects such as the Facility; and

3. $1,160.25 for the retention of Mr. Bob Nowak of Groundwater Exploration & Research Ltd. to review the evidence of the Applicants' expert with regard to hydrogeology. His expertise and advice were necessary to assist the Approval Holder and the Board in understanding the evidence of the expert for the Applicants. Mr. Nowak was not retained to provide a report or attend the Hearing, which limited his services to assisting the Approval Holder and its legal counsel to prepare for the Hearing.

[49] The Approval Holder noted these expenses are in addition to the fees and expenses it incurred performing testing requested or required by the Director and in pursuing the regular steps of the approval process. The Approval Holder acknowledged the expenses for the initial testing compliance and reporting to the Director are properly paid by the Approval Holder, but the costs associated with the Hearing should not be fully borne by the Approval Holder.

[50] The Approval Holder stated its legal counsel made all reasonable attempts to minimize their fees, including having a junior lawyer perform some of the work, providing services at a discounted rate, and writing off fees resulting from an overlap between junior and senior counsel.

[51] The Approval Holder acknowledged its legal fees would likely exceed those of the Applicants because, throughout the process, the Approval Holder was responding to the Applicants and Director as well as the Board. The Approval Holder stated it had to anticipate the concerns of the Applicants before they were addressed by the Board, resulting in the Approval Holder being forced to perform "… much of the heavy lifting regarding information for the Board."[9] The Approval Holder submitted its legal counsel's work was an asset to the Board and apportioning the costs should reflect this.

[52] The Approval Holder stated DGH Engineering was retained to visit and examine the site, review plans and Approval documents, and assist counsel and the Board in understanding the nature of the project, and provide views of any risks and the efficacy of the environmental control measures. The Approval Holder stated Mr. Dennis Hodgkinson, the principal of DGH Engineering, had experience in agricultural engineering, including work with similar biodigesters, bio-filters, and feedstocks.

[53] The Approval Holder argued it is clear from the Board's findings the Board preferred Mr. Hodgkinson's testimony to the expert evidence offered on behalf of the Applicants. The Approval Holder stated Mr. Hodgkinson's evidence was necessary to explain how the Facility would actually operate, given the "unhelpful and mistaken" evidence from the Applicants' expert, Dr. Hettiaratchi. The Approval Holder requested all, or a portion, of the costs of DGH Engineering be awarded to the Approval Holder.

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[9] Approval Holder's submission, dated June 7, 2011, at paragraph 19.

[54] The Approval Holder stated it retained Mr. Nowak when it learned the Applicants retained Mr. Clissold. The Approval Holder stated Mr. Nowak was an important asset in preparing the Approval Holder's legal counsel to assist the Board in addressing Mr. Clissold's evidence.

[55] The Approval Holder stated it appeared the Board rejected Mr. Clissold's evidence while accepting the Approval Holder's evidence regarding groundwater impacts. The Approval Holder stated it maximized the value of retaining Mr. Novak by limiting his review to Mr. Clissold's evidence. The Approval Holder submitted it would be appropriate to award all or a portion of Mr. Nowak's costs.

[56] The Approval Holder understood the Board sometimes requires the approval holder to be responsible for a disproportionate share of the costs associated with a hearing but, according to the Approval Holder, in this case the Board was not dealing with appeals involving a large multi-national approval holder and pensioner appellants. The Approval Holder stated it is a family business, operating in the same vicinity as the Applicants. The Approval Holder submitted the Applicants are likely to be as financially able to contribute to the costs associated with the Hearing as it is. The Approval Holder argued that, given the number of Applicants and Appellants, it is reasonable to presume the Applicants are in a better position to pay costs associated with the Hearing. The Approval Holder stated that, despite multiple invitations, the Applicants persistently refused to visit the site in order to learn about its operation and impacts, which resulted in the Hearing process being burdened from the Applicants' lack of understanding about the Facility. The Approval Holder stated the lack of understanding was passed down to the Applicants' expert witnesses. The Approval Holder argued "… the Appellants' choice to remain ignorant of the Facility's true nature hampered and prolonged the Hearing process, as a great deal of irrelevant and unhelpful evidence was submitted by the Appellants, and it became necessary for the Approval Holder to correct matters on the record."[10] The Approval Holder submitted the Applicants should be required to contribute to the costs it incurred.

[57] The Approval Holder submitted it is appropriate for the Board to rescind the interim costs award and order the Applicants repay the Approval Holder the entire amount. The

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[10] Approval Holder's submission, dated June 7, 2011, at paragraph 24.

Approval Holder noted the interim costs award was to pay the costs of retaining Mr. Clissold. The Approval Holder stated the Board's decision indicates the Board rejected Mr. Clissold's evidence in its entirety. The Approval Holder stated the Applicants gave their witnesses an incomplete and mistaken understanding of the Facility, which resulted in the evidence being submitted by the witnesses to be of little or no use.

[58] The Approval Holder submitted any costs incurred by the Applicants should be covered entirely by the Applicants. It argued any costs claimed for Mr. Clissold should also be rejected entirely.

