Appeal No. 01-076-CD

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Costs Decision

Date of Decision – May 10, 2002

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

-and-

IN THE MATTER OF a cost application filed by Ouellette Packers (2000) Ltd. related to an appeal filed by Ms. Margaret Ouimet and CASP Hwy 37 with respect to Preliminary Certificate No. 00150725-00-00 issued under the *Water Act* to Ouellette Packers (2000) Ltd. by the Director, Northeast Boreal Region, Regional Services, Alberta Environment.

Cite as: Costs Decision re: *Ouellette Packers (2000) Ltd.*

William A. Tilleman, Q.C., Chair.

PARTIES:

Appellants:	Ms. Margaret Ouimet and CASP Hwy 37, represented by Mr. David Reay and Mr. Adrian Jewell, Sharek Reay.
Director:	Mr. Patrick Marriott, Director, Northeast Boreal Region, Regional Services, Alberta Environment, represented by Ms. Michelle Williamson, Alberta Justice.
Approval Holder:	Ouellette Packers (2000) Ltd., represented by Mr. Keith Wilson.

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EXECUTIVE SUMMARY

This appeal relates to a Preliminary Certificate and proposed Licence issued to Ouellette Packers (2000) Ltd. under the *Water Act*. The Preliminary Certificate provides that if Ouellette Packers meets the conditions of the Preliminary Certificate, it will be granted a Licence to divert 8,292 cubic meters of water annually from a well located in SW 03-055-26-W4M, near St. Albert, Alberta. Ouellette Packers intends to establish a hog processing plant at this location, and the water is required to supply the plant. Ms. Margaret Ouimet and a group of local residents calling themselves "CASP Hwy 37" filed an appeal opposing the issuance of the Preliminary Certificate and proposed Licence.

The Board issued its decision on January 28, 2002, dismissing the appeal. The Board determined that Ms. Ouimet and the members of CASP Hwy 37 did not provide sufficient evidence to demonstrate that they were directly affected.

The Board received an application for costs from Ouellette Packers (2000) Ltd. After receiving written submissions from Ms. Ouimet and Ouellette Packers, the Board has denied Ouellette Packers' application for costs.

I. BACKGROUND

[1] On July 23, 2001, the Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment (the "Director") issued Preliminary Certificate No. 00150725-00-00[1] to Ouellette Packers (2000) Ltd. (the "Certificate Holder") pursuant to the *Water Act*, R.S.A. 2000, c. W-3.[2] The Preliminary Certificate provides that if the Certificate Holder meets the conditions prescribed in the Preliminary Certificate, it will be granted a Licence for the diversion of 8,292 cubic meters of water annually from a well in SW 03-055-26-W4M (the "Ouellette Well"), near St. Albert, Alberta. The proposed Licence is for an industrial use to supply a hog processing plant.[3]

[2] On August 24, 2001, the Environmental Appeal Board (the "Board") acknowledged receipt of a Notice of Appeal, filed by Ms. Margaret Ouimet, Secretary for a group of local residents calling themselves "CASP Hwy 37" (the "Appellants"). In general terms, the Notice of Appeal raised concerns about potential contamination and water quantity.[4] On the same date, the Board forwarded a copy of the appeal to the Certificate Holder and the Director, and by the same letter, requested a copy of all documents related to the appeal (the "Record") from the Director.

[3] According to standard practice, on August 24, 2001, the Board also wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under either of the Boards' legislation. Both responded in the negative.

[4] On August 31, 2001, the Board received a letter from the Certificate Holder challenging the directly affected status of CASP Hwy 37 and the jurisdiction of the Board to hear this appeal as many of the issues being raised by the Appellants would be more properly dealt

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1 See the Director's Record, 1.0.

2 The *Water Act*, R.S.A. 2000, c. W-3 replaced the *Water Act*, S.A. 1996, c. W-3.5 on January 1, 2002.

3 See the Director's Record, 4.17 and 4.37.

4 Included with the Notice of Appeal was a note from "CASP Hwy 37 - Ms. Marjorie McRae" attaching a newspaper article dated August 7, 2001, and entitled "Water Problems Likely, Says New Aquifer Data." The source of the newspaper article is not known.

with under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").[5]

[5] On August 31, 2001, the Board also received a letter from the Director including the initial part of the Record. Copies of the initial part of the Record were forwarded to the Parties. In the same letter, the Director questioned if the Appellant in the matter was Ms. Ouimet or CASP Hwy 37 represented by Ms. Ouimet. In response to the Director's questions, the Board contacted Ms. Ouimet who advised that she filed the Notice of Appeal on behalf of CASP Hwy 37. The Board confirmed this information in a letter dated September 5, 2001, and asked the Appellants to contact the Board if this was incorrect. *No further correspondence on this question was received from the Appellants* until the Board subsequently received the written submissions.

