Appeal No. 01-090-CD

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Costs Decision

Date of Costs Decision – June 14, 2002

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 an application for costs by Burnswest Corporation and Tiamat Environmental Consultants Ltd. related to an appeal filed by Burnswest Corporation with respect to the decision of the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment to issue Administrative Penalty No. 01/10-BOW-AP-01/10 to Burnswest Corporation and Tiamat Environmental Consultants Ltd.

Cite as: Cost Decision re: *Burnswest Corporation*.

BEFORE:		Dr. M. Anne Naeth, Panel Chair; Dr. John P. Ogilvie; and Mr. Ron V. Peiluck.
PARTIES:	Appellant:	Burnswest Corporation, represented by Mr. R.J. Kimoff; and Tiamat Environmental Consultants Ltd., represented by Mr. Leon Mah.
	Director:	Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Administrative Penalty to Burnswest Corporation and Tiamat Environmental Consultants Ltd. in the amount of $3,500.00 for the contravention of what was section 59 (now section 61) of the *Environmental Protection and Enhancement Act*. This section prohibits a person from carrying out an activity without an approval. Alberta Environment alleged that Burnswest and Tiamat treated more than 10 tonnes of hazardous waste by land treating soil with concentrations of leachable naphthalene greater than 0.5 mg/L at a construction site in Cochrane, Alberta. The treatment of more than 10 tonnes of hazardous waste per month requires an approval. Burnswest, supported by Tiamat, appealed the Administrative Penalty. The Board held a hearing starting on December 11, 2001, which continued on February 1, 2002.

The Board issued a Decision on March 1, 2002, confirming Alberta Environment's decision to issue the Administrative Penalty to Burnswest and Tiamat. However, the Board reduced the amount of the Administrative Penalty from $3,500.00 to $1,000.00.

An application for costs was received from Burnswest in the amount of $1,067.00 and from Tiamat in the amount of $1,760.00.

The Board denied the requests for costs from Burnswest and Tiamat because: (1) the costs were considered part of doing business, (2) the costs were not appropriate to issue against the Director and effectively the taxpayers of Alberta, and (3) the costs fell within the appropriate responsibility of any party to an appeal.

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I. BACKGROUND

[1] On August 27, 2001, the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director") issued Administrative Penalty No. 01/10-BOW-AP-01/10 (the "Administrative Penalty") to Burnswest Corporation (the "Appellant" or "Burnswest") and Tiamat Environmental Consultants Ltd. ("Tiamat") for a contravention of section 59 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3. This section was subsequently replaced by section 61 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "Act").[1] The Administrative Penalty states that the Appellant and Tiamat treated more than 10 tonnes of hazardous waste per month without an approval. Specifically, the Appellant and Tiamat are said to have land treated soil with concentrations of leachable naphthalene greater than 0.5 mg/L (a hazardous waste) at a construction site in Cochrane, Alberta. The treatment of more than 10 tonnes of hazardous waste per month requires an approval.[2]

[2] On September 10, 2001, the Board received a Notice of Appeal from the Appellant appealing the Administrative Penalty. On November 27, 2001, the Board received a letter from the Appellant requesting that the monetary costs for which relief was requested in the Notice of Appeal be included as an issue to be heard by the Board. The Board received a response to the Appellant's request from the Director on that same day, suggesting the Board deal with costs after issuing its decision on the merits. The Board responded to both letters on November 30, 2001, stating:

> "…the Board understands that Mr. Kimoff specifically refers to item V of his

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[1] 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 as part of the Revised Statutes of Alberta. Section 59 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 provides:

> "No person shall commence or continue any activity designated by the regulations as requiring an approval or registration unless that person holds the required approval or registration."

The wording of section 61 of the revised statute is the same.

[2] Section 5(1) of the *Activities Designation Regulation*, A.R. 211/96 (the "Activities Designation Regulation") provides:

> "The activities listed in Schedule 1 are designated as activities in respect to which an approval is required."
>
> Schedule 1, Division 1, (a) of the Activities Designation Regulation provides:
>
> "…the construction, operation or reclamation of a fixed facility where more that 10 tonnes per month of waste is treated…."

