ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 23, 2020

IN THE MATTER OF sections 91, 92, 94, 95, and 96 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Lars Larsen with respect to the decision of the Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks, to issue Approval No. 00255428-00-00 under the *Water Act* to Lafarge Canada Inc.

Cite as: Costs Decision: *Larsen* v. *Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks,* re: *Lafarge Canada Inc.* (23 March 2020), Appeal No. 15-021-CD (A.E.A.B.), 2020 AEAB 11.

BEFORE: Mr. Alex MacWilliam, Board Chair;
Ms. Meg Barker, Board Member; and
Mr. Timothy Goos, Board Member.

SUBMISSIONS BY:

Appellant: Mr. Lars Larsen, represented by Ms. Ifeoma Okoye, Ackroyd LLP.

Director: Mr. Muhammad Aziz, Director, Operations Division, Upper Athabasca Region, Alberta Environment and Parks, represented by Ms. Nicole Hartman, and Ms. Jade Vo, Alberta Justice and Solicitor General.

Approval Holder: Lafarge Canada Inc., represented by Ms. Shauna Finlay, Reynolds Mirth Richards & Farmer LLP.

EXECUTIVE SUMMARY

Alberta Environment and Parks issued an approval (the Approval) to Lafarge Canada Inc. (the Approval Holder) under the *Water Act* for the construction and maintenance of an end pit lake and flood protection works (the Project).

Mr. Lars Larsen (the Appellant), who lives near the Project, appealed the issuance of the Approval.

The Board held a hearing on the appeal and made recommendations to the Minister. Based on the Board's recommendations, the Minister issued a Ministerial Order varying the Approval.

The Appellant filed a costs application seeking $72,507.74 in legal fees and $58,711.20 for expert and witness fees.

The Board reviewed the submissions from the parties regarding the Appellant's costs application. The Board noted the moderate complexity of the appeal and considered the extent to which the Appellant's experts and witnesses assisted the Board in making its recommendations to the Minister. The Board found the Appellant's expert, Dr. Fennell, to be of assistance to the Board, and recognized the role legal counsel played in helping the Appellant present his case.

The Board awarded $4,593.75 in costs to the Appellant for his expert, Dr. Fennell, and $20,407.27 for the Appellant's legal fees. As the Board had previously awarded $7,890.75 to the Appellant in interim costs, the Board ordered the Approval Holder to pay the Appellant $17,110.27 for final costs.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's (the "Board") decision regarding the costs application submitted by Mr. Lars Larsen (the "Appellant"). The Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks, (the "Director") issued Approval No. 00255428-00-00 (the "Approval") under the *Water Act,* R.S.A. 2000, c. W-3, to Lafarge Canada Inc. (the "Approval Holder") to construct and maintain an end pit lake, and to construct flood protection works.

[2] The Appellant appealed the Director's decision to issue the Approval. The Approval related to a sand and gravel operation (the "Project") located at NE 34-61-6-W5M and SE 3-62-6-W5M, on lands owned by the Approval Holder in Woodlands County, adjacent to the Freeman River. The Freeman River flows into the Athabasca River, near the Project. The Project included a gravel pit (the "Phelan Pit"), which was subject to a registration issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") that was not a part of the appeal. The Approval authorized the Approval Holder to construct flood protection works to protect the Phelan Pit from a "pit capture" event, which occurs when a river floods a pit. The Approval required the Approval Holder to construct and maintain an end pit lake as part of the reclamation of the Phelan Pit. This work was the subject of the appeal.

[3] Following an oral hearing into the appeal, the Board recommended the Minister of Environment and Parks (the "Minister") order changes to the Approval.[1] After the hearing, the Appellant filed a final costs application with the Board. The Board requested and received submissions on this application from the Appellant and the Approval Holder. Following review of these submissions the Board determined the Appellant was entitled to receive final costs of $17,110.27.

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[1] Details of the issues considered by the Board and the reasons for its recommendations are contained in *Larsen* v. *Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks*, re: *Lafarge Canada Inc.* (30 May 2019), Appeal No. 15-021-R (A.E.A.B.), 2019 AEAB 15.

