ALBERTA
ENVIRONMENTAL APPEAL BOARD

COST DECISION

Date of Hearing: March 4 - 7, 1997
Date of Decision: July 7, 1997

IN THE MATTER OF Sections 84 and 88 of the Environmental Protection and Enhancement Act (S.A. 1992, c. E-13.3 as amended);

-and-

IN THE MATTER OF applications for costs related to an appeal filed by Ms. Bernice Kozdrowski with respect to Approval No. 10348-01-00 issued by the Director, Chemicals Assessment and Management Division, Alberta Environmental Protection to Laidlaw Environmental Services (Ryley) Ltd. for the operation and reclamation of a hazardous waste storage and hazardous recyclable storage and processing facility and the construction, operation and reclamation of a hazardous waste landfill.

Cite as: Cost Decision re: Bernice Kozdrowski.

PANEL MEMBERSHIP		Dr. William A. Tilleman, Chair Dr. John P. Ogilvie Dr. M. Anne Naeth
HEARING APPEARANCES	Appellant:	Ms. Bernice Kozdrowski, represented by Mr. Mitch Bronaugh; Dr. Robert MacMillan; Dr. Jim Plambeck
	Other Parties:	Ms. Leslie Price, Ms. Marilynn Fenske and Ms. Alice Mahlum, represented by Ms. Karin Buss of Ackroyd, Piasta, Roth and Day; Mr. Adelhardt Glombick
		Mr. Robert Wilde, Ms. Donna Clandfield and Ms. Irma Rowlands; Dr. David Schindler; Mr. Rainer Ebel
		Director, Chemicals Assessment and Management Division, Alberta Environmental Protection, represented by Mr. William McDonald (counsel), Mr. Silver Lupul, Mr. John Taggart, Mr. Tony Epp, Mr. Sadiq Unwala and Mr. Andrew Cummins
		Laidlaw Environmental Services (Ryley) Ltd., represented by Mr. Ron Kruhlak (counsel), McLennan Ross; Mr. David McNeil, Mr. Don White, Mr. Tom Dance and Mr. Paul Ruffell

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I. BACKGROUND

[1] The Environmental Appeal Board (Board) issued a Report and Recommendations for Appeal 96-059 on June 12, 1997. At the end of the hearing, the Board received several requests for costs; the Board advised that it would issue a decision on costs at a later date. The following is the Board's decision on costs.

II. CLAIM FOR COSTS

[2] The Board received several requests for costs from the Appellant and all the parties who supported her. The Director and the Approval Holder (Laidlaw Environmental Services (Ryley) Ltd., hereinafter "LES") did not ask for costs and both state that costs should not be awarded against them. Their arguments will be considered later.

[3] The summary of the final cost application is:

The Appellant, Bernice Kozdrowski:

Mitch Bronaugh	$ 8812.05
Karin Buss (legal fees)	$ 695.50
Bernice Kozdrowski (personal)	$ 227.82
Dr. MacMillan	$ 2407.50
Dr. Plambeck	$ 5295.04
TOTAL	$17,437.91

Marilynn Fenske and Leslie Price:

Fenske and Price	$ 932.07
Karin Buss (legal fees)	$12,706.25
Dr. Schindler	$ 1,108.52
Dr. Crickmore (analysis)	$ 361.13

	TOTAL	$15,107.97
Donna Clandfield:		
Rainer Ebel		$ 450.00
Car expenses		$ 194.40
	TOTAL	$ 644.40
Irma Rowlands:		
Travel		$ 135.00
	TOTAL	$ 135.00
Robert Wilde:		
Travel		$ 36.00
Telephone and copying		$ 103.37
	TOTAL	$ 139.37
GRAND TOTAL APPLICATION		$33,464.65

III. SUMMARY OF ARGUMENTS REGARDING COSTS

A. The Department

[4] Mr. McDonald argues that the only parties to the proceedings are the Appellant, Bernice Kozdrowski, the Approval Holder, LES and the Director. Therefore, according to him, they alone should be entitled to request costs.