Notice of Appeal which states:

> 'The relief I request is as follows:
> 1. Return of the $3500 penalty
> 2. Return of the $1000 application fee
> 3. Return of the $136.36 Advertising Cost
> 4. Rebate of Fence Rental 10mo @ $432.28/mo = $4320.28 [*sic*].'
>
> The Board advises that item 1, the return of the $3500 administrative penalty would be a logical consequence should the Board decide that the Administrative Penalty was improperly issued to Burnswest Corporation and Tiamat Environmental and therefore does not need to be addressed as a separate issue at the hearing. With respect to items 2 to 4, the Board does not have the jurisdiction to deal with such items.
>
> With respect to any requests for costs in relation to preparation and participation in this appeal, the Board advises that parties may indicate any intentions to request costs, on December 11, 2001, prior to the close of the hearing. Such applications will be dealt with after the Board has rendered its decision."

Subsequently, at the hearing, the Appellant reserved his right to ask for costs in this appeal.

[3] Through consultation with the Parties, a hearing was held on December 11, 2001, and February 1, 2002, in Calgary, Alberta, and the only issues to be addressed at the hearing were "Did the Director act reasonably and correctly in issuing this Administrative Penalty?" and "Is this an activity which requires an approval under the *Environmental Protection and Enhancement Act*?"[3]

[4] On March 1, 2002, the Board issued its decision.[4] The Board reduced the penalty that was assessed from $3500.00 to $1000.00. As stated in the Executive Summary of the Decision:

> "In coming to this decision, the Board assessed a greater portion of the penalty than Alberta Environment suggested for failing to obtain an approval from Alberta Environment prior to starting the treatment of hazardous waste. The Board believes that the requirement to obtain an approval is the cornerstone of the regulatory scheme. However, the Board also reduced a portion of the penalty as there was considerable confusion among Alberta Environment employees as to the type of authorization required, resulting in miscommunication and an

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[3] Board's Letter, dated November 26, 2001.

[4] *Burnswest* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (March 1, 2002), E.A.B. Appeal No. 01-090-D (the "Decision").

> unacceptably long delay for Burnswest to be informed of what was needed in the application and in assessing the administrative penalty. The Board also decreased the amount of the penalty taking into account the level of response and cooperation from Burnswest and Tiamat."

[5] In its Decision, the Board requested that any applications for costs be submitted within two weeks of the date of the Decision and that any responses to such costs be submitted within four weeks of the date of the Decision.

[6] The Board wrote to the Parties on March 14, 2002, acknowledging receipt of costs applications from the Appellant and Tiamat and advised that it required "…additional information … to consider their cost applications." The Board set a schedule to receive this additional information and written submissions regarding costs.

II. PARTIES

[7] The Board notes that only Burnswest filed a Notice of Appeal, and therefore, Burnswest is the only proper appellant before the Board. While Tiamat never made application to be added as a party, throughout these proceedings Burnswest has been acting in concert with Tiamat. For example, most of the submissions provided to the Board dealt with both Burnswest and Tiamat, and a representative of Tiamat was the principle witness called by Burnswest at the hearing.

[8] For the purposes of the hearing this was not an issue, because the Administrative Penalty was assessed jointly against Burnswest and Tiamat and whatever decision the Board made affected them both. The effect of the substantive decision in this matter was to reduce the total penalty to $1000.00, which affected Burnswest and Tiamat equally.

[9] For purposes of costs, however, the status of Tiamat is an issue. Pursuant to section 18(1) of the *Environmental Appeal Board Regulation*, A.R. 114/93 (the "Regulation"), only a party to an appeal may submit a costs application.[5] However, given that Tiamat has acted in concert and assisted Burnswest throughout this appeal, the Board will accept the costs application of Tiamat as part of the costs application of Burnswest, as if Burnswest requested

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[5] Section 18(1) of the Regulation provides:

> "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."

these costs. The Board understands Tiamat has not charged Burnswest for the services it provided that were associated with the appeal.[6]