II. BACKGROUND

[4] On August 28, 2018, after reviewing the Notice of Appeal and the submissions provided by the Parties, the Board set the issues for the hearing as follows:

> 1. Will the construction and maintenance of the end pit lake and river flood protection works, as allowed under the Approval, impact surface water quality and quantity, including but not limited to the Freeman River and the end pit lake itself, and the aquatic resources in the Freeman River?
> 2. Will the construction and maintenance of the end pit lake and river flood protection works and the mining operations impact groundwater quantity and quality?
> 3. Are the terms and conditions of the Approval reasonable to protect the surface water and groundwater in the area and the aquatic environment in the Freeman River?[2]

[5] On January 14, 2019, the Appellant requested the Board award interim costs. On April 4, 2019, after hearing from the Parties, the Board issued a decision awarding interim costs of $7,890.75 to the Appellant for legal and expert costs related to the preparation of expert reports, as well as for preparation and attendance at the hearing.[3]

[6] The Board requested and received expert reports and written submissions from the Parties on the issues for the hearing between February 1, 2019, and April 23, 2019.

[7] On April 25, 2019, the Approval Holder raised three preliminary motions for determination at the hearing:

> "1. Whether certain portions of Mr. Makowecki's evidence will be admitted.
>
> 2. Whether the statements by the individual non-expert parties will be admitted (submitted by L. Larsen and included in his written submissions), including the statement and proposed witness Duane Radford.
>
> 3. Whether the additional technical report, written in 2016 and updated subsequently, by David Mayhood will be admitted and Mr. Mayhood will be permitted as a witness. It would appear Mr. Mayhood is being put forward as a technical witness but his evidence is only brought up in rebuttal and, Lafarge's

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[2] Preliminary Motions Decision: *Larsen* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Lafarge Canada Inc.* (28 August 2018), Appeal No. 15-021-ID1 (A.E.A.B.).

[3] Interim Costs Decision: *Larsen* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Lafarge Canada Inc.* (4 April 2019), Appeal No. 15-021-DL1 (A.E.A.B.), 2019 AEAB 8.

position, is that it is not proper rebuttal and could have been produced in the time frame for other expert witness reports."[4]

[8] On April 26, 2019, the Board notified the Parties there would be an opportunity to raise any preliminary motions, and respond to them, at the beginning of the hearing.

[9] The Board held an oral hearing on April 30, 2019, in Edmonton, Alberta. At the conclusion of the hearing, the Appellant reserved his right to apply for costs.

[10] The Board subsequently provided its Report and Recommendations to the Minister. The Minister accepted the Board's recommendations and issued Ministerial Order 32/2019 on July 3, 2019. The Board provided copies of its Report and Recommendations and the Ministerial Order to the participants on July 4, 2019.

[11] On August 1, 2019, the Appellant submitted its costs application. The Board did not receive a costs application from the Approval Holder or the Director. On August 29, 2019, the Director advised the Board the Director had no position regarding the Appellant's cost application. On August 29, 2019, the Approval Holder provided a written response to the Board on the Appellant's costs application.

III. SUBMISSIONS

A. Appellant

[12] The Appellant requested the Board award him legal costs of $72,507.74 and costs of $58,711.20 for his experts and witness expenses incurred as follows:

(a) $40,149.10 for Dr. Jon Fennell;
(b) $14,513.62 for Mr. Ray Makowecki; and
(c) $4,048.48 for Duane Radford.

[13] The Appellant stated the costs claimed were directly related to the preparation and presentation of the submissions on the issues related to his Notice of Appeal.

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4 Letter from the Approval Holder, April 25, 2019.

[14] The Appellant submitted the following factors favoured an award of the full amount claimed:

(a) the Appellant, his legal counsel, and expert witnesses made a substantial contribution to the appeal;

(b) the Director's actions with respect to the Approval necessitated the participation of the Appellant and the involvement of his legal counsel and expert witnesses;

(c) the Appellant coordinated and presented the evidence of other stakeholders that would have intervened in the appeal, saving costs and ensuring the hearing proceeded efficiently and effectively;

(d) an award of costs to the Appellant would be consistent with the goals set out in section 2 of EPEA; and

(e) the costs claimed were reasonable in the circumstances.

[15] The Appellant stated he requires financial resources and has no other sources of funding available to him. The Appellant submitted he has a sporadic and limited income from his guiding business, which is barely sufficient to sustain his family. The Appellant said he suffered financial loss due to a recent burglary and that his limited income left him with nothing to offset the legal and expert costs arising from the appeal.