[59] The Approval Holder argued the evidence of Dr. Hettiaratchi was of little value and confused the Hearing process because it proceeded on an incorrect understanding of the nature of the process at the Facility. The Approval Holder submitted that it was clear from reading the Board's decision that Dr. Hettiaratchi's evidence was rejected in its entirety and was of little or no value to the Hearing. The Approval Holder submitted the cost of retaining Dr. Hettiaratchi should be borne entirely by the Applicants.

[60] The Approval Holder requested:

(1) the Appellants pay costs to the Approval Holder in the amount of $111,916.68;

(2) the interim costs order be rescinded and the Applicants be ordered to repay the Approval Holder the sum of $3,375.00; and

(3) the Applicants' application for final costs be dismissed in its entirety.

III. RESPONSE SUBMISSIONS

A. The Applicants

[61] The Applicants submitted this is not an appropriate appeal for the Approval Holder to be granted costs. The Applicants noted the Approval Holder's costs submission provided no information to support its claim that special circumstances existed that warrant the granting of costs to the Approval Holder. The Applicants stated the Approval Holder's submission did not contain any information that would indicate the appeals were frivolous or vexatious. They stated the 30 substantive amendments to the Approval demonstrate the

substantive and significant contribution their appeals made to the regulatory process and environmental protection.

[62] The Applicants stated the Approval Holder implied special circumstances existed because, according to the Approval Holder, by the Applicants and Appellants refusing to visit the site, they chose to remain ignorant of the Facility which subsequently contributed to the costs. The Applicants stated they did not choose to remain ignorant, and their repeated and persistent information requests, including requests regarding how the Facility would in fact be operated, the waste streams to be processed, and the environmental monitoring baseline information that had been or would be generated, demonstrated their commitment to understanding how the Facility was going to operate. The Applicants noted the Approval Holder never supplied them with basic information on how the Facility would be operated, details regarding the waste streams to be processed, or specifics regarding the pollution control systems. The Applicants said they, the Appellants, and the Director, as a result of the Approval Holder's statements, were led to believe a low temperature process would be installed rather than the process originally proposed in the application. The Applicants stated that, at the Hearing, the Approval Holder's expert indicated the Facility was being considered as a pilot project for the low temperature technology, so for the Approval Holder to suggest the basis for this focus was the Applicants' and Appellants' choice to "remain ignorant" was incorrect and offensive.

[63] The Applicants argued the Approval Holder's suggestion that a site visit would have cleared up a lack of understanding is specious. The Applicants noted the Browns attended such a site visit and toured the building which was going to hold the Facility but, as the Browns indicated in their closing submissions at the Hearing, the visit did not answer their questions or address their concerns. The Applicants stated the suggestion that a site visit would have eliminated the appeals is indicative of the fact the Approval Holder had failed to appreciate and respond to the serious and substantive environmental concerns of the community. The Applicants stated that, if they and the Appellants were kept ignorant of the true nature of the Facility, it was not by their choice, and "… it is repugnant to think that the Approval Holder's evasion and obfuscation of the facts could now be the basis for their claim of special circumstances that warrant a costs award against the Appellants."[11]

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[11] Applicants' submission, dated June 21, 2011, at page 3.

[64] The Applicants argued there are procedural grounds for dismissing the Approval Holder's costs application. In response to the Approval Holder's claim for costs for retaining Mr. Nowak, the Applicants considered it inappropriate to seek costs for an expert who did not tender any form of evidence at the Hearing and who was not subject to cross-examination by the Applicants or Appellants or questioning by the Board. The Applicants could not see how the Board was assisted by the preparation of the Approval Holder's counsel by this expert. The Applicants argued that, if Mr. Nowak could have been of such assistance to the Board, he should have tendered evidence and been available for questioning at the Hearing. They stated that, since Mr. Nowak provided no evidence and did not attend the Hearing, costs for his contribution should not be considered.

[65] The Applicants argued the number of hours and rates of the lawyers providing services to the Approval Holder were not provided, making it impossible for the Board to assess the reasonableness of the costs claimed. The Applicants noted the legal costs claimed by the Approval Holder considerably exceeded the amount claimed by the Applicants, and without greater detail, it is not possible to assess the basis of the difference and whether it is reasonable. The Applicants argued the legal costs associated with touring the Facility are not appropriate since the Approval Holder did not establish a linkage between the tour and a substantive contribution to the Hearing.

[66] The Applicants noted Mr. Hodgkinson of DGH Engineering did not provide a written report, and they could not find any reference in the Report and Recommendations that made it clear the Board considered his evidence or relied on his testimony. The Applicants argued the Approval Holder did not establish the linkage between its expert's evidence and the Board's reasons, so this portion of the costs application should be dismissed.

[67] The Applicants objected to the Approval Holder's statement that the quality of the contributions by the Applicants' legal counsel and expert, Mr. Clissold, warrant a return of the interim costs granted by the Board. The Applicants argued the contributions by their legal counsel and expert at the Hearing were reflected in the amendments to the Approval and clearly established and affirmed the interim costs award. The Applicants argued the Board should reinstate the $1,000.00 to the interim costs award that had been deducted.

