ALBERTA
ENVIRONMENTAL APPEAL BOARD

Costs Decision

Date of Costs Decision – June 27, 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 Ron and Gail Maga and Ron Maga Jr., Cameron Wakefield, A. Ted Krug, Stanley Kondratiuk, Roger G. Hodkinson, Neil Hayes, and Anna T. Krug, with respect to Amending Approval No. 10339-01-03 issued to Inland Cement Limited by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Maga et al*. (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (A.E.A.B.).

BEFORE: William A. Tilleman, Q.C., Chair;
Dr. Steve E. Hrudey, Board Member; and
Mr. Al Schulz, Board Member.

PARTIES:

Appellants: Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, Dr. Roger G. Hodkinson, represented by Ms. Jennifer Klimek; Mr. Neil Hayes; and Ms. Anna T. Krug, represented by Mr. Gavin Fitch, Rooney Prentice.

Director: Mr. Kem Singh, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Darin Stepaniuk, Alberta Justice.

Approval Holder: Inland Cement Limited (Lehigh Inland Cement Limited), represented by Mr. Dennis Thomas, Q.C. and Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

Other Parties: Edmonton Friends of the North Environmental Society, represented by Ms. Jennifer Klimek; Edmonton Federation of Community Leagues, represented by Mr. Gavin Fitch, Rooney Prentice; and the Capital Health Authority and Dr. Gerry Predy, the Medical Officer of Health, represented by Mr. James Murphy, Q.C., Ogilivie LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval under the *Environmental Protection and Enhancement Act* to Inland Cement Limited, now known as Lehigh Inland Cement Limited, (Inland) to allow the burning of coal instead of natural gas as a fuel source at its cement plant in Edmonton, Alberta. The Board received twenty-nine appeals. Largely based on agreement between the parties, the Board accepted seven appeals from local residents, and also made the Edmonton Federation of Community Leagues and the Edmonton Friends of the North Environmental Society parties to these appeals.

The Board issued a Report and Recommendations recommending that the Minister of Environment confirm the Amending Approval, subject to a number of changes. The Minister accepted the Board's recommendations.

After the Report and Recommendations was issued, the Board received applications for costs from Ms. Anna T. Krug and the Edmonton Federation of Community Leagues (the EFCL) in the amount of $87,348.10. The costs were in the amount of $51,976.93 for legal costs and in the amount of $35,371.17 for witness costs. The Board also received a costs application from the Edmonton Friends of the North Environmental Society (EFONES), Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, and Dr. Roger G. Hodkinson in the amount of $74,706.07, which included $35,571.76 for legal costs and $39,134.31 for witness costs. Mr. Neil Hayes also submitted an application for costs in the amount of $3,519.12.

The Board decided to award costs to the EFCL in the amount of $31,954.87 and to EFONES in the amount of $15,775.82. Mr. Hayes was awarded costs in the amount of $90.32. All costs, which total $47,821.01, are to be paid by Inland.

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I. BACKGROUND

[1] On May 24, 2002, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 10339-01-03 (the "Approval") to Inland Cement Limited[1] ("Inland" or the "Approval Holder") under the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12 ("EPEA" or the "Act") for the construction, operation, and reclamation of a cement manufacturing plant (the "Plant") in Edmonton, Alberta. The Approval allows for the burning of coal instead of natural gas as a fuel source (the "Substitution Fuel Project") at the Plant.

[2] Between June 14, 2002, and July 2, 2002, the Environmental Appeal Board (the "Board") received a total of twenty-nine appeals with respect to the Approval. Notices of Appeal were received from Mr. David Doull (02-018), Mr. James Darwish (02-019), Ms. Verona Goodwin (02-020), Ms. Elena P. Napora (02-021), Mr. Don Stuike (02-022), Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr. (02-023), Mr. Cameron Wakefield (02-024), Mr. David J. Parker (02-025), Mr. A. Ted Krug (02-026), Mr. Bill Bocock (02-027), Mr. Michael Nelson (02-028), Mr. Stanley Kondratiuk (02-029), Mr. Greg Ostapowicz (02-030), Mr. Douglas Price (02-031), Ms. Holly MacDonald (02-032), Mr. Stuart Pederson (02-033), Ms. Linda Stratulat (02-034), Mr. Leonard Rud (02-035), Mr. Marcel Wichink (02-036), Dr. Roger G. Hodkinson (02-037), Ms. Lorraine Vetsch (02-038), Ms. Gwen Davies (02-039), Mr. Garry Marler (02-040), a group of Community Leagues from the City of Edmonton (02-041),[2] Mr. Neil Hayes (02-047), Mr. Robert Wilde (02-060), the Edmonton Friends of the North Environmental Society

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[1] On September 11, 2002, the Board was notified that Inland Cement Limited is now Lehigh Inland Cement Limited.

[2] The group of Community Leagues from the City of Edmonton is composed of all of the Community Leagues in the City of Edmonton that are members of the Edmonton Federation of Community Leagues (the "EFCL"), "…and in particular the Community Leagues of Sherbrooke, Dovercourt, Inglewood, Wellington Park, Athlone, Woodcroft, Mayfield, High Park, McQueen and North Glenora…." See: EFCL's Submission, dated November 15, 2002, at paragraph 2. According to the EFCL, it was authorized to bring this appeal on behalf of all Community Leagues in the City of Edmonton. They further stated that approximately 58,480 households are Community League members, and therefore, the appeal is on behalf of approximately 59 percent of the citizens of Edmonton. See: EFCL's Submission, dated November 15, 2002, at page 5. The Notice of Appeal filed by the EFCL was on behalf of this group of Community Leagues and on behalf of two individuals, Ms. Bonnie Quinn (02-073) and Ms. Anna T. Krug (02-074). While these three parties filed only one Notice of Appeal, their standing differs, and as a result, the Board assigned three appeal numbers to this one Notice of Appeal.

("EFONES") (02-061),[3] Ms. Bonnie Quinn (02-073), and Ms. Anna T. Krug (02-074) (collectively the "Notice of Appeal Filers").[4]

[3] The Board acknowledged receipt of the various appeals and notified the Notice of Appeal Filers, the Approval Holder, and the Director of these appeals. In the same letters, the Board also requested that the Director provide the Board with a copy of the records (the "Record") relating to the Approval.[5]

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board ("NRCB") and the Alberta Energy and Utilities Board ("AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB notified the Board that these appeals were not subject to review under its legislation. The AEUB stated that it had not held a public hearing or review into the subject matter of the appeals.[6]

[5] On July 17, 2002, the Board received a letter from the Approval Holder in which it disputed that any of the Notice of Appeal Filers had standing, but if some of the Notice of Appeal Filers were determined to have standing, it was willing to work with the other parties to come to an agreement on the issues to be heard.

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[3] A total of three Notices of Appeal were filed on behalf of EFONES. On July 2, 2002, EFONES filed its third Notice of Appeal. Attached to this Notice of Appeal was a letter from EFONES indicating that the Notices of Appeal filed by Mr. James Darwish and Mr. Robert Wilde were intended to be filed on behalf of themselves and EFONES.

[4] The majority of the Notice of Appeal filers nominated either EFONES or the EFCL to represent them. EFONES represented: Mr. James Darwish, Ms. Verona Goodwin, Ms. Elena P. Napora, Mr. Don Stuike, Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. David J. Parker, Mr. A. Ted Krug, Mr. Bill Bocock, Mr. Michael Nelson, Mr. Stanley Kondratiuk, Mr. Greg Ostapowicz, Mr. Douglas Price, Ms. Holly MacDonald, Mr. Stuart Pederson, Ms. Linda Stratulat, Mr. Leonard Rud, Mr. Marcel Wichink, Dr. Roger G. Hodkinson, Ms. Lorraine Vetsch, Ms. Gwen Davies, Mr. Garry Marler, and Mr. Robert Wilde. The EFCL represented: the group of Community Leagues from the City of Edmonton, Ms. Bonnie Quinn, and Ms. Anna T. Krug. Mr. David Doull and Mr. Neil Hayes represented themselves.

[5] On July 11, 2002, the Board received a copy of the Record. On July 22, 2002, a copy of the Record was sent to the Notice of Appeal Filers and the Approval Holder.

[6] However, the AEUB provided a copy of Industrial Development Permit No. IDP 00-1 and IDP IC 80-1 (the "IDP"), permitting "…Inland to use natural gas produced in Alberta as fuel in the production of cement in the Province…." See: AEUB's letter, dated July 17, 2002, and attachments. The Board sought the submissions of the parties and all of the parties agreed that section 95(2)(a) and 95(5)(b)(i) of EPEA were inapplicable in these circumstances. Therefore, after reviewing the documentation provided by the AEUB and the submissions of the parties, the Board determined that the issues that are before the Board have not been considered in any hearing or review by the AEUB.

[6] On August 2, 2002, the Board wrote to the parties and indicated it would schedule a Preliminary Meeting to deal with various motions that had been identified. On August 27, 2002, the Board advised all parties that a Preliminary Meeting would be held on September 17, 2002.[7]

[7] On September 5, 2002, EFONES contacted the Board and advised that it, along with the Director, Approval Holder, and the EFCL were close to an agreement on recommending to the Board what issues should be considered at the hearing and who should be granted standing. EFONES requested an extension to the deadline for filing written submissions. The Board granted this request and the parties subsequently provided written submissions.

[8] The Board held a Preliminary Meeting on September 17, 2002 and after reviewing the submissions and hearing arguments, the Board determined that Mr. Ron and Ms. Gail Maga and Ron Maga Jr. (02-023), Mr. Cam Wakefield (02-024), Mr. A. Ted Krug (02-026), Mr. Stan Kondratiuk (02-029), Dr. Roger G. Hodkinson (02-037), Mr. Neil Hayes (02-047), and Ms. Anna T. Krug (01-074) (collectively, along with the EFCL and EFONES, the "Appellants") would have standing at the Hearing. The Board also accepted the EFCL and EFONES as full parties to these appeals.[8] The remaining Notices of Appeal were either dismissed or withdrawn.[9]

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[7] The Board stated that the purpose of the Preliminary Meeting was to hear arguments on the following matters:

> "1. the standing of the Appellants [(Notice of Appeal Filers)], including their directly affected status and whether they filed valid statements of concern;
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> 2. the standing of Mr. Doull, including whether the statement of concern filed by Mr. Doull is a valid statement of concern for the purposes of filing a Notice of Appeal and whether Mr. Doull is directly affected;
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> 3. the issues to be dealt with at the hearing of these appeals; and
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> 4. whether to consolidate the appeals."

The Board specified a deadline by which any other preliminary motions needed to be filed. No other preliminary motions were received.

[8] See: Re: *Doull* v. *Alberta (Director, Northern Region, Regional Services, Alberta Environment)* (2003), 49 C.E.L.R. (N.S.) 210 (Alta. Env. App. Bd.), (*sub nom*. Preliminary Issues: *Doull et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited*) (11 October 2002), Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1 (A.E.A.B.) at paragraphs 96 and 97. The appeal of Mr. David Doull was dismissed. The other Notice of Appeal Filers not granted standing had agreed to withdraw their appeals and allow the EFCL and EFONES to present their concerns. See: *Darwish et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-019, 020, 021, 022, 025, 027, 028, 030, 031, 032, 033, 034, 035, 036, 038, 039, 040, and 060-DOP (A.E.A.B.).

[9] See: Letter from EFONES, dated November 25, 2002. Therefore, the proper parties to these appeals are the Appellants, the Approval Holder, and the Director (collectively the "Parties").

