ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 2, 2010

IN THE MATTER OF sections 91, 92, 94, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Amil Shapka with respect to *Environmental Protection and Enhancement Act* Approval No. 248406-00-00 issued to the Evergreen Regional Waste Management Services Commission by the Director, Northern Region, Environmental Management, Alberta Environment.

Cite as: Costs Decision: *Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (02 July 2010), Appeal No. 08-037-CD (A.E.A.B.).

BEFORE:	Mr. Alex MacWilliam, Panel Chair; Dr. Alan Kennedy, Board Member; and Dr. Dan Johnson, Board Member.
SUBMISSIONS FROM:	
Appellant:	Dr. Amil Shapka, represented by Ms. Eva Chipiuk, Ackroyd LLP.
Intervenor:	Mr. Robert Tomlinson.
Approval Holder:	Evergreen Regional Waste Management Services Commission, represented by Mr. William Barclay, Reynolds Mirth Richards & Farmer LLP.
Director:	Mr. Kem Singh, Director, Northern Region, Environmental Management, Alberta Environment, represented by Ms. Michelle Williamson, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Environmental Protection and Enhancement Act* to the Evergreen Regional Waste Management Services Commission, authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II), where more than 10,000 tonnes per year of non-hazardous waste is disposed of in the County of St. Paul, Alberta. The Approval replaced the Registration under which the landfill was previously authorized.

The Board received an appeal from Dr. Amil Shapka and a hearing was held on January 18 and 19, 2010. At the close of the hearing, Dr. Shapka and the Commission reserved their rights to apply for costs.

Dr. Shapka applied for costs totalling $65,765.69, including $40,533.53 for expert costs and $25,232.16 for legal costs. The Commission applied for costs totalling $202,264.83, including $105,559.98 for expert costs and $99,704.85 for legal costs.

The Board did not award costs to either party for legal fees. The parties were well represented by their counsel, and this assisted in the efficient participation of the parties in the hearing, but the Board did not view this as warranting awards of costs for legal fees. The Board did not have detailed information related to the costs claimed by the Commission for its legal counsel or its expert. The Board could not determine whether the costs claimed by the Commission directly related to the preparation for and presentation at the hearing, so no costs were awarded to the Commission.

The Board had previously awarded interim costs to Dr. Shapka, payable by the Commission, to retain an expert to prepare and present evidence at the hearing. The Board considered the evidence presented by Dr. Shapka's expert raised issues the Commission and the Director needed to be aware of. Therefore, the Board considered the requirements of the interim costs were met and none of the interim costs would have to be returned. However, the Board did not award any additional costs for Dr. Shapka's expert because of the limited assistance he provided in making recommendations regarding the identified issues.

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I. BACKGROUND

[1] On December 30, 2008, the Director, Northern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 248406-00-00 (the "Approval") to the Evergreen Regional Waste Management Services Commission (the "Approval Holder" or the "Commission") authorizing the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II)[1] (the "Landfill") where more than 10,000 tonnes per year of non-hazardous waste is disposed of at W-15-56-10-W4M in the County of St. Paul, Alberta. The Approval was issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). The Landfill previously operated under Registration No. 189305-00-00.

[2] On January 30 and February 2 and 4, 2009, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Robert and Ms. Yvonnne Tomlinson[2] and Dr. Amil Shapka (the "Appellant") appealing the Approval.

[3] The Hearing was held on January 18 and 19, 2010, in St. Paul, Alberta. At the close of the hearing, the Appellant and Approval Holder reserved their rights to apply for final costs.

[4] The Board recommended the Approval be varied, and the Minister issued a Ministerial Order on March 1, 2010.[3]

[5] The Appellant and Approval Holder filed costs applications. The Board received submissions from the Parties[4] and Intervenor between March 16, 2010 and March 30, 2010.

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[1] Class II landfill is defined in the *Waste Control Regulation*, Alta. Reg. 192/96, as "…a landfill for the disposal of waste, not including hazardous waste."

[2] On October 23, 2009, the Board notified the Parties and Mr. and Ms. Tomlinson that the appeal of Ms. Tomlinson was dismissed for failing to file a Statement of Concern. Mr. Tomlinson was found to be not directly affected, and therefore his appeal was also dismissed. Mr. Tomlinson (the "Intervenor") was allowed to participate at the Hearing as an Intervenor. See: *Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal No. 08-037-ID2 (A.E.A.B.).

[3] See: *Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (18 February 2010), Appeal No. 08-037-R (A.E.A.B.).

II. COSTS APPLICATIONS

A. Appellant

[6] The Appellant claimed final costs totaling $65,765.69, which included $40,533.53 for expert costs and $25,232.16 for legal costs. The Appellant stated the costs claimed were directly related to the matters contained in the Notice of Appeal, the preparation of submissions on preliminary matters and the Hearing, and presenting at the Hearing. The Appellant submitted the Board should exercise its discretion and award costs in the full amount claimed because of the following circumstances:

(a) Costs increased prior to the Hearing as a result of the Approval Holder's uncooperative behaviour and actions;

(b) A costs award to the Appellant would be consistent with and would further the goals of EPEA;

(c) He made a substantial contribution to the appeal;

(d) He had divided success in his appeal; and

(e) The expert and legal costs incurred were directly related to his appeal.

[7] The Appellant stated the Approval Holder requested the Board determine if the Appellant was directly affected and which issues raised by the Appellant were in the Board's jurisdiction. The Appellant referred to the October 9, 2008 Commission meeting minutes in which the Commission's manager stated that only the Appellant can be considered directly affected. The Appellant stated the Approval Holder did not acknowledge in its submission that the Appellant may be directly and adversely affected and instead argued the Appellant failed to meet the test for standing. The Appellant stated that, as a result, he incurred additional costs making his submission on standing.

[8] The Appellant argued the Board was persuaded by the Appellant's arguments with respect to the issues raised. The Appellant noted the Director raised two issues for the

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[4] The Appellant, Approval Holder, and Director are, collectively, the "Parties."