[68] The Applicants took exception to the Approval Holder's assertion that the Board rejected the evidence offered by the Applicants and their experts. The Applicants stated the evidence of Dr. Hettiaratchi was essential information that provided the background necessary to understand the potential scale and scope of the environmental impacts associated with different ways of operating the Facility as well as identifying the vital pollution control points in the Facility process. The Applicants stated there is nothing in the Report and Recommendations to suggest Dr. Hettiaratchi's information was not relevant or was rejected.

[69] The Applicants stated Mr. Clissold noted the lack of adequate baseline information gathered by the Director and Approval Holder, which limited everyone's understanding of the groundwater and local hydrology of the site. The Applicants stated it was not Mr. Clissold's role or their role to establish baseline groundwater conditions at the site. The Applicants submitted Mr. Clissold's evidence alerted all the Parties to the fact the Facility was located in an area potentially impacted by existing groundwater contamination and existing conditions may be indicative of fractured permeability conditions at the site. The Applicants stated these features supported a cautious and preventative approach to groundwater monitoring and impact response in the amendments to the Approval. The Applicants noted the Board recommended groundwater monitoring be conducted prior to the Facility becoming operational. The Applicants rejected the Approval Holder's assertion that Mr. Clissold's evidence was irrelevant or rejected by the Board or that evidence from the Approval Holder was preferred.

[70] The Applicants stated that, even though not all the amendments recommended by their experts were adopted by the Board, this is not an indication their evidence was rejected and should not provide the basis to deny the claim for costs for the experts. The Applicants argued the public interest is not served where full acceptance of the party's evidence, argument, and suggested amendments is required in order to substantiate an application for costs. The Applicants noted this is not the test used by the Board. The Applicants submitted the Approval Holder failed to meet the Board's test. The Applicants argued they clearly and cogently met the test.

B. Appellants and Intervenors

[71] Mr. and Ms. Vipond strongly opposed the Approval Holder receiving any costs. They stated the Approval Holder's activities have infringed on their lives. Mr. and Ms. Vipond

stated they did not ask to live next to the Facility, and now their property values have dropped through no fault of their own. They stated they have had to "fight" with the Director to have their concerns heard, including making telephone calls, countless letters, preparing for the Hearing, and losing three days of work. Mr. and Ms. Vipond noted they have nothing to gain by participating in the appeal process, but the Approval Holder has everything to gain from the Facility. They stated the Applicants have been supportive and helpful to all of the Appellants, and the Applicants never hesitated to share the advice they received from their lawyer to help all of the Appellants. Mr. and Ms. Vipond explained they all tried to contribute what they could, but the bulk of the costs fell on the Applicants. Mr. and Ms. Vipond hoped the Applicants would receive the final costs they applied for because, without their help, none of the Appellants could have gotten as far as they did with their dispute with the Approval Holder.

[72] Ms. Brown submitted the Applicants should be awarded all final costs they requested. She stated that, given the amount of time and effort the Applicants put in, the amount they requested is low. Ms. Brown stated it has "… been nothing short of a fiasco since the application was filed with the incorrect legal land description."[12] Ms. Brown took exception to the Approval Holder's indication that the Appellants did not bother to tour the Facility. Ms. Brown stated that she and her husband toured the Facility, but they left the Facility wondering how anyone without a bio-science doctorate degree and years of experience could hope to manage the proposed operation. She stated that, at the time of the tour, there was little actual equipment in place. Ms. Brown indicated nothing was gained by taking the tour, and she was certain the Applicants and other Appellants would have also found the tour to be a waste of time. Ms. Brown did not agree with the Approval Holder's statement that the Applicants are in a better position to bear the costs than the Approval Holder. She stated the Applicants are farmers who have had their land, cattle, and their own health adversely affected by the Approval Holder. She noted the Applicants make an honest living that does not jeopardize the health and well-being of those around them. Ms. Brown argued: "Having the backbone to stand up for what they believe in and fighting to make right what has gone terribly wrong should not cost them a cent."[13]

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12 Ms. Brown's submission, dated June 20, 2011.

13 Ms. Brown's submission, dated June 20, 2011.

[73] Mr. Currie stated that when industry proposes to construct an industrial complex in a high density rural setting, it must expect that public consultation and a hearing will be required. Mr. Currie believed the Applicants acted in the best interest of the local community. He stated going after the Applicants for significant costs would create a huge deterrent for anyone in the future. Mr. Currie stated that once the decision is made for the hearing to proceed, the appellants should be protected from the approval holder's costs. Mr. Currie noted the Municipal District of Foothills reduced property taxes for those living near the Facility. He argued: "To award cost compensation to the Approval Holder while surrounding property value assessments have dropped considerably would be completely contradictory and send a horrible message about the priorities of this province."[14]

C. Approval Holder

[74] The Approval Holder submitted that a significant portion of the Applicants' written and oral submissions filed prior to the Hearing were not relevant and not directly and primarily related to the matters contained in the Notices of Appeal. The Approval Holder argued the time and effort expended on those portions of the submissions do not properly form a part of a costs award.

