ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 23, 2005

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

-and-

IN THE MATTER OF appeals filed by Mike Northcott with respect to *Water Act* Licence Nos. 00192603-00-00 and 00206791-00-00 and *Environmental Protection and Enhancement Act* Approval No. 76893-00-01 issued to Lafarge Canada Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Northcott* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (23 December 2005), Appeal Nos. 04-009, 011 and 012-CD (A.E.A.B.).

BEFORE: Mr. Ron V. Peiluck, Vice Chair,
Dr. Alan J. Kennedy, Board Member, and
Mr. Al Schulz, Board Member.

SUBMISSIONS BY:

Appellant: Mr. Mike Northcott, represented by Mr. Richard Secord, Ackroyd Piasta Roth & Day LLP.

Director: Mr. Tom Slater, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

Approval Holder: Lafarge Canada Inc., represented by Ms. Cherisse Killick-Dzenick, Reynolds, Mirth, Richards & Farmer LLP.

EXECUTIVE SUMMARY

Alberta Environment issued two *Water Act* Licences and an *Environmental Protection and Enhancement Act* Amending Approval to Lafarge Canada Inc. (Lafarge) for a sand and gravel operation, near Calahoo, Alberta. The Board received Notices of Appeal from Mr. Mike Northcott appealing the Licences and the Amending Approval.

A hearing was held, and the Board submitted its recommendations to the Minister. The Minister accepted the Board's recommendations, confirming the Approval and Licences with a number of the recommended additional conditions.

Before the close of the hearing, Mr. Northcott advised that he may wish to make an application for costs. Lafarge and Alberta Environment indicated they did not intend to make an application for costs. After the release of the Minister's decision, Mr. Northcott submitted a request for costs for the total sum of $12,337.38.

The Board determined legal counsel for Mr. Northcott did assist the Board in its process. Therefore, the Board awarded costs in the amount of $5,071.17 to Mr. Northcott, to be paid by Lafarge.

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I. BACKGROUND

[1] On April 30, 2004, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Licence Nos. 00192603-00-00 and 00206791-00-00 (the "Licences") under the *Water Act*, R.S.A. 2000, c. W-3, and Amending Approval No. 76893-00-01 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Lafarge Canada Inc. (the "Approval Holder") in relation to a sand and gravel operation, commonly known as the Onoway Wash Plant (the "Wash Plant"), near Calahoo, Alberta. The Wash Plant has existed since the mid-1950s and was originally authorized by way of a water licence issued in 1957 (the "1957 Licence"), which it still holds today.[1] The Wash Plant is located next to and uses water from Kilini Creek, a tributary of the Sturgeon River, which is in the North Saskatchewan River Basin.

[2] Licence No. 00192603-00-00 ("Licence 192603") authorizes the diversion of up to 80,175 cubic metres of water annually from Pit 92 ("Pit 92"), located in SW 31-53-01-W5M, to Kilini Creek for the purpose of recharging the Wash Plant's settling ponds. Licence No. 00206791-00-00 ("Licence 206791") authorizes the diversion of up to 1,764,000 cubic meters of water annually from Kilini Creek, through works located in W 06-54-01-W5M, for the purpose of aggregate washing, and also authorizes the diversion of water from Pollock Pond ("Pollock Pond"), located in SW 7-54-01-W5M, for the purpose of maintaining instream flows in Kilini Creek.

[3] The Approval, an amendment to an existing approval that was initiated by the Director, imposes a number of additional monitoring and reporting conditions on the Wash Plant. The Approval amends existing Approval No. 76893-00-00, which allows for the opening up, operation, and reclamation of a sand and gravel pit on W 7-54-1-W5M, 11-54-2-W5M, W 12-54-2-W5M, SE 12-54-2-W5M, W 1-54-2-W5M, N 2-54-2-W5M, SE 2-54-2-W5M, N 3-54-2-

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[1] The 1957 Licence (No. 3318) was issued as an interim licence in May 1957. It was updated and reissued as an interim licence on February 6, 1989, and issued as a licence under the *Water Resources Act*, R.S.A. 1980, c. W-5, on March 5, 1990. The 1957 Licence authorizes the diversion of 1,400 acre-feet (1,726,875 cubic metres) annually from Kilini Creek, and permits the "consumptive use" of 280 acre-feet (345,375 cubic metres). It also allows for annual losses of 10 acre-feet (12,335 cubic metres) and requires return flows to Kilini Creek of 1,110 acre-feet (1,369,165 cubic metres). (See: Director's submission, dated October 20, 2004, at Tab 2.) Since approximately

W5M, and SE 10-54-2-W5M, and the operation of a sand and gravel wash plant and infrastructure located on W 6-54-1-W5M.

