ALBERTA
ENVIRONMENTAL APPEAL BOARD

COST DECISION

Dates of Hearing: June 23, 1998 and July 13, 1998
Date of Decision: October 5, 1998

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

- and-

IN THE MATTER OF an appeal filed by Wayne and Laurel Penson, with respect to Reclamation Certificate 33463 issued to Pembina Corporation (now Talisman Energy Inc.) on September 26, 1997, by Mr. David Lloyd, Inspector of Land Reclamation, Alberta Environmental Protection.

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

PANEL MEMBERSHIP		Dr. M. Anne Naeth, Panel Chair Dr. John P. Ogilvie Mr. Ron V. Peiluck
APPEARANCES	Appellants:	Mr. Darryl Carter, counsel, Carter, Lock & Horrigan representing Mr. Wayne and Ms. Laurel Penson
	Other Parties:	Ms. Maureen Harquail, counsel, Alberta Justice representing Mr. David Lloyd and Mr. Rick Ostertag, Alberta Environmental Protection
		Ms. Letha MacLachlan, counsel, Macleod Dixon representing Mr. Jim Gordon and Mr. Robert Staniland, Pembina Corporation (now Talisman Energy Inc.)
		Mr. Doug Kulba and Mr. Bob Onciul, Alberta Environmental Protection and Mr. Russell Bardak, Riverview Consulting Ltd.

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BACKGROUND

[1] This Decision addresses cost claims in an appeal filed by Mr. Wayne and Ms. Laurel Penson concerning Reclamation Certificate No. 33463 issued by the Inspector of Land Reclamation, Alberta Environmental Protection.[1] The Inspector issued the reclamation certificate on September 26, 1997 to Pembina Corporation (Pembina). The site that is the subject of the reclamation certificate is known as Decalta Dome Stur 13-35-68-22 well and is located in the NW Sec. 35 Tp. 68 Rge. 22 W5M. In October 1997, Talisman Energy Inc. (Talisman) acquired the oil and gas assets of Pembina and in doing so, assumed all responsibilities associated with their operating and abandoned locations.

[2] Pembina applied for a reclamation certificate on October 2, 1995 and an inquiry was held at the site on September 25, 1996 by Mr. Doug Kulba and Mr. Bob Onciul, Alberta Environmental Protection. As a result of this inquiry the application was refused and cancelled. Pembina requested a review of the inquiry. The second inquiry was held on September 26, 1997 by Mr. David Lloyd and Mr. Rick Ostertag, Alberta Environmental Protection and the reclamation certificate was issued.

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[1] Hereinafter, the "Inspector". Alberta Environmental Protection will hereinafter be referred to as the "Department".

[3] The well was surveyed and drilled in 1963. It was abandoned in 1978 and reclamation began in 1992. The Environmental Appeal Board (the Board) held hearings on the appeal on June 23, 1998 and July 13, 1998. Parties were requested to file submissions on costs by September 16, 1998 and reply submissions by September 23, 1998. On September 18, 1998, the Board issued its Report and Recommendations[2] which recommended that the appeal be allowed and that Talisman Energy Inc. be required to carry out further reclamation activities at the site and submit a new application for a reclamation certificate. This report was subsequently approved by the Minister on September 23, 1998.

CLAIM FOR COSTS

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

1. The Appellants, Wayne and Laurel Penson:

Hotel (2 nights)	220.00
Phone calls	50.00
Mileage	750.00
TOTAL	$1,020.00

2. Riverview Consulting Ltd., Mr. Russell Bardak:

For services rendered	3,680.00
7% GST	257.60
TOTAL	$3,937.60

3. Mr. J. Darryl Carter, Q.C., Carter, Lock & Horrigan:

Legal fees	20,957.50
Other charges - office handling	25.00
Freedom of Information documents	25.00
Long distance/fax/courier charges	398.00
7% GST	1,496.65
TOTAL	$22,902.15

GRAND TOTAL APPLICATION $27,859.75

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[2] *Penson v. Inspector of Land Reclamation, Alberta Environmental Protection re: Pembina Corporation*, Appeal No. 98-005-R, September 18, 1998.

SUMMARY OF ARGUMENTS FOR COSTS

The Appellants

[5] The Appellants asked for costs for their counsel and their expert witness, as well as compensation for their own direct expenses. Mr. Carter argues that the Appellants' efforts were not only important to them but to other landowners and the public. He submitted they were the only ones in the process to provide support for the decision made by the original reclamation inspectors and to argue the case for environmental protection and enhancement and for land reclamation. He further states it is obvious this was a case to test the pre-1983 wellsite reclamation criteria and thus is important to industry and government.

[6] In response to cost arguments from Talisman and the Department who both discussed the refusal of the Appellants to mediate, Mr. Carter said he discussed mediation with counsel for both these parties. He argues that the Appellants did not refuse to go to mediation but that he said there was no possibility of a "win-win" outcome for all nor did he see how it could resolve the matter. He said he was concerned about the expenses his clients would incur in a mediation that would not be fruitful.