[75] The Approval Holder stated the Board recognized the Applicants' complaints and submissions did not relate to the Facility. The Approval Holder stated the Board noted much of the Applicants' evidence was based on a mistrust of the Approval Holder. It stated the Board noted the complaints about odours, aesthetics, possible existing groundwater contamination, and operation of the composting facility were based on the existing facilities and not the proposed Facility.

[76] In response to the Applicants' submission that flaws in the Notice of Application forced them to assume responsibility for the interests of community members, the Approval Holder submitted that it was not in control of the notice process and should not be penalized for irregularities in the process if any existed. The Approval Holder stated that if there were any irregularities, they were corrected by the Board at the time of the preliminary motions decision where the Board accepted the appeals of other parties more than two months prior to the

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[14] Mr. Currie's submission, received June 20, 2011.

Hearing. It was unclear to the Approval Holder why the Applicants felt compelled to assume responsibility for the community's interests after that date.

[77] The Approval Holder stated that, after the Board accepted the Appellants, they had the opportunity to discuss sharing the costs of the Hearing. The Approval Holder noted the Applicants outlined that significant co-operation and overlap occurred between the Applicants and Appellants, including the fact the evidence of two Appellants was presented by the Applicants.

[78] The Approval Holder submitted that, given the Applicants agreed to share their resources, the Applicants should seek compensation from the Appellants. The Approval Holder argued the Applicants and Appellants should share the costs of preparing for the Hearing given EPEA states that all Alberta citizens have a shared responsibility to participate in the processes afforded by the legislation.

[79] The Approval Holder noted the Applicants took steps to seek contributions from the Appellants and interested community members for expert and legal fees. The Approval Holder stated the Applicants provided no explanation as to why they were unable to receive further contributions from the Appellants and community members or even if the Applicants sought contributions for the balance of the out-of-pocket expenses after the Hearing.

[80] The Approval Holder reiterated that, given the number of Appellants, it is reasonable to presume they are in a better financial position to pay costs than it is.

[81] The Approval Holder submitted the general economic conditions and their effect on the Applicants' income are not within the Approval Holder's control and should not be reflected in any costs award. The Approval Holder noted the Applicants provided their financial records to the Board, but the Applicants refused to provide the Approval Holder with the records or any evidence of financial hardship. The Approval Holder stated it has not had an opportunity to review any materials on this point and objected to the inclusion of the financial records as evidence on the basis their inclusion constitutes a breach of natural justice and of the Board's duty to supply the Parties with procedural fairness.

[82] The Approval Holder argued the Applicants overstated their contribution to the Board's decision. The Approval Holder stated that certain items listed by the Applicants were

either suggested or implemented at the Approval Holder's initiative or were amendments put forward by the Director without prompting from the Applicants. The Approval Holder noted in particular the Emergency Response Plan which it undertook even though it was not required by the legislation, and the Odour Reduction Plan which was similar to the plan put forward by the Director.

[83] The Approval Holder submitted Mr. Clissold was not a significant factor underlying the rationale for the amendments concerning groundwater conditions at the Facility. The Approval Holder stated the Board rejected Mr. Clissold's evidence in its entirety and, since the Applicants provided their witnesses with an incomplete and mistaken understanding of the Facility, the witnesses' evidence was of little or no use. The Approval Holder submitted it is appropriate for the Board to rescind the interim costs award and order the Applicants to repay the Approval Holder the entire interim costs award.

[84] The Approval Holder noted the Board generally does not allow costs for in-house photocopying or printer copies, scanning, production of CDs, or for items such as index tabs. The Approval Holder submitted the Applicants should not be awarded costs for these items.

[85] The Approval Holder requested the Board dismiss the Applicants' application for costs, rescind the interim costs order, and require the Applicants to repay the $3,375.00 interim costs awarded.[15]

D. Director

[86] The Director argued the Applicants did not establish any special circumstances that would warrant costs be payable by the Director. The Director stated he was open and willing to review his decision granting the Approval, and he should not be punished for this.

[87] The Director stated that, if he was ordered to pay costs, the monies would come from the Alberta Environment operational budget, taking valuable and scarce government funding away from other services provided to all Albertans.

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[15] As the remedy sought in the Approval Holder's response submission varied from the original relief requested, the Board contacted the Approval Holder for confirmation of the relief it was requesting. The Approval Holder responded on July 19, 2011, confirming it was still requesting costs in the amount of $111, 916.68.

[88] The Director noted the Applicants seek to rely on procedural irregularities to substantiate their claim. The Director stated the irregularities were not substantive and were not done in bad faith. The Director noted the land description was corrected on the Approval as soon as possible after the appeals were filed. The Director noted the public notice for the Hearing included all the correct information so all interested public were free to apply for intervenor status and still had the opportunity to participate in the appeal process.

[89] The Director explained the proposed amendments were prepared as part of the written submission. He noted the majority of the amendments were not substantive changes. The Director stated it was not unfair for the Applicants to learn of the Director's and Approval Holder's position two weeks before the Hearing, as it was the same time he first heard the Applicants' position. The Director stated all Parties were treated the same and, if the Applicants believed receiving and filing submissions two weeks before the Hearing was unfair, they should have objected to the procedures and deadlines when set by the Board.