[4] On May 28, 2004, the Environmental Appeals Board (the "Board") received three Notices of Appeal from Mr. Mike Northcott (the "Appellant"), appealing the Licences and Approval. The Appellant also requested a stay of the Licences and Approval pending the appeals.

[5] On June 1, 2004, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals. The Board requested the Appellant provide written comments regarding the request for a stay.

[6] On August 3, 2004, the Board wrote to the Parties informing them the Board had reviewed the written submissions in relation to the stay, and the Board decided to deny the request for a stay and to proceed directly to a hearing of these appeals.

[7] In response to the Board's Notice of Hearing, the Board received intervenor requests from the Onoway River Valley Conservation Association (the "ORVCA" or the "Intervenor") and Mr. Robert Brian Ford. Based on the submissions provided by the Parties, the Board decided not to accept Mr. Ford's request for intervention, as he did not provide the Board with sufficient information as to his interest in the appeals. The Board permitted the ORVCA to participate in the Hearing via written submission only and stated they would be permitted to discuss only certain issues identified in their intervenor request.[2] The Board understands the Appellant is an active member of the ORVCA.

[8] Between October 20 and 26, 2004, the Board received the submissions from the Parties. The Hearing was held on November 5, 2004, in Edmonton, Alberta. Before the close of the Hearing, the Appellant advised that he may wish to make an application for costs.

1971, the 1957 Licence has also authorized an on-stream dam and impoundment. (See: Appellant's submission, dated October 25, 2004.)

[2] See: Board's letter of October 19, 2004, where the Board stated the issues the Intervenor would be allowed to address were: the loss of flow downstream past the dam on Kilini Creek; settling pond discharge into creek bed/fish habitat/public lands; the predicted hydrological changes to the area of 820 hectares more or less that is to be strip mined below the water table; the major aquifer that provides source water to many domestic users; change to the hydrologic cycle/weather patterns; and cumulative affects within the Sturgeon River drainage basin as a whole.

[9] The Board submitted its Report and Recommendations to the Minister on January 6, 2005. The Minister issued a Ministerial Order on February 28, 2005, accepting the Board's recommendations and confirming the Approval and Licences with additional conditions.[3]

[10] On March 3, 2005, the Board notified the Parties of the submission process regarding costs. The Parties provided their submissions on March 15 and April 6, 2005.

II. SUBMISSIONS

A. Appellant

[11] The Appellant submitted a costs claim for legal costs incurred, including $14,525.00 for legal fees, $636.51 for disbursements and other charges, and $1,061.31 for GST, for a total costs claim of $16,222.82.[4] The Appellant explained the costs submitted covers services including reviewing documents, preparing and filing written submissions, preparing for and attending the one day Hearing, examination-in-chief and cross-examination of witnesses, and providing final and reply arguments.

[12] The Appellant stated the costs claimed are directly related to the matters contained in his Notices of Appeal and the preparation and presentation of his submissions. The Appellant submitted the Board should exercise its discretion and award 75 percent of the Appellant's legal fees plus disbursements and GST. He argued this would be consistent with and would further the goals set out in section 2 of EPEA and the *Water Act*. The Appellant stated he made a substantial contribution to the appeals and had considerable success.

[13] The Appellant stated he required financial resources to make an adequate submission, as he has a fixed, modest income and was unable to access or use any other funding sources. He further stated his monthly income is small and he is just able to make ends meet. The Appellant explained that without legal assistance, his written submission and oral evidence would not have been as effective.

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[3] See: *Northcott* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (6 January 2005), Appeal Nos. 04-009, 04-011 and 04-012-R (A.E.A.B.).

[4] Counsel for the Appellant, Mr. Richard Secord, reduced his fees from $14,525.00 plus GST to $10,893.75 plus applicable GST.