[6] On September 4, 2001, the Board set a schedule for receiving written submissions from the Parties to determine if the Appellants were directly affected and if the Board had the jurisdiction to move forward with the appeal.

[7] On September 10, 2001, the Board acknowledged a letter dated September 6, 2001, from the Director and a letter dated September 7, 2001, from the Certificate Holder. In these letters, the Director and the Certificate Holder raised further preliminary issues that they wished to have addressed. In the acknowledgement letter, the Board requested the following three issues be addressed by the parties in their written submissions:

> "1. Is CASP Hwy 37 directly affected and does the Board have jurisdiction to hear this appeal?;
>
> 2. CASP Hwy 37 is not a corporate entity and therefore is not a 'Person' entitled to file a Notice of Appeal; and
>
> 3. CASP Hwy 37 did not file a statement of concern and therefore is not entitled to file a Notice of Appeal according [*sic*], to section 115(1)(b)(i) of the *Water Act*."[6]

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[5] The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 on January 1, 2002.

[6] Section 115(1)(b)(i) of the *Water Act* provides:

> "A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances: ... (b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted (i) by the preliminary certificate holder or by any person *who previously submitted a statement of concern* in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108...." (Emphasis added.)

When the Board asked the parties to address these issues, it was operating on the understanding, based on the conversation that the Board's staff had with Ms. Ouimet, that the Appellants in this matter were CASP Hwy 37 and not Ms. Ouimet.[7]

[8] Between September 17, 2001 and October 2, 2001, the Board received the written submissions of the Parties. In the Appellants' Initial Submission, the Board was advised that the Notice of Appeal was filed by Ms. Ouimet in her own capacity and as Secretary of CASP Hwy 37.[8] Then, in the Appellants' Rebuttal Submission, the Board was advised that the Notice of Appeal was filed by Ms. Ouimet in her own capacity, as Secretary of CASP Hwy 37, and on behalf of the individual members of CASP Hwy 37.[9] As a result, the Initial Submission of the Appellants and the Rebuttal Submission of the Appellants raised questions for the Board about the identity of the Appellants.[10]

[9] On November 13, 2001, the Board advised the parties that the appeal had been dismissed with reasons to follow.

[10] While the Board was reviewing the submissions and preparing its Decision, it received a letter from the Certificate Holder on January 18, 2002, notifying the Board that the Certificate Holder would be seeking costs. On January 25, 2002, the Board received a letter from the Appellants in response to the request for costs from the Certificate Holder stating that it did not believe this was "an appropriate circumstance in which to award costs."

[11] The Board issued its Decision with respect to the appeal of the Preliminary Certificate on January 28, 2002.[11]

[12] In the Decision, the Board addressed the issue of identification of the Appellants. As the Board dismissed the appeal, the Board was of the view that neither the Director nor the Certificate Holder suffered any prejudice as a result of the confusion with respect to who actually filed the appeal. The Board considered the following restated issues:

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7 This telephone conversation was confirmed in the Board's letter of September 5, 2001.

8 See Initial Submission of the Appellants dated September 17, 2001, paragraph 2.

9 See Rebuttal Submission of the Appellants dated October 1, 2001, Affidavit of Ms. Ouimet, paragraph 3.

10 See Initial Submission of the Appellants dated September 17, 2001, paragraph 2. See Rebuttal Submission of the Appellants dated October 1, 2001, Affidavit of Ms. Ouimet, paragraph 3.

11 *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment* re: *Ouellette Packers (2000) Ltd.*, E.A.B. Appeal No. 01-076-D.

"1. May CASP Hwy 37 file an appeal?

2. May Ms. Ouimet file an appeal?

3. May the individual members of CASP Hwy 37 file an appeal?

4. Should an extension of the thirty-day appeal period be granted to allow the individual members of CASP Hwy 37 to file their own appeals?"[12]

[13] In its decision, the Board determined that Ms. Ouimet was not directly affected within the meaning of section 115(1)(b)(i) of the *Water Act*. Ms. Ouimet did not meet the required test as she did not demonstrate that she had a unique interest that was directly, proximately, and rationally connected to the decision of the Director.