IV. LEGAL BASIS

A. Statutory Basis for Costs

[90] 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."[16]

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

[16] *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.)[17]

[91] The sections of the *Environmental Appeal Board Regulation*,[18] (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.
>
> (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

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[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] *Environmental Appeal Board Regulation*, A.R. 114/93.

[92] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of EPEA as stated in section 2.[19]

[93] 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 to a particular claim for costs.[20] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[21] 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."[22]

[94] As stated in previous appeals, the Board evaluates each costs application against the criteria in EPEA 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:

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[19] Section 2 of EPEA provides:

"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;

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

(f) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; …

(h) the responsibility of polluters to pay for the costs of their actions;

(i) the important role of comprehensive and responsive action in administering this Act."

[20] *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.)).

[21] *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.) (*"Paron*").

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

(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."[23]

[95] 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.[24]

B. Courts vs. Administrative Tribunals

[96] In applying these costs provisions, it is important to remember 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, 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 purposes listed in section 2 of EPEA.

[97] The distinction between the costs awarded in judicial and quasi-judicial settings was stated by the Federal Court of Appeal 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

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

[24] *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.).

> word which must necessarily be given in proceedings before regulatory tribunals."[25]

[98] 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 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 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.'"[26]

[99] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it. 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

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[25] *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."

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

> 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."[27]

[100] The Board has generally accepted the starting point is that costs incurred in an appeal are the responsibility of the individual parties.[28] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.[29]

V. ANALYSIS

A. Applicants

[101] As the Board has stated in previous decisions, the starting point of any costs decision is that the Parties are responsible for the costs they incurred. Section 2 of EPEA gives citizens of Alberta a responsibility in protecting the environment. Participating in the approval and appeal processes is one way of fulfilling this obligation.

[102] When assessing whether costs should be awarded, the Board looked at the degree to which the Parties contributions to the Hearing assisted the Board in developing its recommendations. The Board reviewed the costs submissions from the Parties and the evidence presented during the Hearing to determine whether and to what extent the written submissions and oral evidence materially assisted the Board in preparing its recommendations to the Minister. In making its decision on whether costs should be granted, the Board can look at whether costs were required to make an adequate submission. In this case, the Applicants provided detailed

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[27] *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.).

[28] *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.).

[29] Section 2 of EPEA states:

> "(2) 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…."

information on their financial status confidentially to the Board. In determining the Applicants' costs application, the Board did not have to consider these documents and, therefore, it was not necessary to provide the documents to the other Parties. The Board based its decision on the Applicants' assistance to the Board in making recommendations for an improved Approval.

[103] The Applicants appealed the issuance of the Approval and, as a result, the Director reviewed the Approval and suggested a number of amendments. Although many of the suggested changes were minor, they did result in a clearer Approval. As a result of the appeals, the Director became aware of an error in the land description in the Approval. As the appeals instigated the suggested amendments and the correction of the Approval, the Board will consider some of the costs incurred by the Applicants to bring the appeals forward.

1. Legal Counsel

[104] The Applicants in this case were represented by legal counsel. The Applicants requested costs totaling $55,494.15 for legal costs, including $55,303.27 for their counsel and GST and $190.88 for disbursements with GST. Although most of the disbursements were broken down, one invoice did not have the specific costs for each item. The disbursements were for copying, long distance telephone calls, and courier costs.

[105] Ms. Meadows was retained by the Applicants, but it is apparent she also assisted the Appellants throughout the appeal process. This minimized overlap in the submissions and presentations. She was effective, for the most part, in keeping the Applicants' submissions and evidence focused on the issues identified for the Hearing. Ms. Meadows effectively raised concerns about the operations of the Facility and existing environmental conditions when cross-examining the Approval Holder and its consultant. The Board considers it appropriate to award costs to the Applicants for their legal counsel.

[106] The Applicants stated their counsel charged $385.00 per hour[30] and, based on the invoices, Ms. Meadows charged out for 137.7 hours. In reviewing the itemized invoice, there were some items that did not relate to the preparation and presentation of their submissions at the Hearing. For example, time was claimed for preparing the interim costs submission and

[30] In reviewing the invoices, it appears Ms. Meadows charged $375.00 for some of the work she did on these appeals. Although there is a discrepancy in the rate charged, the Board will use the total provided in the Applicants' submission and as amended by the Board.

reviewing documentation, preparing for community meetings, and reviewing orders related to the existing operations, not the Facility. Therefore, the Board is deducting 8.9 hours from those claimed, so the starting point will be 128.8 hours.

[107] As stated in the interim costs decision and confirmed in the Applicants' costs submission, their legal counsel, Ms. Teresa Meadows, was called to the Alberta Bar 18 years ago. Based on the tariff of fees used by the Government of Alberta for outside counsel retained by it, a lawyer with 18 years experience would be paid $250.00 per hour. 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.[31]

[108] In this case, the Board accepts the Government of Alberta rate to determine the allowable fees. This results in a starting point of $32,200.00 (128.8 hours x $250.00 per hour) plus $1,610.00 for GST. Taking into consideration the effective submissions and cross-examination, the Board will allow 50 percent of these costs. Therefore, the Board will award $16,100.00, plus $805.00 for GST, for legal fees.