[9] The Board, in its Decision,[10] also determined that the issues to be considered at the hearing of these appeals were:

1. emission limits for particulate matter, sulphur dioxide, nitrogen oxides, heavy metals and radioisotopes;
2. adequacy of existing baseline data;
3. emission monitoring, including the type, location and frequency of monitoring;
4. appropriateness and validity of modeling methods and results;
5. appropriateness of including certain requirements in the Approval as opposed to making them requirements of the application, specifically: a) ambient air monitoring plans, b) trial burn, c) fugitive emission reduction plan, d) use of landfill gas, and e) information regarding the type and source of coal;
6. use of best available demonstrated technology;
7. timeline for installation of a baghouse;
8. number of trips;
9. local residents trip notification system;
10. adequacy of health impact assessment;
11. appropriateness of health impact assessment update;
12. ongoing consultation with local residents and local residents liaison committee;
13. need for the conversion to coal as a fuel source;
14. control of greenhouse gas emissions; and
15. use of tires as kiln fuel, limited to Approval Clause 4.1.17.

[10] On October 9, 2002, the Board received a request from the EFCL to compel the Approval Holder to produce a number of documents related to these appeals. The EFCL had requested the documents from the Approval Holder previously, but the Approval Holder refused to voluntarily provide the documents.[11]

[11] The Board requested submissions from the Parties on the issue of document production.[12] After reviewing the submissions, the Board determined that the documents appeared to be potentially relevant and necessary to the issues in these appeals and ordered the

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[10] Re: *Doull* v. *Alberta (Director, Northern Region, Regional Services, Alberta Environment)* (2003), 49 C.E.L.R. (N.S.) 210 (Alta. Env. App. Bd.), (*sub nom*. Preliminary Issues: *Doull et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited*) (11 October 2002), Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1 (A.E.A.B.).

[11] See: EFCL's letter to the Approval Holder, dated September 25, 2002, and the Approval Holder's letter, dated September 26, 2002.

[12] See: Board's letter, dated October 11, 2002.

Approval Holder to produce the requested documents.[13] The Approval Holder provided the documents to the other Parties on November 12, 2002.

[12] The Hearing was scheduled for November 26 and 27, 2002, and submissions in preparation for the Hearing were received from the Parties on November 15, 2002. The Board reviewed the submissions of the Parties, and as the issue of public health was important to everyone involved, the Board contacted the Parties and the Capital Health Authority to determine if a representative of the Capital Health Authority should attend the Hearing and appear as one of the Director's witnesses or as an independent witness.[14] On November 25, 2002, the Board received a letter from the Capital Health Authority stating that it "…believes that the process and decision were reasonable. In view of the short time frame, Capital Health is unable to adequately prepare for the hearing, and as a result, we will not be attending the hearing."

[13] Further, in the submissions filed in preparation for the Hearing, the Approval Holder included a health impact study, dated November 13, 2002 (the "Cantox Report"). On November 22, 2002, the Board received a revised version of this report, dated November 21, 2002 (the "Revised Cantox Report" and collectively the "Cantox Reports").

[14] On November 25, 2002, the Board received letters from the EFCL and EFONES objecting to the admissibility of the Cantox Reports. They stated that the Revised Cantox Report was not proper rebuttal evidence, having been filed less than a week before the hearing, and that they would not have an adequate opportunity to review this new information prior to the Hearing. The Appellants subsequently indicated that they would be seeking an adjournment if the Board were to accept the Cantox Reports into evidence.[15]

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[13] See: Board's letter, dated November 5, 2002. See also: Document Production: *Maga et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (13 February 2002), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-ID3.

[14] See: Board's letter, dated November 22, 2002.

[15] See also: Mr. Neil Hayes' letter, dated November 25, 2002. See also: Board's letter, dated November 25, 2002. The Board notified the Parties on November 25, 2002, that it intended to address the admissibility of the Cantox Reports as a preliminary matter at the Hearing and requested the Parties be prepared to present submissions on this matter. The Board also indicated it would hear arguments, at the start of the Hearing, as to whether an adjournment should be granted. See: Board's letter, dated November 25, 2002.

[15] The Hearing commenced on November 26, 2002. The Appellants argued that neither of the Cantox Reports should be admitted into evidence, but if the Cantox Reports were admitted into evidence, the Hearing should be adjourned.

[16] The Board determined that the Cantox Reports should be accepted as evidence, and held that the rules of procedural fairness require that the Appellants must have an opportunity to assess the information in the reports prior to the Hearing. Therefore, the Board adjourned the Hearing until December 16, 17, and 18, 2002.[16]

[17] The Board again asked the Parties whether the Medical Officer of Health should attend the Hearing to answer questions on behalf of the Capital Health Authority. After hearing the submissions of the Parties, the Board determined that the Medical Officer of Health should attend the Hearing when it reconvened and, pursuant to section 95(1) of the Act, the Board made a formal request that the Medical Health Officer personally attend the Hearing.[17]

[18] The Hearing reconvened on December 16, 2002, and continued through December 17 and 18, 2002. On January 17, 2003, the Board issued its Report and Recommendations, and on January 22, 2003, the Minister issued a Ministerial Order accepting the Board's Report and Recommendations.[18]

[19] At the close of the Hearing, the Appellants, the EFCL, and EFONES reserved their right to ask for costs in these appeals. The Approval Holder reserved its right to ask for costs at the Hearing, however it later withdrew its request.[19]

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[16] See: Re*: Maga* (2003), 50 C.E.L.R. (N.S.) 77 (Alta. Env. App. Bd.), (*sub nom.* Adjournment Decision: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Lehigh Inland Cement Limited*) (12 December 2002), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-ID2 (A.E.A.B.).

[17] See: Board's letter, dated November 26, 2002. Section 95 (1) of the Act states:

> "The Board has all the powers of a commissioner under the *Public Inquiries Act*."

Section 5 of the *Public Inquiries Act*, R.S.A. 2000, c. P-39, provides:

> "The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench."

The Medical Officer of Health and the Associate Director of Environmental Health Services for the Capital Health Authority attended the Hearing as requested.

[18] See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.).

[19] See: Approval Holder's letter, dated December 19, 2002.

[20] The Capital Health Authority and the Medical Officer of Health did not specifically reserve costs at the end of the Hearing. However, the Board notes that in a letter dated December 14, 2002, they stated that they are "…appearing at this hearing at the request of the Board and not as litigants or as witnesses for any party. As such, we trust the Board will make good our clients' costs in this regard."[20]

II. APPLICATIONS FOR COSTS

[21] On February 5, 2003, the Board received letters from Mr. Neil Hayes and from Mr. Gavin Fitch on behalf of Ms. Anna T. Krug and the EFCL (the "EFCL Submission"), and on February 7, 2003, a letter was received from Ms. Jennifer Klimek on behalf of Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, Dr. Roger G. Hodkinson, and EFONES (the "EFONES Submission"). These letters requested costs on behalf of the various Appellants. The costs requests are summarized as follows:

1. Mr. Hayes, for preparation and attendance at the hearing, 68 hours at the rate of $50.00 per hour, and disbursements in the amount of $119.12, for a total of $3,519.12;[21]
2. the EFCL Submission, including Mr. Fitch's legal services, being fees and disbursements in the amount of $51,976.93, and witness fees in the amount of $35,371.17, for a total of $87,348.10; and
3. the EFONES Submission, including Ms. Klimek's legal services, being fees and disbursements in the amount of $35,571.76, and witness fees in the amount of $39,134.31, for a total of $74,706.07.

[22] The Director initially sent in a letter indicating "…that the Director neither seeks costs nor does the Director agree to pay any costs…."[22] No application for costs was received from the Capital Health Authority or the Medical Officer of Health.

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[20] The Board notes that the Capital Health Authority and the Medical Officer of Health did not submit an application for costs. Further, the Board specifically rejects the notion that merely because a party is requested to appear at a hearing by the Board that they are entitled to some form of costs award.

[21] Although the total claimed by Mr. Hayes was $3,523.08, the Board notes that the actual expenses listed total $3,519.12.

[22] See Director's letter, dated February 5, 2003.

[23] As is the Board's practice, an opportunity to respond to these costs applications was provided, and response submissions were subsequently received from the Director and the Approval Holder.

[24] On May 5, 2003, the Board also received a supplemental letter from the EFCL advising that a disbursement in the amount of $100.58 had not been included in their previous costs request. The disbursement was part of the account of Dr. Edo Nyland[23] and relates to a working dinner with some of the Appellants. Given the Board's decision that an award of costs is not appropriate with respect to Dr. Nyland, the Board has determined that it need not consider this additional disbursement.

[25] On June 23, 2003, the Board issued a letter indicating its decision with respect to costs and indicated the Board's reasons to follow. These are the Board's reasons.

III. DISCUSSION

A. Statutory Basis for Costs

[26] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA, 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."

[27] 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.*:

> "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."[24]

Further, Mr. Justice Fraser stated:

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[23] Dr. Nyland is one of the witnesses presented by the EFCL.

[24] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 at 146 (Alta. Q.B.).

> "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.)[25]

[28] The sections of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation") concerning final costs 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:
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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;
>
> (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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> (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
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> (a) any other party to the appeal that the Board may direct;
>
> (b) the Board.

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[25] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 at 147 (Alta. Q.B.).

> (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[29] 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;… ."

[30] While all 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 bringing the proper balance into its costs decisions. Section 2(f) puts an obligation on citizens to participate in the process to ensure better decision-making regarding the environment, but it does not mean participants to an appeal are *entitled* to be compensated for their involvement.

[31] The Board has repeated in other decisions that it has the legislated discretion to decide which of the criteria in the Act and Regulation should apply in particular claims for costs.[26] The Board also determines the relative weight to be given to each criterion, depending on the specific circumstances of each appeal.[27] In *Cabre Exploration Ltd.*, 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

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[26] See: Re: *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.).

[27] See: Re: *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.).

the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[28]

[32] As stated in previous appeals, the Board evaluates each costs application against the criteria in the Act and 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.[29]

[33] Under section 18(2) of the Regulations, 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.[30]

[34] The Board looks at the financial resources of the parties, and while the Board has a starting point that each party to an appeal should bear its own costs, as we discuss further below, the Board is also aware that an "…environmental hearing challenging a highly technical and scientific approval may require a balancing of resources to 'level the playing field' between citizen appellants … and corporations… ."[31]

[35] In the Board's view, financial assistance to enable the retention of experienced legal counsel may help to address the imbalance of resources in these circumstances and contribute to the efficient functioning of the appeal process set out under the Act, all of which ultimately assists appellants, the Board, the public, and the approval holders whose approvals are under appeal.

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28 *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 at 147 (Alta. Q.B.).

29 See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.).

30 See: Costs Decision re: *Monner (*17 October 2000), Appeal No. 99-166-CD (A.E.A.B.) at paragraph 25.

31 Costs Decision re: *Krozdrowski* (7 July 1997), Appeal No. 96-059 (A.E.A.B.) at paragraph 30.

B. Court vs. Administrative Tribunals

[36] 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 a part of all hearings before the Board, the Board must consider the diverse aspects of the public interest when making its 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, which can be complicated, and the overall legislative purpose as defined in section 2 of the Act.