[16] The Appellant submitted he had taken responsibility for the appeal process since 2010, which included a significant expenditure of time and resources reviewing information, communicating and meeting with the Director and the Approval Holder, and preparing and filing a statement of concern. The Appellant noted the time he had spent on the appeal was time taken from his work, family, and other matters. The Appellant stated he had not claimed reimbursement for time and financial resources spent meeting with his legal counsel and experts. The Appellant said he had not received funding from the public interest groups that supported his appeal.

[17] The Appellant submitted the complexity of this appeal required expenditures beyond the usual costs of standard environmental hearings. The Appellant noted the Approval Holder and the Director raised preliminary motions regarding standing, for which the Board required the Appellant to provide written submissions. The Appellant stated he succeeded in

opposing the preliminary motions and the Board granted him standing in the appeal.

[18] The Appellant said the appeal required a significant amount of technical expertise to address the hearing issues. The Appellant stated his legal counsel and experts were necessary to provide a clear and articulate presentation at the hearing that addressed the issues set by the Board. The Appellant submitted that throughout the appeal process, he made considerable contributions to the hearing through technical expertise, legal advice, and his presentation of his interests.

[19] The Appellant submitted Dr. Jon Fennell, the Appellant's hydrogeologist and geoscientist expert, was a substantial and significant contributor at the hearing and provided important written and oral evidence, including:

> "(a) Explaining the inadequacies and flaws of the groundwater modelling relied upon by the Director in issuing the Approval. For instance, the geologic layers shown in the modelling are not accurate representation of the actual geologic and hydrologic conditions of the site;
>
> (b) Explaining the potential for thermal seasonal stratification to occur in the end pit lake and the potential implications for the Freeman River and the reliant aquatic resources once the end pit lake is in existence;
>
> (c) Identifying the lack of geochemical assessment to determine the type of conditions necessary to facilitate water quality degrading reactions and the lack of proof that the water quality standard, absent the geochemical assessment, will be sufficient to avert any risk to fish and other aquatic organisms in the Freeman River or the alluvial aquifer supporting the River.
>
> (d) Explaining the inadequacy of the river protection works to guard against future channel avulsion event, subsequent pit capture of the Freeman River and the related impacts to stream morphology, land stability and aquatic habitat both upstream and downstream of the gravel pit footprint.
>
> (e) Identifying that adequate consideration has not been given to how climate change will increase the risk of the gravel pit and the end pit lake being involved in a future "capture" event. Dr. Fennell explained the inevitability of a river "capture" event occurring is likely given the dynamic nature of the Freeman River floodplain.
>
> (f) Explaining that there is historical evidence of erosional scarring on the landscape within and outside the gravel pit footprint and evidence that the end pit lake is within the channel migration zone including the erosion hazard area. The entire floodplain is susceptible to channel migration hence, the reason the engineered river protection works will not eliminate the risk of a gravel pit or end pit lake capture event in extreme conditions.

(g) Identifying that assessment of how the pit dewatering works may affect the Freeman River during sensitive flow periods has not been conducted and the risk has not been properly assessed.

(h) Explaining the absence of field verified fish and fish habitat surveys in the Freeman River and how changes to the groundwater-surface water interaction dynamics between the end pit lake and the gravel pit may affect fish and fish habitat."[5]

[20] The Appellant stated the above issues would not have been addressed or identified at the hearing without Dr. Fennell's contribution.

[21] The Appellant submitted Dr. Fennell's contribution to the hearing is evident in the Board's recommendations to the Minister. The Appellant stated the Board adopted or agreed with the following points from Dr. Fennell's evidence:

"(a) The possibility of seasonal thermal stratification occurring in the end pit lake that could result in anoxic conditions and the mobilization of trace elements or metals that would impact water quality;

(b) The need to conduct geochemical testing of the overburden material to further protect water quality;

(c) The need to extend the flood protection works to the northwest of the Project to cover the entire northern portion that is vulnerable to erosion and the importance of conducting a study to determine the extent of such flood control measures;

(d) The importance of additional monitoring to ensure appropriate functioning of the water flow through the lake; and

(e) The activities allowed under the Approval could impact surface water and groundwater quality and quantity and the aquatic resources in the Freeman River. The need to amend or vary the Approval to ensure adequate protection of surface water and groundwater quality and quantity and the aquatic environment in the Freeman River."[6]

[22] The Appellant submitted his costs claimed for the work done by Dr. Fennell should be allowed in full as Dr. Fennell acted in good faith, answered all questions put to him, and presented his evidence in a clear and efficient manner.

