ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision: December 1, 1999

IN THE MATTER OF Section **92.1 of the** Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and-

IN THE MATTER OF a reconsideration with respect to a Cost Decision issued by a previous panel of the Board regarding an appeal filed by Wayne and Laurel Penson.

Cite as: Reconsideration of costs decision *re: Penson and Talisman Energy Inc.*

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I. BACKGROUND

[1] A three member panel of the Environmental Appeal Board (the Board) heard a land reclamation appeal in 1998. Pembina Corporation sought a land reclamation certificate from the Department of Environmental Protection (the Department) in respect to a well site on land owned by Mr. Wayne and Ms. Laurel Penson (the Pensons). Department officials held an initial inquiry and refused the application. However, a second inquiry resulted in the issuance of a reclamation certificate. Pensons then filed an appeal with the Environmental Appeal Board.

[2] The Pensons' arguments and the replies of the respondent oil company (by then Talisman Energy Inc.) and the Inspector of Land Reclamation, Environmental Protection are set out in this Board's previous Report and Recommendations dated September 18, 1998[1]. The Board allowed the appeal, but decided the case on a relatively narrow ground when contrasted to the wider ranging procedural, legal and other matters advanced by the Pensons and addressed by the other parties at the hearing.

[3] The Board's hearing into the Pensons' appeal took two days[2] at the Court House in Grande Prairie, Alberta. Each party was represented by counsel throughout the proceedings. Counsel for the Pensons had provided written submissions on behalf of his clients. The evidence concluded at the end of the second day but argument remained to be given. Since the parties favoured making written submissions over returning to Grande Prairie for a third day of hearings, these submissions were subsequently received by the Board and used in its deliberations.

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1 *Penson v. Inspector of Land Reclamation, Alberta Environmental Protection re: Pembina Corporation,* EAB 98-005 R, (September 18, 1998).

2 Appeal hearing held on June 23 and July 13, 1998.

II. FIRST COSTS DECISION

[4] At the conclusion of the Board's proceedings, the Pensons applied to the Board for an award of costs. They submitted written argument in support of their request, which totalled $27,859.75. The amounts sought are detailed below in paragraph [24]. The claim was advanced on a full solicitor-and-client basis including $22,402.15 for solicitor's fees on account with Carter, Lock & Horrigan. It included the statement of account submitted to the Pensons by Riverview Consulting Ltd. for the consulting work and testimony of Mr. Russell Bardak, which amounted to $3,937.60. It also included a claim for hotel expenses, mileage and phone calls incurred by the Pensons directly for $1,020.00.

[5] Both respondents, Talisman Energy Inc and the Department, filed written replies arguing that costs should not be awarded.

[6] The three member panel of the Board issued its costs decision on October 5, 1998.[3] After reviewing the submissions of the parties and several of the Board's earlier decisions on costs in other cases, the panel denied the request. The panel's reasons are set out in paragraphs 20 to 23 of that decision, which read:

> [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.

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3 *Supra*, note 1.

[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 focused 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.

III. JUDICIAL REVIEW

[7] The Pensons sought judicial review of the panel's costs decision. Their Originating Notice of Motion and subsequent brief of argument filed in the Court of Queen's Bench raised several points summarized as follows:[4]

- That the Board erred in asking about or taking into account failure to use mediation to resolve this issue which in the Board's view might have been resolved by mediation.
- That the validity of the Reclamation Criteria for well sites was an issue and that this was a test case for these criteria.

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4 This summary is not meant to be exhaustive; it just touches on the main points raised on behalf of the Pensons in their judicial review motion.

- That it was procedurally wrong for the Department officials to allow an informal appeal and that the original refusal should have prevailed and the second granting should have been set aside.

- That the Board erred in characterizing Mr. Bardak's evidence as opinion when, as expert evidence, it could only be opinion.

- That the Board erred in finding the applicants had not shown any or any sufficient need for costs.