[37] The distinction between the costs awarded in judicial as opposed to quasi-judicial settings was stated in *Bell Canada* v. *C.R.T.C.*:[32]

> "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."[33]

[38] 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 *Green*, Michaels & Associates Ltd., *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

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

[33] *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."

costs decision of the Public Utilities Board [('P.U.B.')]. 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."[34]

[39] The Act and the Regulation give the Board the authority to award costs if it determines the situation warrants it and further supports the view that the Board is not bound by the loser pays principle. As stated in *Mizeras*:

> "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* [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."[35]

[40] As indicated earlier, under section 18(2) of the Regulation, a party may make an application to the Board for all costs that are *reasonable* and that are directly and primarily

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[34] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 at 147-148 (Alta. Q.B.).

[35] See: Re: *Mizeras* (2000), 32 C.E.L.R. (N.S.) 33 (Alta. Env. App. Bd.), (*sub nom.* Costs Decision re: *Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 9. See also: Costs Decision re: *Cabre Exploration Ltd*. (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 6.

related to the matters contained in the Notice of Appeal, and for the preparation and presentation of the party's submission. The Board has a starting point that costs incurred in an appeal are the responsibility of the individual parties.[36] There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.

C. Submissions

[41] With the starting point described in the previous section in mind, the Board evaluates each costs application against the criteria in the Act and Regulation. In this particular case, the Appellants were represented by two major entities – EFONES and the EFCL. Therefore, the analyses of the costs applications will be according to the submissions of Mr. Neil Hayes, EFONES, and the EFCL,[37] and the response submissions of the Approval Holder and the Director.[38]

1. Mr. Neil Hayes

[42] Mr. Hayes submitted an application for costs, dated February 5, 2003, for the following:

1.	Photocopying ($63.27 + $18.05) (receipts provided)	$ 81.32
2.	Parking (receipts provided)	$ 9.00
3.	Mileage (4 days of hearings x 15 km x $0.32/km and 3 trips around plant and area x 10 km x $0.32/km)	$ 28.80
4.	Attendance Cost (based on 3½ days x 8 hours/day x $50/hour)	$ 1,400.00
5.	Research, Reading, and Collecting data (based on 40 hours x $50/hour)	$ 2,000.00
	TOTAL	$ 3,519.12[39]

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[36] See: Re: *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.).

[37] EFONES represented: Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, and Dr. Roger G. Hodkinson. The EFCL represented: the group of Community Leagues from the City of Edmonton and Ms. Anna T. Krug. Mr. Neil Hayes represented himself.

[38] No submissions on costs were received from the Capital Health Authority or the Medical Officer of Health.

[39] Although the total claimed by Mr. Hayes was $3,523.08, the Board notes that the actual expenses listed

[43] Mr. Hayes stated that he invested many hours researching, reading, submitting responses, speaking with public health officials and scientists, and reviewing and compiling technical data provided by Inland. He further stated that he had spent more time preparing for the appeal than what he actually claimed, and representing himself was more cost effective than having legal representation. Mr. Hayes also expressed concerns regarding letters from the Approval Holder that were "…somewhat personally threatening…" in that Inland considered his appeal frivolous and he should be personally responsible for costs.

[44] Mr. Hayes provided receipts for photocopying expenses and parking expenses while attending the Hearing. Mr. Hayes also stated that he was required to take three and a half days off work to attend the Hearing and his salary costs were $1,400.00, which was based on a rate of $50.00 per hour. He did not indicate how he determined this hourly rate or provide any evidence to support his argument that his salary costs were $1,400.00. Mr. Hayes also did not indicate who he believed the costs should be paid by, however, he stated that if "…Inland Cement had agreed to install the bag house filter in 2001, when I first heard of this project, I would not have had to invest the personal time to fight this appeal."

2. EFONES

[45] EFONES requested costs be paid by either the Approval Holder or the Director. Although there were originally 29 Notices of Appeal filed,[40] EFONES came to a consensus with the Director and the Approval Holder that the only appeals that would proceed, would be Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, and Dr. Roger G. Hodkinson, all to be represented by EFONES. EFONES stated that they retained Dr. James Plambeck, Dr. Michael Brauer, Dr. Brain Sproule, Dr. Colin

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total $3,519.12. Therefore, the Board will use the corrected total as the actual amount claimed.

[40] The original appeals filed in association with EFONES were by: Mr. James Darwish, Ms. Verona Goodwin, Ms. Elena P. Napora, Mr. Don Stuike, Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. David J. Parker, Mr. A. Ted Krug, Mr. Bill Bocock, Mr. Michael Nelson, Mr. Stanley Kondratiuk, Mr. Greg Ostapowicz, Mr. Douglas Price, Ms. Holly MacDonald, Mr. Stuart Pederson, Ms. Linda Stratulat, Mr. Leonard Rud, Mr. Marcel Wichink, Dr. Roger G. Hodkinson, Ms. Lorraine Vetsch, Ms. Gwen Davies, Mr. Garry Marler, and Mr. Robert Wilde.

Soskolne, Ms. Verona Goodwin, and Mr. James Darwish as "expert witnesses"[41] to assist legal counsel in the appeal. The specific costs claimed were:

"1.	Verona Goodwin	$16,630.87*
2.	Dr. M. Brauer	$ 5,980.00*
3.	Dr. B.J. Sproule	$ 3,300.00*
4.	James O. Darwish	$ 3,200.00*
5.	Dr. J.A. Plambeck	$ 1,000.00*
6.	Dr. C.L. Soskolne	$ 4,737.43
7.	Jennifer J. Klimek	$35,571.76
8.	EFONES – Expenses	$ 2, 178.25
	GST on accounts marked with *	$ 2,107.76
	TOTAL (including GST)	$74,706.07"[42]

[46] EFONES submitted that they had assisted the Board in its process as they had made an agreement with the Approval Holder, the EFCL, and the Director regarding standing and the issues, thereby making effective use of the Board's time. EFONES also stated they had coordinated their involvement with the other Appellants to avoid duplication and to effectively use their respective resources.[43] According to EFONES, the evidence and submissions presented related directly to the issues set out in the Notices of Appeal. They further submitted that their witnesses provided "…articulate, relevant and succinct evidence…" and their cross-examination focused on the relevant issues.

[47] With respect to Ms. Verona Goodwin,[44] EFONES stated her involvement in the appeal was "…very extensive and helpful to Counsel, the other Experts and, ultimately, the Board." They continued by stating that Ms. Goodwin reviewed the application to assist in determining the appropriate issues, provided factual information to the other consultants, conducted research on the issues, provided opinion evidence on many issues in the appeals, and

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41 As the Board stated at the Hearing, it does not normally qualify people as experts, but the Board does note the person's experience and education. See: Transcript, December 16, 2002, at page 29, lines 2 to 11.

42 EFONES' submission, dated February 7, 2003.

43 According to EFONES, their submissions at the Hearing focused on "…the health issues, the nature of the review done by the Director with respect to those matters, the emission levels from the plant, the monitoring of emissions and the Director's public consultation process." EFONES' submission, dated February 7, 2003.

44 Ms. Verona Goodwin is an Industrial Hygiene Consultant with a Masters Degree in Medical Science – Public Health Science. See: Affidavit of Ms. Verona Goodwin, dated November 14, 2002.

briefed EFONES' counsel for both the presentation of their case and their submissions. They further stated that even though Ms. Goodwin was one of the original appellants and she was a member of EFONES, the time she contributed to the appeal should not be considered as volunteer time, as EFONES would have had to retain another person with her qualifications to review the application and provide evidence. EFONES submitted that "…the test of whether a party should be paid should be the nature of his or her involvement, not whether he or she belongs to a particular group or is an Appellant. If he or she provides expert evidence then those costs should be recoverable."[45]

[48] Ms. Goodwin provided a statement of her expenses and time spent preparing for and attending the Hearing. According to EFONES, the total was reduced by 25 percent to account for research completed on identified issues that were of lesser priority at the Hearing[46] and for time she volunteered. She provided a detailed list of her activities associated with these appeals and billed 442.5 hours at a rate of $50.00 per hour. Also included in her invoice was 70 kilometres for travel at $0.35 per kilometer and photocopying expenses.[47] Her total costs were $22,174.50, and from this, she deducted 25 percent, leaving her final costs claimed at $16,630.87.

[49] EFONES further argued the evidence provided by three of their other experts was accepted by the Board in one form or another. They submitted that Dr. Brauer provided evidence on the health effects of the proposed Substitution Fuel Project, including evidence of the threshold levels of particulate matter.[48] EFONES stated that Dr. Sproule, a physician with expertise in respiratory care, provided evidence on the potential effects of the conversion on an

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45 EFONES' submission, dated February 7, 2003.

46 The issues that were of lesser priority, according to EFONES, were:

1. radioisotopes in coal;
2. raw materials for cement production constituents;
3. waste iron ore, bottom ash;
4. rubber tires;
5. effectiveness of chemical agents for fugitive dust control; and
6. review of stack survey reports.

47 The invoice provided by Ms. Goodwin included hourly costs totaling $22,125.00, travel costs of $24.50, and photocopying costs of $25.00. See: EFONES' submission, dated February 7, 2003.

48 Dr. Brauer invoiced EFONES for a total of $5980.00, including 39.5 hours at $150 per hour (totaling $5925.00), and additional expenses, such as airport parking and meals, totaling $55.00. See: EFONES' submission,

individual basis.[49] They stated that Dr. Soskolne provided evidence on the shortcomings of the Director's public consultation process.[50]

[50] Mr. Darwish, a chartered accountant, provided evidence regarding his interpretation of financial statements and alternatives to burning coal. According to EFONES, he also volunteered a great deal of time organizing the Appellants' and other peoples' work and did not include these hours in his invoice. Mr. Darwish submitted an invoice for $3,200.00, in relation to 32 hours of work at $100.00 per hour.[51]

[51] Dr. Plambeck, also engaged by EFONES, reviewed the application, assisted the Appellants in drafting their statements of concern, advised counsel on issues to be raised at the Hearing, and advised what experts were needed. He was not available at the time of the Hearing and therefore was not further retained by EFONES. A copy of an agreement between EFONES and Dr. Plambeck was provided, stating the minimum compensation would be $1,000.00 and would increase as he submitted invoices.[52]

[52] EFONES further stated: "Although the Board did not accept all of the evidence, it is submitted that the evidence was relevant to the issues and the Board accepted some of each Experts' evidence in its final decision."[53]

[53] Counsel for EFONES stated she spent 160.7 hours working on these appeals, and her billable rate is $200.00 per hour.[54] EFONES further stated that their counsel had "…worked with other Counsel to streamline the process." They submitted that:

> "This was a complicated Appeal and required legal expertise to streamline it so it could be presented in an organized, focused manner. We achieved this goal by organizing succinct relevant written evidence and submissions, staying within our timelines and making the most of our cross examination."

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dated February 7, 2003.

[49] Dr. Spoule invoiced EFONES for 11 hours at $300.00 per hour, for a total of $3,300.00. See: EFONES' submission, dated February 7, 2003.

[50] Dr. Soskolne billed EFONES $4,737.43 for 25.3 hours at $175.00 per hour, including $309.93 for GST. See: EFONES' submission, dated February 7, 2003.

[51] See: EFONES' submission, dated February 7, 2003.

[52] See: EFONES' submission, dated February 7, 2003.

[53] EFONES' submission, dated February 7, 2003.

[54] See: EFONES' submission, dated February 7, 2003.

[54] Counsel for EFONES provided a very detailed list of the time spent working on these appeals. Her fee was $33,155.00.[55] In addition to the fees charged, counsel also had disbursements totaling $89.64 plus $6.27 GST, and applicable GST on the legal fees in the amount of $2,320.85. Therefore, the total amount claimed was $35,571.76.

