ALBERTA
ENVIRONMENTAL APPEAL BOARD

COSTS DECISION

Date of Decision – September 8, 2003

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 applications for costs filed by the City of Calgary, Calhome Properties Limited, the Lynnview Ridge Residents Action Committee, and the Calgary Health Region related to an appeal filed by Imperial Oil Limited and Devon Estates Limited with respect to Environmental Protection Order #EPO-2001-01 issued to Imperial Oil Limited and Devon Estates Limited by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.).

BEFORE: Dr. M. Anne Naeth, Panel Chair;
Mr. Ron Peiluck, Board Member; and
Mr. Al Schulz, Board Member.

PARTIES:

Appellants: Imperial Oil Limited and Devon Estates Limited, represented by Mr. Ken Mills and Mr. Paul Jeffrey, Blake, Cassels and Graydon LLP.

Director: Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Grant Sprague, Alberta Justice.

Intervenors: The City of Calgary, represented by Mr. Ron Kruhlak and Mr. Corbin Devlin, McLennan Ross LLP.

Calhome Properties Ltd., represented by Mr. Ted Helgeson, Helgeson & Chibambo Law Office.

Lynnview Ridge Residents Action Committee, represented by Mr. Gavin Fitch, Rooney Prentice.

Calgary Health Region, represented by Mr. David Wood, Donahue Ernst Young LLP., and Dr. Tim Lambert, Calgary Health Region.

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EXECUTIVE SUMMARY

Imperial Oil Ltd. and Devon Estates Ltd. (a subsidiary of Imperial Oil) filed a Notice of Appeal regarding a "substance release" environmental protection order (EPO). Alberta Environment issued the EPO to Imperial Oil and Devon Estates because hydrocarbon and lead contamination was found at the Lynnview Ridge residential subdivision in southeast Calgary, where Imperial Oil operated an oil refinery from the 1920s until the 1970s.

Imperial Oil argued, for a number of reasons, that Alberta Environment should have addressed the Lynnview Ridge pollution problem, not through a "substance release" EPO, but through a "contaminated site" EPO, largely because the pollution was "historic." Imperial Oil argued that a "contaminated site" EPO would have resulted in a "fairer" allocation of cleanup responsibility that included other parties, such as the City of Calgary and Calhome Properties Ltd.

The Board undertook an extensive hearing and received volumes of legal, technical, and scientific information regarding the appeal from Imperial Oil and Devon Estates, Alberta Environment, the City of Calgary, Calhome Properties, the Lynnview Ridge Residents Action Committee, and the Calgary Health Region. Taking all of this information into account, the Board recommended to the Minister of Environment that he should confirm the EPO, subject to two exceptions. The Minister confirmed the EPO. Imperial Oil subsequently filed a judicial review of the Minister's decision and the Board's recommendations in the Court of Queen's Bench. This judicial review has now been completed, and the Minister's decision has been confirmed and the Board's recommendations upheld.[*]

The Board received applications for costs from Calhome Properties, the Calgary Health Region, the Lynnview Ridge Residents Action Committee, and the City of Calgary. After reviewing these applications, and the submissions of all of the parties, the Board awarded costs to the Lynnview Ridge Residents Action Committee ($15,540.49) and the City of Calgary ($46,383.17). These costs are payable by Imperial Oil and Devon Estates. No costs were awarded to the Calgary Health Region as its participation in this appeal was part of its statutory mandate. Further, no costs were award to Calhome Properties as its application for costs was withdrawn during the course of the Board's deliberations.

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[*] See: *Imperial Oil Limited* v. *Alberta (Minister of Environment),* 2003 ABQB 388, and *Imperial Oil Limited* v. *Alberta (Minister of Environment)* (25 June 2003), Calgary 0201-15975 (Alta.Q.B.).

I. INTRODUCTION

[1] This is a decision on applications for costs filed by Calhome Properties Limited ("Calhome"),[1] the Calgary Health Region (the "CHR"), the Lynnview Ridge Residents Action Committee (the "Residents Committee"), and the City of Calgary (the "City"), regarding an appeal filed by Imperial Oil Limited ("Imperial Oil") and its wholly owned real estate subsidiary Devon Estates Limited ("Devon Estates") under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the "Act" or "EPEA").[2]

[2] Imperial Oil and Devon Estates (collectively the "Appellants") filed a Notice of Appeal regarding Environmental Protection Order #EPO-2001-01 (the "Order") with the Environmental Appeal Board (the "Board") on July 3, 2001. The Order was issued to the Appellants on June 25, 2001, by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director") with respect to the Lynnview Ridge residential subdivision ("Lynnview Ridge") in Calgary, Alberta. The Order was issued to the Appellants in response to the discovery of lead and hydrocarbon contamination at Lynnview Ridge. Imperial Oil ran an oil refinery on a portion of the Lynnview Ridge lands from the 1920s until the 1970s. The Director issued the Order under section 102 (now section 113 of EPEA 2000) of the Act. Section 102 provides the Director with broad authority to require that "persons responsible" for pollution take appropriate steps to assess its extent and to clean it up or otherwise properly manage any risks.

[3] Following two separate written submission processes, the Board decided on five issues that the Board considered at the hearing of this Appeal.[3] The first four issues resulted

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[1] Calhome's application for costs was subsequently withdrawn. See: Calhome's letter, dated December 13, 2002.

[2] The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA 2000") replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 on January 1, 2002. The Board will make reference to provisions of both versions of the *Environmental Protection and Enhancement Act* as appropriate.

[3] The issues established by the Board were:

> "1. Are the Appellants persons responsible under section 102 [(now section 113 of EPEA 2000)]? This question is limited to the issues of whether section 102 has retroactive effect.
> 2. Has there been a release within the meaning of section 1(ggg) [(now section 1(hhh) of EPEA 2000] having regard to its 'historical nature' and has this release caused an adverse effect?

from a common underlying complaint of the Appellants: the Director should have addressed the Lynnview Ridge pollution problem, not through the Order issued under section 102 of the Act which applies to "substance releases," but through an environmental protection order ("EPO") issued under section 114 of the Act (now section 129 of EPEA 2000) which applies to "contaminated sites." The Appellants contended that application of section 114 would result in a "fairer" allocation of cleanup responsibility would that include other parties that have been connected with the site. The fifth issue[4] related to subsequent directions made by the Director to the Appellants pursuant to the Order. The Appellants questioned the nature and extent of the clean up obligations prescribed by the Director, and the Board considered whether the Order was reasonable in the circumstances of these subsequent directions.

[4] In addition to the Appellants, who were the recipients of the Order, and the Director, who issued the Order, the other parties to the appeal were: the Lynnview Ridge Residents Action Committee, which represented the interests of many of the residents of the Lynnview Ridge subdivision; the Calgary Health Region, who presented community health concerns; the City of Calgary; and Calhome Properties Ltd., a wholly owned subsidiary of the City.[5] The City and Calhome participated in this appeal to refute claims by the Appellants that the Director should have also named them in the Order.

> 3. Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114 [(now section 129 of EPEA 2000)]? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?
> 4. Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO [(the Order)]?"
> 5. Is the EPO [(the Order)] reasonable and sufficiently precise in the circumstances up to the date of the hearing?"

See: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (22 August 2001), Appeal No. 01-062-ID (A.E.A.B.); and *Imperial Oil Ltd*. (2002) 42 C.E.L.R. (N.S.) 89 (Alta. Env. App. Bd), (*sub nom*. Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (26 October 2001), Appeal No. 01-062-ID (A.E.A.B.).

[4] The fifth issue as set by the Board was: "Is the EPO [(the Order)] reasonable and sufficiently precise in the circumstances up to the date of the hearing?" See: *Imperial Oil Ltd.* (2002) 42 C.E.L.R. (N.S.) 89 (Alta. Env. App. Bd), (*sub nom*. Preliminary Motions*: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (26 October 2001), Appeal No. 01-062-ID (A.E.A.B.).

[5] The parties to this appeal were the Appellants, the Director, the City, Calhome, the Residents Committee, and the CHR (collectively the "Parties").

II. PROCEDURAL BACKGROUND

[5] The procedural history of the appeal is complicated,[6] involving a number of preliminary motions that addressed various matters such as stay requests, setting of issues, intervention requests, a "second" notice of appeal, and addition of the fifth issue. The details of these matters can be found in the preliminary decisions issued by the Board.[7] Prior to making each of these decisions, the Board received extensive submissions from the Parties.

[6] Of particular note, a dispute over document production between the Appellants and the City culminated in the Board's document production decision.[8] In this decision, the Board ordered the City and the Appellants to produce specific documents to the Board for its review in relation to the appeal.

[7] The first part of the hearing of the appeal occurred on October 16, 17, and 18, 2001. On October 18, 2001, the Board adjourned the hearing to hear the document production motion and a series of motions that resulted in the addition of the fifth issue. The second part of the hearing was held on February 5 and 6, 2002, where the Board heard further evidence and received further submissions arising out of the documents produced by the Appellants and the City, and on the fifth issue. Prior to each part of the hearing, the Parties filed extensive written

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6 See: *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

7 See: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (22 August 2001), Appeal No. 01-062-ID (A.E.A.B.); Imperial Oil Ltd. (2002) 42 C.E.L.R. (N.S.) 89 (Alta. Env. App. Bd), (*sub nom*. Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (26 October 2001), Appeal No. 01-062-ID (A.E.A.B.); *Imperial Oil Ltd*. (2002), 42 C.E.L.R. (N.S.) 114 (Alta. Env. App. Bd.), (*sub nom*. Document Production Motions*: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.); Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (23 July 2002), Appeal No. 01-062-ID4 (A.E.A.B.); and *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 48 C.E.L.R. (N.S.) 35 (Alta. Env. App. Bd.), (*sub nom.* Stay Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (23 July 2002), Appeal No. 01-062-ID5 (A.E.A.B.).

8 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

submissions and affidavits in support of their positions. After the second part of the hearing, at the request of the Parties, the Board received final extensive written arguments.

[8] After reviewing all evidence and submissions, the Board issued its Report and Recommendations on May 21, 2001.[9] In accordance with section 91 (now section 99 of EPEA 2000) of the Act, the Board recommended that the Minister of Environment:

> "1. confirm the Director's decision to issue the Order and that the Order properly applied section 102 (now section 113 [of EPEA 2000]) to the pollution at the site, even to the extent the pollution originated before EPEA came into force;
>
> 2. confirm the Director's decision to forego naming parties other than Imperial Oil Limited and Devon Estates Limited in the Order;
>
> 3. confirm that the Director's decision to issue the Order was reasonably and sufficiently precise so as to provide a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of soils containing greater than 140 ppm of lead between 0.3 metres and 1.5 metres;
>
> 4. confirm that the Director's decision to issue the Order was reasonably and sufficiently precise so as to provide a proper foundation for the requirement in the September 11 and 12, 2001 letters to require the removal of 0.3 metres of soil under decks, fences, gardens, shrubs, and tree;
>
> 5. vary the Order issued by the Director to make it clear that requirement to remove 0.3 metres of soil under driveways, patios, and sidewalks on private property where they provide an effective barrier to the lead in the soil is not within the scope of the Order;
>
> 6. vary the Order issued by the Director to require that the work under the Order should be performed to the satisfaction of the Director; and
>
> 7. direct the Director to continue to apply the Order under section 102 (now section 113 [of EPEA 2000]) and, if new evidence supports it, to apply the procedures in Part 4, Division 2 (now Part 5, Division 2 [of EPEA 2000]) to the site."[10]

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[9] *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

[10] *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 325 (Alta. Env. App. Bd.), (*sub nom. Imperial*

On July 22, 2002, the Minister of Environment issued Ministerial Order 19/2002, generally accepting the Board's recommendations and confirming the Order.[11]

[9] At the close of its Report and Recommendations, the Board stated "…that any of the Parties who have reserved the right to claim costs, should provide a submission on costs to the Board within two weeks from the date of the Minister's Order with respect to this Report and Recommendations." The Board received costs submissions on August 7, 2002, from the City of Calgary and the Residents Committee, and on August 8, 2002, from the CHR and Calhome. The Director and the Appellants did not seek costs nor did they agree to pay costs.[12] As the other parties were seeking costs from the Appellants, the Appellants provided a response submission on August 21, 2002.[13]

Oil Ltd. and Devon Estates Ltd. v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

[11] Specifically, the Board recommended to the Minister that he make an order in the following terms:

> "1. Order that the decision of the Director respecting the EPO [(the Order)] is confirmed, subject to the following;
> 2. Order that the decision of the Director respecting the EPO [(the Order)] is varied by adding to the EPO [(the Order)]: "This Environmental Protection Order shall be interpreted such that the removal of soil under driveways, patios, and sidewalks will not be required where they provide an effective barrier to lead in soil.";
> 3. Order that the decision of the Director respecting the EPO [(the Order)] is varied by adding to the EPO [(the Order)]: "All work performed under this Environmental Protection Order shall be performed to the satisfaction of the Director."; and
> 4. Further order the Director to continue to require compliance with the EPO [(the Order)] under section 113 [of EPEA 2000] (previously section 102) and, if new evidence supports it, to give due consideration to applying the procedures in Part 5, Division 2 [of EPEA 2000] (previously Part 4, Division 2) to the site."