[8] The judicial review motion came before Mr. Justice J.S. Moore in the Court of Queen's Bench in Grande Prairie on June 18, 1999. At the conclusion of the proceedings, the Court granted the motion for judicial review and set aside the panel's decision.

[9] Justice Moore gave his ruling from the bench, with only brief reasons. He said:

> This is not an easy matter. It is a very interesting matter. These proceedings are on tape, so it is not a secret to anyone what my concerns were. Anybody can get a transcript of these proceedings by ordering it. So I am not going to go into "bunching" reasons right now. I think the reasons are self-evident.
>
> I am awarding certiorari, and that means that the matter of costs goes back for a hearing.
>
> I want it to be in "bold" or "underlined" that I do not consider this hearing a test case. My decision today is based only on the fact situation that is in front of me today and the law that applies to that fact situation. I hope that no one takes from my granting of certiorari that the Board, in its ordinary day to day hearings, will do much differently from what the Board feels it should do. In other words, I respect the prohibitive clause.
>
> However, there are times, there are days in each of our lives, mine included, the panel' s, where something seems to go wrong for a particular fact situation. And that is what I conclude regarding this particular fact situation. The total denial of costs based upon the reasons given by the panel make it patently unreasonable. And that is the test.

> **This decision should not be considered a precedent decision for anything.** (emphasis added by the Court).

[10] No party appealed the Court's decision.

IV. NEW SUBMISSIONS

[11] Following the Court's decision, the Board invited submissions from the Pensons, the Department and Talisman Energy, on what procedure the Board should use for the costs claim and by whom such costs should be paid.

[12] The Pensons argue that their full claim for solicitor-client costs is justified. In their view this was a test case on the applicability of the well-site criteria. They maintain that mediation was not a viable option given the position of Talisman and the Department. While the decision in their favour was based on metallic debris, the appeal dealt with broader issues. The Pensons also relied on the arguments they presented in the original costs decision[5] (paragraphs 5 and 6).

[13] The Inspector's submissions, in summary, are as follows. The Inspector has a statutory responsibility in the matter but no personal interest. The legislation protects the Inspector for claims of damages for all acts done in good faith. This should extend to costs awards, absent *mala fides.* The Pensons' contribution to the hearing was unfocussed and insufficient. The discussion about the criteria was not directly related to the notice of appeal. The Pensons decided not to mediate, which should be considered under s. 20(2)(a). They have not proven a need for financial assistance under 20(2)(c). This was not a complex case requiring substantial preparation.

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5 *Cost Decision re: Pembina Corporation,* EAB 98-005-C (October 5, 1998).

[14] Talisman Energy Inc. argues that no costs should be awarded. If they are, it should be against Alberta Environment due to their inconsistent manner of applying the well-site reclamation criteria. It argues that it was the Pensons who refused to mediate while Talisman was willing to do so. The presence of metallic debris could have been dealt with through mediation. Several of the issues the Pensons raised in their appeal were not raised in the two reclamation inquiries, where they might have been resolved earlier. Failing to raise issues until the appeal, in their opinion, justifies a refusal of costs.

[15] Talisman Energy Inc. further submits that the Pensons failed to present valuable evidence that made a substantial and significant contribution to the appeal. The Pensons' expert alleged hydrocarbon contamination but took no soil samples and presented no evidence to establish this allegation. His evidence did not touch on the metal debris, which was the reason for the ultimate decision. The validity of the criteria was not raised in the notice of appeal, therefore it is an issue that is beyond the authority in section 18(2) of the Regulation to grant costs. This case was not a "test case" on these criteria, and the Pensons were in any event unsuccessful on this point. The Pensons' costs claims are unreasonable and excessive. The power to award costs is discretionary and this is not a case for full repayment of all expenditures. This is so particularly because counsel dwelt on issues the Board found irrelevant to the appeal. Full solicitor-client costs are inappropriate except in rare and exceptional cases.' Talisman therefore argues that the claim for costs is excessive for a two day hearing.