Hearing. The Appellant submitted that, "…given the Commission's actions and the Director's acknowledgement of whether the potential impacts were properly assessed, the Commission and the Director ought to be responsible for the costs incurred by Shapka in making these preliminary motions submissions."[5]

[9] The Appellant stated the Board provided the Approval Holder an opportunity to work cooperatively with the Appellant in dealing with the site visit, interim costs, and information requests, but the Approval Holder refused to cooperate with any of the requests, resulting in further submissions being filed with the Board. The Appellant submitted the Approval Holder could have made a reasonable offer for interim costs rather than simply denying the request. The Appellant argued the Approval Holder had the opportunity to agree to the site visit and the information requests, thereby reducing the Appellant's costs, but the Approval Holder did not cooperate with the Appellant.

[10] The Appellant submitted awarding final costs in his favour would support the purposes of EPEA, particularly those stated in sections 2 (a), (c), (f), (g), and (i).[6] The Appellant stated the potential effects to the groundwater and surface water were the key issues in the appeal, and he retained a consultant, Mr. Roger Clissold, to provide expert evidence on the issues. The Appellant stated his consultant provided expert evidence on the hydrogeology of the area, and his presentation contributed to a better understanding of the issues. The Appellant argued the issues were related to preventing and mitigating the environmental impacts of the

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5 Appellant's submission, dated March 16, 2010, at paragraph 31.

6 These sections of EPEA state:

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

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

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

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

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

(i) the responsibility of polluters to pay for the costs of their actions…."

Landfill. The Appellant noted his argument was for the protection of the groundwater, which is an important issue for all Albertans.

[11] The Appellant submitted that, given the complexity of the issues, he was required to retain an expert to ensure meaningful participation in the appeal process, and he should not be required to pay for his expert himself, given the issues affect all Albertans.

[12] The Appellant submitted that, in these circumstances, the "polluter pays" principle must be interpreted to include the cost of funding the participation of local residents. The Appellant argued the Approval Holder was not proactive in addressing the concerns raised by the Appellant or the matters raised by the regulators.

[13] The Appellant argued the financial implications on private citizens to participate in a hearing are "…severe, restrictive and are not keeping with the purpose of the EPEA, specifically section 2(g) of the EPEA and the 'polluter pays' principle."[7]

[14] The Appellant explained he lost income while attending the Hearing and receives no tax benefit for participating in the proceeding. The Appellant noted the costs claimed by him are a tax deductible expense for the Approval Holder.

[15] The Appellant argued an award of costs is warranted because his appeal made a substantial contribution to the Approval. The Appellant noted the Report and Recommendations indicated the Appellant's submissions were useful. The Appellant referred to the evidence provided by his consultant regarding the chloride trend and surface and ground water regimes, and the concerns expressed by the Board regarding the use of natural barriers and the wording of the draft landfill standards currently used. The Appellant noted the Board clarified the Approval Holder's responsibility to the public.

[16] The Appellant argued the success or failure of an appellant should play a minor role in the Board's reasons for awarding costs. The Appellant submitted that, even though the Board was not persuaded by all his arguments, he contributed to the Hearing by presenting evidence with respect to the issues and should, therefore, be awarded costs for his contribution. The Appellant stated the Board was persuaded by his participation at the Hearing, given the

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[7] Appellant's submission, dated March 16, 2010, at paragraph 49.

Board made recommendations to amend the Approval, which the Minister accepted. The Appellant argued the recommendations were only brought forward as a result of his appeal, and to "…impose costs on a private Alberta citizen for assisting an approval holder and the Director in fulfilling their duty is unreasonable, unjust and unfair."[8] The Appellant argued that, if a private citizen must bear all their costs, it would deter Albertans from participating in the appeal process, which is contrary to the purpose of EPEA.

[17] The Appellant submitted the Approval Holder's actions were not consistent with the spirit and intent of EPEA, and it would be unjust if the Appellant must incur additional costs as a result of the Approval Holder's actions.

[18] The Appellant stated the costs requested are reasonable, directly related to the issues, relate to the preparation of submissions, preparing the presentation for the Hearing, and attendance at the Hearing. The Appellant explained Mr. Clissold's hourly rate of $210 per hour is reasonable given he has close to 50 years experience. The Appellant submitted the effectiveness of his participation was due in part to his legal counsel, whose rate was $150 per hour. The Appellant noted he acted in good faith in all phases of the process.

[19] The Appellant submitted the Approval Holder's actions and behaviour constitute special circumstances to warrant an award of solicitor/client costs. The Appellant requested the Board order the Approval Holder to pay costs of $65,765.69, less the interim costs of $11,760.00.

B. Approval Holder

[20] The Approval Holder asked for costs totaling $205,264.83, including $105,559.98 for consultants' fees and $99,704.85 for legal fees. The Approval Holder requested reimbursement of a reasonable amount of the costs, jointly and severally as against the Approval Holder, the Intervenor, and Ms. Yvonne Tomlinson.[9] The Approval Holder also asked for the return of the interim costs paid to the Appellant.

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[8] Appellant's submission, dated March 16, 2010, at paragraph 66.

[9] Mrs. Yvonne Tomlinson had filed a Notice of Appeal, but her appeal was dismissed. See: *Tomlinson and Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional*

[21] The Approval holder stated that, as a result of the appeal, it was required to retain legal counsel and a hydrogeological expert.

[22] The Approval Holder's lead legal counsel was called to the Alberta Bar in 1991, and charged hourly rates of $370 (2010), and $350 (2009). He was assisted by a junior lawyer who was called to the Alberta Bar in 2009 and charged hourly rates of $200 (2010) and $170 (2009).

[23] The Approval Holder's consultant, Mr. Alan McCann, is a senior hydrogeologist with extensive landfill experience who charged $145 per hour. Mr. McCann used the services of other persons within his firm to provide support as required, and most of the support services were provided at lower hourly rates.

[24] The Approval Holder submitted the hourly rates for legal counsel and Mr. McCann and their support staff are competitive in the marketplace for persons of similar qualifications and experience.

[25] The Approval Holder explained that legal costs totaling $25,800.00 were in regard to the Intervenor's second stay application. It further apportioned $21,270.56 of the consultant's costs to the Intervenor.

[26] The Approval Holder recognized the "loser pays" principle applicable in cases of civil litigation in the courts is not determinative of the issue, but it should be a factor together with related matters such as the nature and merit of the appeal.