As his decision, the Minister issued Ministerial Order 19/2002, which provided:

> "1. Order that the decision of the Director respecting the EPO [(the Order)] is confirmed, subject to the following;
> 2. Further order the Director to continue to require compliance with the EPO [(the Order)] under section 113 [of EPEA 2000] (previously section 102) and, if new evidence supports it, to give due consideration to applying the procedures in Part 5, Division 2 [of EPEA 2000] (previously Part 4, Division 2) to the site."

See: *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at pages 280 and 281 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R at pages 116 to 119 (A.E.A.B.).

[12] See: Director's letter, dated August 6, 2002, and Appellants' letter, dated August 6, 2002.

[13] Following the deadline for the receipt of submission on costs, the Board received three additional letters, which will be addressed later in this decision. The first was from the Appellants, dated December 3, 2002. This letter advised that 17 statements of claim had been filed against Imperial Oil and Devon Estates by members of the

[10] On September 24, 2002, Imperial Oil and Devon Estates filed a judicial review of the Minister's Order and the Board's Report and Recommendations.[14] Imperial Oil and Devon Estates sought, for a number of reasons, to quash the Minister's Order and the Board's Report and Recommendations. A potential consequence of Imperial Oil and Devon Estates being successful in their judicial review would be for the matter to be remitted back to the Board. The judicial review concluded on June 25, 2003, when Madame Justice Nation issued the second of two decisions.[15] In the second decision, Madame Justice Nation dismissed the judicial review, stating "…the original EPO [(the Order)] is to stand."[16] With the judicial review concluded, the potential for the appeal being remitted back to the Board no longer exists. Therefore, the Board can proceed to consider applications for costs in this matter.[17]

Residents Committee and directed the Board's attention to the portion of the Appellants' costs submission that expressed "…significant concern that a costs award is being sought from the Environmental Appeal Board to fund civil litigation…." The second letter was from the Residents Committee, dated December 12, 2002. The Residents Committee objected to the position of the Appellants regarding the alleged use of a costs award to fund civil claims. The Residents Committee argued that such submissions by the Appellants are irrelevant to the Board's considerations regarding costs. The final letter was from Calhome, dated December 13, 2002. In this letter, Calhome advised that it had reached an agreement with the Appellants "…for the purchase of the Calhome lands on Lynnview Ridge … [and that the] release executed by Calhome indicates that Calhome shall release Imperial [Oil] and Devon [Estates] from, *inter alia,* all claims for costs." The letter went on to state: "…you may consider our application for costs withdrawn."

[14] See: *Imperial Oil Ltd.* v. *Alberta (Minister of Environment)* (24 September 2002), Calgary 0201-015975 (Alta.Q.B.).

[15] See: *Imperial Oil Limited* v. *Alberta (Minister of Environment)* (25 June 2003), Calgary 0201-15975 (Alta.Q.B.) and *Imperial Oil Limited* v. *Alberta (Minister of Environment)*, 2003 ABQB 388. It should be noted that the Judgment Roll with respect to the judicial review has yet to be finalized. See also: Reasons of the Minister (20 May 2003), Re: Ministerial Order 19/2002.

[16] *Imperial Oil Limited* v. *Alberta (Minister of Environment)* (25 June 2003), Calgary 0201-15975 at page 3 (Alta.Q.B.).

[17] The Board notes that as part of the judicial review, Madame Justice Nation quashed certain implementation letters issued by the Director, stating: "…[I]f the directives in the September letters were meant to continue as an EPO and be enforceable, then Imperial Oil is entitled to an appeal." See: *Imperial Oil Limited* v. *Alberta (Minister of Environment)* (25 June 2003), Calgary 0201-15975 at pages 3 and 4 (Alta.Q.B.). Based on these statements, while the judicial review respecting the Order is complete, the Board notes that it may be possible for other decisions made by Alberta Environment respecting the Appellants and Lynnview Ridge, potentially involving the other parties, to come before the Board. The Board wishes to make it clear that its decision respecting costs is made without prejudice to and without regard for any future matters, proceedings, or hearings that may come before the Board. This decision is not intended as a matter of fact or law to make any finding regarding any future matter, proceeding, or hearing that may come before the Board with respect to any of the Parties or Lynnview Ridge.

III. SUBMISSIONS

A. City of Calgary

[11] The City submitted it was a "…third party participant in the Appeal, not an appellant, a decision maker, or a polluter or 'person responsible' for the hydrocarbon and lead contamination at Lynnview Ridge."[18] The City stated it was obligated to participate in the appeal at considerable expense, was required to engage in "…extensive research, preparation and effort…" to ensure it provided detailed and accurate historical information regarding Lynnview Ridge, and was required to provide extensive evidence on governing legislation and the practical operation of its planning and subdivision processes to defend against allegations made by the Appellants.[19]

[12] The City stated that it provided a knowledgeable, helpful witness to present evidence, Mr. Owen Tolbert. Mr. Tolbert reviewed documents and spoke with former and current employees of the City to inform himself of pertinent information regarding Lynnview Ridge. The City stated that it "…undertook an extensive internal and external review of files and documentary materials, as well as an extensive interview process involving many former and current City staff who had knowledge of the facts and circumstances surrounding the Lynnview Ridge subdivision."[20] It stated the review process undertaken to obtain the requested documents required "…great time and expense to the City and, ultimately, to the taxpayers of the City of Calgary."[21]

[13] The City submitted the Appellants used the appeal process in an attempt to discover evidence that would implicate the City in having a level of management or control over the contaminants found at Lynnview Ridge, and to have the City and others deemed persons responsible, thus sharing in the costs of remediation.[22] The City argued:

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18 City's submission, dated August 7, 2002, at paragraph 8.

19 See: City's submission, dated August 7, 2002, at paragraphs 17 and 18.

20 City's submission, dated August 7, 2002, at paragraph 21.

21 City's submission, dated August 7, 2002, at paragraph 23.

22 See: City's submission, dated August 7, 2002, at paragraph 37.

> "…the Appellants' motivation for advancing their appeal was not in advancing the public interest but rather, at least in respect of Issue #4, in obtaining financial contribution to their clean-up costs associated with the Lynnview Ridge site.
>
> This Appeal differs from many other appeals before the Board in that the initiation of the Appeal is not one made by a party acting in the public's interest but rather in its own interest. The City submits that the outcome of the Appeal should be considered in this instance where the party initiating the Appeal has done so for financial reasons."[23]

The City argued the document production process was similar to document discovery in civil proceedings, that it was not part of the Board's standard practice, and that it indicated the private nature of the Appellants' claim against the City.[24] The City stated that its submissions and presentation were directly related to the issues on appeal. The City argued that the polluter pays principle should apply in this case, and as the Appellants were deemed persons responsible for the contamination, they should bear the responsibility for any costs awarded to the City.[25]

[14] The City stated that its costs claim did not include use of internal staff and resources, nor relevant fees incurred since the hearing. It stated the amount claimed "…will not nearly indemnify the City for its participation in this Appeal."[26] It argued the costs claimed "…reflects the complexity and seriousness of the proceedings, the voluminous submissions from the Appellants that required research and response, and the seriousness with which the City addressed the document production process and the Appeal generally."[27]

[15] In concluding, the City reminded the Board that Calgary taxpayers would ultimately be responsible for paying for the City's "involuntary role" in the appeal. As the City considered that the Appellants' appeal had essentially been dismissed, it believed the Appellants should be ordered to compensate the City. It stated that the costs incurred were "…in relation to the considerable legal submissions and the extensive document review and production process initiated by the Appellants, and the uniqueness of this Appeal."[28]

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23 City's submission, dated August 7, 2002, at paragraphs 37 to 38.

24 See: City's submission, dated August 7, 2002, at paragraph 39.

25 See: City's submission, dated August 7, 2002, at paragraphs 33 to 35.

26 City's submission, dated August 7, 2002, at paragraph 42.

27 City's submission, dated August 7, 2002, at paragraph 44.

28 City's submission, dated August 7, 2002, at paragraph 50.

[16] The City submitted an application for costs of $534,313.61, comprised of legal and consulting fees.[29] Documentation and invoices were submitted with the costs application.

B. Lynnview Ridge Residents Action Committee

[17] The Residents Committee filed an application for costs to cover legal fees. It did not claim costs associated with hiring its environmental consultant, Komex International Ltd. ("Komex"), or on behalf of any of the members personally.[30] The Residents Committee submitted that "…the costs being claimed are directly and primarily related to the matters contained in Imperial's [(the Appellants')] Notice of Appeal and the preparation and presentation of the Resident's submissions at the public hearing and throughout the proceeding."[31] It argued that it had made a substantial contribution to the appeal.

[18] The Residents Committee argued that the Board should award costs for the full amount claimed (solicitor-client costs). This argument was premised on the exceptional circumstances of the appeal and that:

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[29] The City of Calgary's request for costs was presented as follows:

Hearing Preparation	1,281.2 hours	$ 255,109.50
Document Production	1031.5 hours	$ 105,052.50
Hearing Attendance	178.1 hours	$ 28,730.00
Post Hearing	340.8 hours	$ 54,997.50
Total Professional Fees	2,831.6 hours	$ 443,889.50
GST		$ 31,072.27
Photocopying		$ 13,214.03
GST		$ 924.98
Disbursements		$ 19,258.42
GST		$ 1,348.09
Total Legal Fees		$ 509,707.29
G. Douglas Crarer	144.5 hours	$ 10,837.50
Expenses		$ 367.92
L. Lee Guyn	156.0 hours	$ 1,1700.00
Expenses		$881.90
GST		$819.00
Total Costs Claim		$ 534,313.61

The Board notes that the request for costs does not identify which or how many lawyers worked on the file, nor does it identify the hourly rate that was charged by each of these lawyers. However, it appears that the average hourly rate was $156.76. See: City's submission, dated August 7, 2002.

[30] See: Residents Committee's submission, dated August 7, 2002, at paragraph 2. The Board notes that the Appellants and the Director assisted the Residents Committee in paying for the Komex Report.

[31] Residents Committee's submission, dated August 7, 2002, at paragraph 8.

> "…there was both a strong public interest element and also a strong element of a *lis* between private parties. The operations of Imperial's former refinery contaminated what are now private lands owned by members of the Lynnview Ridge Residents Action Committee and others. In light of the Minister's decision, Imperial's appeal was wholly unsuccessful. This justifies an award of costs against Imperial in favour of the Residents."[32]

[19] The Residents Committee argued the appeal "...was not only technically daunting but also legally complex."[33] It submitted that:

> "The volume of technical documents alone was immense. It would be completely unrealistic and unfair to expect that the residents of the neighbourhood could have put together an adequate submission without professional assistance…. [I]t is important to observe that without having a scientific expert 'on their side', the Residents would have had no way of understanding the many technical arguments that were so important to this appeal….
>
> [A]s indicated by the Board in its Issues Decision, many of the issues on appeal were primarily legal in nature. They had to be addressed. In short, this was not a simple appeal in which citizens could fairly participate on their own without representation. All other parties had counsel. The Appellants had at least four lawyers at the hearing. To make an 'adequate submission', the Residents too needed counsel…. [T]he Residents submit that they meet the criterion set out in Section 20(2)(e) in that they required financial resources to make an adequate submission."[34]

[20] The Residents Committee submitted it had promoted the goals of the Act, in particular sections 2(a), (d), (f), (g), and (i). According to the Residents Committee, human health was a key issue, particularly that of the residents of Lynnview Ridge. As the appeal dealt with mitigating past environmental impacts, and the prime effect was on "…a discrete segment of the population…", the Residents Committee argued it should be fully funded for its participation. The Residents Committee further argued that:

> "With regard to Sections 2(f) and (g), it is submitted that in this particular appeal, again having regard to its complexity and difficulty, meaningful participation in the appeal by the Residents required professional assistance which they should not be required to pay for themselves. In this case, the participation of the Residents was not so much a choice as a necessity, given what was at stake,

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32 Residents Committee's submission, dated August 7, 2002, at paragraph 9.

