ALBERTA
ENVIRONMENTAL APPEAL BOARD

Costs Decision

Date of Costs Decision – November 12, 2002

IN THE MATTER OF Sections 91 and 96 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an application for costs filed by Paul Adams, Jim Kievit, Jeff Eamon, and the Bow Valley Citizens for Clean Air related to appeals filed by Paul Adams, Jim Kievit, and Jeff Eamon with respect to Amending Approval No. 1702-01-02 issued by the Director, Approvals, Southern Region, Regional Services, Alberta Environment to Lafarge Canada Inc.

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

BEFORE: William A. Tilleman, Q.C., Chair,
Dr. Steve E. Hrudey, and
Ron Heirath.

APPEARANCES:

Appellants: Dr. Paul Adams, Mr. Jim Kievit, Mr. Jeff Eamon, and the Bow Valley Citizens for Clean Air, represented by Ms. Jennifer Klimek.

Director: Ms. May Mah-Paulson, Director, Approvals, Southern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Ms. Charlene Graham, Alberta Justice.

Approval Holder: Lafarge Canada Inc., represented by Mr. Ron Kruhlak and Mr. Corbin Devlin, McLennan Ross LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Lafarge Canada Inc. for its cement manufacturing plant near Exshaw, Alberta. The Amending Approval allows Lafarge to change the fuel supply for part of the plant from natural gas to coal. The Environmental Appeal Board received ten appeals challenging this Amending Approval, but based on a joint recommendation of the parties, the Board accepted only three of the appeals – the appeals filed by Dr. Paul Adams, Mr. Jim Kievit, and Mr. Jeff Eamon. The Board also made the Bow Valley Citizens for Clean Air a party to these appeals.

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

After the Report and Recommendations was issued, the Board received an application for costs from Dr. Adams, Mr. Kievit, Mr. Eamon and the Bow Valley Citizens for Clean Air, for a total amount of $49,510.40. The costs requested were for legal counsel ($22,682.18) and for two witnesses ($9,471.68 and $17,356.54).

The Board denied the request for costs with respect to the two witnesses because: (1) the submissions made by these witnesses did not assist the Board to the degree necessary to support an award for costs; (2) the bills submitted by these witnesses were presented as though they were accepted as expert witnesses by the Board, which they were not; and (3) these witnesses had, in any event, stated that they were "volunteering their time" as part of the group who originally filed appeals.

The Board allowed, in part, the request for costs for legal counsel because the quantum and nature of these costs were reasonable, the legal counsel did an exemplary job in streamlining the appeal process, and the legal counsel was extremely helpful to the Board. Second, the Board awarded these costs as it found the appeals furthered the public interest and goals of the *Environmental Protection and Enhancement Act*.

The Board therefore awards costs in the total amount of $10,559.08 payable by Lafarge Canada Inc. to Dr. Paul Adams, Mr. Jim Kievit, Mr. Jeff Eamon and the Bow Valley Citizens for Clean Air.

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I. BACKGROUND

[1] On October 22, 2001, the Director, Approvals, Southern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 1702-01-02 (the "Approval") under what is now the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act")[1] to Lafarge Canada Inc. (the "Approval Holder" or "Lafarge") with respect to its cement manufacturing plant (the "Plant") at Exshaw, Alberta. The Approval allows the Approval Holder to make modifications to the Plant to allow the burning of coal instead of natural gas as part of what is referred to as the "Fuel Flexibility Project."

[2] On November 21 and 22, 2001, the Environmental Appeal Board (the "Board") received ten Notices of Appeal expressing concerns with the Fuel Flexibility Project.[2] The Board acknowledged these appeals on November 21 and 23, 2001, and requested a copy of the record (the "Record") from the Director. The Board also provided the Approval Holder and the Director with copies of the Notices of Appeal. The Board subsequently received the Record from the Director and provided a copy to each of the other Parties[3] to these appeals.

[3] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the Alberta Energy and Utilities Board (the "AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative. The AEUB advised that it had issued an Industrial Development Permit to the Approval Holder.[4]

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1 On January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

2 Notices of Appeal were received from Mr. James Kievit, Dr. Paul Adams, Mr. Marlo Raynolds, Ms. Nadine Raynolds, Mr. Jeff Eamon and Ms. Anne Wilson, Mr. Hal Retzer, the Bow Valley Citizens for Clean Air and the Pembina Institute for Appropriate Development, Dr. Tracey Henderson, Ms. Amy Taylor, and Mr. Gary Parkstrom.

3 In this decision, the Parties are the Approval Holder, the Director, Dr. Paul Adams, Mr. Jim Kievit, Mr. Jeff Eamon, and the Bow Valley Citizens for Clean Air.

4 The Board considered the effect of the AEUB's Industrial Development Permit on these appeals and determined that the AEUB had not held a hearing or review of this matter. See: Standing Decision: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc*. (24 June 2002), Appeal Nos. 01-097, 098 and 101-D2 (A.E.A.B.).

[4] The Board determined, based on an agreement reached by the Parties to these appeals, that it would accept the Notices of Appeal filed by Mr. James Kievit, Dr. Paul Adams, and Mr. Jeff Eamon (collectively the "Appellants").[5] The Board also granted full party status to the Bow Valley Citizens for Clean Air (the "BVCCA").

[5] A Preliminary Meeting was held on March 25, 2002, following which the Board issued its Decision,[6] which included directions on the status of the intervenors, the scheduling of written submissions and affidavits for the Hearing on April 24 and 25, 2002, and the issues to be dealt with at the Hearing. The eight issues to be decided were set out by the Board as follows:

1. SO_2 emissions – Approval Clause 4.1.13;
2. mercury and heavy metals;
3. particulates;
4. monitoring and reporting – Approval Clauses 4.1.24 and 4.1.28;
5. human health impact assessment/vegetation assessment study – Approval Clauses 4.1.30 and 4.1.37;
6. any potential antagonistic environmental effects of burning tires and coal;
7. the environmental effects of burning coal on the viewscape (limited to noise, visible pollutants, blue haze, and odour); and
8. the environmental effects of burning coal on the natural surroundings.