[27] The Approval Holder noted EPEA, the regulations, and the Board's Rules of Practice make it clear that anyone can apply for costs. The Approval Holder explained it is aware that in previous costs decisions, the Board has taken the position that approval holders must accept that appeals are a possibility and costs must be accepted as a cost of doing business in a regulated environment. The Approval Holder argued that "…to the extent that this Board adopts a policy of refusing to awarding (*sic*) costs to Approval Holders, the Board breaches its own statute, the regulations, the procedure guide, and breaches the duty of fairness it owes to all

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Waste Management Services Commission (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.).

parties who appear before it."[10] The Approval Holder stated that the legislation allows anyone to apply for costs, and that must mean that costs can be awarded to anyone. The Approval Holder argued it is unfair or inappropriate to discriminate against one of the parties to an appeal. The Approval Holder argued this is effectively what the Board does when it indicates an approval holder must pay, but cannot obtain, costs. The Approval Holder argued that EPEA does not provide that an approval holder is not deserving of costs.

[28] The Approval Holder submitted this is especially the case when the approval holder is a public authority providing a much needed and required public service.

[29] The Approval Holder stressed that it is a public authority, attempting to provide a public service in an environmentally responsible manner. The Approval Holder stated it provides a public service, not for or at a profit, and its expenditures are paid for by its members and, ultimately, by the public ratepayers who live in the member communities. The Approval Holder argued "…this is real money taken out of real pockets, and any suggestion that the approval holder, when it comes to cost applications, is simply a bearer of costs, and cannot obtain costs, is discriminatory and inappropriate."[11] The Approval Holder argued such a policy would be contrary to the Board's legislation and to the purposes of EPEA.

[30] The Approval Holder explained that, in response to the Appellant's request that his expert be allowed to visit the Landfill site for inspection purposes, the Approval Holder arranged for a public open house. The Approval Holder stated Mr. Clissold was unable to attend that day, so the Appellant requested an alternative date. The Approval Holder stated the Appellant also submitted an interim costs application that included costs related to a site visit. The Approval Holder argued it is one thing to request a site visit, but quite another to demand a site visit at the Approval Holder's expense. The Approval Holder stated it asked the Appellant why the site visit was required, and based on the reply, the Approval Holder believed the information could be obtained from the documents already in the Appellant's possession. The Approval Holder questioned why an approval holder would allow an inspection when it could have costs awarded against it for doing so with no hope of recovering the costs.

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10 Approval Holder's submission, dated March 16, 2010, at paragraph 27.

11 Approval Holder's submission, dated March 16, 2010, at paragraph 36.

[31] The Approval Holder argued a policy of refusing to award costs to approval holders discourages the siting and establishment of modern landfills constructed to current environmental standards. The Approval Holder stated further financial burdens placed on communities and their ratepayers weigh against a decision to construct modern facilities.

[32] The Approval Holder stated the purposes of EPEA should not be used to discriminate against the Approval Holder. The Approval Holder noted the starting point in considering a costs application is that the parties are responsible for the costs they incurred, and any party applying for costs needs to show the Board there are sufficient reasons to depart from that starting point.

[33] The Approval Holder stated the Approval was varied by the addition of two conditions, but neither condition was requested by the Appellant or Intervenor. The Approval Holder noted that none of the conditions set out in the Appellant's submission was adopted by the Board, and therefore, it "…would be an unnatural strain of logic to suggest that the Appellant's written submissions assisted the Board in drafting the recommendations."[12]

[34] The Approval Holder stated that one of the key issues was whether or not the Landfill was underlain by an exceptional aquifer as suggested by Mr. Clissold, but at the Hearing, Mr. Clissold stated he did not believe there was an exceptional aquifer underneath the Landfill. The Approval Holder stated that Mr. Clissold also acknowledged a number of errors in his report and that the report was inherently unreliable. The Approval Holder submitted the evidence provided by Mr. Clissold was counterproductive. The Approval Holder stated Mr. Clissold's analysis of the chloride level was not based on sound mathematical principles.

[35] The Approval Holder noted that the Board accepted the Director's conclusion that no exceptional aquifer exists under Phases 1 and 2 of the Landfill, and even if there was an aquifer underlying Phases 1 and 2, there is a liner in place to protect the groundwater. The Approval Holder added that the Director took the additional step of requiring additional testing and analysis before an application is made to include Phases 3 and 4.

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12 Approval Holder's submission, dated March 16, 2010, at paragraph 44.

[36] The Approval Holder commented that "…this whole expensive and time consuming process appears to have been unnecessary."[13]

[37] The Approval Holder noted the Appellant acknowledged the Landfill site was moved at his request, and the Appellant attended public meetings regarding the site selection and the Approval application. The Approval Holder argued the real reason for the appeal was political and not environmental, specifically his concerns with the Commission accepting waste from outside its boundaries. The Approval Holder questioned whether the Appellant would have been granted directly affected status had his true position been revealed earlier in the proceeding.

[38] The Approval Holder stated the Appellant pursued a stay application even though he acknowledged he would probably not suffer irreparable harm if the stay was not granted.

[39] The Approval Holder argued that one third of the Appellant's written Hearing submission was an attempt to reintroduce issues which the Board had previously rejected, but since the issues were raised, the Approval Holder and its witnesses were required to prepare a response.

[40] With respect to the Appellant's request for a site visit, the Approval Holder stated it was not until the Appellant filed his rebuttal submission that information was requested that was not otherwise available. The Approval Holder stated the Appellant referred to a discrepancy between aerial photographs and the location of the stagnation moraine, which could lead to an inconsistency in piezometer elevations, but the issue was not pursued at the Hearing. The Approval Holder explained that it agreed to a site visit when it received the new information. The Approval Holder explained it was never disclosed that Mr. Clissold was really interested in observing vegetation patterns. The Approval Holder argued that, had adequate information been provided at the outset, the preliminary request process would have been unnecessary.

[41] The Approval Holder noted that, in the Appellant's application for interim costs, the Appellant did not provide all of the required information in his initial submission, and details were not provided until his rebuttal submission, to which the Approval Holder had no

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13 Approval Holder's submission, dated March 16, 2010, at paragraph 54.

opportunity to respond. The Approval Holder stated this same technique was used by the Appellant in his preliminary motions submission.