III. APPLICATION FOR COSTS

[10] On March 20 and 21, 2002, the Appellant identified expenditures related to the hearing including parking, travel, preparation of the Statement of Facts, preparation of the written submission, administrative services, and photocopying, for a total of $1,067.00. The Appellant stated the application for costs was reasonable and directly and primarily related to matters in the Notice of Appeal and to the preparation and presentation of its submission. The Appellant further stated:

> "Burnswest submits it had a legitimate and justifiable appeal in this matter. Burnswest's appeal was denied by accepting the approving authorities' own interpretation of a regulation in order to justify the position taken, rather than a reasonable, logical and legally defensible interpretation. It was not a matter of a game of interpreting the rules being played, but rather a matter of whether or not the section of the regulations applied to the Burnswest situation, which it clearly did not. R.J. Kimoff [(the individual representing the Appellant)] works under a management contract for Burnswest Corporation. In preparing for and presenting the appeal, Burnswest was deprived of productive management input from Kimoff and support staff, together with incidental costs, and it is submitted that Burnswest should be compensated for same."

[11] On March 21, 2002, Tiamat provided its initial submission received earlier by the Board with supplemental information to support its cost application of $1,760.00. The application consisted of costs associated with reviewing the Appellant's submissions, preparing for the hearing, and attending the hearing. In further support of its application, Tiamat stated:

> "Being an engineering consultant, our earnings are based on knowledge and time. As a key witness for Burnswest Corporation, we have decided to absorb the incidental costs for travel, photocopy and clerical services related to this matter. We feel that we made a notable contribution to the appeal hearing on each date and presented project information in a manner that assisted the Board in

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[6] See: Tiamat's Submission, dated March 21, 2002:

"…the time spent to prepare meaningful summary documentation was unique to this project and consequently we do not considered [*sic*] this to be billable to Burnswest Corporation."

See: Burnswest's Submission, dated March 20, 2002:

"…Tiamat has voluntarily waived their billing to the client (i.e. Burnswest) for any costs associated with this appeal."

> understanding the events on this matter. In support of this request, a copy of our staff timesheets summarizing the man-hours expended is enclosed. Please note that we have also included a copy of our schedule of fees for the year 2000.
>
> As the Board is aware of the specifics of this matter and the peculiarity of AENV's [(Alberta Environment)] Enforcement & Monitoring Division, Environmental Services Division and Alberta Justice, the time spent to prepare meaningful summary documentation was unique to this project and consequently we do not considered [*sic*] this to be billable to Burnswest Corporation. Furthermore, with the length of time involved for this entire matter (about 7 months) and despite the elapsed time for this appeal hearing to conclude, we feel that our request for recovery is justified and this request is appropriate for the Board to review and consider."

[12] In response to the requests for costs, the Director advised "…that no award of costs should be made against the Director in this matter for the following reasons:

1. The Director's decision to issue the administrative Penalty was confirmed by the Environmental Appeal Board;
2. Burnswest and Tiamat were clearly found to be in contravention of the legislation and did not meet their 'shared responsibility' under the *Environmental Protection and Enhancement Act*; and
3. The Director was not found to be in error or acting in bad faith in carrying out the statutory duties under the *Environmental Protection and Enhancement Act*, and awarding costs against a statutory decision maker raises the risk that he/she may inappropriately consider costs as a factor in future statutory decision making."[7]

IV. DISCUSSION

A. Statutory Basis for Costs

[13] The legislative authority giving the Board jurisdiction to award costs is section 96 of the Act, which states:

> "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."

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[7] Director's Response Submission, dated April 4, 2002.

[14] 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.*:[8]

> "Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it…'. The legislation gives the Board broad discretion in deciding whether and how to award costs."[9]

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.][10]

[15] The sections of 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.
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> 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.
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> (2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:
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> (a) whether there was a meeting under section 11 or 13(a);
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> (b) whether interim costs were awarded;
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> (c) whether an oral hearing was held in the course of the appeal;
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> (d) whether the application for costs was filed with the appropriate information;

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

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

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

(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."