[14] The Appellant submitted sections 2(a), (b), (c), (d), and (f) of the *Water Act*,[5] and section 2(a), (d), (f), and (g) of EPEA,[6] support costs being awarded to him. He stated that with regard to section 2(d) of the *Water Act* and sections 2(f) and (g) of EPEA, and the "...complexity and difficulty of these appeals, meaningful participation in the appeals by Northcott required professional assistance, which he should not be required to entirely pay for himself."[7]

[15] The Appellant argued he made a useful and substantial contribution to the appeal, as the Board recommended a number of variations to the Approval and Licences. The Appellant argued that, "Although the Directors' decisions were not overturned by the Board, they were significantly varied."[8] The Appellant referred to the Board's Report and Recommendations, including the Board's discussion of the wording of the Licences being unclear and the issue of instream flow requirements and the monitoring information.

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5 These sections of the *Water Act* provide:

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

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

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

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

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

(f) the important role of comprehensive and responsive action in administering this Act.";...."

6 These sections of EPEA state:

"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;...."

7 Appellant's submission, dated March 15, 2005, at paragraph 22.

8 Appellant's submission, dated March 15, 2005, at paragraph 27.

[16] The Appellant stated he made articulate presentations that advanced the public interest, and he focused on the 15 matters contained in his Notices of Appeal. He explained it took "...a significant amount of effort and preparation to present evidence on so many issues in an intelligible and coherent manner...."[9]

[17] The Appellant argued his presentation was made in a timely and efficient manner so as not to unduly delay or prolong the Hearing. He submitted the costs are reasonable and reflect only the actual expenditures incurred by his counsel in the preparation of the submission and attendance at the Hearing.

[18] The Appellant broke down the costs for preparing and filing the written submission (46.6 hours x $250.00 = $11,650.00) and attendance at the Hearing (11.5 hours x $250.00 = $2,875.00). The Appellant submitted the effectiveness of his participation was due in part to the efforts of his legal counsel, Mr. Richard Secord. According to the Appellant, his legal counsel was able to elicit evidence within tight time limits, and he was able to cross-examine the Director and the Approval Holder efficiently.

[19] The Appellant explained Mr. Secord was called to the Alberta Bar in 1980 and has been practicing in the area of environmental law since the mid 1980s. He stated his hourly rate of $250.00 per hour is reasonable for a lawyer who has been practicing for 24 years.

[20] The Appellant requested final costs in the sum of $12,337.38, consisting of $10,893.75 for legal fees, $636.51 for disbursements, and $807.12 for applicable GST, to be paid by the Approval Holder.

B. Approval Holder

[21] The Approval Holder argued no costs should be awarded in these appeals, and the individual Parties should be responsible for their own costs.

[22] The Approval Holder argued the Appellant made minimal contribution to the Hearing, and the evidence he presented was based on conjecture and hearsay and not supported by scientific evidence. The Approval Holder stated a lot of the information presented and

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9 Appellant's submission, dated March 15, 2005, at paragraph 32.

prepared by the Appellant was not relevant or useful to the appeals, and therefore was not useful to the Board in understanding the issues. The Approval Holder argued the points raised by the Appellant dealing with the construction of the existing facilities, past non-compliance by a previous owner, and policy considerations were not properly before the Board and resulted in an "...ineffective and inefficient use of resources of the Board and the parties."[10]

[23] The Approval Holder stated it took a proactive approach in ensuring it complied with the legislation and in communicating with the community. The Approval Holder stated it commissioned a number of expert reports, which were provided to the Director and accepted by the Board. It stated the reports assisted the Board with respect to water source, quantity, and quality.

[24] The Approval Holder argued solicitor-client costs or substantial costs in relation to the solicitor-client costs should not be awarded. It also argued costs should not be awarded on account of the amendment to the wording of the existing conditions in the Approval and Licences. It submitted that, if costs are awarded, they should be minimal, 10 percent of what is claimed.

[25] The Approval Holder stated the Board found no credible evidence presented by the Appellant to support his position that the Wash Plant negatively affected his groundwater well. The Approval Holder stated the Board accepted the Approval Holder's evidence on water supply, which indicated no connection between the Wash Plant operations and the Appellant's water supply, and the bedrock is essentially impermeable to water percolating down from the sand and gravel formation.

[26] The Approval Holder argued the Board also rejected the Appellant's argument that taking of the water would interfere with the recharge capability of Kilini Creek and Kilini/Bogstad Lake. The Approval Holder stated the Board also rejected the Appellant's argument that increased concentrations of certain heavy metals in his well were caused by the Wash Plant.