[42] The Approval Holder submitted that the manner in which the Appellant and Intervenor proceeded in the appeal created significant costs for the Commission, and much of the costs could have been avoided if the Appellant and Intervenor had conducted themselves in a different manner.

[43] The Approval Holder noted the number of issues raised by the Intervenor in his submissions, stating many of the issues were speculative and based on conjecture, inquisitorial in nature rather than based on fact or evidence, or were issues outside the Board's jurisdiction.

[44] The Approval Holder submitted it was of assistance to the Board because it asked the Board to rule on the issues that would be heard by the Board.

[45] The Approval Holder submitted the Intervenor created a significant amount of unnecessary costs related to the proceeding. The Approval Holder explained the Intervenor brought a second stay application, largely based on conjecture and speculation.[14] The Approval Holder stated it was required to make submissions on the second stay application even though the Board ultimately ruled Mr. Tomlinson was not directly affected and would not be given full party status. The Approval Holder explained it required assistance from its consultant to address the construction and operational issues alleged by the Intervenor. The Approval Holder stated the construction issues raised by the Intervenor had been addressed on a number of occasions, including in the Approval Holder's response to the second stay application.

[46] The Approval Holder stated the appeal was tremendously time consuming and costly, and many of the costs could have been and should have been avoided, particularly the Intervenor's excessive submissions.

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[14] At the time the second stay application was made, Mr. Tomlinson was an appellant. The Board determined he was not directly affected, so his stay application could not be considered by the Board. See: *Tomlinson and Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.).

Mr. Tomlinson was later granted Intervenor standing. See: *Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal No. 08-037-ID2 (A.E.A.B.).

III. RESPONSE SUBMISSIONS

A. Appellant

[47] The Appellant stated that, as a public authority, the Approval Holder gets public money from the government to fund its service. Therefore, according to the Appellant, all Alberta taxpayers and the Commission's ratepayers, including the Appellant, share the costs of this public service.

[48] The Appellant agreed the public need for the Landfill should be considered in deciding the costs application. The Appellant explained it is at his private expense as an adjacent landowner, that the Approval Holder can operate a business that satisfies the needs of the public.

[49] The Appellant stated the Approval Holder knew the costs of constructing a landfill, and the Approval Holder contemplated the use of public funds at the inception of the project. The Appellant referred to minutes of the St. Paul and District Regional Waste Management Authority Committee discussing the regional Landfill, stating that funding for 75 percent of the total capital could be obtained through the Waste Management Assistance Program (Tab 114 of the Director's Record). The Appellant argued the Approval Holder can apply for financial assistance from the public assistance program, but he cannot. The Appellant argued the Approval Holder increased all of the Parties' costs due to its uncooperative behaviour.

[50] The Appellant stated landfills are a business, not a charitable venture created to address a public good, and it is inappropriate for the Approval Holder to disguise itself as such.

[51] The Appellant stated he acted pursuant to the purposes of EPEA by engaging the appeal process, and had he not appealed, the Director would have missed the opportunity to further and better discharge his obligations and the Approval Holder would not have had the opportunity to better manage its facility and the needs of the public. The Appellant stated the Board was presented with expert evidence from the Parties which enhanced the public interest. The Appellant argued imposing costs on him for acting in the public interest would be punitive and not further the purpose and goals of EPEA.

[52] The Appellant noted that, rather than respecting the regulatory scheme, the Approval Holder suggested the process was expensive, time consuming, and unnecessary. The Appellant argued the Approval Holder is more concerned with the costs of the Landfill than the environmental impacts or mitigation measures. The Appellant noted the financial burden of operating the Landfill is placed on the communities and their ratepayers, not the Approval Holder.

[53] The Appellant submitted that complete information is imperative in the appeal process, and had the Approval Holder provided adequate information at the outset, the preliminary motions and Hearing may not have been necessary.

[54] The Appellant stated it was the Approval Holder that did not intend to answer any further correspondence and suggested the Appellant was abusive for asking legitimate questions. The Appellant noted it was the Approval Holder that withdrew from the mediation process, not the Appellant, and if the Approval Holder believed additional information may have negated the appeal, then it should not have prematurely withdrawn from the mediation process.

[55] The Appellant stated the cost associated with the appeal is part of doing business in Alberta. The Appellant argued awarding costs against him or not awarding him full expert and legal costs claimed, would provide a financial benefit to the Approval Holder because it would not have to pay the full cost of doing business in Alberta.

[56] The Appellant submitted it would cause a serious financial burden on any Alberta taxpayer or Commission ratepayer to be liable for their own expert and legal costs of an appeal. The Appellant argued it would not promote the purpose of EPEA of providing opportunities for citizens to protect the environment, and it is not in the public interest. The Appellant submitted that ordering the Approval Holder to pay costs is in keeping with the purpose of EPEA to have citizens share responsibility to protect the environment as the Approval Holder receives public funds. The Appellant argued the threat of citizens subsidizing a part of an approval holder's business does not promote the purposes under EPEA and may make them fearful of engaging in the process again.

[57] The Appellant stated his expert and legal costs were reasonable and were the actual expenditures incurred in the preparation of the appeal. The Appellant noted his costs claimed were three to four times less than what the Approval Holder claimed. The Appellant stated that not all costs claimed by the Approval Holder were reasonable or directly related to the appeal. The Appellant argued the costs claimed by Mr. McCann were excessive, given he produced only one report and his relatively low hourly rate. The Appellant questioned whether the Approval Holder is acting in a heavy handed manner given the excessive costs claimed. The Appellant submitted this behaviour constitutes special circumstances warranting an award to him for his complete expert and legal costs. The Appellant argued it is proper to fix costs "…on a body that is using natural resources not just to meet local need for waste disposal but to generate a profit by soliciting garbage from other jurisdictions…."[15]

[58] The Appellant stated he did not achieve any personal gain in the appeal process, but he acted in the interest of all Albertans in further protecting the environment and the public interest. The Appellant explained he is not looking for a financial benefit, and he noted he did not claim for his time in preparing for and attending the Hearing. The Appellant stated the Approval Holder, however, gained an Approval that further protects the environment and the public interest.