33 Residents Committee's submission, dated August 7, 2002, at paragraph 12.

34 Residents Committee's submission, dated August 7, 2002, at paragraphs 11 and 12.

> which was nothing less than the future of their individual properties and of their neighbourhood."[35]

The Residents Committee submitted that as the appeal was an "extraordinary circumstance," the "…'polluter pays' principle must be interpreted to mean that the 'costs of [Imperial's] actions' includes the cost of funding the participation of the Residents in the Board's hearing process."[36] The Residents Committee submitted it made a substantial contribution to the hearing, and it was important that it be a party to the proceedings. It continued that

> "…it was crucial for the Board to understand the Residents' position generally and, in particular, that the residents fully supported the issuance of the Order and the implementation directives made by the Director, especially given Imperial's [(the Appellants')] arguments about the inappropriateness of many of the actions taken by the Director and the CHR."[37]

[21] The Residents Committee argued the evidence provided by it, in particular the report prepared by Komex (the "Komex Report")[38] and the expert testimony it presented, provided valuable information to the Board and evidence on the potential migration of contaminants. It argued the Board commented favourably in the Report and Recommendations on its submissions regarding proper interpretation of "release" in the Act and its arguments regarding evidence of "damage to property."[39]

[22] The Residents Committee stated it had an interest "…above and beyond the public interest…," and it had no alternative but to participate in the appeal. It stated that based on the previous Board decision of *Penson*,[40] because the Appellants essentially lost their appeal and the other parties, including the Residents Committee won in the appeal, an "…award of costs against Imperial in favour of the Residents…" is justified.[41]

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35 Residents Committee's submission, dated August 7, 2002, at paragraph 16.

36 Residents Committee's submission, dated August 7, 2002, at paragraph 17.

37 Residents Committee's submission, dated August 7, 2002, at paragraph 19.

38 *Assessment of Environmental Studies and Proposed Remediation Options* by Komex International Ltd., August 9, 2001.

39 See: Residents Committee's submission, dated August 7, 2002, at paragraph 22.

40 *Penson* (2002), 32 C.E.L.R.(N.S.) 15 (Alta.Env.App.Bd.), (*sub nom.* Reconsideration of Costs Decision re: *Penson and Talisman Energy Inc.*) (1 December 1999), Appeal No. 98-005 (A.E.A.B.) ("*Penson*").

41 See: Residents Committee's submission, dated August 7, 2002, at paragraph 24.

[23] The Residents Committee submitted this was an exceptional circumstance due to the "magnitude and complexity of the appeal." It further submitted that:

> "… [I]n this case the Residents really had no choice but to retain professional assistance to assist them in responding to an appeal that otherwise would have been overwhelming.
>
> … [T]his appeal was unique in that it contained strong elements of both the public interest and a *lis* between parties….
>
> Third, and most importantly, is the 'high stakes' nature of the appeal. An entire neighbourhood is contaminated … what was at stake in this appeal was nothing less than the future of the Residents. Again, it is submitted that the Residents really had no choice but to respond to the appeal. They should not have to bear the reasonable cost of doing so."[42]

[24] The Residents Committee provided a detailed breakdown of time spent by legal counsel on the file as well as a tally of disbursement costs. The total claim for costs from the Residents Committee was $47, 000.00[43]

C. Calgary Health Region

[25] The CHR submitted costs that were "…exclusively made up of its external legal costs directly related to the matters set out in the notice of appeal and the preparation and submission of the Calgary Health Region's submission to the Board …" and that its "…application for final costs does not include any internal costs."[44]

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[42] Residents Committee's submission, dated August 7, 2002, at paragraphs 26 to 28.

[43] See: Residents Committee's submission, dated August 7, 2002, at paragraph 29. In paragraph 3 of its submission, the Residents Committee applied for costs in the total amount of $47,159.66, however in the closing of its submission, it stated "…the legal costs of $47,000 represents the total amount of costs claimed…." (Emphasis in the original.) The costs claimed by the Residents Committee is presented as follows:

G. Fitch ($225/hr)	185.2 hours	$ 41,670.00
L. Berg ($115/hr)	5.0 hours	$ 575.00
D. Barkley ($65/hr)	8.5 hours	$ 552.50
Total Professional Fees	198.7 hours	$ 42,797.50
GST		$ 2,995.83
Photocopying		$ 64.38
GST		$ 4.51
Disbursements		$ 1,212.56
GST		$ 84.88
Total Costs Claim		$47,159.66

[44] CHR's submission, dated August 7, 2002, at page 1.

[26] The CHR submitted that "…its participation in the appeal was necessary due to the significant nature of the public health issues associated with the contamination and the remedial aspects of the Environmental Protection Order."[45] The CHR submitted that "…its expertise and participation in the hearing made a valuable and significant contribution to the appeal."[46] The CHR recognized that although the Appellants were entitled to aggressively pursue every issue and sub-issue, this tactic "…significantly increased the cost to other parties, including the Calgary Health Region."[47]

[27] The CHR included itemized accounts from its legal counsel, resulting in a total claim for costs of $40,528.60. According to the CHR, its counsel "…does not charge separately for disbursements such as courier, photocopy, fax or long distance charges, but instead charges a 4% flat fee…."[48]

D. Calhome Properties Ltd.

[28] Calhome initially made an application for costs of $11,804.45.[49] Calhome stated:

> "Calhome's request for costs is only for counsel's time actually spent in attendance at the hearings, at counsel's usual hourly rate of $170 per hour, and for those disbursements necessary and incidental to the preparation of Calhome's two formal submissions to the Board of September 6th, 2001, and March 7th, 2002.
>
> Calhome's counsel spent 46.5 hours in hearings, for a total of $7905.00 at his usual hourly rate, for a total of $8,458.35 including GST. If the Board considers

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45 CHR's submission, dated August 7, 2002, at page 1.

46 CHR's submission, dated August 7, 2002, at page 1.

47 CHR's submission, dated August 7, 2002, at pages 1 and 2.

48 CHR's submission, dated August 7, 2002, at page 1. The costs claimed by the CHR are presented as follows:

D. Wood ($260/hr)	152.7 hours	$ 39,702.00
Administrative Charge		$ 560.56
Disbursements		$ 266.04
Total Costs Claim		$ 40,528.60

The costs claim notes that the CHR is GST exempt.

49 The costs claimed by Calhome is presented as follows:

T. Helgeson ($170/hr)	46.5 hours	$ 7,905.00
GST		$ 553.35
Disbursements		$ 3,127.20
GST		$ 218.90
Total Costs Claim		$ 11,804.45

> this inappropriate, we would ask the Board to consider awarding costs of $1,000 per day, in accordance with the 'Court model' in the *Penson* decision cited above, for six days of hearing time. There can be no question that Calhome's counsel, noted for his steely gaze, was present throughout the hearings."[50]

The amount claimed for disbursements was $3,346.10, with GST, to cover printing and binding costs of its submissions and to review transcripts of the proceedings.

[29] On December 13, 2002, the Board received a letter from Calhome advising it had reached an agreement with the Appellants "…for the purchase of the Calhome lands on Lynnview Ridge … [and that the] release executed by Calhome indicates that Calhome shall release Imperial [Oil] and Devon [Estates] from, *inter alia,* all claims for costs." The letter went on to state that "…you may consider our application for costs withdrawn."

E. Imperial Oil Limited and Devon Estates Limited

[30] The Appellants argued the parties claiming costs participated in the hearing voluntarily and chose the extent of their involvement. Therefore, they argued that they should not be liable for any costs, and if costs are awarded, the amounts claimed are "…excessive and ought to be substantially reduced…."[51]

[31] The Appellants submitted they were successful in their appeal on a number of issues and were "near success" on other matters.[52] They enumerated six factors they considered to support the position that costs should not be awarded against them:

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[50] Calhome's submission, dated August 7, 2002, at page 3. See: *Penson* (2002), 32 C.E.L.R.(N.S.) 15 (Alta.Env.App.Bd.), (*sub nom.* Reconsideration of Costs Decision re: *Penson and Talisman Energy Inc.*) (1 December 1999), Appeal No. 98-005 (A.E.A.B.).

[51] Appellants' submission, dated August 21, 2002, at paragraph 3. The Board notes that in their submission, the Appellants make arguments respecting Calhome. Given that Calhome has withdrawn their application for costs, the Board has not included a summary of the Appellants arguments respecting Calhome in its decision.

[52] See: Appellants' submission, dated August 21, 2002, at paragraphs 10 and 11. The Appellants stated they had persuaded the Board that:

> "(a) unreasonable deadlines were imposed by the Director;
> (b) the Director had improperly delegated his discretion to the residents; and
> (c) remediation under sidewalks, driveways, and patios on private property was not necessary."

The "near successes" included:

> "(a) the Board recommended that the Director consider proceeding under Contaminated Sites provisions of the Environmental Protection and Enhancement Act …;

1. "…the Board's default approach is that each party should bear its own costs. This is not an exceptional case justifying departure from that approach."

2. "…each of the parties claiming costs chose to participate in the appeal of its own volition, and determined the extent of that participation…."

3. "…Imperial [Oil] simply sought to protect its rights through a legitimate and thoughtful appeal. The appeal was not an abuse of process, frivolous or vexatious…."

4. "…even while contesting the Director's actions in the appeal, Imperial [Oil]:

   (a) Offered to all Lynnview Ridge residents the opportunity to depart with generous compensation and, as a consequence, purchased the vast majority of the homes in Lynnview Ridge;
   (b) Actively participated in the 'iterative process' established by the Director; and
   (c) Complied with the reasonable delineation and immediate interim requirements set by the Director."

5. "…this appeal was not a private dispute between parties justifying a departure from the Board's general practice to not award costs. The mere fact that numerous parties appeared demonstrates that no '*lis*' existed with respect to any one of those parties. Rather the appeal involved a significant level of public interest, which attracted the attention of various constituencies and perspectives."

6. "…Imperial was not the loser of the appeal, in any event. This Board considered many issues and acceded to certain of Imperial's arguments, ultimately recommending modification of the EPO [(the Order)]."[53]

[32] The Appellants further submitted the City's "…obstructionist conduct during the hearing significantly and unnecessarily increased the costs of Imperial, and the City's own costs."[54] The Appellants stated that because the City refused to provide documents requested by the Appellants, the Board's process was used, "…causing all parties unnecessary costs."[55] They

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(b) the Board stated that while the Director was not obligated to name every entity that could be characterized as a person responsible, he is required to name those that clearly fall within this category; and
(c) the Board clearly indicated that the requirement to remediate below 0.3m to a standard of 140 ppm was a difficult issue, which required considerable analysis of the evidence and submissions of the parties."

53 Appellants' submission, dated August 21, 2002, at paragraphs 23 to 31.

54 Appellants' submission, dated August 21, 2002, at paragraph 33.

55 Appellants' submission, dated August 21, 2002, at paragraph 34.

further argued the City and the Appellants formally agreed that "…the Board would arbitrate any disagreements over documents…" and that "…the City should not be entitled to costs for a process agreed to by it."[56] According to the Appellants, the City provided additional documents just prior to the initial hearing, preventing the Appellants the opportunity to thoroughly cross-examination the evidence. The Appellants submitted costs should not be awarded because they had made reasonable arguments with respect to the City, and "…there was clearly a live and difficult issue with respect to City responsibility."[57]

[33] The Appellants argued the City had not demonstrated any need for costs. They concluded by stating: "…in light of the City's conduct with respect to documents, it is submitted that it is the City that ought to be penalized with an award of costs against it, at least with respect to costs relating to the late document disclosure."[58]

[34] The Appellants argued costs related to the document production process would have been "…substantially reduced had the City acted reasonably and proactively in providing all documentation touching upon the issues…."[59] They further argued that allowing the City to recover costs for document production would "…become an incentive for parties to ignore their obligation to discover, locate and produce relevant documents for the Director and wait until further legal process commences so that the cost of the exercise can be defrayed."[60]

[35] The Appellants submitted the City failed to provide sufficient details in its costs claim. No breakdown of legal costs was submitted to identify the lawyers and their level of expertise, and therefore, according to the Appellants, the Board is unable to determine if costs claimed were reasonable. The Appellants argued that the City included airfare for its counsel, reflecting "…the generally excessive and unreasonable costs claim of the City. The City could have retained very capable Calgary counsel but chose not to do so…."[61]

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56 Appellants' submission, dated August 21, 2002, at paragraph 36.
57 Appellants' submission, dated August 21, 2002, at paragraph 38.
58 Appellants' submission, dated August 21, 2002, at paragraph 40.
59 Appellants' submission, dated August 21, 2002, at paragraph 75.
60 Appellants' submission, dated August 21, 2002, at paragraph 75.
61 Appellants' submission, dated August 21, 2002, at paragraph 78.