[109] In addition, the Board will award costs for some of the disbursements. Disbursements totaled $181.78 plus $9.10 for GST. The Board generally does not award costs for in-house printer copies, scanning, or producing CDs. These costs are usually included as part of the fees charged as overhead. Since the Board cannot determine what portion of the costs were associated with copying, the Board is reducing the starting point for disbursements by half, or $90.89 plus $4.54 for GST, for a total of $95.43. Given the Board is basing legal fees on approximately 65 percent of the rate charged by Ms. Meadows, the Board will award 65 percent of the costs for disbursements. Therefore, the Board will allow $59.08 for disbursements plus $2.95 for GST.

[110] The total costs for legal fees and disbursements, including GST, is $16,967.03. This amount is reduced by the interim costs awarded for legal fees. The Board had originally granted $3,000.00 for legal costs. However, the total interim costs award was reduced by $1,000.00. The $1,000.00 reduction amounted to a 22.857 percent reduction in the total interim

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[31] 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.

costs award that would have been awarded. The reduction was made from the total interim costs awarded and, therefore, impacted interim costs for legal fees and consultant fees. Therefore, to determine the actual amount awarded in interim costs for legal fees, the Board reduces the interim costs of $3,000.00 initially allocated for legal costs by 22.857 percent, leaving $2,314.29. The total legal costs are reduced by $2,314.29 for the interim costs, giving a total of $14,652.74.

[111] In the interim costs decision, the Board reduced the amount awarded by $1,000.00 because the Applicants had not provided any evidence that they tried to procure other sources of funding, including from the Appellants and community members. The Applicants requested this $1,000.00 be reinstated since they did subsequently receive funding from some of the Appellants and community members. The Board will not reinstate the $1,000.00, because the interim costs were awarded based on the information at the time. Under section 19(3)(d) of the Regulation, one of the factors the Board considers when awarding interim costs is whether alternate funding sources were sought. The Board acknowledges the efforts the Applicants took to obtain funding from other sources, and it is an element the Board looks at when determining a final costs award. Since there were a number of Appellants in this case and the Applicants and Appellants continued to state there were a number of other community members who had an interest in these appeals, the Board would have expected at least some of them would have assisted the Applicants. Interim costs are considered in the final costs calculation, so even if the $1,000.00 were reinstated, the end calculations for final costs would not vary.[32]

2. Consultants

[112] The Applicants retained Mr. Roger Clissold to provide evidence on groundwater issues around the Facility. This was a major issue at the Hearing. Mr. Clissold explained a number of concerns regarding groundwater around the Facility in an effective manner. The Applicants requested costs related to Mr. Clissold and Hydrogeological Consultants Ltd. totaling $21,795.01, including $11,815.00 for Mr. Clissold's hours and $590.75 for GST, $6,201.00 for the services of a junior hydrogeologist and $310.05 for GST, $420.00 for the certified engineering technologist plus $21.00 for GST, and $6.83 for clerical services including $0.33

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[32] See: Section 19(1) of the Regulation states:

"An application for an award of interim costs may be made by a party at any time prior to the close of a hearing of the appeal but after the Board had determined all parties to the appeal."

GST. In addition, the invoices incorporated costs for disbursements including mileage ($675.45), quality assurance/control ($226.80), administration and telecommunication ($920.39), groundwater centre ($378.00), courier services ($14.00), printing and binding ($100.00), and $116.09 for GST.

[113] In the interim costs decision, the Board determined a reasonable rate for Mr. Clissold was $275.00 per hour.[33] The Board considers this a reasonable amount for determining the starting point for final costs as well. Mr. Clissold invoiced for 27.8 hours, and at a rate of $275.00 per hour, the starting point for his costs is $7,645.00. Given the Board considers it appropriate that parties to an appeal are responsible for some of the costs for appearing before the Board, the Board will reduce this amount by half, leaving $4,013.62, including $191.12 for GST. The interim costs awarded for Mr. Clissold's attendance at the Hearing is subtracted from this total. As stated above, the Board has prorated the $1,000.00 reduction in the interim costs decision against the interim costs awarded. The interim costs awarded for Mr. Clissold was $1,375.00, and with a 22.857 percent reduction, leaves $1,060.71. When this is subtracted from the costs award, the Board awards final costs of $2,952.91 for Mr. Clissold's participation in the Hearing.