The Board also decided that greenhouse gases was *not* an appropriate issue for the hearing of these appeals.

[6] The Board undertook an extensive Hearing on April 24 and 25, 2002, in Calgary, Alberta, and received volumes of legal, technical, and scientific information regarding the appeals from the Approval Holder, the Director, the Appellants, the BVCCA, and the Municipal District of Bighorn.[7] At the close of the Hearing, the Appellants and the BVCCA reserved their right to ask for costs in this appeal.[8]

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[5] See: Standing Decision: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (24 June 2002), Appeal Nos. 01-097, 098 and 101-D2 (A.E.A.B.).

[6] See: Preliminary Motions: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (16 April 2002), Appeal Nos. 01-097, 098 and 101-D (A.E.A.B.).

[7] The Municipal District of Bighorn requested and was granted intervenor status. The Stoney Nakoda First Nation was also granted intervenor standing, but at the beginning of the Hearing they withdrew their request to

[7] Taking all of this information into account, including some of the recommendations that the Approval Holder submitted to the Board at the close of the Hearing, which the Board accepted, the Board recommended in its Report and Recommendations[9] (the "Report and Recommendations") that the Minister uphold the Approval, subject to the following changes:

> "1 the SO_2 emission reduction plan should be submitted by August 1, 2003, (instead of by June 1, 2005, as originally planned) and a 25% reduction in SO_2 should be implemented by June 1, 2005 (no date was originally specified);
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> 2. prior to the application for the renewal of the Approval, Lafarge should provide Alberta Environment with information regarding Best Available Demonstrated Technology for the control of emissions of SO_2, fine particulate, mercury, and heavy metals;
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> 3. a continuous SO_2 monitor should be placed at the Barrier Lookout for one complete operational season (as suggested by Lafarge); the results of this monitoring program should analyze the validity of the ambient air quality modeling; this analysis should be provided to Alberta Environment to allow an independent review of the modeling; and all the Parties to these Appeals should be encouraged to form and participate in an Air Quality Management Zone;
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> 4. Lafarge should submit the terms of reference for the proposed bioaccumulation study to Alberta Environment for approval, and Lafarge should be encouraged to involve the local government and the other Parties to this appeal in the review of the terms of reference and, if possible, in the study itself;
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> 5. if the monitoring program reveals that emission levels of mercury and heavy metals are higher than predicted, then Lafarge should develop a program to reduce these emissions;
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> 6. the vegetation study should include an additional vegetation sampling site to the west of Exshaw (agreed to by Lafarge);
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> 7. if blue haze remains an issue, Lafarge should undertake studies on the causes of any portion of the blue haze that they might be responsible for and develop a plan to reduce this problem, and this plan should be

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participate. See: Preliminary Motions: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (16 April 2002), Appeal Nos. 01-097, 098 and 101-D (A.E.A.B.).

[8] See: Transcript, April 24 and 25, 2002, at pages 370-371.

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

provided to Alberta Environment before the application for renewal of this approval is submitted;

8. Lafarge (as they suggested) should have a complaint line for addressing noise complaints from affected neighbours;

9. the Human Health Impact Assessment that Lafarge is required to undertake should involve consultation with all of the Parties to these Appeals and evaluate the impact of air emissions from the Plant using the emerging source, ambient, and other available monitoring results; and

10. the proposal for the Human Health Impact Assessment should be provided for approval to Alberta Environment by December 31, 2002 (instead of by June 1, 2003, as originally planned), and it should be completed by December 31, 2003 (instead of by March 1, 2004, as originally planned)."[10]

[8] The Minister accepted the Board's recommendations in Ministerial Order 17/2002, which was issued on July 8, 2002. The Board provided copies of this Ministerial Order and the Report and Recommendations to the Parties on July 10, 2002, and indicated that applications for costs would be accepted until noon on July 24, 2002.[11] This date was subsequently extended to July 26, 2002.[12]

II. APPLICATION FOR COSTS

[9] On July 26, 2002, the Board received a letter from the Appellants and the BVCCA requesting "…an order directing Lafarge Canada Inc. ('Lafarge') or the Director to pay the costs…" summarized as follows:

1. Ms. Jennifer Klimek's legal services, being fees in the amount of $20,600.00, representing 103 hours at the rate of $200.00 per hour, and disbursements in the amount of $598.30, for a total bill of $22,682.18 including GST;

2. Mr. Chris Severson-Baker's professional consulting services, being fees in the amount of $8,593.75, representing 137.5 hours of work and

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[10] *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101- R (A.E.A.B.) at Executive Summary and paragraph 68.

[11] See: Board's Letter, dated July 10, 2002.

[12] See: Board's Letter, dated July 24, 2002.

disbursements in the amount of $259.28, for a total bill of $9,471.68 including GST;[13] and

3. Mr. Hal Retzer's professional consulting services, being fees in the amount of $16,221.25, representing 170.75 hours at the rate of $95.00 per hour, for a total bill of $17,356.54 including GST.[14]

[10] In their submission, the Appellants and the BVCCA explained that they retained Mr. Retzer, Mr. Severson-Baker, and Ms. Klimek to assist them with the appeal of the Lafarge Approval. They enclosed invoices from Mr. Retzer, Mr. Severson-Baker, and Ms. Klimek. All of these invoices were directed to the BVCCA to the attention of Dr. Tracey Henderson. The Appellants and the BVCCA relied on the Board's costs decisions in *Paron*[15] and *Kozdrowski*[16] in addressing the criteria for awarding costs to a party who appears before the Board, the purpose of the Act, and in particular sections 2(a), (f), and (g),[17] and section 20 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation")[18] to argue that costs should be awarded. The Appellants and the BVCCA argued:

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[13] In their application for costs, the Appellants and the BVCCA stated that Mr. Severson-Baker's charge for consulting is $100.00 per hour. However, the Board notes that 137.5 hours at that rate does not equal $8,593.75. If the hours of work are correct, it appears the rate actually charged by Mr. Severson-Baker is $62.50 per hour.