[36] The Appellants considered payments to a former City employee unreasonable as the employee was not a witness and therefore did not contribute significantly to the appeal.

[37] The Appellants submitted the Resident's Committee's involvement in the appeal was "…superfluous and unnecessary…"[62] as the Director advanced its interests. They stated that the Residents Committee did not have to participate to advance the idea that remediation was necessary or to argue the extent of the Appellants' liability to remediate the site.

[38] The Appellants argued the Residents Committee should not be awarded costs as the "…primary motivation of the LRRAC [(the Residents Committee)] to participate in the appeal was to obtain information that would assist in civil claims that will inevitably be brought against Imperial."[63] The Appellants made reference to the by-laws of the Residents Committee which, according to the Appellants, state that the purpose of the Residents Committee is to "…pursue and secure restitution from the responsible parties in order to compensate the current and former residents and homeowners of Lynnview Ridge who have suffered personal or property damage arising out of the environmental contamination of the area."[64] The Appellants argued they had already done their part as they, along with Director, provided funding for the preparation of the Komex Report for the Residents Committee.

[39] The Appellants stated solicitor-client costs are not appropriate as the Appellants were successful on a number of issues and no extraordinary circumstances existed to warrant solicitor-client costs. They argued that, based on the court model, the Residents Committee would not have been entitled to full costs. The Appellants concluded by stating the claim should be substantially reduced because the Residents Committee benefited from participating in the appeal in furthering its civil claims against the Appellants; the Appellants paid for the Residents Committee's expert; and the Appellants continued to take costly steps responding to the Order.[65]

[40] The Appellants submitted there was no need for the CHR to have participated in the hearing as evidence it brought forward could have been provided by the Director calling the

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62 Appellants' submission, dated August 21, 2002, at paragraph 41.

63 Appellants' submission, dated August 21, 2002, at paragraph 45.

64 Appellants' submission, dated August 21, 2002, at paragraph 46.

65 See: Appellants' submission, dated August 21, 2002, at paragraph 81.

CHR witnesses. The Appellants submitted the CHR should have no real interest in who pays for the remediation as long as the health issues are addressed. The Appellants continued that "…if this was the basis for the CHR's participation in the appeal, it was participating in matters beyond its authority and should not be awarded its costs."[66] They further argued the CHR's submissions were duplicative of the others and that its participation was ineffective.

[41] The Appellants argued the costs incurred by the CHR were unnecessary and could have been avoided, as the CHR did not have to participate in the hearing or much of it. They argued that solicitor-client costs "…for discussion of issues with other counsel…" were wholly unreasonable.[67] The Appellants continued by stating "…the CHR need not have incurred any costs with respect to legal counsel. Dr. Lambert conducted cross-examination of the witnesses during the initial hearing and presented much of its case."[68]

[42] The Appellants took issue with the manner in which legal fees were assessed. They submitted:

> "…the invoices provided by the CHR reflect an hourly rate for counsel of $260/hour. Imperial [Oil] submits that this hourly rate is excessive. Additionally, Imperial [Oil] notes that the invoices reflect a 4% standard rate for disbursements. However, such a standard rate does not adequately establish that disbursements were incurred, or that such disbursements related to the hearing. There is not a sufficient evidentiary basis for the amounts claimed."[69]

[43] The Appellants referred to the previous Board decision of *Penson*[70] and based on that decision, argued that, if costs are awarded, the maximum awarded should be $1000.00 per hearing day for counsel's fee, and $500.00 per day for preparation for the hearing.[71]

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66 Appellants' submission, dated August 21, 2002, at paragraph 62.

67 Appellants' submission, dated August 21, 2002, at paragraph 85.

68 Appellants' submission, dated August 21, 2002, at paragraph 85.

69 Appellants' submission, dated August 21, 2002, at paragraph 86.

70 *Penson* (2002), 32 C.E.L.R.(N.S.) 15 (Alta.Env.App.Bd.), (*sub nom.* Reconsideration of Costs Decision re: *Penson and Talisman Energy Inc.*) (1 December 1999), Appeal No. 98-005 (A.E.A.B.).

71 See: Appellants' submission, dated August 21, 2002, at paragraph 73.

F. The Director

[44] The Director's position on costs is simple; it neither claimed costs nor agreed to have costs awarded against it. This is the general position advanced by the Director on costs claims in most appeals, and is supported and consistent with *Cabre*.[72]

IV. ANALYSIS AND DISCUSSION

A. Statutory Basis for Costs

[45] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA 2000 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 EPEA 2000)] 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."[73]

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 EPEA 2000)] 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.)[74]

[46] The sections of the *Environmental Appeal Board Regulation*,[75] (the "Regulation") concerning final costs provide:

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[72] See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.); and *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 (Alta.Q.B.) ("*Cabre*").

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

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

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

"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."

[47] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the Act. The purpose of EPEA is found in section 2 which 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; …
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; …
> (i) the responsibility of polluters to pay for the costs of their actions;
> (j) the important role of comprehensive and responsive action in administering this Act."

While all of these purposes are important, the Board believes the shared responsibility that section 2(f) of EPEA places on all Albertans "…for ensuring the protection, enhancement and wise use of the environment through individual action…" is particularly instructive in making its costs decision.

[48] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in the Act and the Regulation should apply in the particular claim for costs.[76] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[77] 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."[78]

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

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[76] *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.).

[77] *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*").

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

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
> (b) directly related to the matters contained in the Notice of Appeal; and
> (c) made a significant and noteworthy contribution to the goals of the Act.
>
> If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[79]

[50] 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.[80]

B. Courts vs. Administrative Tribunals

[51] 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 purpose as defined in section 2 of EPEA.

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

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the

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

[80] *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.).

> litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[81]

[53] 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.'"[82]

[54] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it, and the Board is not bound by the loser-pays principle. As stated in *Mizera*:

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[81] *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."

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

> "Section 88 [now section 96] of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese* v. *Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta. L.R. (3d) 40, [1993] W.W.R. 450 (Alta.Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[83]

[55] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[84] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.[85]

C. Consideration and Application of Criteria

1. General Comments

[56] There is little doubt this has been one of the most extensively contested appeals the Board has heard in its nearly ten years of existence. One need only look at the nature of the issues considered by the Board,[86] the volumes of paper involved (currently totals over 10 banker

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[83] *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.).

[84] *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.).

[85] 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…."

[86] The issues that were considered in this appeal, as determined after two separate written submission processes, were:

> "1. Are the Appellants persons responsible under section 102 [(now section 113 of EPEA 2000)]? This question is limited to the issues of whether section 102 has retroactive effect.
> 2. Has there been a release within the meaning of section 1(ggg) [(now section 1(hhh) of EPEA 2000] having regard to its 'historical nature' and has this release caused an adverse effect?
> 3. Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114 [(now section 129 of EPEA 2000)]? If the Director has

boxes), the length of the hearing (in excess of 40 hours over five days,[87] compared to the usual Board hearing of less than one day), and the number of "decision" documents issued by the Board (counting this decision will total seven). The Board noted the "…extensive evidence and comprehensive technical, scientific and legal arguments presented before the Board…"[88] and various complex arguments presented to it, including arguments "…about the retrospective application of the law, arguments regarding joint venture agreements with other developers, arguments regarding development agreements and the municipal planning process, and legal arguments regarding how the Act should be interpreted…"[89] in its 119 page Report and Recommendations.

[57] The Board believes all Parties that appeared before it made a contribution to the determination of these issues, although some evidence was clearly more relevant and instructive than others. The Appellants had the right to appeal the Order against them and to present the arguments they deemed appropriate. However, as one of the principle grounds of their appeal was that additional parties should be named as persons responsible, and therefore share in the liability for the pollution at Lynnview Ridge, this drew some of the other parties, specifically the City and Calhome, into the appeal. In response to the costs applications filed by these parties, the Appellants argued their participation was voluntarily and these parties chose their level of participation. While the Board does not accept the characterization of this argument, as advanced by the Appellants, the Board recognizes each Party had a different *role* in the appeal.

> the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?
>
> 4. Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO [(the Order)]?"
>
> 5. Is the EPO [(the Order)] reasonable and sufficiently precise in the circumstances up to the date of the hearing?"

87 The Board accepts the characterization of the amount of hearing time that was involved in this matter as advanced by Calhome, being 46.5 hours. See: Calhome's submission, dated August 7, 2002, at page 3.

88 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 30 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

89 *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 34 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd. v. Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* re: *Imperial Oil Ltd*.) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

[58] The Appellants argued the City and Calhome had some control or management over the contaminants at Lynnview Ridge, the effect of which, had the Appellants been successful in their argument, would have been to expose the City and Calhome to substantial liability, the same liability against which the Appellants invested considerable resources to argue that it should not be assigned to them. The Board has little doubt that had the situation been reversed, the Appellants would have intervened without hesitation.

[59] The Appellants argued the City was "obstructionist" and its costs would have been substantially reduced had it complied with the document production request of the Appellants. The Appellants advocated the City be "penalized" with a refusal to award costs because of its position regarding document production. The Board notes the Appellants also strongly resisted the City's document production request against them and as a result, does not accept the Appellants' characterization that the City was being "obstructionist" and finds no merit in this argument. The Board notes that an agreement was reached between the Parties on document production, and that the only questions regarding document production that came before the Board were on the documents on which the Parties could not agree.

[60] The Board rejects the notion that the City should be "penalized" with a refusal to award costs. The Board has not, in the past, used costs as a method to penalize any party. Rather, in general, the Board's view on costs has been to reward parties for their assistance, their substantial contribution to appeals, and for furthering the purposes of the Act. Based on the same reasoning, the Board also rejects the argument advanced by the City that because it "won" the appeal, the Appellants should be required to "compensate" or "indemnify" it.[90] The Board will discuss its views on using costs as a "punitive measure" in more detail below.

[61] Given the nature of the allegations against them, the Board is of the view that the City and Calhome had a right to participate in the appeal, and the decisions made by the City and Calhome to participate were reasonable and appropriate. As stated, the Appellants had the right to appeal the Order against them and to present arguments they deemed appropriate. The corollary of this is that it was reasonable for the City and Calhome to defend themselves against

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[90] See: City's submission, dated August 7, 2002, at paragraphs 42 and 50.

these arguments. The Board recognized this in its Intervenor Decision,[91] in which it determined that it was proper for the City and Calhome to be Parties to the appeal. The Board stated:

> "As the Appellants named the City of Calgary and Calhome as potential 'persons responsible,' it would be against the principles of natural justice to prevent these parties from participating in the appeal. The principles of natural justice require that the City of Calgary and Calhome be permitted to 'defend' themselves against the arguments of the Appellants that they should be added to the EPO [(the Order)] as persons responsible. It is clear that the City of Calgary and Calhome have information that only they can bring forward that will be relevant to the Board's decision."[92]

[62] The Board questions the assertion by the Appellants that the participation of the City was voluntary or not necessary given that the Appellants argued that the substantial disclosure of documents by the City of Calgary was necessary for their case. In fact, given the nature of the arguments presented by the Appellants, the Board found the participation of the City and Calhome important to complete its understanding of the circumstances of the appeal.

[63] The Board believes it was appropriate the Residents Committee be heard. As stated in its previous decision, the individuals who live or who have lived at Lynnview Ridge are potentially affected more than anyone else in the Province.[93]

[64] As for the arguments presented by the Appellants that the Residents Committee participated only to glean information that could be used in civil litigation, the Board expects there are many possible civil claims that could be brought forward as a result of this matter by any of the Parties, including the Appellants, and that all of the Parties are mindful of the potential impact of the information obtained in this appeal. The Board agrees that its processes should not be used for this purpose. However, the Appellants must realize that the information provided to the Board, either in written submissions or orally at the hearing, is available to the public. Therefore, even if the Residents Committee had not participated in the hearing, the evidence

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91 See: Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (23 July 2002), Appeal No. 01-062-ID4 (A.E.A.B.).

92 Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (23 July 2002), Appeal No. 01-062-ID4 at paragraph 34 (A.E.A.B.).

93 See: Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (23 July 2002), Appeal No. 01-062-ID4 (A.E.A.B.).

presented was still available for it to examine. Thus, the Board places no merit in this argument. The Board notes after the submissions process had closed, it received a letter from the Appellants dated December 3, 2002, and a responding letter from the Residents Committee dated December 12, 2002.[94] These letters do not change the Board's view that there is no merit in this argument.