Talisman

[7] Ms. MacLachlan argues that Talisman should not be required to pay the costs of any party to this appeal. She states the Appellants raised issues of law for determination by the Courts that were not within the jurisdiction of the Board. She further argues that the Appellants raised issues for the first time in the appeal that were not raised in the Notice of Appeal and would have been more efficiently dealt with by the reclamation inspectors at the time of the inquiry.

[8] Ms. MacLachlan states that the evidence provided by the Appellants and their expert witness did not meet the standards previously set by the Board because they did not make a valuable and substantial contribution to the hearing. She argues that much of the evidence provided by the Appellants and Mr. Bardak was opinion that was not supported by facts.

[9] Ms. MacLachlan submits that the outright rejection of mediation to resolve the appeal indicates a rejection by the Appellants of a more timely and less costly means of addressing their concerns. She further submits that the Appellants were not interested in the public interest but sought only to advance their private interests. She also suggests there is no basis to assume this is a test case. She argues that the Appellants have neither indicated nor provided evidence that they required financial resources to make an adequate submission but that they simply believed they were entitled to the compensation for their costs in the appeal.

[10] Ms. MacLachlan concludes by saying that the Appellants' actions in a number of instances were neither reasonable nor directly and primarily related to the matters of the Notice of Appeal. She cited examples of this unreasonableness including calling and questioning the first reclamation inspectors, preparing submissions on the validity of the Criteria and continuing to make arguments related to the same after repeated admonition by the Board, and preparing and attempting to submit a second report by Mr. Bardak after the Appellants had finished submitting evidence.

The Department

[11] Ms. Harquail argues that the Appellants' case was not presented in an efficient or effective manner so as to contribute substantially to the hearing. She further states the Appellants' case was not focussed directly on the matter contained in the Notice of Appeal. She argues that counsel for the Appellants spent a significant amount of time attempting to dispute the validity of the Criteria. Further, the Appellants refused mediation in a situation where a resolution may have been achieved. She argues that the Appellants have fundamentally failed to meet the burden placed on

them that costs were reasonable and necessary.

CONSIDERATIONS BY THE BOARD

[12] This appeal was filed pursuant to the *Alberta Environmental Protection and Enhancement Act* (the Act), S.A. 1992, ch. E-13.3, as amended. Section 88 of the Act provides that the Board "may" award final costs and, in accordance with regulations established by the Minister, direct who should pay costs awarded by the Board. Section 94 of the Act gives the Minister authority to adopt regulations "prescribing the criteria" for the Board to consider in "directing . . . costs to be paid." Section 18(2) of those regulations provide that any party may apply for all costs that are "reasonable" and "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." Section 20(2) of the regulations provides that, in deciding whether to grant a request for costs, the Board "may" consider seven factors, the first three of which refer to the nature of the appeal; the remaining factors are: whether the cost request is supported by "the appropriate information"; whether the party seeking costs "required financial resources to make an adequate submission"; whether the party made a "substantial contribution" to the appeal; and whether the party's costs were "directly related" to the matters raised in the appeal and to the "presentation of the party's submission." Section 20(2) of the regulations also allows the Board to base its cost decision on "any further criteria the Board considers appropriate." The Board has previously stated that it has discretion to decide which of the criteria in section 20(2) of the regulations should apply to a particular claim for costs, and that a cost claimant need not satisfy all of the criteria in that section.[3]

[13] Section 20(3) of the regulations authorizes the Board to order that a party's costs be paid by either or both of any other party to the appeal or the Board.[4]

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[3] *Cost Decision re:* Zon, *et al.*, EAB No. 97-005 - 97-015, Dec. 22, 1997, at 7.

[4] Section 33 of the Board's Rules of Practice mirrors several of the provisions of the regulations referenced above.

[14] The Board has long made it clear that it is not bound to follow the "loser pays" principle generally adopted by courts in civil litigation.[5] Rather, the Board determines whether an award of costs is appropriate in light of the "public interest" generally and the Act's overall purpose in section 2, which is to "support and promote the protection, enhancement and wise use of the environment. . . ." That purpose is subject to ten principles in section 2(a)-(j), two of which refer expressly to the importance of the public's role in fostering environmental protection. Section 2(f) refers to the "shared responsibility of all Alberta citizens" for protecting the environment "through individual actions"; section 2(g) refers to the "opportunities made available through this Act for citizens to provide advice on decisions affecting the environment. . . ." One of these opportunities is the appeal process in Division 2, Part 3 of the Act. [6] In addition, section 2(c) of the Act refers generally to the principle of "sustainable development".

[15] In a 1995 report, an Alberta Task Force listed the following as a "priority" for implementing the principle of sustainable development: "Ensure greater environmental empowerment and accountability for all sectors of Alberta society."[7] The report stated that it was necessary to "[e]mpower Albertans through measures that facilitate individual environmental responsibility" and that "[p]ublic input is essential to an empowered society."[8] Accordingly, the report admonished "[a]ll levels of government . . . [to] actively identify and implement appropriate ways to empower Albertans to contribute to our common sustainable future."[9]

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5 *E.g., Zon,* at 9 n. 11; *Cost Decision re: Bernice Kozdrowski,* EAB No. 96-059, July 7, 1997, at 9.

