

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Cost Decision

Dates of Hearing: August 18, 1999 and September 3, 1999

Date of Final Replies: September 30, 1999

Date of Report and Recommendations: October 29, 1999

Ministerial Approval: December 16, 1999

Date of Cost Decision: January 26, 2000

IN THE MATTER OF Sections 84 and 88 of the Environmental Protection and Enhancement Act (S.A. 1992, c. E-13.3 as amended);

-and-

IN THE MATTER OF an application for costs related to an appeal filed by Cabre Exploration Ltd., with respect to the November 16, 1998 decision of Mr. Doug Rawluk, Conservation and Reclamation Officer, Alberta Environmental Protection, to refuse to issue a reclamation certificate to Cabre Exploration Ltd.

Cite as: Cost Decision *re: Cabre Exploration Ltd.*

PANEL MEMBERSHIP

Dr. M. Anne Naeth, Chair
Dr. Ted W. Best
Dr. Curt Vos

APPEARANCES

Appellant:

Mr. Howard Ward, counsel, Burstall Ward, representing Mr. Ron Groves, Mr. Richard Kaminski, Cabre Exploration Ltd.; Mr. Michael Melnyk, Environment; and Mr. Robert Staniland, Talisman Energy Inc.

Department:

Ms. Maureen Harquail, counsel, Alberta Justice representing Mr. Doug Rawluk, Mr. Arnold Janz, Mr. David Lloyd and Mr. Calvin Symington, Alberta Environmental Protection

Other Party:

Mr. Darrel Dzurko

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	CLAIMS FOR COSTS	1
III.	SUMMARY OF ARGUMENTS	1
IV.	CONSIDERATIONS OF THE BOARD	2
	A. Statutory Matters	2
	B. Judicial v. Quasi-Judicial Forum	4
	C. Relevancy, Materiality and Purposes of the Act	5
V.	ANALYSIS	7
VI.	CONCLUSION	8
VII.	DECISION	8

I. BACKGROUND

[1] The Environmental Appeal Board (the Board) issued a Report and Recommendations for Appeal 98-251-R which received Ministerial approval on December 16, 1999.¹ At the end of the hearing all parties agreed to make written closing arguments and cost applications. Closing arguments were due from Cabre Exploration Ltd. (Cabre or the Appellant) by September 13, 1999 and from the Department of Environment (Department) and Mr. Darrel Dzurko by September 23, 1999 with final reply due from Cabre on September 30, 1999.

II. CLAIMS FOR COSTS

[2] Cabre applied to the Board for an award of costs to be paid by the Department of Environment. They provided no receipts or cost breakdown as they were not aware of the information which would be required. They said they would provide any further information the Board deemed appropriate. The Department argued costs should not be awarded and Mr. Dzurko provided no comment on costs.

III. SUMMARY OF ARGUMENTS

[3] The Appellant stated the appeal would not have been necessary if the Department had exercised its mandate properly in accordance with established reclamation criteria. Cabre submitted it provided considerable evidence to support their appeal. The Department argued that Cabre did not meet the test for an award of costs as set out in the legislation and in the previous decisions of

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Cabre Exploration Ltd. v. Conservation and Reclamation Officer, Alberta Environmental Protection, October 29, 1999, EAB 98-251-R. The Ministerial Order states that the decision of the Conservation and Reclamation Officer, dated November 16, 1998, refusing to issue a reclamation certificate to Cabre Exploration Ltd. for lands located at LSD 12, Sec. 6, Rge. 38, TWP 3, M4, be reversed and that a reclamation certificate be issued for such lands effective October 29, 1999.

the Board.

IV. CONSIDERATIONS OF THE BOARD

A. Statutory Matters

[4] In considering whether to award costs, the purposes of the *Environmental Protection and Enhancement Act*² (Act) that provides the Board with its jurisdiction must be considered.³ One of the key purposes of the Act is to ensure that the integrity of ecosystems and human health are protected. The mechanism with which to do so, at least at the appeal level, is found in section 84 which provides Parties with procedural details of the appeal process.⁴

² S.A. 1992, c. E-13.3 (as amended).

³ Section 2 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:

- (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; ...
- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; ... [and]
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...

⁴ The portions of section 84 relevant to the facts of this cost decision are:

84 (1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director

[5] Provisions are included in the Act to address issues of awarding and distributing costs.⁵ The Act clearly states the Board may award costs for proceedings before it on a final or interim basis and may direct by whom and to whom costs will be paid. The Environmental Appeal Board Regulation⁶ (Regulation) more specifically addresses the awarding of costs for matters pertaining to the Notice of Appeal and for preparation and presentation of Party submissions.⁷ Section 20 provides for the matters to be considered by the Board when awarding final costs.⁸ The

(i) issues an approval, ...

a notice of appeal may be submitted

(iv) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's decision,

⁵ Section 88 of the Act provides:

88 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.

⁶ AR 114/93.

⁷ Section 18 provides that:

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.

⁸ The relevant portions of section 20 read:

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: ...

legislature has left it to the discretion of the Board to weigh the above factors. Not all of the criteria need to be met for a successful claim for costs.