[27] The Approval Holder stated the Appellant's information that his use and enjoyment of Kilini Creek was diminished due to the Director's treatment of Kilini Creek, was

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[10] Approval Holder's submission, dated received April 5, 2005, at paragraph 3.

anecdotal, speculative, and based on hearsay. The Approval Holder stated there is no connection between the Wash Plant and the Appellant's argument, and the submission did not contribute to the issues on appeal.

[28] The Approval Holder argued the Appellant raised a number of issues that were not properly before the Board, and the irrelevant issues took a substantial amount of time at the Hearing for which costs should not be awarded. The Approval Holder stated the irrelevant issues included the Appellant's arguments regarding past non-compliance of a previous owner, the drawdown of pit 92, the height of the culverts, the mixing of surface and groundwater, and the design of the Wash Plant.

[29] The Approval Holder stated the Appellant requested the Approval and Licences be cancelled, which was not done by the Board, and most of the changes were primarily to clarify the Director's wording or clerical changes. The Approval Holder argued it did not draft or review the Approval and Licences prior to them being issued, and therefore, it should not be ordered to pay costs with respect to this. The Approval Holder stated the changes did not change the operations of the Wash Plant and the recommendations did not come as a result of any lack of action or questionable action by the Approval Holder.

[30] The Approval Holder explained it already had monitoring systems in place and the additional monitoring required as a result of the recommendations supplemented the existing monitoring systems. It argued that, if the Appellant is awarded costs for the issue of monitoring, it should be minimal.

[31] The Approval Holder stated the Appellant's attempt to have the Approval Holder responsible for the past operator's actions was inappropriate for the Hearing and was an ineffective and inefficient use of resources.

[32] The Approval Holder argued costs should not be awarded to the Appellant for advancing policy concerns directed at Alberta Environment, as the Hearing was the inappropriate forum for advancing such arguments and the submissions had nothing to do with the Approval Holder.

[33] The Approval Holder stated it recognized its obligations and responsibilities in addressing environmental concerns, and it took proactive steps, such as taking immediate action to rectify non-compliance issues and establishing lines of communication with area residents.

[34] The Approval Holder stated the Appellant had entries on his costs submission referring to conferences and correspondence with Mr. Ian Skinner, but neither Mr. Skinner nor the Onoway River Valley Conservation Association, of which Mr. Skinner is a member, were appellants in these appeals. The Approval Holder stated there was insufficient evidence as to whether ORVCA was contributing to the costs.

[35] The Approval Holder argued this is not an exceptional case where solicitor-client costs should be considered, and if costs are awarded, they should be minimal as the Appellant was only partially successful in the appeals on the issue of amending the wording of the Approval and the Licences.

[36] The Approval Holder argued the situation is the same in this case as it was in the Board's previous decision, the *City of Calgary*.[11] The Approval Holder submitted that even though the Appellant "...may have contributed to the Act's objective and guiding principles, his evidence was weak, irrelevant, speculative and based on hearsay. Costs should not be awarded."[12]

C. Director

[37] The Director stated the Appellant is only seeking costs against the Approval Holder. The Director submitted that he should not be responsible for paying any of the costs claimed by the Appellant. The Director stated he is in a unique role in these matters as he is the statutory decision-maker whose decision is being appealed. The Director explained that, because he is the statutory decision-maker on whether or not to issue an approval applied for with certain terms and conditions, he is an automatic party to an appeal. The Director stated the courts and the Board have recognized this statutory role and have considered it to be a vital factor in not ordering the Director to pay costs, as long as the Director was acting in good faith.

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11 See: Cost Decision #2 re: The City of Calgary (Fay Ash) (2 July 1998), Appeal No. 97-032-C-2 (A.E.A.B).

12 Approval Holder's submission, received April 5, 2005, at paragraph 33.

[38] The Director submitted he "....acted in good faith in receiving the concerns of Mr. Northcott that resulted in the applications for the Licenses and Approval that were the subject of this appeal."[13] The Director argued there were no special circumstances that should result in costs being assessed against the Director.

III. ANALYSIS AND DISCUSSION

A. Statutory Basis for Costs

[39] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which provides: "The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid." This section gives the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*:

> "Under s. 88 [(now section 96)] of 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."[14]

Further, Mr. Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs ... and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid....'" (Emphasis in the original.)[15]

[40] The sections of the *Environmental Appeal Board Regulation*,[16] (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

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13 Director's submission, dated April 6, 2005, at paragraph 26.