[14] See: Letter from the Appellants and the BVCCA, dated July 25, 2002.

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

[16] Costs Decision re: *Kozdrowski* (7 July 1997), Appeal No. 96-059 (A.E.A.B.) ("*Kozdrowski*").

[17] Sections 2(a), (f), and (g) of the Act provide:

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

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well being of society;…

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;…."

[18] Section 20 of the Regulation provides:

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

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

(a) whether there was a meeting under section 11 or 13(a);

(b) whether interim costs were awarded;

(c) whether an oral hearing was held in the course of the appeal;

(d) whether the application for costs was filed with the appropriate information;

> "In the end their participation resulted in a much better approval as many gaps were filled. These changes and the resulting benefit to the environment would not have occurred without their appeals and participation in the process. Their involvement assisted the Board in achieving the goals of the Act and in its interpretation. By addressing these important, complex issues the public interest has been served."[19]

[11] The Appellants and the BVCCA submitted that the costs asked for were reasonable, and each person worked diligently, efficiently, and in such a manner that the time was very effectively used. The Appellants and the BVCCA provided a background of Ms. Klimek, Mr. Severson-Baker, and Mr. Retzer to justify the billing rate and time charged for each.

[12] In response to the request for costs, the Director submitted "… the application for payment of costs as it relates to costs being directed against the Director, should be dismissed."[20] The Director relied on the Board's recent costs decision in *Burnswest Corporation*,[21] and the reference to *Cabre Exploration Ltd*.,[22] to argue that:

> "…where the Department [(the Director)] has carried out is [*sic*] mandate and has been found, on appeal, to be in error, then in the absence of special circumstances, should not attract an award of costs. The Board in the Cabre decision states that

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> (e) whether the party applying for costs required financial resources to make an adequate submission;
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> (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 appeal and the preparation and presentation of the party's submission;
>
> (h) any further criteria the Board considers appropriate.
>
> (3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of
>
> (a) any other party to the appeal that the Board may direct;
>
> (b) the Board.
>
> (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

19 See: Letter from the Appellants and the BVCCA, dated July 25, 2002.

20 Director's Submission, dated August 7, 2002, at page 6.

21 Costs Decision re: *Burnswest Corporation* (14 June 2002), Appeal No. 01-090-CD (A.E.A.B.).

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

> unless there are exceptional circumstances, the Board does not believe that an award of costs against the Department would be justified."[23]

[13] The Director submitted "…there has been no allegation in this appeal that there are any special circumstances or of any misconduct of the Director in the decision to issue the approval amendment to Lafarge."[24]

[14] In response to the request for costs, the Approval Holder submitted that:

> "The Appellants made a limited, albeit positive, contribution to the hearing. Their application for costs does not meet all of the criteria established by the Board. The hearing occurred largely to deal with questions of policy outside of the approval holder's control. The approval holder demonstrated exemplary cooperation and a willingness to address stakeholder concerns throughout the hearing. Finally, most of the costs claimed by the Appellants are not actual or proper expenses." [25]

[15] The Approval Holder further submitted that:

> "If the Board is inclined to make an award of costs in favour of the Appellants … some of the costs claimed are unsupportable and, in any event, this is not a case for an award that would indemnify the Appellants for their solicitor and client costs."[26]

In regard to the issue of solicitor and client costs, the Approval Holder referred to the Board's decision in *Mizeras*[27] to argue that the Board has indicated that it will award such costs only in exceptional cases. The Approval Holder then submitted that "…the maximum amount the Board should consider in the circumstances of this appeal is 30 to 40% of Ms. Klimek's account."[28]

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[23] Director's Submission, dated August 7, 2002, at paragraph 16. See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) and *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

[24] Director's Submission, dated August 7, 2002, at paragraph 19.

[25] Lafarge's Submission, dated August 7, 2002.

[26] Lafarge's Submission, dated August 7, 2002.

[27] Costs Decision re: *Mizeras, Glombick, Fenske, et al.* (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) ("*Mizeras*").

[28] Lafarge's Submission, dated August 7, 2002.

III. DISCUSSION

A. Statutory Basis for Costs

[16] The legislative authority giving the Board jurisdiction to award costs is section 96 of the Act which states:

> "The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid."

[17] This section appears to give the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre Exploration Ltd.*:

> "Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it…'. The legislation gives the Board broad discretion in deciding whether and how to award costs."[29]

Further, Mr. Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs … and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid….'" (Emphasis in the original.)[30]

[18] The sections of the Regulation concerning final costs provide:

> "18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
>
> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
>
> (a) the matters contained in the notice of appeal, and
>
> (b) the preparation and presentation of the party's submission. …
>
> 20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

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

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

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

(a) whether there was a meeting under section 11 or 13(a);

(b) whether interim costs were awarded;

(c) whether an oral hearing was held in the course of the appeal;

(d) whether the application for costs was filed with the appropriate information;

(e) whether the party applying for costs required financial resources to make an adequate submission;

(f) whether the submission of the party made a substantial contribution to the appeal;

(g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;

(h) any further criteria the Board considers appropriate.

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

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

(b) the Board.

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

[19] When applying these criteria to the specific facts of the appeal, the Board must also remain cognizant of the purpose of the Act as stated in section 2:

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

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well being of society;…

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;…

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;…"

[20] While all these purposes are important, the Board believes that the shared responsibility that section 2(f) of the Act places on all Albertans "…for ensuring the protection,

enhancement and wise use of the environment through individual actions…" is particularly instructive in making its costs decisions.