[65] The Board notes that the Residents Committee provided the Komex Report, which was very useful. The data from the Komex Report not only assisted the Residents Committee in its presentation, and the Board in making its final determination, but also provided further analyses to assist the Appellants and the Director. However, while the Komex Report was prepared for the Residents Committee, it was funded by the Appellants and the Director, and therefore, it would not be appropriate to make an award of costs for its development. The Board anticipates that if the Komex Report had not been presented by the Residents Committee, it could have been presented to the Board by the Director. This having been said, the only claim for costs advanced by the Residents Committee is for their legal costs and not for this report. The fact that the Komex Report was financed by the Appellants and the Director may be relevant to the "financial need" component of the Board's costs considerations.

[66] The Board notes that the Appellants were continuing to provide relevant information to the Director during the appeal process. It also understands that many of the residents of Lynnview Ridge accepted the Appellants' buyout or compensation. However, this does not mean that the residents gave up their rights to be involved in the appeal process. At the time the appeal was heard, many of the individuals of the Residents Committee still lived in Lynnview Ridge, and those who did live there for a number of years had the right to know and to present information on how their health may have been affected by the contaminants.

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[94] See: Appellants' letter, dated December 3, 2002. The letter advised that 17 statements of claim had been filed against Imperial Oil and Devon Estates by members of the Residents Committee and directed the Board's attention to the portion of Imperial Oil and Devon Estates' costs submission that expressed "…significant concern that a costs award is being sought from the Environmental Appeal Board to fund civil litigation...." See: Residents Committee's letter, dated December 12, 2002. The Residents Committee objected to the submissions of the Appellants regarding the alleged use of any costs award to fund a civil claim against them. The Residents Committee argued that these submissions by the Appellant are irrelevant to the Board's considerations regarding costs.

[67] The Appellants presented the argument that because there were a number of parties involved in the appeal, no *lis* existed with respect to any one of the Parties. The Appellants stated there was a significant level of public interest and, therefore, no costs should be awarded. The public interest element is an important factor that the Board must consider in all of its decisions, including costs decisions, and in fact, where the public interest is advanced by a party, that may form the foundation for a costs award.

[68] The Board is of the view that the participation by the CHR was useful. The purpose of the CHR's participation in this appeal was to ensure that public health concerns were presented and considered by the Board in its review of the Order. Given the nature of the problems addressed by the Order, it was important that this information be presented.

[69] The Board acknowledges that the Appellants did bring important issues forward in the appeal. The Board accepted some of their arguments and, as a result, made some recommendations that the Order be modified and raised some questions about potential concerns with the iterative process used by the Director. However, this is not the basis upon which the Board believes it is appropriate to determine costs in this instance. As stated in *Kostuch:*

> "It would be undesirable for the Board to use its power to award costs to thwart appellants who feel they have specific, legitimate concerns, even though in the end the rather specific terms of the Act may preclude the Board from hearing the appeal, or the appellants may be unsuccessful in the appeal. In the case before us, there is no doubt about the Appellant's bona fides in bringing this appeal."[95]

Therefore, the arguments relating to succeeding or failing on issues will not be determinative as to whether costs will be awarded.

[70] The Board notes most of the costs requested in this case are legal fees, and in particular the City and the Residents Committee requests were for legal fees on a solicitor-client basis. The Board has clearly set out its approach to costs in regard to solicitor fees in two recent decisions[96] and believes these reasons are pertinent to this decision as well.

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[95] *Kostuch* v. *Alberta (Director, Air & Water Approvals Division)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 46 (Alta. Env. App. Bd.), (*sub nom. Dr. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.) ("*Kostuch*").

[96] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras,*

[71] In *Mizera*, the Board stated:

> "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 amount of trial and preparatory time customarily involved in matters of that type. In Alberta, this approach is embodied in the Schedule 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.
>
> 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."[97]

The Board notes some of the arguments advanced as to why solicitor-client costs should be awarded in this instance are rooted in the view that costs should be awarded in a "punitive" manner. The Board does not believe that being "punitive" is an appropriate basis upon which to award costs. Having regard to all of the arguments advanced by the Parties, the Board does not believe that the special circumstances contemplated in *Mizera*[98] exist in this case to warrant granting solicitor-client costs.

Glombick, Fenske, et al.) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.); and *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.).

[97] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraphs 17 to 18 (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 paragraphs 10 and 11 (A.E.A.B.).

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

[72] The Board, if it does award legal costs, will generally base the award on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board determines to be relevant in the specific case. As stated in *Paron*:

> "In the case before the Board, virtually all of the costs are legal fees. For this category of expense, except in exceptional cases, the Board has not previously assessed costs awards on a full solicitor and client basis. (Costs Decision re: *Cabre Exploration Ltd*., E.A.B. Appeal No. 98-251-C). Where the Board awards legal costs, the Board will generally base the costs awards on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board applies under the Act and the Regulation for that case."[99]

The Board believes the approach discussed in *Paron* is the appropriate approach in this case.

[73] A number of the Parties raise the *Penson*[100] case as a basis upon which to determine the appropriate amount of costs in this case. In *Penson* the claim for legal fees was in excess of $20,000 and, following a judicial review,[101] the Board reconsidered its initial denial of costs and awarded legal fees in the amount of $3,409.28.[102] The Board believes that the approach taken in the *Penson* case in inapplicable in this case.[103]

[74] The Appellants raised the question of "financial resources" of the various parties requesting costs. The Board is prepared to accept that the Residents Committee has limited financial resources compared to the other Parties, because it is an organization of residents and former residents of Lynnview Ridge. While the Board notes that the Appellants have now purchased the majority of homes in the Lynnview Ridge subdivision, it has no doubt that the

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99 *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.).

100 *Penson* (2002), 32 C.E.L.R.(N.S.) 15 (Alta.Env.App.Bd.), (*sub nom.* Reconsideration of Costs Decision re: *Penson and Talisman Energy Inc.*) (1 December 1999), Appeal No. 98-005 (A.E.A.B.).

101 See: *Wayne Penson* v. *Environmental Appeal Board et al.* (18 June 1999), Edmonton 9904 00198 (Alta.Q.B.). In the judicial review, the Court made it very clear that its "…decision should not be considered a precedent for anything."

102 In the *Penson* case, the Board awarded $1000.00 per day for the hearing and allowed two days for the hearing, totaling $2000.00. Further the Board awarded $500.00 per day for preparation and allowed two days of preparation. The remainder of the costs award was disbursements in the amount of $409.28.

103 The *Penson* case dealt with a reclamation certificate, and the facts of the case were simple: casing protectors and other metal debris were found on the site, leading to the conclusion that the site had not been properly reclaimed. See: *Penson* v. *Inspector of Land Reclamation, Alberta Environmental Protection* re*: Pembina Corporation* (18 September 1998), Appeal No. 98-005-R at paragraph 44 (A.E.A.B.).

costs of dealing with this matter and moving have taxed the limited resources of these individuals, and thus it is appropriate to award costs. The Board accepts that the City and the CHR, as publicly funded organizations, have greater resources than the individual residents at Lynnview Ridge. However, the Board believes that these publicly funded organizations also have limited resources and their resources are intended to be used for carrying out their stated mandates. Therefore, in so far as they have been called upon to exceed these mandates, the Board is prepared to accept their financial resources are limited, and it may be appropriate to award costs.

[75] The final matter that the Board will address before beginning its examination of individual claims, is the use of costs as a method to penalize a party. As the Board stated above, it has not, in the past, used costs to penalize any party. Some of the arguments advanced specifically or in more general terms are punitive in nature and suggested that the opposing party should be penalized by granting or denying a costs award because of a particular behaviour or outcome. Rather, the Board believes that the contribution a party has made is what is important in determining whether to award costs. As the Board stated in *Mizera*:

> "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."[104]

The Board's view on costs has been to *reward* parties for their assistance, their substantial contribution to the Board's understanding of the issues under appeal, and for generally furthering the purposes of the Act. The Board is of the view that it is this type of approach that is more appropriate as contemplated by the Act, and in particular the various purposes of the Act included in section 2.

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[104] *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 6 (A.E.A.B.).

2. Calhome

[76] As Calhome has withdrawn its application for costs, the Board need not address the claim further. Therefore, the Board confirms that no costs are payable to Calhome.

[77] However, the Board is of the view that Calhome's costs application provides two useful reference points in analyzing the other claims. First, according to Calhome's application for costs, the amount of time spent by legal counsel in the hearing was 46.5 hours. Second, the hourly rate for Calhome's legal counsel, Mr. Ted Helgeson, was $170.00 per hour. Mr. Helgeson has approximately 16 years of experience, and in comparison to the tariff of fees used by the Government of Alberta for outside legal counsel, the rate of $170.00 per hour is an appropriate rate.[105]

3. The Calgary Health Region

[78] The CHR has claimed costs of $40,528.60. This claim is based on 152.7 hours at $260.00 per hour for a total of $39,702.00 in legal fees. They claimed a specific disbursement of $266.04 for a delivery charge, and a general administrative disbursement based on 4% of the legal fees of $560.56.

[79] The Board does not believe that an award of costs to the CHR is appropriate. In the Board's view, the participation of the CHR in this appeal was part of its statutory mandate. The *role* of the CHR is that of a regulator.

[80] The CHR has a statutory mandate to protect the health of its citizens. Under the *Public Health Act*, R.S.A. 2000, c. P-37, the CHR has the authority to "…inspect any public place for the purpose of determining the presence of a nuisance or determining whether this Act and the regulations are being complied with."[106] Under the *Public Health Act*, the CHR also has authority to require the site to be vacated and the substance causing the nuisance to be

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[105] According to the Alberta Legal Telephone Directory 2002-2003, Mr. Helgeson was admitted to the Law Society of Alberta in 1986 and as a result, has 16 years of legal experience. Based on the tariff of fees used by the Government of Alberta for outside counsel, a rate of $190.00 per hour would be appropriate, however, as indicated, Mr. Helgeson only charges $170.00 per hour. The Board is of the view that this is an appropriate tariff against which to judge the appropriateness of legal fees in this case, but notes that there are circumstances in which it may not be appropriate.

[106] *Public Health Act*, R.S.A. 2000, c. P-37, section 59(1).

removed.[107] Given this authority, the Board is of the view that the CHR's participation in the appeal was as a result of its statutory mandate to protect the public health, and its participation in this appeal was consistent with the principles included in EPEA. The CHR recognized these statutory responsibilities in its intervention request, where it stated:

> "In addition to its statutory responsibilities under the Regional Health Authorities Act [(R.S.A. 2000, c. R-10)] to promote and protect the health of the population with in its region, Calgary Health Region is also a potentially affected party by having to provide services to those residents of the community whose mental and physical health is negatively affected by the soil contamination in their community."[108]

The Board accepted the statutory role of the CHR in its Intervenor Decision, where it stated:

> "The Calgary Health Region's mandate is to protect the health of its citizens. A large number of its citizens may be affected by the decision of this appeal, and it is the Board's understanding that regional health authorities work in conjunction with Alberta Environment to ensure a healthy environment for all citizens. By allowing the Calgary Health Region to participate as a Party, the Board has the opportunity to more thoroughly understand the health effects that may occur at the Subdivision.
>
> The Board recognizes the concurrent jurisdiction regarding human health between the Director and the Calgary Health Region. Section 2(a) of the Act states:
>
> 'The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing … the protection of the

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[107] Section 62 of the *Public Health Act* states:

"62(1) Where, after an inspection under section 59 or 60, the executive officer has reasonable and probable grounds to believe that a nuisance exists in or on the public place or private place that was the subject of the inspection or that the place or the owner of it or any other person is in contravention of this Act or the regulations, the executive officer may issue a written order in accordance with this section. …

(4) An order may include, but is not limited to, provisions for the following:

(a) requiring the vacating of the place or any part of it;

(b) declaring the place or any part of it to be unfit for human habitation;

(c) requiring the closure of the place or any part of it;

(d) requiring the work specified in the order in, on or about the place;

(e) requiring the removal from the place or the vicinity of the place of anything that the order states causes a nuisance;

(f) requiring the destruction of anything specified in the order;

(g) prohibiting or regulating the selling, offering for sale, supplying, distributing, displaying, manufacturing, preparing, preserving, processing, packaging, serving, storing, transporting or handling of any food or thing in, on, to or from the place."

[108] CHR's submission, August 10, 2001.