[16] Talisman Energy Inc. further argues that, if costs are ordered, it should only be against Alberta Environment, because of their inconsistent application of the criteria. In Talisman's submission, all the parties' costs "could have been avoided had Alberta Environment been clear and consistent on the intent and use of the *criteria."*

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6 See e.g.: *Jackson and Parkview Holdings v. Trimac Industries* (1993), 138 A.R. 161.
Sidorsky v. CFRN Communications Ltd. (1997), 206 A.R. 382.

V. ANALYSIS

[17] The Board's power to order costs comes from section 88 of the *Environmental Protection and Enhancement Act:*

> 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.

This authority is supplemented by Ministerial regulations enacted under the authority of section 94:

> 94 The Minister may make regulations
>
> (d) prescribing the criteria to be considered by the Board in directing interim or final costs to be paid;

[18] The Environmental Appeal Board Regulation[7] expands upon this costs jurisdiction by describing both limitations upon the costs to be awarded and the criteria the Board should consider. The pertinent sections for this case are:

> 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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> (a) the matters contained in the notice of objection, and
> (b) the preparation and presentation of the party's submission.
>
> 20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.
>
> (2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

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7 A.R. 114/93 as amended.

(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 objection 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.

[19] Historically, many of this Board's earlier costs decisions approached the matter from the perspective of *intervenor* costs. Indeed, many of the appeals that come before the Board involve the approval of a project which because of its size or location has the potential for some broader impact on the public at large or upon citizens living in the vicinity of the project who fear being affected adversely by the project's operation. Such appeals are characterized by a high level of public interest and potential public impact. This case, as we discuss below, is different in that the Appellants, Mr. and Mrs. Penson, actually own the land that is the subject of the Department's order and the respondent's (and its predecessor's) activities.

[20] The Board has previously emphasized that when considering funding for appellants or public interest intervenors, it will apply the criteria to reflect the Board's desire, and need for, presentations that allow full exploration of the public interests involved. Those considerations include whether the party has a substantial interest in the appeal, participates responsibly and contributes in a way that details the environmental issues before the Board with the purposes of the Act (section 2) in mind at all times.

[21] The appeals that come before this Board, based on its environmental jurisdictions (air, soil and water, and impacts on wildlife, land and many other matters) are not all of the same character. Some involve less of a public interest and more the characteristics of disputes between two private parties. While protection of the environment is a key feature in each case, in some cases the impact is much more confined to individual landowners and their successors, than to the broader public. As the Board noted in a recent cost decision:

> The Board's statutory authority gives it jurisdiction over a variety of matters. In some appeals the public interest component is very high. In other appeals the subject matter is closer to a */is* between two parties with the public interest still involved, but to a lesser degree.[8]

[22] With this principle in mind, it is apparent that in this case, the Pensons are directly involuntarily affected by the well site on their land. They are not pursuing the matter before the Board on public interest grounds so much as on personal grounds. These grounds, from the Board's perspective, are easy to understand; Talisman's lack of reclamation directly affects Penson's use of their own land. Their complaint is with the mineral leaseholder, now Talisman Energy Inc., which carries the statutory responsibility to return the land to an appropriate condition.[9]

[23] In this case, the principles applicable to public interest intervenor funding can be modified to reflect the different realities of the relationship and the direct and immediate rights and obligations between the parties. The criteria set out in the Regulation and quoted above are flexible and discretionary enough to cover the full spectrum of cases that come before the Board.

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8 *Cost Decision re: Mizeras, Glombick, Fenske, et al.,* EAB No. 98-231, 232, and 233-C (November 29, 1999), para. 11.

9 Until Talisman does so they must keep paying the Pensons a surface rent, an obligation which continues until the Department issues a reclamation certificate (subject to appeals to the Board).