[5] Mr. McDonald also describes, in his opinion, what an applicant must do to qualify for costs. The applicant must meet the requirements of section 20(2) of the Environmental Appeal

Board Regulation[1], and, more particularly, subsections (d), (e), (f) and (g) of that section. Mr. McDonald also claims that none of these requirements were met by either the Appellant or the supporters of the Appellant. Therefore, the Director's position, at least initially, is that no costs should be awarded.

B. The Approval Holder: Laidlaw Environmental Services (Ryley) Ltd. (LES)

[6] The Approval Holder agrees with the Director that costs should not be awarded to the Appellant or to the parties supporting the Appellant, because the information they presented did not make a substantial contribution to the appeal, nor did it relate directly to the matters raised in the statement of concern. LES contends that it has complied fully with its statutory duty throughout the approval process, that it has endeavoured to comply with requests for information, and its experts have answered all the concerns raised in the statement of concern. It should not be penalized by having costs awarded against it.[2] LES further claims that it should not be required to pay costs to the Appellant since it requested participation in the hearing and was not originally required to attend.

[7] Mr. Kruhlak notes that, although this is not a "public interest" review such as that conducted by the Natural Resources Conservation Board or the Alberta Energy and Utilities Board, even in such cases, the general rule in Alberta is to award final costs to the "successful party". He cites *Reese* v. *Alberta (Ministry of Forestry, Lands and Wildlife)*[3] as support for this proposition and notes that section 20(3) of the Environmental Appeal Board Regulation supports this general rule in that it allows the Board to award costs to "any other party to the appeal".

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1 Alta. Reg. 114/93 [hereinafter Regulation].

2 This decision will conclude that the Board's statutory authority to award costs is not based on the premise that a party is "penalized" by having costs awarded against it, but rather to compensate a party who does not have the resources to assert and vindicate essential elements of the public interest in the process of participating in the hearing.

3 (1992), 5 Alta. L.R. (3d) 40; [1993] 1 W.W.R. 450 (Alta. Q.B.) [hereinafter *Reese*].

[8] Mr. Kruhlak argues that it would be improper to award final costs against LES on the basis that LES has the financial resources to pay them (assuming that is the criterion). In support for this principle, he quotes L. Friedlander:

> By definition, public interest litigation is beneficial to the public. A defendant's substantial economic resources should not spawn an implication that the defendant is the appropriate party to absorb costs that should arguably be borne by the population as a whole.[4]

[9] Accordingly, he states that, if final costs are awarded, they should be paid by the Board or alternatively, by the Appellant or the Director as the unsuccessful party.

IV. CONSIDERATIONS OF THE BOARD

A. Statutory Matters

[10] In considering the decision to award final costs, whether in whole or in part, it is important, as always, to consider the Purposes of the *Environmental Protection and Enhancement Act*[5] (Act) that provides the Board with its jurisdiction:

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

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4 L. Friedlander, "Costs and the Public Interest Litigant" (1995), 40 McGill L.J. 55 at 99. We note that this article is primarily concerned with issues respecting public interest and litigation, rather than public interest and administrative tribunals. And there is, of course, a distinction between litigation and an administrative review of a government decision. We also note that this quote was used in the context of a discussion on the Ontario Law Reform Commission and its advocacy of the implementation of a "one-way" costs rule, meaning that "if the plaintiff is successful, the defendant would be required to pay party-and-party costs, but if the defendant is successful, each party would pay its own costs, subject to a variety of conditions".

5 S.A. 1992, c. E-13.3 (as amended).

> (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; ...
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; ... [and]
>
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ... (Emphasis added.)

[11] Thus, one of the key purposes of the Act is to ensure that the integrity of ecosystems and human health are protected. The mechanism with which to do so, at least at the appeal level, is found in section 84. This section provides appellants with procedural details of the appeal process. The portions of section 84 relevant to the facts of this costs decision are:

> 84 (1) A notice of objection may be submitted to the Board by the following persons in the following circumstances:
>
> (a) where the Director
>
> (i) issues an approval, ...
>
> a notice of objection may be submitted
>
> (iv) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 70 and is directly affected by the Director's decision, ...

[12] Related provisions are included in the Act to address issues of awarding and distributing costs. Section 88 of the Act raises these issues in connection with Board proceedings:

> 88 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.