[14] The Board did not find evidence in the submissions of the Appellants to show how Ms. Ouimet was affected over and above the community that was generally affected by the granting of the Preliminary Certificate. Although she may be generally affected, that was insufficient to grant her standing to file an appeal. The submissions did not make the proximate and direct connections between the Certificate Holder's well and Ms. Ouimet.

[15] The Board also dismissed the addition of the individual members of CASP Hwy 37 as appellants pursuant to section 95(5)[13] of EPEA because it was not properly before the Board. The timing was wrong, and the identities of the individual members were unknown. The main problem the Board faced in considering the standing of the individual members of CASP Hwy 37 was that nowhere in the Notices of Appeal, the Statements of Concern, the Director's Record, or the submissions of the Parties, were the individual members specifically identified. Although the Board could surmise a few individuals named in the submissions were members of CASP Hwy 37, there was no indication from these individuals that they had authorized Ms. Ouimet to act on their behalf. Even if authorization was given, the submissions did not give the

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[12] *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment* re: *Ouellette Packers (2000) Ltd.*, E.A.B. Appeal No. 01-076-D at paragraph 17.

[13] Section 95(5) of EPEA provides:

"(5) The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit,

(ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m), the Board is of the opinion that he person submitting the notice of appeal is not directly affected by the decision or designation,

(iii) for any other reason the Board considers that the notice of appeal is not properly before it...."

Board any evidence to illustrate the proximate and direct connection between the Ouellette Well and the individual members of CASP Hwy 37. The Board was not convinced, based on the evidence presented, that the majority of the individual members of CASP Hwy 37 were individually and personally impacted.

[16] At no point in the Decision did the Board think the appeal filed by the Appellants to be frivolous or vexatious. In fact, the Board believed that the true issue of Ms. Ouimet's appeal was the possibility of contaminants being released into the environment from the processing plant and that these contaminants could potentially enter the groundwater. This issue of potential contamination would be a matter that this Board could deal with under EPEA in the future.

[17] The appeal was dismissed because the submissions of the Appellants had not provided sufficient evidence upon which the Board could find that any of the individual members of CASP Hwy 37 were directly affected.

[18] The Board wrote to the parties on January 29, 2002 setting February 7, 2002, as the date for receiving written costs submissions, and February 14, 2002 as the date the Board was to receive replies to the cost submissions. In the letter, the Board clearly indicated that:

> "...where possible, invoices, receipts and other necessary documentation should be attached. A detailed breakdown of all costs should be provided. In addition, the party should indicate the reasons why the funds are needed."

[19] On January 30, 2002, the Director indicated that he would "...not be seeking or taking any position with respect to costs." In a letter dated February 6, 2002, the Appellants stated that they would "...not be seeking or applying for costs in respect of the above noted appeal." The Certificate Holder, in a letter dated February 7, 2002, requested the Board award costs in the amount of $4,750.00 to cover legal costs incurred from the time the appeal was filed to the time the Decision was released. The Appellants provided written arguments in response the Approval Holder's application for costs.

II. COSTS SUBMISSIONS

A. Certificate Holder's Submission on Costs

[20] In its written submission of February 7, 2002, the Certificate Holder stated that the appeal filed by the Appellants

> "...was not in furtherance of the public interest nor protection of the environment.... We filed submissions that pressed the Appellant to substantiate her claims and in response the evidence that was presented to the Board was merely an affidavit by the Appellant which simply restated the same bare accusations. Clearly, there is a difference between raising reasoned, substantive environmental concerns supported by creditable evidence on the one hand, and filing an appeal for the purpose of causing a developer delay and additional costs with the view to stopping an otherwise legitimate development. It is our respectful submission that this appeal falls within the later [*sic*] category." [14]

The Certificate Holder also submitted that:

> "...the Appellant's counsel will argue that the Appellant is not a lawyer and would not appreciate that her appeal should have been filed against the impending Approval instead of the water licence.
>
> While we recognize that the appeal was initially filed by an unrepresented appellant, it is significant that the appeal was continued after counsel was retained. Indeed, extensive submissions where [*sic*] presented by the Appellant's counsel relating to various technical and jurisdictional arguments as to why the Board should hear the appeal. Each of these submissions had to be responded to by Ouellette and costs were incurred."