[21] The Board has repeated in other decisions that it has the legislated discretion to decide which of the criteria in the Act and Regulation should apply in particular claims for costs.[31] The Board also determines the relative weight to be given to each criterion, depending on the specific circumstances of each appeal.[32] In *Cabre Exploration Ltd.*, Mr. Justice Fraser noted that section "…20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs…" and concluded "…that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[33]

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

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
>
> (a) substantially contributed to the hearing;
>
> (b) directly related to the matters contained in the Notice of Appeal; and
>
> (c) made a significant and noteworthy contribution to the goals of the Act.
>
> If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or time lost from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[34]

[23] Under section 18(2) of the Regulation, costs awarded by the Board must be "…directly and primarily related to … (a) the matters contained in the notice of appeal, and (b)

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31 See: Costs Decision re: *Zon et al.* (22 December 1997), Appeal Nos. 97-005-97-015 (A.E.A.B.).

32 See: Costs Decision re: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

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

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

the preparation and presentation of the party's submission." These elements are not discretionary.[35]

B. Court vs. Administrative Tribunals

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

[25] The distinction between the costs awarded in judicial as opposed to quasi-judicial settings was stated in *Bell Canada* v. *C.R.T.C.*:[36]

> "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."[37]

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

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

37 *Bell Canada* v. *C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals* (Scarborough: Carswell, 2001), at page 8-1, where he attempts to

> "…express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is

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

> "…administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Green*, Michaels & Associates Ltd., *supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board [("P.U.B.")]. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:
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> > In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right."[38]

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

> "Section 88 [(now section 96)] of the Act and section 20 of the Regulation, give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese* [*Reese* v. *Alberta (Ministry of Forestry, Lands and Wildlife)* (1992), 5 Alta. L.R. (3d) 40 [1993] W.W.R. 450 (Alta. Q.B.)]. The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and

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> an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

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

> arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[39]

[28] The Board has a standard starting point that costs incurred in an appeal are the responsibility of the individual parties.[40] There is an obligation for each member of the public to accept some of the responsibility of bringing environmental issues to the forefront.[41]

C. Application

[29] With this starting point in mind, the Board evaluates each costs application against the criteria in the Act and the Regulation.

[30] As indicated earlier, under section 18(2) of the Regulation, a party may make an application to the Board for all costs that are *reasonable* and that are directly and primarily related to the matters contained in the Notice of Appeal, and for the preparation and presentation of the party's submission. While the Board is satisfied that costs claimed by the Appellants and the BVCCA are directly and primarily related to matters contained in the Notice of Appeal and the presentation of and preparation for their submission, the Board has some concerns with the reasonableness of the costs claimed on behalf of Mr. Retzer and Mr. Severson-Baker. For this reason, the Board will deal with these costs claims separate from those related to Ms. Klimek.

1. Mr. Retzer and Mr. Severson-Baker

[31] The Board finds that the invoices for Mr. Retzer and Mr. Severson-Baker were presented as though these individuals participated in the capacity of expert witnesses.[42] The

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[39] See: Costs Decision re: *Mizeras, Glombick, Fenske, et al*. (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 9. See also: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 6.

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

[41] Section 2 of the Act provides:

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

Board is not prepared to consider Mr. Retzer and Mr. Severson-Baker as experts, at least in this appeal, and while it commends each for working diligently to bring this matter forward, the Board is not willing to allow costs associated with the retention of experts where, at the end of the day, the Board does not find experts were in fact utilized.[43] The Board notes that, with

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[42] Submission by the Appellants and the BVCCA, dated July 25, 2002, at page 3, provides the following justification for the costs claimed on behalf of Mr. Retzer and Mr. Severson-Baker:

> "Mr. Retzer, a Professional Engineer, has worked extensively in the resource industry. He was instrumental in bringing this matter to an effective hearing. He reviewed the application extensively and as such, had a very good grasp of the issues involved. He was presented as an *expert* on the issues of environmental planning and how business decisions are made with projects such as this one. He also assisted in reviewing the Appellants' affidavits and preparing witnesses. His input, both in the preparation for and at the hearing, was critical. Mr. Retzer's invoice does not include a bill for all the time he spent on the appeal. *It reflects the time a consultant would charge for and in particular, the time spent reviewing the technical and business aspects of the application and affidavits.* Mr. Retzer's *consulting rate* is $95.00 per hour and he spent $170.75 [*sic*] hours working on these matters.
>
> Mr. Severson-Baker, has a very extensive background in environmental policy and planning and other environmental issues and was also very instrumental in preparing for and presenting at the hearing. The Pembina Institute is extremely well known and is frequently retained by both industry and interveners to provide the services Mr. Severson-Baker provided at the hearing. Mr. Severson-Baker *provided expertise* in reviewing the application and much of the Director's file. He provided a framework for the appeal as he understood the principles of environmental management and many of the environmental issues raised by this project. Mr. Severson-Baker's charge for such *consulting* is $100.00 hour. He has charged for 137.5 hours, although he has spent many more hours on this matter." (Emphasis added.)