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

"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;…

(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; …"

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

[18] However, the Board has stated in other decisions that it has discretion to decide which of the criteria in the Act and Regulations should apply in particular claims for costs.[11] The Board also determines the relevant weight to be given to each criterion, depending on the

[11] Costs Decision: *Zon et al*. (December 22, 1997), E.A.B. Appeal No. 97-005-97-015.

specific circumstances of each appeal.[12] 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."[13]

[19] 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 time lost from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[14]

[20] 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.[15]

B. Courts vs. Administrative Tribunals

[21] 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, the Board must consider the public interest when making its decision or recommendation. The outcome is not simply making a determination of a dispute between

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12 Costs Decision: *Paron et al*. (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD.

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

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

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 the Act.

[22] The distinction between the costs awarded in judicial and quasi-judicial settings was stated in *Bell Canada* v. *C.R.T.C.*:[16]

> "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."[17]

[23] 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

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15 Cost Decision re: *Monner* (October 26, 2000), E.A.B. Appeal No. 99-166-CD, at paragraph 25.

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

17 *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."

> 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."[18]

[24] The Act 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*:[19]

> "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), 5 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."[20]

[25] The Board has a standard starting point that costs incurred in an appeal are the responsibility of the individual parties.[21] There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.[22]

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

[19] Cost Decision re: *Mizeras, Glombick, Fenske, et al*. (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C.

[20] Cost Decision re: *Mizeras, Glombick, Fenske, et al*. (November 29, 1999), E.A.B. Appeal No. 98-231, 232 and 233-C, at paragraph 9; Cost Decision re: *Cabre Exploration Ltd.* (January 26, 2000), E.A.B. Appeal No. 98-251-C, at paragraph 6.

[21] Costs Decision: *Paron et al*. (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD.

[22] Section 2 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 the following: …
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions…."

C. Application

[26] With this starting point, the Board has assessed the request for costs through an analysis of the various factors listed above.

[27] Section 20(2)(d) of the Regulation provides that: "In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider … whether the application for costs was filed with the appropriate information…." The Appellant and Tiamat provided detailed costs breakdowns of their claims and receipts, where appropriate, to substantiate their claims. However, while very important to a successful costs application, it alone is not a sufficient foundation for a costs award.

[28] As indicated previously, 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.[23] Section 20(2)(g) of the Regulation also provides that "In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider … 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…." The Board is satisfied that costs claimed by the Appellant and Tiamat are directly and primarily related to matters contained in the Notice of Appeal and the presentation of and preparation for the Parties' submission. However, while this is a requirement for a successful costs application, it alone is not a sufficient foundation for an award of costs.

[29] The Appellant and Tiamat chose to base their costs application on an hourly rate for the individuals that attended the hearing.[24] No particular justification was provided for these rates. The hourly rate for the individual representing the Appellant was derived from a monthly contract based salary. The rate for the individual representing Tiamat was based on the fee charged for services by Tiamat. The Board believes these claims are more appropriately characterized as a type of compensation rather than costs incurred since the Appellant and

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[23] Costs Decision: *Paron et al*. (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD; Cost Decision re: *Cabre Exploration Ltd*. (January 26, 2000), E.A.B. Appeal No. 98-251-C.

[24] Mr. R.J. Kimoff for Burnswest at $51.50 per hour and Mr. Leon Mah from Tiamat at $80.00 per hour.

Tiamat are not "out of pocket" for the amount claimed, but could have used those services for other purposes.

1. Parties Should Pay Their Own Costs

[30] As stated above, in previous decisions on costs, the Board has "…generally accepted the starting point that the costs incurred with respect to the appeal are the responsibility of the individual parties."[25] The basis for this position is found in sections 2(f) and (g) of the Act, which provide:

> "The purpose of the 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;
>
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; …"

[31] The Act emphasizes the "shared responsibility of all Alberta citizens." Appellants that come before the Board should expect to bear their own costs, unless they can convince the Board there is sufficient reason costs should be awarded. In the Board's view, the Appellant and Tiamat have not presented sufficient reasons why the Board should be moved from its starting point that parties should bear their own costs.

[32] The Appellant, in its submission of March 20, 2002, argued it had a legitimate and justifiable appeal. The Board accepts that the Appellant was entitled to appeal and raise the argument it did; this is effectively the case with all appellants that are properly before the Board. This argument is not sufficient to move the Board from its starting position that parties should bear their own costs.