[13] Sections 18, 19 and 20 of the Environmental Appeal Board Regulation more specifically govern the award of costs. Section 18 provides that:

> 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.
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> (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 objection, and
>
> (b) the preparation and presentation of the party's submission.

[14] Section 19 applies to interim costs and, since the Board has decided against the award of interim costs, in this case, it need not be considered here. Section 20 provides for the matters to be considered by the Board when awarding final costs. The relevant portions of section 20 read:[6]

> 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: ...
>
> (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;
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> (g) whether the costs were directly related to the matters contained in the notice of objection and the preparation and presentation of the party's submission;
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> (h) any further criteria the Board considers appropriate
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> (3) In an award of final costs the Board may order the costs to be paid in

[6] These sections were also referred to in written submissions of Mr. McDonald on behalf of the Director.

whole or in part by either or both of

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

(b) the Board. ...

[15] Section 20(2)(h) is particularly relevant to cases where participants are vindicating elements of policy that our legislators have deemed important enough to protect. Anand and Scott have stated:

> Where a board is given a broad residual authority to do what it considers necessary to carry into effect the intent of the legislature, it can be argued that it should ensure that there is a balanced representation of views at its public hearings by funding groups which could not otherwise participate in an effective manner.[7]

[16] At this point the Board notes that the legislature has left a discretion to use any of the above factors; not all of the criteria need to be met in order to be successful in a claim for costs.

B. Judicial v. Quasi-Judicial Forum

[17] When considering the issue of whether or not to award final costs, it is important at the outset to clarify the distinction between the awarding of costs in civil litigation fora as opposed to quasi-judicial hearings. This distinction has been addressed by R. Macaulay, Q.C., who states that:

> The public interest is an unseen but vital party in virtually all agency deliberations. The public interest may be explicitly set out in the mandating legislation or alternatively implied by it.
>
> Elsewhere [in his book, he attempts to] express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more

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[7] R. Anand & I.G. Scott, Q.C. "Financing Public Participation in Environmental Decision Making" (1982) 60 Can. Bar. Rev. 81 at 104, cited from Regulated Industries Program, Consumers' Association of Canada, Costs Awards in Regulatory Proceedings: A Manual for Public Participants (1979) at 20.

> 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, a 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 represented before it.[8] (Emphasis added.)

[18] Conversely, according to Macaulay, Boards can also rule "in favour" of all parties appearing before it if the public interest in a particular case supports such a determination. Thus, when considering the issue of whether or not this Board should grant final costs, in whole or in part, the outcome of the hearing (in this case, whether or not LES was granted or denied the Approval) should be relevant to an assessment for or against a costs ruling, but only in part. Administrative proceedings are different from judicial proceedings and the Board finds that environmental hearings, such as this case, are technically complex, value based (almost always requiring a combination of persons to speak of values); and they require experts to speak of biophysical issues, and legal counsel to advise on procedural matters. A request for costs may conceivably address compensation in all three areas.

[19] Administrative hearings are different than court hearings. The focus in administrative hearings is on the public interest, not a *lis* between parties. And according to Professor Evans, "[t]he nature of regulatory proceedings is not compatible with the general rule applied in civil litigation that costs follow the event...".[9] As Justice Urie of the Federal Court of Appeal stated in *Bell Canada v. C.R.T.C.*[10] :

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8 R. Macaulay Q.C., *Practice and Procedure Before Administrative Tribunals* (Scarborough: Carswell, 1988) at 8-1.

9 J.M. Evans, "Developments in Administrative Law: The 1985-86 Term" (1987) 9 Sup. Ct. L.R. 1 at 45.

10 34 C.P.C. 121, 147 D.L.R. (3d) 37, 72 C.P.R. (2d) 162, [1984] 1 F.C. 79, 48 N.R. 197 (Fed. C.A.), affirmed (*sub nom. Bell Canada v. Consumers' Assn. of Can.*), [1986] 1 S.C.R. 190, 17 Admin.L.R. 205, 9 C.P.R. (3d) 145, 65 N.R. 1, 26 D.L.R. (4th) 57 at 147 D.L.R. pp. 39 [hereinafter *Bell Canada*]. We note that the Supreme Court of Canada's decision regarding the interpretation of the word "costs" in *Bell Canada* has been heavily criticized. See Evans, *ibid* at 42. For other cases which have recognized the potential for unfairness in the traditional cost rule, see Anand & Scott, *supra* note 7 at text accompanying footnotes 79-81 and 84-85.