[43] During the hearing, the Board heard extensive discussions on the qualifications of Mr. Severson-Baker and Mr. Retzer. (See: Transcript, April 24 and 25, 2002, at pages 25 to 45.) The Board agreed with the Director and Lafarge that the qualifications of Mr. Retzer and Mr. Severson-Baker would not likely meet the court standards of an expert witness. The Board did believe, however, that these two individuals had, within Rule 24 of the Board's Rules of Practice, a specialized knowledge as presented on their resumes, and the Board was willing to hear them within those areas. As the Board stated: "…the Board does find that these two witnesses do have enough experience that at least we believe that they are asking some of the right questions." See: Transcript, April 24 and 25, 2002, at pages 44 and 45, lines 23 to 27 and 1 to 19:

> "THE CHAIR: The Board has discussed the issues and contemplated the arguments and the background of these witnesses and so on, and it has three points to make as it makes its decision on the qualifications of an expert.
>
> The first point is that the Board accepts the qualifications generally as presented, but we do agree with the Director and Mr. Kruhlak that these two witnesses' qualifications may not meet the court standards of an expert witness. I think that's true, and the Board agrees.
>
> Number two, having said that, we have looked at Rule 24, and within Rule 24 we believe that these two individuals have a specialized knowledge as presented on their resumes and as conceded by Mr. McDonald and probably Mr. Kruhlak, and within those concessions we would like to hear them on those points.
>
> Number three, the Board does find that these two witnesses do have enough experience that at least we believe that they are asking some of the right questions. So, again, we would like to hear from them.

regard to the invoice submitted for Mr. Severson-Baker, the types of costs claimed were more easily characterized as those associated with organizing the appeal – and not those of an expert witness.[44] With regard to the type of bills presented for Mr. Retzer, it is the Board's view that he did not present the detailed technical information and advice characteristic of an expert witness.[45]

[32] The Board also notes that in this case, Mr. Retzer and Mr. Severson-Baker might be characterized as "modified appellants" or "modified parties" in that both (Mr. Retzer as an individual appellant and Mr. Severson-Baker through the Pembina Institute for Appropriate Development) originally filed Notices of Appeal in this matter.[46] Also, as the Approval Holder pointed out in its submission, Mr. Retzer and Mr. Severson-Baker both "…expressly indicated at the hearing that they were volunteering their time (hearing transcript page 30, line 18; page 63, line 6)."[47] Under these circumstances, the claims being made on behalf of Mr. Retzer and Mr.

> Number four, of course to Mr. Kruhlak and Mr. McDonald, and all of you, the Board itself will decide the answers to the questions in front of us.
>
> That's the decision…."

[44] For example, Mr. Severson-Baker's hourly billing record for the month of November 2001, indicates a total of 16 hours for tasks described as follows: "update from BVCAA," "discuss appeal with BVCAA," "review intervention letter," "update from BVCAA – strategy – review apeal [*sic*] letter," "next steps with Lafarge Appeal," "edit intervention letter – appeal," "update and strategy," "strategy – legal rep change," and "meeting with new potential lawyer." See: Submission by the Appellants and the BVCCA, dated July 25, 2002, enclosed invoice from Pembina Institute for Appropriate Development.

[45] For example, Mr. Retzer's Affidavit, dated April 1, 2002, raises a number of important issues that the Board addressed, and in some cases ultimately included in its recommendations. However, neither his Affidavit nor his oral presentation provided the level of detailed technical information and advice characteristic of an expert witness in an appeal such as this one.

[46] Appeal Nos. 01-102 (filed by Mr. Retzer) and 01-103 (filed by Mr. Severson-Baker on behalf of the BVCCA and the Pembina Institute).

[47] Lafarge's Submission, dated August 7, 2002, at page 3. At the Hearing, Lafarge asked Mr. Severson-Baker: "Is the Pembina Institute retained by the appellants, or are you just volunteering your services?" Mr. Severson-Baker responded: "*We're volunteering*, and to go back in history of this process, we originally got involved, partly at the invitation of the individual groups and also because we have members of Pembina Institute that, and otherwise, that reside in Canmore who had concerns about the air quality of Canmore and the areas where they were created in Bow Valley." (Emphasis added.) See: Transcript, April 24 and 25, 2002, pages 30 and 31, lines 21 to 27, and line 1. Mr. Retzer also stated: "For this project, I've been involved with all the meetings between the appellants and Lafarge over the last year and a half and since not being granted standing, I've stepped down – not being granting [*sic*] standing, *I've volunteered my time* to assist with the appellants throughout the whole review of documentation." (Emphasis added.) See: Transcript April 24 and 25, 2002, page 57, lines 3 to 8.

Severson-Baker may be characterized as a type of compensation rather than an actual expense incurred as a neutral third party in the capacity of an expert.[48]

[33] Furthermore, the Board finds that the contributions made by Mr. Retzer and Mr. Severson-Baker on behalf of the Appellants and the BVCCA, while helpful in that they reviewed the Director's Record in detail and posed a number of constructive questions, did not make a substantial contribution to the appeal, pursuant to section 20(2)(f) of the Regulation, so as to justify an award of costs for retaining these individuals. In considering whether a party made a substantial contribution, it is important to note the shared responsibility is a requirement that section 2(f) of the Act places on all Albertans "…for ensuring the protection, enhancement and wise use of the environment through individual action…."

[34] In previous cases, the Board has considered the significant contribution a party has made to a hearing as a factor in deciding to award costs. In *Paron*, the Board awarded costs for legal fees to an environmental group because its lawyer was of particular assistance to the Board. In *Paron*, the Board held:

> "The principle reason for LWEPA's [(the environmental group)] successful costs request is the significant assistance that LWEPA – and more specifically LWEPA's legal counsel, Mr. Brian O'Ferrall, Q.C. – gave the Board with respect to the preliminary meeting. Mr. O'Ferrall made two significant and unique contributions to the preliminary meeting. The Board relied upon these contributions. First, Mr. O'Ferrall made a substantial contribution to the interpretation of [the] Act with respect to standing. … Second, Mr. O'Ferrall made a significant contribution to the hearing by providing the Board with a thorough and detailed understanding of the participation of the Appellant Enmax [(one of the other appellants before the Board)] in the Energy and Utilities Board process associated with the deregulation of the interest. This information, which goes to our Board's jurisdiction, formed in part, the basis of the Board's decision to dismiss Enmax's appeal."[49]

[35] In *Kozdrowski*, the Board awarded costs to an appellant because she "…contributed to the hearing through a strong submission, she asserted in good faith an appeal

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[48] The Board has previously stated that in circumstances where claims are made where the claimant is not "out of pocket" for the amount claimed, "…these claims are more appropriately characterized as a type of compensation rather than costs …." See: Costs Decision re*: Burnswest Corporation* (14 June 2002), Appeal No. 01-090-CD (A.E.A.B.) at paragraph 29.