6 The Board notes that the Court of Queen's Bench *Kostuch* case said that s.2(g) was not intended to refer to EAB appeals (at least not on the facts of that case). *Kostuch v. Environmental Appeal Board, et al.*, [1996] 21 C.E.L.R. (N.S.) 257 at 263 (Alta. Q.B.).

7 "Ensuring Prosperity - Implementing Sustainable Development, The Report of the Future Environmental Directions for Alberta Task Force," March, 1995, at 76.

8 *Ibid.,* at 81.

9 *Ibid.,* at 82.

[16] Consistent with the principles in section 2 of the Act, the Board believes that it should decide requests for costs with the primary objectives of making the appeal process a meaningful "opportunity" under the Act for public participation, to help enable citizens to fulfill their individual "responsibility" for protecting the environment, and to empower citizens to promote sustainable development. To fulfill these objectives, where an appeal validly raising broad "public interest" concerns is nevertheless filed unsuccessfully by private citizens (by themselves or by non-profit organizations on their behalf), the Board will generally not require the citizen-appellants to pay for the costs incurred by the approval holder or by the Director who ultimately prevail in the appeal.[10] Conversely, the Board may exercise its discretion to award costs to a citizen-appellant who raises issues important to the matter, not identified or not advanced adequately by other parties. This will normally arise where the appellant's intervention promotes the public interest by ensuring that evidence of value to the Board is put forward where that evidence might otherwise have been unavailable.

[17] In the Board's view, a successful appeal is typically a pre-requisite for the Board to conclude that the appeal has promoted the public interest. Thus, a citizen-appellant generally must succeed in the appeal to be eligible for a cost award. In addition, the Board may consider the reasonableness of the appellant's overall claim for costs, not only whether those costs are "directly related" to the issues decided by the Board, but also the degree of success achieved in relation to the Act's objective and guiding principles and the relief sought by the Appellant.

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[10] In *Dr. Martha Kostuch v. Director, Air and Water Approvals Div., Alberta Environmental Protection*, Appeal No. 94-017, the Board dismissed a private citizen's appeal, regarding the environmental impacts of a proposed cement plant, because the citizen lacked "standing" to file the appeal. August 23, 1995 Decision, at 21. The Board nevertheless denied the cement company's claim for costs, noting that it would be "undesirable" for the Board to award costs "to thwart appellants who feel they have specific, legitimate concerns, even though in the end the rather specific terms of the Act may preclude the Board from hearing the appeal, or the appellants may be unsuccessful in the appeal." *Ibid.*, at 22. The Board observed that there was "no doubt about this Appellant's bona fides" in filing her appeal and that her appeal had raised "interesting and genuine issues of fact and law, her case was clearly and effectively presented, and her appeal was well argued by competent counsel." *Ibid.*

[18] Following these standards for deciding requests for costs, the Board must first consider whether, and the extent to which the Appellants prevailed in their appeal.

[19] In Kozdrowski, the Board stated:

> "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.
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> Fiscal constraints on all parties require that appeals be resolved in an efficient and effective manner,[11] 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."
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> ...
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> "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."

SUMMARY

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

[20] The Board believes there were no substantive issues raised in the hearing that could not have been dealt with in a mediation. The site obviously still contained metallic debris. This issue could have been raised at the inquiry or discussed with Talisman. The evidence presented by the Appellants that convinced the Board that the inspector erred in issuing the reclamation certificate was the metallic debris collected from the site. The Board did not need to consider further issues as this alone was sufficient to indicate the site had not been reclaimed. The Board believes if this evidence had been brought to the attention of the other parties at the inquiry or in mediation the issues could have been resolved without a hearing.

[21] The Board further concludes that the evidence presented by Mr. Bardak did not convince the Board since it was mostly opinion and often not supported by actual evidence. Some "statements of fact" he presented were erroneous. Thus the Board concludes he did not contribute substantially to the hearing and costs for his expenses should not be considered.

[22] Mr. Carter's continued focus on the validity of the Criteria even after the Board clearly stated this was not an issue in the appeal did not contribute to a timely and cost effective hearing. Moreover it likely increased the costs to all parties. Mr. Carter focussed on this appeal as a test case when it clearly had very simple problems that were not linked to the pre-1983 wellsite reclamation criteria. The problems would clearly indicate the site was not reclaimed. Thus the Board denies the application for costs for his expenses.

[23] Finally the Board was not convinced that the Appellants met the burden of proving that costs were reasonable and necessary. They gave details of their expenses but no indication that they required assistance to provide substantive information in the hearing.

DECISION

[24] For the reasons given above, the Board denies the applications for costs.

Dated on October 5, 1998, at Edmonton, Alberta.

Dr. M. Anne Naeth

Dr. John P. Ogilvie

Mr. Ron V. Peiluck