[55] EFONES itself also submitted receipts for expenses incurred. The expenses included photocopying and faxing charges, legal researches, freedom of information costs, airfare costs and adjustments for Dr. Brauer, and the purchase of a book. The total for expenses claimed was $2,178.25.[56]

[56] EFONES argued that:

> "The approach of all the witnesses and Counsel was focused and provided valuable assistance to the Board. As a result of this intervention, the Board substantially modified the Approval by making Inland's requirements much more stringent, thereby benefiting the public interest. This decision will also provide the Director guidance as to how he or she should, in the future, conduct public consultation, assess health concerns and implement the policy on best available technology. This decision has resulted in further protection of the environment and public health with respect to the current application and, hopefully, in future applications."[57]

[57] EFONES also stated that the adjournment should be taken into consideration as witnesses had to be brought in for two hearing dates, and witnesses and counsel had to review and provide input regarding the new evidence.

[58] EFONES stated that it is a group with financial need as the majority are "…homeowners, residents or workers in the area near the Plant and are unable to pay the costs of such an Appeal."[58] They continued by stating it is a non-profit society with limited resources, and even though they had managed to pay a small portion of the bill, they "…are certainly not, nor will they be, in a position to pay the full bill."[59] They further argued that EFONES received

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55 The Board notes that this total does not equate to 160.7 hours at $200.00 per hour, which would actually total $32,140.00. In reviewing the submitted documents, it would appear that according to her time record, counsel for EFONES spent 164.7 hours on the file with 156.4 hours billed at $200.00 per hour and 4.3 hours for preparing the costs submission and reviewing the Report and Recommendations being charged at a rate of $250.00 per hour, for a total of $33,155.00.

56 See: EFONES' submission, dated February 7, 2003.

57 EFONES' submission, dated February 7, 2003.

58 EFONES' submission, dated February 7, 2003.

59 EFONES' submission, dated February 7, 2003.

no financial gain by bringing these appeals, but they were concerned about protecting the environment and protecting human health of many other individuals besides themselves.[60]

[59] EFONES concluded by stating that the costs requested were reasonable, and as a result of the appeals being brought forward, changes were made to make a better approval, "…and the resulting benefit to the environment would not have occurred without Appeals filed by the EFONES Group and their participation in the process."[61]

3. EFCL

[60] The EFCL requested legal and witness costs be paid by the Director or the Approval Holder or both. They argued special circumstances exist to justify awarding costs against the Director because, according to the EFCL, "…the Director was found by the Board to have failed to discharge his duty under Section 2 of the Act to involve members of the public in issuing the Approval."[62]

[61] The costs requested totaled $87,348.10, including $51,976.93 for legal costs and $35,371.17 for witness costs.[63] They submitted that all of the costs claimed were directly related to matters contained in the Notices of Appeal and were for the preparation and presentation of their submissions.

[62] The EFCL also argued that costs should be awarded on a solicitor-client basis because: awarding costs would be consistent with and would further the goals set out in section 2 of the Act; they made a substantial contribution to the appeal; the appeal was largely successful; the Director's failure to involve the public made it necessary for members of the public to file an appeal; and the Director did not properly consider the Best Available Demonstrated Technology ("BADT") for particulate matter emission control.[64]

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60 See: EFONES' submission, dated February 7, 2003.

61 EFONES' submission, dated February 7, 2003.

62 EFCL's submission, dated February 5, 2003, at paragraph 2.

63 See: EFCL's submission, dated February 5, 2003, at paragraph 3. The Board notes that on May 5, 2003, an additional claim was submitted by the EFCL to the Board in the amount of $100.58. As the additional information did not have a substantive effect on the Board's decision regarding costs, the Board determined that comments from the other Parties were not required.

64 See: EFCL's submission, dated February 5, 2003, at paragraph 12.

[63] The EFCL stated they required financial resources to make an adequate submission. According to the EFCL, Ms. Anna Krug does not have the means to retain legal counsel and expert witnesses needed to conduct a complex appeal, and she would not have had legal representation had the EFCL not been involved.[65]

[64] The EFCL stated it is a "…non-profit organization whose principal sources of revenue are an annual grant from the City of Edmonton, membership dues, casino revenues and other miscellaneous grants."[66] They also stated many of these sources of income have restrictions limiting what they can be spent on. According to the EFCL, the costs associated with these appeals greatly exceed what EFCL had originally authorized for legal and expert witness costs.[67]

[65] The EFCL submitted that the purposes of the Act support the awarding of costs to them.[68] In particular, they submitted that section 2(a) was supported as one of the issues in the appeals was the integrity of human health for all citizens in Edmonton, but particularly those living in the vicinity of Inland. They stated that the "…full and effective participation, through adequate funding, of the very persons whose health was the subject of such intense discussion at the appeal hearing, was of the utmost importance."[69]

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65 See: EFCL's submission, dated February 5, 2003, at paragraph 14.

66 EFCL's submission, dated February 5, 2003, at paragraph 15.

67 See: EFCL's submission, dated February 5, 2003, at paragraph 16. The EFCL stated they had authorized $10,000.00 for legal costs and $15,000.00 for witness costs.

68 The specific sections of the Act the EFCL quoted as supporting the awarding of costs provide:

> "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 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;…."

69 See: EFCL's submission, dated February 5, 2003, at paragraph 19.

[66] According to the EFCL, the issue of BADT related to the prevention and mitigation of environmental impacts of the Substitution Fuel Project and, therefore, fell within the confines of section 2(b) of the Act.

[67] With respect to sections 2(f) and (g), the EFCL submitted that meaningful participation in the appeal required professional assistance, which they should not be required to pay themselves, as the issues were complex and difficult. They reiterated that the Director's failure to involve members in the approval process provided no choice to the Appellants but to participate in the process before the Board.[70]

[68] They submitted that the "polluter pays" principle enunciated in section 2(i) of the Act should include the "…cost of funding the participation of local residents in the Board's hearing process."[71]

[69] The EFCL submitted that the issue of particulate matter emission controls was the focus of their submissions to the Board. Examples provided by EFCL of their contribution included: their counsel working co-operatively with other counsel to reach an agreement as to the proper parties and issues, thereby streamlining the process and making it more efficient; their motion to compel the production of documents relating to the performance of the ESP from 1997 to 2002 and the issue of when the ESP performance is substandard but does not actually trip; their witness, Mr. Alan Church, provided the only independent evidence regarding BADT and the Board accepted his evidence; cross-examination of the Director demonstrated to the Board the emission limits for particulate matter contained in the Approval were not comparable to best average achievable emission rates at cement kilns; cross-examination of Inland assisted in determining Inland's evidence that $PM_{2.5}$ made up less than 5 percent of the PM emissions should be rejected; evidence from the lay witnesses regarding dust from Inland being a historic and on-going problem for residents; providing evidence on the issue of public involvement/consultation by the Director; and their effective cross-examination of the Director and Approval Holder.[72]

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70 See: EFCL's submission, dated February 5, 2003, at paragraph 21.

71 EFCL's submission, dated February 5, 2003, at paragraph 22.

72 See: EFCL's submission, dated February 5, 2003, at paragraph 24.

[70] The EFCL further stated that, even though they had requested the Board rescind the Approval and prevent the Approval Holder from burning coal, they had also requested in the alternative, should the Approval be upheld, to have the terms and conditions varied. According to the EFCL, the Board and the Minister agreed to have Inland: replace the existing ESP system with a fabric filtration system; establish a resident trip notification system; and establish a community liaison committee.[73] Therefore, they submitted, they were largely successful in their appeal.

[71] They concluded by stating:

> "…the issue of the BADT for particulate matter emission control is especially significant, as this was perhaps the most important issue at the hearing. The success of Mrs. Krug and the EFCL on that issue has resulted in the single most important modification to the Approval ordered by the Board and accepted by the Minister."[74]

[72] The witnesses, Mr. Church and Dr. Nyland, billed the EFCL $30,571.17 and $4,800.00 respectively for services rendered. Total legal fees billed to the EFCL amounted to $51,976.93, including disbursements and GST.[75]

4. Approval Holder

[73] The Approval Holder submitted that the Board should not order it to pay any of the costs claimed by the Appellants. In particular, Inland submitted that it "…ought not to be responsible for any costs associated with the adjournment of the Hearing on November 26 until December 16, 2002."[76]

[74] According to the Approval Holder, the adjournment was in response to the Appellants' concerns regarding the original and revised human health risk assessment, the Cantox Reports, filed by Inland. The Approval Holder submitted that all of the Parties, including the Board, suffered prejudice from the adjournment, not only the Appellants. According to the Approval Holder, the Appellants requested an adjournment in order to properly review the

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73 See: EFCL's submission, dated February 5, 2003, at paragraph 26.

74 EFCL's submission, dated February 5, 2003, at paragraph 27.

75 See: EFCL's submission, dated February 5, 2003. The legal fees also included $1,926.00 for work completed by other lawyers on the file.

76 Approval Holder's submission, dated February 21, 2003, at paragraph 3.

Cantox Reports. The Approval Holder argued, however, that in their direct evidence, neither EFONES nor the EFCL offered any comments specifically addressing the Revised Cantox Report. Inland further stated that EFONES' witness, Dr. Brauer, conducted only a cursory review of the reports, and other statements regarding the assessments could have been determined from the original Cantox Report.[77]

[75] The Approval Holder stated that it took the issue of human health very seriously and retained Dr. Brown to prepare a "…thorough and extensive Human Health Risk Assessment." Dr. Brown subsequently submitted a revised assessment, and the Approval Holder argued that it provided the report before the Hearing to assist the other Parties, but it could have made the corrections through *viva voce* evidence during the Hearing.[78] Therefore, Inland argued that it "…should not be financially penalized for filing the Revised Assessment since it was filed by Lehigh [Inland] to ensure that the issue of public health could properly be addressed."[79]

[76] The Approval Holder argued that the Board has, in previous decisions, determined that it is not appropriate, except in exceptional cases, to award costs on a solicitor client basis. Instead, costs should be awarded on a reasonable allowance for hearing and preparation time, and this criteria should be applied in this case if costs are awarded.

[77] With respect to Mr. Neil Hayes' application for costs, the Approval Holder stated that the evidence provided by Mr. Hayes did not have the scientific or technical basis to be of assistance to the Board, and his cross-examination did not assist the Board. The Approval Holder submitted: "Given that Mr. Hayes did not substantially contribute to the hearing and did not make a significant and noteworthy contribution to the goals of EPEA, it is respectfully submitted that he ought not to be awarded any costs."[80] Inland further submitted that the costs claimed for attending the Hearing and research purposes were unreasonable.

[78] The Approval Holder submitted that a considerable portion of the arguments provided by EFONES at the Hearing were related to the conduct of the Director, issues outside

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77 See: Approval Holder's submission, dated February 21, 2003, at paragraphs 13 and 14.

78 See: Approval Holder's submission, dated February 21, 2003, at paragraphs 17 and 18.

79 Approval Holder's submission, dated February 21, 2003, at paragraph 19.

80 Approval Holder's submission, dated February 21, 2003, at paragraph 23.

of the Approval Holder's control, and therefore it should not be responsible for costs associated with this issue.[81]

[79] The Approval Holder acknowledged that Ms. Klimek, counsel for EFONES, did make a contribution to these Appeals, but stated the contribution was a limited one. It argued that these appeals do not warrant awarding solicitor-client costs, and at most, if costs are awarded, they should not exceed 25 percent of the legal fees and disbursements claimed. It further argued that the legal fees and disbursements should be reduced by 15 percent to take into account the impacts of the adjournment. Based on these calculations, the Approval Holder submitted that a reasonable award for legal costs for EFONES would be $7,064.49 plus GST.[82]

[80] It was argued by the Approval Holder that in these appeals there were two experienced counsel representing the Appellants, allowing the issues to be divided. Therefore, according to the Approval Holder, it is reasonable to award less costs to each counsel.