> environment is essential to the integrity of ecosystems and *human health* and to the well-being of society.' (Emphasis added.)
>
> Section 11 of the Act refers to the cooperative approach that must be taken between environment and health. It states:
>
> 'The Minister shall, in recognition of the integral relationship between human health and the environment, co-operate with and assist the Minister of Health and Wellness in promoting human health through environmental protection.'
>
> The Board notes the Calgary Health Region and the Director have been in consultation with each other with respect to the matters in this appeal. This cooperative approach can only benefit all of the citizens of Alberta."[109]

[81] The Board believes the statutory mandate of the CHR is similar to that of the Director, and thus, the CHR should be treated in a similar manner to the Director for costs. In previous decisions,[110] the Board determined that the Director should not be held liable for costs where the Director's actions were carried out in good faith in furtherance of the Director's statutory duties. The Court of Queen's Bench, in the judicial review of *Cabre,* adopted the Board position regarding the Director, stating:

> "There is a clear rational for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision."[111]

[82] The Board believes the same principles should be applied to the CHR where, as in the appeal, it was carrying out its statutory duties. The CHR should be free to request to participate in an appeal without concern of costs being awarded against it as long as this participation is carried out in good faith and in furtherance of its statutory duties. The corollary of this is the CHR is not entitled to costs where it is participating in an appeal in furtherance of

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[109] Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (23 July 2002), Appeal No. 01-062-ID4 at paragraphs 42 to 45 (A.E.A.B.).

[110] See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.); and *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 (Alta.Q.B.).

[111] *Cabre Exploration Ltd*. v. *Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 34 (Alta.Q.B.).

its statutory duties. This position supports the purposes of the Act and in particular, section 2(a), which recognizes the interrelationship between human health and the protection of the environment.[112] Therefore, as the Board finds that the CHR was carrying out its statutory duties in this appeal, and that its participation in this appeal was in good faith, the Board will not award costs to the CHR.

4. Residents Committee

[83] The Residents Committee initially applied for costs of $47,159.66, however in the closing of its submission, it stated: "…the legal costs of $47,000.00 represents the total amount of costs claimed…." (Emphasis in the original.) The costs claimed by the Residents Committee is for $41,670.00 in professional fees, based on a rate of $225.00 per hour for 185.2 hours by the Residents Committee's lead counsel, Mr. Gavin Fitch, plus an additional $1127.50 in fees by junior counsel, plus $2,995.83 GST on professional fees. The Residents Committee also claimed for various disbursements totaling $1,366.33, inclusive of GST.

[84] The Board recognizes the importance of the Residents Committee's participation in the appeal. As noted in its Intervenor Decision: "The members of the Residents Committee live, or have lived, in the area that is contaminated…" and it is "…their health, more than any one else in the province, that could potentially be affected by the contamination on the site. … The residents of the Subdivision are the ones directly affected by the decision of the Director, and ultimately, this Board."[113]

[85] The Board recognizes the economy achieved by allowing the Residents Committee to participate. Although each individual resident could have filed an appeal, the Board appreciates the efforts made by the Residents Committee to consolidate appeals and resources. By cooperating in this way, time was not wasted at the hearing, and it was an efficient and effective way to present the interests of the residents of Lynnview Ridge.

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[112] Section 2(a) of the Act provides:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing … (a) the protection of the environment is essential to the integrity of ecosystems and *human health* and to the well-being of society." (Emphasis added.)

[113] Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional*

[86] The Board believes the Residents Committee made a useful presentation and conducted an effective, focused cross-examination. The Residents Committee identified a number of places in the Board's Report and Recommendations where it made a substantial contribution. The Board agrees with its submission on this point. As identified in its submission, the Residents Committee's presentation of the authors of the Komex Report was of assistance to the Board.[114]

[87] The Resident's Committee identified three examples of effective cross-examinations and the Board agrees these were useful to its deliberations. The first was when the Board came to its conclusion on the adverse effect issue, stating:

> "The Board views the following exchange between Mr. Teal from Imperial Oil and Mr. Fitch, counsel for the Residents Committee, as significant:
>
> 'Mr. Fitch: I guess I'm still curious about your statement that you don't think there had been any damage to the environment. Let's take the example of 3 Lynnview Rise. There was a reading there of 990 milligrams per kilogram of lead in the surface soil?
>
> Mr. Teal: At what depth?
>
> Mr. Fitch: I don't know. It's in the 0 -- the ground to 0.3 metre horizon.

Services, Alberta Environment (23 July 2002), Appeal No. 01-062-ID4 at paragraphs 39 to 40 (A.E.A.B.).

[114] In the Report and Recommendations, the Board stated:

> "Dr. Staudt, one of the authors of the Komex Report, addressed the conclusions of that report against the criticisms of Dr. Agar. It appears to the Board that both Dr. Agar and Dr. Staudt agreed that further testing was required in the Subdivision Lands to fully delineate the presence and migration of hydrocarbons. The Board is satisfied that the authors of the Komex Report reported potential migration of hydrocarbon vapours into three of the townhouses at Lynnview Ridge. While this does not prove that migration has occurred or will occur, the Board is of the view that the conclusions of the Komex Report were sufficient to support the Director's initial opinion that the presence of the hydrocarbons may cause or is causing an adverse effect, for the purposes of issuing the Order.
>
> The Board echoes Dr. Staudt's views when he said:
>
> 'My biggest point was, and that's also my disappointment, I believe we identified evidence, the potential, we're not just making a scientific argument. And there are people living there, so we were hoping that our evidence would have been picked up and either confirmed or clearly refuted, so the people who live there can just say with confidence, it's not going to be a problem.'"

Imperial Oil Ltd. v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraphs 160 and 161(Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.). See: Transcript, dated October 16 to 18, 2001, at pages 561 to 562.

> Mr. Teal: Okay.
>
> Mr. Fitch: You don't consider that a problem?
>
> Mr. Teal: It certainly is a potential problem. If those soils were exposed, if in fact those soils became available and were, in fact, inhaled or ingested, then certainly that could be an issue from an environmental perspective, from a human health perspective.'
>
> The Board is uncertain whether Imperial Oil purports to distinguish between 'a potential problem' and a release that 'may cause ... an adverse effect,' but in the Board's view, for the purposes of this Appeal, they mean the same thing. Indeed, the Board is satisfied that the *potential* for an adverse effect to occur *continues to exist* while high levels of released hazardous substances remain in the soil.
>
> The Board is satisfied that sufficient preliminary evidence existed to support the Director's decision to issue the Order, especially given that one of the purposes of the Order was to require further delineation of the Substances."[115]

The second example of useful cross-examination was on the potential for exposure to lead, where the Board stated:

> "… Mr. Teal indicated that seasonal conditions were relevant to exposure pathways and should be considered in applying the CCME Guidelines for lead:
>
> 'Mr. Fitch: If you wouldn't apply this conservative guideline in this case where you are dealing with the residential neighbourhood with hundreds of people living there, when on earth would you ever apply it?
>
> Mr. Teal: Again, you would look at applying it, but you would look at how much exposure, what are the exposure pathways in this set of circumstances, and is there availability on 365 days a year at this location? As we all know, there is frozen ground. Soil is covered by snow for a number of days of the year. Et cetera. So those are the kinds of things that would have to be brought into play as far as is it applicable as 140 specifically or should it be adjusted according to the conditions on the site? … It may, in fact, be if you were in a situation where you were in warm climate where the soils were exposed for 365 days a year, and you had children playing in those soils every day, then that might very well be applicable. ... There's very few locations in Alberta that you would believe that this should be applied, that's correct.
>
> Mr. Fitch: Name one.

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[115] *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraphs 163 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.). See: Transcript, dated October 16 to 18, 2001, at pages 169 to 170.

> Mr. Teal: I can't think of one.'
>
> On the issue of the seasonal aspect of soil exposure, we do not accept that a standard adopted by Alberta Environment should be rejected because the ground is frozen in Alberta for at least part of the year. The Appellants have not presented any evidence of climatic conditions that are specific to the Subdivision Lands and, therefore, warrant remediation of the Subdivision Lands to a different standard than that adopted for Alberta. The Lynnview Ridge lands are not frozen in the summer."[116]

[88] The third example of effective cross-examination was on the approaches taken to lead contamination in other jurisdictions, where the Board stated:

> "During cross examination of Dr. Smith (who was not familiar with background lead levels in Alberta), the following exchange with Mr. Fitch occurred on the relationship between the Lynnview Ridge and Port Colborne sites:
>
> 'Mr. Fitch: There are also differences aren't there?
>
> Dr. Smith: I imagine there are some. I have not enumerated all the characteristics of both sites.
>
> Mr. Fitch: Well, I just took a quick look at the executive summary to the 2-inch thick report that we were provided by our friend and I see that in the Port Colborne case, the lead levels were similar to other urban residential sites in Ontario; is that right?
>
> Dr. Smith: That's correct. ...
>
> Mr. Fitch: You would agree with me that the levels found in Lynnview Ridge are not similar to levels found in other urban residential communities in Alberta, or do you even know?
>
> Dr. Smith: I am not familiar with the Alberta database. ...
>
> Mr. Fitch: I also read in the executive summary that the lead levels found in the soil, in fact, are not attributable to the emissions from the INCO Refinery. Isn't that right? ...
>
> Dr. Smith: I understand that's still under debate because of the rubble issue and because of the activities that INCO had over the period that is attributed to the lead emissions. They may, in fact, come from another industry that is no longer there.

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[116] *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraphs 290 and 291(Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.). See: Transcript, dated February 5 and 6, 2002, at pages 1199 to 1201.

> Mr. Fitch: Well, I read this, on page 1 of the executive summary: The lead levels are not attributed to INCO emissions. So do you understand where I got that impression?
>
> Dr. Smith: ... Yes, I understand.
>
> Mr. Fitch: Would you agree with me that it would be a bit odd for the ministry of environment in Ontario to issue, say, the Ontario equivalent of an environmental protection order against a company when the lead levels found were not, in fact, attributable to that company's emissions? That would be pretty unusual, in fact, very unreasonable, wouldn't it?
>
> Dr. Smith: Yes.'
>
> On the relevance of similar circumstances in other jurisdictions, the Board is of the view that while they may have some relevance to the question of reasonableness, ultimately, the Director must reach his own decision on what is appropriate for Alberta. Specifically in relation to the Port Colborne Report, the Board notes the importance of background or regional lead levels to the reasonableness of cleanup requirements. Background levels were recognized as a site specific factor by the CCME and appear to be one reason for not requiring remediation of lead contamination of soils at Port Colborne." [117]

[89] Finally, the Residents Committee identified a number of places in the Board's Report and Recommendations where "…the Board commented favourably on their submissions with regard to the complete absence of property transactions in Lynnview Ridge being evidence of 'damage to property' … and on the proper interpretation of the term 'release' in the Act …."[118]

[90] The Board concludes that the Residents Committee made a contribution to the proceedings and is prepared to exercise its discretion and grant an award of costs.

[91] All professional fees, with the exception of 4.4 hours, occurred between the filing of the Notice of Appeal (July 3, 2002) and the filing of the final submissions (April 19, 2002), and all appear to relate to the preparation and presentation of the Residents Committees'

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[117] *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraphs 297 and 298 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.). See: Transcript, dated February 5 and 6, 2002, at pages 931 to 933.

[118] Residents Committee's submission, dated August 7, 2002, at paragraph 22. See: *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraphs 131 and 136 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.)* (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

concerns in the appeal. The disbursements similarly appear related to the participation of the Residents Committee in the proceeding.

[92] The Board notes that Mr. Fitch, lead counsel for the Residents Committee, has 10 years of legal experience.[119] Based on the tariff of fees used by the Government of Alberta for outside legal counsel, the maximum hourly rate that would be paid is $150.00 per hour. Mr. Helgeson, Calhome's legal counsel, claimed costs for time spent in the hearing for a total of 46.5 hours; he did not claim for preparation time. The Board notes with interest that this is almost one fourth of the amount of hours claimed by Mr. Fitch (185.2 hours),[120] meaning that for every hour in the hearing, Mr. Fitch spent three hours preparing. This amount of time sounds reasonable for this complex case and the role the Residents Committee played in the appeal.

[93] The Board notes that the Residents Committee argued that costs should be awarded on a full solicitor-client basis. However, as discussed above, the Board believes that full solicitor-client costs are not appropriate in this case. The Board believes that section 2(f) of the Act emphasizes the "…shared responsibility of all Alberta citizens for ensuring the protection … of the environment through individual actions…." Based on this principle, the Residents Committee should be prepared to carry part of its legal costs. Thus, the Board exercises its discretion and will award costs to the Residents Committee for half of the hours spent by Mr. Fitch at a rate of $150.00 per hour for a total of $13,890.00,[121] plus GST in the amount of $972.30, for a total of $14,862.30.

[94] While the Board recognizes the economy of having assistance from junior counsel, the substantial contribution to the appeal was a result of Mr. Fitch, the Residents Committee's lead counsel, and therefore, the Board is not prepared to award costs for junior counsel.