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5 Appellant's application for final costs, at pages 9-10.

6 Appellant's application for final costs, at page 10.

[23] The Appellant stated Mr. Makowecki was a significant contributor at the hearing who provided the following evidence:

> "(a) Lack of site-specific current information on fish aquatic organisms and their habitats in the project area was not assessed. Onsite, adjacent, downstream and upstream assessments of risk are necessary in order to understand environmental impacts from changes to surface water quality or quantity;
>
> (b) There are several fish species such as Arctic Graylin, Mountain Whitefish and all trout species that are present in the Freeman River which are considered to be at high risk requiring protection of their habitat, rigorous assessments and protective conditions and regulations to minimize the risk to them and their habitat.
>
> (c) Development activities in floodplains could increase risk of sedimentation and contamination downstream considering anticipated changes in drainage patterns.
>
> (d) There is a risk of minimum flows to Freeman River and need for increased monitoring.
>
> (e) There is a potential for introduction of heavy metals into the groundwater and the Freeman River which could have adverse consequences for the aquatic organisms living in the river and the floodplain environment.
>
> (f) Larger buffers would reduce the environmental risk.
>
> (g) Monitoring as a means of addressing site stability is not sufficient due to failures of such monitoring measures in other developments in floodplain areas of Alberta."[7]

[24] The Appellant submitted the Board considered Mr. Makowecki's contribution to the issues of a larger buffer and the potential for seepage from the end pit lake. The Appellant acknowledged the Board did not agree with all of Mr. Makowecki's submissions but stated the Board's consideration of the submissions demonstrated the value of Mr. Makowecki's contributions.

[25] The Appellant said Mr. Makowecki's costs should be allowed in full as he acted in good faith and presented his evidence in a timely and efficient manner.

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7 Appellant's application for final costs, at page 11.

[26] The Appellant submitted Mr. Radford's contributions were of value to the hearing, including the following:

> "(a) Providing a personal observation and account of a pit capture event that occurred in the Mixcor Dahm pit which has similar features to the Lafarge gravel pit operation;
>
> (b) Providing a history of flooding of the proposed end pit lake site during prior flood events and explaining the likelihood of flooding of the proposed site during extreme weather condition i.e. extreme wet condition;
>
> (c) Explaining the Species at Risk Act new 'endangered species' listing of Athabasca Rainbow Trout;
>
> (d) Explaining the need to consider previous capture events at similar pits and ensuring that adequate protection is put in place to ensure that such pit capture events which are disastrous to fish do not happen again; and
>
> (e) Recommending the implementation of a contingency plan to respond to worst case scenarios and potential pit capture during a flood event considering that the Mixcor Dahm pit was not properly handled by AEP [Alberta Environment and Parks]."[8]

[27] The Appellant stated that while the Board did not agree with Mr. Radford's submissions, costs for his contributions should be allowed in full because the Board considered Mr. Radford's submissions regarding the implementation of a contingency plan. The Appellant said Mr. Radford acted in good faith, and presented his evidence in a timely and efficient manner.

[28] The Appellant submitted the effectiveness of his participation in the appeal was primarily due to his legal counsel. The Appellant noted his legal counsel responded to preliminary motions on standing and issues, helped prepare the Appellant's experts' reports and prepared submissions, PowerPoint presentations, and opening and closing remarks. The Appellant stated his legal counsel also attended the hearing where she provided submissions on preliminary motions, opening remarks, direct examination of the Appellant's witnesses, cross-examination of the Approval Holder's witnesses and the Director's witnesses, and written and oral final and reply argument.

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[8] Appellant's application for final costs, at pages 12-13.

[29] The Appellant submitted his legal counsel effectively presented his interests at the hearing. The Appellant requested the Board award him the full amount of his legal costs.