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

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

16 *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

(a) the matters contained in the notice of appeal, and
(b) the preparation and presentation of the party's submission.

...

20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

(a) whether there was a meeting under section 11 or 13(a);
(b) whether interim costs were awarded;
(c) whether an oral hearing was held in the course of the appeal;
(d) whether the application for costs was filed with the appropriate information;
(e) whether the party applying for costs required financial resources to make an adequate submission;
(f) whether the submission of the party made a substantial contribution to the appeal;
(g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
(h) any further criteria the Board considers appropriate.

(3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of

(a) any other party to the appeal that the Board may direct;
(b) the Board.

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

[41] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of EPEA as found 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;
(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; ...
(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...
(i) the responsibility of polluters to pay for the costs of their actions;
(j) the important role of comprehensive and responsive action in administering this Act."

[42] Similar provisions exist under section 2 of the *Water Act*:

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

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
(b) the need for Alberta's economic growth and prosperity;
(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
(d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
(f) the important role of comprehensive and responsive action in administering this Act."

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

[44] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in the *Water Act*, EPEA, and the Regulation should apply in the particular claim for costs.[17] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[18] In *Cabre*, Mr. Justice Fraser noted that section "...20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs..." and concluded "...that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[19]

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

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
> (b) directly related to the matters contained in the Notice of Appeal; and
> (c) made a significant and noteworthy contribution to the goals of the Act.
>
> If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[20]

[46] Under section 18(2) of the Regulation, costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.[21]

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17 *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.).

18 *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.) (*"Paron"*).

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

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

21 *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

B. Courts vs. Administrative Tribunals

[47] In applying these costs provisions, it is important to remember there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings or proceedings. As the public interest is part of all hearings before the Board, it must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply making a determination of a dispute between parties. Therefore, the Board is not bound by the "loser-pays" principle used in civil litigation. The Board will determine whether an award of costs is appropriate considering the public interest generally and the overall purpose as defined in section 2 of EPEA and the *Water Act*.

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

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the 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."[22]

[49] The effect of this public interest requirement was also discussed by Mr. Justice Fraser in *Cabre*:

> "...administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green, supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to

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[22] *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."

> 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.'"[23]

[50] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[24] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.[25]

C. Consideration and Application of Criteria

[51] The Appellant's costs totaled $16,222.82, which included $14,525.00 for legal fees, $636.51 for disbursements and other charges, and $1,016.75 for GST. As is common practice in the legal field, Mr. Secord discounted his legal fees, so the total costs application was for $12,337.38.

[52] The Board acknowledges and appreciates the efforts of counsel for all of the Parties in keeping their arguments focused on the specified issues and for presenting their arguments within the time allotted.

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

[24] *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.).

[25] Section 2 of EPEA states:

> "(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ... (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions...."

[53] The Appellant, through his counsel, raised a number of important concerns regarding the Approval and Licences. As a result, many of the conditions in the Approval and Licences were varied in order to have clarity for the Approval Holder, to know what is expected of it; the Director, to be able to enforce the conditions easier; and the public, to know what is allowed under the Approval and Licences.

[54] The issues in these appeals were complex, and counsel for the Appellant handled the issues well and in a very professional and coherent fashion. The Appellant's counsel was able to make the important points relevant to the Board and its decision-making. He highlighted the monitoring issues and the need for a water balance record. It is this type of assistance to the Board that is key in determining whether legal costs should be awarded. As a result of the arguments presented, the Board recommended changes to the Approval and Licences to include better monitoring and recording and the need for a water balance record. It was counsel for the Appellant who managed to keep arguments focused on the identified issues. Also the costs requested for representation of this caliber were reasonable.

[55] The Board notes the Approval Holder did state minimal costs may be in order in these circumstances, as the Appellant did raise the issue of additional monitoring that was incorporated into the Board's recommendations and the Ministerial Order. The Approval Holder stated 10 percent of the costs claimed would be justified in this case.

[56] Given the number and complexity of issues argued in these appeals, the Board believes it is appropriate to award costs.