[59] The Appellant explained he initially provided the Approval Holder with funding to prepare the site testing, and as a private citizen, he should not be financially burdened with assisting a public body to fulfill its public mandate.

B. Intervenor

[60] The Intervenor noted the Approval Holder applied for costs separately against him. The Intervenor stated he was allowed 15 minutes to present his submission at the Hearing, and he was cross-examined by the Board. The Intervenor confirmed he did not seek costs, and he was self represented throughout the process.

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[15] Appellant's submission, dated March 30, 2010, at paragraph 31.

[61] The Intervenor stated there are no cases of costs being awarded against intervenors. He argued costs are not usually awarded against an appellant as long as the appeal raises legitimate concerns regarding the approval.

C. Approval Holder

[62] The Approval Holder submitted that no costs should be awarded to the Appellant.

[63] The Approval Holder stated it is not a for-profit organization, and as a regional service commission incorporated as a public authority pursuant to the *Municipal Government Act*, R.S.A. 2000, c. M-26, it is prohibited from making a profit.

[64] The Approval Holder stated it does not undertake its activities for its own benefit but acts for the public's benefit. The Approval Holder stated the ratepayers within the affected municipalities must pay for its activities and the only other alternative is to reduce services, which would be contrary to the purposes of EPEA and harmful to the environment.

[65] The Approval Holder stated the Natural Resources Conservation Board and Alberta Energy and Utilities Board primarily deal with for-profit corporations, and there is a general expectation that profit driven corporations pay a portion of the costs related to their applications. The Approval Holder submitted this approach is more logical with profit driven applicants and applications.

[66] The Approval Holder stated that, to the extent the legislation for these boards contemplates that applicants pay, it is a major distinction from EPEA. The Approval Holder noted that EPEA contemplates anyone can apply for costs, and therefore, anyone can obtain costs. The Approval Holder stated EPEA does not say that approval holders pay and others do not. The Approval Holder argued that, given other legislation contemplates applicants pay, the Legislature made a different policy when it enacted EPEA. The Approval Holder argued the Legislature had the ability to provide a particular party pay the costs of others but decided not to do so in EPEA. The Approval Holder submitted this is further evidence that there is no contemplation that approval holders automatically pay the costs of other parties appearing before the Board.

[67] The Approval Holder argued the "polluter pays" principle does not apply in this case. The Approval Holder stated,

> "From a logical perspective, it would make just as much sense for Evergreen to submit that the polluter pays principle should be applied to the Appellant. However, we do not do so because there is no evidence of pollution in this case from any party."[16]

[68] The Approval Holder stated it incorporated the principles of EPEA into its operations and provided reasonable accommodation to the Parties, but it could not say the same for the Appellant.

[69] The Approval Holder did not agree with the Appellant's statement that it had been uncooperative. The Approval Holder stated it went through an expensive and time consuming site selection process that involved public input. The Approval Holder stated it agreed to move the site farther away from the Appellant's residence at his request.

[70] The Approval Holder stated its Landfill existed for a number of years without any adverse effect. It was only when it decided to accept waste from another waste management commission that issues arose and the appeal was launched. The Approval Holder stated the Appellant was clear he would not have filed an appeal if the Approval Holder refused to accept waste from outside the Commission's boundaries. The Approval Holder stated it went through the time and expense of retaining a hydrogeologist to respond to the technical issues raised in the Appellant's Statement of Concern to ensure it provided a full and complete response to the Appellant's technical concerns. The Approval Holder stated the Board's decision agreed with the response to the Appellant's Statement of Concern.

[71] The Approval Holder stated it followed the required public process and the Appellant was given the opportunity and did participate. The Approval Holder explained it agreed to the mediation requested by the Appellant.

[72] The Approval Holder explained that, when the Appellant first requested a site visit, the request could not be complied with because cell construction was ongoing, resulting in staffing and work place safety concerns. The Approval Holder explained it responded with a

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[16] Approval Holder's submission, dated March 30, 2010, at paragraph 17.

letter volunteering the most recent test results and indicating a public open house would be arranged. The Approval Holder noted Mr. Clissold could not attend and the Appellant did not attend the open house. The Approval Holder stated a site inspection was allowed even though it was not legally required. The Approval Holder noted the Intervenor was granted access to the site previously, and he was allowed to take pictures which were later submitted to the Board.

[73] The Approval Holder submitted it conducted itself within the principles of EPEA, provided reasonable accommodation to the Appellant, and cooperated with the Appellant within reasonable limits.

[74] The Approval Holder did not think it made sense that its decision to withdraw from the mediation resulted in the Appellant incurring $11,090.46 in legal and expert costs. The Approval Holder stated failure of the mediation process was not attributable to itself.

[75] The Approval Holder submitted that the preliminary motions it brought forward benefitted the Board and all the Parties. The Approval Holder stated its preliminary motions resulted in the issues being narrowed, thereby shortening the hearing and preparation time and reducing costs. The Approval Holder argued the Appellant's submission dealt with issues which were previously rejected by the Board.

[76] The Approval Holder stated that, by the time of the Hearing, the Appellant admitted his water supply was not at risk. The Approval Holder confirmed run-on and run-off systems at the Landfill were designed to prevent releases from occurring.

[77] The Approval Holder argued the Appellant was not cooperative, because he did not admit that many of his issues were not appropriate and he did not acknowledge the Approval Holder's time and expense to provide him with the geotechnical information.

[78] The Approval Holder noted the Appellant made applications regarding a site visit, interim costs award, and information requests. The Approval Holder stated the Appellant was unsuccessful on two of the matters and only partially successful on the third, but the Appellant was still attempting to seek costs in respect of these applications.

[79] The Approval Holder stated that, despite the Board telling the Appellant it had no jurisdiction to order a site visit, the Appellant applied for an adjournment when the Approval

Holder stated it would allow a site visit. In response to the Appellant's submission that the Approval Holder refused to cooperate on the preliminary issues, the Approval Holder allowed a site visit. The Approval Holder noted the Appellant did not make any request for specific documents.