[30] The Appellant noted he stepped into the role of an advocate for the public interest in the appeal, and it would be unfair to impose on him the financial burden of advancing issues with significant impacts on him and the public.

[31] The Appellant submitted the high volume of highly technical documents that had to be analyzed and considered justified the legal and expert costs, which the Appellant said were reasonable and related directly to the issues set by the Board for the Hearing.

[32] The Appellant noted the Government tariff rate has not changed since 2004, and in other appeals the Board has awarded legal costs based on rates higher than the Government tariff.[9] The Appellant stated the Alberta Utilities Commission ("AUC") and the Alberta Energy Regulator ("AER") had established rates of $280.00 per hour for lawyers with similar experience as the Appellant's legal counsel. The Appellant submitted the Board should award legal costs at the AUC and AER rates.

[33] That Appellant stated the Approval Holder, should pay the Appellant's costs.

B. Approval Holder

[34] The Approval Holder noted the Board expects parties to be responsible for their own costs and, where it decides to award costs to a party, generally awards 50 percent of adjusted costs for legal counsel, witnesses, and experts, depending on how much assistance they were to the Board in determining the appeal. The Approval Holder stated the success or failure of an appellant should play a minor role in the Board's decision on final costs.

[35] The Approval Holder submitted the Board's recommendations did not support some of the Appellant's costs claims. The Approval Holder stated the Board had already found that most of the Appellant's submissions were beyond the scope of the issues set for the hearing and, therefore, the Appellant should only be entitled to a portion of the costs claimed.

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9 Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098 and 101-CD (A.E.A.B.).

[36] The Approval Holder said the Appellant did not provide sufficient details to prove the appeal had a high pubic interest element.

[37] The Approval Holder noted the Board only awarded final costs for preparation and submissions directly related to the issues before the Board in the hearing. The Approval Holder said only the legal fees which resulted from work that contributed directly to the hearing should be considered eligible for costs.

[38] The Approval Holder stated the disbursements claimed by the Appellant as legal costs do not relate to the matters under appeal and should be excluded from a costs award. The Approval holder said of the four lawyers the Appellant claimed legal fees for, only two, Ms. Okoye and Ms. Steingard, did work that was directly related to the hearing.

[39] The Approval Holder submitted an appropriate amount to award for legal fees is $19,435.50, which the Approval Holder calculated by applying the Government of Alberta rate to the hours worked by the Appellant's legal counsel, and reducing that amount by 50 percent as per the Board's standard practice.

[40] The Approval Holder noted the Board did not agree with Dr. Fennell on the issues of flood protection or groundwater modelling and instead accepted the evidence of Dr. Schmidt, the Approval Holder's expert.

[41] The Approval Holder acknowledged Dr. Fennell provided relevant evidence related to hydrogeology and geochemistry. The Approval Holder noted Dr. Fennell is not an expert in hydrology, but still provided testimony in the hearing regarding surface water quantity, modelling, flow, and climate change, all issues related to hydrology. The Approval Holder stated the Board should not award costs for the testimony of an expert if they are testifying outside of their field of expertise. As Dr. Fennell is not an expert on hydrology but testified on such matters, the Board should reduce costs for Dr. Fennell's testimony.

[42] The Approval Holder noted the Appellant claimed 113.75 hours for Dr. Fennell at a rate of $350 per hour. The Approval Holder said the Board's standard practice is to award costs equivalent to one to four hours of preparation for each hour spent in a hearing. The Approval Holder submitted Dr. Fennell should only be entitled to 2 hours of preparation time per hour of hearing time as the issues were narrow, and Dr. Fennell testified regarding matters that

were not in his area of expertise. If the Board followed its standard practice to reduce the costs by 50 percent, the Approval Holder submitted the Appellant was entitled to $4,550.00 in costs for Dr. Fennell.

[43] The Approval Holder stated the Appellant's witness, Mr. Mackowecki, provided evidence, which was mostly speculative and not focused on the issues of the appeal. The Approval Holder said the Board did not accept Mr. Mackowecki's submissions and expressly rejected his evidence that a larger buffer was required to protect the water and aquatic environment.