[81] The Approval Holder objected to the awarding of costs for any of the other witnesses provided by EFONES. In response to the claims by Ms. Goodwin and Mr. Darwish, the Approval Holder argued that they may have assisted EFONES with organizing their appeal, but as they had submitted their own Notices of Appeal with the Board, they could not be considered neutral third party experts. The Approval Holder further stated that Ms. Goodwin, a member of EFONES, "…did not provide an independent technical analysis in respect to the information reviewed nor did she provide what could in any way be considered an expert opinion."[83] Inland submitted that Mr. Darwish's participation was "…in large part outside of his capacity as a chartered accountant."[84] The Approval Holder submitted that the costs claimed by Ms. Goodwin and Mr. Darwish were in the nature of compensation rather than costs and ought not to be awarded by the Board.

[82] With respect to Dr. Brauer, the Approval Holder stated that even though it may consider him an expert given his academic background, Inland did not consider the evidence

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81 See: Approval Holder's submission, dated February 21, 2003, at paragraph 26.

82 See: Approval Holder's submission, dated February 21, 2003, at paragraph 31. Inland calculated this amount by first reducing the legal fees by 15 percent ($4,986.70), leaving legal fees and disbursements totaling $28,257.94 plus GST. It then took 25 percent of this amount, $7,064.49, plus GST, as a reasonable award of costs.

83 Approval Holder's submission, dated February 21, 2003, at paragraph 34.

84 Approval Holder's submission, dated February 21, 2003, at paragraph 48.

presented by Dr. Brauer made a substantial or positive contribution to the appeals. The Approval Holder argued that due to concerns with respect to Dr. Brauer's evidence, the Board gave little weight to his opinion that emissions from the Inland facility will cause increased mortality among residents in adjacent neighbourhoods.[85] The Approval Holder continued by stating that, as a result of Dr. Brauer overestimating the risk to residents, it was required to set up audiovisual equipment throughout the hearing room in order to alleviate public fears by ensuring the public would be able to follow the evidence of its witness, Dr. Brown.[86] For these reasons, the Approval Holder submitted that costs should not be awarded in relation to Dr. Brauer's participation in the Hearing.

[83] The Approval Holder argued that it should not be responsible for costs associated with Dr. Sproule because "…his evidence was not of a scientific or technical nature but was rather in the form of a high level overview of issues relating to asthmatics,…"[87] and "…his evidence was not in any way relevant to the Lehigh [Inland] Cement Plant in particular."[88] The Approval Holder submitted that Dr. Sproule already possessed the knowledge regarding the evidence he presented, and therefore he "…did not require any preparation and did not address the scientific and technological areas of uncertainty that the Board had to base its decision upon."[89] For these reasons, the Approval Holder submitted that costs should not be awarded in connection with Dr. Sproule's participation, and in any event, costs associated with the adjournment should not be awarded.

[84] The Approval Holder submitted that costs related to Dr. Plambeck ought not be awarded, as EFONES did not provide any description of what Dr. Plambeck did and he did not appear at the Hearing. Inland stated "…there is no evidence that Dr. Plambeck assisted with the appeal in any meaningful way and his costs have not been substantiated."[90]

[85] According to the Approval Holder, the testimony of Dr. Soskolne was in relation to the public consultation process that was followed by the Director, and therefore, it "…was not

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85 See: Approval Holder's submission, dated February 21, 2003, at paragraphs 37 and 39.

86 See: Approval Holder's submission, dated February 21, 2003, at paragraph 41.

87 Approval Holder's submission, dated February 21, 2003, at paragraph 43.

88 Approval Holder's submission, dated February 21, 2003, at paragraph 44.

89 Approval Holder's submission, dated February 21, 2003, at paragraph 45.

90 Approval Holder's submission, dated February 21, 2003, at paragraph 52.

in relation to matters that were within the control of Lehigh [Inland] and accordingly Lehigh [Inland] ought not to be responsible for the costs associated with his participation in this matter."[91]

[86] The Approval Holder argued that it should not be responsible for the disbursements claimed by EFONES itself. Inland did not consider it appropriate that it should pay costs related to the adjournment, charges incurred by changing witness flight times, or for the purchase of books.

[87] The Approval Holder stated that the EFCL, because it did not present any technical or scientific evidence in respect to human health, "…did not contribute in a meaningful way to the hearing in respect to the issue of human health."[92] The Approval Holder further stated that much of the evidence put forward by the EFCL was in relation to the conduct of the Director and the public consultation process followed by the Director. Therefore, according to Inland, it should not be responsible for costs associated with these latter issues, as they were not within Inland's control.

[88] Inland responded to the EFCL's statement that it was their participation that resulted in the resident trip notification system and a community liaison committee, by stating that "…this ignores the fact that Lehigh [Inland] had agreed to participate in a community liaison committee and already had a trip notification system in place."[93]

[89] The Approval Holder disputed the EFCL's claim that it had insufficient financial resources to participate in these appeals. According to the Approval Holder, if the EFCL decided to become involved in the proceedings, then it must have access to the necessary financial resources. Inland continued by stating that it is not responsible if the EFCL's budget process is unreliable, and the costs claim should be reduced by $25,000.00, the amount budgeted by the EFCL for the appeals ($10,000.00 for legal costs and $15,000.00 for experts).[94]

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91 Approval Holder's submission, dated February 21, 2003, at paragraph 54.

92 Approval Holder's submission, dated February 21, 2003, at paragraph 61.

93 Approval Holder's submission, dated February 21, 2003, at paragraph 63.

94 See: Approval Holder's submission, dated February 21, 2003, at paragraph 66.

[90] Inland stated that the EFCL had not provided any justification to award costs on a solicitor and client basis against it and instead only referred to the conduct of the Director.[95]

[91] The Approval Holder acknowledged that "…Mr. Fitch made a contribution to this Appeal, but this contribution was limited to the issue of pollution abatement technology."[96] Inland submitted that an award of costs should only be in respect to 25 percent of the legal fees and disbursements claimed, "…after deducting the $10,000 budgeted for by the EFCL and also after taking into account the impact of the adjournment and the fact that Mr. Fitch practices out of Calgary."[97] The Approval Holder estimated 50 hours were billed as a result of the adjournment, and approximately $1,500.00 in travel expenses was in respect to the adjournment. Inland submitted that the legal fees and disbursements should be reduced by 20 percent to take into account the impacts of the adjournment.[98]

[92] The Approval Holder submitted that the legal fees and disbursements should be reduced a further 15 percent to account for travel, meals, and lodging associated with the EFCL's counsel, or his representatives, traveling between Calgary and Edmonton on seven occasions.[99] After taking into account these reductions and the funds set aside for these appeals, the Approval Holder submitted that it is reasonable to award 25 percent of the remaining amount, $28,544.31, which amounts to $7,136.08 for legal costs and disbursements.[100]

[93] The Approval Holder acknowledged the contribution made by Mr. Alan Church and stated it was appropriate to award costs in respect to a portion of his fees and disbursements. Inland submitted that costs associated with the adjournment, including traveling expenses and time, should not be awarded. The Approval Holder argued that the funds set aside for experts by the EFCL should also be deducted from his fees. According to the Approval Holder, this would

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95 See: Approval Holder's submission, dated February 21, 2003, at paragraph 68.

96 Approval Holder's submission, dated February 21, 2003, at paragraph 69.

97 Approval Holder's submission, dated February 21, 2003, at paragraph 69.

98 See: Approval Holder's submission, dated February 21, 2003, at paragraph 70.

99 See: Approval Holder's submission, dated February 21, 2003, at paragraph 74. According to the Approval Holder's calculations, the trips were made on June 18, July 29, September 17, November 5, November 15, November 25, and December 16 through 19. Inland stated that each trip takes approximately six hours at approximately $200.00 per hour. However, the Board notes that Mr. Fitch's representatives did not charge $200.00 per hour, but rather $75.00 and $100.00 per hour. Therefore Inland's estimated cost of $8,400.00 is higher than what was actually claimed.

100 See: Approval Holder's submission, dated February 21, 2003, at paragraph 75.

leave an outstanding amount of $10,991.19 for Mr. Church's fees and disbursements. Inland submitted that it should not be responsible for this total amount merely because the EFCL failed to budget appropriately, and therefore, Inland submitted that $7,000.00 would be a reasonable award of costs in connection with Mr. Church's participation.[101]

[94] The Approval Holder argued that Dr. Edo Nyland did not address the "…complicated and technical matters at issue in this Appeal…" and "His evidence did not assist in any meaningful way to the hearing and his evidence did not make a significant and noteworthy contribution to EPEA."[102] The Approval Holder submitted that costs ought not be awarded in connection with Dr. Nyland's participation.

5. Director

[95] In his original submission, the Director stated that he neither seeks costs nor does he agree to pay any costs.[103] As the Appellants claimed costs against the Director, he provided a response submission, dated February 21, 2003. In his response submission, the Director confirmed he was not seeking costs nor should costs be awarded against him. He argued that the "…application for payment of costs as it relates to costs being directed against the Director, should be dismissed."[104] The Director argued that the Ministerial Order expressly stated that the decision of the Director was confirmed, albeit with a number of changes to the Approval conditions.

[96] In his response submission, the Director argued that none of the Appellants had provided any evidence to indicate that special circumstances exist to justify the awarding of costs against him. He stated the onus is on the Appellants to demonstrate that special circumstances exist and that "…no special circumstances exist as a result of the Director's process or conduct either during the application review process or before the Board that would amount to special circumstances."[105]

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101 See: Approval Holder's submission, dated February 21, 2003, at paragraphs 77 to 79.

102 Approval Holder's submission, dated February 21, 2003, at paragraph 81.

103 See: Director's letter, dated February 5, 2003.

104 See: Director's submission, dated February 21, 2003, at paragraph 50.

105 Director's submission, dated February 21, 2003, at paragraph 24.

[97] With respect to the Director's approach to public consultation, the Director stated he had complied with the requirements of the legislation, he had undertaken a detailed analysis of the statements of concern, and he corresponded with several statement of concern filers. Therefore, according to the Director, he did not act in bad faith with respect to his statutory obligations.

[98] The Director further argued that he had acted in good faith in determining that the existing pollution abatement equipment could be used unless the number of trips allowed under the Approval was exceeded. According to the Director, the Board's decision to require the change in pollution abatement equipment now instead of later, did not indicate the Director was acting in bad faith, only that the Board disagreed with the Director's conclusion.