> 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*. (Emphasis added.)

[20] In the case before us, the Board's statutory authority to award costs in the administrative sense, rather than in a civil litigation context, is clear and unambiguous. Through the wording of section 88, the Alberta Legislature granted the Board cost awarding powers for any "proceedings". "Proceeding" is defined by Black's Law Dictionary as:

> ... the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. *[The term] also refers to administrative proceedings before agencies, tribunals, bureaus, or the like*.[11] (Emphasis added.)

[21] Section 88 of the Act, and the Regulation, tell the Board that it has the ability to grant 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 does not expect to be bound by the general principle that the "loser pays", as outlined in *Reese.* Even if the Board was subject to the principle that the winner is entitled to costs, the results in the LES case do not suggest that the Appellants were in result the "losers" and LES the "winners". The original Approval, after all, has been varied, following essentially a *de novo* hearing, not a record review. The Board wishes to stress that deciding "who won" is less important than assessing and balancing the contribution of the parties so that the evidence and arguments presented to the Board are not

[11] H.C. Black et al., *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 1204.

skewed. Our preference is to have articulate, succinct, presentations by both expert and lay spokespersons to appear before the Board and advance the public interest for both environmental protection and economic growth in reference to the decision appealed.

C. Nature of the Evidence

[22] The substantive issues raised by the Appellant and supported by others in this appeal questioned the design and standards to which the LES facility at Ryley must comply with to minimize leakage of hazardous contaminants into the environment. During the course of the hearing, evidence was presented that dealt with hydrogeology, leachate migration, and the design and operation of hazardous waste facilities. Landfilling of hazardous waste is a highly technical topic that many "experts" do not even fully understand; not even LES' experts, and quite obviously, not the Department's experts in this case. Professor Jeffery has commented on the care with which waste treatment facilities must be approached and assessed:

> The problems associated with waste disposal are perhaps the ones that are readily recognized by the public and regulatory authorities as requiring the most serious and careful attention, primarily as a result of the potentially devastating impacts upon mankind's most important non-renewable environmental resources: air, land and water. The methods used for waste disposal are varied and include, for example, landfilling, incineration, recycling and the landfarming of biodegradable wastes. In each case the particular method of waste treatment or disposal undertaken requires an understanding of complex scientific and technological principles, which are themselves in the developmental stage.[12]

[23] A recurring issue in recent appeals before this Board, and for other environmental decision-makers that implement environmental law,[13] is scientific and technological uncertainty. This uncertainty became particularly evident during the LES hearing with respect to the kinds of

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[12] M. Jeffery, Q.C., *Environmental Approvals in Canada* (Toronto: Butterworths, 1989) at 5.28.

[13] F.P. Grad, *Treatise on Environmental Law*, vol. 1 (New York: Matthew Bender, 1973) (1992 Supplement) at 1-25.

materials that are capable of withstanding chemical attack of hazardous wastes, the synergisms and antagonisms between these materials and landfill leachate, attenuation of contaminants, and the rate at which leachate permeates different geological media. Therefore, it was necessary for the Board to hear evidence presented by the scientific community, through all parties, to assist it in understanding this appeal and coming to the decision that it did.[14]

[24] In this case, issues of the adequacy of the facility's design and specifications were placed in issue through evidence presented by the Approval Holder, LES, and then were challenged directly by the Appellant's agent and experts. The parties affected by the Approval spent substantial time and money to understand (and help the Board understand) whether or not the design and operating requirements of the LES hazardous waste facility would be sufficient to protect the environment as it must pursuant to section 2(a) of the Act. Despite the fact that the information from the LES experts may have ultimately contributed favourably to their position taken at the hearing and, hence, the decision of the Board, it was critical for the Appellant, Ms. Kozdrowski, to elicit some expert assistance and place it before the Board - with the result that the Approval was varied. As the Board will discuss below, some of her experts made a substantial contribution to the hearing directly on the matters raised in her appeal (Dr. MacMillan); others did not (Dr. Plambeck).