[114] Since the Board is awarding costs for Mr. Clissold at approximately 65 percent of his usual hourly rate, the starting point to determine costs claimed for the junior hydrogeologist and certified technician will be reduced by 35 percent. Therefore, the rate used for the junior hydrogeologist is $58.50 per hour.[34] The junior hydrogeologist worked 68.9 hours on these appeals; therefore, the starting point of his costs is $4,030.65 plus GST. No explanation was

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[33] See: Interim Costs: *Vipond et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (20 May 2011), Appeal Nos. 09-006-009, 016 & 019-IC (A.E.A.B.) at paragraph 56:

> "In order to find a reasonable rate, the Board used the following formula to determine the appropriate cost for consultants: (((salary + overhead) x profit)/billable hours worked per year). To determine annual salary, the Board referred to the Association of Professional Engineers, Geologists and Geophysicists of Alberta document, 2010 Value of Professional Services. Given Mr. Clissold's experience, the Board used the top level salary mean for geologists, which is $206,147.00 per annum. It is common practice to use the annual salary as the amount required to cover overhead. In addition, the Board allowed for a profit of 20 percent, which is represented by 1.2 in the formula. The Board expects that a person with Mr. Clissold's years of experience would be entitled to 4 weeks of holidays per year. Based on 48 weeks per year and 37.5 billable hours per week (7.5 hours x 5 days), the total billable hours per year would be 1800 hours. When these values are placed in the equation, (((206,147 + 206,147) x 1.2)/1800), the hourly rate would be $274.86. For the Board's purposes, it will use $275.00 per hour." (Footnotes deleted.)

[34] This is based on $90.00 per hour with a 35 percent reduction.

given as to the junior hydrogeologist's role in preparing the submission or presentation. The Board recognizes that it is common practice to have a junior member of the team to analyze data in order to reduce costs, but without a clear explanation of the role of the junior hydrogeologist, the Board will further reduce the amount by 75 percent, leaving $1,007.66 plus $50.38 for GST for a total of $1,058.04.

[115] Hydrogeological Consultants Ltd.'s invoices included costs for a certified engineering technologist. Based on the foregoing rationale, the starting point for his cost claim is $105.00 per hour less 35 percent ($68.25), for 4 hours charged, totaling $273.00 plus GST. There was no explanation given as to what work was done by the certified engineering technologist, so this amount will be further reduced by 75 percent, leaving the final costs allowed at $68.25 plus $3.41 for GST, for a total of $71.66.

[116] The Board will not award costs for the additional expenses except for 65 percent of the courier services ($14.00 x 65% = $9.10 plus $0.46 GST). The remaining disbursement costs lacked details or were costs the Board generally does not allow to be claimed. There was no indication of the mileage rate or number of kilometres driven, and there was no explanation as to what the quality assurance and groundwater centre were or how they assisted in preparation of the submission. There was also no indication of what was included in administration and telecommunication. Clerical services and printing are generally not allowed as costs since these in-house costs are normally incorporated into the fees charged as part of the overhead.

[117] The Applicants also retained the services of Dr. Peter Hettiaratchi to review the proposed operations at the Facility. His invoice included 10 hours for reviewing the application and literature and preparing a report, and 6 hours for preparation and attendance at the Hearing. It became evident at the Hearing that Dr. Hettiaratchi spent some of his research time on subjects outside of his expertise, such as issues related to the storage pond. Therefore, the Board will reduce the time spent reviewing the literature by 25 percent, leaving 13.5 hours. His hourly rate will be reduced by 35 percent, leaving an hourly rate of $97.50. Therefore, the starting point for his fees is adjusted to a total of $1,316.25. His evidence alerted the Board to issues about the operations of the Facility, particularly regarding the type of process that is to be installed into the Facility. The Board will allow half of his fees, totaling $658.12. No GST was charged by Dr. Hettiaratchi.

[118] Therefore, the total final costs award to the Applicants are $19,403.03:

1. Legal Fees: $14,652.74
2. Consultant Fees:
    a. Hydrogeological Consultants Ltd.: $4,092.17
    b. Dr. Hettiaratchi: $658.12

B. Approval Holder

[119] In reviewing the progression of the appeals, the Board notes the Appellants and Applicants had to make numerous requests for documents from the Approval Holder. By waiting until the Board ordered the production of the documents, the Approval Holder delayed the appeal process.

[120] At the Hearing, issues arose as to which process the Approval Holder was implementing in the Facility, as a result of information filed by the Approval Holder regarding psychrophilic processing. The Applicants and Appellants questioned whether the terms and conditions of the Approval could be complied with since psychrophilic processing had not been included in the initial Approval issued. This led to further discussions and questioning at the Hearing to determine exactly how the Approval Holder intended to operate the Facility. This resulted in the Board including recommendations requiring any change to the process be handled as an amendment to the Approval requiring public notice and input and conditions being added to ensure the Facility is in compliance prior to starting operations.[35]

[121] Although the Approval Holder incurred expenses as a result of the appeals, the terms and conditions the Approval Holder must comply with are now more clearly stated. This will assist the Parties and community members to understand what is required from the Approval Holder to operate the Facility with minimal environmental impact.

[122] The Approval Holder claimed costs totaling $111,916.65,[36] including $99,333.37 for legal fees, disbursements, and GST, $11,423.03 for Mr. Hodgkinson and DGH Engineering Ltd. for consulting fees, disbursements, and GST, and $1160.25 for Mr. Nowak's consultant fees and GST.

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[35] See: Ministerial Order 12/2011, Conditions 2.5 and 3.1.2.