B. Judicial v. Quasi-Judicial Forum

[6] Section 88 of the Act, and section 20 of the Regulation, give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*.⁹ 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.

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- (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 objection 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. ...

⁹ *Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992), 5 Alta. L.R. (3d) 40; [1993] 1 W.W.R. 450 (Alta. Q.B.).

[7] The Board's statutory authority gives it jurisdiction over a variety of matters. In some appeals the public interest component is very high. In other appeals the subject matter is closer to a *lis* between two parties with the public interest still involved, but to a lesser degree.

C. Relevancy, Materiality and Purposes of the Act

[8] Fiscal constraints on all parties require that appeals be resolved in an efficient and effective manner,¹⁰ and one that is fair. For awarding costs, the Board intends to exercise restraint and caution, while at the same time to give effect to the statutory provisions (section 88) for costs so that this provision is not an empty gesture to parties that otherwise meet the requirements for financial assistance.

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

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

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or time lost 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.

[10] In court proceedings, it is only in exceptional circumstances that the courts award costs on a solicitor and client basis. Rather, the norm is for the courts to base costs, in so far as they relate to the costs of advocacy, upon a scale related to the size and nature of the dispute and the

¹⁰ See J.M. Evans et al., *Administrative Law: Cases, Text, and Materials* (Toronto: Emond Montgomery Publications Ltd., 1995) at 18-19.

amount of trial and preparatory time customarily involved in matters of that type. In Alberta, this approach is embodied in the Schedules to the Rules of Court. Such amounts are, at all times, subject to the overriding discretion of the court. They are not intended to compensate for the full costs of advocacy, even in the court system where a "loser pays" approach is the norm.

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

[12] The Board also wishes to avoid costs applications deteriorating into an overly personal or acrimonious critique of the quality of the other Party's representation. A feature of a regulatory environment is that parties and their advocates often appear in many proceedings. It would be detrimental to good working relations if each proceeding ended with the parties examining and then engaging in detailed criticism of each other's expenditures. As ability to pay is one criteria (section 18(2)(e)), it may also be that this burden would fall particularly on those opposing projects on public interest grounds, since they are the ones who, more frequently seek costs.

[13] An award of costs, while made up of several components, will be just one award of the costs, ultimately payable to the Party concerned by the Board or by one or more of the other parties to the appeal, depending upon the Board's decision under section 20(3) of the Regulation. It remains the responsibility of each Party to attend to paying for its advisors and disbursements; these are not sums the Board will order paid directly. A Board decision *not* to award costs, or the full

costs, of any particular advisor, advocate or disbursement should not be taken as any indication that the sum involved was unreasonable or inappropriate. The Board has to consider a variety of factors in awarding costs, any one of which may affect the exercise of the Board's overall discretion. This is particularly true because a factor in the Board's discretion will often be that various parties made similar submissions.

[14] Awards for preparation and presentation time will reflect the Board's view that presentations must be focused on relevant issues that are useful to the Board and that are directly and primarily related to the matters contained in the appeal. This requires that parties come prepared so they can deliver a succinct, time conscious presentation and may require parties of similar interests to merge resources and time to best cover the issues without undue repetition. The Board will usually not award costs for relevant information that was presented by more than one similar interest Party unless it covers that evidence from a different, relevant perspective, or adds significantly to the original evidence.

V. ANALYSIS

[15] The Party claiming costs clearly dealt with matters associated with issues before the Board in this appeal. Their presentations were needed by the Board to make its decision. However the costs were not itemized, nor were receipts provided.

[16] In assessing costs for legal counsel and expert witnesses, the Board reiterates the importance of current specific data/information in their hearings, concise and organized cases and for Parties to have access to informed, experienced assistance in preparing their cases.

VI. CONCLUSION

[17] Section 88 of the Act, read carefully, allows for an award of costs without regard for success on the merits. The Board believes that a paramount consideration in ordering costs is whether a Party has served the public interest by furthering the goals of the Act and assisting the Board in the interpretation of the Act and Regulation. The Party requesting costs did contribute to the goals found in section 2(a) of the Act by addressing important issues involving reclamation certification. The hearing resulted in a better understanding of the importance of controls in the reclamation assessment and necessity for Parties to agree on controls.

[18] The legislation protects departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the Department differently than the role of those proposing projects. Where, on the facts of this case, the Department has carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs.

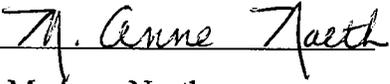
[19] This is not a case where there are exceptional circumstances to justify making an award of costs against the Department. Cabre has not sought costs against the landowner. Thus, the costs appropriately remain Cabre's own responsibility, and not be borne by the public purse through the Board or the Department. The costs of the appeal in circumstances such as this are properly part of the cost of operation for the Party that benefits from the lease and carries the burden of reclamation.

VII. DECISION

[20] No costs will be awarded in this appeal.

[21] So ordered.

Dated on January 26, 2000, at Edmonton, Alberta.



Dr. M. Anne Naeth



Dr. Ted W. Best



Dr. Curt Vos