[99] In response to EFONES' claim for costs against the Director, the Director submitted that the costs claimed by Ms. Goodwin, who had filed a Statement of Concern and a Notice of Appeal and was not conceded to be an expert by the Director, were compensation and not actual expenses.[106] He further questioned when the work claimed by Ms. Goodwin was done, as it appeared to him the "…bulk of the services were undertaken with respect to the Environmental Assessment Process and the application review, and were not undertaken with respect to the Appeal."[107] He further submitted that the services were in the "…category of organizing the appeal and not those of an expert…."[108]

[100] In regards to the testimony of Mr. Darwish, the Director did not concede Mr. Darwish was an expert, and therefore, the Board should determine if Mr. Darwish's testimony made a substantial contribution to the Hearing.[109]

[101] The Director submitted that there was insufficient information to establish that the services provided by Dr. Plambeck met the criteria stated in section 20 of the Regulation. According to the Director, the report was provided to Mr. Darwish on September 24, 2001, well in advance of the Director's decision on May 24, 2002.[110]

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106 See: Director's submission, dated February 21, 2003, at paragraph 41.

107 Director's submission, dated February 21, 2003, at paragraph 41.

108 Director's submission, dated February 21, 2003, at paragraph 41.

109 See: Director's submission, dated February 21, 2003, at paragraph 42.

110 See: Director's submission, dated February 21, 2003, at paragraph 43.

[102] The Director submitted that Dr. Brauer did not make a substantial contribution to the appeals.[111] In response to the claim for costs for Dr. Soskolne, the Director argued that Dr. Soskolne's evidence was not related to the Hearing or the process set out in the legislation but was promoting an alternative consultation process, and the Board Hearing was not the appropriate forum.[112]

[103] Regarding the legal fees claimed by EFONES and the EFCL, the Director reiterated that the starting point for awarding costs is that costs are the responsibility of the individual parties. The Director referred to the previous Board decision, *Kievit*,[113] in which legal fees were awarded in the amount of 45 percent of the total account of fees plus disbursements.

[104] The Director submitted that the costs application of Mr. Neil Hayes should be dismissed, as he was seeking compensation for himself and not for third party expertise. The Director also stated that it was his understanding that "…discussions were undertaken with Mr. Hayes, to participate with the EFONES group. He declined."[114]

D. Analysis

1. Mr. Neil Hayes

[105] The starting point for determining costs awards is section 2 of EPEA, in that the individual parties are responsible for some, if not all of the costs incurred in bringing an appeal before the Board. With this starting point in mind, the Board has reviewed the costs application provided by Mr. Hayes. He has claimed costs totaling $3,519.12.[115] Mr. Hayes provided receipts for photocopying expenses and parking expenses while attending the Hearing. The Board requires this form of documentation whenever possible.

[106] Mr. Hayes also included a request for costs for appearing at and preparation for the Hearing for a total of 68 hours at a rate of $50.00 per hour – 28 hours for attending the

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111 See: Director's submission, dated February 21, 2003, at paragraph 44.

112 See: Director's submission, dated February 21, 2003, at paragraph 45.

113 See: Costs Decision: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098, and 101-CD (A.E.A.B.).

114 See: Director's submission, dated February 21, 2003, at paragraph 48.

115 Although the total claimed by Mr. Hayes was $3,523.08, the Board notes that the actual expenses listed total $3,519.12. Therefore, the Board will use the corrected total as the actual amount claimed.

Hearing (what he refers to as salary costs) and 40 hours for research. Mr. Hayes stated he was required to take three and a half days off work to attend the Hearing, but he did not provide any documentation to verify his actual salary costs were $1,400.00, nor did he actually state that he lost this amount in wages as a result of taking the days to come to the Hearing. With great respect, it would appear that Mr. Hayes merely selected a rate of $50.00 per hour. Even if the Board were to consider making an award of costs for lost wages, clear documentation would be required, as the Board would not normally award costs for lost wages in an amount greater than what an applicant would have actually earned. It is not the intent of awarding costs to put the applicant in a better position financially than he normally would have been (though this may or may not be true in Mr. Hayes' case). Further, the Board is of the view that taking "time off work" to attend the Hearing is a routine and necessary part of being an appellant and is not the type of contribution to an appeal that would normally attract an award of costs.

[107] The Board has a similar view of Mr. Hayes' request for $2,000.00 with respect to the 40 hours claimed for research. While the Board accepts Mr. Hayes' statement that this is probably a conservative estimate of the amount of time he spent preparing for the Hearing, no justification is provided for the rate of $50.00 per hour. Further, the preparation that Mr. Hayes undertook to participate in this Hearing is consistent with the type of preparation that the Board would expect of citizen appellants as contemplated by section 2(f) of the Act. As a result, this is not the type of contribution to an appeal that would normally attract an award of costs.

[108] The Board appreciated Mr. Hayes' participation in the Hearing. The Board is concerned about the statements attributed by Mr. Hayes in his costs submission that: "They [(Inland)] indicated to me that that they felt my complaints were frivolous…." The Board wishes to make it clear that it did not view Mr. Hayes concerns' as frivolous. The participation of individuals such as Mr. Hayes in the appeal process is one of the essential components of EPEA.[116] Although the Approval Holder argued that, due to the highly scientific and technical nature of the appeal, Mr. Hayes did not contribute significantly to the Board's decision, it is important to note that the Board finds value in the evidence presented by citizens and especially the evidence of directly affected residents such as Mr. Hayes. These appeals had a significant public interest element, and part of the public interest is how individuals, such as Mr. Hayes,

have been or will be affected by the Director's decision. Mr. Hayes expressed his concerns effectively and sincerely and his participation and input were important to us. He summarized the underlying concern for human health with conviction and was impassioned when he stated:

> "The reason that I asked to be involved was to protect my children, as I have mentioned, Julianne who is 10 and Derek who is 7. And as I was putting my daughter to bed last night, she indicated something to me which I think was somewhat a wise comment, and I think I would like to share it with the Board. She said, Daddy, wouldn't it be great if Inland was forced to put together a new filter and not allow it to burn coal. I said yes, that would be great. I would be really happy. That would be a great Christmas present, wouldn't it? She said yes, and she said that would make the air really clean, wouldn't it, Dad? I said, yeah, it would definitely improve the air quality and it would make it better for us where we live. I debated even bringing her out today."[117]

[109] However, the evidence presented by Mr. Hayes does not justify the Board moving too far from its starting point that "…the costs incurred with respect to the appeal are the responsibility of the individual parties."[118] Section 2 of the Act states that it is the responsibility of Alberta citizens to protect the environment, and becoming involved in the appeal process, as Mr. Hayes has done, is one way of fulfilling his obligation. Therefore, the Board will award costs to Mr. Hayes in the amount of $90.32, being his out-of-pocket expenses for parking ($9.00) and for photocopying ($81.32).[119] As costs are being awarded in relation to Mr. Hayes' out of pocket expenses only, there is no need to consider the effect of the adjournment.

2. EFONES

[110] EFONES represented a number of individuals, including the appellants Mr. and Ms. Ron Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, and Dr. Roger G. Hodkinson, and had as legal counsel, Ms. Jennifer Klimek. A

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116 See: Section 2 of EPEA.

117 Transcript, December 18, 2002, at page 540, lines 4 to 19.

118 Re: *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.) at paragraph 38.

119 The Board has not awarded the mileage costs as Mr. Hayes would have had the costs of driving to work each day in any event, and the Board sees no purpose in the mileage costs associated with driving around the Plant.

costs application was received and included costs associated with retaining legal counsel and expert witnesses,[120] as well as costs claimed by Ms. Verona Goodwin and Mr. James Darwish.

[111] The latter two claimants, Ms. Goodwin and Mr. Darwish, were originally appellants and elected to have EFONES represent them in the appeals. Although they testified as "expert" witnesses for EFONES, their evidence was limited and, with respect, did not significantly contribute to the Board's decision. The Board does not doubt that both of these individuals assisted EFONES in preparing for the Hearing, but much of the work can be classified as administrative or organizational in nature and not expert evidence. Further, as parties that filed Notices of Appeal in this matter, and despite the fact their appeals were withdrawn when they elected to have EFONES represent them, they cannot be considered neutral third party experts. The fact that they filed Notices of Appeal makes it clear that they have a personal stake in the matter, and as a result, the Board expects them to participate in the appeals, including using their professional skills to assist in the presentation of the appeal.

[112] Mr. Darwish was an accountant, and his evidence was in respect to the issue of whether the Substitution Fuel Project was, in fact, necessary. Although the Board notes Mr. Darwish does, in all likelihood, have the skills to compare raw numbers, in a project such as the one at issue in these appeals, more information is required to do a thorough cost/benefit analysis. Therefore, his evidence could not be considered as expert testimony, and his time billed out at $100.00 per hour is higher than what would be expected for a "non-expert." The time spent on the file involved meeting with EFONES' counsel, reviewing documents, and attendance at the Hearing. These are steps that all appellants to an appeal must take and can be considered part of fulfilling his obligation to protect the environment and, in particular, these are the steps that an appellant with an accounting background should have done to discharge his duties under the Act. The Board thanks Mr. Darwish for his participation, but does not make an award of costs with respect to the claim for Mr. Darwish. As no costs are being awarded with respect to Mr. Darwish, there is no need to consider the effect of the adjournment.

[113] Ms. Goodwin, who has a Masters Degree in medical science, spent approximately 118 hours reviewing the documents, 29 hours preparing her statement of concern and affidavits,

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[120] EFONES requested costs in respect to Dr. Brauer, Dr. Sproule, Dr. Plambeck, and Dr. Soskolone.

68 hours at the Hearing, and 37 hours meeting with EFONES' counsel and experts. The majority of the remaining hours claimed was for research. The Board notes she reduced the number of hours claimed by 25 percent to take into account the hours spent researching issues that were not argued during the Hearing. It is difficult for the Board to justify allowing each individual that was at the same meeting to claim costs for the same time. Although every person's time does have value, the party paying costs should not be required to pay three or four times over, for the same citizens in the same appeal making similar contributions. Ms. Goodwin reviewed the application, assisted in finding experts, and conducted research on the issues. All of these activities are part of the ordinary process of any appellant appearing before the Board. During the Hearing, Ms. Goodwin provided evidence on whether a health assessment or screening process was adequately performed by the Approval Holder. She stated some of the hazards were identified while others were not, and she concluded by referring to Dr. Brauer to complete the analyses.[121] The Board accepts that her graduate degree did provide her with an advantage in her research abilities, in preparing her presentation, and in effectively communicating her concerns and results. However, this is not her field of expertise,[122] and therefore, the Board, with respect, cannot accept her testimony as that of an expert. In the Board's view, Ms. Goodwin did what an appellant with a background in medical science should have done to discharge her duties under the Act. Therefore, while the Board thanks Ms. Goodwin for her participation, the Board will not make an award of costs for the claim of Ms. Goodwin. As no costs are being awarded with respect to Ms. Goodwin, there is no need to consider the effect of the adjournment.

[114] With respect to EFONES' witness, Dr. James Plambeck, the Board notes that he did not appear at the Hearing and only assisted EFONES in drafting their Statements of Concern. Although Statements of Concern are required before an individual can be considered a party to an appeal, it is not directly related to the preparation and presentation of the evidence at a hearing. Although his report was attached to many of the Notices of Appeal filed by EFONES,

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[121] See: Transcript, December 16, 2002, at pages 30 to 32. Ms. Goodwin stated that hazards such as sulphur dioxide, NOX, and particulates had been identified, while others, including vehicle exhaust emissions and diesel engines, were not identified, and others were identified but not evaluated.

[122] In her testimony, Ms. Goodwin explained her educational background was in the area of evaluating health effects in workplaces, including evaluation of physical, biological, and chemical health hazards in the workplace, and her Masters thesis was a comparison of dispersion models at sour gas plants. See: Transcript, December 16, 2002, at page 21, lines 24 to 28, and page 22, lines 3 to 19.