[36] Although the Approval Holder asked for costs totaling $111,916.68, the total of the invoices was $111,916.65.

[123] When claiming for costs, the Board asks that information be provided to demonstrate how costs claimed were calculated and how it relates to the preparation for and presentation at the Hearing. In its submission for costs, the Approval Holder's legal costs only listed the date, the lawyer's initials, and a brief description of the tasks done. It does not provide any details including the rate charged per hour or the amount of time spent on each item and, in some cases, an explanation of who the lawyer was that conducted the work. The Board needs this type of information to determine whether the costs claimed are reasonable and to determine if there were items claimed that would not be included in a costs award. An example of an item the Board would not award costs for and that was included in the Approval Holder's counsel's costs was reviewing the file for judicial review of the Board's decisions. These costs did not assist in the preparation or presentation of submissions for the Hearing.

[124] The Board also asks that copies of receipts be provided for disbursements, including parking, meals, accommodations, airfare, and vehicle rentals. Without receipts, the Board is reluctant to consider these expenses in a costs claim. Mr. Hodgkinson claimed these expenses, but no documentation was provided to support the claim, so the Board would not consider these expenses.

[125] Without the required details, the Board will not consider the costs requested by the Approval Holder.

[126] The Approval Holder requested the interim costs award be returned. As the costs allowed by the Board exceed the interim costs awarded, the interim costs will be deducted from the total final costs awarded.

C. Who Should Bear the Costs?

[127] 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,[37] that costs should not be awarded against the Director providing his actions in carrying out his statutory duties were done in good faith.

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[37] See: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

[128] In this case, the Director's decision was not overturned but was varied. Even if the decision had been reversed, special circumstances are required for costs to be awarded against the Director. The Court of Queen's Bench in the *Cabre* decision, considered this issue:

> "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….
>
> 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."[38]

[129] The Applicants requested the Board consider assessing costs against the Director, primarily on the basis of the land description being vague on the Notice of Application and on the inaccurate land description on the initial Approval issued. In its preliminary motions decision, the Board recognized there may have been some confusion with the residents, but the Board dealt with this issue by granting standing to the Appellants even though they did not file valid Statements of Concern. If the Board was to now assess costs against the Director, the Board would be using costs in a punitive manner. As stated previously, costs are not punitive in nature. Costs are to be awarded based on how the evidence and submissions for the hearing provided by the party assisted the Board in making its recommendations. In this case, the Director was not acting outside his jurisdiction and was not acting in bad faith. In fact, the Director meticulously reviewed the Approval and provided a number of amendments to improve the clarity of the Approval. The Approval Holder, Appellants, and Applicants accepted the suggested amendments. This was very useful to the Board in preparing its recommendations. The Board recommended all of the amendments the Director suggested, and the Minister agreed with the recommendations.

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[38] See: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.) at paragraphs 33 and 35.

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

[130] The Director was forthright in his oral evidence. He also agreed that a condition requiring written notification of future amendments be provided to residents within a three kilometre radius would be useful around the Facility to improve communication with adjacent landowners.

[131] Therefore, the Board cannot find that special circumstances existed that would warrant costs against the Director.

[132] The Approval Holder argued that, given the number of Appellants and Applicants, they would be in a better position to pay the costs associated with the Hearing than the Approval Holder. The Board recognizes the Approval Holder is not a large corporation. However, it is a business that requires an approval. In determining whether the proponent should bear the costs of an appellant, the Board does not differentiate between types of projects. From the Board's perspective, the project is one that requires an approval. There are costs associated with filing an application for an approval, including preparing reports and the potential of having to deal with an appeal. As stated in previous decisions, it is a cost of doing business in this Province.

[133] To balance this out, the Board rarely awards full solicitor-client costs. The legislation anticipates persons will take the responsibility for protecting the environment, which includes absorbing some of the costs associated with bringing issues forward through the approval and appeal processes. In this case, the Applicants and Appellants worked cooperatively, and the Applicants were able to secure funding from some of the Appellants and members of the community who did not actively participate in the Hearing.

[134] Based on the circumstances of this appeal, the Board considers it appropriate for the Approval Holder to bear the costs determined by the Board for the Applicants' participation in the hearing process, totaling $19,403.03. The interim costs previously paid by the Approval Holder have been taken into account in calculating the final costs.

VI. DECISION

[135] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Applicants, Mr. Bruce and Ms.

Marcia Jeffers and Mr. Robert and Ms. Lisa Cowling, in the amount of $19,403.03, payable by the Approval Holder, EcoAg Initiatives Inc.

[136] The Board orders these costs be paid within 60 days from the date of this decision. Payment is to be made to the Applicants' counsel, Ms. Teresa Meadows, in trust. EcoAg Initiatives Inc. is requested to provide written confirmation to the Board that payment has been made.

Dated on October 24, 2011, at Edmonton, Alberta.

"*original signed by*"
_____
Alex G. MacWilliam
Panel Chair

"*original signed by*"
_____
Jim Barlishen
Board Member

"*original signed by*"
_____
A.J. Fox
Board Member