[49] Costs Decision: *Paron et al.* (8 February 2002), Appeal Nos. 01-002, 01-003, and 01-005-CD (A.E.A.B.) at paragraphs 61 and 62.

that, in the end, placed directly into issue public health, a key legislative priority, and she significantly contributed to the Board's decision…."[50] Further, in *Kozdrowski*, the Board stated "…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."[51] The Board subsequently concluded Ms. Kozdrowski had "…indeed made a difference…"[52] and on that basis awarded costs.

[36] In the case presently before the Board, the Appellants and the BVCCA made a series of submissions to argue that Mr. Retzer and Mr. Severson-Baker made a substantial contribution to the hearing.[53] In the Board's respectful view, neither Mr. Retzer nor Mr. Severson-Baker presented evidence beyond what the Board would expect from any appellant before it with respect to an appeal of this scope. While Mr. Retzer and Mr. Severson-Baker certainly contributed to the hearing process, they did so in a manner comparable to those of the individual Appellants themselves. Respectfully, they did not make the type of contribution made by the appellants in *Paron* and *Kozdrowski*.

[37] As the Board has stated in previous costs decisions, it has "…generally accepted the starting point that the costs incurred with respect to the appeal are the responsibility of the individual parties."[54] With regard to the costs claimed by Mr. Retzer and Mr. Severson-Baker, the Board cannot justify moving from this starting point.

2. Ms. Klimek

[38] The Board finds the costs claimed on behalf of Ms. Klimek to be reasonable and her contribution on behalf of the Appellants and the BVCCA to be "substantial" as required by sections 18(2) and 20(2)(f) of the Regulation. However, the Board also believes that pursuant to section 2(f), the Appellants and the BVCCA must also be prepared to bear part of the legal fees.

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

51 Costs Decision: *Kozdrowski* (7 July 1997), Appeal No. 96-059 (A.E.A.B.) at paragraph 34.

52 Costs Decision: *Kozdrowski* (7 July 1997), Appeal No. 96-059 (A.E.A.B.) at paragraph 41.

53 See: Submission of the Appellants and the BVCCA, dated July 25, 2002, at page 2.

54 Costs Decision re: *Paron et al.* (8 February 2002), Appeal Nos. 01-001, 003 and 005-CD (A.E.A.B.) at paragraph 38.

Therefore, the Board will exercise its discretion and award the Appellants and the BVCCA costs in the amount of 45 percent of Ms. Klimek's legal fees, plus disbursements and GST, for a total award of $10,559.08.[55]

[39] The principle reason for awarding costs for Ms. Klimek is the significant assistance that Ms. Klimek, on behalf of the Appellants and the BVCCA, gave the Board with respect to the appeal process, procedurally and otherwise. The Board has awarded costs in previous decisions where it has found that a party made a substantial contribution to the hearing.[56]

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

> "In assessing costs for legal counsel and expert witnesses, the Board reiterates the importance of current specific data/information in their hearings, concise and organized cases and for Parties to have access to informed, experienced assistance in preparing their cases…. In this appeal … many aspects of the presentations by Parties claiming costs added value to the Board's overall process. The Board's costs awards are based on this added value." [57]

The Board also stated with regard to solicitor and client costs, in *Mizeras*:

> "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 account charged by the lawyer or advisor in question. Rather, the Board intends to follow the court's approach of basing any costs awards on a reasonable allowance for hearing and preparation

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[55]

Legal Fees	$20,600.00 @ 45% =	$9,270.00
GST	$9,270.00 @ 7%=	$648.90
Disbursements	$598.30	$598.30
GST	$598.30 @ 7% =	$41.88
Total		$10,559.08

[56] See excerpts set out earlier in this decision from: Costs Decision re: *Kozdrowski* (7 July 1997), Appeal No. 96-059 (A.E.A.B.) and Costs Decision re: *Paron et al.* (8 February 2002) Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.). See also: Costs Decision re: *Mizeras, Glombick, Fenske, et al*. (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.).

[57] Costs Decision re: *Mizeras, Glombick, Fenske, et al.* (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 26.

> time, suitably modified to reflect the administrative and regulatory environment and the other criteria that apply before the Board." [58]

[41] The Board found Ms. Klimek to be extremely helpful, and the Board is quite sure that without Ms. Klimek's assistance, the processing of the appeal would have been longer and more costly for all Parties. In the Board's view, it was through Ms. Klimek's guidance that the Appellants and the BVCCA were able to come to agreements on standing and issues, were able to pool their resources, and were able to work together to streamline the process. She also focused the presentation of the Appellants and the BVCCA on key issues and conducted a focused and efficient cross-examination. The Board agrees with the Appellants and the BVCCA that by doing so, the Appellants and the BVCCA made "the most of the Board's time." [59]

[42] Second, the Board finds Ms. Klimek's fee to be very reasonable, especially given her experience and expertise. Ms. Klimek has 17 years experience, holds a Masters degree in Environmental Law, has worked in the environmental area since 1990, and has appeared before this Board, and other tribunals, on previous occasions.[60] Her hourly rate is $200.00, and she spent 103 hours working on this matter as indicated in the costs application. The Appellants and the BVCCA point out in their submission that the AEUB allows $250.00 per hour for lawyers at her level of academic and practical experience. Finally, the legal time was very effectively used.[61]

[43] As the Board stated in *Paron*, $190.00 per hour is the maximum hourly rate the Government of Alberta would likely pay for senior outside counsel based on its tariff of fees.[62] Given the nature of the issues under appeal, the number of Appellants represented by Ms.