[44] The Approval Holder said Mr. Mackowecki's evidence was of little value and did not assist the Board in making its recommendations. The Approval Holder stated the Appellant should only be entitled to one hour of preparation time per hour of hearing for Mr. Mackowecki as his testimony was of little assistance to the Board. The Approval Holder said the Appellant should only be entitled to 13 hours of preparation time at a rate of $150.00 per hour, which totals $1,950.00. The Approval Holder stated the standard practice of the Board is to reduce expert fees by 50 percent and this would bring the total costs for Mr. Mackowecki to $975.00.

[45] The Approval Holder said the evidence provided by the Appellant's witness, Mr. Radford, did not relate to the issues set by the Board for the appeal and was speculative. The Approval Holder noted the Appellant's application for final costs did not present Mr. Radford as an expert. The Approval Holder submitted the Board should not award any of the $4,048.48 claimed by the Appellant as costs for Mr. Radford.

[46] The Approval Holder stated the Board should not award costs for meals, travel, mileage, hotel accommodation, and parking for the Appellant's experts.

[47] The Approval Holder said the Appellant did not provide information on whether he requested assistance from other groups or individuals in paying the costs related to the appeal. The Approval Holder noted the Appellant claimed the support of some public interest groups, and it was incumbent on the Appellant to seek funding from these organizations. The Approval Holder stated the costs claimed should be reduced as the Appellant had not made efforts to secure funding.

[48] The Approval Holder noted the Board already determined in its interim costs decision that AUC rates were not appropriate for this appeal.

[49] The Approval Holder submitted if the Board determines final costs are appropriate, then the Appellant should only be awarded a total of $24,960.50. As the Approval Holder already paid interim costs of $7,890.75, the Approval Holder states it would be required to pay an additional $17,069.75 in final costs.

C. Director

[50] The Director advised the Board he took no position with respect to the Appellant's cost application.

IV. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[51] 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 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."[10]

Further, Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs … and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid….'" (Emphasis in the original.)[11]

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

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

[52] The sections of the *Environmental Appeal Board Regulation*,[12] (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:
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> (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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12 *Environmental Appeal Board Regulation*, A.R. 114/93.

[53] When applying these criteria to the specific facts of the appeal, the Board must remain mindful of the purposes of the *Water Act* as stated in section 2.[13]

[54] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in *Water Act* and the Regulation should apply to a particular claim for costs.[14] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[15] In *Cabre*, 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..." Justice Fraser concluded, "...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."[16]

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

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
>
> (b) directly related to the matters contained in the Notice of Appeal; and

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13 Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
(b) the need for Alberta's economic growth and prosperity;
(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
(d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
(f) the important role of comprehensive and responsive action in administering this Act."

14 *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.).

15 *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.).

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

(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."[17]

[56] 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.[18]

B. Courts vs. Administrative Tribunals

[57] 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 proceedings before quasi-judicial tribunals. As the public interest is a consideration in all hearings before the Board, it must consider the public interest when making its final decision or recommendations. The Board is not simply deciding 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 the *Water Act*.

[58] The Federal Court of Appeal in *Bell Canada* v. *C.R.T.C.*, noted the distinction between costs awarded in judicial and quasi-judicial settings:

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

18 *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."[19]

[59] Justice Fraser also discussed the effect of this public interest requirement 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.'"[20]

[60] 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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19 *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."

20 *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."[21]

V. ANALYSIS

[61] The Board has the authority to award interim costs and final costs. The Board may award final costs in recognition of the assistance provided by the parties at the hearing to allow the Board to prepare its recommendations. The Board awards costs when it considers it appropriate and based on the evidence and arguments presented at the hearing.

[62] The Board has always held that an award of costs is intended to defray a party's expenses associated with preparing for a hearing in which the party has provided evidence and submissions that assisted the Board in reaching its decision and making its recommendations. The Board must look at whether the costs claimed were necessary for the party to prepare and present its case at the hearing. The Board does not award costs to provide a financial benefit to a party appearing before the Board, and costs are not awarded to penalize another party unless that party was acting in a vexatious manner.[22]

[63] When it assessed whether costs should be awarded to the Appellant, the Board looked at the degree to which the Appellant's contributions to the hearing assisted the Board in developing its recommendations. The Board reviewed the costs submissions and responses and the evidence presented during the hearing to determine to what extent the written submissions and oral evidence materially assisted the Board in preparing its recommendations to the Minister.

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

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