[24] The Pensons original claim for costs is as follows:

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 B 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

[25] Section 20(2)(a) of the Environmental Appeal Board Regulation allows the Board to consider, as a factor in awarding costs, "whether there was a meeting under section 11 or 13(a)." These are the two sections allowing the Board to convene a pre-hearing meeting, in part to "facilitate the resolution of the notice of objection." In this case, the Board did not actually convene a pre-hearing meeting. Counsel for the Pensons objects to the Board considering whether or not mediation (through a pre-hearing meeting) took place as a factor in assessing costs. He also argues that, in this case, responsibility for not attempting mediation lies with all parties, not just the Pensons. The Board remains of the view that all parties would have been well served in this case to have explored

a mediated solution, because the issue of the metal debris would have surely arisen earlier and led to at least some interim resolution.

[26] However, the Board did not convene a meeting under section 11 or 13(a), which it could have done notwithstanding the parties' reluctance. In the circumstances the Board accepts the point that any lack of enthusiasm for mediation in this case falls equally on the parties involved. It takes no account of this criteria in this decision.

[27] The Regulation also allows the Board to consider "(e) whether the party applying for costs required financial resources to make an adequate submission." For this factor particularly, the Board now finds it appropriate to draw some distinction between cases of intervenor funding in a case involving a high level of public interest and cases like this one that involves a direct dispute between private parties. In the latter case, involving privately held land, who wins or loses is a stronger factor, while the financial resources available are a lesser factor. This makes the traditional Court model of costs, more appropriate. Where a party loses in such circumstances, it is more because the other directly affected party's view prevailed (their land was impacted) and less because of the broader public interest.

[28] In this case, the Pensons through their income tax returns and through having to take a loan to fund their appeal, have demonstrated that they required financial resources to make an adequate submission.

[29] Subsection 20(2)(g) of the Regulation relates back to section 18(2) which is a limiting provision on the Board's consideration. It requires that costs must first be "reasonable" and secondly that they be "directly and primarily" related to the matter contained in the notice of objection and the preparation and presentation of the party's submission. This subsection relates to the scope of the submission. Regulation section 20(2)(f) "whether the submission of the party made a substantial contribution to the appeal" is a related factor, but directed more to the utility of the submissions than their scope. It is directed to the question of whether and how the submissions

added value to the Board's deliberations.

[30] Despite counsel for the Pensons (and to some extent for the Department) characterizing this as a "test case", the Board did not view it as such, as noted in the Board's decision[10] on the merits of the appeal at paragraphs [50] to [54]. This conclusion does not lead the Board to reduce the costs potentially allowed nor does it persuade the Board to award any additional monies because of any "test case" status. Even if it was a test case, the issue is primarily one of legal argument.

[31] The other issue which the Pensons maintain was important and justifies higher costs was the legal argument over whether it was open to the Director to reinspect a refused application for a reclamation certificate. The Board, however, decided the case on the more obvious basis that land containing metal debris cannot properly be certified as reclaimed.

[32] The Board agrees with Talisman that some of the matters raised by the Pensons in their presentation before the Board were not items raised in the original appeal documents and thus not matters directly and primarily related to the matters raised in the notice of objection. The Board also believes the parties would have been better served if matters of concern to the Pensons such as the presence of metallic objects in the soil, could have been raised earlier, preferably at the inspection stage, perhaps eliminating the need for these appeal proceedings.

[33] Regarding legal fees, the Board has commented in a previous decision[11] on whether to proceed to deal with costs on a solicitor-client basis. It said, at page 8:

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[10] *Supra*, note 1.

[11] *Supra*, note 8.