[80] The Approval Holder agreed that the Director's Record and the application materials are public records. The Approval Holder stated the only issue it was aware of was when Ms. Yvonne Tomlinson[17] attempted to obtain multiple copies of the application materials; she was provided one copy and was advised she would have to sign for additional copies.

[81] The Approval Holder argued it is contrary to the purposes of EPEA to make a public authority approval holder pay for the appellant's costs as of right. The Approval Holder argued it is also contrary to EPEA to prohibit costs awards to the benefit of a public authority approval holder.

[82] The Approval Holder stated there is no indication the Appellant is impecunious, cannot pay, or that he lacked financial resources to make an adequate submission. The Approval Holder argued the "polluter pays" principle is inappropriate in this case. The Approval Holder submitted the financial implications of the appeal are more significant and detrimental to the Commission. It stated the Appellant's submission that the costs are a tax deductible business expense for the Commission does not apply, because the Commission is a not for profit organization.

[83] The Approval Holder argued the Appellant did not make a substantial contribution to the proceedings. The Approval Holder stated that, more than a year after the Appellant filed a Statement of Concern and after going through a lengthy process including numerous motions and a mediation, the Board's findings virtually repeated what the Appellant was told in response to his Statement of Concern.

[84] The Approval Holder argued that "…Mr. Clissold's evidence was not only unhelpful, but that it was counter productive, and increased costs associated with the Hearing,

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[17] Ms. Yvonne Tomlinson had filed a Notice of Appeal, but her appeal was dismissed. See: *Tomlinson and Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.).

and indeed, the whole appeal process."[18] The Approval Holder stated the report prepared by Mr. Clissold in January 2009 was not relied on by all the Parties at the Hearing. The Approval Holder stated Mr. Clissold was forced to acknowledge the report was invalid and should not be relied upon. The Approval Holder explained its consultant was required to prepare a report to point out all the errors in Mr. Clissold's report. The Approval Holder stated Mr. Clissold's errata report also had problems, and Mr. Clissold acknowledged that, even with revised calculations, the transmissivity did not indicate an exceptional aquifer existed. The Approval Holder submitted the entirety of Mr. Clissold's evidence was error prone, and a significant amount of time and cost was expended to deal with matters that should not have been in issue.

[85] The Approval Holder pointed out that none of the Appellant's suggested outcomes were adopted.

[86] The Approval Holder argued Mr. McCann's evidence was superior to that of Mr. Clissold's and of greater assistance to the Board. The Approval Holder submitted Mr. Clissold's rate of $210 per hour was excessive.

[87] The Approval Holder submitted the Appellant was not cooperative in the appeal process and did not act in good faith throughout the proceeding. The Approval Holder argued the Appellant appealed because he was opposed to allowing waste from outside the Commission's boundaries. The Approval Holder argued the Appellant was committed to fighting this use of the Landfill, and the appeal was one form that was utilized to achieve that end. The Approval Holder submitted the Appellant tried to delay the Hearing throughout the process in an attempt to make the Landfill expansion an issue in the upcoming municipal elections. The Approval Holder provided as examples the stay application, an unnecessarily long and drawn out mediation process, and an application to adjourn the Hearing.

[88] The Approval Holder submitted the Appellant should be responsible for his own costs, and it is inappropriate to award costs against the Approval Holder.

D. Director

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[18] Approval Holder's submission, dated March 30, 2010, at paragraph 55.

[89] The Director submitted that he should not be responsible for any of the costs claimed by the Appellant and Approval Holder.

[90] The Director stated the Board and the courts have developed principles for costs claims as they relate to the Director given the unique role he holds in these matters as statutory decision-maker whose decision is being appealed. The Director explained that, given his statutory role, the legislation makes a Director an automatic party to every appeal, and as a result, the Board and the courts have considered this a vital factor in not ordering the Director to pay costs as long as the Director was acting in good faith. The Director noted that, in past decisions, the Board has not considered the variation or reversal of an approval to be a special circumstance to warrant awarding costs against the Director.

[91] The Director submitted that no costs award should be made against him, because there were no findings of bad faith in the actions or interpretations taken by the Director. The Director stated the Board concurred with the kind of approval issued, and it went beyond the usual approval by requiring additional testing and analyses before the Approval Holder files a future application to amend the Approval to include additional phases.

[92] The Director stated the Appellant was not successful in rescinding the Approval or having the conditions he requested added to the Approval. The Director stated the conditions added to the Approval arose from the Board's own expertise and assessment of the environmental needs. The Director noted the conditions added do not alter the Approval in relation to runoff controls and leachate collection systems. The Director stated one condition requires a contingency plan be developed in the unlikely event a release occurs, but this was not put in issue by the Appellant at the Hearing.

[93] The Director noted the Approval Holder was not seeking costs from the Director, and he reiterated that he should not be responsible for any of the Approval Holder's or Appellant's costs.

IV. LEGAL BASIS

A. Statutory Basis for Costs

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

> "Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it…'. The legislation gives the Board broad discretion in deciding whether and how to award costs."[19]

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.)[20]

[95] The sections of the *Environmental Appeal Board Regulation*,[21] (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.
>
> (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;

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

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

[21] *Environmental Appeal Board Regulation*, A.R. 114/93.

(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."

[96] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of EPEA as stated in section 2.[22]

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[22] Section 2 of EPEA provides:

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

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; …
(e) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
(f) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; …
(h) the responsibility of polluters to pay for the costs of their actions;
(i) the important role of comprehensive and responsive action in administering this Act."

[97] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.[23] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[24] In *Cabre*, Mr. Justice Fraser noted that section "…20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs…" and concluded "…that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[25]

[98] As stated in previous appeals, the Board evaluates each costs application against the criteria in EPEA and the 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 lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[26]

[99] Under section 18(2) of the Regulation, costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.[27]

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[23] *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.)* (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.)).

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

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

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

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

B. Courts vs. Administrative Tribunals

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

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

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[28]

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

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

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

> "…express the fundamental differences between administrative agencies and courts. Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:

> 'In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.'"[29]

[103] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it. As stated in *Mizera*:

> "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) 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 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."[30]

[104] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[31] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.[32]

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

[30] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) ("*Mizera*"). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

[31] *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8

V. ANALYSIS

A. Discussion

[105] As the Board has stated in previous decisions, the starting point of any costs decision is that the Parties are responsible for the costs they incurred. Section 2 of EPEA gives citizens of Alberta a responsibility in protecting the environment. Participating in the approval and appeal processes is one way of fulfilling this obligation.