[33] The Appellant went on to say that:

> "[The]…appeal was denied by accepting the approving authorities' own interpretation of a regulation in order to justify the position taken, rather than a reasonable, logical and legally defensible interpretation. It was not a matter of a game of interpreting the rules being played, but rather a matter of whether or not

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[25] Costs Decision: *Paron et al.* (February 8, 2002), E.A.B. Appeal Nos. 01-001, 01-003, and 01-005-CD, at paragraph 38.

> the section of the regulations applied to the Burnswest situation, which it clearly did not."[26]

While these statements are somewhat unclear, the Appellant appears to be arguing that it should be entitled to costs because it disagrees with the Board's decision and maintains the position it argued was correct. This statement is not relevant to the Board's costs consideration.

[34] Finally, the Appellant argued it should be entitled to costs because it was deprived of the "…productive management input of Kimoff [(the individual representing the Appellant)]…." Again, this is no different than any other appellant and does not provide justification why the Board should move from its starting point of parties bearing their own costs. As noted above, the Appellant is not "out of pocket" for the costs claimed, but is claiming compensation for employee services it could have used elsewhere.

[35] Tiamat argued that its "…earnings are based on knowledge and time…" and they made a substantial contribution to the hearing and presented information in a manner that assisted the Board. Such an argument does not provide a justification why the Board should move from its starting point that each party should bear its own costs.

2. Substantial Contribution

[36] Section 20(2)(f) of the Regulation provides that in "…deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider … whether the submission of the party made a substantial contribution to the appeal…." In considering whether a Party made a substantial contribution, it is important to note the shared responsibility that section 2(f) of the Act places on all Albertans "…for ensuring the protection, enhancement and wise use of the environment through individual action…."

[37] In previous cases, the Board has considered the significant contribution a party has made to a hearing as a factor in deciding to award costs. In *Paron*,[27] the Board awarded costs, legal fees, to an environmental group because its lawyer was of particular assistance to the Board. In *Paron*, the Board held:

> "The principle reason for LWEPA's [(the environmental group)] successful costs request is the significant assistance that LWEPA - and more specifically

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26 Appellant's Letter, dated March 20, 2002.

27 Costs Decision: *Paron et al.* (February 8, 2002), E.AB. Appeal Nos. 01-002, 01-003, and 01-005-CD.

> LWEPA's legal counsel, Mr. Brian O'Ferrall, Q.C. - gave the Board with respect to the preliminary meeting. Mr. O'Ferrall made two significant and unique contributions to the preliminary meeting. The Board relied upon these contributions. First, Mr. O'Ferrall made a substantial contribution to the interpretation of [the] Act with respect to standing. … Second, Mr. O'Ferrall made a significant contribution to the hearing by providing the Board with a thorough and detailed understanding of the participation of the Appellant Enmax [(one of the other appellants before the Board)] in the Energy and Utilities Board process associated with the deregulation of the interest. This information, which goes to our Board's jurisdiction, formed in part, the basis of the Board's decision to dismiss Enmax's appeal."[28]

[38] In *Kozdrowski,*[29] the Board awarded costs to an Appellant because she "…contributed to the hearing through a strong submission, she asserted in good faith an appeal that, in the end, placed directly into issue, public health, a key legislative priority, and significantly contributed to the Board's decision…."[30] Further in *Kozdrowski,* the Board stated "…the success of a claim for costs will depend on the extent to which the Appellant raises significant issues in the public interest that no one else raises and that are tied to goals promoted in section 2 of the Act."[31] The Board subsequently concluded Ms. Kozdrowski had "…indeed made a difference…"[32] and on that basis awarded costs.

[39] In the case presently before the Board, the Appellant does not make any specific arguments that it made a substantial contribution to the hearing. Tiamat argued it made a "…notable contribution to the appeal hearing on each date and presented project information in a manner that assisted the Board…." In the Board's view, neither the Appellant nor Tiamat presented evidence beyond what the Board would expect from any appellant before it with respect to an administrative penalty. They certainly did not make the type of contribution made by the appellants in *Paron* and *Kozdrowski*. Thus, the Board does not believe the contribution of either the Appellant or Tiamat was sufficiently significant to warrant an award of costs.