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58 Costs Decision re: *Mizeras, Glombick, Fenske, et al.* (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) at paragraph 18.

59 Submission of the Appellants and the BVCCA, dated July 25, 2002, at page 2.

60 According to the Alberta Legal Telephone Directory 2002-2003, Ms. Klimek was admitted to the Law Society of Alberta in 1985 and as a result, has 17 years of legal experience. As indicated in the costs application, Ms. Klimek charges $200.00 per hour. However, based on the tariff of fees used by the Government of Alberta for outside counsel with her level of experience, the rate would be $190.00/hour. The Board is of the view that the Government of Alberta rate is an appropriate tariff against which to judge the appropriateness of legal fees, but notes that there are circumstances in which it may not be appropriate.

61 See: Submission of the Appellants and the BVCCA, dated July 25, 2002, at page 3.

62 See: Costs Decision re: *Paron et al*. (8 February 2002) Appeal Nos. 01-002, 003 and 005-CD (A.E.A.B.) at notes 37 and 46.

Klimek, and the fact that a Preliminary Meeting and a two-day Hearing were held, the Board finds the legal costs claimed by the Appellants and the BVCCA to be reasonable.

[44] Third, the Board is of the view that through Ms. Klimek, the Appellants and the BVCCA were able to further the public interest and the goals of the Act, and the Board notes that the Approval Holder properly acknowledged that "…the Appellants made a limited, albeit positive, contribution to the hearing."[63] As the Board stated in *Paron*:

> "In any decision on costs, the purpose of the Act must be considered. The purposes of the Act are found in section 2 …. While all of these purposes are important, the Board is of the view that the shared responsibility that section 2(f) of the Act places on all Albertans '…for ensuring the protection, enhancement and wise use of the environment through individual action…' is particularly instructive in making its costs decision."[64]

In this regard, the Appellants and the BVCCA submitted that:

> "The Board has stated that the overriding principle in deciding whether to order costs is whether the Appellants served the public interest in protecting the environment and promoting economic interests. The Appellants [*sic*] participation in the appeal certainly meets this criterion. The Appellants did not ask the Board to set aside the approval. They asked the Board to modify the approval to ensure that the environment and human health was protected. This approach balanced the various interests that the Board must consider under the Act.
>
> The Appellants provided valuable assistance to the Board in this appeal. Their evidence and submission was focused on relevant issues. The issues raised, and evidence provided, assisted the Board in the interpretation of the Act and relevant policies. As a result of the Appellants' submission, the Board addressed the Director's obligations when a proponent makes an application to amend an approval and, in particular, what environmental concerns must be addressed. The Board also addressed the import of the Air Quality Guidelines and the Department's policy on best available technology. This decision will provide guidance to the Director in the future and therefore is very much in the public interest."[65]

[45] The Board concurs with the Approval Holder that the Appellants and the BVCCA made a positive contribution to the hearing. In the Board's view, the extent of this contribution was such that the Appellants and the BVCCA assisted the Board in varying the Approval to be

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63 Lafarge's Submission, dated August 7, 2002, at pages 2 and 3.

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

consistent with sections 2(a), (b), (d), (f), and (g) of the Act. The filing of the Appellants' appeals and their pursuance of the issues before this Board has, in result, positively affected the original Approval in favour of the protection of ecosystems and human health.[66]

[46] It was in large part as a result of the submissions of the Appellants and the BVCCA that the Board recommended, and the Minister accepted, a number of amendments to the Approval. As identified in the Board's Report and Recommendations, the Appellants and the BVCCA raised concerns about adverse human health effects from sulphur dioxide.[67] In response to these concerns, the Board held that although there was no evidence to suggest that adverse health effects had occurred,

> "…Albertans rightly expect that the air quality Guidelines that have been established for all locations in Alberta will be enforced with vigour, particularly in locations such as the Bow Valley corridor where such high intrinsic values, in terms of Provincially protected recreational areas, and aesthetic and ecological values are evident."[68]

As a result, in response to this conclusion, the Board recommended, and the Minister accepted, that "…the SO_2 emission reduction plan should be submitted by August 1, 2003, (instead of by June 1, 2005, as originally planned) and a 25% reduction in SO_2 should be implemented by June 1, 2005 (no date was originally specified)…"[69] and that "…a continuous SO_2 monitor should be placed at the Barrier Lookout for one complete operational season…"[70] to allow for an independent review of the modeling information upon which the Approval is based.

[47] Further, with respect to Best Available Demonstrated Technology ("BADT"): "The Appellants argued that the Approval does not require the Approval Holder to use BADT in

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65 Submission of the Appellants and the BVCCA, dated July 15, 2002, at page 2.

66 See the Board's Recommendations set out earlier in this decision.

67 See: *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraph 23.

68 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraph 24.

69 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at Executive Summary and paragraph 68.