Dr. Plambeck was not available at the Hearing to allow for cross-examination by the Parties adverse in interest, which makes his report neither helpful nor appropriate. Thus, the evidence provided by Dr. Plambeck did not contribute significantly to the Board's process, and therefore, the Board does not award any costs associated with Dr. Plambeck. As no costs are being awarded with respect to Dr. Plambeck, there is no need to consider the effect of the adjournment.

[115] Dr. Soskolne appeared before the Board to provide evidence on what he perceived to be shortcomings in the public consultation process carried out by the Director prior to issuing the Approval. The evidence presented was interesting, and perhaps valuable information for future public consultation processes the Director may develop. Although it was interrelated to some of the issues, including the adequacy of the baseline data, the need for ongoing consultation with local residents, and the trip notification system, it did not relate specifically to any of the identified issues in these appeals. Although it should be a part of the approval process, the public consultation process addressed by Dr. Soskolne would more appropriately have been a part of an environmental impact assessment, but as the Board determined it did not have the jurisdiction to hear appeals of Alberta Environment's decision not to conduct an environmental impact assessment, it was not included as an issue in these appeals. Section 18(2) of the Regulation requires any costs awarded 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." As Dr. Soskolne's evidence did not directly relate to the issues in appeal, costs cannot be awarded for his participation. As no costs are being awarded with respect to Dr. Soskolne, there is no need to consider the effect of the adjournment.

[116] Dr. Sproule provided evidence regarding the potential effect burning coal could have on the respiratory system and on individuals at higher risk to respiratory problems. One of the major issues before the Board was the effect the conversion to coal would have on the environment and local residents. The Board, in its Report and Recommendations, referred to the importance of protecting the health of local residents, and these conclusions were reached, in part, by the evidence presented by Dr. Sproule.[123] His evidence, although general in nature, did

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[123] The conclusions of the Board stated:

> "1. Alberta Environment policies require the Director to ensure that industrial emissions of substances posing health concerns must be controlled using the best available demonstrated technology (BADT)….

relate specifically to the issues in these appeals. As stated, section 18(2) of the Regulations requires any costs awarded must be "…directly and primarily related to …(a) the matters contained in the notice of appeal…." Dr. Sproule's fees amounted to $3,300.00, which appears reasonable to the Board given his expertise and the evidence presented. However, as Dr. Sproule's evidence was more general in nature and did not address the Inland facility specifically, any costs awarded must take this into consideration. Therefore, the Board awards costs in the amount of $900.00 for Dr. Sproule's participation in the Hearing, being his claim for attendance at the Hearing on December 16, 2002.[124] Given that the Board is awarding costs in relation to Dr. Sproule's attendance at the December 16, 2002 Hearing only, there is no need to consider the effect of the adjournment.

[117] The Board, in its Report and Recommendations,[125] had concerns regarding the testimony of Dr. Brauer. Although he did raise a number of valid questions, his analyses were flawed. For example, his initial assessment of the number of deaths that could be attributable to fine particulate emissions from the Inland facility was a ten-fold overestimation. This type of error can cause greater alarm to the residents in the area than necessary. The Board also noted other concerns with his analysis of the data.[126] The Board gave "…little weight to the opinion of Dr. Brauer that emissions from Inland will cause or contribute to increased mortality among

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3. There are valid potential health concerns, related to peak emission levels of fine particulates that were predicted to exceed relevant ambient air quality criteria using the existing ESP, under the conditions of the Approval. These peak emissions must be properly mitigated in order to minimize the risk to the Appellants and other residents in the area.

4. The body of evidence in support of health concerns in the population arising from exposure to fine particulates provides a credible case for minimizing population exposures to these pollutants. Furthermore, short term health effects, among sensitive individuals such as asthmatics, that may arise from peak exposures to airborne particulate matter are a concern to the Board."

See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 277.

[124] See: EFONES' submission, dated February 7, 2003, Tab 3. The Board notes that the rate of $300.00 per hours seems high, but in that the Board is making an award only for the time spent attending the hearing and is not making an award for preparation for the hearing, the Board has not decided to adjust this rate.

[125] See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.).

[126] See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 64.

residents in the neighbouring community."[127] The Board further stated in its conclusion that: "There is no credibility in the evidence presented by the Appellants predicting that a specific number of fatalities would be caused by the emissions from the Inland Plant."[128] These concerns illustrate that the Board cannot justify awarding costs in relation to Dr. Brauer's participation in the Hearing. As no costs are being awarded with respect to Dr. Brauer, there is no need to consider the effect of the adjournment.

[118] Although the Board did not directly quote evidence and cross-examination provided by Ms. Klimek, she raised significant issues, focused the presentations of her clients, and clearly made the Hearing more efficient and effective. The Board notes that the Approval Holder conceded that some form of costs award was appropriate with respect to Ms. Klimek.[129]

[119] The total hours claimed by Ms. Klimek, counsel for EFONES, was 164.7 hours, at a rate of $200.00 per hour, except for the time she claimed for reviewing the decision and drafting the costs arguments.[130] As these latter items are not directly related to the preparation and presentation of the evidence at the Hearing, these 4.3 hours, totaling $1,075.00, will not be considered in any awarding of costs. Therefore, the starting point for Ms. Klimek's costs claim is 160.4 hours and $32,080.00. All counsel, including that of the Approval Holder and the Director, worked at reaching an agreement on the issues and parties, and therefore, these hours should not be included, recognizing the importance of collegial cooperation. It appears Ms. Klimek charged for approximately 15 hours in this process. Therefore, Ms. Klimek's costs claim should be reduced by 15 hours or $3,000.00.

[120] According to the Alberta Legal Telephone Directory 2002-2003, Ms. Klimek has been at the Alberta Bar for approximately 18 years, and she holds a Masters Degree in environmental law. Based on the tariff of fees used by the Government of Alberta for outside counsel, a lawyer of her experience would be paid at the rate of $190.00 per hour. As the Board

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127 *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 65.

128 *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 277.

129 See: Approval Holder's submission, dated February 21, 2003.

130 In the EFONES' submission, counsel for EFONES advises that she spent 160.7 hours dealing with the matter. However, in reviewing the time records it appears that she spent 164.7 hours (156.4 hours at $200 per hour and 4.3 hours at $250 per hour). The Board infers that the reference to 160.7 is a typographical error.

has previously stated, it views the Government of Alberta rate as an appropriate tariff against which to judge the appropriateness of legal fees, but always being cognizant that there may be circumstances in which it may not be appropriate.[131] Therefore, based on the Government of Alberta rate, her legal fees would total $27,626.00 (145.4 hours x $190.00 per hour). Again, as the Parties are responsible for some of the costs of presenting their issues to the Board, and considering the cooperative efforts of all counsel in reaching an agreement on the issues and the parties, the fee should be reduced by half to $13,813.00, plus GST ($966.91). While the Board believes the impact of the adjournment on legal fees was minimal, the Board has taken this into account by reducing the fees by half. The disbursements claimed totaled $89.64 plus $6.27 GST. These appear to be entirely reasonable considering the technical nature of this appeal and the information presented. Therefore, these disbursements will be included as payable costs.

[121] EFONES submitted a claim for its own expenses, over and above that claimed for experts, in the amount of $2,178.25. In reviewing the expenditures claimed, EFONES has included the cost for the purchase and shipping of a book in the amount of $106.00. This expense does not directly relate to the preparation and presentation of the issues at the Hearing or contributed substantially to it. Further, EFONES also included costs for airfare of their witnesses and adjustments to the airfare as a result of the adjournment, in the amount of $991.15. Parties can obtain the services of experts that can best provide the evidence, but it is still that party's decision as to how much it wants to spend on the appeal and from where to retain witnesses. As the Board stated previously, it does not generally award costs for travel, either for legal counsel or experts, therefore the adjournment did not affect the amount of costs awarded. The Board notes that the adjournment in this situation was to the benefit of all Parties, and the Board, as it enabled Dr. Gerald Predy, Medical Officer of Health for the Capital Health Authority, to attend and answer questions.

[122] Additional costs claimed in the amount of $1,071.10, were for items including photocopying, faxing material, room rentals, doughnuts, searches, and parking. Although there is a list of these items included, the Board notes that some of the expenses were for the operation of EFONES itself. For example, some items are listed as office supplies, which may have been

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[131] See: Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098, and 101-CD (A.E.A.B.) at paragraph 42 and associated footnotes.

actually purchased for EFONES and not specifically for the appeal, or where it states room rental, there is no indication of why the room was rented. There was inadequate information provided to clearly explain how the costs related to the preparation and presentation of the issues, and therefore, the Board does not award costs for EFONES, except those relating to Ms. Klimek and Dr. Sproule as outlined above.

[123] Based on these calculations, total costs payable to EFONES is $900.00 for witness fees with respect to Dr. Sproule and $14,875.82 for legal fees for Ms.Klimek, for a total of $15,775.82.

3. The EFCL

[124] Mr. Fitch, on behalf of the EFCL, submitted an application for costs in the amount of $51,976.93 for legal fees and $35,371.17 for witness fees ($30,571.17 for Mr. Church and $4,800.00 for Dr. Nyland).[132]

[125] The EFCL provided a concise and effective presentation before the Board. Mr. Fitch remained focused on the identified issues, and the time allotted to the EFCL was effectively used. They provided a credible and knowledgeable witness, Mr. Church, who also submitted a useful report as part of his evidence. Their counsel was extremely effective in his cross-examination of the Approval Holder's witnesses, and even the Approval Holder, to its credit, conceded that Mr. Fitch made a contribution to these appeals.[133] Although the Approval Holder argued that it should not be responsible for any costs associated with the adjournment, the Board reiterates that the adjournment was for the benefit of all Parties as it allowed full examination of all the relevant information available and provided the Parties, and the Board, to question Dr. Predy of the Capital Health Authority. As costs associated with travel, including that of the witnesses, are not included in the Board's assessment of costs in this situation, the Approval Holder will not be financially penalized as a result of the adjournment.[134]

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[132] The Board notes the letter received from the EFCL on May 5, 2003, claiming an additional $100.58 for Dr. Nyland. As the additional information did not have a substantive effect on the Board's decision regarding costs, the Board determined that comments from the other Parties were not required, and the amount was not factored into the determination of costs.

[133] See: Approval Holder's submission, dated February 21, 2003, at paragraph 69.

[134] The Board notes that it does not normally award costs for travel. The Board is of the view that a party to an

[126] The evidence provided by Dr. Nyland did not contribute significantly to the Board's decision, and therefore no costs should be awarded for his participation. His evidence primarily evaluated the reports provided by the Approval Holder in its application. He did not complete any analyses of the data but only provided general comments on the information.[135]

[127] The Board noted in its Report and Recommendations that it found the EFCL's witness, Mr. Church, a "reliable and credible witness" with respect to industrial air emission control devices,[136] and the Board did rely on much of Mr. Church's evidence. His fees included work done by other associates, but as it was his testimony and his responses in cross-examination that the Board relied upon, only his hours will be considered. The fees charged, less GST, were for the amount of $28,571.19, and Mr. Church's billable rate was $175.00 and $200.00 per hour. When the contribution of other associates ($7,590.00) and disbursement costs ($2,343.69) are subtracted from the overall total, Mr. Church's total fee is $18,637.50, even though Mr. Church charged a flat rate of $12,000.00 on the first invoice. These hours were all charged at the rate of $175.00 per hour, and therefore he worked the equivalent of 106.5 hours in preparing his report and in preparing for the Hearing. Another 20 hours was added for time at the Hearing, and this time was billed at the rate of $200.00 per hour. Therefore, the total billed time is approximately 126.5 hours. The Board notes that he has charged for travel time from Toronto. The Board does not, as a general rule, allow costs for travel or travel time as it is not directly and primarily related to the matters contained in the Notices of Appeal. On the day before the Hearing in December, he billed for six hours, and on the day after the hearing, he billed eight hours for travel. In November, he billed six hours the day before the hearing and four hours on the day the hearing was adjourned. If the Board allows 24 hours for travel in total, the billable hours would be reduced to 102.5.