[57] When awarding costs, the Board believes parties should be responsible for some of the costs as part of their responsibility to protect the environment as stated in section 2 of the Water Act and EPEA. Therefore, the Board frequently uses 50 percent of a reasonable claim as a starting point, and will adjust the amount awarded, either up or down, based on the level of contribution the party made to the hearing. In this case, counsel for the Appellant, Mr. Secord, reduced his claim from $16,222.82 to $12,337.38. The total amount was based on 58.1 hours of legal services at a rate of $250.00 per hour ($14,525.00), plus $636.51 for disbursements and other charges, and $1,061.31 for GST.

[58] Depending on the number and complexity of the issues to be heard, the Board accepts as a general rule, that lawyers will spend three to six hours preparation time for each hour spent in the Hearing. Mr. Secord's records indicate 11.5 hours on the file on the date of the Hearing, including attendance at the Hearing and preparation time. This would mean 34.5 to 69 hours of preparation time plus the 11.5 hours for the Hearing. Mr. Secord's charge for 58.1 hours is well within the range expected.

[59] The Board appreciates the fact that Mr. Secord did reduce his total costs for legal services to $10,893.75 plus $762.56 for GST, for a total of $11,656.31. Taking into consideration the Board's belief that parties should bear the responsibility, including the costs, of bringing environmental matters before the Board, the Board will use 50 percent of $10,893.75 ($5,446.88) as its starting point in awarding costs.

[60] In these appeals, a major problem was the wording of the Approval and the Licences. The Board varied many of the conditions in order to provide clarity for all of the Parties. The Board appreciates the Appellant raising these issues in his appeals. However, it does not seem reasonable to require the Approval Holder be responsible for all of the costs associated with this part of the appeal. The Board notes the Approval Holder's comments that it did not write or review the Approval or Licences before they were issued. Therefore, the costs awarded will be reduced to take this into consideration. Although the Board found numerous conditions needed to be clarified, the Director did not act in bad faith. Therefore, the Board does not consider these as exceptional circumstances that warrant costs being awarded against the Director. The Board believes the reduction in this case is consistent with the purpose of EPEA that all Albertans have a responsibility in the protection of the environment.

[61] In these particular appeals, the Appellant did raise a number of issues, the most significant being the requirement for monitoring and the need for a water balance. However, there were issues raised that cannot be classified as the Approval Holder's responsibilities, primarily the need for clarity in the terms and conditions of the Approval and Licences. As a large part of the evidence presented was in relation to the clarity of the Approval and Licences, the Board does not consider it appropriate to assess the full 50 percent of the costs against the Approval Holder. It is also important to note that the Board is not willing to assess costs against the Director, as will be explained in greater detail below. Therefore, the Board reduces the

amount it will award to 40 percent of the original legal fees claimed. This would result in an award of costs for legal fees of $4,357.50, plus $305.03 for GST, for a total of $4,662.53.

[62] Mr. Secord charged $636.51 for disbursements and other charges, plus $44.56 for GST. The disbursements were kept to a minimum and were reasonable considering the number of issues that had to be discussed. However, little information was provided regarding the disbursements other than general categories of costs. Most of the costs claimed relate to photocopying charges. Part of the responsibility of presenting arguments before the Board includes the preparation of arguments and providing copies to the other Parties and the Board. It is a required part of appearing at a Board hearing. As the disbursement costs were reasonable, the Board is only reducing the disbursements claimed by 40 percent. The Board awards disbursement costs of $381.91, plus the applicable GST of $26.73.

[63] Therefore, the costs awarded to the Appellant will be $4,357.50 for legal costs, $381.91 for disbursements and other charges, and $331.76 for applicable GST, for a total costs award of $5,071.17.

[64] The principal reason for awarding costs for Mr. Secord is the significant assistance that Mr. Secord, on behalf of the Appellant, gave the Board with respect to the 15 issues identified by the Board. The Board has awarded costs in previous decisions where it has found that a party made a substantial contribution to the hearing.[26] The Board finds Mr. Secord's fees very reasonable considering his experience and expertise. Mr. Secord has over 25 years experience and has appeared before this Board, and other tribunals, on previous occasions.[27] The Board found Mr. Secord to be very helpful and very professional. The Board is quite sure that without his assistance, the processing of the appeals would have been longer and more costly for all Parties.