D. Relevancy, Materiality and Purposes of the Act

[25] To arrive at a reasonable assessment of costs, the Board must ask, first: did the Appellant present suitable witnesses and skilled experts; then, a second question: did the Appellant present valuable evidence and contributory arguments? Dr. MacMillan provided expertise on the permeability of water through glacial till, and cited a situation where pesticides from a storage area

[14] The role of scientific expertise in the form of expert evidence at quasi-judicial decision settings is increasing. See R. Smith & B. Wynne (eds.), *Expert Evidence: Interpreting Science in the Law* (London: Routledge, 1989) at 1.

west of the landfill were detected in groundwater monitoring wells.[15] The Board notes that the study of hydrogeology is a science very much in a state of evolution,[16] further justifying the need for Dr. MacMillan's evidence and his assessment of LES' Approval. Both tests were met in the case of his evidence.

[26] Still, before costs can be awarded, section 20(2)(f) of the Regulation requires that experts make a "substantial contribution" to a hearing and this calls into question the effect of their presentation on section 2 of the Act. Almost all presenters in this case made a "contribution". But, something more is required if all parties, witnesses and "experts" that are called upon to participate in a hearing are reimbursed, regardless of the quality of their evidence and its effect on furthering legislative intent. The Board cannot, and will not, reimburse costs for irrelevant evidence. And even if relevant, the evidence must, in our opinion:

(a) substantially contribute to the hearing;
(b) directly relate to the matters contained in the notice of appeal; and
(c) make a significant and noteworthy contribution to the goals of the Act.

[27] Fiscal constraints on all parties require that appeals be resolved in an efficient and effective manner,[17] and one that is fair. For awarding costs, the Board intends to exercise restraint and caution, while at the same time attempt to give effect to the statutory provisions (section 88) providing for cost claims, so that this provision is not an empty gesture to parties that otherwise meet the requirements for financial assistance.

V. ANALYSIS

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[15] *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (June 1997), No. 96-059 (Alberta Environmental Appeal Board) at 7 [hereinafter *Kozdrowski*].

[16] See, e.g., Jeffery, *supra* note 12 at 5.34 and 5.35.

[17] See J.M. Evans et al., *Administrative Law: Cases, Text, and Materials* (Toronto: Emond Montgomery Publications Ltd., 1995) at 18-19.

A. The Appellant

[28] Ms. Kozdrowski has convinced the Board through testimony, and as required under section 20(2)(e) of the Regulation, that she requires the financial assistance to make an *adequate* submission. She has significantly contributed to the appeal hearing through the considerations that Dr. MacMillan raised. The Board believes that Ms. Kozdrowski's personal costs ($227.82) and her initial legal costs ($695.50) should be paid.

[29] The Board recognizes also that Ms. Kozdrowski had to retain an agent to prepare and put forward a reasonable submission and to that end she retained Mr. Bronaugh. He prepared and presented her submission and retained expert witnesses. While his personal evidence was not overwhelming in its significance to the Board, he did raise a number of key points, and he marshalled and directed her appeal throughout. In addition, the evidence presented by Dr. MacMillan, one of Mr. Bronaugh's expert witnesses, was definitely useful to the Board as pointed out in this decision. Therefore, the Board believes that 1/4 of Mr. Bronaugh's costs, or $2,203.00 should be paid, as well as all of Dr. MacMillan's costs, or $2,407.50.

[30] In contrast to what Mr. Kruhlak argues, environmental hearings challenging a highly technical and scientific approval may require a balancing of resources to "level the playing field" between citizen appellants like Ms. Kozdrowski and corporations like LES. The Board finds that Ms. Kozdrowski definitely needed financial assistance, she contributed to the hearing through a strong submission, she asserted in good faith an appeal that, in the end, placed directly into issue public health, a key legislative priority, and she significantly contributed to the Board's decision and recommendations to the Minister. As Professor Valiante has commented on this issue:

> Often, in administrative proceedings, members of the public challenge the proposal of a public sector agency, or a large private sector business that has substantial financial and human resources to professionally present a case. Individuals and

> members of public interest groups generally have fewer resources to contribute... Accordingly, for participation to be effective in a proceeding where there is such an imbalance of resources, an attempt to redress that imbalance is required. In this depiction, financial assistance, provided directly or indirectly to intervenors, and provided by the government, the tribunal, or the proponent, is vital for redressing the imbalance.[18]

[31] Ms. Kozdrowski has made a substantial contribution to this appeal, as required by section 20(2)(f) of the Regulation. The filing of her appeal and the pursuance of it before this Board has, in result, significantly affected the original Approval in favour of protection for ecosystems and human health. The three specific recommendations that have varied this Approval are:

1. LES will be required to submit to the Director a final design of the landfill cell with a clay liner at least 1.5 metres in thickness.