[106] The Board reviewed the costs submissions from the Parties and the evidence presented during the Hearing to determine whether and to what extent the written submissions and oral evidence materially assisted the Board in preparing its recommendations to the Minister.

[107] The Appellant claimed final costs totaling $65,765.00, which included $40,533.53 for expert costs and $25,232.16 for legal costs. The Approval Holder asked for costs totaling $205,264.83, including $105,559.98 for consultants' fees and $99,704.85 for legal fees. The Approval Holder requested costs, jointly and severally as against the Approval Holder, the Intervenor, and Ms. Yvonne Tomlinson.

[108] The Approval Holder argued the Board would be in breach of its own legislation if it did not allow approval holders to ask for costs. The Board knows its legislation clearly states that any party to an appeal can ask for costs, and in this case, this would include the Approval Holder. The Approval Holder is also aware that, in past decisions when costs are awarded, it is the approval holder that bears the costs as a directly affected person's right to file an appeal is part of the application process.

[109] The Approval Holder argued the Board has a policy of not awarding costs to approval holders. This is not correct. Although the Board has not awarded costs to an approval

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February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

[32] Section 2 of EPEA states:

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

holder in the past, the Board reviews every costs application, including those from approval holders, with the same diligence. In reviewing each costs application on its merits, the Board assesses the submissions made by the parties and the value of these submissions in assisting the Board in making its recommendations to the Minister.

[110] There is no doubt that circumstances will exist when an appellant should bear some of the costs of an approval holder, such as when the appeal is frivolous or vexatious. It is important to note the Board does not consider an appeal frivolous or vexatious if the Board recommends the approval be confirmed as issued or if not all of the amendments asked for are not included in the recommendations. There must be valid reasons to consider an appeal frivolous or vexatious.

[111] The Board will look at the amount of any interim costs awarded as part of the costs incurred by the payer. If the Board determines the information provided does meet the expectations as to why interim costs were awarded, the Board will require the payee to return some or all of the interim costs awarded.[33] Even if the Board does not award costs against an approval holder, the expert costs incurred by the approval holder during the appeal process will often benefit the approval holder by providing additional information about the effects of the project and will, at times, highlight potential problems.

[112] In this case, through the appeal process, issues came to light that had been identified. The Appellant raised concerns about the possible increase of chlorides outside of the Landfill cells. Although the Board did not recommend changes to the Approval to reflect this concern, the issue has been identified and the Approval Holder is aware of the possible issue and should be taking appropriate measures to monitor and mitigate the issue. The Director is also now aware of the possible issue.

[113] The Board starts its consideration of a costs application from the position that parties to an appeal should bear their own costs.

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[33] See: Costs Decision: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (01 May 2009), Appeal No. 07-128-CD (A.E.A.B.).

[114] The Approval Holder in this case could have been more cooperative. The Appellant had requested an opportunity to have his consultant visit the Landfill site. A public open house was provided, but it appears there was no consultation with the Appellant to determine if his consultant would be able to attend that day. If the purpose of the open house was to provide Mr. Clissold an opportunity to visit the site, then the day chosen should have been determined with input from Mr. Clissold and the Appellant.

[115] The Approval Holder took the position that access to inspect the site would result in costs awarded against it for doing so with no hope of recovering the costs. The Approval Holder was not recognizing the ability of the Board to determine the amount of costs that will be awarded, if any. If the Approval Holder provided explanations why costs should not be awarded for certain costs claimed, the Board would certainly consider these submissions. The Approval Holder should not assume it has no recourse to costs awarded as even interim costs can be required to be repaid if the Board determines the value of the submission was less than anticipated. The same rule can apply for any costs that may have been awarded for a site visit. If the Board finds little information was obtained by visiting the site, the interim costs award, or a portion of the award, can be required to be returned. In this case, interim costs were not awarded for the site visit. The costs awarded were for preparation for the Hearing, review of the available data, and for attendance at the Hearing.

[116] The Approval Holder made it difficult for interested persons to obtain a complete copy of the application. This, as stated in the Board's Report and Recommendations is not acceptable. The public should be able to easily access public documents, and they should not have to pay for these documents.

[117] The Approval Holder questioned whether the Appellant would have been granted directly affected status had his "true position" been revealed. It is uncertain as to what the Approval Holder meant by this. The Appellant was willing to forego income for two days to attend the Hearing. The Appellant lived within two kilometers of the Landfill. In the Appellant's submission at the Hearing, the Appellant explained that he had personally funded an additional study to find a less intrusive site for the Landfill. The Board would expect the proponent of a project to conduct such studies, not individual persons. This clearly indicates the

Appellant had participated in the process, even prior to the application stage, in good faith. There is nothing to indicate he had any motives other than to ensure the Approval conditions protected the environment. It must also be recognized that at the time the appeal was filed, the Appellant did not have all the information, including his consultant's report. It was through the appeal process that additional information and concerns were brought forward.

[118] Although the Approval Holder applied for costs, there is little in its submission to demonstrate to the Board that it should be awarded costs other than stating it is a not for profit business and its consultant's evidence was superior to the Appellant's consultant's evidence. There is no breakdown of the legal costs, other than a total of the statements sent out. The Board cannot determine from these general statements whether the costs claimed were, in fact, related to the preparation and presentation of evidence. The Board has stated in previous decisions that a detailed account of the costs claimed must be provided. The account statements for the Approval Holder's consultant are also total costs, with no breakdown as to how the time was spent. There is no indication that the time claimed was for preparation for the Hearing and presentation at the Hearing, or was for collecting and analyzing data and preparing reports. Without details of the costs claimed, the Board cannot award costs.

[119] The Approval Holder submitted it was of assistance to the Board in raising preliminary motions such as defining the issues. The Board, in reviewing the Approval Holder's submission on the issues motion, provided little guidance to the Board as to what it considered appropriate issues for the Hearing, if one was held.