[21] The Certificate Holder requested costs be awarded in the amount of $4,750.00 for legal costs incurred. A further breakdown of these costs was not provided and invoices were not supplied. It would have been helpful to know the number of hours billed by legal counsel and the breakdown of the disbursement costs.

B. Appellants' Submission on Costs

[22] The Appellants in their submission of February 13, 2002, submitted that the Board should not "...exercise its discretion to award costs in this appeal" and argued that the appropriate remedy is that "all parties shall bear their own costs in this appeal and no costs be

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[14] See the Submission by the Certificate Holder dated February 7, 2002.

awarded." They argued in their submission that the public interest was to be considered when determining if costs should be awarded. They continued by stating:

> "The Board has stated that it should decide requests for costs with the primary objective of making the appeal process a meaningful opportunity under the Act for public participation, to help enable individual citizens to fulfill their responsibility for protecting the environment, and to empower citizens in order to achieve these ends. (*Ash* v. *Alberta Department of Environmental Protection*, [1998] A.E.A.B.D. No. 24)."[15]

[23] The Appellants took issue with the Certificate Holder's accusations regarding the motives of the Appellants in filing the appeal. In the Appellants' submission, they stated, "...the appeal process should not be discouraged under the threat of a penalty of an award for costs." They further argued that the application for costs made by the Certificate Holder did not provide "...appropriate or sufficient information to the Board."

C. Director's Submission on Costs

[24] The Director advised the Board that he would not seek costs or take any position with respect to costs.

III. DISCUSSION

A. Statutory Basis for Costs

[25] The legislative authority giving the Board jurisdiction to award costs is section 96 of the EPEA which provides:

> "The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid."

[26] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre Exploration Ltd.*:[16]

> "Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it...'. The

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15 See Submissions of the Appellants in Respect of Costs dated February 13, 2002 at paragraph 20.

16 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.).

legislation gives the Board broad discretion in deciding whether and how to award costs."[17]

Further, Mr. Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the 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.][18]

[27] The sections of the Environmental Appeal Board Regulation, A.R. 114/93, (the "Regulation") concerning costs (except interim costs, which are not involved here) provide:

> "18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
>
> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
>
> (a) the matters contained in the notice of appeal, and
>
> (b) the preparation and presentation of the party's submission.
>
> 20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.
>
> (2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:
>
> (a) whether there was a meeting under section 11 or 13(a);
>
> (b) whether interim costs were awarded;
>
> (c) whether an oral hearing was held in the course of the appeal;
>
> (d) whether the application for costs was filed with the appropriate information;
>
> (e) whether the party applying for costs required financial resources to make an adequate submission;
>
> (f) whether the submission of the party made a substantial contribution to the appeal;
>
> (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
>
> (h) any further criteria the Board considers appropriate.

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[17] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 23.

[18] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

(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."

[28] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the *Water Act* as stated in section 2:

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

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;

(b) the need for Alberta's economic growth and prosperity;

(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning. regulatory actions and market forces;

(d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making..."

[29] In any decision on costs, the purpose of the act must be considered. The purpose of EPEA is found in section 2 which provides:

"The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well being of society;...

(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 action;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ..."

While all of these purposes are important, the Board is of the view that the shared responsibility that section 2(f) of EPEA and section 2(d) of the *Water Act* 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.

[30] However, the Board has 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.[19] The Board also determines the relevant weight to be given to each of the criteria, depending on the specific circumstances of each appeal.[20] 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."[21]

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

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
>
> (b) directly related to the matters contained in the Notice of Appeal; and
>
> (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."[22]

[32] 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.[23]

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19 Cost Decision *re: Zon et al.*, E.A.B. Appeal No. 97-005-97-015.

20 Costs Decision Costs Decision: *Paron et al.*, E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD.

21 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraphs 31 and 32.

22 Cost Decision re: *Cabre Exploration Ltd.*, E.A.B. Appeal No. 98-251-C at paragraph 9.

23 Costs Decision re: *Monner*, E.A.B. Appeal No. 99-166-CD at paragraph 25.

B. Courts vs. Administrative Tribunals

[33] In applying these costs provisions, it is important to remember that 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, the Board 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.

[34] The distinction between the costs awarded in judicial and quasi-judicial settings was stated in *Bell Canada* v. *C.R.T.C.*:[24]

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[25]

[35] 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:

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[24] *Bell Canada* v. *C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.).