70 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at Executive Summary and paragraph 68.

addressing SO_2 emissions from the Plant."[71] Following cross-examination by the Appellants and the BVCCA on this point,[72] the Board held: "…the Board is not convinced that Alberta Environment has been provided with an adequate basis to determine the nature of BADT for this industrial sector, particularly for SO_2 emissions."[73] Based on these arguments, the Board recommended, and the Minister accepted, that: "…prior to the application for the renewal of the Approval, Lafarge should provide Alberta Environment with information regarding Best Available Demonstrated Technology for the control of emissions of SO_2, fine particulate, mercury, and heavy metals…."[74]

[48] The Appellants and the BVCCA also raised concerns about the Human Health Impact Assessment. As noted in the Board's Report and Recommendations:

> "The Appellants argued that this study should have been completed before the submission of an application for the Approval. The rationale presented by the Appellants, that impact assessments should be completed before a project is implemented, has undeniable merit. Notwithstanding these merits, the Appellants' closing argument proposed allowing the Approval Holder to complete the study within 12 months of the fuel conversion to coal."[75]

In response to this argument, the Board recommended, and the Minister accepted, that:

> "…the Human Health Impact Assessment that Lafarge is required to undertake should involve consultation with all of the Parties to these Appeals and evaluate the impact of air emissions from the Plant using the emerging source, ambient, and other available monitoring results; and …"
>
> "…the proposal for the Human Health Impact Assessment should be provided for approval to Alberta Environment by December 31, 2002 (instead of by June 1,

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71 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraph 34. See also: Written Submission of Appellants, dated April 5, 2002, at page 3, paragraph 7(f)(i).

72 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraphs 38 to 40.

73 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraph 42.

74 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at Executive Summary and paragraph 68.

75 *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraph 60. See also: Exhibit No. 12, Appellants' Proposed Changes, Issue 5.

> 2003, as originally planned), and it should be completed by December 31, 2003 (instead of by March 1, 2004, as originally planned)…."[76]

[49] A final example of how the Appellants appeals before this Board have furthered the purposes of the Act, is identified in the Report and Recommendations where it stated:

> "The Appellants argued that the noise from this operation should be governed by the [A]EUB noise abatement guidelines and that there should be a complaint line maintained by the Approval Holder so that affected neighbours can find out what may be contributing to noise impacts. The Board concludes that a complaint line for noise concerns provides a reasonable response to this problem."[77]

In response to this argument, the Board recommended, and the Minister accepted, that "Lafarge (as they suggested) should have a complaint line for addressing noise complaints from affected neighbours…."[78]

D. Financial Resources

[50] With regard to section 20(2)(e) of the Regulation, the Appellants and the BVCCA submitted that they:

> "…are certainly a group with financial need. The BVCCA is a fledgling organization with few resources. The individuals should not be expected to pay the bill when the importance of their appeal is considered. Furthermore, there was no financial gain for any of the Appellants. They brought this appeal because they were concerned about the protection of the environment and human health."[79]

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[76] *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at Executive Summary and paragraph 68.

[77] *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at paragraph 67. See also: Exhibit No. 12, Appellants' Proposed Changes, No. 9. See also: Affidavit of Dr. Paul R. Adams, dated April 1, 2002, at paragraph 8, where Dr. Adams states: "… Noise levels, as presented by Lafarge in its noise map, indicate noise in the range of 50-55 dB at Lac Des Arcs. These noise levels would not meet the [A]EUB Guideline ID 99-8." Transcript, April 24 and 25, 2002, at page 74. Dr. Paul Adams, in his direct evidence on noise, provided: "…Noise control directives should be implemented for the Lafarge plant and better mechanisms for submitting and resolving complaints should be provided; in other words, if somebody does have a concern, how do they register it? Who do they phone? How do they submit it?"

[78] *Kievit et al.* v. *Director, Approvals, Southern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098 and 101-R (A.E.A.B.) at Executive Summary and paragraph 68.

[79] Submission of the Appellants and the BVCCA, dated July 25, 2002, at pages 2 and 3.

[51] While the Board reiterates its starting point that each party to an appeal should bear its own costs, the Board is also aware that "…environmental hearings challenging a highly technical and scientific approval may require a balancing of resources to 'level the playing field' between citizen appellants … and corporations…."[80]

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

E. Who Should Bear the Costs?

[53] The Appellants and the BVCCA requested that costs should be awarded against the Director or Lafarge.[81]

[54] As the Director pointed out in her submission, the Appellants and the BVCCA made no assertion of special circumstances or of any misconduct of the Director that would warrant an award against the Director as stated in *Cabre*.[82]

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

[56] The Approval Holder argued that it "…demonstrated cooperation throughout this appeal and … therefore … this is not an appropriate case for making an award of costs against

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

81 See: Submission of the Appellants and the BVCCA, dated July 25, 2002, at page 1.

82 See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.). In *Cabre*, the Board stated that where the Department has carried out its mandate and has been found, on appeal, to be in error, then in the absence of *special circumstances*, it should not attract an award of costs. The Court of Queen's Bench upheld the Board's decision: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

Lafarge."[83] The Approval Holder added, among others, that the Hearing focused largely on policy issues not directly related to its project but that:

> "Lafarge acted throughout to offer its cooperation and present practical solutions, although it could not control the questions of policy at issue. These considerations militate against an award of costs against Lafarge."[84]

[57] In previous costs decisions against a project's proponent, the Board has described the role of project proponents as being "….responsible for incorporating the principles of environmental protection set out in the Act into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties…."[85] As the Board has stated before, "…these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources, and responsible for the project's financing, than upon the public at large as would be the case if they were to be assessed against the Department."[86]

[58] Costs in the circumstances of these appeals will therefore be ordered against the Approval Holder, Lafarge Canada Inc.

IV. DECISION

[59] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs in the total amount of $10,559.08 to the Appellants and the BVCCA, for the costs associated with retaining its legal counsel, Ms. Jennifer Klimek. This award of costs shall be paid by the Approval Holder to the Appellants and the BVCCA within 45 days of this decision.

Dated on November 12, 2002 at Edmonton, Alberta.

"original signed by"

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83 Lafarge's Submission, dated August 7, 2002, at page 1.

84 Lafarge's Submission, dated August 7, 2002, at page 2.

85 Costs Decision re: *Mizeras, Glombick, Fenske, et al*. (29 November 1999) Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.).

86 Costs Decision re: *Mizeras, Glombick, Fenske, et al.* (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.).

William A. Tilleman, Q.C.
Chair

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

"original signed by"
Ron Hierath
Member