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appeal should be able to find a local lawyer or expert to represent their views. If a party chooses to retain a lawyer or expert from another location, the Board is of the view that such additional costs should normally be borne by that party.

[135] See: Transcript, December 17, 2002, at pages 169 to 174. For example, he stated that his comments were limited to "…the quality of the data that is used to drive the modelling." He continued by stating that the cited literature was often irrelevant or weak, and according to Dr. Nyland, the mass balance calculations could be challenged based on the geochemistry of the coal and the meteorological inputs. He did not, however, provide alternative inputs or determine the calculations using any alternatives.

[136] See: *Maga et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 156.

[128] If the Board allows $152.00 per hour for the legal services provided by Mr. Fitch, legal counsel for the EFCL, as is discussed below, it would appear fair to apportion an equivalent rate for Mr. Church. Mr. Fitch guided the evidence and therefore, in these circumstances, we will use the same rate for Mr. Church. Therefore, Mr. Church's total costs would be $15,580.00, and if that value were halved to take into consideration the balancing purpose of the Act as stated in section 2, the costs would be for the amount of $7,790.00 plus GST, $545.30, totaling $8,335.30.[137] The Board believes that this is an appropriate award of costs taking into account Mr. Church's contributions to the Hearing and the Board's Report and Recommendations.

[129] Counsel for the EFCL, Mr. Fitch, effectively cross-examined the witnesses of the Approval Holder and the Director. One of the important issues raised by Mr. Fitch was in respect to the performance of the existing ESP and the reporting requirements. This is one example:

> "Mr. Fitch: Thank you. So the follow-up question is what is the magic of the ESP actually being de-energized? I mean, isn't the real point that there are cases even when the ESP doesn't de-energize, the plant is running normally, and you've got a lot of particulate emissions in that stack?
>
> Mr. Meagher: Sometimes we get situations where the ESP is not working at its efficiency, and that could be due to a problem with the moisture level. As I showed you this morning, the condition of the gases coming into the tower. We will go above the 20 percent for some period of time, and after 6 minutes we have to report that to Alberta Environment."[138]

[130] Mr. Fitch also questioned the Approval Holder's witnesses regarding the ESP efficiency for collecting fine particulates if the ESP had tripped.[139] Another valid issue that was raised during cross-examination of the Director was with respect to the emission limits set at other comparable facilities.[140] He raised the issue of whether comparative modeling was done to evaluate the relative effectiveness of controlling emissions with the existing ESP, a new ESP, or

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137 In halving Mr. Church's fee, the Board is also taking into account that the original hearing date was adjourned.

138 *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 98, quoting the transcript, dated December 17, 2002, at page 310, lines 21 to 34.

139 See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at footnote 163.

140 See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at footnote 193.

a baghouse.[141] These lines of questioning significantly assisted the Board in developing its recommendations. Therefore, it is appropriate to award costs for the EFCL's legal counsel.

[131] Although the Board recognizes that counsel does, in all likelihood, receive assistance from other staff within the office, it is the efforts of Mr. Fitch in presenting his arguments concisely and effectively, and cross-examining witnesses effectively that has persuaded the Board to award costs. Mr. Fitch's claim includes 19.7 hours for other staff. As it was Mr. Fitch's ability to present the evidence and effectively cross-examine the witnesses, the costs associated with the other lawyers from his office will be deducted from the claim, therefore legal fees (without GST and disbursements) for Mr. Fitch totaled $43,200.00, representing 216 hours at $200.00 per hour. In his costs claim, he included time for travel to and from Edmonton, for reviewing the Lafarge material[142], for meeting with other lawyers in his firm, and for speaking with potential witnesses that were not used at the Hearing. This time, which the Board will not consider as it is not directly and primarily related to the issues identified, amounted to 27.4 hours. Also, the time claimed for working with the other counsel, including the counsel for the Approval Holder and the Director, in reaching a joint recommendation to the Board regarding the issues to be heard and the parties will not be included in the costs application. All of the counsel participated in reaching the agreement, and it would be unfair to penalize Inland for spending this time coming to an agreement that assisted all Parties and ultimately the Board. Therefore, an additional 9.4 hours will be taken off the total hours claimed. Based on these figures, the total hours the Board will consider for Mr. Fitch's costs claim is 179.2 hours.

[132] According to the Alberta Legal Telephone Directory 2002-2003, Mr. Fitch has been at the Alberta Bar for approximately 11 years. Based on the tariff of fees used by the Government of Alberta for outside counsel, a lawyer of his experience would be paid at the rate of $152.00 per hour. At this rate for the 179.2 hours allowed, he would be entitled to claim costs in the amount of $27,238.40. As all parties should be responsible for part of the costs of an appeal, all other matters being equal, the Board would award half of this amount, including GST. However, in this particular case, the Board was most impressed with most of the EFCL's

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[141] See: *Maga et al*. v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-R (A.E.A.B.) at paragraph 154.

[142] See: *Kievit et al*. v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re*: Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.).

witnesses and with Mr. Fitch's guidance in presenting their evidence. For example, Mr. and Ms. Quinn provided very important testimony on the effect of the facility on them as residents in the adjacent neighbourhood. The Board is of the view that their evidence was an important contribution to the Hearing, as it clearly set out the potential impact of the Plant on the local residents. Further, Mr. Fitch brought in Mr. Church who was a reliable and knowledgeable witness, and Mr. Fitch effectively used Mr. Church's data to cross-examine the Approval Holder's panel of witnesses. In this situation, and considering the complicated technical data that had to be presented and explained, the Board will award additional costs towards Mr. Fitch's legal costs as he effectively brought forward the issues and evidence. As the Board has stated in a previous decision:

> "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."[143]

In this case, Mr. Fitch's presentations, including evidence such as the Quinn's, clearly met all of these requirements. Therefore, the Board determines that it will award a total of 75 percent of the entitled legal costs claimed by Mr. Fitch. This amounts to a total of $20,482.80, plus $1,430.02 for GST, for legal fees.

[133] The disbursements claimed included $1,587.62 for travel and $1,595.09 for photocopying charges (totaling $3,182.91). As the Board does not usually accept travel time, it should not, as a general rule, accept travel costs. The Board accepts that the submissions provided by the EFCL were succinct and relevant, thus the Board can accept the costs for photocopying. These costs amount to $1,595.09 in disbursements, plus $111.66 for GST.

[134] Thus, the total costs awarded to the EFCL will be $8,335.30 for their witness and $23,619.57 for legal fees and disbursements, for a total of $31,954.87.

E. Who Should Bear the Costs?

[135] In any appeal, the parties involved have a right to ask for costs from any other party. Therefore, even though Mr. Hayes indicated that he felt threatened by the Approval

Holder,[144] Inland did have the right to ask for costs. (The Approval Holder initially reserved its right to claim costs, but later withdrew that claim.)[145] However, it is also important that the parties realize that it is the Board that makes the determination as to whether costs will or will not be awarded.

[136] The Appellants requested that costs should be awarded against the Director and/or Inland.[146]

[137] 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,[147] that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

[138] In this case, the Director's decision was not overturned by the Board but was, albeit, significantly, 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*, 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

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143 See Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-151-C (A.E.A.B.).

144 See: Mr. Hayes' submission, dated February 5, 2003.

145 See: Approval Holder's letter, dated December 19, 2002.

146 See: EFONES' submission, dated February 7, 2003, and EFCL's submission, dated February 5, 2003.

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

> 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."[148]

[139] 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 as inappropriate as defined by the legislative authority, and it certainly was not an exercise of bad faith. What the Board stated in its decision that, given the location of the facility and potential for health effects, and the fact that the Director was aware of the number of people who were expressing concerns regarding the Substitution Fuel Project, extra steps should have been implemented in these circumstances. Although the Board would have preferred that the Director would have taken these additional steps, and that his answers were more direct, the Board does not find that this constitutes the "special circumstances" contemplated by the court, or this Board, to award costs against the Director.

[140] The Board finds no special circumstances or misconduct of the Director and, therefore, does not view this as an appropriate case in which to order costs against the Director.

[141] In previous costs decisions against a project's proponent, the Board has 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…."[149] As the Board has stated before, "…these costs are more properly fixed upon the body proposing the project, filing the

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[148] *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board*) (9 April 2001) Action No. 0001-11527 (Alta. Q.B.) at paragraphs 33 to 35.

[149] 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.)

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."[150]

[142] The Approval Holder argued that it should not be required to pay all of the legal fees as the Appellants had divided the issues so EFONES presented arguments on public participation and emission effects on human health, and the EFCL provided arguments on emission limits and best available demonstrated technology. Therefore, according to the Approval Holder, costs awarded should be reduced as they each only argued some of the issues. The Board sees the approach taken by the Appellants as a valuable method of utilizing resources. Even though the Board may have emphasized the issues examined by one lawyer more than those argued by the other lawyer in its Report and Recommendations, it does not justify making them "share" any costs awarded. Each lawyer presented their case on their issues, and time was better spent using this method as evidence and arguments were concise and thorough. This allowed the Appellants to provide full arguments on the issues rather than each provide only part arguments on the matters to be heard. It was also a way to avoid duplication of the evidence and arguments. As one of the factors the Board will look at when determining if costs should be awarded is whether the appellants had combined resources, this is a good example of co-operation between the Appellants and their respective counsel.

[143] The Board has clearly set out its approach to costs in regard to solicitor fees in two prior decisions and believes that these reasons are pertinent to this decision as well. 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 Schedules to the Rules of Court. Such amounts are, at all times, subject to the overriding discretion of the court. They are not intended to compensate for the full costs of advocacy, even in the court system where a 'loser pays' approach is the norm.
>
> 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

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[150] Re: *Mizeras* (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.) at paragraph 33.

> 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."[151]

[144] 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. (Cost 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."[152]

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

IV. DECISION

[146] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act,* the Board awards costs, to be payable by Lehigh Inland Cement Limited, as follows:

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[151] Costs Decision re: *Cabre Exploration Ltd*. (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraphs 10-11; Re: *Mizeras* (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.) at paragraphs 17 to 18.

[152] Re: *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.) at paragraph 44.

1.	Mr. Neil Hayes	$ 90.32
2.	Edmonton Friends of the North Environmental Society, Mr. Ron and Ms. Gail Maga and Mr. Ron Maga Jr., Mr. Cameron Wakefield, Mr. A. Ted Krug, Mr. Stanley Kondratiuk, and Dr. Roger G. Hodkinson	$ 15,775.82
3.	Edmonton Federation of Community Leagues, and Ms. Anna T. Krug	$ 31,954.87
	TOTAL	$ 47,821.01

[147] The Board orders costs to be paid within 60 days of issuance of this decision.

Dated on June 27, 2003, at Edmonton, Alberta.

"original signed by"
William A. Tilleman, Q.C.
Chair

"original signed by"
Dr. Steve E. Hrudey
Board Member

"original signed by"
Mr. Al Schulz
Board Member