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[119] According to the Alberta Legal Telephone Directory 2002-2003, Mr. Fitch was admitted to the Law Society of Alberta in 1992 and as a result, has 10 years of legal experience. Based on the tariff of fees used by the Government of Alberta for outside counsel, and having regard to all the circumstances of this case, a rate of $150.00 per hour would be appropriate. The Board is of the view that this is an appropriate tariff against which to judge the appropriateness of legal fees in this case, but notes that there are circumstances in which it may not be appropriate.

[120] 185.2 hours / 4 = 46.3 hours or approximately 46.5 hours. See: Residents Committee's submission, dated August 7, 2002, at Appendix A. (100.3 hours + 71.8 hours + 13.1 hours = 185.2 hours.)

[121] 185.2 hours / 2 = 92.6 hours x $150.00 per hour = $13,890.00.

[95] The Board is prepared to award costs for disbursements claimed by the Residents Committee. The disbursements claimed were properly related to the preparation and presentation of the Residents Committee's position. The only exception to this is a disbursement fee charged for a "QL Systems Search" of $9.30 plus GST. The Board believes this is not a proper disbursement and is no different than attempting to charge a client for the use of the firm's library. Therefore, the amount of disbursements that the Board will consider is $1,356.38, inclusive of GST.[122] Having regard to the shared responsibility of all Alberta citizens, the Board will award costs for disbursement of $678.19, being half of the amount properly claimed.[123]

[96] The total award of costs to the Residents Committee is $15,540.49, which, as discussed below, is payable by the Appellants.[124]

5. City of Calgary

[97] The City of Calgary has submitted a request for costs totaling $534,313.61. These costs were broken down as follows:

Hearing Preparation	1,281.2 hours	$255,109.50
Document Production	1,031.5 hours	$105,052.50
Hearing Attendance	178.1 hours	$28,730.00
Post Hearing	340.8 hours	$54,997.50
Total Professional Fees	2,831.6 hours	$443,889.50
GST		$31,072.27
Photocopying		$13,214.03
GST		$924.98
Disbursements		$19,258.42
GST		$1,348.09
Total Legal Fees		$509,707.29
G. Douglas Crarer	144.5 hours	$10,837.50
Expenses		$367.92

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122 $1,366.33 - $9.30 for QL - $0.65 GST = $1356.38.

123 $1356.38 / 2 = $678.19.

124

Professional Fees	$13,890.00
GST	$972.30
	$14,862.30
Disbursements (GST included)	$678.19
Total Costs Award	$15,540.49

L. Lee Guyn	156.0 hours	$11,700.00
Expenses		$881.90
GST		$819.00
Total Costs Claim		$534,313.61

[98] The City had a greater level of participation in the appeal than some of the other parties, including, but not limited to document production and the related motions hearing in which only the Appellants, the Director, and the City participated. The Board is surprised by the amount of the legal fees claimed by the City. However, the Board notes that the City, with its own legal department, had a choice to make regarding the distribution of work between its internal and external resources in order to participate in the appeal.

[99] In its submission, the City included a list under legal fees and expenses briefly describing the actions taken by counsel. There is no breakdown on which lawyer completed the work and the amount of time spent on each item. There is only a total number of hours and fees. More information would have been helpful, and the City advised it was prepared to provide more information if required, subject to solicitor-client privilege.[125] However, notwithstanding the amount of information that was provided, the Board has sufficient basis on which to determine the appropriateness of a costs award.

[100] The Board is of the opinion that the decision by the City to participate in the appeal was reasonable. The Appellants named the City as a possible person responsible, and thus it was appropriate that the City participated to defend itself. The Board believes the City made a valuable contribution to the proceedings, and in particular provided a "prototypical good witness" in Mr. Owen Tolbert.[126] As discussed below, Mr. Tolbert provided clear and reliable evidence essential to the Board's understanding of the matters under appeal.

[101] A key argument advanced by the Appellants was that the City should have been included as a "person responsible" for the release of substances addressed by the Order. The

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[125] See: City's submission, dated August 7, 2002, at paragraph 43, where it states that "…actual accounts are not attached as they disclose particulars of legal communications and are subject to solicitor/client privilege. Should the Board require greater specificity in any respect, the City would be pleased to provide same and hereby seeks leave to provide such further and better details on a basis that protects solicitor/client privilege should the Board require same."

[126] See: City's submission, dated August 7, 2002, at page 10. See also: Transcript, February 5 and 6, 2002, at page 1148.

Appellants stated that based on the planning processes and discussions between the Appellants and the City at the time the Lynnview Ridge subdivision was developed, the City had "care, management and control" of the substances identified in the Order. As stated in the Board's Report and Recommendations:

> "In essence, the Appellants submitted that because the City had extensive knowledge of the contamination on the Subdivision Lands, and because the City encouraged the Appellants to release their land for residential development, the City's subsequent approval of the re-zoning, and its imposition of conditions and restrictions on the development of Lynnwood Phase 4, went beyond mere regulatory approval and instead constituted 'charge, management and control' over the substances as contemplated by EPEA."[127]

[102] The City countered this argument. As stated in the Board's Report and Recommendations:

> "By contrast, the City of Calgary submitted that the relevant test is not whether a person had *knowledge* of the substance, or a role in planning, development, and approval of a subdivision, but, rather, whether the person had charge, management, or control of the substance. The City of Calgary submitted that its involvement with the planning approval processes for the Subdivision Lands did not equate to charge, management, or control of the Substances. The Board agrees that the focus of the test is the charge, management, or control of the *substances,* rather than planning approval processes. However, the Board must determine whether control over land use approval processes indirectly imputes charge, management, or control over the Substances."[128] (Emphasis in the original.)

[103] The majority of the documents requested by the Appellants from the City in the document production motion were aimed at bolstering their argument on this point. The documents production motion between the Appellants, the City, and the Director led the Board to

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[127] *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 210 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.). See also: Appellants' submission, dated February 21, 2001, at paragraphs 150 to 178.

[128] *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 211 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.). See also: City's submission, dated December 21, 2001, at paragraph 11.

issue a substantive decision on its ability to compel document production.[129] The Board believes the City made a substantial contribution to its decision on this issue.

[104] In particular, the Board notes the City was particularly helpful in providing scope to the documents production decision. Under the heading of "Broad Considerations," the Board considered two overriding factors that limited document production.[130] First, there was the "Scope of the Documents Requested." The Board noted that "…[w]ith respect to some of the documents requested, the City of Calgary responds that the Appellants appear to be incorrectly equating the issue of charge, management and control of the substance with that of the subdivision development processes."[131] The Board accepted this argument, excluding documents that "…relate *solely* to the planning and subdivision development processes…"[132] (emphasis in the original) and ordering production of documents relating to "…whether the City of Calgary had charge, management or control…" of the substances identified in the Order.[133]

[105] The second broad concern was that of "Privilege." The submissions of the City on this point were also helpful. The City raised the question of an "Implied Undertaking" and referred the Board to the case of *LSI Logic Corp. of Canada Inc.* v. *Logan*,[134] which the Board accepted.[135] The Board accepted the City's argument that the production of documents should be

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129 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

130 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraph 79 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

131 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraph 85 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

132 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraph 86 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

133 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraph 86 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

134 *LSI Logic Corp. of Canada Inc.* v. *Logan* (8 August 2001), 2001 ABQB 710.

135 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraphs 91 and 92 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

subject to an implied undertaking.[136] Further, the City assisted the Board by directing it to a number of cases on solicitor-client privilege, which were also important to the Board's decision on document production.[137]

[106] Following the document production motion and document production, as discussed at some length in the Board's Report and Recommendations, the Board relied on many of the City's submissions on these documents and believes they were essential to its understanding of these matters.

[107] The Appellants organized and presented the documents that were produced by the City into three categories to convince the Board that the City should be held a "person responsible." The first category was "The City's Early Initiatives," where the Appellants argued it was the City that "pressed" the Appellants to develop Lynnview Ridge. The City responded by demonstrating that the letters the Appellants sought to use as evidence in this regard were written when the lands were still part of Imperial Oil's refinery.[138] Further,

> "…the Appellants suggested that the City's anxiousness to residentially develop the surplus refinery lands resulted in it taking an active role in ensuring the process was carried out expeditiously as possible. By contrast, the City claims that it followed its usual planning processes. The Board was impressed by the testimony on the City's planning processes provided by Mr. Owen Tobert, Executive Officer for Utilities and Environmental Protection at the City of Calgary. The Board accepts Mr. Tobert's evidence on the planning process. Further, in the Board's view, the speed with which the City conducted the planning process, which commenced almost ten years before the residential development of the Subdivision Lands, has little bearing on the question of the City's charge, management, or control of the Substances."[139]

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136 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraph 93 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

137 *Imperial Oil Ltd.* (2002), 42 C.E.L.R. (N.S.) 114 at paragraph 105 and 106 (Alta. Env. App. Bd.), (*sub nom. Document Production Motions: Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment*) (10 December 2001), Appeal No. 01-062-ID (A.E.A.B.).

138 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 218 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

139 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 221 (Alta. Env. App. Bd.), (*sub nom. Imperial*

[108] The second category of documents was used by the Appellants to argue that the City had "extensive" knowledge of the events at Lynnview Ridge and therefore should be held a "person responsible." The Board accepted the Appellants arguments that the City must have known about the hydrocarbons at Lynnview Ridge,[140] but also accepted "…the City's evidence that, especially at the time of the development, it did not have the environmental expertise to inspect soil conditions to verify compliance with the Development Agreement."[141]

[109] The final category of documents were used by the Appellants to argue that the City should be held a "person responsible" because of the City's "active" role in the development of Lynnview Ridge. The Appellants argued that the internal consultation process undertaken by the City, and the development agreement between the Appellants and the City, which included a special clause, demonstrated that the City should be held responsible. Again, the Board accepted the evidence of Mr. Tolbert stating:

> "…the Board finds nothing unusual or untoward in the circulation through the various City departments of applications for a large residential development for comment, or the various comments received from those departments. The Board accepts Mr. Tobert's responses to the Appellants' questioning on specific conditions. The Board accepts that weeping tile requirements, sulphate resistant concrete, and stripping and rough grading of the site were standard planning issues normally arising in the development of similar subdivisions at the time."[142]

[110] The Board relied on evidence and arguments advanced by the City in a number of other areas, but in particular on whether the City should be considered a person responsible. As stated by the Board "The issue of the City's level of responsibility for the current situation at the

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Oil Ltd. and Devon Estates Ltd. v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

140 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 223 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

141 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 227 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

142 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 225 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

Subdivision Lands is a difficult one. The City approved a land use that allowed a large number of people to come into contact with soils polluted by lead and hydrocarbons. However, the City did not cause the pollution of those soils."[143]

[111] On this point, one of the arguments advanced by the Appellants was that the Board should follow the Ontario Environmental Appeal Board decision of *Sabiston*.[144] In *Sabiston*, the Ontario Environmental Appeal Board held that by passing a by-law, a municipality assumed some level of responsibility for contamination on the land in question. Based in part on the arguments advanced by the City, the Board distinguished the *Sabiston* case and determined it was not applicable to the appeal.[145]

[112] Having determined that the City made a valuable contribution to the appeal, the Board concludes it should make an award of costs. The amount of professional fees claimed were:

Hearing Preparation	1,281.2 hours	$255,109.50
Document Production	1,031.5 hours	$105,052.50
Hearing Attendance	178.1 hours	$28,730.00
Post Hearing	340.8 hours	$54,997.50
Total Professional Fees	2,831.6 hours	$443,889.50

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143 *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraph 212 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

144 *James Sabiston Ltd.* v. *Ontario (Ministry of Environment),* [1980] O.E.A.B. No. 22 ("*Sabiston*"). See: *Imperial Oil Ltd.* v. *Alberta (Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 47 C.E.L.R. (N.S.) 170 at paragraphs 235 and 236 (Alta. Env. App. Bd.), (*sub nom. Imperial Oil Ltd. and Devon Estates Ltd.* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment re: Imperial Oil Ltd.*) (21 May 2002), Appeal No. 01-062-R (A.E.A.B.).

145 In its submission to the Board, the City distinguished the *Sabiston* case on the following grounds:

1. In *Sabiston*, the municipality was a joint operator of the facility;
2. The municipality was not a party to the appeal and, therefore, was not given the opportunity to examine or reply to the evidence;
3. The Ontario Environmental Appeal Board recommended considering joining municipalities in future proceedings, but the municipality was not held to be a person responsible.