2. LES must follow the current American Society for Testing Materials (ASTM) specifications and other requirements in Appendix G of their application for the Approval including but not limited to the construction material and methods and the qualifications of the personnel involved in the design and construction of the cell.

3. Performance data on the operations and monitoring as well as the compliance record of LES should be subjected to a review and evaluation every five years. If this review and these specific recommendations are not met to the Director's satisfaction at the end of the first five year period, the Approval issued to LES shall terminate.[19]

[32] Thus, Ms. Kozdrowski's participation has resulted in modifications to the design of the facility that would not have been made had she chosen not to appeal the decision of the Director. The gaps in the original Approval were revealed through evidence presented at the hearing, which could, in the Board's opinion, only be addressed by imposing through a final decision more stringent terms and conditions than required by the original Approval.

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[18] M. Valiante & W.A. Bogart, "Helping 'Concerned Volunteers Working out of Their Kitchens': Funding Citizen Participation in Administrative Decision Making" (1993) 31 Osgoode Hall L.J. 687 at 692. See also Jeffery, *supra* note 12 at 4.1 and 4.2.

[19] *Kozdrowski, supra* note 15 at 53.

[33] Under section 20(2)(h) of the Regulation, the Board may consider any further criteria necessary to determine whether costs should be awarded. The Board considers that in highly technical appeals such as this, a party should be awarded costs because through the appeal process the Board was better able, thanks to that certain party's submission, to inculcate the public interest, allowing it to reach a fully informed decision and present sound recommendations to the Minister.

[34] Of course, the success of a claim for costs will depend on the extent to which the Appellant raises significant issues in the public interest that no one else raises and that are tied to goals promoted in section 2 of the Act. It is possible that the Department's witnesses represent the public and public interest in any given case. In this case they did not, and certain elements of the public's environmental interest were at the risk, therefore, of being dropped. The Board was in the hands of the Appellant and supporters to push the issue. In the words of Valiante and Bogart:

> Regulatory decisions always affect some segment of the public. Sometimes individuals are financially affected, each to a small degree, as with telephone or utility rates. Sometimes individuals' health and well-being are affected, as with environmental or food and drug regulation. In principle, if people are affected by decisions, they have the right to be heard.
>
> Where regulatory decisions affect the public and are required to be made in the "public interest", the quality of those decisions is improved when representatives of the affected interests participate. They can apprise an agency or tribunal of facts that might not otherwise come to its attention and they can assert different perspectives on and opinions about the consequences of a decision which challenge those of the regulated industry. In this way, the agency or tribunal gains a fuller understanding of the range of dimensions that comprise the "public interest" it is charged with serving. It is also argued that better decisions are the result.[20]

B. Marilynn Fenske and Leslie Price

[35] A large part of these parties' submission dealt with alleged omissions in the

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[20] Valiante & Bogart, *supra* note 18 at 691.

Environmental Impact Assessment carried out by LES and submitted as a part of the application for the Approval. These omissions included the lack of an assessment of alternate sites, and the lack of a consideration of alternative means of disposing of the hazardous waste. This evidence, and especially the arguments of Ms. Buss, contributed to the public hearing. The Board believes that these parties require some financial assistance, and will ensure this assistance by allowing costs for one-third of the legal bill or $4,235.42.

C. Others

[36] The Board feels that all parties made a contribution to the hearing, one way or another. However, since the Regulation requires a "substantial" contribution, the Board has decided to focus the attention of this decision mainly on the Appellant.

