
ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: February 18, 2000

IN THE MATTER OF Section 92.1 of the Environmental Protection and Enhancement Act (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF a request for reconsideration filed by Mr. Wayne and Laurel Penson with respect to the December 1, 1999 Decision issued by the Board on a reconsideration of costs decision regarding an appeal filed by Mr. Wayne and Ms. Lauren Penson.

Cite as: Penson request for reconsideration, re: Reconsideration of costs decision
re: Penson and Talisman Energy Inc.

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BACKGROUND

[1] On December 1, 1999, the Board issued a decision¹ awarding costs to Mr. Wayne and Ms. Laurel Penson (Appellants). The decision followed a successful motion of judicial review which quashed the Environmental Appeal Board's (Board) decision not to award costs in that appeal.²

[2] On December 9, 1999, Mr. and Ms. Penson wrote to the Board expressing concerns about the December 1, 1999 decision and asked the Board to reconsider it. The Board forwarded copies of this letter to the other parties to the appeal and sought their submissions. Replies were received from counsel for Talisman Energy Inc. (Talisman) and from counsel for the Inspector of Land Reclamation, Alberta Environment (Department), on January 14, 2000. Mr. and Ms. Penson made a further submission on January 14, 2000 and replied to the other submissions on February 3, 2000. The Board has considered each of these submissions.

[3] Some of the matters raised in the letters from Mr. and Ms. Penson express discontent with the Board's process and resulting decision. Some of those concerns formed part of the motion for judicial review. It is not the Board's intention to debate those issues particularly in the overly personalized manner the correspondence invites. The letters do ask the Board to reconsider the December 1, 1999 decision on three specific points. The *Environmental Protection and Enhancement Act* gives the Board an explicit power to undertake such a reconsideration in appropriate cases.³

¹ Reconsideration of costs decision *re: Penson and Talisman Energy Inc.*, Appeal No. 98-005-RC, December 1, 1999.,

² Cost Decision *re: Pembina Corporation*, Appeal No. 98-005-C, October 5, 1998.

³ Section 92.1 states: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[4] The first basis on which Mr. and Ms. Penson seek reconsideration relates to the amount of costs awarded on account of a soil specialist retained by them and who testified on their behalf before the Board. The Board's review of the factors relevant to this aspect of the claim is set out in paragraphs [35] - [37] of the decision. At paragraph [40] the Board set out its global costs award saying, in part:

The total costs award is set out in the following summary. These amounts take into account the various factors set out above, some of which limit the amounts that might otherwise have been appropriate.

...

2.	And on account of Bardak	
	2 days at hearing @\$500 per day	\$1,000.00
	Mileage - 1 site visit	\$90.00
	1 day for site visit and 1 day for preparation @ \$250 per day	<u>\$500.00</u>
	Total	\$1,590.00

[5] The Pensons' submission says, in part:

On page 14 (paragraph 36, second sentence) "However the Board also knows that at least the first day's field work was done at the time of the Department's inquiry process rather than as part of the appeal to this Board." This statement is wrong and the Board should know this. The Inspector issued the reclamation certificate on September 26, 1997 and Mr. Bardak's first inspection was done 40 days later on November 5, 1997.

The Penson's appeal to this Board was filed on February 10, 1998. The Board had understood that the initial inspection report had been commissioned in part for ongoing discussions with the Department. That may not have been so. The Pensons are correct in saying the report was referred to in proceedings before the Board. This has never been in issue. The Board's decision on the appropriate amount of costs involved several factors other than the one sentence quoted above. It included a consideration of the contributions made by this evidence to the relevant issues before the Board, the amount of time necessary for a site visit to prepare a suitable presentation, the fact that the metal debris, which became a key factor in the decision, was not raised in a timely way despite Mr. Bardak's site visits and so on. It also included the more general factors set out elsewhere in the

decision. The Board finds its award is appropriate and is not persuaded to reconsider its decision in this respect.

[6] The Pensons' next submission is that the Board erred in not awarding specific costs for written argument. Mr. Penson asserts that "this appeal could have been over in one day" with the implication that the need for written argument was due to some default on the part of the Board. In particular the suggestion is that the Board ought to have told everybody at the outset that it was going to decide the case on the basis of metal debris and everything else was surplus to requirements.

[7] The Board's decision in respect to costs for Counsel was a decision made on a global basis after taking into account a series of factors set out in the earlier decision. It may well have been that the proceedings could have been shortened. In part at least the length of time taken was due to Counsel for the Pensons maintaining, throughout, that this was a test case on the reclamation criteria. Time was also consumed when the Pensons raised, unsuccessfully, the argument that the Department lacked the statutory authority to proceed as it did. The Pensons were not successful in this aspect of their case. The Board during the proceedings suggested to Counsel for the Pensons that it appeared to the Board that the case was not a test case as asserted. Nonetheless counsel, in spite of the Board's strong urgings to the contrary, chose to continue to develop these broader arguments. The Board only notes this in answer to the suggestion that it was the Board that somehow forced an unnecessary written argument on the parties. As to the argument that the Board might have indicated the result earlier, it is sufficient to say that it is the Board's practice to hear each party before delivering its decision since presentations by one party which, at first appear to point one way, may take on a different aspect once the other parties are heard.

[8] The Pensons' third point is that the Board ought to have ordered a specific amount for costs for their reconsideration application. Again we emphasize that the costs award made at paragraph [40] of the award was a global figure made after considering a series of factors, several of them limiting. By setting two days for hearing and two days for preparation the Board does not imply that all other matters were excluded, only that a figure in that amount is, in the Board's view,

appropriate considering all the relevant factors.

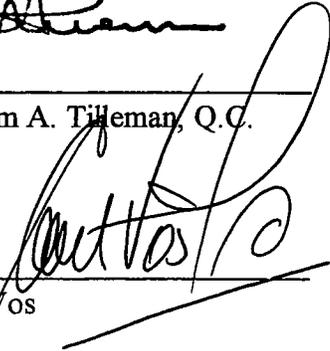
DECISION

[9] The Board is not persuaded to reconsider its December 1, 1999, decision and the request is dismissed.

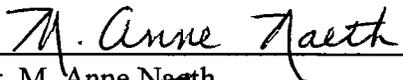
Dated February 18, 2000, at Edmonton, Alberta.



Dr. William A. Tilleman, Q.C.
Chairman



Dr. Curt Vos



Dr. M. Anne Naeth



Mr. Ron V. Peiluck



Dr. John P. Ogilvie