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[28] Costs Decision: *Paron et al.* (February 8, 2002), E.A.B. Appeal Nos. 01-002, 01-003 and 01-005-CD, at paragraphs 61 and 67.

[29] Costs Decision: *Bernice Kozdrowski* (July 7, 1997), E.A.B. Appeal No. 96-059.

[30] Costs Decision: *Bernice Kozdrowski* (July 7, 1997), E.A.B. Appeal No. 96-059, at paragraph 30

[31] Costs Decision: *Bernice Kozdrowski* (July 7, 1997), E.A.B. Appeal No. 96-059, at paragraph 34.

[32] Costs Decision: *Bernice Kozdrowski* (July 7, 1997), E.A.B. Appeal No. 96-059, at paragraph 41.

3. Financial Resources

[40] Section 20(2)(e) of the Regulation provides that in "…deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider … whether the party applying for costs required financial resources to make an adequate submission…."

[41] Neither the Appellant nor Tiamat presented any information on their financial resources. The Board notes the Appellant and Tiamat are both corporate entities. The Appellant is a "family owned business of 90 years and is now principally a land developer."[33] According to the Appellant, "Tiamat is a small independent consultant…."[34] This information provides no indication that Appellant and Tiamat cannot bear their own costs in this appeal. As corporate entities, the Appellant and Tiamat will be able to write off the expenses associated with this appeal as business expenses – the cost of doing business. The Board is of the view that this fact militates against an award of costs.

4. Taxpayers Should Not Pay

[42] The Appellant and Tiamat have not indicated against whom they wish the Board to award costs. In that the appeal was against the decision of the Director who issued the administrative penalty, the Board assumes the claim for costs is against the Director.

[43] The Board considered a claim of costs against the Director at some length in the case of *Cabre.* In *Cabre,* the Board denied the appellant's claim for costs against the Director because the net effect of awarding costs against the Director would be to have the taxpayers of Alberta pay the Appellant's costs. As stated by the Board in *Cabre*:

> "The legislation protects departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the Department differently than the role of those proposing projects. Where, on the facts of this case, the Department has

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[33] According to the Appellant's website:

"BURNSWEST Corporation is a family owned and operated company in Calgary, Alberta, Canada that has a history spanning nearly 90 years and four generations. Today, BURNSWEST operates under a new mandate but currently retains the spirit and active involvement of two generations of Burns'. Once involved only in the mining operations of sand & gravel properties and their associated plant sites, we have now shifted our main focus to land reclamation and development and management of those properties."

(http://www.burnswest.com/about/index.shtml)

[34] Appellant's Submission, dated March 20, 2002.

carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs.

This is not a case where there are exceptional circumstances to justify making an award of costs against the Department. Cabre has not sought costs against the landowner. Thus, the costs appropriately remain Cabre's own responsibility, and not be borne by the public purse through the Board or the Department. The costs of the appeal in circumstances such as this are properly part of the cost of operation for the Party that benefits from the lease and carries the burden of reclamation."[35]

[44] The Court of Queen's Bench upheld the Board's decision on Cabre. The Court held:

"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 á 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 the special circumstances that would give rise to such an order before those circumstances arise."[36]

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[35] Cost Decision re: *Cabre Exploration Ltd*. (January 26, 2000), E.A.B. Appeal No. 98-251-C, at paragraphs 18 and 19.

[36] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (April 9, 2001), Calgary 0001-11527 (Alta. Q.B.), at paragraphs 33 to 35.

[45] The Board finds no special circumstances that would warrant an award of costs against the Director. Further, the costs of an appeal in circumstances such as this are properly part of the costs of the Appellant's business operations.

V. DECISION

[46] For the foregoing reasons, and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the requests for costs by the Appellant and Tiamat are denied.

Dated June 14, 2002, at Edmonton, Alberta.

"original signed by"
Dr. M. Anne Naeth

"original signed by"
Dr. John P. Ogilvie

"original signed by"
Mr. Ron V. Peiluck