[120] The Approval Holder referred to ulterior motives for the Appellant's appeal, specifically filing the appeal and then delaying the process in order to try to have the issue of accepting waste outside of the commission's boundaries become an election issue. The Board considers this speculation on the part of the Approval Holder.

[121] In reviewing the submissions and the evidence presented at the Hearing, the Board concludes that both the Appellant and Approval Holder provided valuable information. Their legal counsel were of assistance in keeping the witnesses focused on the issues. The contributions of the Appellant and Approval Holder in this regard are viewed as equal, and

therefore, the Board will not award any costs for legal expenses for either the Appellant or the Approval Holder.

[122] The Appellant's consultant, Mr. Clissold, reviewed the data available and conducted analyses based on the data. He also prepared a report setting out his conclusions. During the Hearing, Mr. Clissold acknowledged some of his conclusions were inaccurate. However, he also raised issues that were of interest to the Board, such as the need to monitor the cells to detect any potential movement of chlorides. The Board considers it appropriate to award costs for Mr. Clissold's participation in the Hearing process. His participation ensured all concerns of potential surface or ground water impacts were assessed from all viewpoints. This allowed the Board to provide stronger recommendations to the Minister.

[123] As stated above, interim costs were awarded to the Appellant for Mr. Clissold's preparation for the Hearing, review of the available data, and for attendance at the Hearing. Mr. Clissold completed a review of the data and provided a report with his conclusions, which he discussed at the Hearing.[34]

[124] The Board considers the interim costs previously awarded, totaling $11,760.00, appropriate for the participation of Mr. Clissold.

B. Who Should Bear the Costs?

[125] Although the legislation does not prevent the Board from awarding costs against the Director, the Board has stated in previous cases, and the Courts have concurred,[35] that costs

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[34] See: *Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal No. 08-037-ID2 (A.E.A.B.) at paragraph 50:

> "The hearing is scheduled to last two days, or approximately 14 hours. It is reasonable to expect 1.5 hours preparation time for every hour at the hearing, thereby totaling 21 hours of preparation time in this case. As stated above, the Board expects arguments will be technical in nature, so it will allow, for the purposes of determining interim costs, 21 hours for data review. This results in 56 hours for preparation time and attendance at the hearing. The Board accepts the stated rate of $210.00 per hour for a senior hydrogeologist. Therefore, the total interim costs granted is $11,760.00."

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

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

[126] In this case, the Director's decision was not overturned but was varied. Even if the decision had been reversed, special circumstances are required for costs to be awarded against the Director. The Court of Queen's Bench in the *Cabre* decision, considered this issue:

> "I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department's officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board's decision, that the Department should be treated differently from other parties to an appeal.
>
> The Board states in its written submission for this application:
>
> > 'There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker's judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.'
>
> In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board's decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise."[36]

[127] The Board recognized the efforts of the Director to ensure the groundwater is protected by issuing the Approval for Phases 1 and 2 only, and requiring additional data before considering amending the Approval to include Phases 3 and 4. In this case, there are no special circumstances that would warrant costs against the Director.

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

[128] The Approval Holder asked for costs against Mr. and Ms. Tomlinson. Ms. Tomlinson was not a party to the appeal and she did not seek intervenor status. She attended the Hearing as a public spectator. She did not present evidence or provide a submission after the Board determined she did not have a valid Notice of Appeal.[37] The legislation states costs can be awarded against any party to an appeal, and since Ms. Tomlinson was not a party nor did she actively participate in the Hearing, costs cannot be awarded against her.

[129] Mr. Tomlinson was granted intervenor status.[38] The level of participation of an intervenor is determined by the Board. In most cases an intervenor is given fewer rights than a party to an appeal. In this case, the Intervenor was allowed to provide a written submission and provide brief comments at the Hearing. Although he was subject to cross-examination, he was not given the right to cross-examine the Parties or provide opening or closing arguments. There may be circumstances where costs may be awarded to or against an intervenor based on their level of participation and rights given to them.[39] These circumstances do not exist in the appeal currently before the Board because of the limited rights given to the Intervenor, and therefore, the Board will not award costs against the Intervenor.

[130] The Approval Holder argued that, because it is a not for profit business, costs should not be awarded against it. The Landfill does not operate at a loss. It is expanding its customer base, which will increase revenues. If additional monies are required, the Approval Holder can increase user rates or increase the amount received from ratepayers. The Board recognizes the Approval Holder is operating a business that benefits the public and the Commission does not want to increase rates. However, it is also a business that requires an approval. There are costs associated with filing an application for an approval, including preparing reports and the potential of having to deal with an appeal. As stated in previous decisions, it is a cost of doing business in this province.

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[37] See: *Tomlinson and Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.).

[38] See: *Tomlinson and Shapka* v. *Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.).

[39] See: Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD

[131] To balance this out, the Board rarely awards full solicitor-client costs. The legislation anticipates persons will take the responsibility for protecting the environment, which includes absorbing some of the costs associated with bringing issues forward through the approval and appeal processes. In this case, the Appellant also paid for additional testing of alternative sites for the Landfill, a task normally funded by the proponent of the project, thereby reducing the costs expended by the Commission.

[132] In determining whether the proponent should bear the costs of an appellant, the Board does not differentiate between types of projects. From the Board's perspective, the project is one that requires an approval. The Board has previously required other landfill operations to bear some of the costs associated with an appeal.[40]

[133] Based on the circumstances of this appeal, the Board considers it appropriate that the interim costs previously paid by the Approval Holder in the amount of $11,760.00 are appropriate as final costs.

VI. DECISION

[134] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board has determined the interim costs of $11,760.00 previously paid by the Approval Holder to the Appellant are sufficient.

Dated on July 2, 2010, at Edmonton, Alberta.

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Alex G. MacWilliam
Board Member and Panel Chair

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Alan J. Kennedy

(A.E.A.B.).

[40] See: Costs Decision: *Fenske* v. *Director, Central Region, Environmental Management, Alberta Environment*, re: *Beaver Regional Waste Management Services Commission* (01 May 2009), Appeal No. 07-128-CD (A.E.A.B.).

Board Member

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Dan L. Johnson
Board Member