> [17] In court proceedings, it is only in exceptional circumstances that the courts award costs on a solicitor and client basis. Rather, the norm is for the courts to base costs, in so far as they relate to the costs of advocacy, upon a scale related to the size and nature of the dispute and the amount of trial and preparatory time customarily involved in matters of that type. In Alberta, this approach is embodied in the Schedules to the Rules of Court. Such amounts are, at all times, subject to the overriding discretion of the court. They are not intended to compensate for the full costs of advocacy, even in the court system where a "loser pays" approach is the norm.
>
> [18] In exercising its costs jurisdiction, this Board believes it is not appropriate (except perhaps in exceptional cases) to base its awards on a solicitor and client costs approach. It is up to each party to decide for themselves the level and the nature of representation they wish to engage. Similarly, it is up to each party to decide to what extent they wish their advocates to be involved in their pre-hearing preparation. The Board does not intend, through the exercise of its costs jurisdiction, to become involved in such decisions, yet this would be inevitable if, in deciding costs, the starting point was the actual amount charged by the lawyer or advisor in question. Rather, the Board intends to follow the approach used by Courts of basing any costs awards on a reasonable allowance for hearing and preparation time, suitably modified to reflect the administrative and regulatory environment and the other criteria that apply before the Board.

[34] The Board finds that a counsel fee of $1,000.00 per day and $500.00 per day preparation time is appropriate in a case of this nature, considering in part the approach taken by the courts in respect to costs.

[35] As for Mr. Russell Bardak, the Pensons ask for costs on account of the work done by him through Riverview Consulting Ltd. This includes Mr. Bardak's attending before the Board during the two days to give evidence and being available for consultation. It also includes the work Mr. Bardak undertook in assessing the site. Leaving aside $180.00 for travel, Riverview Consulting Ltd.'s account shows 7 days of work, each charged at $500.00 per day and described as follows:

011/05/97	Travel time and detailed site inspection fieldwork.
05/30/98	Travel time and detailed site inspection fieldwork.
06/06/98	Detailed site inspection report preparation.
06/20/98	Technical review of Talisman and AEP submission and preparation meeting with Darryl Carter.
06/23/98	Attendance and testimony at EAB appeal.
07/13/98	Attendance and technical support at EAB appeal.
08/11 & 20/98	Review of Talisman and AEP testimony and preparation of technical support notes. Review of Talisman and AEP final submission and preparation of technical support notes for final argument.

[36] The Board knows that it is not always possible to determine in advance of a hearing what issues the expert may be called on to comment upon, so preparation must take that into account. However, the Board also knows that at least the first day's field work was done at the time of the Department's inquiry process rather than as part of the appeal to this Board.

[37] The Board has considered the degree to which the evidence and testing work undertaken by the consultant assisted the Board in respect of the matters raised in the appeal. Mr. Penson provided valuable evidence to the Board in making its decision. The Board based its decision mostly on the fact that metallic industrial debris was still found on site and thus was clearly not reclaimed. Mr. Penson presented a sack of industrial debris collected from the site and pictures of metallic debris on the site as evidence. Mr. and Mrs. Penson retained Mr. Bardak as an expert

witness whose written statement *corroborated* the evidence of Mr. Penson that industrial metallic debris was found on the site. Thus this component of Mr. Bardak's written statement was to that extent useful to the Board. The Board believes a reasonable claim for such an expert is $500.00 per day hearing time and $250.00 per day preparation time.

[38] As for the Pensons, they seek costs for certain unreceipted disbursements incurred in the course of the appeal:

Two nights hotel costs	$220.00
Phone calls	$50.00
Mileage	$750.00
TOTAL	$1,020.00

[39] There are other costs, some valid and some not valid.[12] The Pensons seek certain additional costs for the post-decision process detailed by Mr. Penson in his own submission of September 6, 1999:

> The other area of costs should include interest paid on the bank loan, any additional lawyer bill and my time and expense since. Hopefully the Board and other parties don't argue that I'm not entitled to these costs. I didn't want to be paid for my time spent in the appeal. But I don't it's unreasonable to ask for wages for my time since the Board made it's Cost Decision. The Board erred in the Cost Decision. Even asking for a reconsideration fell on deaf ears.
>
> I'm asking for 50 hours of time spent driving, writing letters, attending court and meeting with my lawyer. If the Board doesn't agree with this maybe David Lloyd would volunteer to work 50 hours on my farm.
>
> I'm also asking for expenses driving 750 miles. This would cover 5 trips to Grande Prairie. Also $30 dollars for phone calls and faxing and photocopying.