VI. CONCLUSION

[37] Section 88 of the Act, read carefully, allows for a reward of costs without regard for success on the merits. The Board believes that a paramount consideration in ordering costs is whether a party has served the public interest by furthering the goals of the Act and assisting the Board in the interpretation of the Act and Regulation. Even though the Appellant did not substantially prevail, in having the Approval overturned, she did contribute to the goals found in section 2(a) of the Act by addressing important, complex issues involving hazardous waste and public health, and by rendering non-duplicative assistance to the Board.

[38] The Board has not made a practice of awarding costs in previous cases, primarily on the theory that all parties to the appeal should pool resources, donate time and expenses, and consider hiring and sharing experts. This case, however, is different, both in its importance and the issues raised. The matters under appeal (the hydrogeology and potential contamination of significant

exposure pathways) are complicated both from a technical and scientific viewpoint as well as from a position of their impact on the future of Alberta's environment, including particularly, groundwater. The Board is satisfied that the Appellant and Ms. Buss required extensive preparation to advance their case. They presented specific evidence and detailed arguments on technology, toxicology of hazardous waste, alternative treatment options, and so on. There was in this case an imbalance of financial resources that potentially affected the presentation of critical evidence. Put another way, the Board is convinced that no other party had a sufficient economic interest to risk their time and commitment to pursue these environmental issues in this appeal. The Board believes the Appellant and her supporters are justified in seeking expert advice, and to the extent that these experts have significantly contributed to the hearing within the parameters of the issues raised in this appeal, and the principles found in this decision, the parties can legitimately expect to be reimbursed for it.

[39] The Board must now decide who is responsible for costs. The Director has taken the position that LES should be responsible for costs. Mr. McDonald made the following comments, with which the Board agrees:

> It is the Approval Holder who is undertaking the activity for which the Director issued the approval. The Approval Holder is a corporation who is undertaking the activity for the purpose of generating profit.... As it is the Approval Holder who is undertaking the activity and will benefit from that activity, it is the one who should be responsible for any costs that may be awarded.
>
> The Approval Holder, Laidlaw ... has made its application and is operating the facility as a profit-making venture. Because the activity is for the benefit of Laidlaw, and because Laidlaw has the ongoing responsibility of ensuring that the facility is operated in an acceptable manner, it is against Laidlaw that costs should be awarded.[21]

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[21] Excerpts from "Response to Cost Request of the Director of Chemicals Assessment and Management" at page 7, and "Submission of the Director of Chemicals Assessment and Management" at paragraph 47, page 15.

[40] LES, of course, argues that parties should bear their own full costs; in any event, LES argues that it should not be responsible for anyone else's costs. In the Friedlander article referred to previously, the Board notes that the following viewpoint was also expressed in the article, though not referenced by Mr. Kruhlak:

> If disincentives to wider public participation exist, it is foreseeable that those who are able to bear the costs of litigation will have an exaggerated impact on judicial decision-making. Business groups, for example, will be able to present their arguments in court more frequently than will other groups, thus heightening judicial awareness of business concerns. If other concerns are not articulated, judges may be more inclined to view business' claims with favour. Public interest litigants and intervenors can provide the court with the evidence and arguments necessary for a full consideration of all the issues.[22]

[41] The Board does agree with LES that some parties should pay their full costs[23] and that other parties or agents pay a portion of their own costs.[24] But, that is not the end of the story. The Appellant raised groundwater issues through Dr. MacMillan that LES missed or ignored. Similarly, the arguments of Ms. Buss and others on the adequacy of the application and the impact assessment fell on LES' deaf ears throughout the entire approvals process, even though the appellants were right on this point.[25] Thus, by awarding costs against the Board or Department, as LES would suggest, the

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[22] Friedlander, *supra* note 4 at 86.

[23] Dr. Plambeck, Mr. Robert Wilde, Ms. Donna Clandfield, Ms. Irma Rowlands, Dr. Schindler, Dr. Crickmore, and the Department.

[24] Mr. Mitch Bronaugh, Ms. Leslie Price and Ms. Marilynn Fenske.

[25] "Ms. Buss criticizes the EIA submitted by LES in that it does not establish a need for the expansion of the facility. Although terms of reference for the EIA included requests for analysis of waste streams to be received and a projection of the supply and demand, no such information was provided. Nor was the information requested by the Director when reviewing the application. She further criticises the EIA in that it... failed to consider social effects. Thus the Director did not review and approve a proper balance between economic need and environmental impact of the project. She contends that since these matters were not carefully considered by the Director in his review of the application (because they were absent from the EIA) the Approval is faulty under the Act and the appeal should be allowed." *Kozdrowski*, *supra*, note 15 at 25.