The City argued that its involvement in Lynnview Ridge related to zoning and subdivision approval, and "…such tangential, entirely non-custodial, non-physical involvement with the contaminant as in the current case can not bring the City within the definition of person responsible, nor should it. The City played no part whatsoever in the creation of the contamination, its release or the operations that produced it." See: City's submission, dated March 6, 2002, paragraph 94 to 98. See also: City's submission, dated September 2, 2001, paragraphs 29 to 33.

[113] The City has filed a claim for 2,831.6 hours of legal fees totaling $443,889.50.[146] To put this claim into perspective, working eight hours a day, this is almost 354 days. Working five days a week, this is approximately 71 weeks or one lawyer working on nothing but this appeal for one year and five months.[147] While the Board accepts this was a very complex appeal, it does not believe that one year and five months is a reasonable claim.

[114] The Board accepts that the Parties attended five days of hearings (46.5 hours according to Mr. Helgeson). The Board notes that some of the larger law firms in Alberta have a "rule of thumb" to estimate that each day at a hearing will require ten days for preparation. Based on this approach, the City would have taken 50 days of preparation time and, therefore a total of 55 days for the hearing.[148] Adding one day for the document production motion and ten days of preparation (total of 11 days for the document production motion), the Board reaches 66 days, which is almost one fifth the time claimed by the City, and is still, in the Board's view, a significant amount of time.[149]

[115] When reviewing the submission for costs from the City of Calgary, it appears the City wants the Board to make those with the deepest pockets pay. There is a reoccurring theme in the City's costs submission where it appears that the City wants to use costs to penalize the Appellants. (The Board notes that a similar theme appears in the submissions of the Appellants, where they appear to argue that costs should be denied to penalize the City.) As stated, the intent of the Board is not to penalize a party to an appeal, but to assess costs in a manner that fairly represents the involvement of the various parties, keeping in mind the purpose of the Act.

[116] As discussed above, the Board notes Mr. Helgeson (Calhome's counsel) claimed costs for the time spent in the actual hearing of 46.5 hours, and Mr. Fitch (the Residents

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146 The Board notes that 340.8 hours and $54,997.50 of this claim relates to "Post Hearing" work. In the Board's view, this portion of the claim does not relate to the preparation and presentation of the City's submission and, therefore, is not properly included in a costs award.

147 2,831.6 hours / 8 hours per day = 353.95 days. 354 days / 5 days per week = 70.8 weeks. 71 weeks / 50 weeks per year (2 weeks being vacation) = 1.42 years = 1 year and 5 months.

148 5 day hearing +10 days preparation per day of hearing = 55 days for preparation and hearing.

149 66 days / 354 days = 19% or approximately one fifth.

Committee's counsel) claimed almost four times this amount,[150] meaning for every hour in the hearing, Mr. Fitch spent three hours preparing. As stated, this amount of time seems reasonable.

[117] Using this as a reference point, given the nature of the client involved and the arguments being advanced, the Board believes it would be reasonable to have legal counsel for the City to have spent double the amount of time spent by Mr. Fitch for the hearing. Giving the benefit to the City, 46.5 hours in the hearing plus three times 46.5 hours of preparation time (139.5 hours) totals 186 hours, times two is 372 hours. (Putting this into perspective this is 46.5 days or 9.3 weeks of one lawyer working full time on this appeal.)[151] The Board is prepared to add one day (8 hours) for the document production motion and three days (24 hours) preparation for this motion, for a total of 32 hours.[152] Therefore, the total hours the Board is prepared to consider is 404 hours.

[118] Taking into account the obligation found in section 2(f) of EPEA for all citizens of Alberta to take a role in protecting the environment, the Board believes it would be reasonable to award half of this amount or 202 hours.

[119] No hourly rate was specified by counsel for the City. Based on $443,889.50 for 2831.6 hours, the average hourly rate on the file was $156.77 per hour. The Board believes several counsel worked on the file, but as discussed above for the Residents Committee, the key contribution to the appeal process came from lead counsel, which for the City was Mr. Ron Kruhlak. Mr. Kruhlak is a senior member of the environmental bar in Alberta, having 18 years of experience. He has appeared before the Board on numerous occasions. Based on this, the Board finds it appropriate to use an hourly rate of $190.00 per hour, which is the top rate found in the Government of Alberta tariff.[153] Therefore, for professional fees, the Board awards a total of $38,380.00 plus GST, in the amount of $ 2686.60, for a total of $41,066.60.[154]

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150 185.2 hours / 4 = 46.3 hours or approximately 46.5 hours.

151 372 hours / 8 hours per day = 46.5 days / 5 days per week = 9.3 weeks.

152 4 days x 8 hours per day = 32 hours.

153 According to the Alberta Legal Telephone Directory 2002-2003, Mr. Kruhlak was admitted to the Law Society of Alberta in 1984 and as a result, has 18 years of legal experience. Based on the tariff of fees used by the Government of Alberta for outside counsel, and having regard to all the circumstances of this case, a rate of $190.00 per hour would be appropriate. The Board is of the view that this is an appropriate tariff against which to judge the

[120] The Board notes that many of the costs claimed by the City related to document production and review. The City argued it was required to do extensive research into archival documents to gather all the requested documentation. These are normal requests of parties to an appeal and, beyond what was awarded as part of the professional fees, should be absorbed by the individual parties. Thus the Board is not prepared to award costs for fees associated with Mr. Crarer and Mr. Guyn.

[121] The remaining portion of the claim was for disbursements. The disbursements claimed by the City were:

Photocopying	$13,214.03
GST	$924.98
Disbursements	$19,258.42
GST	$1,348.09
Total Disbursements	$34,745.52

[122] The general disbursements of $19,258.42 plus $1,348.09 in GST relate principally to costs associated with retaining legal counsel from Edmonton.[155] The Board does not believe costs associated with retaining legal counsel from elsewhere in the Province are a proper part of a costs award and will not award any portion of these costs. Further, the Board will not award costs for the claim of $702.00 for on-line searches. The Board does not believe this is an acceptable disbursement as it is similar to charging a client for the use of the firm's library. There is also a claim for the cost of purchasing the transcript ($3,330.50 plus $233.14 GST for a total of $3,563.64). Having regard to the shared responsibility of all citizens of Alberta to protect the environment, as identified in section 2(f) of the Act, and having regard to the fact the transcript made by the City referenced the transcript in its submissions, which the Board found

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appropriateness of legal fees in this case, but notes that there are circumstances in which it may not be appropriate.

[154] 202 hours x $190.00 per hour = $38,380.00.

[155] The general disbursements claimed by the City that relate to using counsel from Edmonton instead of Calgary included: Cab Fare $1,423.18; Gas $27.38; Airfare $6,437.87; Hotel $4,683.28; Meals $497.00; Parking $68.12; and Meeting Room Rental and Lunch $905.01. The remaining general disbursements included: Runner Costs $28.00; Agent Filing Fees $18.00 (the Board is uncertain as to what filing fees there were); Deliveries $1,015.24 (a portion of these fees may relate to using counsel from Edmonton instead of Calgary); Postage $54.60; and Searches $68.00. There is also an additional disbursement of $702.00 for online searches and $3,330.50 for the transcript, both of which are discussed separately.

useful, the Board is prepared to award half of the cost of purchasing the transcript for a total of $1,781.82 inclusive of GST.

[123] The remaining disbursement is photocopying for $13,214.03, plus $924.98 in GST, for a total of $14,139.01. There is no indication of the number of copies or the rate charged for photocopying. The Board accepts that photocopying is generally a necessary part of preparing and presenting the City's submissions in this appeal. However, the Board has no basis upon which to award in excess of $14,000.00 for photocopying where no specifics provided and where it is left with many unanswered questions. (How many photocopies were made? How much does each photocopy cost? What was photocopied? How does this photocopying charge relate to the preparation and presentation of the City's submission in its appeal?)

[124] The total disbursement for preparing and presenting the submission of Calhome as claimed by Mr. Helgeson was $3,346.10, which provides some point of reference, although this accounts for both photocopying and transcript purchasing. The disbursement of $3,346.10 is approximately one quarter of $14,139.01. If Calhome was able to prepare and present their submission for $3,346.10, that is a reasonable approximation upon which to base an award of costs to the City for photocopying charges. The Board is therefore prepared to award costs in the amount one quarter of the photocopying costs, which is $3,534.75.

[125] Therefore the Board awards costs to the City in the amount of $41,066.60 for professional fees, $1,781.82 for transcript purchase (general disbursements), and $3,534.75 for photocopying, for a total of $46,383.17 inclusive of GST. This award, as is discussed below, is payable by the Appellants.

D. Who Should Bear the Costs?

[126] In any appeal, parties involved have a right to ask for costs from any other party. In this case, the parties that requested costs claimed them against the Appellants. 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,[156] that costs should not be awarded

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

against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

[127] In this case, the Director's decision was not overturned by the Board but was varied. Even if the decision had been reversed, special circumstances may be required for costs to be awarded against the Director. The courts, in the decision of *Cabre*,[157] considered the issue of the Board not awarding costs against the Director. In his reasons, Justice Fraser stated:

> "I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board's decision, that the Department should be treated differently from other parties to an appeal.
>
> The Board states in its written submission for this application:
>
> 'There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.'
>
> In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise."[158]

[128] In this case, the Director exercised his judgment in performing his statutory duties, and even though this Board did not agree entirely with his methods, his actions could not be considered inappropriate as defined by the legislative authority, and it was not an exercise of

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

[158] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 at paragraphs 33 to 35 (Alta.Q.B.).

bad faith. Although the Board had questions regarding the Director's use of the iterative letters, it does not find that this constitutes the "special circumstances" contemplated by the court, or this Board, to award costs against the Director. As the Board finds no special circumstances or misconduct of the Director, it does not view this as an appropriate case in which to order costs against the Director.

[129] In previous costs decisions against a project's proponent, the Board described the role of project proponents as being "…responsible for incorporating the principles of environmental protection set out in the Act into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties…."[159] As stated before, "…these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the projects financing, than upon the public at large as would be the case if they were to be assessed against the Department [(the Director)]."[160]

[130] Therefore, and for the reasons set out in the previous sections, the Board concludes no special circumstances exist to warrant costs being awarded against the Director. Costs in the circumstances of these appeals will be ordered against the Appellants.

V. CONCLUSIONS

[131] Based on the reasons stated above and in previous sections of this Decision, the Board has determined the Appellants, Imperial Oil Limited and Devon Estates Limited, shall jointly pay costs to the Lynnview Ridge Residents Action Committee and the City of Calgary.

[132] The Residents Committee made a valuable contribution to the hearing and is composed of the individuals most affected by any contamination on the site. The Residents Committee was formed to consolidate the concerns of the residents and present them in a

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

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

cohesive manner. In its Report and Recommendations, the Board recognized the effective cross-examination of witnesses by the Residents Committee. The participation of the Residents Committee in the hearing was important to ensure the Board heard from those most directly affected. Therefore, the Board has determined that the Residents Committee shall receive a costs award of $15,540.49, payable by the Appellants. This award includes $14,862.30 for professional fees and $678.19 for disbursements, inclusive of GST.

[133] The Board determined it was reasonable for the City to participate in the appeal as the Appellants had named the City as also being responsible for the contamination, and if the Board had accepted the Appellants' arguments, the City could have been potentially liable. The City's participation assisted the Board in understanding the matters under appeal. Although the Board viewed the request for costs excessive, the Board determined the City is entitled to some of its costs, as it did make an important contribution to the appeal process. Therefore, the Board awards the City of Calgary $41,066.60 for professional fees and $5,316.57 for disbursements, for a total of $46,383.17, inclusive of GST, and payable by Appellants.

[134] The Board notes the contribution made by Calhome Properties Ltd. and its counsel. However, as its request for costs was withdrawn, the Board need not consider a costs award.

[135] Although the Calgary Health Region's participation in the hearing was appreciated and was proper given its statutory mandate, no costs will be awarded. The Board has determined the CHR is in a similar position to that of the Director; it is a regulator and its involvement in the appeal was part of its statutory mandate. By treating the CHR in a similar manner as the Director, it provides some protection to the CHR from having costs awarded against it if it participates in other hearings, providing its participation is carried out in good faith and in furtherance of its statutory duties.

[136] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs, to be payable jointly by Imperial Oil Resources Limited and Devon Estates, as follows:

1.	Residents Committee	$15,540.49
2.	City of Calgary	$46,383.17
	Total costs payable	$61,923.66

The Board orders that costs to be paid within 60 days of issuance of this decision.

Dated on September 8, 2003 at Edmonton, Alberta.

"original signed by"

Dr. M. Anne Naeth, Panel Chair

"original signed by"

Mr. Ron V. Peiluck, Member

"original signed by"

Mr. Al Schulz, Member