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[26] See: Costs Decision: Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.); *Maga et al.* (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (A.E.A.B.); Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098 and 101-CD (A.E.A.B.); Costs Decision re: *Kozdrowski* (7 July 1997), Appeal No. 96-059 (A.E.A.B.); and Costs Decision re: *Paron et al.* (8 February 2002) Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.). See also: Costs Decision re: *Mizeras, Glombick, Fenske, et al.* (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.).

[27] According to the Alberta Legal Telephone Directory 2004-2005, Mr. Secord was admitted to the Law Society of Alberta in 1980 and as a result, has 25 years of legal experience in Alberta. Based on the tariff of fees used by the Government of Alberta for outside counsel with his level of experience, the rate would be $250.00/hour. The Board considers the Government of Alberta rate is an appropriate tariff against which to judge the

[65] The arguments raised regarding these issues resulted in a number of amendments to the Approval and Licences that were accepted by the Minister.[28]

[66] With regard to costs associated with legal counsel, the Board stated in *Mizera*:

> "In assessing costs for legal counsel and expert witnesses, the Board reiterates the importance of current specific data/information in their hearings, concise and organized cases and for Parties to have access to informed, experienced assistance in preparing their cases.... In this appeal ... many aspects of the presentations by Parties claiming costs added value to the Board's overall process. The Board's costs awards are based on this added value." [29]

[67] Through Mr. Secord, the Appellant furthered the public interest and the goals of the *Water Act* and EPEA. As the Board stated in *Paron*:

> "In any decision on costs, the purpose of the Act must be considered. The purposes of the Act are found in section 2 .... While all of these purposes are important, the Board is of the view 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 action...' is particularly instructive in making its costs decision."[30]

[68] The costs claimed on behalf of Mr. Secord are reasonable and there is no doubt his contribution on behalf of the Appellant was beneficial to the appeal process for all Parties concerned and the Board, as required by sections 18(2) and 20(2)(f) of the Regulation. However, the Board is unwilling to award costs on a solicitor-client basis. Pursuant to section 2(f) of EPEA and 2(d) of the *Water Act*, the Appellant must accept the responsibility of bearing some of the costs related to the appeals.

D. Who Should Bear the Costs?

[69] 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,[31] that costs

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

[28] See: *Northcott* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (6 January 2005), Appeal Nos. 04-009, 04-011 and 04-012-R (A.E.A.B.).

[29] 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 26.

[30] Costs Decision re: *Paron et al.* (8 February 2002) Appeal Nos. 01-002, 003 and 005-CD (A.E.A.B.) at paragraph 30.

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

should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

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

> "I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board's decision, that the Department should be treated differently from other parties to an appeal.
>
> The Board states in its written submission for this application:
>
> > 'There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.'
>
> In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise."[32]

[71] In this case, the Director appropriately exercised his judgment in performing his statutory duties. His actions could not be considered as inappropriate, and were certainly not exercised in bad faith. Although the Board would have preferred that the Director would have

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(Alta. Q.B.).

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

ensured the conditions in the Approval and Licences were more clearly written, the Board does not find that this constitutes the "special circumstances" contemplated by the court, or this Board, to award costs against the Director.

[72] In previous costs decisions where costs have been awarded against the project 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 [EPEA] into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties...."[33] As the Board has stated before, "...these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the projects financing, than upon the public at large as would be the case if they were to be assessed against the Department."[34]

[73] The Approval Holder argued it should not be responsible for any costs awarded to the Appellant, but if the Board determined costs should be awarded in recognition of the monitoring provisions added to the Approval and Licences, the costs awarded should be minimal.

[74] In the circumstances of these appeals, costs will be ordered against the Approval Holder.

IV. CONCLUSION

[75] For the forgoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Appellant in the amount of $5,071.17 for the assistance of the Appellant's counsel, Mr. Richard Secord, to be payable by the Approval Holder, Lafarge Canada Inc. The Approval Holder shall pay this award of costs to the Appellant within 60 days of issuance of this decision and payment shall be made on trust to the

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[33] 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.)

[34] 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.

Appellant's counsel, Mr. Richard Secord. The Approval Holder is requested to provide confirmation to the Board that the payment has been made.

Dated on December 23, 2005, at Edmonton, Alberta.

"*original signed by*"

Mr. Ron V. Peiluck
Vice-Chair

"*original signed by*"

Dr. Alan J. Kennedy
Board Member

"*original signed by*"

Mr. Al Schulz
Board Member