(continued…)

Board ignores groundwater protection goals (section 2(a)) and impact assessment evidence affecting the application that LES missed and members of the community, through the Appellant, picked up. A shifting of financial liability as proposed by LES to the Board or Department would result in a requirement that the taxpayers of Alberta reimburse a portion of hearing costs for a critical part of the Approval that was varied in favour of environmental protection so earnestly promoted by the Appellant and passed over by the respondents, LES and the Director. On the basis of the Appellant's presentation, the Board decided to require a thicker liner, in situ, than originally designed[26]; and the Board required strict adherence to all other specifications for the landfill[27] including Specific Recommendations 1 through 3 now ordered by the Minister; failing which, the Approval will terminate in five years[28]. The Appellant indeed made a difference.

[42] At all times LES was aware that the environmental decision-making process in Alberta, including the appeal process, permits citizens that are directly affected by the Approval of such facilities to appeal the issuance of such an Approval and to request costs in so doing. As a matter of reference only, the regulations made pursuant to legislation which governs other Alberta

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(…continued)

> "Requirements for an impact statement (EIA Report) are found in section 47 of the Act. While this Board does not have direct jurisdiction over an impact statement, it must be satisfied that components of the Report include proper evidence when the EIA is the primary document submitted with the application to justify an Approval. (For impact assessment jurisdiction of the EAB, see *Slauenwhite v. the Alberta Environmental Appeal Board* (1995), 175 A.R. 42 (Alta. Q.B..)) Section 47(h) of the Act introduces the alternatives requirement which is the heart of any EIA report. The objectives of good environmental planning are to provide a neutral decision maker with many alternatives from which she/he then chooses the best alternative. As a result, any EIA report that fails to consider alternatives is *per se* deficient, regardless of the type of Approval contemplated. In cases of hazardous waste or toxic substances, the Board would expect to see far more detail than LES authorized and the Director acquiesced to in the terms of reference for the EIA report." *Kozdrowski, supra*, note 15 at 47.

26 *Kozdrowski, supra* note 15, Specific Recommendation #1 at 53.

27 *Kozdrowski, supra* note 15, Specific Recommendation #2 at 53.

28 *Kozdrowski, supra* note 15, Specific Recommendation #3 at 53.

Boards, the Natural Resources Conservation Board and the Alberta Energy and Utilities Board, suggest applicants pay.[29]

[43] For reasons stated above, and particularly because the Appellant has assisted in the appeal process with the result varying a landfill Approval to be consistent with environmental protection of ecosystems and human health required by section 2(a) of the Act, the Board approves final costs in the amount of $9,769.24.

VII. SUMMARY OF COSTS ALLOWED

[44] The total costs requested of the Board were $33,464.65. The Board allows costs of $9,769.24, to be paid by LES, and allocated as follows:

Appellant, Bernice Kozdrowski:	$ 923.32 [$227.82 (personal) and $695.50 (legal)]
Mitch Bronaugh:	$2,203.00 (25% of claim)
Dr. MacMillan:	$2,407.50 (100% of claim)
Marilynn Fenske and Leslie Price:	$4,235.42 (33.3% of legal bill)
TOTAL	$9,769.24

[29] Section 7(1) of the Energy and Utilities Board Local Interveners' Cost Regulation (Alta. Reg. 517/82) states that the applicant is responsible for paying costs. Similarly, section 4(4) of the Funding for Eligible Interveners Regulation (Alta. Reg. 278/91), created pursuant to the *Natural Resources Conservation Board Act* (S.A. 1990, c. N-5.5) provides that unless the Natural Resources Conservation Board otherwise orders, costs are to be paid by the applicant.

[45] So ordered.

Dated on July 7, 1997, at Edmonton, Alberta.

“original signed by”

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Dr. William A. Tilleman, Chair

“original signed by”

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Dr. John P. Ogilvie

“original signed by”

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Dr. M. Anne Naeth