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12 The question of costs on the judicial review motion was dealt with by the Court of Queen's Bench, and are not before this Board for consideration.

> Any additional fees paid to Mr. Carter should be the other parties responsibility. Also whatever amount the Board decides I should get from the first area of costs I should get reimbursed the interest I paid on the bank loan.

[40] The Pensons' records show payment of $162.00 for each month's interest on a $25,000.00 loan. The claim for interest on the Pensons' bank loan is tied directly to the question of solicitor-client costs. This is not, in the Board's view, an appropriate case for solicitor-client costs and therefore it is inappropriate to award interest on monies borrowed to pay that account. But, the Board does award the Pensons' additional costs of $30.00 for phone calls and two extra trips to Grande Prairie. The total costs award is set out in the following summary. These amounts take into the various factors set out above, some of which limit the amounts that might otherwise have been appropriate.

1.	Penson's Personal Out of Pocket Expenses	
	Hotels	220.00
	Phone calls	80.00
	Mileage	1,050.00
	8 days for hearing attendance, field investigation, picture taking, and sampling; hearing preparation and meals - Total $100 per day	800.00
	TOTAL	$2,150.00
2.	And on account of Bardak	
	2 days at hearing @$500 per day	1,000.00
	Mileage - 1 site visit	90.00
	1 day for site visit and 1 day for preparation @$250 per day	500.00
	TOTAL	$1,590.00
3.	And on account of Legal Counsel	
	2 days of hearings @1000 per day	2,000.00
	2 days of preparation @$500 per day	1,000.00
	Disbursements	409.28
	TOTAL	$3,409.28
	GRAND TOTAL	$7,149.28

VI. RESPONSIBILITY FOR COSTS

[41] The next issue the Board must address is who should be held responsible for the costs awarded. In the Board's view, the situations in which the Board (meaning the taxpayer) should pay costs are extremely limited. It might occur in those situations where it is appropriate and necessary to have submissions from intervenors which would otherwise not be forthcoming because of a lack of resources. Even then, this would only be in the situation where it would be for some reason inappropriate to allocate those costs to other parties to the appeal.

[42] In this case, it was Talisman and its predecessors who had the legal duty to bring this land back to its appropriate condition. That they failed to do so was *patently* obvious from the presence of metal debris on the lease. For this reason, the Board finds Talisman should bear responsibility for the costs awarded.

[43] Should the Department also be held liable for costs? The Department's role is statutory. There are some cases where it can clearly be said that it is a failure by the Department's officials to carry out their statutory role completely or adequately that is the true cause of an appeal. This is more likely to be so where the issue involved carries a heavy public interest component and where the Department's role in assessing the environmental impact of a project is crucial.

[44] In this case, the departmental officials were there to inspect and certify that the user of the surface lease did what it should have done. Their role was supervisory, not primary. In this case, the Department has carried out its mandate but has been found on appeal to be in error. In the absence of special circumstances, this should not attract an award of costs. In this case it is Talisman that must carry the burden of costs not the Department. Since Talisman failed in what amounted to a private responsibility, any costs should not be carried by the public purse.[D]

Dated on December 1, 1999, at Edmonton, Alberta.

"original signed by"
Dr. William A. Tilleman
Chairman

"original signed by"
Dr. Curt Vos

"original signed by"
Dr. M. Anne Naeth

"original signed by"
Dr. John P. Ogilvie

[13] It was Talisman's responsibility to adequately reclaim the land in question and they ought not have been granted a reclamation certificate (and thus relieved of their lease payment obligations) until this was done.