[25] *Bell Canada* v. *C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to

> "...express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

> In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right."[26]

[36] EPEA and the Regulation give the Board the 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 *Mizeras*:[27]

> "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*. 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."[28]

[37] The Board has generally accepted the starting point that the costs incurred with respect to an appeal are the responsibility of the individual parties.[29] There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.[30]

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26 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.) at paragraph 32.

27 Cost Decision *re*: *Mizeras, Glombick, Fenske, et al.*, E.A.B. Appeal No. 98-231, 232 and 233-C.

28 Cost Decision *re*: *Mizeras, Glombick, Fenske, et al.*, E.A.B. Appeal No. 98-231, 232 and 233-C at paragraph 9; Cost Decision re: *Cabre Exploration Ltd.*, E.A.B. Appeal no. 98-251-C at paragraph 6

29 Costs Decision: *Paron et al.*, E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD.

29 Section 2 of EPEA states:

"(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

C. Consideration and Application of Criteria

[38] With this starting point in mind, the Board has assessed the request for costs through an analysis of the factors listed above. As indicated earlier, 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 binding.[31]

[39] The Board does not agree with the Certificate Holder's belief that the appeal was filed in an attempt to delay and add additional costs to the project. The Board believes that individuals should be allowed to present legitimate concerns regarding the environment to the Board. They should not be discouraged from filing an appeal because of the possibility of costs being awarded against them. Even if the appeal does not go to a hearing, if the appellant presented legitimate concerns and the appeal was not filed to be frivolous or vexatious, costs should not be automatically awarded against them. The Board notes that the Certificate Holder did not bring notice that the appeal was frivolous or vexatious in its submissions. The Board found the Appellants were forthright in their submissions, and the Board did not consider the appeal frivolous or vexatious. They had a legitimate concern, but the Board found there was insufficient evidence presented by the Appellants to determine that they were directly affected.

[40] Costs are not based on the loser-pays basis. As stated in *Kostuch*:[32]

> "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."

[41] One of the criteria the Board considers is whether the party applying for costs required financial resources to make an adequate presentation. The costs request was for legal fees. As the breakdown of the fees was not provided, the Board cannot determine which portion

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

[31] Costs Decision: *Paron et al.*, E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD and Cost Decision re: *Cabre Exploration Ltd.*, E.A.B. Appeal No. 98-251-C.

[32] *Kostuch* v. *Alberta (Director, Air & Water Approvals Division)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 56.

actually related specifically to the preparation of the appeal and which portion constituted general work involved in any case.

[42] Although not defined, it appears the amount claimed is based on a solicitor-client basis for services. No justification is given for this request. The Board has clearly set out its approach to costs in regard to solicitor fees in two recent decisions[33] and believes that these reasons are pertinent to this decision as well.

[43] 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 time, 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."[34]

[44] The Board, if it does award legal costs, will generally base the costs 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:

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[33] Cost Decision *re*: *Mizeras, Glombick, Fenske, et al.*, E.A.B. Appeal No. 98-231, 232 and 233-C, and Costs Decision: *Paron et al.*, E.A.B. Appeal No. 01-002, 01-003 and 01-005-CD.

[34] Cost Decision re: *Cabre Exploration Ltd.*, E.A.B. Appeal No. 98-251-C at paragraphs 10-11; Cost Decision re: *Mizeras, Glombick, Fenske, et al.*, E.A.B. Appeal No. 98-231, 232 and 233-C at paragraphs 17-18.

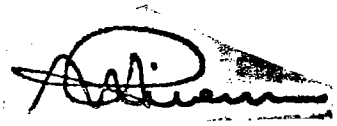
> *Cabre Exploration Ltd.*, E.A.B. Appeal No. 98-251-C). Where the Board awards legal costs, the Board will generally base the costs awards on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board applies under the Act and the Regulation for that case."[35]

[44(a)] In this case, the issues were determined by written submissions only. The application for costs did not include receipts or a breakdown of the specific costs. There was little justification provided for the costs claimed.

IV. DECISION

[45] Therefore, for the reasons provided above and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the application for costs is denied.

Dated on May 10, 2002 at Edmonton, Alberta.



William A. Tilleman, Q.C.
Chairman

35 Costs Decision: *Paron et al.*, E.A.B. Appeal No. 01-002, 01-003 and 01-005-CD at paragraph 44.